ARTICLES

THE CASE FOR THE INDEPENDENT COUNSEL

*The Honorable Peter W. Rodino, Jr.**

I. Introduction

The concept of a statutory Independent Counsel[1] was a direct consequence of the Watergate Crisis of 1973 and 1974. The spectre of the "Saturday Night Massacre" and the firing of Archibald Cox seriously threatened the principle that no one is above the law, as well as the fundamental precept that democracy requires a respected government. These events demonstrated the need for legislative action to both insure the preservation of those principles and provide absolute independence to any prosecutor investigating the highest levels of government, including the Presidency.

The original legislation creating the office of the Independent Counsel was enacted in 1978 for an initial period of five years.[2] Although it was twice extended,[3] it was allowed to expire on December 15, 1992, during the waning months of the Bush Administration. Recently, Congress passed a five-year reauthorization of

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[1] The term originally employed to describe this office was "Special Prosecutor." Ethics in Government Act Amendments of 1982, Pub. L. No. 97-409, 96 Stat. 2039 (codified as amended at 28 U.S.C. §§ 590-599 (Supp. 1991)). The term "Independent Counsel" was substituted in 1983 without intending any change in substance. *Id.*

[2] Ethics in Government Act of 1978, Pub. L. No. 95-521, § 598, 92 Stat. 1867 (1978) (codified at 28 U.S.C. § 598 (1982)).

[3] *See* Ethics in Government Act Amendments of 1982, Pub. L. No. 97-409, 96 Stat. 2039 (1983) (codified as amended at 28 U.S.C. §§ 590-599 (1988)); Independent Counsel Reauthorization Act of 1987, Pub. L. No. 100-191, 101 Stat. 1293 (1987) (codified as amended at 28 U.S.C. §§ 590-599 (Supp. 1991)).

the Independent Counsel law[4] despite some attempts to oppose such legislation.[5] Although this reauthorization legislation was necessary and has preserved the office of the Independent Counsel, two problems remain unsolved: first, the temporary nature of the legislation; and second, the nature of the relationship between the scope of the Independent Counsel investigations and Congressional inquiries.

II. History of the Independent Counsel

In one sense, the notion of a "Special Prosecutor" is not a novel one; the appointment of a Special Prosecutor by a mayor, governor, or the President to investigate wrongdoing has occurred repeatedly throughout the history of our country.[6] Indeed, the

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[4] Independent Counsel Reauthorization Act of 1994, Pub. L. No. 103-270, 108 Stat. 732 (1987) (codified as amended at 28 U.S.C. §§ 590-599 (1994)).

[5] *See* 140 CONG. REC. H424-25 (daily ed. Feb. 10, 1994) (statement of Rep. Gekas). Despite this need for legislative action, many in Congress such as Representative Gekas, whose proposed amendment was viewed by some as a "rhetorical smoke bomb lobbed at members to create panic and destroy the careful plan of the Independent Counsel statute," have attempted to block such legislation. *Id.* (statement of Rep. Brooks).

[6] CONG. Q. INC., WATERGATE: CHRONOLOGY OF A CRISIS 1, at 44-45 (William B. Dickson, Jr., ed., 1973) [hereinafter WATERGATE CHRONOLOGY]. The presidency has seen several scandals during the last century alone, each of which required some form of investigation to uncover the entire sequence of alleged wrongdoing. *Id.* The Harding Administration came under attack in the infamous "Teapot Dome" scandal. *Id.* Congress enacted the General Leasing Act in 1920, which authorized the Secretary of the Navy, in certain circumstances, to lease naval oil reserves located on public property to private oil operators. *Id.* President Harding signed an Executive Order on May 31, 1921, at the insistence of Interior Secretary Fall and Navy Secretary Edwin Denby, that transferred jurisdiction of the oil reserves to the Interior Department from the Navy. *Id.* Subsequently, Interior Secretary Fall leased the Teapot Dome reserve in Wyoming to the Mammoth Oil Company and the Elk Hills reserve in California to the Pan-American Petroleum and Transport Company. WATERGATE CHRONOLOGY, *supra*, at 44. These leases were granted without notice to the public, and they were not the product of a competitive bidding process. *Id.* A Congressional investigation then revealed that Interior Secretary Fall had accepted substantial bribes in connection with the leases. *Id.* Because of Justice Department inaction, President Coolidge appointed Harlan Fiske Stone as Attorney General with special instructions to clean up the Department. *Id.*

President Truman's special assistant for personnel affairs in the Reconstruction Finance Corporation (RFC), Donald Dawson, was also surrounded by controversy. *Id.* at 45. The RFC offered lenient credit terms to failing businesses. WATERGATE CHRONOLOGY, *supra*, at 45. Dawson came under attack when Senator William Fulbright accused him of exerting excessive influence over the process of selecting those who would receive RFC grants. *Id.* No criminal charges were ever brought, however, and

tough, brilliant, determined, and above all, honest attorney, recruited from outside the normal bureaucratic channels, is part and parcel of American folklore.[7] The 1978 legislation which created the Special Prosecutor, however, changed the scheme of the traditional Special Prosecutor in two crucially important ways: first, the authority to investigate and the discretionary control over the course of an investigation ordinarily entrusted to the Chief Executive and his delegees was eliminated or severely curtailed; second, the power of appointment was removed from the executive branch and entrusted to the judiciary.[8] In a sense, it may be suggested that enactments of such legislation tinkers with the fundamental mechanism of checks and balances established among the three branches of government by the framers of the Constitution. In fact, it was not until the Republic neared the third century of its existence that the occasion for considering such action arose, in

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Dawson continued in his position despite widespread speculation concerning his alleged activities. *Id.* In the face of these charges, as well as numerous resignations and criminal convictions resulting from the investigation of officials in the Bureau of Internal Revenue (predecessor to the Internal Revenue Service) and the Justice Department by a special House Ways and Means subcommittee, Truman directed Attorney General McGrath to begin a clean-up campaign within the Justice Department. *Id.* Truman's efforts to rid the administration of corruption were considered insufficient by many who say McGrath's involvement with the Justice Department during the period of alleged corruption and his Democratic Party loyalties were factors that prejudiced his ability to conduct an objective investigation. *Id.* When numerous high-level officials within the Bureau of Internal Revenue and the Justice Department were implicated by charges of fixing tax cases, President Truman appointed Newbold Morris, a prominent New York attorney, as a Special Prosecutor to investigate the corruption and conduct any necessary prosecutions. WATERGATE CHRONOLOGY, *supra*, at 45. Attorney General McGrath, however, after quarreling with Morris, fired him; McGrath was, in turn, fired by Truman. *Id.*

Finally, President Eisenhower was tainted by the resignation of his Chief of Staff, Sherman Adams, when a House Legislative Oversight Subcommittee charged Adams with attempting to influence the disposition of a case before the Civil Aeronautics Board. *Id.* Further investigation revealed that Adams had accepted bribes from Bernard Goldfine, an influential textile magnet involved in cases before the Federal Trade Commission and the Securities and Exchange Commission. *Id.* Although Eisenhower issued a public statement of support for Adams, Adams eventually resigned because of mounting controversy concerning his actions. *Id. See also* TERRY EASTLAND, ETHICS, POLITICS AND THE INDEPENDENT COUNSEL: EXECUTIVE POWER, EXECUTIVE VICE 1789-1989 7-11 (1989) (illustrating circumstances in which U.S. Presidents and outside attorneys handled matters of internal corruption).

[7] *See* EASTLAND, *supra* note 6, at 8. *See also Out Of Politics*, N.Y. TIMES, Aug. 31, 1972, at 31 (editorial arguing the need for a blue-ribbon prosecutor to investigate Watergate Affair).

[8] *See infra* note 32 (explaining role of the division of the court).

the protracted and bitter confrontation between the 93d Congress and President Richard M. Nixon that is universally known as Watergate.

Watergate began on June 17, 1972, when a motley group of former CIA operatives and individuals who had served Richard Nixon's administration as well as the Committee to Reelect the President (CRP) attempted what has been described as a third-rate burglary, bungling a break-in at the office of the Democratic National Committee in a prestigious Washington office complex called the Watergate.[9] Although there was immediate speculation that those arrested were connected in some way to high ranking members of the government,[10] the events had no detrimental impact upon the presidential elections of November 1972: Nixon won a second term in a landslide.[11] Beginning in 1973, however, the Senate Select Committee on Presidential Campaign Activities conducted hearings regarding the relationship between the break-in and White House officials. On May 18, 1973, Attorney General Elliot Richardson, acting pursuant to his statutory authority,[12] appointed Archibald Cox to investigate "extraordinary inappropriate activities."[13]

Archibald Cox was a Special Prosecutor of the old school: a distinguished law professor with a bipartisan reputation for integrity, ability, and independence.[14] His investigation was materially

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9 *See* United States v. Haldeman, 559 F.2d 31, 52 (D.C. Cir. 1976). These operations were given the code name "Gemstone." *Id.*

10 CARL BERNSTEIN & BOB WOODWARD, ALL THE PRESIDENT'S MEN 20 (Warner Books ed., 1976). Bob Woodward of the Washington Post started his investigation on June 18, 1972. *Id.* On July 10, 1972, Carl Bernstein learned that the $25,000 paid to the burglars could be traced to CRP. *Id.* at 34-35.

11 *Id.* at 224. Nixon defeated George McGovern, receiving 61% of the vote. *Id.*

12 *See infra* note 19 and accompanying text (discussing the authority vested in the Office of the Attorney General).

13 WATERGATE CHRONOLOGY, *supra* note 6, at 96. Harvard Law Professor Archibald Cox accepted Attorney General-designate Elliot Richardson's offer to lead an investigation into the Watergate break-in on May 18, 1973. *Id.* The Senate Judiciary Committee then considered and approved Richardson's appointment of Cox on May 21, 1973. *Id.* Cox's office, known as the Watergate Special Prosecutor Force (WSPF), had five task forces: Watergate; the Plumbers; Campaign Finances; Political Espionage; and the circumstances surrounding the merger of International Telephone and Telegraph (ITT) with the Hartford Fire Insurance Company. *Id.* at 137, 187.

14 *Id.* at 96. Cox was born in New Jersey, but spent most of his life in Massachusetts at Harvard University or in Washington serving Presidents. *Id.* Cox attended both Harvard University and Harvard Law School and later was named a full professor at Harvard Law School. *Id.* In addition to his teaching career, Cox served President

aided by some of the original Watergate defendants' disclosures of information about the involvement of White House officials.[15] Additionally, he was provided with information concerning charges leveled at President Nixon's closest advisors by former White House counsel John Dean. A startling and important break in the Watergate case was the disclosure to the Senate Committee by Alexander Butterfield, then Administrator of the Federal Aviation Administration and former deputy assistant to President Nixon, that Richard Nixon routinely tape-recorded all of his conversations, meetings, and conferences.[16] When the existence of these vitally important tapes was disclosed, Cox subpoenaed them for use at criminal trials that were, by then, pending against John N. Mitchell, H.R. Haldeman, and John D. Ehrlichman.[17]

Between July and October of 1973, Cox issued additional subpoenas, but President Nixon refused to turn over any tapes. Although the legal issues generated by the standoff would not be resolved by the Supreme Court for almost another year,[18] Presi-

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Truman as chairman of the Wage Stabilization Board as well as Solicitor General for Presidents Kennedy and Johnson. *Id.*

15 WATERGATE CHRONOLOGY, *supra* note 6, at 10. These disclosures were made after Federal Judge John Sirica had imposed provisional maximum sentences on defendants Baker, Hunt, Sturgis, Martinez, and Gonzalez, subject to revision if there was cooperation with the special prosecutor. *Id.* Gordon Liddy received a minimum prison term of six years and eight months to a maximum of 20 years, as well as a $40,000 fine. *Id.* James McCord's sentencing was delayed to allow testimony by him before Congress. *Id.* at 11. *See generally* 18 U.S.C. § 4208(b)(maximum provisional sentencing).

16 *Watergate Investigation, 1973: Hearings Before the Senate Select Comm. on Presidential Campaign Practices*, 93d Cong., 1st Sess. 2073-2090 (1973) (statement of Alexander Butterfield, Administrator of Federal Aviation Administration).

17 United States v. Nixon, 418 U.S. 683, 687 (1974). On March 1, 1974, seven individuals were named in an indictment handed down by a federal grand jury in the District of Columbia. *Id.* at 687 n.3. Those indicted on charges of conspiracy to defraud and obstruction of justice, among other offenses, were John N. Mitchell, John D. Ehrlichman, H.R. Haldeman, Charles W. Colson, Kenneth W. Parkinson, Robert C. Mardian, and Gordon Strachan. *Id.* at 687. The named defendants had either been on Nixon's White House staff or had been involved in CRP. *Id.*

18 In *Nixon*, 418 U.S. at 683, the Supreme Court held that absent a claim of need to protect national security secrets, the confidentiality of presidential communications was not materially affected by producing evidence for a criminal trial under an in camera inspection. *Id.* at 703-07. Although the courts will afford the utmost deference to presidential acts, the defendants' due process rights demanded that the President's asserted privilege must yield to the fair administration of justice. *Id.* at 707-13. Cox issued the first subpoena demanding the tapes on July 23, 1973. *See* Nixon v. Sirica, 487 F.2d 700, 704 (D.C. Cir. 1973).

dent Nixon undertook a course of action that sought to avoid a court battle by more direct means. Namely, Nixon decided to unilaterally close down the Cox investigations.

General authority for criminal prosecutions is vested by statute in the Office of Attorney General.[19] Accordingly, Nixon directed Attorney General Elliott Richardson to discharge Cox. Richardson refused and resigned. When Assistant Attorney General William Ruckelshaus also refused to fire Cox, Nixon fired Ruckelshaus. On October 20, 1973, Solicitor General Robert Bork, having become the top official in the Justice Department, summarily discharged Cox. After Cox's termination, many of the Watergate files were locked and removed from his office. History will remember these events as the "Saturday Night Massacre."[20]

Nixon's actions were not only unlawful,[21] they were politically disastrous. The public outcry over the "Saturday Night Massacre" was instantaneous and universal. Nixon quickly, although reluctantly, acceded to the promulgation of a regulation by the Attorney General delegating to a new Special Prosecutor sole responsibility for the investigation. The prosecutor's duties included control over the assertion of executive privilege and over the determination of which cases to prosecute.[22] The regulation specifically provided that

> the Special Prosecutor will not be removed from his duties except for extraordinary improprieties on his part and not without the President's first consulting the Majority and Minority Leaders, Chairmen, and ranking Minority Members of the Judiciary Committees of the Senate and House of Representatives and ascertaining that their consensus is in accord with his proposed action.[23]

Archibald Cox was replaced by Leon Jaworski, who pursued the

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19 28 U.S.C. § 516 (1988). The Attorney General also has the power to appoint and discharge subordinates. *See* 28 U.S.C. §§ 509, 510, 515, 533 (1988).

20 Nader v. Bork, 366 F. Supp. 104, 107 (D.D.C. 1973).

21 *Id.* at 108 (holding Bork's discharge of Cox was clearly in violation of Justice Department regulations). Immediately after Nixon's actions, Archibald Cox publicly declared that he would not return to the Watergate investigation under any circumstances. *Id.* at 105.

22 38 Fed. Reg. 30,738 (1973).

23 *Id.* The regulation was amended to add the following language: "[T]he jurisdiction of the Special Prosecutor will not be limited without the President's first consulting with such Members of Congress and ascertaining that their consensus is in accord with his proposed action." 38 Fed. Reg. 32,805 (1973).

Watergate investigations with the protection of the newly promulgated regulations. When the litigation over the White House tapes reached the United States Supreme Court in 1978, however, the President again asserted that the doctrine of separation of powers gave him sole authority to make the final determination regarding how the Watergate investigation should proceed. Specifically, the President stated that the doctrine gave him the power to assess whether the executive privilege should be asserted.[24] The Court rejected his contentions, based upon the special regulations promulgated to deal with Watergate:

> [I]t is theoretically possible for the Attorney General to amend or revoke the regulations defining the Special Prosecutor's authority. But he has not done so. So long as this regulation remains in force the Executive Branch is bound by it. . . . Moreover, the delegation of authority to the Special Prosecutor in this case is not an ordinary delegation: . . . with the authorization of the President, the Acting Attorney General provided in the regulation that the Special Prosecutor was not to be removed without the "consensus" of eight designated leaders of Congress.[25]

Although it would have been, in my judgment, politically unthinkable for Richard Nixon to direct the Attorney General to rescind the Watergate regulations, the Supreme Court had left open the question whether it would have been legally permissible to do so. Moreover, had it not been for the "Saturday Night Massacre," there would have been no federal regulation to restrain the President. The Supreme Court, while noting that the regulation then in force severely limited the President's power to remove the Special Prosecutor, did not actually determine the validity of that regulation.[26]

In the aftermath of Watergate, many of us in Congress recognized a future crisis of this magnitude could have a different and more dangerous result. A future President confronted with a Watergate of his own could assert constitutional authority to select the prosecutor and control the investigation without any external check at all. Before the legality of such actions could be determined by the Supreme Court, the President's term might well expire. Accordingly, many members of Congress became convinced that the best way to

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24 *Nixon*, 418 U.S. at 693.

25 *Id.* at 696 (footnote omitted).

26 *Id.*

protect the Republic in a crisis of such magnitude would be a statute requiring a Special Prosecutor to conduct investigations of crimes involving high ranking executive branch members, and making the Special Prosecutor independent of the normal chain of authority extending from the President and the Attorney General. Bills addressing these issues were introduced in 1976 and 1977, but were not enacted.[27]

A. *The Independent Counsel Law*

The first Independent Counsel statute was enacted as Title VI of the Ethics in Government Act of 1978.[28] The new law addressed the complex legal problems that had preoccupied the Congress during the Watergate crisis by establishing the position of an Independent Counsel. However, the Independent Counsel was not a regularly appointed and permanent official. Rather, the Act required the Attorney General to conduct an investigation whenever he or she received specific information that any of sixty specified executive branch employees[29] had violated a federal criminal law.[30] The precise nature and scope of the investigation was left to the

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27 *See, e.g.*, H.R. 14476, 94th Cong., 2d Sess. (1976); S. 495, 94th Cong., 2d Sess. (1976). *See also Hearings Before the Subcomm. on Criminal Justice of the Comm. on the Judiciary to Provide for a Special Prosecutor*, 94th Cong., 2d Sess. (1976).

28 Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1867 (1978) (codified at 28 U.S.C. §§ 591-599 (1982)).

29 28 U.S.C. § 591(b) (1982). The 60 individuals included:

> (1) the President and Vice President;
> (2) any individual serving in a position listed in section 5312 of title 5;
> (3) any individual working in the Executive Office of the President and compensated at a rate not less than the annual rate of basic pay provided for level IV of the Executive Schedule under section 5315 of title 5;
> (4) any individual working in the Department of Justice and compensated at a rate not less than the annual rate of basis pay provided for level III of the Executive Schedule under section 5314 of title 5, any Assistant Attorney General, the Director of Central Intelligence, and the Commissioner of Internal Revenue;
> (5) any individual who held any office or position described in any of paragraphs (1) through (4) of this subsection 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; and
> (6) any officer of the principal national campaign committee seeking the election or reelection of the President.

Id.

30 28 U.S.C. § 591(a) (1978). The statute specifically excluded petty offenses. *Id.*

discretion of the Attorney General, but it had to be completed within ninety days.[31]

Upon completion of the investigation, the Attorney General was required to report the results to a newly created tribunal, "the division of the court."[32] If the Attorney General found that the matter was so unsubstantiated that no further investigation was warranted, that determination was final, and the court had no power to appoint an independent counsel. If, on the other hand, the Attorney General concluded that the matter warranted further investigation or prosecution, then the law required the Attorney General to apply to the division of the court for the appointment of an Independent Counsel.[33]

The language of the statute imposes strict limits on the Attorney General's discretion. He or she is not to determine whether there is probable cause to indict, or whether prosecution is in the national interest, but only whether there is any reasonable basis for "further investigation."[34] Thus, the general statutory provisions that vest the Attorney General with full discretionary power to determine which cases to prosecute was superseded in cases where designated high-ranking members of the Executive Branch may have committed federal crimes. The Attorney General's power was replaced with a mandate that virtually eliminated his other prosecutorial discretion and, indirectly, that of the President. Moreover, the general statutory authority of the Attorney General to determine the appointment and removal of prosecutors responsible for particular cases was supplanted by a provision that vested that authority in a panel of judges, selected in the manner specified by the law.[35] Likewise, the scope of the Independent Counsel's prosecutorial discretion was also to be defined by the division

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31 *Id.* § 592(a).

32 *Id.* § 593. The "division of the court" was responsible for appointing the Independent Counsel and defining his or her jurisdiction. *Id.* The statute provided for the appointment of three judges/justices to be assigned to the "division of the court" for two-year periods. *Id.* The "division" was a special panel of the Court of Appeals for the District of Columbia, appointed by the Chief Justice of the Supreme Court. *Id.*

33 28 U.S.C. § 592. Such application was also required if 90 days elapsed without a determination by the Attorney General. *Id.*

34 *Id.* § 592(c)(1). This standard determines when the Attorney General must apply to the division of the court for appointment of an Independent Counsel. *Id.*

35 *See supra* note 32.

of the courts.[36] In this way, the power of the President to direct the Attorney General to decline to prosecute, or to direct the appointment or removal of the attorney responsible for the prosecutions, was automatically curbed in cases involving those closest to the President. In short, the "Saturday Night Massacre" was to have been a one night stand.

The Independent Counsel provisions also addressed the problems created by President Nixon's assertion of the power to direct and control the manner in which such prosecutions are conducted, by specifically granting the Independent Counsel full authority to discharge these functions.[37]

Additionally, the law required the Independent Counsel, upon receipt of any substantial and credible information that might constitute grounds for impeachment, to advise the House of Representatives, which has the sole power under the Constitution to consider impeachment resolutions and vote articles of impeachment.[38] Finally, the Act provided that the Independent Counsel could only be removed for "good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such Independent Counsel's duties."[39]

Although this first Independent Counsel statute was supported by both the Congress and the Executive Branch,[40] it was

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[36] *Id.*

[37] 28 U.S.C. § 594 (1987). Generally, the Independent Counsel had the same power and independent authority to exercise all investigative and prosecutorial functions and powers as that of the Attorney General or any other officer of the Department of Justice. *Id.* The statute, however, provided that the Attorney General should exercise control or direction as to those matters that specifically required the Attorney General's personal action under 18 U.S.C. § 2516 (1982). *See also* 28 U.S.C. § 594(a).

[38] 28 U.S.C. § 595(c). *See also* U.S. CONST. art. I, § 2 (House of Representatives shall have the sole power of impeachment).

[39] 28 U.S.C. § 596(a). Upon removal of the Independent Counsel, the Attorney General is required to submit a report to the division of the court specifying those facts found and used as the basis for the removal. *Id.* § 596(b). Any Independent Counsel who is removed may obtain judicial review. *Id.* § 596(c).

[40] *See, e.g.*, President Carter's Remarks Upon Signing the Ethics in Government Act of 1978 (Oct. 26, 1978), in 14 WEEKLY COMP. PRES. DOC., Oct. 30, 1978, at 1854-55. Specifically, President Carter declared:

> I am pleased that no major provision of my own original proposal has been deleted or weakened, and that the Congress, with our support, has actually extended important provisions to the legislative and judicial branches of Government. . . . If in the future there are ever substantial allegations of criminal violations by [high-ranking officials,] . . . a special

determined, given the radical nature of the new mechanism, that the law would be limited to an initial period of five years. The Act initially appeared to be successful in accomplishing its goals, in light of the fact that thirteen different Independent Counsels were appointed to investigate a myriad of allegations.[41] The statute was

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> prosecutor will be appointed. . . . I believe this act will help to restore public confidence in the integrity of our Government, and I think it might serve as a bellwether or a guide to other elements of our government at the State and local level who might wish to imitate what has been done so well by the Congress this year.

Id.

41 S. REP. No. 123, 100th Cong., 1st Sess., pt. B, at 1 (1987). Among the numerous Independent Counsel investigations conducted since 1978, eleven were made public knowledge. *Id.* Those investigations included probes into possible wrongdoing by officials in the Carter, Reagan, and Bush administrations. H.R. REP. No. 224, 103d Cong., 2d Sess., pt. C, at 12-13 (1993); H.R. REP. No. 316, 100th Cong., 1st Sess., pt. III, at 14 (1987). The officials investigated included Hamilton Jordon (Chief of Staff to President Carter), Timothy E. Kraft (Appointments Secretary and Assistant to President Carter), Raymond J. Donovan (Secretary of Labor under President Reagan), Edwin A. Meese III (Counsellor to President Reagan and later Attorney General), Theodore B. Olson (Assistant Attorney General), Michael K. Deaver (Chief of Staff and Assistant to President Reagan), Oliver North et al (Iran Contra), Franklyn Nofziger (Assistant to President Reagan), W. Lawrence Wallace, Samuel R. Pierce, Jr. et al (investigation of HUD), and Janet Mullins et al (State Department Records Search). H.R. REP. No. 224, *supra*, at 11; H.R. REP. No. 316, *supra*, at 14-20. In addition to these eleven investigations were two sealed investigations in May of 1989 and April 1991. H.R. REP. No. 224, *supra*, at 11. Of these investigations four resulted in convictions, of which one was reversed and two are still pending. *Id.* Eight of the investigations resulted in no charges at all. *Id.* at 9. The cost of conducting these investigations has not always exceeded reason. Among the 13 investigations, five of them together only account for little over $100,000 in total expenses. *Id.* at 15. There have been exceedingly expensive investigations, however; most noteworthy was Lawrence Walsh's Iran Contra investigation which totaled approximately $35 million in costs. *Id.*

Despite the lack of convictions obtained under the statute and the high costs which have sometimes resulted from Independent Counsel investigations, there remains a strong consensus in support of the law. See Beth Nolan, *Removing Conflicts from the Administration of Justice: Conflicts of Interest and Independent Counsels Under the Ethics in Goverment Act*, 79 GEO. L. J. 1 (Oct. 1990); Eugene Gressman, *A Symposium on Special Prosecutions and the Role of the Independent Counsel: Introduction*, 16 HOFSTRA L. REV. 1 (1987); Senator Carl Levin & Elise J. Bean, *The Independent Counsel Statute: A Matter of Public Confidence and Constitutional Balance*, 16 HOFSTRA L. REV. 11 (1987); Stephen L. Carter, Comment, *The Independent Counsel Mess*, 102 HAR. L. REV. 105 (1988); *See also Oversight of the Independent Counsel Statute: Hearings Before the Senate Subcomm. on Oversight of Government Management of the Comm. on Governmental Affairs*, 100th Cong., 1st Sess. 215-16 (1987) (statement of Irvin B. Nathan, Chairman, Ad Hoc Comm. on the Independent Counsel Statute, American Bar Association); *Id.* at 186 (statement of Archibald Cox, Professor of Law, Harvard University); *Hearings Before Senate Subcomm. on Administrative Law and Government Relations of the Comm. on Govern-*

extended with minor modifications in 1983, 1984, and 1987.[42]

B. *Iran Contra*

The Independent Counsel law generated little controversy between 1978 and 1986, perhaps because none of the investigations implicated the President. The statute was to be tested, however, perhaps beyond its limits, in the confusing and chaotic intrigue that is known to history as "Iran Contra." Tactical missiles were sold to Iran in an apparently blatant violation of the applicable laws, and the proceeds from those arms sales were covertly expended to directly support the effort of rebel troops in Nicaragua, an expenditure specifically prohibited by the Boland Amendment.[43]

Some of the parallels between Iran Contra and Watergate were striking. The initial disclosures came fortuitously and dramatically after the Enterprise, a plane owned by a covert CIA operation and flown by a mercenary, crashed. The information led directly to Lieutenant Colonel Oliver North, then a member of the President's National Security Council staff. President Reagan attempted to control the damage by instructing Attorney General Edwin Meese to conduct an immediate investigation, a tactic that produced virtually no concrete information and intensified public speculation about an attempted coverup. Public speculation quickly shifted from the immediate perpetrators to consideration

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mental Affairs, 103d Cong., 2d Sess. 26-32 (1993) (statement of Janet Reno, Attorney General of the United States).

[42] *See supra* note 3. The 1983 amendments provided for more rigorous standards for triggering a preliminary investigation, raised the standards for requesting the appointment of an Independent Counsel, and provided for the reimbursement of reasonable attorney fees to defendants who were not indicted and could show causation. Ethics in Government Act Amendments of 1982, Pub. L. No. 97-409, 96 Stat. 2039 (1983) (codified as amended at 28 U.S.C. § 591-599(1988); Pub. L. No. 100-191, 101 Stat. 1297 (1987) (codified as amended at 28 U.S.C. § 599 (Supp. 1991)). Prior to 1983, none of the investigations conducted under the Independent Counsel statute had produced convictions or even an indictment. *See supra* note 41.

[43] *See* Pub. L. No. 97-377, § 793, 96 Stat. 1833, 1865 (1982). The Boland Amendment was actually two acts of Congress. *Id. See also* Pub. L. No. 98-473, § 8066, Stat. 1935, 1984 (1985). Boland I, adopted in 1982, prohibited the use of CIA money in aid of efforts to overthrow the Sandinista regime; however, it was not an absolute prohibition on the use of available funds. Pub. L. No. 97-377, § 793, 96 Stat. 1833, 1865 (1928). When it became apparent that Boland I was not effective, Boland II was enacted, effectively terminating the expenditure of any funds in support of Contra military activities. Pub. L. No. 98-473, § 8068, 98 Stat. 1935, 1984 (1985).

of whether the President, Vice President Bush, or other top members of the Executive Branch were involved in a course of unlawful conduct.

There were important differences between Watergate and Iran Contra as well. Most importantly, at least initially, it appeared during the early stages of the Iran Contra investigation that the Independent Counsel statute was serving its intended purpose in requiring a prompt investigation and the appointment of an Independent Counsel. Unlike the Iran Contra investigations, nine months elapsed after the Watergate burglary, before Archibald Cox was appointed Special Prosecutor. When Cox was appointed in May 1973, there was no indication that impeachment of the President was even a remote possibility. It was not until six more months had passed, and Cox had been removed, that regulations were promulgated to ensure some independence for the Special Prosecutor's Watergate investigations. In sharp contrast, after the initial disclosures that the United States was supporting the Contras in apparent violation of the Boland Amendment, Lawrence Walsh was appointed on December 19, 1986, pursuant to the Independent Counsel statute to investigate the Iran Contra affair a scant six weeks after denying the story first appeared in the news.[44]

Although all seemed well on the surface, there was good reason for concern. Eventually, three significant problems would contribute to the mixed results of the Iran Contra inquiries. First, before Iran Contra had even materialized, President Reagan had already adopted a strong position opposing the Independent Counsel provisions. When the House Judiciary Committee recommended in 1985 that several members of the Attorney General's office should be investigated by an Independent Counsel,[45] the Reagan Administration responded by challenging the constitution-

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44 REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIRS, H.R. REP. NO. 100-433, S. REP. NO. 100-216, 100th Cong., 1st Sess. (1987) [hereinafter IRAN-CONTRA REPORT]. The story surfaced on November 3, 1986, when *Al-Shiraa*, a Beirut-based weekly, reported that the United States had secretly sold arms to Iran. *Id.*

45 *See* Morrison v. Olson, 487 U.S. 654, 665 (1987). The principals included an assistant Attorney General for the Office of Legal Counsel, a Deputy Attorney General, and an Assistant Attorney General for the Land and Natural Resources Division. *Id.* The underlying concern was the Justice Department's withholding of certain EPA documents and the Justice Department's defiance of outstanding subpoenas issued by the House of Representatives for the documents. *Id.*

ality of the Independent Counsel provisions.[46] When this dispute was argued before the Supreme Court in April 1988,[47] the significance of the Court's decision was increased by the implications of Iran Contra. Thus, even as Walsh began his investigation, there were questions about the constitutionality of the office.[48] Although, as discussed below, the Court sustained the validity of the Independent Counsel provisions,[49] it did so over a strong dissent by Justice Scalia[50] and, perhaps more significantly, in a case involving executive branch members well below the cabinet level.

The second problem that emerged immediately in Iran Contra was national security. In the cases against North and Poindexter, both the prosecution and the defense on many occasions sought evidence consisting of classified information.[51] Although the Independent Counsel statute authorized Walsh to contest national security claims,[52] it provided no mechanism for resolving such claims. The judiciary has generally deferred to claims of executive privilege in areas involving national security.[53] As a result, the Reagan White House was able, by asserting executive privilege, to delay and, in many instances, actually thwart the

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46 *See id.* at 668.

47 *Morrison* was argued on April 26, 1988, and was decided on June 29, 1988. *Id.*

48 *See In re* Sealed Cases, 838 F.2d 476 (D.C. Cir. 1988), *rev'd*, 487 U.S. 654 (1987). In fact, the Court of Appeals for the District of Columbia declared the Independent Counsel provisions of the law invalid. *Id.* The court held that the Independent Counsel is a "principal officer," and not an "inferior officer," and thus must be appointed with the Senate's advice and consent as required by the Appointments Clause. *Id.* at 481-87. *See* U.S. CONST. art. II, § 2, cl. 2 (Appointments Clause).

49 *See infra* notes 62-66 and accompanying text.

50 *See Morrison*, 487 U.S. at 697-734 (Scalia, J., dissenting).

51 H.R. HALDAMAN, ENDS OF POWER 29-42 (1978). Although the Federal Bureau of Investigation was apparently told that the Central Intelligence Agency was involved in the Watergate burglary in an effort to thwart the investigation, and despite President Nixon's efforts to invoke executive privilege in the name of national security when faced with a subpoena demanding taped conversations in the oval office regarding the Watergate coverup, no serious threat to national security was involved. *Id.*

52 28 U.S.C. § 594(a)(6) (1988). The statute did provide that the Independent Counsel's duties included the authority to receive appropriate security clearances and, when necessary, to contest an asserted privilege or attempt to withhold evidence on national security grounds. *Id.*

53 *See, e.g.*, Luftig v. McNamara, 252 F. Supp. 819 (D.D.C. 1966), *aff'd*, 373 F.2d 664 (D.C. Cir.), *cert. denied*, 387 U.S. 945 (1967). In *Luftig*, the court stated that "'decisions in the large matters of basic national policy, as of foreign policy, present no judicially cognizable issues and hence the courts are not empowered to decide them.'" *Id.* at 820 (quoting Pauling v. McNamara, 331 F.2d 796, 798 (D.C. Cir. 1963), *cert. denied*, 377 U.S. 933 (1964)).

efforts in the Iran Contra prosecutions to obtain important evidence.[54]

The third problem, and perhaps the most troubling, was the inability to satisfactorily resolve the tensions between the Independent Counsel and parallel Congressional investigation of Iran Contra.[55] Mr. Walsh repeatedly warned Congress that his investigations and potential prosecutions would be impeded unless Congress exercised care in conducting hearings into the matter while his cases were pending. I clearly recall that, on the first day of the Congressional inquiry, Walsh warned the select Committees that they risked forestalling or tainting his own investigation if key figures in the investigation were given immunity and were compelled to testify. Nevertheless, Congress decided to utilize its statutory authorization[56] to confer immunity upon Oliver North, thus allowing him to freely and with only a limited threat of criminal liability announce to the nation the obstructions of justice and other crimes he committed in attempting to cover up the facts of Iran Contra.[57] In retrospect, the grants of immunity by Congress

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54 IRAN-CONTRA REPORT, *supra* note 44, at 644-45 (additional views of Reps. Rodino, Fascell, Brooks, and Stokes). Although President Reagan personally committed the executive branch to comply with the investigation, the White House and the executive agencies often either refused to produce documents or significantly impeded their deliverance. *Id.* For example, the Select Committee repeatedly requested all Justice Department records relating to Iran Contra, but the Committee did not receive the documents until two months after the public hearings began. *Id.* Similarly, Admiral Poindexter's and Edwin Meese's telephone logs and Chief of Staff Donald Regan's own notes were received after much delay. *Id.*

55 *See* S. Res. 23, 100th Cong., 1st Sess. (1987). Congress launched its own investigation into Iran Contra early in 1987. *Id.* On January 6, the Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition was established by the Senate. *Id.* On January 7, the House created the Select Committee to Investigate Covert Arms Transactions with Iran. H.R. Res. 12, 100th Cong., 1st Sess. (1987). The two Committees assumed the jurisdiction of a number of smaller congressional inquiries that had already begun, and were charged with undertaking a comprehensive investigation into the affair. *Id.* at 683. This was the first joint investigation ever conducted by Congress, as well as the first joint hearings and joint report. *Id.* at 684.

56 18 U.S.C. § 6002 (1970). Testimonial or "use" immunity is conferred by Congress through an immunity order compelling testimony despite any Fifth Amendment claim of privilege. *See* George W. Van Cleve & Charles Tiefer, *Navigating the Shoals of "Use" Immunity and Secret International Enterprises in Major Congressional Investigations: Lessons of The Iran-Contra Affair*, 55 MO. L. REV. 43, 44 n.1 (1990). *See also infra* note 78 and accompanying text (discussing delegation of authority to Congressional committees).

57 IRAN-CONTRA REPORT, *supra* note 44, at 639-40 (additional views of Reps. Rodino, Fascell, Foley, Brooks, Stokes, Aspin, and Boland). North described at length

in the Iran Contra investigation were mistakes.[58] The net effect of the Committees' decisions was to impede Walsh's prosecutions.

Although Congress had a legal basis to believe that the grants of immunity would aid the disclosure of information to the American public without completely precluding prosecution of those who testified,[59] the courts subsequently ruled that the prosecutions were tainted by the compelled testimony, and those who most clearly were culpable in Iran Contra went unpunished.[60]

Despite Congressional interference, Lawrence Walsh was able to obtain convictions of both Oliver North and John Poindexter.[61] Perhaps as a result of congressional interference and a lack of cooperation from the White House, however, Walsh spent approximately $40 million over a seven-year period investigating the Iran Contra affair. Some members of Congress, because of Walsh's inability to make any of the convictions stick and because of the high cost and length of the investigation, questioned whether the Independent Counsel position had fulfilled its intended purpose. It would in my view be unfair to blame Walsh for the indecisive outcome of Iran Contra. Much of the delay and expense of the Iran Contra prosecutions were in great measure the consequence of a lack of full cooperation from the Reagan White House and the de-

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and in detail his systematic shredding of documents in the wake of the Eugene Hasenfaus disclosures. *Id.* I also recommended a stronger effort to obtain computer disks and tapes that likely contained copies of much of the destroyed material, but Congress declined to aggressively use its subpoena power to do so. *Id.*

58 *See id.*, at 687 (appendix) (Joint Committee admitted that while decision to grant immunity was not an easy choice, it was a necessary one). Initially I opposed granting immunity to North and others, but was unable to persuade my colleagues and voted with the majority, though reluctantly, to confer immunity. *See also infra* note 77.

59 In Kastigar v. United States, 406 U.S. 441 (1973), the Supreme Court held that a witness compelled to testify after asserting his privilege against self-incrimination could be prosecuted if the government could satisfy the court that its case rested solely upon evidence that the government had obtained from sources other than the compelled testimony. The procedure for applying this decision has become known as a "*Kastigar*" hearing.

60 *See* United States v. North, 920 F.2d 940 (D.C. Cir. 1990), *cert. denied*, 111 S. Ct. 2235 (1991). No *Kastigar* hearing was held in connection with the original North prosecution, and Walsh, having decided that it was impossible to meet his burden of proof under Kastigar on remand, abandoned the prosecution. *Id.*

61 *See North*, 920 F.2d at 940 (conviction overturned on *Kastigar* grounds); United States v. Poindexter, 951 F.2d 369 (D.C. Cir. 1991), *cert. denied*, 113 S. Ct. 656 (1992) (defendant's conviction reversed because Independent Counsel failed to establish additional evidence wholly independent of the compelled testimony).

cisions of the Congress granting immunity, and not due to deficiencies in the Independent Counsel or Lawrence Walsh's conduct as Independent Counsel.

III. The 1994 Reauthorization and Amendments

A. *102d Congress*

In June 1988, while then Vice President George Bush was in the midst of his own campaign for the presidency, seven Justices of the Supreme Court joined in holding that the Independent Counsel provisions did not unconstitutionally infringe upon the Executive's Appointment Power[62] or unconstitutionally vest that power in the judiciary.[63] A crucial basis of the Court's decision was its determination that each individual Independent Counsel is an "inferior officer," whose appointment may constitutionally be vested by law in the heads of departments or the judiciary.[64] The Court reasoned that because each Independent Counsel is appointed for a limited time and a specific purpose to handle each individual inquiry, the occupant of that position is an inferior officer, even though the mechanism by which the appointment process is triggered may be of longer duration.[65] The Court, however, took pains to point out that constitutional issues would arise from any major expansion of the Independent Counsel provisions beyond their original bounds:

> The record in other cases involving Independent Counsel indicate that the Special Division has at times given advisory opinions or issued orders that are not directly authorized by the Act. . . . The propriety of the Special Division's actions in [such]

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62 U.S. CONST. art. II, § 2, cl. 2. The Constitution provides that the President shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Id.

63 Morrison v. Olson, 487 U.S. 654 (1987). Of the seven Justices, only Rehnquist, Stevens, and O'Connor remain.

64 *Id.* at 670-77.

65 *Id.* at 672.

> instances is not before us . . . but we nonetheless think it appropriate to point out not only that there is no authorization for such actions in the Act itself, but that the Division's exercise of unauthorized powers risks the transgression of the constitutional limitations of Article III that we have [previously] discussed.[66]

Although the Independent Counsel provisions were declared constitutional, they were not supported by President Bush or by many Republicans in Congress. In 1992, H.R. 5840 was introduced to continue the Independent Counsel provisions without substantial change.[67] Although hearings were held, the bill was abandoned after stated opposition by the Bush Administration and the threat of a Senate Republican filibuster in the closing days of the session.[68] On December 15, 1992, the law authorizing the Independent Counsel expired after fourteen years of operation.

B. *103d Congress*

In early 1993, legislation was introduced to Congress reauthorizing the Independent Counsel law for an additional five years.[69] The bill was approved by the House Judiciary Committee on March 9, 1993. The Senate's version, S. 24, passed the Senate on November 18, 1993.[70] In early 1994, a number of amendments were offered in the House. The most controversial of these was the Gekas Amendment, which would have extended mandatory coverage of the Independent Counsel provisions to members of Congress. Those who supported the amendment contended that Congress should not exempt itself from the high ethical standards expected of the high-ranking officials of the Executive Branch.[71] This argument, however, misses the point of the Independent Counsel provisions, which do not impose substantive ethical requirements, but merely provide a mechanism for prosecuting violations of law when there is an inherent potential for conflict of interest between the investigators and those investigated.[72] Mem-

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66 *Id.* at 684-85 (footnote omitted).

67 H.R. 5840, 102d Cong., 2d Sess. (1992).

68 *See Renew the Independent Counsel Law*, N.Y. TIMES, Aug. 8, 1992, at 20; John P. MacKenzie, *The Truth, Out of Control*, N.Y. TIMES, Dec. 31, 1992, at A24.

69 H.R. 811, 103d Cong., 1st Sess. (1993).

70 S. 24, 103d Cong., 1st Sess. (1993).

71 *See supra* note 5 and accompanying text.

72 Indeed, in the years after Watergate, the executive branch demonstrated its abil-

bers of Congress are subject to investigation at any time by the Justice Department. There is usually no conflict of interest because, in general, members of Congress do not have the same influence with the Attorney General and the Administration as do members of the Executive Branch. Therefore, there is no inherent conflict of interest. Several members of Congress, however, were concerned with the scope of the Independent Counsel's jurisdiction and argued to include investigations of members of Congress.[73]

Eventually, the Congress did pass S.24, a five-year reauthorization of the Independent Counsel law.[74] This law was based primarily upon the original 1978 Ethics in Government Act with some changes. Much of the statute was reworded or only slightly amended. The procedure for appointing the Independent Counsel has been preserved, as well as the basic duties of the Attorney General and the Independent Counsel. One primary element of the revisions incorporated into the new law were controls of the sometimes high costs in conducting such Independent Counsel

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ity and willingness to police misconduct by members of Congress in initiating the extensive and controversial "sting" operation that became known as "Abscam." *See, e.g.*, United States v. Jenrette, 744 F.2d 817 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1099 (1985) (involving Rep. John Jenrette's acceptance of $50,000 bribe from FBI agents posed as wealthy Arabs); United States v. Kelly, 707 F.2d 1460 (D.C. Cir.), *cert. denied*, 464 U.S. 908 (1983) (involving Rep. Richard Kelly's acceptance of $25,000 bribe from FBI agents posed as wealthy Arabs).

73 *See* 140 CONG. REC. H432-33 (daily ed. Feb. 10, 1994). The Gekas Amendment would have required the Attorney General to investigate Members of Congress. *Id.* A substitute amendment offered by Representative Bryant and subsequently passed by the House would permit, but not require, the Attorney General to use the procedures in the Independent Counsel reauthorization to investigate and prosecute Members of Congress if doing so would be in the public interest. Actually, the Attorney General has had this authority since 1983, because Members were added to the Independent Counsel statute in that year's reauthorization. Ethics in Government Act Amendments of 1982, Pub. L. No. 97-409, 96 Stat. 2039 (1983) (codified as amended at 28 U.S.C. § 591(c) (1982 & Supp. I 1983)) (emphasis added). The 1983 Amendment provided:

> Whenever the Attorney General receives information sufficient to constitute grounds to investigate that any person not described in [42 U.S.C. § 591 (b)] . . . has committed [an offense] . . . , the Attorney General *may* . . . apply for an independent counsel . . . if the Attorney General determines that investigation of such person . . . may result in a personal, financial, or political conflict of interest.

Id.

74 Independent Counsel Reauthorization Act of 1994, Pub. L. No. 103-732, 108 Stat. 732 (codified at 28 U.S.C. §§ 590-99 (1994)).

investigations.[75]

IV. The Need for an Independent Counsel

My experiences in serving as Chairman of the House Judiciary Committee during Watergate and Iran Contra have unambiguously convinced me that there is an overriding and recurring need for an Independent Counsel. Indeed, the reaction of Congress and the American public to the nascent "Whitewater"[76] affair confirms the expectation that allegations of wrongdoing by those at the highest levels of the Executive Branch should not be handled through normal channels, but should be dealt with by an Independent Counsel. Although the Clinton Administration took a course completely opposed from that of Richard Nixon after Watergate by promptly and completely acceding to demands for the appointment of an Independent Counsel with full responsibility to investigate all aspects of the matter, I do not believe the nation can simply expect that another President would voluntarily follow that avenue. Without a statute in place to govern the pursuit of such inquiries, the system could easily fail and be unable to deal with similar situations

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[75] *See* 140 CONG. REC. H4734 (1994) (statement of Rep. Derrick) (discussing the cost control features of the legislation agreed to by the conference). The relevant portion of this new section reads:

> (l) Cost Controls.
> (A) In general. An independent counsel shall
> (i) conduct all activities with due regard for expense;
> (ii) authorize only reasonable expenditures; and
> (iii) promptly, upon taking office, assign to a specific employee the duty of certifying that expenditures of the independent counsel are reasonable and made in accordance with law.
> (B) Liability for invalid certification. An employee making a certification under subparagraph (A)(iii) shall be liable for an invalid certification to the same extent as a certifying official certifying a voucher is liable under section 3528 of title 31.

28 U.S.C. § 591(l)(A),(B)(1994).

[76] Richard L. Berke, *So What Is This "Whitewater" The People Speak (or Yawn)*, N.Y. TIMES, March 7, 1994, at A1. The term "whitewater" refers to the investigation surrounding the Clinton's investment in an Arkansas real estate venture. *Id.* While enthusiasm for the Whitewater affair has waned, the heated debates in Congress about holding hearings to investigate the affair and the public's lack of knowledge and thus lack of conviction regarding President Clinton's involvement illustrate the need for an Independent Counsel to investigate such matters in order to obtain the truth quickly and accurately. See David Hess, *Independent Counsel Deal Reached*, DET. FREE PRESS, May 18, 1994, at 1A; Michael Hedges, *Whitewater; Observers Note Nixonian Twists*, WASH. POST, March 7, 1994, at A1; Michael Wines, *A Populist From Texas Who Bows to No One*, N.Y. TIMES, March 24, 1994, at A18.

that may arise in the future.[77]

I recognize that there is respectable support for the opposing view. Indeed, John Doar, counsel to the House Judiciary Committee for its Watergate Inquiry, and not, incidentally, an old and dear friend, opposed the idea of an Independent Counsel. He believed in the integrity of the Constitution, and analyzed separation of powers purely in terms of what the Constitution explicitly prescribes. For John Doar, the Constitution provides sufficient checks and balances: if the Attorney General does not discharge his statutory duty to investigate the President, then he himself should be investigated. While I respect this high-minded view of our government, political pragmatism moves me to wonder who is going to investigate the Attorney General if such a breach of duty occurs. Accordingly, although I look forward to an American future that will never have another Watergate or Iran Contra, I am more comfortable with a statute already in place should such a crisis recur. Congress has noted this need with its recent five-year reauthorization of the Independent Counsel law.

V. Statutory Controls on the Independent Counsel

Once we accept the need for a statutory mechanism for investigating the conduct of high-ranking members of the Executive Branch, there remain several difficult questions regarding the proper role for the Independent Counsel. If the statute is to serve its intended purposes, Congress must better assess the true nature of that role. The two basic problems that must be effectively addressed, as I see them, are: one, statutory limitations upon the budget and/or time limits for investigations; and two, the relationship between investigations by the Independent Counsel and Congressional inquiries on the same subject.

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77 *See* David Johnston, *Three Judges Spurn Protest On Whitewater Prosecutor*, N.Y. TIMES, August 19, 1994, at A16. For example, the recent appointment of Kenneth Starr over President Clinton's appointment of Robert Fiske to investigate the Whitewater affair illustrates the unpredictability of these investigations. *Id.* Moreover, the costs associated with the appointment of a new Independent Counsel will be significant and are, in fact, contrary to the effort of Congress in drafting the Independent Counsel Reauthorization Act to allow appointment by Robert Fiske, the Special Prosecutor appointed by President Clinton. *See* 140 CONG. REC. H4734 (1994) (statement of Rep. Derrick).

A. *Budget Restrictions and Time Limitations*

The latest Independent Counsel statute imposes several limitations on the costs associated with investigations by an Independent Counsel. The cost control provisions added to the Independent Counsel statute by Congress this past spring[78] account for the proper role of the statute in determining the scope of the Independent Counsel's investigation. By imposing a standard of only "reasonable and lawful expenditures"[79] as opposed to specific budgetary limitations on how much an Independent Counsel may spend, the Congress has provided the Independent Counsel with the flexibility and independence needed to conduct a thorough and efficient investigation.

The costs associated with an Independent Counsel investigation are often unavoidable in a system that provides for the appointment of an individual Independent Counsel from outside regular governmental agencies. While a permanent Independent Counsel might well be vested with the necessary authority to avoid some of the costs necessarily resulting from the requirement that each new Independent Counsel start from scratch, it is unlikely that such an office could withstand constitutional scrutiny.[80] Indeed, I would question the wisdom of investing such extensive authority in any individual. Moreover, we should as a nation recognize the constraints that specific budget limits impose upon the inquiry process. If our goals are to protect our constitutional system against abuse, to foster good government, and to ensure that the rule of law applies to all citizens, including those in the highest government offices, we can scarcely measure our commitment to these goals by assigning a dollar value as a measure of their worth. If we do, I think we will ultimately surrender our system to the demands of expediency. If financial constraints measure our commitment to democracy, our system will eventually be subverted

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78 28 U.S.C. § 594(l) (1994) (requiring the Independent Counsel to "(1)(A)(i) conduct all activities with due regard for expense; (ii) authorize only reasonable and lawful expenditures; and (iii) promptly, upon taking office, assign to a specific employee the duty of certifying that expenditures of the Independent Counsel are reasonable and made in accordance with law").

79 *Id.*

80 *See* Morrison v. Olson, 487 U.S. 654, 672 (1987) (reasoning that Independent Counsel was an "inferior officer" because appointed for a *limited* time and for specific purposes).

by those who would undermine and abandon the rule of law. Congress' latest attempt to reach this delicate balance between cost control and guarding the integrity of the government may be a success given the flexibility of the statute in determining what constitutes reasonable expenditures in any given case.

B. *Independent Counsel and Congressional Inquiries*

The Independent Counsel law was written and adopted to resolve the fundamental conflict of interest between the Executive Branch and the investigation of officials within that branch by the Attorney General.[81] However, it is easy to undermine the law by permitting political agendas to control its drafting and application. It is inevitable that the party, with whom the targets of the investigation are aligned, will attempt political maneuvering. In Watergate the votes on the impeachment resolutions by the House Judiciary Committee were in the main bipartisan.[82] In contrast, the Iran Contra hearings, rather than concentrating upon the duty of the President to take care that all duly-enacted laws are faithfully executed, degenerated into a political discussion regarding the wisdom of the Boland Amendment. As a result, the Independent Counsel had to investigate allegations of wrongdoing while some Republicans were outwardly declaring Oliver North a hero.

The Independent Counsel provisions, both those that have existed and those most recently enacted, have failed to address a fundamentally important question: what happens to the Independent Counsel's role if Congress insists on simultaneously conducting its

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81 *See infra* note 85 (discussing the fundamental goal of the "Special Prosecutor Act" of 1978).

82 HOUSE COMM. ON THE JUDICIARY, IMPEACHMENT OF RICHARD M. NIXON PRESIDENT OF THE UNITED STATES, H.R. REP. NO. 1305, 93d Cong., 2d Sess. (1974). The final report from the House Judiciary Committee contained three articles of impeachment. *Id.* at 332. Article I outlined specific criminal conduct in which President Nixon was allegedly involved. *Id.* Of the 27 ayes in support of this article, 21 were Democrats and 6 were Republicans. *Id.* at 335. All 11 nays in opposition to article I were Republicans. *Id.* Article II discussed misuse of presidential power to cover up the apparent wrongdoing. H.R. REP. NO. 1305, *supra*, at 332. Among 28 ayes in support of article II, 21 were Democrats and 7 were Republicans. *Id.* All 10 nays were cast by Republican members. *Id.* Article III declared Nixon's refusal to comply with subpoenas issued by the Judiciary Committee a misuse of presidential power. *Id.* at 332. The vote on this slightly more controversial article saw 21 Democrats and 2 Republicans vote aye with 2 Democrats and 15 Republicans voting nay. *Id.* at 337.

own inquiry regarding the same subject?[83] Both Watergate and Iran Contra abounded with unresolved questions concerning the exchange of information, grants of immunity to witnesses, the timing of the proceedings, and public disclosure of the results of such proceedings.

These problems are inherent in any inquiry, at least one that in any way signals possible presidential involvement. Thus, notwithstanding the appointment of an Independent Counsel to investigate Whitewater, members of Congress almost immediately called for Congressional hearings into the affair. Independent Counsel Robert Fiske—like his predecessor Lawrence Walsh—immediately cautioned Congress that there might be interference with his work if such hearings were held precipitously. In addition, despite repeated assurances from those advocating Congressional hearings that no interference is intended, I think it is inevitable that problems will arise, even if actual interference is not intended. Given the reality that any Congressional inquiry is likely to impede the work of the Independent Counsel, it becomes proper to ask just what Congress is appropriately undertaking to investigate. The character of Congressional inquiries is tailored to satisfy the needs of the legislative process and not the prosecution of persons who violate the law. Indeed, even Congressional investigations of government officials under Congress' oversight jurisdiction serve a unique legislative purpose: monitoring the execution of laws according to congressional intent and overseeing the execution of delegated authority. Such investigations are not criminal prosecutions. Therefore, Congress must remember its legislative purpose when setting up and conducting investigations of high level gov-

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[83] 28 U.S.C. § 595(c) (1994). The latest reauthorization of the Independent Counsel statute contains no provision dealing with this hypothetical, if not likely, circumstance. *Id.* Moreover, the Independent Counsel statute has never contained such a provision despite the warnings of several Independent Prosecutors. *Id.* Section 595(c) does, however, require the Independent Counsel to hand over any information which "may constitute grounds for an impeachment." *Id.* Moreover, section 595(c) specifically states that the authority vested in the Independent Counsel in no way limits the ability of the House of Representatives to obtain information during an impeachment proceeding. *Id.* This statutory scheme, by failing to clearly establish in what cases Congress must yield to the Independent Counsel's investigation and when Congress' constitutionally vested authority to conduct its own investigation prevails, creates an inherent conflict between Independent Counsel investigations and Congressional impeachment powers.

ernment officials which parallel investigations by Independent Counsels.

Obviously, Congress has the requisite constitutional authority to conduct investigations pursuant to its oversight jurisdiction. And, while the Independent Counsel must work within prescribed constraints, Congress has virtually unlimited discretion to establish its own rules and procedures governing the course of any particular hearing. Individual Congressional committees undertaking an inquiry into an extraordinary matter such as Whitewater require authorization via resolutions adopted by the full House or the Senate, to obtain the additional funding and staffing needed for such a project and to exercise the subpoena power.[84] However, it is a political reality that whenever there arises a situation where the President or someone close to him may be investigated, members of the opposition party in Congress will want to hold a hearing.

The scope of a Congressional inquiry that parallels an Independent Counsel's investigation should be delimited by an understanding of the functional roles that each of the participants play. Congressional oversight proceedings are intended to determine whether existing legislation is operating in the intended manner, and not to conduct criminal investigations. Criminal investigations are the responsibility of the Independent Counsel and the courts. A Congressional hearing is not an effective means for determining the truth in an adjudicatory sense: such hearings are not conducted under the rules of evidence; they are not subject to appellate review and any committee member can ask any question, with no greater sanction than to have the Chair rule it out of order. Accordingly, if the primary concern is to investigate and prosecute crimes, the Independent Counsel should have primary authority and priority.

Following the same logic, the Independent Counsel's role should not exceed the intended limits of the office. The Independent Counsel statute was created to deal with a specific problem: investigations that created a conflict of interest between the

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84 *See* CONSTITUTION, JEFFERSON'S MANUAL AND RULES OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES ONE HUNDRED THIRD CONGRESS, H.R. DOC. NO. 405, 102d Cong., 2d Sess. 448-49, 463-65, 474-75, 494-510 (1994); SENATE MANUAL CONTAINING THE STANDING RULES, ORDERS, LAWS, AND RESOLUTIONS AFFECTING THE BUSINESS OF UNITED STATES SENATE, S. DOC. NO. 1, 103d Cong., 1st Sess. 40, 46-47 (1994).

Attorney General and senior Executive Branch officials.[85] By limiting the number of persons covered by the statute, Congress intended the Independent Counsel to deal only with conflicts of interest which surrounded those specific government officials.[86] The only situation in which the interests served by the two institutions may require a substantially parallel and simultaneous investigation is when resolutions of impeachment have been introduced in the House of Representatives.

Keeping in mind the distinctions among criminal investigations by Independent Counsels, general inquiries by Congress, and highly focused, narrow impeachment investigations is essential to striking a balance between efficient and effective criminal investigations of high level Executive Branch officials and the unconstitutional delegations of power in violation of the separation of powers. Thus, an Independent Counsel must conduct criminal investigations and prosecutions free from any unreasonable interference; Congress should conduct its investigations with a specific legislative purpose in mind; and finally, impeachment hearings must maintain their narrow focus, gathering information necessary to determine if there are sufficient grounds to undertake complete impeachment proceedings.

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85 The House Committee on the Judiciary identified this fundamental goal of the statute in its 1978 report on the "Special Prosecutor Act of 1978":

> Few people disagree that there are occasions when it is necessary to have a special prosecutor who is independent of the Attorney General. Investigation of possible wrongdoing by high-level executive branch officials poses special problems for the Federal criminal justice system.
>
> The Attorney General is at the same time the chief Federal law enforcement official and a Presidential appointee who is a key member of the President's cabinet. Cases involving possible wrongdoing by high-level executive branch officials, therefore, present a fundamental institutional conflict of interest.

H.R. REP. No. 1307, 95th Cong., 2d Sess., "Special Prosecutory Act of 1978" (1978). *See also* Nolan, *supra* note 41.

86 28 U.S.C. § 591(b) (1978); *See also supra* note 29. Subsection (c) was not included in the first 1978 version of the statute, and when it was added in 1983 the subsection was written only extending coverage to persons not listed in subsection (b) in circumstances where an investigation by the Attorney General would result in a conflict of interest. Ethics in Government Act Amendments of 1982, Pub. L. No. 97-409, 96 Stat. 2040 (1983) (codified as amended at 28 U.S.C. § 591(c)(2) (1988)). The 1994 reauthorization has amended subsection (c) to include Members of Congress when such an investigation "would be in the public interest." 28 U.S.C. § 591(c)(2) (1994).

VI. Conclusion

My purpose here is simply to suggest an approach that may provide a better balance in dealing with a recurring and troublesome problem. I recognize that there are complex and largely unresolved constitutional questions regarding the validity of a statute that would in any way limit one of the most fundamental powers of the Congress. I believe, however, that there are sound policy considerations supporting a more stately approach to the problem than has thus far emerged.

Much of the political wrangling that occurred at the outset of the Whitewater affair was occasioned by the failure to reauthorize the Independent Counsel statute. Although President Clinton and Attorney General Reno moved quickly and resolutely to appoint an Independent Counsel under the Executive Branch, there is no assurance that such a course of action would be repeated on other occasions. The Independent Counsel provisions should be made permanent and not subject to five-year reauthorizations, although clearly each Independent Counsel should continue to be appointed for the case at hand, and not for a set term of office. However, if the Independent Counsel provision is to become permanent, then I believe we must more carefully consider, and perhaps legislate, the relationship between an Independent Counsel investigation and a Congressional inquiry into the same subject. Identifying the need for an Independent Counsel law is only half the solution. Determining the proper scope of this law, and, more importantly, dealing with the public policy issues raised by its execution require additional attention.