

A Model Independent Counsel Reimbursement Act

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I. INTRODUCTION TO THE INDEPENDENT COUNSEL STATUTE

Independent counsels have their contemporary roots in Watergate. President Nixon's order to fire Archibald Cox as Special Prosecutor for doing his job too vigorously¹ had the effect of "destroying public and Congressional confidence in the ability of the executive branch to carry out its prosecutorial function against itself."²

Title VI of the Ethics in Government Act of 1978 (Independent Counsel Statute)³ sought to remedy the concern about conflicts of interest in the investigation and prosecution of high government officials in serious criminal matters.⁴ Under the Independent Counsel

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¹ See H.R. REP. NO. 103-224, at 5 (1993) ("The primary catalyst for the legislation was the crisis following the 1973 firing of Archibald Cox, who had been appointed from outside the government by former President Richard M. Nixon to investigate the criminal allegations related to the June 7, 1972 burglary of the headquarters of the Democratic National Committee . . ."). The history of independent counsels is discussed in detail in Jack Maskell, *The Independent Counsel Law*, 45 J. FED. LAW. 28 (1998); Mark F. Schultz, *Attorneys' Fees Under the Independent Counsel Act: How the Grinch Stole Lyn Nofziger's Wallet*, *The D.C. Circuit Review* (Sept. 1990 - Aug. 1991), 60 GEO. WASH. L. REV. 1311, 1311 (1992); Hanley A. Ingram, Note, *United States v. Tucker: Should Independent Counsels Investigate and Prosecute Ordinary Citizens*, 86 KY. L.J. 741, 741-47 (1997-98); H.R. REP. NO. 103-224, at 5; S. REP. NO. 103-101, at 5-8, *reprinted in* 1994 U.S.C.C.A.N. 748, 749-52.

² Schultz, *supra* note 1, at 1312.

³ Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1867 [hereinafter Independent Counsel Statute] (codified as amended at 28 U.S.C. §§ 590-99 (Supp. 1998)).

⁴ Until the establishment of independent counsels, the President, through the Attorney General, used independent, non-governmental lawyers to investigate and, if required, prosecute members of the executive branch in situations in which there was sufficient evidence of criminal wrongdoing. See Maskell, *supra* note 1, at 29. These specially appointed lawyers were not truly independent, for "[t]he president and his attorney general . . . always retained ultimate control over the appointment and removal of these attorneys." Schultz, *supra* note 1, at 1310. The removal power, coupled with close personal ties to high-ranking officials, raised the very real possibility of a conflict of interest and the disruption of investigations and prosecutions.

Statute, an independent counsel⁵ may be appointed by a special court⁶ to provide an independent⁷ review and, if need be, prosecution of alleged serious criminal activity by specified officials in the executive branch or the legislative branch.⁸

Despite the good intentions that motivated its adoption in 1978, current events illustrate that the Independent Counsel Statute has had unintended and largely negative effects on individuals and on the nation as a whole. First, the Independent Counsel Statute has become a weapon in the on-going battle between the two major po-

As one House Report put the matter:

Because the Attorney General is a key member of the President's Cabinet and, in many instances, a close personal friend of the president and other high ranking Executive Branch officials, the potential for . . . conflicts of interest is both substantial and real. Congress concluded that public confidence in [the] system of criminal justice and in [the] system of government required that the Attorney General not be responsible for investigating and prosecuting high-level Executive Branch officials.

H.R. REP. NO. 103-224, at 5-6.

⁵ The original title for an independent counsel was "Special Prosecutor." The title was modified by Congress in 1983 to rid the office of the specter of its Watergate origins. See Pub. L. No. 97-409, 96 Stat. 2039. "The term special prosecutor survives in popular usage." Schultz, *supra* note 1, at 1312 n.3; see also Maskell, *supra* note 1, at 30. Specifically, Maskell notes:

Initially, the new legislation changed the name of the "special prosecutor" to "independent counsel," as the term "special prosecutor" was thought too pejorative, and not reflective of the fact that the law can not only be triggered by an impending "prosecution," but also by merely a matter that warrants further investigation.

Id. at 30. For the sake of simplicity, this Article will use "independent counsel" without regard to the time period.

⁶ The special court comprises three circuit court judges or justices appointed to two-year terms by the Chief Justice of the United States. See generally 28 U.S.C. § 49 (providing for the assignment of judges to a special court to appoint and oversee the operation of independent counsels).

⁷ See, e.g., 28 U.S.C. § 594(i) (providing that "[e]ach independent counsel appointed under this chapter . . . [is] separate from and independent of the Department of Justice").

⁸ Due to the recent media attention involving the Independent Counsel Statute, it is assumed that the reader has a basic familiarity with the scope and operation of the Statute. Further, the scope and operation of the Independent Counsel Statute are not, with the exception of the portion of the Statute that deals with attorneys' fees, directly relevant to this Article. Readers who are interested in a thorough discussion of the operation of the Statute should consult the entire Independent Counsel Statute, which is codified as amended at 28 U.S.C. §§ 590-99. The operation of the Statute also is discussed in detail in Maskell, *supra* note 1; Schultz, *supra* note 1; Ingram, *supra* note 1; H.R. REP. NO. 103-224, at 5-6; S. REP. NO. 103-101, at 8-9, reprinted in 1994 U.S.C.C.A.N. 748, 752-53. A good, critical discussion of the operation of the Statute may be found at Julie O'Sullivan, Essay, *Eleventh Survey of White Collar Crime, The Independent Counsel Statute: Bad Law, Bad Policy*, 33 AM. CRIM. L. REV. 463 (1996).

litical parties,⁹ with frequent allegations of wrongdoing being followed immediately by calls for the appointment of an independent counsel.¹⁰ The skirmishes over whether to appoint an independent

⁹ Hundreds of magazine and newspaper articles have been written in which some member of Congress or some other individual who is affiliated with one of the two major parties is quoted as asserting that the Independent Counsel Statute is — at least sometimes — used for partisan purposes. After reading a good number of these articles, it is fair to say that whatever the real problems with the operation of the Independent Counsel Statute, the complaints about partisanship fall into the “whose ox is being gored” school of argument. Some of the more interesting of these articles include Robert S. Bennett, *We Should Sink the Partisan Ship; Politics is Poisoning the Search for Wrongdoing*, WASH. POST, Mar. 16, 1997, at C01; Comment: *Reform Special Counsel Law*, ARIZ. DAILY STAR, Aug. 18, 1998, at 12A (“More than any other of the 20 independent counsels appointed since they were authorized by law in 1978, [Kenneth] Starr has appeared obsessive and partisan.”); Terry Eastland, *Rule of Law: Democrats Change Their Minds on Independent Counsel Law*, WALL ST. J., Jan. 22, 1997, available in 1997 WL-WJSJ 2406567; Carl Levin, *Nonpartisanship Lost: Top Officials Need Equal Treatment*, ARIZ. REPUBLIC, Feb. 12, 1998, at B5; Lawrence M. O’Rourke, *Many Lawmakers Targeting Independent Counsel Law*, SACRAMENTO BEE, Feb. 16, 1998, at A17; see also Susan Page, *Are Independent Counsels Out of Control? Investigations Now Taking Longer and Costing More*, USA TODAY, Nov. 14, 1997, at 1A (indicating that “over the past two decades, the Ethics in Government Act of 1978 has become a blunt political weapon wielded by both parties — propelling marginal accusations into full-scale investigations, wrecking the reputations of innocent people and costing taxpayers millions of dollars a year.”). Page also indicates that “Republicans say [Lawrence] Walsh’s seven-year, \$47.9-million investigation into Iran-contra was a politically driven fishing expedition. Democrats make similar accusations about Starr’s four-year, \$31.7-million investigation into Whitewater.” *Id.*; see also David G. Savage & Edwin Chen, *Counsel Law is Tied Up in Congressional Tug of War Politics: GOP, Democrats Bicker Over Need for Outside Prosecutor in Fund-Raising Probe. Reno is Caught in the Middle*, L.A. TIMES, Mar. 14, 1997, at A15; Tony Snow, Editorial, *Prosecutors and Partisanship: It is the Democrats Who Made Independent Counsels Into Political Beings*, PITTSBURGH POST-GAZETTE, Aug. 14, 1998, at A25.

¹⁰ See, e.g., Kathleen Clark, *Paying the Price for Heightened Ethics Scrutiny: Legal Defense Funds and Other Ways that Government Officials Pay Their Lawyers*, 50 STAN. L. REV. 65, 67 (1997) (“In recent years, persons running for or holding government office have increasingly used charges of illegal and unethical conduct against their opponents, and these charges have proven to be potent weapons in political battles.”); Schultz, *supra* note 1 (discussing at length the view that the Independent Counsel Statute is used in political battles between Democrats and Republicans and between the executive branch and the legislative branch). The popular press contains similar observations. Naftali Bendavi notes, for example:

Created amid the post-Watergate fervor for reform, many agree the system appears to be bogged down in politics, obsessed with trivial transgressions and fueled by partisanship rather than justice . . . Reformers envisioned a device for tackling rare, Watergate-like scandals. Instead the independent counsel has become a fixture of the political landscape, just one more weapon in the ethics wars constantly fought by the parties. Inevitably, the opposition party pushes hard for an independent counsel no matter how small the transgression involved, and those in power fight back with equal desperation.

“It injects the political process directly into the criminal justice

counsel can, in themselves, distract members of the government and the media, as well as the general public, from important policy concerns. The appointment of an independent counsel itself is followed by a lengthy, searching, and very public investigation, if not by prosecution, which again distracts members of the government, media, and public.

Second, the political use of the Independent Counsel Statute and the ease¹¹ with which independent counsels are appointed¹² con-

decision-making process," said Joseph diGenova, a Republican former independent counsel. "That is a thoroughly corrupting influence."

Naftali Bendavi, *Independent Counsel: Has Law "Run Amok?" Both GOP, Democrats Agree Reforms Need to End Partisan Abuse*, CHI. TRIB., Sept. 23, 1997, at 1. In a similar vein, Lawrence M. O'Rourke writes:

Rep. Bob Barr, R-Ga., says [some] Democrats are now painfully experiencing the results of their past support for independent counsels. "Most targets of independent counsels prior to the Clinton administration were Republicans," Barr said. "Now it's the Democrats' turn." . . . When Republicans controlled the White House and executive branch, they were critical of the independent counsel's office. Democrats, who controlled Capitol Hill but not the White House during the administrations of President Reagan and President Bush, were generally supportive of the independent counsel law. "When a Republican was in the White House, Democrats were champions of the independent counsel law and quick to demand its use at the slightest provocation," said Thomas Mann, a political scientist at the Brookings Institution. "Now, with Bill Clinton as president, Republicans have become born-again advocates of the law, discovering almost daily new grounds for its use to investigate Democratic misdeeds. This is part of a broader criminalization of political conflict in which the destruction of one's opponents is preferred to engaging him or her on policy differences."

O'Rourke, *supra* note 9, at A17.

¹¹ The independent counsel process may be initiated by Congress. Section 592(g) provides that "[t]he Committee on the Judiciary of either House of the Congress, or a majority of the majority party members or a majority of all nonmajority party members of either such committee may request in writing that the Attorney General apply for the appointment of an independent counsel." 28 U.S.C. § 529(g) (1). Because the threshold to trigger an initial investigation is easy to meet, the political use of the Independent Counsel Statute is practically guaranteed.

¹² See, e.g., Alan B. Morrison, *Independent Counsel Insurance*, WASH. POST, June 29, 1998, at A15. Morrison offers some insight into why more government employees are facing the prospect of becoming involved in an independent counsel investigation. He states, "The Independent Counsel Statute certainly has produced major investigations on issues that would never have left the Justice Department in the past. Ethics laws have become stricter, and the media have managed to ferret out more evidence of dubious, if not illegal, conduct than was once true." See also Page, *supra* note 9, at 1A. Page states:

[C]ritics say [that] it's too easy for partisans in Congress or elsewhere to force the appointment of an independent counsel. Under the law, an attorney general who hears specific and credible evidence of significant wrongdoing by a Cabinet member has virtually no choice but to seek a special counsel. In recent years, reports of an incriminating sort in newspapers often spark immediate outcries demanding one.

tribute to a state of affairs in which politicians, pundits, and members of the public loudly lament the trend toward qualified individuals viewing government service¹³ as exacting too great a toll on reputations,¹⁴ personal lives,¹⁵ and personal finances.¹⁶

Id.

¹³ The independent counsel provisions apply to serious federal crimes that may have been committed by a broad range of individuals. For example, the Independent Counsel Statute applies to the President, the Vice-President, Members of the Cabinet, the Director of the CIA, the Commissioner of the IRS and other specified high-ranking government officials. See 28 U.S.C. §§ 591(b)(1)-(5) (specifying various officials who are subject to the statute.) Investigation of these individuals is authorized while they are in office or "for 1 year after leaving the office or position." *Id.* § 591(b)(7). Additionally, the Independent Counsel Statute covers the "chairman and treasurer of the principal national campaign committee seeking the election or reelection of the President, and any officer of that committee exercising authority at the national level, during the incumbency of the President." *Id.* at § 591(b)(6). Likewise, the Independent Counsel Statute addresses "other persons," whether members of the government or non-governmental individuals who otherwise would be subject to federal jurisdiction "[w]hen the Attorney General determines that an investigation or prosecution of a person by the Department of Justice may result in a personal, financial, or political conflict of interest . . ." *Id.* at § 591(c)(1). Finally, the Independent Counsel Statute covers members of Congress. *Id.* at § 591(c)(2).

¹⁴ For example, after being acquitted of wrongdoing in a criminal trial brought by an independent counsel, then-former Secretary of Transportation Raymond Donovan asked the very legitimate question, "Which office do I go to to get my reputation back?" See *How Do I Repair My Reputation? Donovan Asks After His Trial*, CHI. TRIB., May 27, 1987, at 4 [hereinafter *How Do I Repair My Reputation?*]. Congress has recognized that "devastating publicity" may accompany the appointment of an independent counsel. See S. REP. NO. 97-496, at 18 (1982), reprinted in 1982 U.S.C.C.A.N. 3537, 3554 ("An official who is subjected to a special prosecutor investigation incurs extensive burdens both financially and professionally. When a special prosecutor is appointed, the subject of the investigation often bears staggering legal expenses and potentially devastating publicity.")

¹⁵ See, e.g., *How Do I Repair My Reputation?*, *supra* note 14; Page, *supra* note 9, at 1A. Two interviews contained in Page's article are particularly illuminating. The first interview was with Margaret Tutwiler, a former White House official in the Bush Administration. Even though she had been exonerated of charges that she was involved in an illegal search of then-candidate Clinton's passport file and had been reimbursed for \$136,219 in attorneys' fees, Page says Tutwiler described the process as follows: "[S]ometimes the process can be devastating even for those who are ultimately cleared of any wrongdoing. 'It just sucks in whole hosts of people and puts them through hell and then, at the end of the day, says, 'We're so sorry, and here's your money back.''" *Id.*

In the second interview, although cleared in an investigation that his testimony about the EPA "Superfund" misled Congress, Theodore Olson stated,

A very big, black, threatening cloud hangs over your head all of the time. You wake up in the middle of the night thinking about it. It's difficult to go on with a normal life when you're being investigated by a government office that has a sole purpose of investigating you and has no time limits and no constraints upon its resources and has the full power of the U.S. government behind it.

Id.

Third, these burdens also are imposed on the many individuals inside and outside the Beltway who know, work with, or interact with an individual who is the subject of an investigation.¹⁷ These individuals may be questioned by the independent counsel or his¹⁸ staff, may be subpoenaed to testify before a grand jury, or may be prosecuted for crimes discovered during the primary investigation.

¹⁶ See, e.g., Clark, *supra* note 10; Schultz, *supra* note 1; John F. Harris, *Clinton Defends Ethics Record, Decries Climate of Suspicion*, WASH. POST, Mar. 4, 1995, at A10 (quoting former Independent Counsel Joseph diGenova: "How can we expect people to give up lucrative private opportunities [to become government officials and employees] . . . and then basically bankrupt them with [attorneys' fees]?"). For a discussion of the range of harms, including financial harms, caused by an independent counsel investigation, see Ingram, *supra* note 1, at 771-72. Even Congress has recognized that "staggering legal expenses" may accompany the appointment of an independent counsel. See S. REP. NO. 97-496, at 18 (1982), *reprinted in* 1982 U.S.C.A.N. 3537, 3554 ("An official who is subjected to a special prosecutor investigation incurs extensive burdens both financially and professionally. When a special prosecutor is appointed, the subject of the investigation often bears staggering legal expenses and potentially devastating publicity."); cf. Mark R. Levin, *Paying the Legal Bills*, WASH. TIMES, April 30, 1997, at A19. In his article, Mark Levin states:

Before anyone sheds too many tears for the Clintons and their skyrocketing legal bills, remember this: public reports released by the Clinton defense fund seem to indicate that the Clintons have actually paid only \$2,000 out of their pockets for their scores of high-priced criminal defense lawyers; Mr. Clinton's legal fees in the Paula Jones case are allegedly covered by two insurance policies; and if the Clintons escape indictment, the Independent Counsel Act requires the taxpayers to pay their reasonable attorney fees.

Id.

¹⁷ See, e.g., David Eisenstadt, *Bill's Vow May Cost Him \$4M*, N.Y. DAILY NEWS, Aug. 28, 1996, at 10 (indicating that eighty individuals involved with the Clinton Administration have hired attorneys as a result of Whitewater and other investigations); James Skip Thurman, *White House Fame — and Fiscal Ruin? Subpoenas and Legal Bills Hit Clinton Staff*, CHRISTIAN SCI. MONITOR, Feb. 26, 1998, at 1; James Ridgeway & Irina Fernandes, *Legal Affairs*, VILLAGE VOICE, March 31, 1998, at 55. Ridgeway and Fernandes state:

The rise of the Zippergate scandal has been a godsend to Washington's high-priced lawyers set: According to a Voice analysis, legal bills for the 39 individuals ensnared in Kenneth Starr's sex probe have reached \$1.3 million in just over one month's time The scandal has set off a legal feeding frenzy, as nearly everyone associated with the president — friends, aides, interns, even servants — seems to need representation.

Id.

¹⁸ I use masculine pronouns in this Article. My reason is simple. I find writing using "he and she," "his and her," and "himself and herself" to be incredibly cumbersome. Therefore, I have adopted the practice of using either all masculine or all feminine pronouns in every Article I write. The last Article I submitted for publication used feminine pronouns, so I am using masculine pronouns in this Article unless the context clearly requires the use of a feminine pronoun. This is the only method of which I am aware to combine simplicity of prose and, over the totality of my writing, gender equity.

Fourth, the combination of the partisan political climate in which independent counsel investigations and prosecutions take place,¹⁹ the tenacious nature of the individuals selected as independent counsels, and the media scrutiny to which they are subjected makes them likely to perceive success in terms of finding wrongdoing.²⁰ Thus, an independent counsel may keep investigating in the hope of uncovering some wrongdoing with which he can justify his appointment.

Finally, because the independent counsel has essentially unlimited resources,²¹ no lead is too small for,²² nor is any person immune

¹⁹ See, e.g., Page, *supra* note 9, at 1A (indicating that "there's the pressure to come up with wrongdoing. 'I guess it's a change in our political culture . . . that regards the work of a special counsel as a hunt, and a failure if he doesn't catch someone,' says Archibald Cox, who argues that exoneration should also be considered a success.").

²⁰ See *id.* Page notes:

An entire office has been established, often amid heated political charge and countercharge. The media attention can be intense. The special counsels are typically former U.S. attorneys or prominent lawyers — as a rule, not a retiring breed — determined to avoid any criticism that their inquiries were somehow incomplete.

Id.

²¹ The independent counsel may use resources provided by the United States government, including Department of Justice resources and personnel, *see* 28 U.S.C. § 594(d)(1) (Supp. 1998), administrative support by the director of the Administrative Office of the United States Courts, *see id.* at § 594(l)(2), and equipment, supplies, and office space provided by the administrator of General Services, in consultation with the director of the Administrative Office of the United States Courts, *see id.* at § 594(l)(3). The independent counsel also has the authority to hire additional personnel to assist in the independent counsel's work. *See id.* at § 594(c). In addition, the independent counsel has an essentially unlimited budget with which to hire additional personnel; the Department of Justice is required to pick up the tab for the independent counsel. *See id.* at § 594(d)(2) ("The Department of Justice shall pay all costs relating to the establishment and operation of any office of independent counsel.").

²² As a result of the essentially unlimited resources, the independent counsel is capable of conducting investigations and prosecutions that are far more meticulous than can be conducted by an ordinary prosecutorial office. The combination of virtually limitless resources upon which to draw in conducting their investigation or prosecution [combined with] broad jurisdictional grants . . . vest with an [independent counsel] enormous amounts of discretion as to where, how, and for how long such resources may be employed.

Given the [independent counsel's] vast powers and potentially wide-ranging jurisdiction, as well as the incentives for him to employ both to the fullest, there obviously exists the potential for abuses of the [independent counsel] mechanism. For example, the unlimited budget accorded [independent counsels] can be exploited far beyond the limits of reasonableness.

If the [independent counsel] mechanism can be abused when

from, the independent counsel's investigatory reach.²³ The independent counsel may take advantage of the financial mismatch,²⁴ re-

applied to public figures covered by the statute, the possibility of abuse against an ordinary citizen subjected to an [independent counsel] probe . . . would be particularly great.

Ingram, *supra* note 1, at 769.

²³ See, e.g., Robert Dreyfuss, Editorial, *Kenneth Starr's Other Victims. Forget Bill Clinton: the real victims of the Starr inquiry are the hundreds of people being forced to testify. This investigation by the Nation reveals it has cost them \$23m in legal fees alone*, THE GUARDIAN (London), Aug. 15, 1998, at 12. One horror story reaches all the way into a high school.

Perhaps the most egregious case of Starr's overzealousness is that of the Perry County Bank. Perryville is a sleepy town (population: 1,200) near Little Rock. Four years ago Robert Fiske began inquiring into reports that the owners of a small bank there, Herby Branscum Jr. and Rob Hill, had used bank funds to make modest contributions to Clinton's 1990 gubernatorial re-election campaign. The two men were accused of misusing about \$13,000 to contribute to Clinton's re-election. Starr subpoenaed Hill's octogenarian mother, his two adult daughters, his brother, his brother's wife and Hill's 16-year-old son, sending agents to deliver the subpoena to Rob Hill Jr. at his high school (the principal threw them out). The case went to trial in June 1996. Despite Starr's vigorous efforts, Branscum and Hill were acquitted on some charges and the jury deadlocked on others. Yet Branscum and Hill had been seriously damaged. They spent \$1.6m defending themselves and their bank.

Id.

²⁴ See generally Robert G. Morvillo, *White-Collar Crime: Indemnification and Third-Party Payment of Legal Fees*, N.Y. L.J. Oct. 7, 1997, at 3. Although Morvillo writes about the financial mismatch between the Department of Justice and white collar criminal suspects, his comments are even more applicable to the resource-rich independent counsel and the subject of his investigation or a witness:

In an era in which the investigation and prosecution of white collar criminal cases are often exceedingly long and complex, the ability of the subjects and/or targets of prosecution to afford to contest the case is always of concern. The government, of course, possesses unlimited financial resources which it employs to gather evidence sufficient to attempt to sustain its burden of proof. This includes reliance upon ample, well-trained and experienced investigators, experts in almost every conceivable field, and access to various technologies, all of which are called upon with nary a thought to their cost. The budget for the Department of Justice in 1993 was \$9.8 billion.

Individuals who gain the attention of prosecutors are almost always unable to match the government's economic resources. Legal, investigative and expert fees are high and often applied on an hourly basis, which makes the cost of long complicated cases substantial. The pressure of the economic barriers imposed by the resources of the subject of a criminal case often necessitate a rationing of defense activity sometimes leading to a less comprehensive analysis. Insufficient funding also induces unwarranted dispositions. Prosecutors are well aware of this imbalance and sometimes attempt to take advantage of it to gain a tactical advantage.

Id.

sulting in the potential for the "situation in which a high government official is unfairly subjected to a more rigorous application of criminal law than are other citizens."²⁵ The resource-rich independent counsel also may conduct an investigation that involves more interviews and evidence-gathering than would occur in the course of a normal prosecutorial investigation and prosecution. As a result, many innocent individuals who would otherwise be on the periphery of a normal governmental investigation find themselves drawn into an ever-expanding web of an independent counsel's investigation.²⁶

Perhaps the most visible, common, personal, and devastating of these negative effects of entanglement with an independent counsel is the detrimental impact that it has on the individual's finances. To protect themselves from criminal liability for perjury or obstruction of justice, individuals who are asked or who are subpoenaed to provide information to the independent counsel or a grand jury must hire attorneys.²⁷ Likewise, those who are the subject of an independent counsel investigation or prosecution must hire counsel.

Tremendous attorneys' fees and related expenses²⁸ can be incurred as targets of the investigations and others more peripherally

²⁵ S. REP. NO. 103-101, at 20, *reprinted in* 1994 U.S.C.C.A.N. 748, 765.

²⁶ Individuals may incur attorneys' fees even though they are merely potential witnesses and even though they may have been drawn into an investigation by mistake. *See, e.g.*, Dreyfuss, *supra* note 23, at 012. Dreyfuss writes:

In February, Marsha Berry, press secretary to Hillary Clinton, was phoned by an FBI agent working for independent counsel Kenneth Starr. "He said my name had come up in the Monica Lewinsky case," says Berry. She talked to the White House's lawyers, hired an attorney and began worrying whether she would have to begin gathering notes, documents, diaries, phone logs and other "evidence". But when the FBI agents arrived, things quickly got confusing. After the first question or two, Berry told the crack interrogation team that she had begun working in the White House long after the events in question took place. They had confused her with someone else named Berry. "Gee," they told her, "We'd just assumed it was you."

Id.

²⁷ *See, e.g.*, Clark, *supra* note 10, at 71 ("In [an atmosphere in which an independent counsel enjoys vast powers and in which independent counsel investigations often become politically charged], it is not surprising that even 'mere witnesses' feel the need for someone to look out for their best interest."). *But see id.* at n.21 (quoting Bob Dart, *The Whitewater Case Legal Tabs Add to Pile of Woes: Clintons, Close Aides May Be Stuck with Fees*, ATLANTA CONST., Mar. 10, 1994, at A10 ("The question is why people on the periphery of the investigation would have to have counsel anyway If I were called to testify before a grand jury about what happened in a meeting that I attended, I'd just go and tell what I knew." (quoting law professor John Banzhaf))).

²⁸ Ingram has described the situation as that of the independent counsel hold[ing] a blank check An IC is the only prosecutor in the country who is by statute entitled to call upon all the vast resources of

involved in the investigation seek to remain on something close to a level playing field with the resource-rich and highly motivated independent counsel.²⁹ While subjects of an independent counsel's inves-

the federal government without providing any justification, without assuming responsibility for funding shortfalls, and without worrying about competing demands upon available resources.

In the face of such enormous resources, the costs associated with defending a client who is the subject of an IC investigation have skyrocketed

Ingram, *supra* note 1, at 768 (footnotes omitted); *see also*, Clark, *supra* note 10, at 66 (indicating that the attorneys' fees and expenses "often outstrip the individuals' government salaries or even their net worth."). A search of newspaper files reveals scores of articles discussing the impact of independent counsel investigations on the financial fortunes of those individuals who are not the target of the investigation. For examples, *see* Dart, *supra* note 27, at A10. Dreyfuss indicates that there are more than 100 current and former White House officials, along with 200 to 300 people in Arkansas and elsewhere, who have run up more than \$23 million . . . in attorneys' fees since Robert Fiske, the first Whitewater independent counsel, began his inquiry in January 1994 . . . and the meter is still running. Legal bills for White House staffers alone, beginning with the original inquiry into Whitewater and the Madison Guaranty Savings & Loan and extending to the White House Travel Office, misdirected FBI files, Vince Foster's suicide and Lewinsky's relationship with the President, now total nearly \$8m. That doesn't count the First Couple's \$3.5m-plus debt. Most of those hit are simply witnesses and innocent bystanders.

Dreyfuss, *supra* note 23, at 12; *see also* Thurman, *supra* note 17, at 1 ("During Mr. Clinton's first term, at least two-dozen staffers ran up hundreds of thousands of dollars in legal fees. Hillary Rodham Clinton's former chief of staff Margaret Williams's bill came to \$350,000. Adviser Harold Ickes left the administration owing \$250,000.").

Law firms and businesses also must bear significant costs. *See, e.g.*, Dreyfuss, *supra* note 23, at 12 (noting the plight of Kramerbooks, a local Washington, D.C. bookstore that attempted to fight a subpoena from Kenneth Starr's office). Although a law firm or a company such as Kramerbooks may have deeper pockets than a subpoenaed government employee, the cost still is significant.

²⁹ *See* Ingram, *supra* note 1, at 770.

The potential for abuse of power is exceeded only by the near certainty of unequal treatment. Even if the IC does not abuse his powers in the sense of employing them for improper purposes, it is likely that the target of the investigation will be subjected to scrutiny that is longer, more intensive, more invasive and more public than that which the average citizen would suffer.

Id.

For another description of the manner in which independent counsel investigations are different than normal prosecutorial investigations, *see* Schultz, *supra* note 1, stating:

Past experience illustrates that the independent counsel process imposes three types of extraordinary financial burdens. First, burdens arise from what the *Noziger I* court described as the "special limitations and procedures created by the Act." These are requirements that impose a different, more rigorous, standard of the criminal law on an individual covered by the Act. For example, the evidentiary and time

tigation may qualify for reimbursement of reasonable attorneys' fees,³⁰ no such repayment is available for others who are caught in, but are not the subject of, such an inquiry.³¹ Furthermore, complications may arise if individuals accept free legal service or if attorneys forebear or forgive payments.³²

With the weighty concerns facing all who are connected with government service, attention to the fairness of financial reimbursement for expenses incurred during an independent counsel investigation is imperative. With the current incarnation of the Independent Counsel Statute set to expire on June 30, 1999,³³ the problem of

requirements placed on the Attorney General's preliminary investigation may cause an individual to be investigated where the case otherwise would be quickly dismissed The opinion in *Nofziger I* held that only these expenditures would be reimbursed.

Second, additional burdens are imposed by the requirements of the Act making investigations under the Act inherently different from other investigations. For example, the independent counsel is a private attorney. Subjects of independent counsel investigations may incur extraordinary fees raising and addressing conflict of interest issues stemming from the independent counsel's law practice.

Third, factors external to the statutory mechanism also impose burdens. For example, independent counsel investigations require final reports that invite intense media scrutiny. Knowing this, an independent counsel may feel compelled to investigate allegations more exhaustively than would Department of Justice in order to protect his own reputation. In addition, attorneys' fees may be incurred merely answering media inquiries.

Id. at 1353-54 (footnotes omitted); see also Page, *supra* note 9, at 1A. Page writes: [T]he naming of a special counsel paints a bull's-eye on the backs of those being investigated. Even minor figures are subject to intense scrutiny. Peripheral accusations that a regular government prosecutor would be likely to dismiss as not worth pursuing become the stuff of serious prosecution. "A U.S. attorney has hundreds of thousands of cases to look at and a need to make cost judgments about what is worth pursuing," [former Independent Counsel Joseph] diGenova says. "The truth is, because of the way the Independent Counsel Statute works, things a U.S. attorney would never investigate get investigated under this statute because the independent counsel has one and one case only."

*Id.*³⁰ For a discussion of the provisions of the Independent Counsel Statute that deal with attorneys' fees, see *infra* notes 35-79 and accompanying text.

³¹ These individuals must rely on ad hoc measures such as private legislation and legal defense funds. These, in turn, raise a host of problems. See generally Clark, *supra* note 10 (discussing a variety of measures, as well as the accompanying legal risks and practical impediments, by which an individual may seek to raise money to cover his attorneys' fees).

³² See generally *id.* (discussing the many ways in which government employees may seek to pay for legal representation and the legal difficulties inherent in each method).

³³ The Independent Counsel Reauthorization Act of 1994 reauthorized the in-

the reimbursement of attorneys' fees — for subjects of, witnesses for, and other individuals involved in an independent counsel investigation — surely will be a topic of significant congressional and public debate. This Article seeks to frame the debate by proposing an Independent Counsel Reimbursement Act (ICRA) modeled to balance important public policy issues surrounding the use of an independent counsel.³⁴ Before ICRA is discussed, a brief description of the current method of reimbursing attorneys' fees and expenses incurred in independent counsel investigations is provided as a necessary point of comparison.

II. THE OPERATION OF THE CURRENT ATTORNEYS' FEES PROVISION

Shortly after the enactment of the Ethics in Government Act of 1978, it became apparent to Members of Congress that individuals

dependent counsel for five years from its enactment on June 30, 1994. The statute as codified reads as follows:

This chapter shall cease to be effective five years after the date of the enactment of the Independent Counsel Reauthorization Act of 1994, except that this chapter shall continue in effect with respect to then pending matters before an independent counsel that in the judgment of such counsel require such continuation until that independent counsel determines such matters have been completed.

28 U.S.C. § 599 (Supp. 1998).

³⁴ This Article does not address suggested amendments to provisions of the Independent Counsel Statute that do not deal with attorneys' fees. Many individuals have weighed in on the subject of the reform of these other provisions. An indication of the breadth of the suggestions may be derived from the following — admittedly non-random — sampling of articles: Maskell, *supra* note 1; J. Harvie Wilkinson, III & T.S. Ellis, III, *The Independent Counsel Process: Is It Broken and How Should It Be Fixed*, 54 WASH. & LEE L. REV. 1515 (1997) (discussing the existence and nature of problems with the independent counsel process and how these problems might be remedied); Bendavi, *supra* note 10, at 1 ("Proposals for fixing the process include making it harder for independent counsels to expand their scope, giving Congress more control over how much the prosecutors spend, and making it easier for targets to win attorney's fees if cleared."); Comment: *Reform Special Counsel Law*, *supra* note 9, at 12A (discussing reforms proposed by former independent counsels and discussing the "criticisms, cautions and suggestions" offered by "several former independent counsels"); Eastland, *supra* note 9; Kenneth Jost, *Critics Urge Changes in Laws Governing Independent Counsel*, PORTLAND OREGONIAN, Mar. 6, 1997 (discussing the views of supporters and opponents and quoting President Clinton as stating, "This special counsel thing ought to be reviewed because the costs outweigh the benefits."); Alexia Morrison, *A Look At . . . The Office of Independent Counsel: The Law Has Independence and Accountability as Well*, WASH. POST, Feb. 22, 1998, at C3; O'Rourke, *supra* note 9, at A17 (discussing various lawmakers' perspectives on the current independent counsel law, as well as their suggestions for reform); Edith Paal, *Senate Candidate Outlines Special Prosecutor Reform Proposal*, ASSOCIATED PRESS POL. SERV., Feb. 16, 1998 (discussing changes to the independent counsel law proposed by Nate Coulter, at the time a Democratic candidate for a United States Senate seat from Arkansas); Jonathan Weisman, *Both Parties Eye Revamping Rules for Special Prosecutor; Law Governing Scope of Counsel's Powers Expires in June '99*, BALT. SUN, Mar. 29, 1998, at 1A.

who otherwise would not have been investigated by a neutral Department of Justice might become the subjects of an independent counsel investigation and that the attorneys' fees incurred by those individuals could be substantial.³⁵ The Ethics in Government Act of 1978 expired after five years, in 1982.³⁶ When it was renewed for an additional five years by the Ethics in Government Act Amendments of 1982, the statute was amended to provide that a subject of an independent counsel's investigation who was not indicted might be eligible for reimbursement of his attorneys' fees:³⁷

Upon the request of an individual who is the subject of an investigation conducted by an independent counsel pursuant to this chapter, the division of the court may, if no indictment is brought against such individual pursuant to that investigation, award reimbursement for those reasonable attorneys' fees incurred by that individual during that investigation which would not have been incurred but for the requirements of th[e Independent Counsel Statute].³⁸

The statute establishes six conditions that must be satisfied prior to recovery of attorneys' fees: (1) No indictment was brought against the fee applicant as a result of the independent counsel's investigation, (2) The applicant must have been a "subject" of the investigation, (3) The fees must have been "incurred," (4) The time at which the fees were incurred must have been "during" the investigation, (5) The fees would not have been incurred "but for" the requirements of the Independent Counsel Statute, and (6) The fees were "reasonable."³⁹ Even if these conditions are met, the statute provides for permissible reimbursement. The court "may," but need not, order reimbursement. Indeed, Congress appears to intend the attor-

³⁵ See S. REP. NO. 97-496, at 18 (1982), *reprinted in* 1982 U.S.C.C.A.N. 3537, 3554 (indicating that the attorneys' fees incurred by Hamilton Jordan exceeded \$1 million even though no indictment was issued and discussing the possibility that the independent counsel might take actions — with resulting expenses — that would not have been taken by the Department of Justice).

³⁶ See 28 U.S.C. § 599 (1978).

³⁷ See Ethics in Government Act Amendments of 1982, Pub. L. No. 97-409, § 5, 96 Stat. at 2041 (codified as 28 U.S.C. § 593(f)). For a general discussion of the amendment of the independent counsel laws to provide for reimbursement of attorneys' fees, see Schultz, *supra* note 1, at 1321-22 nn.75-83 and accompanying text. See also S. REP. NO. 97-496, at 18-19, *reprinted in* 1982 U.S.C.C.A.N. at 3554-55 (examining substantial attorneys' fees generated by independent counsel investigations and indicating that the burden would be reduced through reimbursement).

³⁸ 28 U.S.C. § 593(f)(1).

³⁹ See *id.*

neys' fee provision to be narrowly construed and only infrequently to result in the award of fees.⁴⁰

To provide context for ICRA, in the next six sections I briefly explore these requirements.

1. No Indictment. The first requirement for reimbursement is that "no indictment is brought against . . . [the] individual [who is seeking reimbursement] pursuant to the investigation."⁴¹ The "no indictment" requirement is not problematic for the overwhelming majority of the many individuals who play even important roles in an investigation by being questioned informally, by serving as witnesses before a grand jury or at a criminal trial, or by otherwise providing information or other evidence of some kind.

On the other hand, the "no indictment" requirement is problematic for, and works a hardship on, many categories of individuals who arguably ought to be at least partially reimbursed. The statute bars reimbursement to someone who was indicted, even though the indictment subsequently is dismissed in whole or in part,⁴² the indi-

⁴⁰ In the Conference Report accompanying the Independent Counsel Reauthorization Act of 1994, Congress addressed its intent concerning attorneys' fees when it stated:

Since the inception of the attorney fee provision, Congress has intended it to be narrowly construed. The conferees believe detailed analyses of fee requests by both the Department and independent counsel . . . will aid the special court in keeping to a narrow construction

Such recent court decisions suggest that the special court may be viewing the attorney fee provision as one which should routinely result in fee awards. That has not been Congress' intent because, were it not for the existence of the Independent Counsel Statute, the Department of Justice may well have investigated these same matters and, had it done so, no attorney fees would be recoverable under any circumstances. The court has, on occasion, accurately quoted legislative history stating that an attorney fee award under the independent counsel law "is warranted, if at all, in only rare instances" and "should not become a routine event." In reauthorizing the statute, the Congress reaffirms its original intent, as reflected in legislative history, that the special court construe the "but-for" requirement of the attorney fee provision narrowly.

H.R. CONF. REP. NO. 103-511, at 13-14, *reprinted in* 1994 U.S.C.C.A.N. 792, 796-97.

⁴¹ 28 U.S.C. § 593(f).

⁴² See Clark, *supra* note 10, at 82. However, Clark indicates that the nature of the dismissal may influence whether recovery of attorneys' fees is permissible. See *id.* at 82 n.77. If the indictment is dismissed because the Attorney General declines to declassify documents that would serve as evidence, a petitioner has been denied fees. See *In re North* (Fernandez Fee Application), 37 F.3d 663, 663-65 (D.C. Cir. 1994). On the other hand, the court in *In re Nofziger*, 925 F.2d 428, 434-35 (D.C. Cir. 1991) (*Nofziger I*), indicated that if an indictment fails to allege all the elements required to make out a case, the purported indictment is invalid and does not prevent attorneys'

vidual subsequently is acquitted on some or all counts,⁴³ or the individual subsequently prevails on appeal, either partially or in total. It also has been argued that the requirement presents the opportunity for coercive pressure to be employed by an independent counsel.⁴⁴

2. Subject. The second requirement for reimbursement is that the individual seeking reimbursement was a "subject of an investigation conducted by an independent counsel pursuant to this chapter." Although the term "subject" is not defined statutorily, it has been defined judicially⁴⁵ to include any individual "whose conduct was within

fees from being awarded. *See id.*

⁴³ *See Clark, supra* note 10, at 82.

⁴⁴ *See, e.g.,* H.R. REP. NO. 103-224, at 36 (1993). The legislative history indicates that

[t]he attorneys' fees provision in the Independent Counsel law has also been the focus of considerable criticism. Under 28 U.S.C. § 593(f) (1), an individual receives attorneys' fees only "if no indictment is brought". This particular provision has been used as a means of intimidation by various independent counsels — i.e., to "encourage" individuals to become "cooperative witnesses" or otherwise face an overwhelming burden on their personal financial resources.

Id.

⁴⁵ Part of the reason why a statutory definition of "subject" is not feasible is the wide range of individuals who might be involved in an independent counsel's investigation and the changing nature of the independent counsel's actions with respect to some of them. Clark provides a particularly clear summation of the problem:

In the course of their investigations, ICs have summoned hundreds of persons to testify before grand juries and have interviewed thousands more. Many of these witnesses have been government employees. Persons who have contact with an IC investigation fall somewhere on the following continuum: At one extreme lie those high-level officials whose allegedly illegal acts have caused the Attorney General to seek appointment of an IC in the first place; such persons clearly fall within the definition of "subject," as do those persons who have been notified by the IC that they are subjects. At the other extreme lie government employees who may have had some contact with the high-level official being investigated and who are questioned or called to testify as witnesses; such "mere witness[es]" do not qualify for reimbursement of their legal fees. For example, a person who was simply required to produce documents and who was neither a principal nor an agent in the matters being investigated is not a "subject," even if she is interviewed by IC staff and required to appear before the grand jury to testify regarding the documents. But in between these two extremes lie countless government officials and others who have had continuing contact with the alleged wrongdoer and may have witnessed her conduct over extended periods of time. As an IC investigation progresses and expands, the IC's focus may turn from the initial underlying conduct of the high-level official to the issue of whether anyone obstructed the IC's investigation. For government officials who have worked extensively with the subject of the investigation, the IC may want particularly detailed information about their interactions with the subject. If questions are later raised about the veracity of such a "mere

the scope of the grand jury investigation . . . [and] would lead a reasonably counseled person . . . to believe that there was a realistic possibility that he would become a defendant.”⁴⁶ The term also has been described as being “roughly equivalent to ‘potential defendant.’”⁴⁷ It also is clear that an individual is a subject of an investigation if the independent counsel specifically tells him that he is a subject.⁴⁸

A person may fall within the definition of a “subject” for some period and then be excluded.⁴⁹ In addition, a person may meet the requirement for being a subject for some aspects of an investigation, but not for other aspects of the same investigation.⁵⁰

witness’s” responses, that witness may well become the subject of an investigation for false statements, perjury, or obstruction of justice.

Clark, *supra* note 10, at 83-85 (footnotes omitted).

⁴⁶ *In re North* (Dutton Fee Application) [hereinafter *Dutton*], 11 F.3d 1075, 1079 (D.C. Cir. 1993); see also *In re Eli J. Segal* (Sagawa Fee Application), 151 F.3d 1085, 1088 (D.C. Cir., Spec. Div. 1998) (“We have previously defined the term ‘subject’ as a person whose conduct is within the scope of the independent counsel’s investigation such that ‘the Independent Counsel might reasonably be expected to point the finger of accusation’ at her.”); *In re North* (Shultz Fee Application), 8 F.3d 847, 850 (D.C. Cir., Spec. Div., 1993) (per curiam).

⁴⁷ *In re North* (Gardner Fee Application), 30 F.3d 143, 146 (D.C. Cir. 1994) (“The term ‘subject’ is roughly equivalent to ‘potential defendant.’”) (quoting *Dutton*, 11 F.3d at 1078-79).

⁴⁸ See, e.g., *In re Eli J. Segal* (Sagawa Fee Application), 151 F.3d at 1088. Sagawa states that she was expressly informed by the IC’s office that she was a subject of the investigation; the IC does not contest this assertion, noting that he communicated Sagawa’s subject status to Sagawa’s attorneys. There is no indication that this status changed prior to the termination of the investigation.

Id.; see also, e.g., *In re North* (Haskell Fee Application), 74 F.3d 277, 280 (D.C. Cir., Spec. Div., 1996) (per curiam) (“The fact that the IC’s office told Haskell that he was a subject makes it clear that he meets the subject requirement.”).

⁴⁹ See, e.g., *In re Eli J. Segal* (Segal Fee Application), 145 F.3d 1348, 1351-52 (D.C. Cir., Spec. Div. 1998). The D.C. Circuit, in *Segal* noted:

Segal states that he was advised at the outset of the IC’s investigation that he was considered the primary target; the IC substantiates this, noting that Segal’s subject status was communicated to Segal’s attorneys. However, on June 16, 1997, the IC notified Segal that criminal charges would not be pursued against him. As Segal admits, this notification took him outside the definition of “subject” for purposes of attorneys’ fees reimbursement. Consequently, we will deduct fees that were incurred after this change in Segal’s status, except in connection with the Final Report.

Id.

⁵⁰ See *Legal Bills: Who Will Pay Them in Whitewater Probe*, ASSOCIATED PRESS POL. SERV., May 3, 1998 (discussing the fact that “many [individuals] lie in between witness and subject” and indicating that, diGenova, a former independent counsel, has observed that “some people might qualify for fees for one aspect of the investigation in which they are subjects, but not for other portions in which they are witnesses”).

3. Incurred.⁵¹ A third, and frequently overlooked, requirement is that the attorneys' fees be "incurred." A standard dictionary definition of "incur" means "to become liable or subject to."⁵² Thus, the fee arrangement between each subject and his attorney must be examined to see the extent to which the subject is liable for the attorney's fees. It would appear that an individual who has pro bono counsel or whose fee arrangement with counsel is too vague to require payment has not incurred fees because he faces no liability; therefore, he is not entitled to reimbursement.⁵³ On the other hand, a subject may seek reimbursement if a fee arrangement contains the attorney's agreement to "accept the amount the court awarded unless the three-judge panel 'were to substantially deny payment.'"⁵⁴ In any event, it reasonably may be asserted, as did the independent counsel with respect to Edwin Meese, that "a determination is required to determine what fees, if any, [an individual] has actually obligated himself to pay counsel in connection with [an] investigation."⁵⁵

4. During. The fourth requirement is that the "attorneys' fees [have been] incurred by that individual during [the independent counsel's] investigation."⁵⁶ "[T]he maximum period for which fees can be sought [runs] from the time an Independent Counsel [is appointed] to the deadline for filing comments to the final report."⁵⁷

⁵¹ This section is based on the discussion by Clark, *supra* note 10, at 106-07 nn.214-15 and accompanying text.

⁵² See MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 590 (10th ed. 1993).

⁵³ See Clark, *supra* note 10, at 106 n.214 (stating that "[i]n a few cases, the court paid close attention to the statutory language and refused to award any fees where the lawyer had agreed not to charge the client") (citations omitted).

⁵⁴ *Id.* (citations omitted). Clark states:

For example, while Edwin Meese was investigated by Independent Counsel Jacob Stein, Meese's retainer agreement with his law firm "provided that the firm would accept the amount the court awarded unless the three-judge panel were to substantially deny payment." The firm claimed \$533,327 in legal fees, but accepted the court's award of \$357,515 as full payment Another Meese lawyer, E. Robert Wal-lach, said he "considered his \$76,870 portion of the award full compensation for my legal services," even though he had submitted a bill for \$142,562.

Id. (citations omitted).

⁵⁵ Fred Strasser & David Lauter, *\$720,000 Bill Raises Host of Issues: Does Meese Have to Pay Lawyers?*, NAT'L L.J., Feb. 11, 1985, at 5 (quoting Jacob Stein, who was the independent counsel for the investigation of Edwin Meese).

⁵⁶ 28 U.S.C. § 593(f) (1987).

⁵⁷ *In re* Eli J. Segal (Sagawa Fee Application), 151 F.3d 1085, 1088 (D.C. Cir., Spec. Div. 1998). In *In re* Segal, the bracketed material read "begins an investigation of an individual." *Id.* When discussing the facts of the case, however, the court stated:

The relevant period in this case is from November 27, 1996, when IC

5. But For.⁵⁸ The fifth requirement for reimbursement is that the “attorneys’ fees [were] incurred by that individual during that investigation which would not have been incurred but for the requirements of th[e Independent Counsel Statute].” The “but for” requirement was added to the Independent Counsel Statute in 1983 due to a congressional perception “that high-level government officials had been investigated for minor offenses that would not have been investigated, let alone prosecuted, in the case of ordinary citizens.”⁵⁹ A panel of the District of Columbia Circuit explained:

The purpose of limiting fee awards to fees that would not have been incurred “but for” the Act is to ensure that “officials [and here derivative ‘subjects’] who are investigated by independent counsels will be subject only to paying those attorneys’ fees that would normally be paid by private citizens being investigated for the same offense by” federal executive officials such as the United States Attorney.⁶⁰

von Kann was appointed, to October 20, 1997, the deadline for filing comments to the final report. Sagawa is asking for reimbursement for the time period of March 21, 1997, when she retained counsel, until September 12, 1997, the date she reviewed the IC’s final report. Without question the fees and expenses claimed by Sagawa were incurred during the appropriate time period.

Id.; see also *In re Eli J. Segal* (Segal Fee Application), 145 F.3d 1348 (D.C. Cir., Spec. Div. 1998). The court indicated that it had

identified the maximum period for which fees can be sought as spanning from the time an IC begins an investigation of an individual to the deadline for filing comments to the final report [but later concluded] that [t]he relevant period in this case is from . . . when IC von Kann was appointed” and that Segal’s counsel has reviewed the billings and rightly excluded all fees incurred prior to the appointment of the IC. We find that the remaining entries fall within the relevant period.

Id. at 1352.

⁵⁸ The discussion of the “but for” requirement relies heavily on Clark, *supra* note 10, at 85-87 for organization and content.

⁵⁹ *Id.* at 85. The Congress clearly perceived a problem, stating:

Finally, another limit on recovery of attorney fees requires further explanation — the statutory direction that only those fees may be recovered which would not have been incurred “but for” proceedings under the independent counsel law. This provision was included in the statute in 1982, because Congress learned that certain government officials, Hamilton Jordan and Timothy Kraft, had been subjected to investigations by independent counsels that the Department of Justice would not have conducted had these officials been private citizens. These officials, whose cases were closed without indictment, were alleged to have used or possessed a minimal amount of cocaine. Under established policy, the Department of Justice does not perform federal criminal investigations of such allegations.

H.R. CONF. REP. NO. 100-452, at 31 (1987), *reprinted in* 1987 U.S.C.C.A.N. 2185, 2197.

⁶⁰ *In re Eli J. Segal* (Sagawa Fee Application), 151 F.3d at 1088 (quoting *In re*

This has proven to be a difficult element to apply.⁶¹ In *In re Nofziger*,⁶² the court limited the scope of the “but for” requirement to situations in which the investigation of a subject involved “alleged criminal activity which is not or is rarely prosecuted by the Department of Justice.”⁶³ The “but for” requirement is fulfilled if the individual applying for fees was “subjected ‘to a more rigorous application of the criminal law than is applied to other citizens.’”⁶⁴ “[M]ore rigorous application of the criminal law” may consist of a more thorough investigation than the Justice Department would have conducted,⁶⁵ an investigation of activities that the Justice Department would not have considered criminal, or a prosecution of a matter the Justice Department never would have prosecuted.⁶⁶

Sealed Case, 890 F.2d 451, 452 (D.C. Cir., Spec. Div., 1989) (per curiam) (citing S. REP. NO. 97-496, at 18 (1982), *reprinted in* 1982 U.S.C.C.A.N. 3537, 3554) (referring to “fees [that] would not have been incurred in the absence of the [Act]”) (alteration in original).

⁶¹ *In re North* (Bush Fee Application), 59 F.3d 184, 188 (D.C. Cir., Spec. Div. 1995) (“The most difficult element for a fee applicant to establish under the Act is that the fees ‘would not have been incurred but for the requirements of [the Act].’”) (quoting *Dutton*, 11 F.3d at 1079).

⁶² *In re Nofziger I*, 925 F.2d 428 (D.C. Cir., Spec. Div., 1991) (per curiam) (discussing in detail the “but for” requirement).

⁶³ *In re Nofziger II*, 938 F.2d 1397, 1401 (D.C. Cir. 1991).

⁶⁴ *In re Sealed Case*, 890 F.2d 451, 453 (D.C. Cir. 1989) (quoting S. REP. NO. 97-496, at 19 (1982)) (citations omitted).

⁶⁵ *Id.* at 453-54 (noting that legal fees were awarded after the court concluded the Justice Department would not have reviewed six more years of tax returns than were under scrutiny).

⁶⁶ The court may make this determination from the statement made by the Attorney General to the court at the time the Attorney General seeks the appointment of an independent counsel. For example:

Here, the Attorney General, in her Application to the court requesting the appointment of an independent counsel, stated: Although the Department of Justice would in all likelihood exercise its discretion to decline to prosecute this case as a criminal matter . . . I nevertheless am compelled by the terms of the Independent Counsel Act to apply for the appointment of an Independent Counsel. Application to the Court Pursuant to 28 U.S.C. § 592(c) (1) for the Appointment of an Independent Counsel, *In re Eli J. Segal*, Division No. 96-1 (D.C. Cir., Independent Counsel Division) (filed October 30, 1996) at 2. Given this statement by the Attorney General, we are persuaded that Sagawa would not have incurred the attorneys’ fees at issue “but for” the requirements of the Act.

- *In re Eli J. Segal* (Sagawa Fee Application), 151 F.3d 1085, 1089 (D.C. Cir., 1998) (Division for the Purpose of Appointing Independent Counsels Ethics in Government Act of 1978, as Amended); *see also In re Donovan*, 877 F.2d 982, 987-88 (D.C. Cir. 1989) (finding that the “but for” requirement was satisfied where the court concluded that an investigation by the Department of Justice would have resulted in the conclusion that there was no merit to the allegations against Donovan).

6. The Attorneys Fees Be "Reasonable." The sixth requirement for reimbursement is that the attorneys' fees be "reasonable." The statute does not define "reasonable," leaving the matter to judicial interpretation. The determination of whether attorneys' fees and expenses are reasonable is highly fact-specific and asks whether the hourly rates "comport with prevailing community standards and are within the realm of reasonableness,"⁶⁷ "whether the time"⁶⁸ expended by [the fee petitioner's] attorneys on her representation was reasonable" in light of the actions taken and their importance to the representation,⁶⁹ and whether efforts are duplicative⁷⁰ or "a self-inflicted

⁶⁷ *In re* Eli J. Segal (Sagawa Fee Application), 151 F.3d at 1089.

In the Conference Report accompanying the Independent Counsel Reauthorization Act of 1994, Congress provides considerable guidance on the issue of what constitutes "reasonable" attorneys' fees. Congress indicates that

the conferees note that Congress did not intend that properly recoverable attorney fees under this statute be construed to be what the market will bear in the private sector. Rather, Congress intends that the reasonableness of attorney fee requests under the independent counsel law be judged, not solely with reference to the rates commanded by expensive legal counsel, but also with reference to what cost is reasonable for the taxpayers to bear.

H.R. CONF. REP. NO. 103-511, at 14, *reprinted in* 1994 U.S.C.C.A.N. 792, 797. In addition, the conferees examined the projected hourly rate of pay for the independent counsel and the limits on hourly rates under the Equal Access to Justice Act and the Criminal Justice Act of 1984. *See id.* at 14-15, 1994 U.S.C.C.A.N. at 797-78. The conferees conclude with the statement:

Although by design the independent counsel law does not impose a specific ceiling on the hourly rates payable to defense counsel, hourly rates of \$300 and \$400 generally so far exceed other statutorily approved rates that they should not be fully recoverable under the independent counsel law. While individuals remain free, of course, to employ any defense counsel they choose, they should be on notice that the independent counsel law may not authorize payment of taxpayer dollars to reimburse fully all of the fees they incur.

Id. at 15, 1994 U.S.C.C.A.N. at 798.

⁶⁸ *See* H.R. CONF. REP. NO. 100-452, at 31 (1987), *reprinted in* 1987 U.S.C.C.A.N. 2185, 2197 ("Also, in determining the amount of attorneys' fees to be awarded, the special court should pay particular attention to the reasonableness of the underlying items . . . [and] to the number of hours claimed for performing particular services, again to ensure the reasonableness of the underlying item.").

⁶⁹ *In re* Eli J. Segal (Sagawa Fee Application), 151 F.3d at 1089 (citing *In re* Meese, 907 F.2d 1192, 1201 (D.C. Cir., Spec. Div., 1990) (per curiam)); *see also* H.R. CONF. REP. NO. 100-452, at 31 (1987), *reprinted in* 1987 U.S.C.C.A.N. 2185, 2197 ("Also, in determining the amount of attorneys' fees to be awarded, the special court should pay particular attention to the reasonableness of the underlying items. Reimbursable attorneys' fees are for reasonable legal expenses arising from the independent counsel process.").

⁷⁰ *See In re* Eli J. Segal (Sagawa Fee Application), 151 F.3d at 1089-90. The court noted that it

[A]gre[ed] . . . that a subject's representation by more than one attor-

wound.”⁷¹ In addition, the courts examine the specificity of the documentation indicating the legal services performed,⁷² whether the travel expenses meet the standard that “expenses for travel are not reimbursable ‘in the absence of some showing that local counsel could not have rendered the service involved and thereby obviated the necessity of employing an attorney’ who incurs costs traveling from his home to the work site.”⁷³

Although the Ethics in Government Amendments Act of 1982 included a provision that permitted attorneys’ fees to be reimbursed in limited circumstances, the legislative history of the 1982 Act made it clear that Congress did not intend for reimbursement to occur routinely. Senate Report 97-496, which concerned the 1982 Act, indicated that because the 1982 Act made changes

in the standards which trigger a preliminary investigation and an appointment of a special prosecutor, . . . covered officials will not be subjected to a more rigorous application of the criminal law than is applied to other citizens. Thus, the Committee believes that reimbursement of attorneys’ fees would be warranted, if at all, in only rare instances. Th[e] amendment [to the original legislation to include a provision permitting reimbursement of attorneys’ fees in limited circumstances is made], however, as a safeguard to compensate officials in the event that they do incur extraordinary expenses during a special prosecutor investigation which eventually absolves them of any wrongdoing. Reimbursement may be warranted, for example, in instances where the special prosecutor duplicates actions which have been taken by the

ney in a meeting with the IC may be duplicative. But [where] the initial meeting with attorneys from the IC’s office, the purpose of which was for her attorneys “to learn the scope of the investigation and the particular allegations under investigation[.]” [then] “[h]aving two attorneys at such an important initial meeting with the IC’s office is not unreasonably duplicative”.

Id. (citations omitted).

⁷¹ *In re* Eli J. Segal (Segal Fee Application), 145 F.3d 1348, 1353 (D.C. Cir., Spec. Div. 1998) (concluding that the attorneys’ fees and expenses incurred by petitioner in asserting attorney-client and work product privilege were legitimate and were not, as the independent counsel asserted, a “self-inflicted wound” for which Congress did not intend the fees and expenses incurred to be paid by the taxpayers”).

⁷² *See id.* (finding fees to be reasonable after review of time sheets and attorney affidavit that provided detailed information about time billed); *see also In re* North (Corr Fee Application), 56 F.3d 261, 264 (D.C. Cir., Spec. Div. 1995) (per curiam) (fees determined to be reasonable after review of time sheets and attorney affidavit that provided detailed information about time billed).

⁷³ *In re* Eli J. Segal (Segal Fee Application), 145 F.3d at 1353 (quoting *In re* North (Bush Fee Application), 59 F.3d 184, 194 (D.C. Cir., Spec. Div. 1995) (per curiam)); *see also In re* North (Dwyer Fee Application), 120 F.3d 293, 298 (D.C. Cir., Spec. Div. 1997) (per curiam).

Attorney General during the preliminary investigation. The Committee stresses, however, that the court should award attorneys' fees sparingly, and that reimbursement should not become a routine event.⁷⁴

The 1982 amendment undoubtedly went far to protect subjects of an investigation. Many, however, including this author, believe the 1982 amendment did not go far enough. It has been suggested, for example, that the payment of reimbursable attorneys' fees be made mandatory and that coverage be included to embrace the period of investigation, trial, and appeal in the situations in which a subject of an investigation was indicted but acquitted or when, although convicted, the conviction was overturned on appeal.⁷⁵

It also has been suggested that "a witness in an investigation"⁷⁶ be awarded otherwise reimbursable attorneys' fees. Currently, no reimbursement is available to individuals "who must hire a lawyer if they are unfortunate enough to have some peripheral knowledge about a matter being investigated by an independent counsel."⁷⁷

Several avenues are — at least in theory — available to the individual who has incurred attorneys' fees in conjunction with an independent counsel's investigation. Book contracts, speaker's fees, and legal defense funds have been mentioned.⁷⁸ Unfortunately, these mechanisms are not realistically available to the average person — government employee or "outsider" — who is questioned by the independent counsel, who is called or subpoenaed by the independent counsel, or who provides documents to the independent counsel.

⁷⁴ S. REP. NO. 97-409, at 19, *reprinted in* 1982 U.S.C.C.A.N. 3537, 3555; *see also* Morrison, *supra* note 34, at C3; *In re Nofziger* (Bragg Fee Application), 956 F.2d 287, 289 (D.C. Cir. 1992) (explaining that "the right to recover attorney's fees is based on a waiver of the sovereign immunity of the United States [which is to be] strictly construed against the applicant").

⁷⁵ *See, e.g.*, H.R. 117, 105th Cong. § 8 (1997) (seeking to amend the Independent Counsel Statute to require the special court to award attorneys' fees not only when no indictment is brought, but also "if such individual is acquitted of all charges or no conviction is obtained against such individual at a trial brought pursuant to that investigation or if the conviction of that individual is overturned on appeal"); H.R. 139, 105th Cong. § 6 (1997) (seeking to amend the Independent Counsel Statute to require the special court to award attorneys' fees not only when no indictment is brought, but also "if such individual is acquitted of all charges, or no conviction is obtained against such individual, at a trial brought pursuant to that investigation, or if the conviction of such individual at such a trial is overturned on appeal").

⁷⁶ H.R. 117, § 8.

⁷⁷ Morrison, *supra* note 12, at A15. Morrison also notes that most individuals in this situation would be unable to pay for an attorney through book contracts, speaker's fees, or legal defense funds. *See id.*

⁷⁸ *See generally* Clark, *supra* note 10 (discussing each of these ideas in detail).

Independent counsel fee insurance also has been mentioned as a means of protecting government employees.⁷⁹

This author believes that the existing statutory scheme for reimbursement of attorneys' fees in independent counsel investigations does not fully take into account the political use to which the Independent Counsel Statute often has been put, the disincentives to public service that are thereby created, the injustice of pitting a resource-rich independent counsel against less-equipped opponents, and the injustice of requiring innocent, and most frequently cooperative, witnesses to incur substantial attorneys' fees to avoid inadvertent criminal liability and to minimize damage to their reputations and careers in situations not of their own making.

In Appendix A, I use certain portions of the Introductory Comments, model statutory provisions, and model official comments from the Model Business Corporation Act's (MBCA) provisions from Chapter 8 (Directors and Officers), Subchapter E (Indemnification and Advance for Expenses) as a basis of the organization and language of a proposed ICRA. Significant editorial revision to the MBCA has been made to tailor the indemnification and reimbursement provisions to the context of the independent counsel's activities. ICRA addresses the panoply of policy and practical concerns surrounding reimbursement of attorneys' fees. ICRA provides mandatory reimbursement for a wide range of individuals and permissible reimbursement of others. Organizationally, like the MBCA, ICRA consists of an introductory section, which illuminates ICRA's underlying policies, followed by both proposed statutory provisions and official comments, which both explain the policies and purposes which animate the statute and provide examples of the statute's application.

⁷⁹ See *id.* at 111-13 (examining insurance as an option for protecting government employees); see also Morrison, *supra* note 12, at A15. For the use of insurance policies by the President in the Paula Jones matter, see Levin, *supra* note 16, at A19. See also Mark R. Levin, *Woe Isn't Mr. Clinton*, WASH. TIMES, Jan. 6, 1998, at A15 (indicating that "the bulk of Bill Clinton's legal expenses in the Paula Jones sexual harassment suit have already been reimbursed by two insurance companies, State Farm Fire and Casualty Co. and Pacific Indemnity Co. Yes, they recently dropped their coverage after Miss Jones dropped her state defamation claim against the president").

Although insurance for government employees does have some merit, the cost of the insurance would constitute a disincentive to government service. Further, it would not provide any assistance to the many non-governmental individuals who become ensnared in an independent counsel investigation.

CONCLUSION

Although it must be reauthorized in 1999, the Independent Counsel Statute is likely to be a part of the political and judicial landscape for the foreseeable future. Recent trends have demonstrated the deleterious impact that an independent counsel investigation can have on both the subject of an investigation and those innocent individuals who are drawn into the investigation. In Appendix A, this Article has proposed a Model Independent Counsel Reimbursement Act that, if adopted, should both permit future independent counsels to pursue their work and protect individuals from the specter of financial ruin.

APPENDIX A

INDEPENDENT COUNSEL REIMBURSEMENT ACT⁸⁰

Introductory Comment

The Independent Counsel Reimbursement Act (the Act or ICRA) provides a comprehensive treatment of the reimbursement for, and advance of, attorneys' fees and expenses (hereinafter Expenses) related to the activities of an Independent Counsel. The Act strikes a considered balance among important social policies and reflects a substantial departure from the statutory provisions relating to reimbursement of Expenses currently found at 28 U.S.C. § 594(f) and ancillary provisions of the United States Code.

1. Policy Issues Raised by Reimbursement and Advance for Expenses

- A. General Policy Concerns.

Due to the multiplying number of Independent Counsels, the expanding scope of their Investigations, the increasing length and complexity of their activities, and the almost uniform perception that the appointment of, if not the actions by, an Independent Counsel frequently constitutes a weapon in partisan confrontations, it is imperative to contemplate and balance the many policy considerations

⁸⁰ As indicated previously, the Independent Counsel Reimbursement Act is based on — but with substantial revisions, deletions, and additions — Chapter 8, Subchapter E, of the Model Business Corporations Act, reprinted with the approval of the American Bar Foundation. MODEL BUS. CORP. ACT §§ 8.50-53, 8.55, 8.59 (revised through 1998) © 1998 American Bar Foundation.

raised by the effects of the operation of Independent Counsels. An area of significant concern involves the tremendous financial impact that Independent Counsel Investigations and related Proceedings have on the many persons, Subjects and Participants alike, who are involved. More specifically, evidence indicates that Subjects and Participants incur extraordinary Expenses resulting from their legitimate use of counsel.

Traditionally, a person bore the cost of legal representation in criminal matters whether he was merely the subject of a criminal investigation, was the criminal defendant, or stood convicted but was carrying forward an appeal or some other form of appellate review. Witnesses, too, shouldered the cost of any legal representation they thought was necessary and appropriate to protect their interests. Numerous policy reasons and assumptions regarding the operation of the judicial system supported the development of the rule that these individuals would be required to assume the costs of their attorneys' fees and other expenses. These policy reasons and assumptions, however, may not be applicable to the current Independent Counsel system.

First, it was felt that the constitutional, statutory, and other procedural protections for indicted individuals ensured that despite the presumption of innocence at the trial phase there was sufficient evidence of guilt to warrant bringing the weight of the criminal justice system to bear on these individuals. Given the protections and the amount of evidence required for indictment, it seemed only natural that these individuals bear the cost of their attorneys' fees and other expenses. This rationale was strengthened where the individual subsequently was convicted, even if the conviction was later overturned on a technicality. These policy justifications remain intact.

Second, the criminal justice system was seen as being impartial and nonpolitical. Individuals would be investigated, indicted, or charged with a crime and tried for that crime only where the mission of detecting, stopping, and punishing criminal activity entitled the government officials to do so. The impartial, nonpolitical nature of the criminal justice system would ensure that innocent individuals were not harassed and subjected to investigation and prosecution for reasons unrelated to the existence of evidence of their guilt. In addition, the impartial, nonpolitical nature of the criminal justice system would ensure that a witness who testified truthfully would not be subject to politically based charges of obstruction of justice, perjury, and the like. The loud cries that are heard from both political parties about the partisan nature of the Independent Counsel process must

be either bald-faced lies designed for partisan gain or honest perceptions that the appointment of an Independent Counsel and his subsequent activities frequently have partisan motivations.

Third, while the criminal justice system is conviction-oriented, its mission is to apprehend and punish members of an undifferentiated group of people who are guilty of crimes. The system was not designed to target a particular individual or those individuals of a particular ideological persuasion. In addition, the criminal justice system is conviction-oriented, but not in the sense of attempting to find some offense with which a particular individual could be charged and of which he could be convicted. By their very nature, Independent Counsels are appointed to focus their investigatorial and prosecutorial power on one individual or a small group of individuals. Further, Independent Counsels have been criticized for viewing their "success" in terms of their ability to find some offense for which the target of their investigation can be indicted and prosecuted.

Fourth, the criminal justice system's ability to deviate from these basic goals is constrained insofar as the system suffers from a paucity of resources. Individuals in charge of criminal investigations and prosecutions have to allocate their resources in an efficient fashion. There simply are not sufficient resources to continue to investigate an individual until some type of criminal activity is found and then to prosecute him. This ensures that only "good" cases are investigated and "good" cases are prosecuted. In turn, the limited resources of the investigators and prosecutors have the effect of limiting the expenses incurred by the subjects of investigations, those indicted and tried, and witnesses and others involved in a peripheral manner. Independent Counsels possess essentially unlimited resources, and these resources may be directed at an individual for virtually an unlimited length of time. As a result, the Independent Counsel can interview more witnesses, review more documents, and take other actions that will cause any Subject of the Investigation or Related Proceeding to incur substantially more attorneys' fees and related expenses than he would in a traditional investigation.

Fifth, although some criminal investigations and prosecutions take place in the bright glare of media attention, these are few and far between. The general rule that an individual or witness bears the cost of legal representation was formulated in an era in which investigations were not public spectacles and individuals were not tried in the court of — sometimes international — public opinion. Today, Subjects of an Investigation, and witnesses and other peripheral play-

ers who are caught in the spotlight, may have legitimate reasons to fear the damage that might be done to their reputations. Accordingly, they legitimately may require the services of counsel who are not only skilled in their chosen profession, but who also are skilled in dealing with the media.

Finally, the normal functioning of the criminal justice system does not operate as a disincentive to government service. The partisan nature of the Independent Counsel activities, however, combined with the Expenses that routinely are incurred by those who are only peripherally involved in an Independent Counsel's Investigation, act as substantial disincentive to recruiting competent individuals at all levels of government. This is an undesirable impact of the activities of an Independent Counsel.

The mere existence, and certainly the operation of, the Independent Counsel Statute causes the judicial system to deviate substantially from the conditions that were assumed to be the basis for the rule that attorneys' fees and related expenses be shouldered by the subject of a criminal investigation, an indicted individual, a defendant during trial, and a convicted criminal on appellate review. The traditional assumptions that governed the rule that a witness assume his own attorneys' fees and expenses do not govern when an Independent Counsel is involved.

B. Policy Concerns for Individuals Who Are Witnesses or Otherwise Are Peripherally Involved.

Almost all would agree that individuals who are not the Subject of an Independent Counsel's Investigation and who are only peripherally involved in the Investigation should have appropriate protection against being burdened with significant expenses, including attorneys' fees. Frequently, such individuals are relatively low-level, low-paid government employees or others who came either to possess relevant information or are thought by the Independent Counsel to possess relevant information merely as a result of the good-faith performance of their job-related duties or by their social or familial relationship with an individual who is somehow involved in the Independent Counsel's Investigation. It should be remembered that the Independent Counsel quite possibly owes his existence to some partisan conflict; it also should be remembered that if the Independent Counsel did not possess essentially unlimited resources, the witnesses and others might not have been brought into the Investigation or required to participate to the same extent. Reimbursement of (and, sometimes, advance for) reasonable Expenses, including reasonable

attorneys' fees, provides the needed financial protection for these individuals.

Legitimate reasons exist why an individual who is not the Subject of an Independent Counsel's Investigation might wish to retain counsel even if he has committed no wrongdoing and simply is playing a peripheral role in the Investigation or a related Proceeding. The tremendous publicity that accompanies even minimal involvement in the activities of an Independent Counsel, coupled with the deleterious impact on a person's reputation and career, make it understandable that an individual may wish to retain counsel to assist him in protecting his interests and reputation. This is particularly true when the individual is subpoenaed to provide testimony to a grand jury or in any other Proceeding initiated by or resulting from the Independent Counsel's actions. Moreover, grand jury appearances and other Proceedings brought by an Independent Counsel tend to be comparatively high-profile in nature, thus drawing a substantial amount of media attention. Further, because innocent actions, honest misstatements, actual losses of memory, and inadvertent omissions of fact in statements to the Independent Counsel or grand jury may lead to charges of perjury or obstruction of justice, it is important to ensure that an individual is able to afford appropriate and competent legal representation. The combination of media involvement, with the attendant publicity, the political and partisan nature of many Independent Counsel activities, and the possibility of criminal charges being brought requires that specialized, highly competent, and, therefore, highly paid counsel be retained.

Not only is reimbursement for reasonable Expenses, including reasonable attorneys' fees, fundamentally fair to these individuals, but it will contribute to the quality of the operation of the Government. It will become increasingly difficult to persuade responsible and competent individuals to work for the Government or to interact with members of the Government if they are compelled to bear personally the cost of vindicating the propriety of their conduct in every instance in which it might be challenged or in every instance in which they are called upon to provide information to the Independent Counsel's office or to participate in an Independent Counsel-related Proceeding. For reasons of fairness and governmental effectiveness and efficiency, the Government should be forced to bear these reasonable expenses as part of its Investigation. With respect to these individuals, mandatory reimbursement of the entire amount of a Participant's Expenses should be the standard. The Government, not these innocent individuals, should be required to bear the cost of

necessary and appropriate Expenses in its often politically motivated search for justice. Perhaps the knowledge that the Government must bear the cost will force Independent Counsels to be more efficient and focused in their investigations as well.

C. Policy Concerns for Individuals Who Are the Subjects of an Independent Counsel Investigation or Related Proceeding.

The Act also is based on the premise that if a Subject of an Independent Counsel's Investigation and any resulting Proceeding has not acted in an illegal, improper, or inappropriate manner a presumption should exist that mandatory reimbursement is available for Expenses that would not have been incurred but for an Independent Counsel's Investigation and any related Proceeding. However, the Subject ought to be responsible for his Expenses if those Expenses would have been incurred during a non-partisan investigation conducted by, and any related proceeding brought by, the Department of Justice.

At the other end of the spectrum are Subjects who are convicted of criminal activity as the result of an Independent Counsel's Investigation. Particularly if these individuals were members of the Government at the time the criminal activity occurred, they have violated both the law and the public trust. These individuals have forfeited the presumption that they are eligible for reimbursement.

Nonetheless, situations may exist in which fundamental fairness and the desire to avoid driving individuals from public service would suggest that the Government bear at least some of the cost of the Expenses incurred by an individual who was convicted after an Independent Counsel's Investigation.

D. Overall Policy Concerns.

The concept of reimbursement as described in this Act establishes a presumption of the mandatory reimbursement of Expenses for Subjects who have not acted in an illegal manner. The concept also recognizes that there will be situations in which a Subject of an Independent Counsel's Investigation may have engaged in activity that in retrospect can be characterized as illegal, but that in the totality of circumstances is such that the Government should be permitted (or required) to absorb some of the Expenses of a Subject's involvement in an Independent Counsel's Investigation or related Proceeding. Further, reimbursement recognizes that there will be many peripherally involved individuals who have not engaged in any

inappropriate conduct and who should not be required to bear the significant cost of counsel. A carefully constructed reimbursement statute can identify these situations.

If permitted too broadly, however, reimbursement may violate equally basic tenets of public policy. It is inappropriate, for example, to permit individuals to use public funds to avoid the consequences of intentional criminal conduct that violates the public trust. Therefore, an individual who engages in behavior that results in an indictment and conviction for such a crime should not expect to receive assistance from the Government for Expenses and should be required to satisfy from his personal assets not only any liabilities and sanctions, but also Expenses incurred in connection with the Proceeding. Any other rule would tend to encourage socially undesirable conduct and would frustrate the public policy that underlies the federal law.

The fundamental issue that must be addressed by any reimbursement statute is the establishment of policies consistent with these broad principles: to ensure that reimbursement is permitted only where it will further sound public policies and to prohibit reimbursement where it might protect or encourage wrongful or improper conduct. The goals of reimbursement are (a) to find the appropriate balance between discouraging individuals from violating the law and discouraging them from engaging in government service, and (b) ensuring that innocent individuals do not pay too high a price for their involvement in Investigations and related Proceedings conducted under the authority of an Independent Counsel.

Within the general policies previously outlined, there are more specific, and slightly different, policy concerns involved with governmental officials and employees versus individuals outside of Government and those who are a Subject of an Independent Counsel Investigation and those who are not. The various policy concerns will be discussed in the appropriate Official Comment.

2. Application of the Act to Prior Conduct

Absent constitutional or statutory provisions dealing generally with retroactivity of statutory amendments, an individual may make a claim for reimbursement based on personal actions and actions taken by an Independent Counsel that took place prior to the effective date of this Act.

SECTION I: DEFINITIONS

In this Act:

- (1) "Applicant" means any individual, whether Participant or Subject or both, who has applied to the Court for reimbursement or advance of Expenses.
- (2) "Court" means the division established under 28 U.S.C. § 49.
- (3) "Independent Counsel" means the relevant Independent Counsel appointed in compliance with the provisions of Title 28, Chapter 40 of the United States Code, as well as any member of that Independent Counsel's staff, professional and administrative, and, without limitation, any government or non-governmental individual who, or entity which, is participating in the Investigation or a related Proceeding in assistance of the Independent Counsel.
- (4) "Investigation" means any inquiry, activity, or Proceeding conducted by the relevant Independent Counsel pursuant to the authority vested in the Independent Counsel under Title 28, Chapter 40 of the United States Code or by an Attorney General when the investigation by the Attorney General results in the appointment of an Independent Counsel.
- (5) "Expenses" includes (a) attorneys' fees that become billable by, and any legitimate costs incurred or paid for by, an Applicant's attorneys, (b) fees that become billable by, and legitimate costs incurred or paid for by any expert, including but not limited to, individuals with expertise in accounting, financial analysis, statistical analysis, or forensic analysis retained by or on behalf of an Applicant, and (c) any other legitimate costs incurred and paid for by an Applicant who is a Subject or Participant, or both. Expenses shall include the attorneys' fees and other costs involved in collecting information concerning, making application for, and participating in any written or oral arguments concerning an application for reimbursement or advance of Expenses. An Applicant's Expenses shall not include the value of the Applicant's time. Expenses include such matters as the cost of travel, lodging, and meals for the Applicant's attorney(s) and others whose presence is required by such attorney(s), any expert, and the Subject or Participant. Whenever used in this Act,

- “Expenses” shall be read as if it is prefaced by the phrase “necessary and reasonable.”
- (6) “Liability” means the obligation to pay a judgment, settlement, penalty, fine, cost of restitution or imprisonment, or any similar punitive assessment.
- (7) “Official capacity” means acting in the performance of a duty which normally attends one of the government offices that is subject to the scrutiny of a properly appointed Independent Counsel. “Official capacity” also includes any fundraising activity for the Subject or others.
- (8) “Participant” means an individual (a) who is requested by the Independent Counsel to provide, and to the extent of his possession of knowledge, information, documents, and the like does so provide, information, documents, or testimony in conjunction with an Investigation or Proceeding (or does not provide information, documents, or testimony in conjunction with an Investigation or Proceeding based upon the successful assertion of privilege or the like) or who initiates contact with the Independent Counsel and provides information, documents, or testimony, and (b) is not then a Subject of the Independent Counsel’s Investigation. “Participant” shall also include, if required by the context, the individual’s non-governmental employer, estate, devisees, heirs, or judicially appointed personal representative.
- (9) “Proceeding” is intended to be interpreted broadly to include all aspects of any criminal, civil, administrative, or other action undertaken by an Independent Counsel or by a Participant or Subject in response to any aspect of an Investigation or other Proceeding. “Proceeding” also shall include such matters as all aspects of settlement or immunity negotiations or agreements, appeals, petitions for review or rehearing, and rehearings, appeals, or oral arguments after the granting of certiorari.
- (10) “Subject” shall continue to be defined in detail by the judiciary, but it is recognized that under some circumstances an individual may be a Subject or a mere Participant on more than one occasion during a given Investigation or Proceeding.

OFFICIAL COMMENT

The definitions set forth in Section 1 apply only to this Act, and they do not have any application elsewhere in any statutory provision

which relates to the Independent Counsel. Necessary supplementary commentary concerning the provisions follows.

1. Applicant

The definition of Applicant recognizes that an individual who applies for reimbursement or advance of Expenses must be or have been a Participant or a Subject or a person who has occupied both positions at some time during the Independent Counsel's Investigation or during a Proceeding.

2. Expenses

"Expenses" is defined to include attorneys' fees in order to avoid repeated references to such fees every time "Expenses" appears throughout ICRA. "Expenses" includes the fees and costs associated with any necessary expert witness and other witnesses required by a Participant or Subject, as well as the reasonable cost of any study, analysis, engineering report, test, or project which is required by a Participant or Subject. Whether the involvement of an expert or other witness is necessary must be decided on a case-by-case basis. However, if the expert or other witness is retained, or the study, analysis, engineering report, test or project is conducted, in response to the use of a similar expert or other or the use of a similar study, analysis, engineering report, test, or project by the Independent Counsel, the presumption shall be that the Participant's or Subject's retention of a similar individual and the preparation of a similar study, analysis, engineering report, test, or project is necessary.

Whether attorneys' fees, fees paid to an expert or other, or the cost of any study, analysis, engineering report, test, or project are "reasonable" must be decided on a case-by-case basis. In recognition, however, of the essentially unlimited resources possessed by the Independent Counsel, the special expertise that may be possessed by members of the Independent Counsel's staff, and the profound ramifications of being involved, albeit peripherally, in an Independent Counsel Investigation, no artificial cap on hourly rate is intended and it is intended that Participants and Subjects be permitted to retain attorneys within the market rate for attorneys with experience in dealing with Independent Counsel Investigations. This policy is particularly strong with respect to Participants who frequently may be pulled unwillingly into the Investigation or related Proceeding conducted by the Independent Counsel. The same policy is to apply to experts and others and to the production of any study, analysis, engineering report, test, or project.

The Expenses incurred by a Participant or Subject shall not include the value of his or her time.

Within the parameters established by the definition in Section 1(4) and this Official Comment, it is the intent of Congress that "necessary and reasonable" continue to be judicially defined. As indicated in Section 6 of this Act, however, the Department of Justice shall be given the authority to promulgate guidelines to govern this issue.

6. Liability

"Expenses" shall not be construed to include the items listed in the definition of "Liability" and any item which is conceptually similar to those listed. Although the ICRA recognizes that there may be times when a guilty individual should be reimbursed for expenses, it is not the intention of the ICRA that Liabilities be reimbursed or advanced.

7. Official Capacity

"Official Capacity" means acting in the performance of a duty which normally attends one of the government offices set out in 28 U.S.C. §§ 591(b) & (c).

Because of the large number of statutes and regulations that govern fundraising activities, "Official Capacity" also includes any fundraising conducted by, or at the request of, a Subject for himself or for others.

8. Participant

Because of the ICRA's remedial nature, "Participant" is to be broadly construed. The definition of "Participant" includes individuals who may become a Subject, or who may have been a Subject. An individual who is interviewed by the Independent Counsel or who appears, with or without being subpoenaed, as a witness before a grand jury or in a Proceeding is a "Participant" within this definition.

9. Proceeding

"Proceeding" shall be construed expansively to include all listed activities as are related to the Independent Counsel's actions. The broad definition of "Proceeding" is intended to ensure that the benefits of the ICRA will be available to as many individuals, and in as broad a range of situations, as possible. As Investigation is defined to include a "Proceeding," the frequent use of "Investigation or Proceeding," "Investigation or Related Proceeding," and the like is re-

dundant. The redundancy, however, is intended to emphasize that the intent of Congress is to provide, consistent with the provisions of this Act, reimbursement or advance of Expenses in the widest range of situations.

10. Subject

Congress recognizes that an individual may become a Subject and cease to be a Subject. Therefore, the term applies only to that period or those periods of time during which an individual is a Subject. For the purpose of reimbursement or advancement of Expenses, the rule applied shall be determined at the time the Expense was incurred.

SECTION 2: PERMISSIBLE REIMBURSEMENT

- (a) Upon the application of an individual who is or was the Subject of an Investigation conducted by an Independent Counsel, the Court may, even if an indictment was brought against such individual and even if a conviction resulted, award reimbursement for all or some of those Expenses incurred by the Applicant during that Investigation and as a result of any related Proceeding if the Court determines that: (1) The Applicant conducted himself in good faith and reasonably believed the conduct which was the subject of the Investigation or Proceeding was legal; (2) The Applicant received no impermissible financial benefit or received a financial benefit that was minimal in comparison to the Expenses that the Applicant incurred as a result of any Investigation and Proceeding; and (3) The Expenses would not have been incurred but for the requirements of the provisions of Title 28, Chapter 40 of the United States Code.
- (b) The termination of a Proceeding before or after indictment by judgment, order, settlement, or conviction, or upon a plea of *nolo contendere* or its equivalent, is not, of itself, determinative that the Applicant did not meet the factors required for permissible reimbursement.
- (c) Even if the Court determines that the interests of justice warrant reimbursement of some or all Expenses, the Court shall not order the reimbursement of any Liability.
- (d) A Participant or Subject shall not be entitled to reimbursement of, and the Court shall not order the reimbursement of, Expenses to the extent the Applicant has,

by insurance or other contractual or statutory right, the ability to seek reimbursement or indemnification of the Expenses incurred until the Applicant has first exhausted those avenues of reimbursement. This provision shall not require any Applicant to establish a legal defense fund, seek a private bill in Congress, or undertake any other similar fundraising actions to obtain funding for Expenses.

Official Comment

Section 2(a)

Section 2(a) permits, but does not require, the Court to authorize the reimbursement of Subjects if the standard established in Section 2(a) is met. Section 2(a) recognizes that, even though there may have been sufficient evidence to warrant an indictment or a conviction, there may be limited circumstances in which fundamental fairness and the desire to avoid driving individuals from public service would suggest that the Government bear at least some of the Expenses incurred by a Subject. This is particularly important in a process that may be political in nature or in which the essentially unlimited resources of the Independent Counsel resulted in a situation in which the amount of Expenses incurred by a Subject were out of proportion to the crime for which the Subject was indicted and, perhaps, convicted. In such a situation, the Court is to balance the equities in arriving at a decision whether to authorize reimbursement.

The facts and circumstances considered by the Court shall be determined on a case-by-case basis. The statute provides three criteria that must be met for reimbursement to occur. It must be remembered that the Court need not authorize full reimbursement even if these factors are present; rather, these factors permit the Court to attempt to reach a just resolution of the reimbursement matter.

First, the individual must have conducted himself in good faith and with the reasonable belief that his action was legal. No attempt is made to provide a specific definition of good faith or to enumerate the circumstances in which such a finding may be made. It can be said, however, that the "good faith" requirement contains a subjective aspect and an objective aspect. An individual acts in good faith when he subjectively believes he is acting in the best interests of those individuals whom, or entities which, his office is intended to serve; that is, the individual is not acting for selfish or personal motives, even though he may have possessed the intent to act in a manner which, in

hindsight, turns out to be illegal. This concept essentially embodies a "good heart" test.

"Good faith" also embodies an objective "reasonable decision-maker" test. The individual must reasonably investigate the nature of the situation that prompted his action or inaction, as well as the manner in which his decision will be carried out. He may not simply take it on face value that a problem exists or that the information that he is given is valid. He must make reasonable investigation. In addition, he must act with the deliberation and care that an ordinarily prudent decision-maker would exercise in a similar position and similar situation. Moreover, he must exercise reasonable continuing oversight; he may not simply take it on face value that the solution or action that he suggests will be implemented in a lawful manner. Overall, he must act with the care that an ordinarily prudent decision maker would exercise in a similar position and similar situation.

An individual may not turn a blind eye to the legality of the action or inaction. To the extent that the nature of the action would cause a reasonable person to question its legality, the individual must investigate its legality. To the extent that circumstances force the individual to act quickly, without the opportunity to obtain a considered legal opinion, the individual is more likely to have acted appropriately. And, to the extent there was the opportunity to obtain a considered legal opinion from a competent source, the individual is entitled to rely reasonably on the opinion.

To receive reimbursement, the individual must have received little or no financial benefit. To discourage wrongdoing, Section 2(a) bars reimbursement where the Subject has been adjudged to have received a financial benefit to which he is not entitled unless the financial benefit was minimal in comparison to the Expenses which the Subject incurred as a result of the investigation. In general, this section contemplates that the receipt of an improper financial benefit will result in a forfeiture of reimbursement. This section contemplates, however, that the Court will seek justice and will take proportion into account when rendering its decision. For example, assume an individual exercised poor judgment and accepted \$150 worth of football tickets from a company doing business with the government. The official spends \$100,000 during the course of an Independent Counsel Investigation and the structuring of a plea bargain agreement. Justice would seem to permit some recovery of Expenses if the individual did no favors for the company and promptly admitted what he had done as soon as the illegality of the matter became apparent. Although the act clearly was wrong, fundamental fairness as

well as the desire not to scare people away from public service suggests partial reimbursement to be appropriate.

Reimbursement under Section 2 also is discouraged if there has been an adjudication that a Subject received an improper financial benefit (i.e., a benefit to which he is not entitled), even if, for example, he acted in a manner not opposed to the best interests of the Government or the best interests of some other party. For example, improper use of inside information for the individual's financial benefit should not be an action for which the Court should provide reimbursement, even if the Government was not thereby harmed directly or a company or individual providing the information was benefited.

Assuming the Court finds that the individual who is requesting reimbursement has met the required standard, the Court shall consider the request for reimbursement on a case-by-case basis. Without intending to provide an exhaustive list, the Court shall consider factors such as the following:

First, the Court shall examine the length and expense of the Independent Counsel's investigation and the number and nature of charges brought against the Subject. Reimbursement is encouraged where a lengthy, exhaustive, and expensive investigation resulted in one or a small number of minor charges being brought. Reimbursement is encouraged for Expenses resulting from those parts of the Investigation that did not result in any indictment. Reimbursement is encouraged both for Expenses resulting from those parts of the Investigation that resulted in an indictment or in indictments and the conduct of the defense with respect to the matter or matters when the charges are dropped by the Independent Counsel, dismissed by a court, the defendant is found not guilty at trial, or having been found guilty has the conviction overturned on appeal. Reimbursement is discouraged both for Expenses resulting from those parts of the Investigation that resulted in an indictment or in indictments and the conduct of the defense with respect to the matter or matters when the defendant is found guilty.

Second, the Court shall examine whether the manner of the Independent Counsel's investigation resulted in excessive Expenses being incurred by the Subject. Reimbursement shall be encouraged where the length, depth, complexity, breadth, and expense to the Subject of the Investigation exceeded that which would have occurred had the investigation been conducted and had the matter been prosecuted by the Department of Justice.

Third, the Court shall consider whether the Subject of the Investigation — consistent with his assertion of constitutional, statutory, or procedural rights — improperly obstructed or delayed the Investigation. The Court should not reimburse the Subject for any Expenses generated with respect to any matter in which the Subject appeared to have engaged in inappropriate delaying tactics, including the filing of frivolous motions or the assertion of frivolous legal arguments. The Court shall not reimburse the Subject for any Expenses generated with respect to any matter for which the Subject is convicted of having engaged in obstruction of justice or perjury.

Overall, Section 2(a) adopts a middle ground by authorizing permissible reimbursement in some cases in which public policy would not be well served by an absolute bar to reimbursement. A Subject's potential liability for conduct that does not satisfy consistently the requirement of some criminal statute, or that with the benefit of hindsight could be so viewed, would in all likelihood deter qualified individuals from serving in government and inhibit some who serve from taking reasonable actions. Permitting reimbursement against such liability tends to counter these undesirable consequences. Accordingly, Section 2(a) authorizes reimbursement at the Court's option even though an indictment and conviction ensue.

It is easy to conceive of a wide range of situations in which an Independent Counsel may investigate activities which occurred prior to the time the Subject became a member of the Government or which, while they occurred while the person was a member of the Government, had little or nothing to do with the person acting in his Official Capacity. Recent events have indicated that these matters may become embroiled in the political passions that have embraced the appointment and operation of Independent Counsels. While offering no specific guidance, reimbursement is to be more encouraged when the alleged crime had little or nothing to do with the Subject acting in his Official Capacity.

Section 2(b)

The purpose of Section 2(b) is to reject the argument that reimbursement is automatically improper whenever a Proceeding has been concluded on a basis that does not exonerate the Subject claiming reimbursement. Even though a final judgment or conviction is not automatically determinative of the issue of whether the standard of subsection (a) was not met, any judicial determination of substantive liability would in most instances be entitled to considerable weight. It is clear that the termination of a proceeding by settlement

or plea of nolo contendere should not in and of itself create a presumption either that conduct met or did not meet the relevant standard of subsection (a) insofar as a settlement or nolo plea may be agreed to for many reasons unrelated to the merits of the claim. On the other hand, a final determination of non-liability or an acquittal in a criminal case automatically entitles the Subject to reimbursement of expenses under Section 3.

Section 2(c)

This subsection makes clear that reimbursement is not permissible for Liabilities, even though it may be for Expenses.

Permitting reimbursement of Liabilities would give rise to a circularity in which the Government receiving payment of fines or penalties from the Subject in the settlement or judgment (minus Expenses) would then immediately return the same amount (plus Expenses) to the Subject as reimbursement. Thus, the Government would be in a poorer economic position than if there had been no proceeding.

Section 2(d)

Reimbursement for Expenses provided by this Act is designed to ensure that covered individuals are protected from the sometimes crushing cost of legal representation. The Act is neither designed nor intended to provide a safety-net for insurance companies and others who may have an obligation to reimburse a Subject for Expenses.

SECTION 3: MANDATORY REIMBURSEMENT

- (1) The Court shall reimburse the Expenses incurred by any Applicant who:
 - (a) was the Subject of an Investigation conducted by an Independent Counsel pursuant to this chapter where, if an indictment is brought against such individual pursuant to that Investigation, the person was successful, on the merits or otherwise, on any part of any Proceeding, provided, however, that the person shall be reimbursed only for those Expenses (1) that were incurred by that person, (2) that were incurred by the person in connection with any aspect of the Investigation or any related Proceeding, (3) that would not have been incurred but for the requirements of this chapter, and (4) that directly relate to the portion of the Investigation and any related Proceeding

with respect to which the person was successful on the merits or otherwise;

- (b) was the Subject of an Investigation conducted by an Independent Counsel, if no indictment is brought against such individual pursuant to that Investigation, provided, however, that the person shall be reimbursed only for those Expenses (1) that were incurred by that person, (2) that were incurred by the person in connection with any aspect of the Investigation or any related Proceeding, and (3) that would not have been incurred but for the requirements of this chapter;
 - (c) was not the original Subject of an Investigation conducted by an Independent Counsel, if an indictment is brought against such individual pursuant to that Investigation, the person was successful, on the merits or otherwise, on any part of any Proceeding, provided, however, that the person shall be reimbursed only for those Expenses (1) that were incurred by that person, (2) that were incurred by the person in connection with any aspect of the Investigation or any related Proceeding, (3) that would not have been incurred but for the requirements of this chapter, and (4) that directly relate to the portion of the Investigation and any related Proceeding with respect to which the person was successful on the merits or otherwise; or
 - (d) was a Participant in an Investigation conducted by an Independent Counsel if no indictment is brought against such individual pursuant to that Investigation, provided, however, that the person shall be reimbursed only for those Expenses (1) that were incurred by that person and (2) that were incurred by the person in connection with any aspect of the Investigation or any related Proceeding.
- (2) An Applicant shall not be entitled to reimbursement of, and the Court shall not order the reimbursement of, Expenses to the extent the Applicant has, by insurance or other contractual or statutory right, the ability to seek reimbursement or indemnification of the Expenses incurred until the Applicant has first exhausted those avenues of reimbursement. This provision shall not require any Applicant to establish a legal defense fund, seek a private bill in Congress, or undertake any other similar fund-raising actions to obtain funding for expenses.

Official Comment

Section 3(1)

Section 3 creates a statutory right of reimbursement in favor of those individuals who meet the requirements of that section.

The basic standard for mandatory reimbursement under Section 3(1)(a) and Section 3(1)(c) is that the person have been "successful, on the merits or otherwise, on any part of any Proceeding." The phrase "successful, on the merits or otherwise on any part of any Proceeding" is intended to entitle a person to partial mandatory reimbursement if some of the Proceeding is disposed of on a basis that does not include a finding of guilt or liability. For example, the person would be entitled to partial mandatory reimbursement if the court dismisses a count on its own or upon motion by the defendant, if the defendant prevails on the merits of a count, or if the prosecutor moves to dismiss a count. If the person enters into a plea bargain, the person may still be entitled to permissible reimbursement under Section 2. The phrase "on the merits or otherwise on any part of any Proceeding" shall include the situation in which a conviction is overturned on appeal. In such a situation, the Subject shall be entitled to partial or full mandatory reimbursement, depending upon whether every count is overturned. If some or all of the case against a person is overturned on appeal, the person is retried and convicted, and the conviction is upheld on appeal, the person shall not be entitled to mandatory reimbursement, either partial or full, unless such reimbursement is authorized by some aspect of this Section 3 or by some other section.

There should be little concern with reimbursing a person where the person prevailed on the merits of a count, if the court dismisses a count on its own or upon motion by the defendant, or if the prosecutor moves to dismiss a count, except as part of a plea bargain. In each case, a jury has found or a court has ruled in the defendant's favor, or a prosecutor has impliedly or explicitly admitted the lack of a strong case. Given the tremendous cost of defense, the argument that Independent Counsel Investigations may be political in nature, and the reality that many violations may be technical in nature, policy should be balanced in favor of reimbursement. While this standard may result in an occasional defendant becoming entitled to reimbursement because of procedural defenses not related to the merits, e.g., the statute of limitations, it is unreasonable to require a defendant with a valid procedural defense to undergo a possibly prolonged

and expensive investigation, followed by a trial on the merits, in order to establish eligibility for mandatory reimbursement.

Participants in the Independent Counsel's Investigation or in any Proceeding brought by the Independent Counsel in conjunction with or as a result of the Independent Counsel's Investigation require protection from Expenses. The Introductory Comment to this Act provides the policy justification for this position. Sections 3(1)(b) and 3(1)(d) carry out these policies. Given the media attention attached to Independent Counsel activity, the partisan nature of many Independent Counsel appointments, and the increased possibility of a strategic charge of obstruction of justice, perjury, and the like for witnesses in Independent Counsel actions, it shall be presumed that any individual who is a witness before a grand jury or who is a witness at a Proceeding needs representation by counsel and has met the "but for" requirement.

Section 3(2)

Reimbursement for expenses provided by this Act is designed to ensure that covered individuals are protected from the sometimes crushing cost of legal representation. The Act is neither designed nor intended to provide a safety net for insurance companies, corporations with indemnification responsibilities, and others who may have an obligation to reimburse an Applicant for Expenses.

SECTION 4: ADVANCE FOR EXPENSES

- (1) The Court may, before the conclusion of an Investigation or the final disposition of a Proceeding, advance funds to pay for, or pay funds to reimburse, the Expenses incurred by a Subject of, or a Participant in, an Investigation or Proceeding. The Applicant must deliver to the Court (a) a written affirmation by counsel for the Applicant that counsel is unable to represent or to continue representing the Applicant in the absence of an advance for Expenses, (b) those items set forth in Section 5(2), and (c) the Applicant's written undertaking to repay any funds advanced if the person is not entitled to mandatory reimbursement under Section 3 or permissive reimbursement under Section 2.
- (2) The undertaking required by Section 5(2) must be an unlimited general obligation of the Applicant, but need not be secured and may be accepted without reference to the financial ability of the Applicant to make repayment.

- (3) Authorizations under this section shall be made by the Court and must be made within five business days of the Court's receipt of the Applicant's request.
- (4) The Court may condition the payment upon the requirement that the funds be placed in an escrow account, to be released only upon the written approval of the Court.
- (5) The advance made pursuant to this section may be all or part of the projected cost of representation. An Applicant may make multiple requests for advances. The authorization of one advance does not constitute any finding that future advances will be made.

Official Comment

Section 4 authorizes, but does not require, the Court to permit the Government to pay for an Applicant's Expenses in advance if the specified conditions are met.

Section 4 recognizes an important difference between reimbursement and an advance for expenses: Reimbursement is retrospective and, therefore, enables the Court determining whether to make a reimbursement to do so on the basis of known facts, including the outcome of the Investigation and any Proceedings. Advance for Expenses is necessarily prospective and the Court generally will possess fewer known facts on which to base its decision.

This section is based on the policy that an Applicant who serves in the government or who is a Participant in a government investigation in which the Applicant is not a Subject should not be required to finance his own defense. Moreover, adequate legal representation often requires substantial Expenses during the Proceeding and many individuals will be willing to serve in government or to have contact with government employees only if they have the assurance that the Government has the power to advance these Expenses. Wealthy individuals should not be favored over individuals whose financial resources are modest.

The undertaking to repay Expenses must be made by the Applicant and not by a third party. If the Applicant or the Government wishes some third party to be responsible for the Applicant's obligation in this regard, either of them is free to make those arrangements separately with the third party.

The Court shall not make any inquiry into the preliminary findings of an Investigation or the merits of the Proceeding. Thus, in the great majority of cases, no special inquiry will be required. The

Court may, but is not required to, consider any additional matters it deems appropriate and may condition the advance of Expenses upon compliance with any additional reasonable requirements it desires to impose.

The Court is, however, free to reconsider the decision at any time, e.g., upon a change in the financial ability of the Applicant's or the Applicant's attorney to pay the amounts in question.

That there has been an advance for expenses does not determine whether an Applicant is entitled to reimbursement. Repayment of any advance is required only if it is determined ultimately that the Applicant is not entitled to either mandatory or permissible reimbursement, if the amount of the advance exceeds the actual cost, or if the Court later determines that the amounts paid were unnecessary or unreasonable.

SECTION 5: EVALUATION OF EXPENSES.

- (1) Reimbursement of Expenses. Whenever there is a request for reimbursement of Expenses, the Applicant shall submit to the Court along with its motion for reimbursement (a) sufficient written documentation of the Expenses, including the services performed and, where possible, the persons performing them, the rates charged, and the costs incurred, as the case may be; (b) a general written statement of the need, necessity, or justification for general and usual items and a specific written statement of the need, necessity, or justification for unusual items; (c) a general written statement of whether the items would have been incurred but for the requirements of this chapter; (d) the reasonableness of the amount of money requested; and (e) whether the Applicant has incurred the expenses, that is, is liable for them.

Whenever there is a request for reimbursement, the Court shall notify the Independent Counsel who conducted the Investigation and the Attorney General of any request for Expenses. The Court shall direct such Independent Counsel and the Attorney General to file a written evaluation of any request for Expenses under this subsection, addressing (a) the sufficiency of the documentation; (b) the need, necessity, or justification for each underlying item; (c) whether the underlying item would have been incurred but for the requirements of this chapter; (d) the reasonableness of the amount of

money requested; and (e) whether the Applicant has incurred the expenses, that is, is liable for them. Unless good cause is shown for an extension of time, the Independent Counsel and the Attorney General shall have thirty days from the date the request is filed with the Court in which to submit written evaluations of Expenses.

- (2) Advance of Expenses. Whenever there is a request for an advance of Expenses, the Applicant shall submit to the Court along with its motion for advance of Expenses (a) sufficient written documentation of the proposed Expenses, including the services to be performed and where possible the persons to be performing them, the rates to be charged, and the costs to be incurred, as the case may be; (b) a general written statement of the need, necessity, or justification for general and usual items and a specific written statement of the need, necessity, or justification for unusual items; (c) a general written statement of whether the items would have been incurred but for the requirements of this chapter; (d) the reasonableness of the amount of money requested; and (e) whether the Applicant would have incurred the Expenses, that is, is liable for them.

Whenever there is a request for an advance of Expenses, the Court shall notify the Independent Counsel who conducted the investigation and the Attorney General of any request for Expenses. The Court shall direct such Independent Counsel and the Attorney General to file a written evaluation of any request for Expenses under this subsection, addressing (a) the sufficiency of the documentation; (b) the need, necessity, or justification for the underlying item; (c) whether the underlying item would have been incurred but for the requirements of this chapter; (d) the reasonableness of the amount of money requested; and (e) whether the Applicant did or would have incurred the expenses, that is, is liable for them. Unless good cause is shown for an extension of time, the Independent Counsel and the Attorney General shall have three business days from the date the request is filed with the Court in which to submit written evaluations of advances of Expenses.

Official Comment

To assist the Court in determining whether the requested reimbursement or advance of Expenses meets the statutory requirements, this provision both specifies the type of information to be presented to the Court by an Applicant and requires the input of the Attorney General and the relevant Independent Counsel. The time given to the Attorney General and the relevant Independent Counsel to undertake such analysis is shortened considerably for advance of Expenses. It is assumed, however, that the provision for advance of Expenses will infrequently be invoked and that the amount of material to be reviewed will be minimal. If the latter proves not to be true in a given case, the Court may grant an appropriate extension of time.

SECTION 6: MISCELLANEOUS

Although the determination of whether Expenses are “necessary” and “reasonable” ultimately shall be made by the Court, The Department of Justice shall promulgate guidelines concerning when the advice of counsel is necessary for Participants and shall promulgate guidelines concerning how to assess whether Expenses of all types are “reasonable.”

Official Comment

As indicated in Section 1, “‘Expenses’ shall be read to be prefaced by the phrase ‘necessary and reasonable.’” The determination of whether Expenses are “necessary” and “reasonable” ultimately shall be made by the Court. To assist Subjects and Participants, however, the Department of Justice shall promulgate regulations which shall assist Subjects and Participants at the time they contemplate incurring the Expenses and at the time they contemplate making an application for the reimbursement or advance of Expenses.