THE ETHICS IN GOVERNMENT ACT OF 1978 AND SUBSEQUENT REFORMS: THE EFFECT OF POLITICAL AND PRACTICAL INFLUENCES ON THE CREATION OF PUBLIC POLICY

I. Introduction

The lessons learned from past events play a major role in the formulation of public policy, particularly in the creation of statutes designed to regulate the behavior of individuals. One statute which was created and subsequently reformed because of such lessons is the Ethics in Government Act of 1978 (Ethics Act or Act).[1] The Ethics Act, and particularly the special prosecutor provisions contained in Title VI,[2] was Congress's attempt to regain the public's confidence in governmental integrity which was lost as a result of the Watergate scandal. As Senator Carl Levin, chairman of the Subcommittee on Oversight of Government Management,[3] recently remarked, "[t]he bitter legacy of Watergate was a new level of public cynicism and distrust."[4]

The public cynicism and distrust which Senator Levin speaks of is not unique to the Watergate era, nor is the Watergate scandal unique to the American political scene. Presidents long before Richard Nixon have been associated with unethical conduct.[5] What made the Watergate scandal unique, however, was

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[1] Pub. L. No. 95-521, 92 Stat. 1824 (codified in scattered sections of 2, 5, 18, 26, and 28 U.S.C. (1978)).

[2] Pub. L. No. 95-521, secs. 601-04, 92 Stat. 1824, 1867-74 (1978).

[3] Ethics bills are referred to the Committee on Governmental Affairs of which the Subcommittee on Oversight of Government Management is a part.

[4] Levin, *The Independent Counsel Statute: A Matter of Public Confidence and Constitutional Balance*, 16 HOFSTRA L. REV. 13 (1987).

[5] For example, during the administration of Warren G. Harding, Secretary of the Interior, Albert B. Fall, leased government oil deposits to private interests from whom he had received substantial sums of money. This "Teapot Dome" scandal, as it was called, led to the imprisonment of Secretary Fall. President Harding's Attorney General, Harry M. Daugherty, was also indicted for accepting money from prohibition violators. *See* Note, *Fallen Angels, Separation of Powers, and the Saturday Night Massacre: An Examination of the Practical, Constitutional, and Political Tensions in the Special Prosecutor Provisions of the Ethics in Government Act*, 49 BROOKLYN L. REV. 113, 116 n.16 (1982).

During the Truman administration, the reported mishandling of tax evasion

the legislation which followed. After the "Saturday Night Massacre,"[6] numerous congressional hearings were held in both the House and the Senate to discuss government ethics laws and, in particular, the feasibility of appointing a special prosecutor[7] to investigate alleged crimes by high government officials. Testimony was heard from former special prosecutor Archibald Cox, who in support of a special prosecutor law stated that "[t]he pressures, the divided loyalty are too much for any man, and as honorable and conscientious as any individual might be, the public could never feel entirely easy about the vigor and thoroughness with which the investigation was pursued. Some outside person is essential."[8] Testimony was also heard from the Justice Department. Assistant Attorney General John Harmon testified that, "[w]e must not only do justice, but be able to assure the public that justice has been done."[9] The American Bar Association (ABA) also became involved in the debate. The ABA proposed a Division of Government Crimes and supported legislation "authorizing the appointment of a temporary special prosecutor . . . under carefully defined circumstances and standards" to avoid even the appearance of partiality.[10] Indeed, the mood of the country supported strong ethics legislation and many people were quick to jump on the bandwagon. However, as the subsequent amendment and reauthorization of the Act demonstrate, legislation passed to seize the moment is not always complete or effective. Attitudes change, and serious consideration must also be given to the procedural, practical, and constitutional issues.

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cases led to the firing and resignation of over 150 Internal Revenue Service officials, including the Assistant Attorney General of the Tax Division of the Department of Justice. The individual appointed to investigate the matter was fired by the attorney general. Subsequently, President Truman fired the attorney general. *See id.*

[6] Broder, *Nixon Political Clout Shrinks*, Washington Post, Oct. 22, 1973, at A12, col. 2.

[7] The independent counsel was called a special prosecutor in the 1978 Act. It was not until 1983 that the name was changed.

[8] *Public Officials Integrity Act of 1977, Blind Trusts and Other Conflict of Interest Matters: Hearings on S. 555 Before the Comm. on Governmental Affairs*, 95th Cong., 1st Sess. 154 (1977) (statement of Archibald Cox).

[9] *Provision for Special Prosecutor: Hearings Before the Subcomm. on Criminal Justice of the Comm. on the Judiciary*, 94th Cong., 2d Sess. 8 (1976) (statement of John Harmon).

[10] S. REP. NO. 170, 95th Cong., 1st Sess. 3, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 4216, 4219.

This article will trace the process that the Ethics Act, in particular the special prosecutor provisions of Title VI, went through, from its creation in 1978 to its amendment in 1982[11] and reauthorization in 1987[12]. Special attention will be given to the legislative history of the Acts of 1978, 1982, and 1987 with emphasis on the influences behind the legislation. Part II summarizes the Act of 1978 and examines some of the reasons behind its provisions. Part III will explain the Ethics in Government Act Amendments of 1982 (1982 Amendments) and explain some of the reasons why Congress felt reform was necessary. Part IV will discuss the Independent Counsel Reauthorization Act of 1987 (1987 Reauthorization) and briefly address some of the overriding policy and judicial concerns that surrounded the independent counsel provisions at that time.

II. Ethics in Government Act of 1978

The Ethics in Government Act of 1978 was enacted to "establish certain Federal agencies, to effect certain reorganizations of the Federal Government, to implement certain reforms in the operation of the Federal Government and to preserve and promote the integrity of public officials and institutions . . . ."[13] The Act contains seven titles. Titles I, II, and III deal with legislative, executive, and judicial financial disclosure requirements, respectively. Prior to enactment of the Act, financial disclosure requirements for members of the three branches of government were inconsistent, if required at all.[14] For example, the President, Vice President, and Justices of the Supreme Court were not subject to any financial disclosure requirements.[15] The Act contains uniform and complete public financial disclosure requirements for all elected federal government officials, federal judges, candidates for federal elected office, and cabinet appointees.[16]

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[11] Ethics in Government Act Amendments of 1982, Pub. L. No. 97-409, 96 Stat. 2039 (codified as amended at 28 U.S.C. §§ 591-99 (1982)).

[12] Independent Counsel Reauthorization Act of 1987, Pub. L. No. 100-191, 101 Stat. 1293 (codified as amended at 28 U.S.C. §§ 591-99 (1987)).

[13] S. REP. No. 170, *supra* note 10, at 1, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS at 4217.

[14] *See* S. REP. No. 170, *supra* note 10, at 21, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS at 4237.

[15] *Id.*

[16] *See* Pub. L. No. 95-521, secs. 101-309, 92 Stat. 1824, 1824-61 (1978).

Regaining the public's faith in the governmental process appeared to be the overriding concern of many in Congress for creating disclosure requirements. Proponents of public disclosure argued that disclosure would create greater public confidence in government officials, decrease the chance that any conflicts of interest would arise, and provide a better gauge by which the public can judge their elected representatives.[17]

Title IV creates the Office of Government Ethics.[18] Located within the Civil Service Commission, this office is headed by a director who is appointed by the President.[19] The primary function of the Office of Government Ethics is to implement the financial disclosure requirements and to monitor the rules and regulations concerning the executive branch of government. Prior to the Ethics Act, the Civil Service Commission was responsible for monitoring and coordinating any standards of ethical behavior, including any existing financial disclosure requirements.[20] The Commission was not, however, given any power to direct agency enforcement.[21] As a result, agencies failed to create their own specialized guidelines, thus violations unique to certain agencies went unsanctioned.[22] This inadequate enforcement of violations in the agencies, plus a "lack of a centralized supervisory authority" with investigatory and enforcement powers, was the primary reason for the creation of a government ethics office.[23]

Title V places restrictions on activities in which executive branch officials may become involved after they leave government service.[24] This conflict of interest provision states as its objectives "honest government" and "decisions made in an impartial manner."[25] Similar to the reasoning behind Titles I

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17 *See generally* S. REP. No. 170, *supra* note 10, at 21-22, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS at 4237-38.

18 Pub. L. No. 95-521, secs. 401-06, 92 Stat. 1824, 1862-64 (1978).

19 *Id.* sec. 401, 92 Stat. 1824, 1862.

20 *See* S. REP. No. 170, *supra* note 10, at 28-29, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS at 4244-45.

21 S. REP. No. 170, *supra* note 10, at 30, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS at 4246.

22 *See id.*

23 *Id.*

24 *See* S. REP. No. 170, *supra* note 10, at 31, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS at 4247.

25 *Id.*

through III, the "public's confidence in the integrity of government" was the major theme of Title V as Congress sought "to avoid *even the appearance* of public office being used for personal or private gain."[26]

Title V actually revises existing law. Subsection (a) establishes a lifetime prohibition on a former official from acting as an agent or attorney for any person, except the United States, in matters "in which he participated personally and substantially as an officer or employee . . . ."[27] Subsection (b) prohibits a former official, for a period of two years, from acting as an agent or attorney and from aiding, consulting, advising, or assisting in representing any person, except the United States, in matters "which [were] actually pending under his official responsibility as an officer or employee . . . ."[28] Subsection (c) creates a cooling off period of one year between the termination of an officer's or employee's position and the time the officer or employee appears before his former agency or department.[29] During this one-year period, the former official is prohibited from acting as an agent or attorney for any person, except the United States, in matters "which [are] pending before such department or agency or in which such department or agency has a direct and substantial interest."[30] Title V also establishes an administrative disciplinary remedy for any statutory violations. The Act confers upon an agency or department head the authority to prohibit any violator from appearing before the agency or department for a period of up to five years.[31]

The part of the Ethics Act which has received the most attention and has generated the most controversy since 1978 has been the special prosecutor provisions in Title VI.[32] As mentioned above, the Watergate scandal set the mood for a strict ethics law.[33] At the Committee hearings other reasons were also asserted for creating a special prosecutor. These included the need

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[26] S. REP. No. 170, *supra* note 10, at 32, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS at 4248 (emphasis in original).

[27] Pub. L. No. 95-521, sec. 501(a), 92 Stat. 1824, 1864 (1978).

[28] *Id.* sec. 501(b), 92 Stat. 1824, 1864-65.

[29] *Id.* sec. 501(c), 92 Stat. 1824, 1865.

[30] *Id.*

[31] *Id.* sec. 501(j), 92 Stat. 1824, 1866-67.

[32] *Id.* secs. 601-04, 92 Stat. 1824, 1867-73.

[33] *See supra* text accompanying notes 2-6.

to avoid the appearance of impropriety during an investigation by the Justice Department, the need for the investigator to be independent from the attorney general, and the need to avoid any conflict of interest from arising.[34] These goals were contained in eight special prosecutor sections.

Sections 591 and 592 direct the Attorney General to conduct a "preliminary investigation"[35] upon receiving "specific information"[36] that any of the individuals listed in section 591(b) may have violated any federal law, not including a "petty offense."[37] The individuals covered by section 591(b) include the President, Vice President, cabinet members, officials in the executive office classified as level III or IV employees, Director and Deputy Director of the Central Intelligence Agency, and the Commissioner of the Internal Revenue Service.[38] The scope of section 591(b) is broad, as it also covers these individuals if they held their respective offices during the term of the immediately preceding President if that President was of the same political party as the incumbent President.[39] Also covered by section 591(b) are "officers of the principal national campaign committees seeking the election or reelection of the President."[40] It is interesting to note that this last provision was the result of a suggestion by the Justice Department. The Senate version of Title VI originally called for the Act to cover "a national campaign manager or chairman

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34 *See* S. REP. NO. 170, *supra* note 10, at 5-7, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS at 4221-23.

35 Pub. L. No. 95-521, secs. 591-92, 92 Stat. 1824, 1867-68 (1978). A preliminary investigation is one which determines if further investigation is warranted. It might involve contacting the source of the complaint and investigating the facts alleged or alluded to in the allegations of criminal conduct. The attorney general cannot call witnesses before a grand jury nor enter into a plea bargaining agreement. When the attorney general is satisfied that the matter warrants further investigation, the preliminary investigation is over and he must then seek a special prosecutor. *See* S. REP. NO. 170, *supra* note 10, at 53-55, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS at 4269-71.

36 Pub. L. No. 95-521, secs. 591-92, 92 Stat. 1824, 1867-68 (1978). "Specific information" is not to apply to a "generalized allegation of wrongdoing which contains no specific factual support." S. REP. NO. 170, *supra* note 10, at 52, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS at 4268.

37 Pub. L. No. 95-521, sec. 601, 92 Stat. 1824, 1867-68.

38 Pub. L. No. 95-521, sec. 591(b), 92 Stat. 1824, 1868; S. REP. NO. 170, *supra* note 10, at 52, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS at 4268.

39 *Id.*

40 *Id.*

of any national campaign committee seeking the election or re-election of the President."[41] The Justice Department believed that the potential scope of this provision was too broad in that it may "be construed to cover individuals chairing any one of the hundreds of campaign committees which spring up during a national campaign . . . ."[42]

The attorney general's preliminary investigation is not to exceed ninety days.[43] If the Attorney General determines that "the matter is so unsubstantiated that no further investigation or prosecution is warranted,"[44] he need only file a memorandum with the Special Prosecutor Division of the United States Court of Appeals for the District of Columbia (Division of the Court).[45] However, if the attorney general determines that "the matter warrants further investigation or prosecution," he must apply to the Division of the Court for appointment of a special prosecutor.[46]

Section 593 establishes the duties of the Division of the Court. The Division of the Court may appoint as a special prosecutor, any individual it feels is qualified, except an individual currently serving, or who recently served, in a position "of profit or trust" for the United States.[47] This effectively precludes any employee of the United States government and allows only those individuals who are truly independent from the President and attorney general to be a special prosecutor. The Division of the Court is also responsible for defining the special prosecutor's prosecutorial jurisdiction.[48]

Prosecutorial jurisdiction, in relation to the duties of a special prosecutor, is defined in section 594. A special prosecutor is conferred very broad powers under the Act. The special prosecutor is given "full power and independent authority to exercise

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41 H.R. CONF. REP. No. 1756, 95th Cong., 1st Sess. 78, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 4381, 4394.

42 *Id.*

43 Pub. L. No. 95-521, 92 Stat. 1824, 1868 (1978).

44 *Id.*

45 *Id.* The Division of the Court is comprised of three circuit judges. *Id.* They are appointed by the Chief Justice of the Supreme Court and serve two-year terms. *Id.*

46 *Id.*

47 *Id.* 92 Stat. 1824, 1869.

48 *Id.*

all investigative and prosecutorial functions" as necessary to fulfill the obligations of his position.[49] The special prosecutor's role and authority are closely intertwined with the Justice Department. The Justice Department is obligated to assist the special prosecutor if so required.[50] Procedurally, the special prosecutor is to "comply with the written policies of the Department of Justice respecting enforcement of the criminal laws."[51]

Section 595 requires the special prosecutor to keep the Division of the Court and Congress informed of his investigation.[52] This may be accomplished through statements or reports specifying the disposition of all pertinent cases.[53]

Removal of the special prosecutor is covered by section 596. Aside from impeachment and conviction, only the Attorney General is allowed to remove the special prosecutor, and then "only for extraordinary impropriety, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such special prosecutor's duties."[54] Once a special prosecutor is removed, the Attorney General must notify the Division of the Court and Congress of the removal with a report detailing the reasons.[55] In addition, the special prosecutor may obtain judicial review of his removal before the Division of the Court.[56]

Section 597 defines the relationship between the Justice Department and the special prosecutor. Whenever a special prosecutor retains prosecutorial jurisdiction of a matter, the Attorney General and other employees of the Justice Department will suspend any similar investigation regarding the matter.[57]

Congress realized that the implementation of these new provisions would create certain problems. As a result, a "sunset provision" was included in section 598 which stated that the special prosecutor provisions of the Act will expire after five years.[58]

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49 *Id.*
50 *Id.* 92 Stat. 1824, 1870.
51 *Id.* 92 Stat. 1824, 1871.
52 *Id.*
53 *Id.*
54 *Id.* 92 Stat. 1824, 1872.
55 *Id.*
56 *Id.*
57 *Id.* 92 Stat. 1824, 1872-73.
58 *Id.* 92 Stat. 1824, 1873.

This was done

> to see if too many or too few special prosecutors have been appointed, to determine whether there is a need for a revision of the standards defining when a conflict of interest exists, or to determine if there is a need to revise the method of appointment, the method of removal, or any other significant portion of this chapter.[59]

The last title of the Act, Title VII, establishes the Office of Senate Legal Counsel.[60] The Counsel, appointed by the President Pro Tempore of the Senate, is responsible for defending members of the Senate, bringing civil actions to enforce a subpoena, intervening as *amicus curiae* when directed, and acting as an adviser for the Senate.[61] The Senate version proposed an Office of Congressional Legal Counsel for both the House and the Senate.[62] The House, however, did not consider the Senate's proposal.[63]

III. Time for Reform: Ethics in Government Act Amendments of 1982

A. *The Need for Reform*

The special prosecutor provisions of the Ethics Act were scheduled to expire on October 26, 1983.[64] In anticipation of this date, the Subcommittee on Oversight of Government Management (Subcommittee) of the Senate Committee on Governmental Affairs (Committee) held hearings in May 1981 to discuss and evaluate the expiration and possible renewal of these provisions.[65] The Subcommittee hearings were chaired by Senator William Cohen of Maine.[66] Appearing before the Subcommittee were both advocates and opponents of the special prosecutor

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59 S. REP. No. 170, *supra* note 10, at 77, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS at 4293.

60 Pub. L. No. 95-521, secs. 701-16, 92 Stat. 1824, 1875-85 (1978).

61 Pub. L. No. 95-521, sec. 703, 92 Stat. 1824, 1877.

62 H.R. CONF. REP. No. 1756, *supra* note 41, at 80, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS at 4396.

63 *Id.*

64 *See Special Prosecutor Provisions of Ethics in Government Act of 1978: Hearings Before the Subcomm. on Oversight of Government Management of the Comm. on Governmental Affairs*, 97th Cong., 1st Sess. (1981) [hereinafter *Hearings*].

65 *Id.*

66 For a discussion of Senator Cohen's views of possible reforms to the Ethics Act, see Cohen, *Reforming the special Prosecutor Process*, 68 A.B.A.J. 278 (1982).

provisions including former Attorney General Benjamin Civiletti, former Counsel to President Carter, Lloyd N. Cutler, former special prosecutor Arthur H. Christy, and representatives from the ABA.[67] The findings and conclusions of these hearings were published in a report issued in October 1981.[68] As a result of this report, S. 2059, entitled Ethics in Government Act Amendments of 1982,[69] was introduced in the Senate. Further hearings were held in April 1982 on S. 2059.[70] Again, advocates and opponents of the special prosecutor provisions appeared before the Subcommittee. Testimony was heard from former Associate Attorney General Rudolph Giuliani, former Attorney General Elliot Richardson, Lloyd Cutler, and Robert Evans of the ABA.[71] The bill was reported to the Senate in June and passed in August, considered and passed by the House in December, and approved by President Reagan on January 3, 1983. Before examining the changes to the Ethics Act by the 1982 Amendments, it is important to understand some of the events and circumstances which precipitated the calls for reform.

Between October 26, 1978, and the 1981 Subcommittee hearings, a special prosecutor had been appointed twice.[72] The first occurred in 1979 with the appointment of Arthur H. Christy as special prosecutor to investigate information from witnesses that President Carter's Chief of Staff, Hamilton Jordon, had used cocaine.[73] Pursuant to section 591 of the special prosecutor provisions, then Attorney General Benjamin Civiletti conducted a preliminary investigation based upon the information that he had received. Since this information was specific information from

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67 *See Hearings, supra* note 64, at III.

68 *See* STAFF OF SUBCOMM. ON OVERSIGHT OF GOVERNMENT MANAGEMENT OF THE SENATE COMM. ON GOVERNMENTAL AFFAIRS, 97TH CONG., 1ST SESS., REPORT ON SPECIAL PROSECUTOR PROVISIONS OF ETHICS IN GOVERNMENT ACT OF 1978 (Comm. Print 1981).

69 S. 2059, 97th Cong., 2d Sess., 128 CONG. REC. S10,294-301 (daily ed. Aug. 12, 1982).

70 *See Ethics in Government Act Amendments of 1982: Hearings on S. 2059 Before the Subcomm. on Oversight of Government Management of the Comm. on Governmental Affairs*, 97th Cong., 2d Sess. (1982) [hereinafter *Ethics in Government*].

71 *Id.* at III.

72 *See* Kramer & Smith, *The Special Prosecutor Act: Proposals for 1983*, 66 MINN. L. REV. 963, 968 (1982).

73 *See White House in Firm Support of Hamilton Jordon*, N.Y. Times, Oct. 10, 1979, at A23, col. 1.

witnesses the "matter warrant[ed] further investigation or prosecution" and, accordingly, special prosecutor Christy was appointed. Special prosecutor Christy, through his prosecutorial jurisdiction, convened a grand jury which failed to bring an indictment against Mr. Jordon.[74]

The second appointment of a special prosecutor also occurred in 1979 under similar facts. Gerald J. Gallinghouse was appointed special prosecutor to investigate alleged cocaine use by Timothy Kraft, President Carter's 1980 campaign manager.[75] Kraft was also exonerated by the special prosecutor.[76]

The debate which emanated from these cases centered around the standards, or lack of standards, which the special prosecutor provisions established for the attorney general to follow when asking the Division of the Court to appoint a special prosecutor. For example, during the 1981 Subcommittee hearings, Attorney General Civiletti testified that under normal circumstances, the Justice Department would have never proceeded on cases such as Jordon or Kraft on the facts before it. Since the matter was not unsubstantiated, under the Ethics Act the Attorney General had no choice but to ask the Division of the Court to appoint a special prosecutor.[77]

Another event which influenced the reform of the special prosecutor provisions was the "Billygate" affair.[78] President Carter's brother, Billy Carter, received loans from the government of Libya but failed to register himself as a foreign agent.[79] After an investigation by the Justice Department, Attorney General Civiletti found no evidence of wrongdoing by Billy Carter. A Senate Judiciary Subcommittee, investigating Billy Carter and the Justice Department's investigation of the affair, concluded

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74 *See* Pound, *Grand Jury Calls Data Insufficient to Indict Jordon*, N.Y. Times, May 29, 1980, at A18, col. 1.

75 *See* Pound, *Inquiry Set on Alleged Drug Use by Kraft, Carter Campaign Aide*, N.Y. Times, Sept. 14, 1980, at A1, col. 1.

76 *See* Pound, *Kraft's Attorneys Sue to Challenge Powers of Special Prosecutor*, N.Y. Times, Nov. 20, 1980, at A33, col. 1.

77 *See Hearings supra* note 64, at 9 (statement of Benjamin Civiletti). For further views on the Ethics Act by Attorney General Civiletti, see Civiletti, *Post Watergate Legislation in Retrospect*, 34 Sw. L.J. 1043, 1051-56 (1981).

78 *See* S. REP. No. 496, 97th Cong., 2d Sess. 8, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 3537, 3544.

79 *Id.*

that "there [was] no evidence that the investigation or disposition of the case by [the Department of Justice] was skewed in favor of Billy Carter because he [was] the brother of the President."[80] Questions persisted, however, about the possibility of an impartial investigation of the President's brother.[81] Although the Act covered a broad range of officials, the Act did not cover those individuals of whom an investigation may cause the most serious potential for a conflict of interest, members of the President's family.

As with the passage of any legislation, the final product is a result of various testimony, numerous inquiries, and in the case of the 1982 Amendments, some practical experience.

B. *Revisions of the Act*

As in 1978, the desire to prevent actual and perceived conflicts of interest and to promote public confidence in government were the overriding concerns behind the passage of the 1982 Amendments. However, in addressing these practical and procedural problems, the Committee seemed to recognize the overzealousness with which the 1978 Act was passed. The Committee believed that the special prosecutor provisions should "be retained in order to guard against actual and perceived conflicts of interest in the investigation of high-ranking Executive Branch officials . . . who are close to either the President or the Attorney General."[82] Yet the Committee also recognized that changes were needed in the Act to "[make] it more equitable and less burdensome, thus better ensuring that public officials are treated equally and fairly under the law."[83] With the Watergate scandal now almost eight years old, it appeared that some of the post-Watergate motives for a tough ethics law had changed in favor of a more equitable and balanced law. As a result, the scope of those individuals covered under the Act, the Act's investigatory standards, and the power of the Attorney General under the Act were all amended.

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80 S. REP. No. 1015, 96th Cong., 2d Sess. 62 (1980).

81 *See* S. REP. No. 496, *supra* note 77, at 8, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS at 3544.

82 S. REP. No. 496, *supra* note 78, at 4, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS at 3540.

83 *Id.*

One change was rather cosmetic in nature, although it did seem to reflect the new practical, rational mood of Congress. This was the changing of the name special prosecutor to independent counsel.[84] According to the Committee, this change "would remove the Watergate connotation . . . and spare the subject of such investigation adverse public reaction. . . . Also, the name 'independent counsel' . . . does not suggest, as does the name 'special prosecutor,' that an indictment has or will be brought."[85]

Similarly, a further change to the Act allowed for the Division of the Court to award reimbursement for attorney's fees.[86] The 1982 Amendments allowed for the authorization of attorney's fees to an individual who is the subject of an investigation if no indictment is brought against the individual and the fees would not have been expended but for the requirements of the Act.[87] During the Subcommittee hearings, Lloyd Cutler, former counsel to President Carter, testified that Hamilton Jordon's legal fees "exceed[ed] six figures," and he was exonerated.[88] According to Mr. Cutler, "the appointment of an independent counsel increases the cost to the individual and that since that was done primarily for the benefit of the public, the public ought to bear that additional cost at least in the circumstances where no indictment is brought in the end."[89]

Another major area of revision concerned the scope of the Act's coverage provisions. The Committee determined that the Act covered approximately 120 executive positions.[90] Many of these positions were classified at levels III and IV in the Executive Schedule.[91] Individuals in these positions had little, if any, contact with the President or the Attorney General, thus there was little chance of a conflict of interest arising from a possible investigation. To narrow the Act's broad scope, section 591(b)

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84 Pub. L. No. 97-409, sec. 2(a)(1), 96 Stat. 2039 (1983).

85 S. REP. No. 496, *supra* note 78, at 4, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS at 3540.

86 Pub. L. No. 97-409, sec. 5, 96 Stat. 2039, 2041.

87 *Id.*

88 *Hearings*, *supra* note 64, at 36 (statement of Lloyd Cutler).

89 *Ethics in Government*, *supra* note 70, at 65 (statement of Lloyd Cutler).

90 S. REP. No. 496, *supra* note 78, at 6, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS at 3542.

91 *Id.*

was amended to cover only those individuals at levels II and III in the Executive Schedule.[92] According to the Committee, "[w]here the coverage of Executive officials who do not present [any] danger is inherently inconsistent with the purpose of the Act, they should be excluded."[93]

The scope was further narrowed by reducing the number of campaign officials covered under the Act. Originally, section 591 covered any officers of a national campaign committee during the incumbency of the President.[94] However, as the Committee pointed out, officer was not defined and thus there existed a possibility that hundreds of campaign officers, with no conflict of interest dangers, might be covered by the Act.[95] As a result, the Act was amended to include only "the chairman and treasurer of the principal national campaign committee . . . and any officer . . . at the national level such as the campaign manager or director . . . ."[96]

The scope of the Act was also broadened. With the "Billygate" affair firmly in the minds of those in Congress, it is no surprise that the Committee suggested amending the Act to include certain members of the President's family.[97] The term family, according to the Committee, was to include the President's spouse, children and their spouses, parents, brothers and sisters, and their spouses.[98] Also to be covered under the Act were close associates or friends of the President who were not expressly covered by the Act. During the Committee hearings, then Associate Attorney General, Rudolph Giuliani, testified that a serious conflict of interest problem can arise when the Attorney General investigates a close personal or business friend of the President.[99] To rectify this potential problem, section 591 was amended to

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92 Pub. L. No. 97-409, sec. 3, 96 Stat. 2039, 2039-40.

93 S. REP. No. 496, *supra* note 78, at 7, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS at 3543.

94 Pub. L. No. 95-521, 92 Stat. 1824, 1868 (1978).

95 *See* S. REP. No. 496, *supra* note 78, at 8, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS at 3544.

96 *Id.*

97 *Id.*

98 *Id.*

99 *See Ethics in Government*, *supra* note 70, at 10-13.

include a catch-all provision[100] which authorizes the Attorney General to conduct an investigation if he determines that such investigation "may result in a personal, financial, or political conflict of interest."[101] The catch-all provision had merit, but it was debated whether the personal improprieties of the President's family were worth an investigation by an independent counsel.[102] As a compromise, the express listing of the members of the President's family was dropped since the catch-all provision was broad enough to cover family members should the Attorney General find that an investigation be warranted.

Another aspect of the Act to be amended involved the length of time to which individuals covered by the Act were to be subject to its provisions. The Act covered those officials expressly listed "during the incumbency of the President or during the period the last preceding President held office, if such preceding President was of the same political party as the incumbent President."[103] As a result, if a President is elected to a second term and the next succeeding President is of the same political party and serves two terms, an official can be covered by the Act for up to sixteen years. This provision was found to be unfair. This inequity was addressed by amending section 591 to cover individuals only during the incumbency of the President plus one year.[104] Therefore, if an individual left his position prior to the end of the President's term, the Act would cover that individual for a maximum of only two years.[105]

Major revisions were also made to the standards which the Attorney General must follow when beginning his preliminary investigation. According to the Act, the Attorney General need only receive specific information concerning any individual covered by the Act to trigger a preliminary investigation.[106] The Jordon and Kraft affairs demonstrated to Congress that "the present

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100 *See* S. REP. No. 496, *supra* note 78, at 9, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS at 3545.

101 Pub. L. No. 97-409, 96 Stat. 2039, 2040 (1982).

102 *See* Note, *supra* note 5, at 144-45.

103 Pub. L. No. 95-521, sec. 591, 92 Stat. 1824, 1868 (1978).

104 Pub. L. No. 97-409, sec. 3, 96 Stat. 2039, 2040 (1982).

105 *Id.*

106 *See* Pub. L. No. 95-521, secs. 592, 92 Stat. 1824, 1867-68 (1978); *see also* S. REP. No. 496, *supra* note 78, at 11, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS at 3547.

standard [was] too low."[107] As former Attorney General Benjamin Civiletti testified, under normal Justice Department procedures, the cases of Jordon and Kraft would never have been investigated. However, the Ethics Act created a different standard for certain public officials. Recognizing this double standard, section 592(a) was amended to replace the specific information requirement with a requirement that the information received be "sufficient to constitute grounds to investigate."[108] Section 592(a) was also amended to include two criteria for determining sufficient grounds. These criteria are "the degree of specificity of the information received" and "the credibility of the source of the information."[109]

The standards were also changed regarding the appointment of an independent counsel. The Ethics Act required that unless the Attorney General determines that "the matter is so unsubstantiated that no further investigation or prosecution is warranted" an independent counsel must be appointed.[110] The Jordon and Kraft affairs convinced many in Congress that this standard was far below the standards used by the Justice Department when investigating other cases. To remedy the inherent unfairness of this stricter standard for public officials, section 592 was amended to require the Attorney General to appoint an independent counsel only if he "finds reasonable grounds to believe that further investigation or prosecution is warranted."[111]

One final area of amendment concerned the scope of the independent counsel's power. Although the basis of the independent counsel's responsibilities was statutory independence to "assure an impartial investigation and public confidence," many supporters of the Ethics Act favored more stringent controls on the independent counsel's power.[112] In redefining the independent counsel's power, Congress believed that under certain circumstances the independent counsel could abuse his power by prolonging an investigation or controlling an investigation for

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107 S. REP. No. 496, *supra* note 78, at 11, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS at 3547.

108 Pub. L. No. 97-409, sec. 4, 96 Stat. 2039, 2040 (1982).

109 *Id.*

110 Pub. L. No. 95-521, 92 Stat. 1824, 1868 (1978).

111 Pub. L. No. 97-409, sec. 4, 96 Stat. 2039, 2041 (1982).

112 *See* S. REP. No. 496, *supra* note 78, at 15-18, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS at 3551-54.

his own gain.[113] Arthur Christy, the special prosecutor in the Jordon affair and a supporter of the Act, testified before the Subcommittee that the independent counsel's powers were "awesome" and "in the hands of [the wrong] person . . . you might have a great many problems."[114] Mr. Christy may have been correct. It was reported to the Subcommittee that the Kraft investigation was postponed until after the 1980 Presidential election by Special Prosecutor Gallinghouse to avoid any appearance of impartiality or political favoritism.[115] Accordingly, section 594 was amended to require an independent counsel to follow the same standards and procedures as the Justice Department during an investigation.[116] The Attorney General's control of the independent counsel was strengthend by amending the Attorney General's removal powers. Section 596 changed the removal standard from extraordinary impropriety to a good cause standard.[117] Good cause is the standard used for the removal of independent agency heads. Congress believed that it was crucial to have an established body of law to support any removal of an independent counsel and felt that the good cause standard was sufficient.[118] It is interesting to note that Congress supported the good cause removal standard in 1982 because it believed that such a standard would withstand any separation of powers or appointments clause attacks.[119]

Finally, the Committee believed that "[t]he need for a special prosecutor still exists" and extended the provisions for an additional five years.

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113 *Id.*

114 *See Hearings*, *supra* note 64, at 132 (statement of Arthur H. Christy).

115 *See* S. REP. No. 496, *supra* note 78, at 16, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS at 3552.

116 *Id.*

117 Pub. L. No. 97-409, sec. 6, 96 Stat. 2039, 2042 (1982).

118 *See* S. REP. No. 496, *supra* note 78, at 17, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS at 3553.

119 *Id.* The recent Supreme Court decision upholding the constitutionality of the independent counsel provisions makes this concern seem quite omniscient on the part of Congress. *See* Morrison v. Olson, — U.S. —, 108 S.Ct. 2597, 2598 (1988).

IV. External Problems Arise: Independent Counsel Reauthorization Act of 1987

A. *The Ethics Act and the Justice Department*

The independent counsel provisions were to expire on January 3, 1988. The Subcommittee, chaired by Senator Carl Levin of Michigan, conducted six months of interviews with Justice Department officials, former independent counsels, and employees of the Division of the Court.[120] The Subcommittee also held hearings and heard testimony from Assistant Attorney General John Bolton, Lloyd Cutler, Benjamin Civiletti, Archibald Cox, David H. Morton, Director, Office of Government Ethics, and representatives from the ABA.[121] As a result, the Committee recommended passage of Senate bill 1293, The Independent Counsel Reauthoriztion Act of 1987.[122] According to the Committee, "the independent counsel process has served the country well but that clarifying and strengthening amendments to the underlying statute are needed to resolve a variety of potential and actual problems."[123] The bill was passed by the Senate in November, by the House in December, and was signed by President Reagan on December 15, 1987.[124]

Unlike the 1982 Amendments, the 1987 Reauthorization was considerably influenced by outside factors, in particular the Justice Department's interpretation of the Act's provisions. Between the passage of the 1982 Amendments and the 1987 Subcommittee hearings the Justice Department processed thirty-six cases under the independent counsel provisions.[125] Of those thirty-six cases, twenty-five were closed prior to any preliminary investigation.[126] Five of those were closed because the allega-

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120 *See* S. REP. NO. 123, 100th Cong., 1st Sess., *reprinted in* 1987 U.S. CODE CONG. & ADMIN. NEWS 2150, 2153.

121 *See Oversight of the Independent Counsel Statute: Hearings Before the Subcomm. on Oversight of Government Management of the Comm. on Governmental Affairs*, 100th Cong., 1st Sess. III (1987) [hereinafter *Oversight*].

122 S. 1293, 100th Cong., 1st Sess., 137 CONG. REC. S14,432-50 (daily ed. Oct. 16, 1987).

123 S. REP. NO. 123, *supra* note 120, at 5, *reprinted in* 1987 U.S. CODE CONG. & ADMIN. NEWS at 2154.

124 *See generally* 28 U.S.C. §§ 591-597 (1988).

125 S. REP. NO. 123, *supra* note 120, at 6, *reprinted in* 1987 U.S. CODE CONG. & ADMIN. NEWS at 2155.

126 *Id.*

tions did not involve an official covered by the Act, and twenty were closed because Attorney General Edwin Meese conducted a threshold inquiry into those matters and "had determined that the information [received] was insufficient to trigger a preliminary investigation."[127] The Subcommittee, after evaluating these cases, determined that the Justice Department was also declining to initiate a preliminary investigation based on factors other than the credibility and specificity standards stated in the Act.[128] According to Assistant Attorney General John Bolton, the Department developed a criminal intent standard to determine if a preliminary investigation was warranted.[129] That is, if a threshold inquiry failed to show sufficient evidence of an individual's criminal intent to commit a crime, there would be no need for an investigation.[130] Of the eleven cases where a preliminary investigation was conducted, three were eventually closed due to a finding that there was no criminal intent[131] on the part of the individual being investigated, and eight led to the appointment of an independent counsel.[132]

Another area of contention for the Subcommittee concerned the recusal practices of Attorney General Meese. During an investigation by the House of Representatives of the Environmental Protection Agency, the House Judiciary Committee requested Attorney General Meese to conduct a preliminary investigation into the activities of Deputy Attorney General Edward Schmults.[133] Despite the fact that Mr. Meese had attended college with Mr. Schmults and had been personal friends with him for over twenty years, Mr. Meese did not recuse himself from the investigation.[134] In cases where Mr. Meese did recuse himself, no written explanation was given, thus no way existed to determine how and why Mr. Meese decided to recuse himself from those

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127 *Id.*

128 S. REP. NO. 123, *supra* note 120, at 7, *reprinted in* 1987 U.S. CODE CONG. & ADMIN. NEWS at 2156.

129 *See Oversight*, *supra* note 121, at 8 (statement of John Bolton).

130 *Id.*

131 S. REP. NO. 123, *supra* note 120, at 7, *reprinted in* 1987 U.S. CODE CONG. & ADMIN. NEWS at 2156.

132 *Id.* These cases included, for example, investigations of Attorney General Meese and Chief of Staff Michael Deaver. *Id.*

133 *See* S. REP. NO. 123, *supra* note 120, at 11-12, *reprinted in* 1987 U.S. CODE CONG. & ADMIN. NEWS at 2160-61.

134 *Id.*

cases.[135] While fairness and equitable treatment of public officials were influences behind the 1982 Amendments, it was the need to restrain a too-independent Attorney General which influenced the 1987 Reauthorization.

In order to prevent the Justice Department from conducting extended threshold inquiries as a prelude to the Act's required preliminary investigation, the Reauthorization places a fifteen-day limit on the attorney general to determine if grounds to investigate exist.[136] Also, stricter reporting requirements were adopted. During the Subcommittee hearings, it appeared that the Justice Department would conduct threshold inquiries to avoid the reporting requirements of the preliminary investigation.[137] Archibald Cox testified at the Subcommittee hearings that the Attorney General "had done 'everything' necessary in the case[s] to conduct a preliminary investigation except to put that name on it."[138]

The standards the attorney general is to follow were also amended. The Committee sought to clarify the standards by which Congress felt a preliminary investigation should be initiated. As a result, the Reauthorization specifically stated that only the standards of specificity and credibility were to be used in determining whether a preliminary investigation should be commenced.[139] The Committee also sought to codify the criminal intent standard that the Justice Department seemed to be adopting. Section 592 of the Act was amended to include a state of mind standard for beginning a preliminary investigation and appointing an independent counsel.[140] The Reauthorization prohibits the Attorney General from closing a case based upon state of mind prior to a preliminary investigation and only allows the Attorney General to close a case after a preliminary investigation if the evidence was clear and convincing that the necessary state of mind was absent.[141]

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135 *See id.*

136 Pub. L. No. 100-191, 101 Stat. 1293, 1294 (1987).

137 *See* S. REP. No. 123, *supra* note 120, at 9-10, *reprinted in* 1987 U.S. CODE CONG. & ADMIN. NEWS at 2158-59.

138 *See Oversight*, *supra* note 121, at 39 (statement of Archibald Cox).

139 Pub. L. No. 100-191, 101 Stat. 1293, 1294 (1987).

140 *Id.* 101 Stat. 1293, 1295.

141 *Id.*

The Reauthorization also established a recusal policy. A new section was added to the Act which requires the Attorney General to recuse himself if he receives information involving himself or a person with whom he "has a current or recent personal or financial relationship."[142] The recusal must be written and list the reasons for the recusal.[143]

B. *The Ethics Act and the Courts*

The 1987 Reauthorization was also influenced, to some extent, by judicial decisions. Prior to the 1987 Subcommittee hearings, two areas of the independent counsel provisions were addressed by the courts. These were the independent counsel's prosecutorial jurisdiction and the availability of judicial review of an Attorney General's decision not to conduct a preliminary investigation.

The prosecutorial jurisdiction of an independent counsel was examined in *In re Olson*.[144] During an investigation by the House of Representatives of the Environmental Protection Agency (EPA),[145] the House Judiciary Committee requested Attorney General Meese to conduct a preliminary investigation into the actions of three Justice Department officials: Assistant Attorney General Theodore Olson, Deputy Attorney General Edward Schmults, and Assistant Attorney General Carol Dinkins.[146] After conducting the preliminary investigation, the Attorney General requested that the Division of the Court appoint an independent counsel to investigate Theodore Olson, but not Mr. Schmults or Ms. Dinkins.[147] Independent Counsel Alexia Morrison was appointed.[148]

After some investigation, Ms. Morrison requested that the Attorney General expand her jurisdiction to include an investigation of Mr. Schmults and Ms. Dinkins, as well as former General Counsel to the EPA, Robert Perry.[149] According to Ms. Morrison,

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142 *Id.* 101 Stat. 1293, 1294-95.
143 *Id.*
144 818 F.2d 34 (D.C. Cir 1987).
145 *See id.* at 35.
146 *Id.* at 36.
147 *Id.*
148 *Id.* at 37 & n.2.
149 *Id.* at 37.

since the original allegations against Mr. Schmults and Ms. Dinkins were related matters, her request for expanded jurisdiction was authorized under the Act.[150] Attorney General Meese granted expanded jurisdiction regarding Mr. Perry, but denied jurisdiction regarding Mr. Schmults and Ms. Dinkins.[151] According to the Attorney General, it "had already been determined [that] there were no reasonable grounds warranting further investigation or prosecution of the allegations . . . ."[152] Ms. Morrison then applied to the Division of the Court requesting expanded jurisdiction to investigate the allegations against Mr. Schmults and Ms. Dinkins. The Division of the Court held that under the Act, it did not have "the authority to refer allegations to [an] Independent Counsel when the Attorney General specifically determined, under [the Act] that those allegations should not be pursued."[153]

The 1987 Reauthorization, in response to the *Olson* decision, included a new section concerning the expansion of an independent counsel's prosecutorial jurisdiction.[154] The Act originally made no provision for a request by an independent counsel for expanded jurisdiction. Thus, it was unclear what statutory authority the Division of the Court or the Attorney General possessed concerning this issue. The Reauthorization allows the Division of the Court to expand an independent counsel's jurisdiction upon the request of the Attorney General. If the independent counsel receives new information about possible violations of criminal law by persons not included under the current jurisdiction, the independent counsel may submit this information to the Attorney General who then must conduct a preliminary investigation.[155] If after the investigation the Attorney General finds that there are no reasonable grounds to believe that further investigation is warranted, he must notify the Division of the Court.[156] The Division of the Court has no power to expand the juridiction of the independent counsel. If the Attor-

150 *Id.*
151 *Id.* at 38.
152 *Id.*
153 *Id.* at 47.
154 *See* Pub. L. No. 100-191, 101 Stat. 1293, 1298 (1987).
155 *Id.*
156 *Id.* at 1299.

ney General finds that there are reasonable grounds to believe that further investigation is warranted, he must notify the Division of the Court and the Division of the Court must expand the independent counsel's jurisdiction or appoint another independent counsel.[157]

In *Banzhaf v. Smith*,[158] the court decided whether an Attorney General's decision not to conduct a preliminary investigation was subject to judicial review.[159] Neither the Ethics Act nor the 1982 Amendments contained any express provision as to the availability of judicial review of a decision by the Attorney General not to conduct a preliminary investigation. However, the Act did expressly prohibit judicial review of the Attorney General's decision to apply to the Division of the Court for appointment of an independent counsel. Thus, the question arose whether there existed a right to judicial review of the Attorney General's decision not to conduct a preliminary investigation. This question was answered in *Banzhaf*. In *Banzhaf*, the plaintiff requested that then Attorney General William French Smith investigate allegations that James Baker, David Stockman, David Gergen, and Richard Allen removed certain documents from the Carter White House for use by President Reagan's 1980 campaign organization.[160] Attorney General Smith denied the request and plaintiff filed suit in federal district court.[161] The district court granted relief in the form of a writ of mandamus ordering Attorney General Smith to conduct the preliminary investigation.[162] The court of appeals reversed, holding that it was not Congress's intent to subject the Attorney General's decisions not to conduct a preliminary investigation to judicial review.[163] This issue was addressed by the Conference Committee working on the bill.[164] In fact, the

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157 *Id.*

158 737 F.2d 1167 (D.C. Cir. 1984). *See also* Dellums v. Smith, 797 F.2d 817 (9th Cir. 1986); Nathan v. Smith, 737 F.2d 1069 (D.C. Cir. 1984).

159 *Id.*

160 *Banzhaf*, 737 F.2d at 1167-68.

161 Banzhaf v. Smith, 558 F. Supp. 1489 (D.D.C. 1984).

162 *Id.* at 1498.

163 *Banzhaf*, 737 F.2d at 1167. *See* Comment, *Banzhaf v. Smith: Judicial Review Under the Independent Counsel Provisions of the Ethics in Government Act*, 70 IOWA L. REV. 1339 (1985); Note, *The Ethics in Government Act of 1978: Problems with the Attorney General's Discretion and Proposals for Reform*, 1985 DUKE L.J. 497 (1985).

164 *See* H.R. CONF. REP. No. 452, 100th Cong., 1st Sess. 22, *reprinted in* 1987 U.S. CODE CONG. & ADMIN. NEWS 2150, 2188.

Conference Committee "agree[d] that no judicial review is available of decisions of the Attorney General not to conduct preliminary investigations" and "that the unavailability of such review is a matter of settled law . . . ."[165] According to the Conference Report, the primary reason for not explicitly stating that judicial review was not available in such a situation was that the conferees did not want to infer that judicial review of other decisions under the Act may be available.[166] The only exception, according to the Conference Report, is an Attorney General's decision to remove an independent counsel from office.[167] This provision was amended, however. The 1987 Reauthorization amended the Act to allow review of an Attorney General's decision to remove an independent counsel by the United States District Court for the District of Columbia and not, as required previously, by the Division of the Court.[168]

The Reauthorization included some other changes to the Act worth noting. The maximum time period that an individual covered by the Act would remain subject to the Act's provisions was increased from two to three years.[169] Also, the provision that prohibited the Division of the Court from appointing as independent counsel an individual who "recently held public office" was removed.[170] The Committee believed that the Division of the Court should be able to appoint someone "who recently held a federal prosecutorial position such as a U.S. Attorney."[171] A new section was added allowing for severability of any provision found to be invalid so as not to affect the remainder of the Act.[172] The 1987 Reauthorization also amended the financial disclosure requirements of the Act by requiring the "independent counsel and persons appointed by independent counsel" to submit financial statements.[173] Finally, the independent counsel

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165 *Id.*

166 *See generally id.*

167 *Id.*

168 *See* Pub. L. No. 100-191, 101 Stat. 1293, 1305 (1987).

169 *Id.* 101 Stat. 1293, 1294.

170 *Id.* 101 Stat. 1293, 1298.

171 H.R. CONF. REP. NO. 452, *supra* note 164, at 27, *reprinted in* 1987 U.S. CODE CONG. & ADMIN. NEWS at 2193.

172 Pub. L. No. 100-191, 101 Stat. 1293, 1306 (1987).

173 *Id.* sec. 3, 101 Stat. 1293, 1306.

provisions were extended an additional five years.[174]

V. Conclusion

The independent counsel provisions of the Ethics Act are due to expire on December 15, 1992. When the Subcommittee on Oversight of Government Management holds hearings in 1991 to decide the future of the provisions, it would be wise to remember what James Madison said 200 years ago:

> If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls in government would be necessary. In framing a government which is to be administered by men over men the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government: but experience has taught mankind the necessity for auxiliary precautions.[175]

Indeed, there will be several new experiences which will teach, or most certainly influence, the Subcommittee when it considers further auxiliary precautions. Among these will be the Iran-Contra Hearings, to date one of the most infamous and controversial results of an independent counsel's investigation. The Supreme Court's decision in *Morrison v. Olson*,[176] upholding the constitutionality of the independent counsel provisions, will also send a signal to Congress that it now has more discretion in restricting or expanding the Attorney General's power, as well as the authority of the Division of the Court.

Reform may also go beyond the independent counsel provisions. The conflict of interest charges surrounding John Tower's nomination to be Secretary of Defense may create a move to broaden the scope of the post-employment restrictions on former government officials. Also, the recent ethics problems of House Speaker Jim Wright may convince some members of the Subcom-

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174 *Id.* sec. 2, 101 Stat. 1293, 1303.

175 THE FEDERALIST No. 51, at 337 (J. Madison) (I. Kramnick ed. 1987). *See* Note, *supra* note 5, at 146.

176 — U.S. —, 108 S.Ct. 2597 (1988). For a discussion on the constitutional issues involved in the Ethics Act, see Note, *On the Constitutionality of the Independent Counsel Provisions of the Ethics in Government Act: Do They Comport with the Separation of Powers?*, 26 DUQ. L. REV. 715 (1988).

mittee that perhaps the Act's scope should be broadened and the independent counsel provisions should be expanded to include members of Congress.

Other influences affecting reform may come from the Act itself. For example, it was not until Attorney General Meese began employing his own criteria for starting a preliminary investigation that the standards as defined in the Act had to be reinforced. Another area of possible abuse, and subsequent reform, includes the reasonable grounds to believe standard used by the Attorney General in deciding whether to ask the Division of the Court to appoint an independent counsel or to expand an independent counsel's prosecutorial jurisdiction. Although the Attorney General is required to rely on established policies of the Justice Department when deciding whether reasonable grounds exist, Justice Department policies change. As a result, what may constitute a reasonable ground to appoint an independent counsel under one Attorney General may not be a reasonable ground under another. Thus, the consistency and fairness for which Congress seems to be striving is defeated.

Problems of policy also exist concerning standards applied to covered officials. While the inherent unfairness of keeping an individual subject to the Act's provisions for up to sixteen years is understandable, it can be argued that public officials should be held to much higher standards of behavior than ordinary citizens. Reduction of the coverage provision of the Act also appears inconsistent with other provisions, such as the lifetime prohibition of employment in areas where an individual has personally or substantially participated. It would seem that if a former government official can never act in a certain capacity during the rest of his lifetime, a possible sixteen year coverage by the Ethics Act is not unreasonable. Certainly the employment prohibitions are more restrictive than the sixteen year coverage provisions.

The evolution of the Ethics Act, through the 1982 Amendments and the 1987 Reauthorization, demonstrates how multifarious influences affect the creation of public policy. The Ethics Act and its subsequent reforms attempt to consider all influences while trying to anticipate future changes. This, however, is a difficult task. Different circumstances require different rules and refining legislation to accommodate possible future problems is speculation at best. The adage "experience is the best teacher" has been most appropri-

ate during the creation and subsequent reforms of the Ethics Act. It is likely to be as appropriate in 1991.

Thomas J. Satery