Independent counsel: Process and policy

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THE INDEPENDENT COUNSEL: PROCESS AND POLICY

by

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ABSTRACT

Independent Counsel: Process and Policy

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Independent Counsel: Process and Policy examines the Office of the Independent Counsel, established by the Ethics in Government Act of 1978. It discusses the history of the Act, its implementation, and its application. Although there is a need for independent investigation of high-level government officials, the Act suffers from major defects which damage its credibility in accomplishing the goals Congress set with its passage. Independent Counsel: Process and Policy suggests changes to the Act which will increase the efficiency and fairness of the office, and encourage efforts to eradicate the public's perception of the independent counsel as a renegade.
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CHAPTER 1

INTRODUCTION

"The Independent Counsel is wholly free of presidential control and virtually impervious to dismissal; he is accountable only to his own conscience."¹

"Starr: Relentless or Reluctant?"²

"The Escalating War Between the President and Independent Counsel"³

"The Last Starr Fighter?"⁴

The headlines become more outrageous as the days pass. Within a matter of months, Independent Counsel Kenneth Starr has become the subject of a storm of publicity and controversy over his tactics in investigating the relationship between the President of the United States and a White House intern. Although subject to criticism over the Whitewater investigation, which has been ongoing since 1994, Starr’s actions have never been as prominent. Concurrently, the country’s attention has focused on the statute which gives Starr so much power, the Independent Counsel Act, a provision of the Ethics in Government Act of 1978. Almost daily, commentators opine on the efficacy and constitutionality of the Independent Counsel Act, and engage in heated debate over whether it should be modified or repealed.

³ Senator Arlen Specter, The Escalating War Between the President and Independent Counsel, Congressional Record, March 2, 1998, s1195-s1197.
This thesis examines the statute, its history, scope, constitutionality and policy implications, as well as the attacks leveled against the law and its appointees. The Office of the Independent Counsel has significant power, but not unlimited power. It serves a purpose which no other government office can serve: to independently investigate alleged wrongdoing by high-ranking government officials without a conflict of interest. While many argue otherwise, this thesis takes the position that the Independent Counsel is a necessary check on the power of the Executive Branch and should be maintained.

History

The law commonly referred to as the Independent Counsel Act was enacted as part of the Ethics in Government Act of 1978 ("The Act"). It was the first statute providing for a court-appointed Independent Counsel. However, it is not the first time independent investigators have been appointed in response to allegations of malfeasance. It is also not the only way to investigate malfeasance in government office. There are many examples of the President and/or Congress taking it upon himself or itself to investigate allegations of wrong-doing.

In the two hundred years before the enactment of the Ethics in Government Act of 1978, the Executive Branch was responsible for responding to charges of its own malfeasance. One writer terms this the "politics of ethics." In fashioning the unitary executive, it is argued, the Founders believed a single executive would be more accountable to the people for both his conduct and his administration's conduct. Further, the President is obligated under Article II, Section 3 of the Constitution to take care that the laws are faithfully executed. Thus, the President, by design and

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constitutional mandate, is obligated to investigate charges or appoint others to investigate charges against his administration.⁶

The President himself has been directly involved in investigating such allegations on at least two occasions. President Washington confronted his Secretary of State Edmund Randolph with evidence that he might have engaged in treasonous activity with the French, after which Randolph resigned.⁷ President Cleveland instructed his Secretary of the Interior to investigate his Attorney General for alleged conflicts of interest when the Attorney General’s office filed a lawsuit, the result of which could have increased the Attorney General’s financial portfolio by millions. The investigation cleared the Attorney General of any wrongdoing because he never actually authorized the lawsuit.⁸

After the Justice Department was established in 1870, investigations were usually conducted by its attorneys.⁹ For example, during the Garfield presidency in the late 1800’s, the Justice Department investigated the “Star Route Frauds”, which involved fraudulent contracts for mail delivery in rural areas. The investigation implicated Stephen W. Dorsey, Secretary of the Republican National Committee and Garfield’s 1880 campaign manager.¹⁰ During the Kennedy Administration, the Justice Department investigated conflict of interest charges against Secretary of the Navy Fred Korth. During the Nixon Administration, the Justice Department investigated allegations of conspiracy, extortion and bribery involving Vice-President Spiro Agnew.¹¹ Spiro Agnew resigned and pled no contest to one count of tax evasion in October, 1973. He was fined $10,000

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⁶ Eastland, 2.
⁷ Eastland, 7.
⁸ Eastland, 7-8.
⁹ Although the office of the Attorney General was created in 1789, the Justice Department was not created until 1870. Eastland, 8, n.2.
¹⁰ Eastland, 8.
¹¹ Eastland, 8.
and sentenced to three years of unsupervised probation. The Attorney General recommended no prison time as part of an agreement that Agnew would resign.\textsuperscript{12}

Congress has also responded to and investigated Executive Branch misconduct. For example, Congress investigated a corruption charge made against Alexander Hamilton. It investigated President Monroe twice for allegedly putting public funds to private use. It investigated President Monroe's Secretary of the Treasury for illegally managing public funds. Congress also investigated several officials in the Jackson Administration for allegedly misusing public money, and President Buchanan and his administration for bribery and corruption. More recently, it has investigated Secretary of the Treasury Andrew Mellon, President Hoover's Postmaster General, President Truman's top military aide in the White House, and President Eisenhower's chief aide.\textsuperscript{13} Congress has just completed an investigation of the Internal Revenue Service and is currently investigating campaign finance irregularities in the Democratic Party.

As for Special Prosecutors, at least six have been appointed prior to the enactment of the Independent Counsel Act. The first one was appointed during President Ulysses S. Grant's term in 1875. President Grant's personal secretary was investigated for accepting bribes from moonshiners cheating revenue laws.\textsuperscript{14} Grant subsequently fired the Special Prosecutor for being too aggressive in his investigation.\textsuperscript{15} The second and third Special Prosecutors were appointed during Theodore Roosevelt's Administration. In 1902, Francis Heney was appointed to prosecute a land fraud ring implicating the former Commission of the General Land Office. In 1903, Charles Bonaparte was

\textsuperscript{12} United States v. Agnew, 428 F Supp 1293, 1294 (DMd 1974).

\textsuperscript{13} Eastland, 9-11.


\textsuperscript{15} Eastland, 14.
appointed to investigate charges of corruption in the Post Office that implicated an Assistant Attorney General.\textsuperscript{16} Two Special Prosecutors were appointed by President Coolidge and confirmed by the Senate to investigate the Teapot Dome Scandal. One was a Republican and one a Democrat.\textsuperscript{17} During the Truman Administration, the Attorney General appointed a "Special Assistant" to investigate corruption in the Justice Department. When the Special Assistant asked for the Attorney General's files, he was fired. The Attorney General was subsequently fired.\textsuperscript{18}

Prior to the Independent Counsel Act, both the President and Congress had occasion to investigate members of the Executive Branch, with a variety of results. Some officials were cleared, others were fired, tried and convicted, others resigned. Despite the results, investigations were conducted and the public was informed. The public could then choose whether to hold the President accountable for the alleged wrong-doing. When the President did not aggressively pursue investigation, Congress often stepped in and did so, informing the public of the President's failure to take action. Again, the public had its choice. This process significantly changed with the enactment of the Independent Counsel Act.

Title VI of The Ethics in Government Act, 28 U.S.C. §§ 592-599, ("The Act") was first passed in 1978. The purpose of The Act was to establish a neutral procedure for resolving the conflict of interest that arises when the Attorney General must decide whether to pursue allegations of wrongdoing leveled against high-ranking federal officers, which will typically be the Attorney General's close political associates.\textsuperscript{19}

\begin{footnotes}
\item \textsuperscript{16} Eastland, 8.
\item \textsuperscript{17} Eastland, 8. This was the first and only time a special prosecutor has been confirmed by the Senate.
\item \textsuperscript{18} Solloway, 956.
\item \textsuperscript{19} Banzhaf v Smith, 737 F2d 1167, 1168 (DC Cir 1984).
\end{footnotes}
The impetus of The Act was President’s Nixon’s handling of the Special Prosecutor investigating the Watergate scandal, Archibald Cox. When the Watergate scandal broke, President Nixon asked his Attorney General designee, Eliot Richardson, to appoint a Special Prosecutor if he deemed it necessary in order to conduct an impartial investigation. On May 25, 1973, Richardson appointed Archibald Cox. But when Mr. Cox insisted that the President turn over notes, tapes, and memos of conversations, the President ordered the Attorney General to remove Mr. Cox. The Attorney General refused and subsequently resigned. The Deputy Attorney General was also ordered to remove Mr. Cox and refused. He was dismissed from office, after attempting to resign. Finally, Acting Attorney General Robert Bork relieved Cox of his duties. At the same time, Cox’s offices were sequestered by federal agents. The incident was termed the “Saturday Night Massacre.”

As one article comments:

In Title VI of the Ethics in Government Act of 1978, Congress institutionalized the historic political decision made after President Nixon ordered the dismissal of Archibald Cox and sequestered his downtown Washington offices. In the shock of that moment, the American public got a taste of what it would be like to live in a country where their ruler is above the law. They reacted with rare swiftness, clarity, and force. The political message was unambiguous—the Watergate investigation was to proceed, and to proceed outside the control of the President and the Attorney General. Simultaneously, the people sent another instruction to their representatives: find a practical, orderly way—short of impeachment or a Watergate-style political convulsion—to assure that future Presidents could not place themselves or their close aides above the law.

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Subsequently, the Office of the Independent Counsel was first proposed in the Senate in 1974. Committees in the House and Senate conducted hearings in 1975, which continued and culminated in The Act’s enactment in 1978. During the Congressional hearings, the proposed legislation seemed to garner widespread support in the legal community, including the American Bar Association, legal scholars, and public interest groups. Congress provided that The Act would expire in five years. It has been reauthorized three times since, in 1983, 1987, and 1994.

Since 1978, at least 18 Independent Counsels have been appointed to investigate allegations of drug use, perjury, bribery, conflicts of interest, financial improprieties, lying, and abuse of executive power, at a total cost of about $115 million. Of the investigations, the one which has consumed the most resources is Lawrence Walsh’s investigation of the Iran-Contra affair, at a total cost of about $47.4 million. Of those prosecuted by Walsh, four were convicted (two of those overturned), seven pled guilty, and six were given presidential pardons. After Walsh’s investigation, Arlin Adams’ investigation of Samuel Pierce and the Department of Housing and Urban Development cost about $27.1 million and resulted in seven guilty pleas, eleven convictions, and one acquittal. Kenneth Starr’s investigation of Clinton and the Whitewater matter is growing and will surpass Adams’ investigation, at a total cost of $25.6 million as of June, 1997, resulting thus far in at least six guilty pleas and three convictions.

24 Ibid.
26 Ibid.
27 Ibid.
28 Ibid.
29 Ibid.
Scope

Under The Act, the Independent Counsel investigates and prosecutes certain high-ranking government officials, if prosecution is warranted. High-ranking officials include the President and Vice-President, cabinet officials, high-level presidential aides, the Attorney General, high-level assistant attorneys general, the director and deputy director of the CIA, presidential campaign officials, and the commissioner of Internal Revenue. Other persons, including members of Congress, may also be investigated under certain conditions.

The investigation begins when the Attorney General receives information sufficient to constitute grounds to investigate whether a covered official may have violated any Federal Criminal law (other than a Class B or C misdemeanor or an infraction). Once the Attorney General receives this information, she has 30 days in which to determine whether there are grounds to investigate. In making this determination, she shall only consider (A) the specificity of the information received; and (B) the credibility of the source of the information. If within the 30-day period, the Attorney General determines that the information is not specific or is not from a credible source, then the Attorney General shall close the matter. If she finds to the contrary, she shall commence a preliminary investigation. If she cannot determine whether the

31 28 USC § 591(c)(West 1998 supp). An example of a person who was not enumerated under the statute, but prosecuted, is Jim Guy Tucker, former governor of Arkansas. He was prosecuted with respect to his relationship to the failure of the Madison Guaranty Savings & Loan, as part of the Whitewater prosecution. As Governor of Arkansas, Mr. Tucker was not among the enumerated persons in the statute, but was nevertheless prosecuted by the Independent Counsel because of his relationship to the ongoing investigation of enumerated persons. US v Tucker, 73 F3d 1313 (8th Cir 1996).
32 28 USC § 591(d)(2).
information is specific and credible, she shall commence a preliminary investigation with respect to that information.34 If the information concerns the Attorney General or a person who has a personal or financial relationship with the Attorney General, she must recuse herself and the next most senior Justice official must perform her duties under the statute.35

Once the Attorney General begins her preliminary investigation, she has 90 days in which to determine whether further investigation is warranted.36 When she has completed the investigation, or 90 days has elapsed, she reports to a panel of three judges, referred to as the Special Division.37 If the Attorney General determines there are no further grounds for investigation, she informs the panel and no Independent Counsel is appointed. The Attorney General's decision is not reviewable by any court.38 If the Attorney General determines that further investigation is proper or has not made a determination and filed a notification by the time deadline, she must apply to the Special Division for the appointment of an Independent Counsel.39 The application must contain information to help the Special Division to choose an Independent Counsel and define his

35 28 USC § 591(e). In US v McDougal, 906 F.Supp 499 (EDArk 1996), Attorney General Janet Reno referred the investigation of the Whitewater matter to an Independent Counsel based on a political conflict of interest for the Justice Department. Susan McDougal, the subject of an investigation in the Whitewater matter, challenged the appointment on the grounds that Reno did not file a notice of recusal. The court held that a political conflict of interest did not require a written notice of recusal, whereas a financial or personal conflict would, thus the appointment was proper.
36 28 USC § 592(a)(1).
37 The Special Division has authority under 28 USC § 49. It is a three-judge panel of circuit justices appointed by the Chief Justice of the United States. The justices serve 2-year terms. One justice must come from the District of Columbia Circuit, and no two judges may be appointed from the same circuit.
38 28 USC § 592(f). US v Tucker, 78 F3d 1313 (8th Cir 1996). See also Dellums v Smith, 797 F2d 817 (9th Cir 1986)(private citizens have no standing to challenge attorney general's decision in recommending or failing to recommend independent counsel).
39 28 USC § 592(c).
jurisdiction, “so that the Independent Counsel has adequate authority to fully investigate and prosecute the subject matter and all matters related to that subject matter.”

The Special Division then appoints the Independent Counsel and defines his jurisdiction. The Independent Counsel should be “an individual who has appropriate experience and who will conduct the investigation and any prosecution in a prompt, responsible, and cost-effective manner.” The Special Division defines the Independent Counsel’s jurisdiction, and is charged with assuring that he has “adequate authority to fully investigate and prosecute the subject matter ... and all matters related to that subject matter.” The jurisdiction also includes the authority to investigate and prosecute Federal crimes, other than those classified as Class B or C misdemeanors or infractions, that may arise out of the investigation or prosecution of the matter with respect to which the Attorney General’s request was made, including perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses. This provision, as well as related provisions dealing with the scope of the Independent Counsel’s authority, is the subject of numerous challenges.

If the Attorney General so requests, the Special Division may expand an existing Independent Counsel’s jurisdiction, rather than appoint a new Independent Counsel. The Attorney General may receive information about a potential investigation

40 28 USC § 592(d).
41 28 USC § 593(b)(1).
42 28 USC § 593(b)(2).
43 28 USC § 593(b)(3). See US v Secord, 725 FSupp 563 (DDC 1989), in which defendant Secord moved to dismiss indictments against him based on lack of prosecutorial jurisdiction. Defendant’s alleged crimes of perjury before Congress were committed after the Independent Counsel was appointed. The court held that the scope of the jurisdictional order “to seek indictments and to prosecute any persons or entities involved in any of the foregoing events or transactions” [Iran-Contra] was broad enough to include defendant’s alleged perjury before Congress.
44 28 USC § 593(b)(3).
45 In one case, In re Espy, 80 F3d 501 (DC Cir 1996), the court commented that 43 motions challenging the scope of the Independent Counsel’s jurisdiction had already been filed during the investigation.
independently and make the determination whether to submit it to the Special Division, or the Independent Counsel may submit a request to the Attorney General asking for expansion of jurisdiction, if he finds information about persons not covered in the grant of jurisdiction violating criminal laws.\textsuperscript{46} If the Independent Counsel requests expansion of his jurisdiction, the Attorney General shall give great weight to his recommendations.\textsuperscript{47} Again, if the Attorney General decides not to submit the expansion of the Independent Counsel's jurisdiction to the Special Division, it is not reviewable. If she does submit the request, the Special Division then expands the Independent Counsel's jurisdiction.\textsuperscript{48}

In addition to appointing a counsel and defining his jurisdiction, the Special Division also has the duty of awarding attorneys' fees to persons who were the subject of investigation, but did not get indicted. The fees must be reasonable, must have been incurred during the investigation, and must be fees which would not have been incurred but for the requirements of The Act.\textsuperscript{49} This provision of The Act is strictly construed,\textsuperscript{50} making it difficult to obtain attorneys' fees. The "but for" requirement is satisfied when either 1) the subject of the investigation is prejudiced by the Department of Justice's failure to comply with substantive protective features of The Act; 2) the Independent Counsel's investigation constituted a substantial duplication of prior investigations; or 3) the case could have been disposed of at an earlier stage if the Attorney General had not been limited by the statutory restrictions on her preliminary

\textsuperscript{46} 28 USC § 593(c).
\textsuperscript{47} 28 USC § 593(c)(2). When the Independent Counsel submits information to the Attorney General about persons not covered by the original order granting jurisdiction, the Attorney General must follow the procedure set out in 28 USC § 592. In re Meese, 907 F2d 1192 (DC Cir 1990).
\textsuperscript{48} 28 USC § 593(c)(2)(C).
\textsuperscript{49} 28 USC 593(f)(West supp 1998).
\textsuperscript{50} In re Nofziger, 925 F2d 428 (DC 1991).
investigation, resulting in the appointment of an Independent Counsel. Despite this high standard, the Special Division has awarded fees in proper circumstances.

Once appointed, the Independent Counsel has full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice, including conducting grand jury proceedings, engaging in civil and criminal litigation, appealing any decision in which he participates, reviewing documentary evidence from any source, contesting privileges, receiving and challenging national security clearances, determining immunity, subpoenaing tax returns, and initiating and conducting indictments and prosecutions. The Independent Counsel’s power is the subject of many attacks, as it is “both wide in perimeter and fuzzy at the borders.” The attacks often focus on the power conferred under 28 U.S.C. § 594 to refer to the Independent Counsel other matters related to his jurisdiction, which can significantly broaden the matters and/or persons being investigated. In a referral case, the Independent Counsel can request referral of a related matter directly from the Special Division. The Attorney General need not concur for the Special Division to approve the referral. Relatedness depends on the procedural and factual link between the Independent Counsel’s original prosecutorial jurisdiction and the matter sought to be

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51 Ibid. at 438-39.
52 See In re Mullins, 87 F3d 1372 (DC Cir 1996)(Former President Bush’s communications assistant reimbursed for fees incurred as a result of investigation into government inquiries into presidential candidate’s citizenship status during Vietnam.) In re Meese, supra (reasonable fees awarded).
53 28 USC §§ 594(a)(1)-(10).
54 US v Wilson, 26 F3d 142 (DC Cir 1994)(Independent Counsel Arlin Adam’s investigation of Housing Secretary Pierce which consensually overlapped with Department of Justice investigation held not to exceed its jurisdiction. Overlapping investigations held permissible, as long as Department of Justice does not subvert Independent Counsel’s investigation).
55 28 USC § 594(e).
56 In re Espy, 80 F3d 501, 507 (DC Cir 1996).
referred.\textsuperscript{57} During the investigation, the Independent Counsel must comply with the policies of the Department of Justice and has full authority to dismiss matters within his jurisdiction.\textsuperscript{58}

The Independent Counsel receives a government salary, an office, and many resources. He is entitled to hire employees, including attorneys, investigators, and consultants, and may request assistance from the Department of Justice in carrying out his functions. With resources, come cost controls. The Independent Counsel is required to conduct all activities with due regard for expense, authorize only reasonable and lawful expenditures, and assign the duty of certifying all expenditures to one employee.\textsuperscript{59}

The Independent Counsel must file three types of reports. Every six months he must file a report summarizing major expenses and estimating future expenses,\textsuperscript{60} which is audited and/or reviewed by the Comptroller General.\textsuperscript{61} Every year he must submit a report to Congress detailing all activities and giving the status of investigations or prosecutions.\textsuperscript{62} Finally, before the termination of his office, he must file a final report setting forth a description of his work, including the disposition of all cases brought.\textsuperscript{63} The final report, as well as intermediate reports and court filings, may be publicly disclosed under certain circumstances.\textsuperscript{64}

\begin{itemize}
  \item \textsuperscript{57} Ibid.
  \item \textsuperscript{58} 28 USC § 594(e).
  \item \textsuperscript{59} 28 USC § 594(l).
  \item \textsuperscript{60} 28 USC 594(h)(1)(A).
  \item \textsuperscript{61} 28 USC § 596(c).
  \item \textsuperscript{62} 28 USC § 595(a)(2)(West supp 1998).
  \item \textsuperscript{63} 28 USC § 594(h)(1)(B).
  \item \textsuperscript{64} The determination of whether the report or filings will be made public considers 1) whether the subjects of the investigation have already been disclosed; 2) whether or not the subjects object; 3) whether the report or filings contain information already known; and 4) whether the report or filings consist of legal and factual rulings which should be publicly available to understand the court’s rules and precedents. \textit{In re North}, 16 F3d 1234 (CADC 1994)(allowing publication of Iran Contra Final Report).
\end{itemize}
An Independent Counsel’s tenure is terminated in one of two ways. Unless he is impeached and convicted, the Independent Counsel may be removed from office only by the Attorney General for good cause, physical or mental disability, or any condition which substantially impairs his performance.\(^65\) If the Attorney General removes the Independent Counsel, she must submit a report to the Special Division, and the Judiciary Committees of the House and Senate.\(^66\) The Independent Counsel may seek judicial review of his removal.\(^67\)

The second way is by termination of the investigation. The Independent Counsel may terminate the investigation by notifying the Attorney General and filing the final report.\(^68\) The Special Division may also terminate the investigation on its own motion or by request of the Attorney General by determining that all prosecutions or investigations are substantially completed.\(^69\) The Department of Justice may then assume responsibility for the remainder of the work. If the Attorney General does not make this request, the Special Division shall determine on its own motion whether termination is appropriate under this paragraph no later than 2 years after the appointment of an Independent Counsel, at the end of the succeeding 2 year period, and thereafter at the end of each succeeding 1 year period.\(^70\)

Although minimized in the media, Congress does have oversight of the Independent Counsel and the Independent Counsel must cooperate in the exercise of that

\(^{65}\) 28 USC § 596(a)(1).

\(^{66}\) 28 USC § 596(a)(2).

\(^{67}\) 28 USC § 596(a)(3).

\(^{68}\) 28 USC § 596(b).

\(^{69}\) In *In re North*, 10 F3d 831 (DC Cir 1993), a suggestion to review the Independent Counsel’s tenure was made by President Reagan’s lawyers. The Special Division considered the request and issued an Order to Show Cause to Independent Counsel Walsh why the investigation should not be terminated.

\(^{70}\) 28 USC § 596(b)(2)(West supp 1998). This provision was added by the Independent Counsel Reauthorization Act of 1994.
oversight. Further, the Independent Counsel must advise the House of Representatives of any "substantial and credible information which such Independent Counsel receives, in carrying out the Independent Counsel's responsibilities under this chapter, that may constitute grounds for an impeachment."72

The foregoing has shown that the Independent Counsel Act does confer significant power on the appointee. The next chapter discusses the constitutionality of The Act as a whole and the specific provisions which have been unsuccessfully challenged.

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71 28 USC § 595.

72 28 USC § 595(c). Neither the Special Division nor the Independent Counsel has the authority to impeach anyone; if the Independent Counsel receives information that may constitute grounds for impeachment, he is to advise the House of Representatives. In re Visser, 968 F2d 1319, 1322 (1992).
Virtually every article that discusses the Independent Counsel asks whether the Independent Counsel Act is constitutional. It is. In *Morrison v Olson*, the Supreme Court held that the Independent Counsel Act violated neither the Appointments Clause, Article III, nor the separation of powers doctrine. Justice Scalia filed the only dissent and Justice Kennedy took no part in deciding the case. Many have criticized the Court's opinion. Constitutional scholars found it a surprising decision, in which the Court departed from its usual pattern of examining constitutional history for guidance. In *Morrison v Olson*, critics argue, the Court treated constitutional history as virtually irrelevant and subordinated it to policy concerns, which earlier decisions had ignored.

*Morrison v. Olson* was, at heart, a political dispute. Two subcommittees of the House of Representatives subpoenaed documents from the Environmental Protection Agency ("EPA") regarding the enforcement of Superfund laws. The President, on the advice of the Justice Department, instructed the EPA to invoke executive privilege on certain sensitive documents. The House of Representatives then held the EPA Administrator in contempt for claiming executive privilege, after which the EPA and the

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74 Carter, 110. Citing cases such as *INS v Chadha*, 462 US 919 (1983), and *Buckley v Valeo*, 424 US 1 (1976), which held laws unconstitutional based on the framers' intent to separate the powers of the branches, Carter calls the *Morrison* opinion startling. "A little constitutional language, no constitutional history, a dash of deference, and the case is done."
United States filed suit against the House of Representatives. The parties settled the matter until the following year, when the House of Representatives started investigating the Justice Department's role in advising the President to invoke executive privilege and further accused certain individuals of giving false and misleading testimony and wrongfully withholding documents. The House of Representatives sought appointment of an Independent Counsel through proper channels, and one was appointed. The subjects of the investigation challenged the appointment of the Independent Counsel on three constitutional grounds: the Appointments Clause, Article III, and the separation of powers doctrine. The Circuit Court declared the statute unconstitutional, and the Supreme Court reversed. Justice Rehnquist authored the majority opinion.

The Appointments Clause

The Court first considered whether the appointment of the Independent Counsel violated the Appointments Clause of the Constitution. The Appointments Clause provides:

[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, or in the Courts of Law, or in the Heads of Departments.

Since the Special Division has the power to appoint the Independent Counsel, the Independent Counsel must be an inferior officer in order to satisfy the Appointments Clause. If the Independent Counsel is a principal officer, then she must be appointed by the President with the advise and consent of the Senate. The Court

75 Ibid., 2607.
76 U.S. Constitution, Article II, Section 2, Clause 2.
77 For purposes of appointments, the constitution divides officers into two classes: principal and inferior. *Buckley v Valeo*, 424 US 508, 509 (1976).
determined that the Act did not violate the Appointments Clause because the
Independent Counsel was indeed an inferior officer. The Court cited four factors which
led to its conclusion that the Independent Counsel was an inferior officer.\textsuperscript{78}

The first factor was that the Independent Counsel is subject to removal by
a higher Executive Branch official. Although independent, the Independent Counsel may
be removed by the Attorney General. The fact that she may be removed indicates that she
is inferior in rank and authority to the Attorney General and the President.\textsuperscript{79} Second, the
Independent Counsel is empowered to perform limited duties, although she has broad
discretion and power in exercising those duties. Nevertheless, she has no authority to
formulate policy and she has no duties outside of her investigation.\textsuperscript{80} Third, the
Independent Counsel's jurisdiction is limited, both in the possible subjects of
investigation and the scope conferred by the Special Division.\textsuperscript{81} Finally, the Independent
Counsel's office is limited in tenure. Once the task is complete, the Independent
Counsel's tenure is over, although there is no specified time limit.\textsuperscript{82}

In support of its conclusion, the Court compared the Independent Counsel
to other inferior officers, citing several cases. The most notable is \textit{United States v
Nixon},\textsuperscript{83} where the Court referred to the Watergate Special Prosecutor as a "subordinate
\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{78} Ibid., 2608.
\item \textsuperscript{79} \textit{Morrison v Olson}, 2608-09.
\item \textsuperscript{80} Ibid.
\item \textsuperscript{81} Ibid.
\item \textsuperscript{82} Ibid. Subsequent to \textit{Morrison}, Congress amended the Ethics in Government Act
in 1994 to provide that if the Attorney General did not so request, the Special
Division could determine whether termination of the Independent Counsel is
appropriate not later than two years after the appointment, at the end of the next
two year period and thereafter every year. 28 USC § 596(b)(2). This amendment
was found constitutional in \textit{US v McDougal}, 906 FSupp 494 (ED Ark 1995).
Although providing for review, the same conditions exist for termination: that all
investigations or prosecutions are substantially completed.
\item \textsuperscript{83} 418 US 683, 694 (1974). In \textit{United States v Nixon}, the Attorney General
conferred power and authority upon the Special Prosecutor by regulation. Under
Article II, Congress has vested in the Attorney General the power to conduct the
criminal litigation of the United States. The Attorney General also has the power
\hspace{1cm}(continued)(continued...)
\end{enumerate}
\end{footnotesize}

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officer.” Other inferior officers cited by the Court included: temporary vice-counsels, election supervisors, and United States commissioners.

The last Appointments Clause issue addressed by the Court was whether the Special Division’s appointment of the Independent Counsel was proper, since it was an interbranch appointment. The language of the Appointments Clause answers that question in the affirmative, allowing Congress to vest the appointment of inferior officers in the President alone, or in the courts, or in the heads of departments. However, if one branch’s appointment of another branch’s officers had the potential to impair the constitutional functions assigned to one of the branches, it could violate the separation of powers doctrine. Here, the Court did not believe that allowing the Special Division to appoint the Independent Counsel would impair the Special Division’s constitutional functions. In fact, the Court reasoned, courts have appointed prosecutors and U.S. commissioners in other situations, therefore the interbranch appointment of the Independent Counsel was also proper.

...(continued)


to appoint subordinate officers to assist him in the discharge of his duties. 28 USC §§ 509, 510, 515, 533. The Special Prosecutor was one such subordinate officer.

84 United States v Eton, 169 US 331 (1898).
85 Ex parte Siebold, 100 US (10 Otto) 371 (1880).
86 Go-Bart Importing Co. v United States, 282 US 344 (1931).
87 Challengers of the Act argued that even though Congress vested the appointment of inferior officers to either the President, the courts, or department heads, it meant to limit the appointment of inferior officers to the branch under which they belong. The effect of this argument is that only the President may appoint inferior executive officers. The Court rejected this argument, claiming it had no support in the Constitution. Two cases discuss this issue. In Ex Parte Hennen, 38 US (13 Pet.) 257-58, the Court stated “The appointing power here designated, in the latter part of the [Clause], was no doubt intended to be exercised by the department of the government to which the officer to be appointed most appropriately belonged.” In Ex Parte Siebold, supra, the Court said that rule stated in Hennen was the usual and proper procedure, but not absolutely required.

88 Morrison v Olson, 2611.
90 Go-Bart Importing Co. v United States, 344.
Although Justice Scalia's dissent in *Morrison v Olson* concentrated on separation of powers arguments, he did address the Court's Appointments Clause arguments. He disagreed with the Court's analysis of the factors cited, disputing that the Independent Counsel is removable at will, limited in power, limited in tenure, and limited in jurisdiction. First, he argued the fact that the Independent Counsel is removable for cause does not suggest that she is an inferior officer. Rather, the fact that the Independent Counsel is harder to remove than principal officers (who are removable at will) supports the contrary.91 Second, he argued that the Independent Counsel is not limited in power because it has the full power and authority of the Department of Justice, which is substantial in scope.92 Third, Justice Scalia attacked the Court's characterization of the Independent Counsel's jurisdiction and tenure as limited. The Independent Counsel at issue in *Morrison v Olson* had already served more than two years, longer than some cabinet officials.93 Since there are no limits on the length of the Independent Counsel's investigation, there are no true limits on the tenure of the office.

Instead of the factors the Court considered in determining that the Independent Counsel is an inferior officer, Scalia followed the test of the Constitution and the division of power it established. Scalia argued that the Independent Counsel is not an inferior officer because she is not subordinate to any officer in the Executive Branch.94 Because the Independent Counsel is guaranteed independence, she is not

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91 Ibid.
92 Ibid.
93 Ibid., 2633. Since *Morrison v Olson*, at least five Independent Counsels have had investigations lasting three years or longer: Lawrence Walsh (Iran Contra), Kenneth Starr (Whitewater), Donald Smaltz (Mike Espy), James Barrett (Henry Cisneros), and Larry Thompson (Sealed). Wilkinson and Ellis, 1527.
94 In *Edmond v US*, 117 SCt 1573 (1997), Scalia wrote the opinion of the court in a case challenging the constitutionality of the Secretary of Transportation appointing civilian judges to the Coast Guard Court of Criminal Appeals. One of the issues was whether the civilian judges were inferior or principal officers. Scalia cites the factors listed by the Court in *Morrison v Olson*, but states that the court did not purport to set forth a test. Rather, the inquiry comes down to whether or not the officer has a superior, which the civilian judges do. Justice ... (continued)(continued...)
subordinate to either the President or the Attorney General. Therefore, her appointment by anyone other than the President is unconstitutional.

**Article III**

The next issue addressed in *Morrison v Olson* was whether the powers of the Special Division violated Article III. Article III limits judicial power to "Cases" and "Controversies." Generally, executive or administrative duties of a nonjudicial nature may not be imposed on judges holding office under Article III. Since the Special Division's responsibilities under The Act include appointing the Independent Counsel, defining her jurisdiction, granting extensions for investigations, receiving reports, referring related matters, granting attorneys' fees to individuals who are not indicted, determining whether to grant protective orders, determining whether to release the final report to the public, and terminating the Independent Counsel when her duties are completed, there is an issue as to whether these duties exceed the bounds of Article III.

In analyzing the issue, the Court divided the Special Division's duties into three categories: appointment and jurisdiction, ministerial duties (receiving reports, granting extensions, referring related matters, granting fees), and termination. With regard to the first category, the Special Division is expressly given the power to appoint the Independent Counsel by the Appointments Clause. Consequently, the Court reasoned, the Special Division must have some discretion in defining the scope of the Independent Counsel's jurisdiction, particularly where, as here, Congress created a

...(continued)

Souter concurred in the opinion, but did not agree that the consideration of whether the officer has a superior is sufficient to establish an inferior officer, citing the remainder of the *Morrison v Olson* factors.

95 U.S. Constitution, Article III.

96 *Buckley v Valeo*, 123.

97 *Morrison v Olson*, 2612.
temporary position whose duties vary with the factual circumstances. However, the jurisdiction conferred by the Special Division must be demonstrably related to the factual circumstances giving rise to the investigation and request for appointment. As long as the grant of jurisdiction satisfies this condition, the power to define and expand the Independent Counsel’s jurisdiction is incidental to the power to appoint, thus constitutional.

Second, the Court considered whether the administrative duties of the Special Division, such as receiving reports on various matters, granting attorneys’ fees petitions, deciding to release the counsel’s final report and granting or denying protective orders, violated Article III. In order to violate Article III, these administrative duties would have to either encroach upon executive or legislative authority, or be more properly accomplished by those other branches. In this case, the Court held that the Special Divisions’ duties neither encroached upon executive or legislative authority or were more properly accomplished by the other branches. These miscellaneous duties were analogous to functions judges perform in other contexts and were simply ministerial. Since these provisions of The Act do not give the Special Division the power to supervise the Independent Counsel in the exercise of her investigative or prosecutorial authority, they do not violate Article III.

Third, with regard to the power of the Special Division to terminate the duties of the Independent Counsel when it determines that the prosecutions are complete, the Court expressed discomfort because termination in this manner is not a traditional judicial power. Nevertheless, the Court did not view it as a significant judicial

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98 Morrison v Olson, 2613.
99 Ibid.
100 Morrison v Olson, 2613, fn. 17.
101 Ibid.
102 Ibid., 2614.
encroachment upon executive power or upon the prosecutorial discretion of the
Independent Counsel. Further, the Court narrowed the interpretation of The Act so that
the Special Division does not have the power to remove the counsel while an
investigation or court proceeding is still underway, a power which is vested solely in the
Attorney General. Termination may occur only when the counsel’s duties are completed
or so substantially completed that there remains no need for action. Consequently, the
Court did not believe that The Act violated Article III of the Constitution.

Separation of Powers
The last challenge discussed by the Court, and the definitive one for
Justice Scalia, is that The Act violates the principle of separation of powers because the
President neither has the power to remove or control the Independent Counsel, an
Executive Branch officer. The Majority admitted that the Independent Counsel was an
Executive Branch officer and defined the separation of powers analysis as (1) whether
the provision of The Act restricting the Attorney General’s power to remove the
Independent Counsel to only those instances in which she can show “good cause”, taken
by itself, impermissibly interferes with the President’s exercise of his constitutionally
appointed functions; and (2) whether, taken as a whole, The Act violates the principle of
separation of powers by reducing the President’s ability to control the prosecutorial
powers wielded by the Independent Counsel.

Removal
The constitutional arguments challenging the President’s power to remove
the Independent Counsel are based on several major Supreme Court cases.

103 Ibid., 2614.
104 Ibid., 2615.
105 *Morrison v Olson*, 2619.
In *Myers v United States*, the Court considered a law which allowed the removal of certain postmasters by the President only with the advice and consent of the Senate. The Court issued a 70-page opinion, fully researched with many historical references. It held that the statute was unconstitutional because Congress could not give to itself the power to remove or the right to participate in the exercise of the power to remove an Executive Branch official. Only the President may remove an Executive Branch official.

Ten years later in *Humphrey's Executor v United States*, the Court considered a statute which limited the President's removal of the Federal Trade Commissioner only for malfeasance, neglect of duty or inefficiency. The Court determined that the Federal Trade Commissioner's duties were quasi-legislative and quasi-judicial, rather than purely executive like the Postmaster in *Myers*. Accordingly, Congress may fix the period of service and the conditions for removal in order to assure discharge of the Commissioner's duties independent of Executive Branch control. In essence, the Court held that the character of the office will determine whether Congress can condition the removal of an officer. If the office was not purely executive, then the President's removal power could be limited.

In *Weiner v United States*, decided in 1958, the Court addressed whether the President had unfettered discretion to remove a member of the War Claims Commission, which had been established by Congress in the War Claims Act of 1948. The Commission's function was to receive and adjudicate certain claims for compensation from those who had suffered personal injury or property damage at the

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106 272 US 52 (1926).
108 Ibid., 628.
109 Ibid., 630.
hands of the enemy during World War II. Commissioners were appointed by the President, with the advice and consent of the Senate, but the statute made no provision for the removal of officers, perhaps because the Commission itself was to have a limited existence. As in Humphrey's, however, the Commissioners were entrusted by Congress with adjudicatory powers that were to be exercised free from executive control. Consequently, the Court held that the President did not have unfettered discretion to remove such an official.

Finally, in Bowsher v Synar, decided in 1986, the Court addressed whether the powers vested in the Comptroller General under the Balanced Budget and Emergency Deficit Control Act unconstitutionally infringed on the President's power to remove Executive Branch officers. Under that Act, the Comptroller General was required to exercise executive functions. Since the Comptroller General was removable only by Congress, that Act gave Congress power over an official who was executing the laws, which is a power that Congress cannot have under the Constitution. Since the Constitution does not give Congress the power to execute the laws, Congress could not grant that power to an officer under its control, and that provision of the Act was deemed unconstitutional.

As shown, at least until Morrison v Olson, the constitutional analysis of the President's ability to remove a particular official revolved around that official's duties, i.e. purely executive, quasi-legislative, quasi-judicial, or somewhere in-between. After reviewing the above cases, the Court in Morrison v Olson decided that the case before it

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111 Weiner v United States, 356.
113 The Comptroller General is an officer of the United States who is nominated by the President from a list of three provided by the House of Representatives. He/She is confirmed by the Senate and removable only at the initiative of Congress. The office was established to be an office at the control of Congress. Ibid., 726.
114 Bowsher v Synar, 726.
was neither like *Bowsher* nor *Myers*, where Congress had involved itself in the removal of an Executive Branch official. Here, the power to remove the Independent Counsel is in the hands of the Executive Branch, specifically the Attorney General, who may remove the Independent Counsel for physical or mental disability, for good cause, or by impeachment and conviction.

The Court found that this case was more aptly analogized to *Humphrey's* and *Weiner* because in those cases the officials at issue were entrusted with powers which were to be exercised free from executive control. However, the Court did not use the quasi-legislative, quasi-judicial analysis to determine that the character of the office of the Independent Counsel was something other than purely executive,¹¹⁵ which would have restricted the President's removal power. Rather, the Court reasoned "that the determination of whether the Constitution allows Congress to impose a "good cause"-type restriction on the President's power to remove an official cannot be made to turn on whether or not that official is classified as 'purely executive.'"¹¹⁶ The real question was whether the removal restrictions were of such a nature that they impeded the President's ability to perform his constitutional duties. Applying this analysis, the Court recharacterized *Humphrey's* and *Weiner*, explaining that the distinctions based on the functions of the office were a reflection of the importance of the President's ability to remove the officials to his exercise of constitutional duties. In sum, the Court changed the analysis from concentrating on the type of official (purely executive, quasi-legislative, etc.) to analyzing the extent that the removal restriction impeded the President's exercise of his constitutional duties.

¹¹⁵ The Court could not use this analysis in this case because the functions of the Independent Counsel, as admitted by the Court and supported by extensive case law, are purely executive functions. The executive branch has the power to enforce the law, and the duties of a prosecutor are the embodiment of that power.

¹¹⁶ *Morrison v Olson*, 2618.
Applying the reasoning to the case at issue, the Court considered the good cause requirement for removing the Independent Counsel, and concluded that it by itself did not "unduly trammel" on executive authority. Noting that the Independent Counsel is an inferior officer, the Court stated "we do not see how the President's need to control the exercise of that [the Independent Counsel's] discretion is so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President." In addition, since the President retains control over the Independent Counsel through the Attorney General, he is not impermissibly burdened in his power to control or supervise the Independent Counsel in the execution of her duties under The Act. Consequently, the removal restrictions under The Act were not unconstitutional.

The Act as a Whole

The last issue the Court considered was whether The Act, taken as a whole, violated the principle of separation of powers by unduly interfering with the role of the Executive Branch. Although the three branches of government do not and have never been held to operate with absolute independence, if one branch is trying to increase its power at the expense of another, or one branch is usurping the power of another, it may violate the separation of powers doctrine, which is the basis for our system of government. Here, the Court held, neither Congress nor the Judiciary was trying to increase its own power at the expense of the Executive, nor was either usurping Executive power, therefore The Act did not violate the separation of powers principle.

In the case of Congress, Congress has very little role in the application of The Act. With the exception of the power of impeachment (which applies to all officers of the U.S.), Congress retained for itself no powers of control or supervision over the

117 Ibid., 2619.
Independent Counsel.\textsuperscript{119} Congress may request the appointment of a Counsel from the Attorney General, but the Attorney General may refuse. Furthermore, Congress has rights to information and oversight, but those are functions incidental to the legislative function of Congress.\textsuperscript{120} Accordingly, Congress is not increasing its power at the expense of the Executive Branch.

Nor does The Act work any judicial usurpation of properly executive function. Other than the powers of appointment, discussed earlier, the court has no power to supervise or control the activities of the counsel.\textsuperscript{121}

Finally, The Act does not impermissibly undermine the power of the Executive Branch or disrupt the proper balance between the coordinate branches by preventing the Executive Branch from accomplishing its constitutionally assigned functions.\textsuperscript{122} Although it reduces the amount of control and supervision that the Attorney General and President exercise over the investigation and prosecution of a certain class of alleged criminal activity,\textsuperscript{123} the Attorney General has several ways to supervise or control the powers of the Independent Counsel. She may remove the Independent Counsel for good cause, providing the President with substantial ability to ensure that the laws are faithfully executed by the Independent Counsel. She also controls the initial appointment of the Independent Counsel and to some extent, the definition of his jurisdiction by submitting certain facts to the Special Division. In addition, the requirement to abide by Justice Department policy also acts as a control on the Independent Counsel. Consequently, even though the Independent Counsel is free from executive supervision to a greater extent than other federal prosecutors, these features of The Act give the

\textsuperscript{119} \textit{Morrison v Olson}, 2620.

\textsuperscript{120} Ibid., citing \textit{McGrain v Daugherty}, 273 US 135, 174 (1927).

\textsuperscript{121} \textit{Morrison v Olson}, 2621.


\textsuperscript{123} \textit{Morrison v Olson}, 2621.
Executive Branch sufficient control over the Independent Counsel to ensure that the President is able to perform his constitutionally assigned duties.\textsuperscript{124}

Justice Scalia's dissent concentrated on the principle of separation of powers. His main argument is that once one determines that the conduct of a criminal investigation and prosecution is purely an executive power, then one must determine whether The Act deprives the President of exclusive control over the exercise of that power.\textsuperscript{125} He disagrees with the Majority's analysis revolving around the extent that the removal power impedes on the President's exercise of his duties. In his opinion, the Independent Counsel is a purely executive officer, thus he should be removable at will by the President.

In support of his alternative test, Scalia argues that the conduct of a criminal investigation and prosecution is purely an Executive Branch power, citing several cases in support.\textsuperscript{126} Prosecutors make policy decisions in investigating crimes, including deciding who to prosecute, which crimes to pursue, and how to use the subpoena power. Taking supervisory power of these activities away from the President usurps the core of the executive function.\textsuperscript{127} Because the Constitution grants all Executive Power to the President, any distinction the Court makes as to how central the need to control the Independent Counsel is to the President's constitutional duties is invalid to Justice Scalia.\textsuperscript{128}

Since prosecution is a purely Executive Branch function, Justice Scalia argues, then the only relevant question to ask is whether the President has exclusive

\textsuperscript{124} Ibid., 2622.
\textsuperscript{125} Ibid., 2626.
\textsuperscript{127} Ibid., 2628.
\textsuperscript{128} \textit{Morrison}, 2628 (dissent).
control of the prosecutor's removal. Here, the President does not, thus The Act must violate the separation of powers doctrine.

Justice Scalia disagrees with the Majority's contention that the President, through the Attorney General, has control over the Independent Counsel. The good cause restriction on removal serves more as an impediment to removal than as a control. The discretion of the Attorney General to request an appointment is not a control, as the Court believes, but is so "insubstantial that the Attorney General's discretion is severely confined." When a request for appointment has come from Congress, the Attorney general must explain any denial to the Congress. Practically, it would be surprising if the Attorney General had any choice but to seek appointment of an Independent Counsel to pursue the charges, particularly where there is evidence against the person charged. Further, once the referral is made, the Special Division determines the scope and duration of the investigation, not the Attorney General. Most importantly, once appointed, the Independent Counsel exercises executive power free from the President's control. Since the President's power to remove the Independent Counsel is so limited, The Act violates the separation of powers doctrine.

However, the purpose of The Act was to curb the Executive's power, when investigating transgressions by those in his Administration. Should the President still have such exclusive power, even when alleged crimes by him or his close associates are at issue? In effect, Justice Scalia answers in the affirmative. It is a price we pay for liberty, to preserve the separation of powers and our system of checks and balances. Allowing the President to wield all of the executive power, even when it involves possible crimes committed by himself or those close to him is no different than when

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129 *Morrison v Olson*, 2627.

130 Ibid., 2627.
Congress exempts itself from laws it passes\(^{131}\) or when the Supreme Court has the power to pronounce the final decision on the constitutionality of a statute reducing its salaries.\(^{132}\) The President’s power can be checked constitutionally by the power to impeach a President who fails to enforce the laws. Further, there is a political check by the people who elected the President. They may vote him out of office.

Finally, Justice Scalia comments on the political effects of The Act. It chills speech between the President and his advisors if they have no protection. It allows Congress to trigger an investigation rather than bring impeachment proceedings against a President, proceedings which may hurt their political futures. The investigations themselves become a source of constant political damage and are widely publicized and much too long.\(^{133}\) The Independent Counsel has immense power and the danger of that power combined with unlimited resources and a staff of those devoted to the cause without the political check of removal by the President, creates a mini-executive: narrow, focused and unlimited. "I fear the Court has permanently encumbered the Republic with an institution that will do it great harm."\(^{134}\)

In the years since *Morrison v Olson*, many have agreed with Justice Scalia’s arguments. The dissent has been widely cited in articles that call for The Act’s repeal. But the The Act is not likely to be overruled in the near future, since ten Justices supported its constitutionality. It is up to Congress to determine the future of The Act.

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\(^{131}\) Justice Scalia cites the Civil Rights Act of 1964, Title VII, 42 USC section 2000e as an example.


\(^{133}\) *Morrison v Olson*, 2631.

\(^{134}\) Ibid., 2641.
CHAPTER 3

POLICY CONSIDERATIONS

From its beginnings in the early 70's, the Ethics in Government Act has been controversial. The original act contained a sunset clause providing that the Act would expire in December of 1982. While Congress re-authorized the Act in 1983, and again in 1987 and 1994, it has amended the Act in important ways in response to public policy concerns raised by its application. This chapter examines many of the changes made and the impetus for such changes.

As previously discussed, the policy behind the Act is to ensure independent investigation of high-level executive officials. After Watergate, many believed it made sense to separate the investigators from those being investigated, to avoid the appearance of impropriety and to ensure that the investigations would be fair and impartial. However, perceived abuses precipitated amendments to the Act. The 1983 Amendments to the Act were influenced by the investigations of three Carter officials, Jordan, Kraft, and Donovan, none of which resulted in criminal charges. Critics alleged that the Act was too easily engaged and that the scope of the Act was too broad, thus the amendments changed the standard for commencing a preliminary investigation.

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See *Offutt v. United States*, 348 US 11, 14 (1954)(“Justice must satisfy the appearance of justice.”). See also *American Bar Association, ABA Model Code of Professional Responsibility, Canon 9* (1979)(“a lawyer should avoid even the appearance of professional impropriety.”)
While the Reagan Administration opposed The Act on constitutional and cost grounds, it later dropped its opposition because the public still favored The Act.\(^{136}\)

In 1987, The Act was up for reauthorization and more than half a dozen investigations had already been launched. Reagan Attorney General William French Smith opposed reauthorization, claiming that the process of Independent Counsel investigation was “cruel and devastating in its application to individuals, falsely destroying reputations and requiring the incurring of great personal costs.”\(^{137}\) The second Reagan Administration, with at least four pending investigations of its advisers, launched constitutional attacks on the bill, resulting in the *Morrison v Olson* Supreme Court decision. Democrats, on the other hand, vigorously supported The Act in 1987. Leading Senate Sponsor Carl Levin made comparisons between the pending investigations and Watergate, claiming that The Act had restored public confidence in the criminal justice system.\(^{138}\) The Act was reauthorized in 1987, with overwhelming support, and President Reagan was forced to sign it. One day later, the Office of the Independent Counsel secured its first conviction under The Act, that of Reagan official Michael Deaver, for perjury.

The Bush Administration continued to assault The Act, but investigations continued, including one of Bush Defense Secretary Caspar Weinburg. In addition, Lawrence Walsh continued what would be a seven-year investigation of the Iran-Contra Affair. The Act again expired at the end of 1992, and it was in the hands of the newly-elected Clinton Administration. Although warned by the outgoing administration, the Clinton Administration believed in The Act and vowed to retain it. Shortly thereafter, Republicans called for an Independent Counsel to investigate Clinton for unethical

\(^{136}\) Stanley I. Kutler. “*In the Shadow of Watergate: Legal, Political, and Cultural Implications*”, 18 Nova L. Rev. 1743, 1751 (1994).

\(^{137}\) Ibid.

\(^{138}\) Ibid., 1752.
business dealings. Consequently, the Republicans, although they hated The Act, were in a quandary about reauthorization. The Act prevailed, and was again reauthorized in 1994.

It is a foregone conclusion that if an administration is plagued by Independent Counsel investigations, it is not likely to support reauthorization of The Act. However, opposing The Act is politically difficult, because it can make an administration look like it has something to hide. Consequently, the alternative to repealing The Act is to attack it, which has been the tactic of every administration since The Act’s inception. The attacks may not have caused the repeal of The Act, but they have precipitated important changes to it, specifically in the following areas:

Name

The Independent Counsel became known as such with the 1983 Amendments. Prior to 1983, he was known as the Special Prosecutor. In changing the name, Congress sought to remove the stigma associated with the name Special Prosecutor.140

Standard for Preliminary Investigation and Request for Appointment

The amendments directed at the standards for preliminary investigation and request for appointment were the most important. The current standard for commencing a preliminary investigation requires the Attorney General to determine within 30 days of receiving “sufficient information” if there are grounds to investigate a covered official. In making the determination, she shall only consider 1) the specificity of the information received and 2) the credibility of the source.141 However, the Attorney

139 Ibid.
140 O’Keefe and Safirstein, 146.
141 28 USC §§ 591(d)(1) and (2).
General cannot use the normal tools of a prosecutor to do so: she cannot subpoena records, she cannot use a grand jury, and she cannot give witness immunity. The Amendments changed this inquiry in two ways.

First, prior to the 1994 Amendments to The Act, the Attorney General only had 15 days to determine whether a preliminary investigation should be commenced. The current standard gives the Attorney General 30 days, a reasonable period of time to review the allegations presented. Second, the standard for instituting a preliminary investigation has been narrowed in scope. The original version of the statute required the Attorney General to conduct a preliminary investigation when the Attorney General received "specific information" of a violation of any federal criminal law, other than a petty offense. It did not define "specific information" and it did not give the Attorney General much discretion in determining whether the information was credible. Specific information could conceivably come from any source, as long as it was detailed. In addition to considering the specificity of the information, the Attorney General may now also consider the credibility of the source.

This change in The Act, made in 1983, was made in response to Attorney General Benjamin Civiletti's request for Independent Counsels to investigate Carter Administration Official Hamilton Jordan and Campaign Manager Timothy Kraft. Jordan was accused of using cocaine in a discotheque in 1978, and Kraft was similarly accused of using drugs. The Attorney General had received reports of drug use from several people who were the subject of investigations by the Department of Justice. After preliminary investigations, he was compelled to appoint Independent Counsels in both cases. Both were exonerated after investigation.

Civiletti testified before the Senate that he would have neither commenced a preliminary investigation nor appointed Independent Counsels had he been following

142 Ibid., 1528. 11 USC § 591-592.
standard Department of Justice procedures rather than following the provisions of The Act. Since he had specific information about alleged drug use, he was compelled to begin a preliminary investigation.\textsuperscript{144} Whereas Attorney General Civiletti was not permitted to discount the credibility of the sources, now the Attorney General may do so.

Similarly, the standard for requesting an Independent Counsel has changed. The original Act made the request mandatory unless the matter under investigation was "so unsubstantial" as to not warrant further investigation or prosecution. Civiletti testified that he could not classify the allegations against Jordan and Kraft as "so unsubstantial", thus had to appoint Independent Counsels. The 1983 Amendments changed the standard to "there are no reasonable grounds to believe" that further investigation or prosecution is warranted. It also added that the Attorney General shall, in determining whether reasonable grounds exist to warrant further investigation, comply with written or other established policies of the Department of Justice with respect to the enforcement of criminal laws.

As a policy matter, the Public Integrity Section of the Criminal Division of the Justice Department, the unit which reviews Independent Counsel requests, receives several dozens allegations every year. For example, from 1987 to 1992, over 50 requests were made. Of those requests, thirty-five preliminary inquiries were undertaken where it was determined that the evidence was not sufficiently specific or credible to warrant a preliminary investigation. In nine cases, there was specific and credible information as to a covered person, but it was determined that no referral was appropriate because no further investigation was warranted. There were specific and credible allegations made as to eight people who were not covered by The Act, but who were associated with a covered person, such as a family member or a close business associate. Of these eight

\textsuperscript{143} O'Keefe and Safirstein, 147, n.57.

\textsuperscript{144} O'Keefe and Safirstein, 137, fn. 52 and 135.
allegations, initial inquiries were undertaken and it was determined that they did not justify a referral. Lastly, in five cases during this period, there were applications for an Independent Counsel."

It has been reported that Attorney General Janet Reno construes the language of The Act strictly, by gathering much more evidence than required to institute a preliminary investigation. For example, Congressional Republicans requested that Reno appoint an Independent Counsel for campaign finance reform issues. To date, she has refused. However, there is no shortage of Independent Counsels investigating the Clinton Administration. In May of 1998, Attorney General Reno decided to seek an Independent Counsel to investigate allegations against Labor Secretary Alexis Herman. Reno also appointed an Independent Counsel to investigate Interior Secretary Bruce Babbit for allegedly lying to Congress about his role in rejecting a proposed Indian casino. Other Clinton Administration officials who have been investigated by Independent Counsels include: Henry Cisneros, Mike Espy, Ron Brown, and Clinton himself.

Cost

The costs of Independent Counsel investigations have escalated, ranging from $3,300.00 to $47.4 million. The 1994 Amendments added provisions regarding cost controls. None were present in the original statute. These provisions require the Independent Counsel to conduct activities with due regard for expense, authorize only

145 Wilkinson and Ellis, 1528.
147 Spector, 1195-1197
149 Wilkinson and Ellis, 1523.
reasonable and lawful expenditures, and assign a person to certify that the expenditures are reasonable. Further, the Independent Counsel must comply with Department of Justice policies on expenditures unless inconsistent with purposes of The Act. Expenses are audited every six months. However, amendments also provided for travel expenses, per diem fees, and subsistence expenses, subject to certain limits. Anyone who wrongly certifies an expense is liable as other public officials are, but few if any limits are imposed on the funds expended in an investigation. The reports on expenditures are made public, but even public outcry does not compel the Independent Counsel to cut its expenditures. On this front, the Independent Counsel is left to his own discretion.

**Length and Termination**

An Independent Counsel serves until his prosecution is complete or he is removed from office. Prior to and including the 1983 Amendments, length of office was not a concern to Congress, because the three counsels who had served had all completed their investigations in reasonable periods of time. Consequently, no changes were made regarding the length of the Independent Counsel's service. In 1994, The Act was amended to require that if the Independent Counsel did not initiate termination himself (because all prosecutions were substantially completed), the Attorney General could initiate it or the Special Division, on its own motion, shall determine whether termination is appropriate. The Special Division must do so no later than two years after appointment, at the end of the next two year period, and at the end of every one year period thereafter.\(^{151}\)

The Independent Counsel may be removed by impeachment and conviction, by the Attorney General for good cause, physical or mental disability, or any

\(^{150}\) 28 USC § 594(1).

\(^{151}\) 28 USC § 596.
other condition that substantially impairs his performance. The good cause requirement was added by the 1983 Amendments. Prior to good cause, the standard was extraordinary impropriety. Extraordinary impropriety was not defined in The Act, but it was the same standard under which the Watergate Prosecutor was appointed. In establishing the good cause standard, Congress did not define good cause, but the Senate commented that the standard should be interpreted in accordance with existing case law on the removal of other officials who are subject to good cause removal. Neither did the Supreme Court define good cause in *Morrison v Olson*. While it is true that other government agencies have a good cause-type standard for removal, specifically the Federal Reserve, the Federal Trade Commission, and the former Interstate Commerce Commission, there is very little case law discussing what good cause means. The Federal Trade Commission standard specifies cause as inefficiency, neglect or malfeasance, which has been held in by the United States Supreme court to exclude removal on a whim. Consequently, some commentators believe it is possible to interpret the standard broadly to encompass a lot of conduct, but it has not yet been applied to any Independent Counsel.

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152 O'Keefe and Safirstein, 147, fn 47. According to O'Keefe and Safirstein, Attorney General Richardson chose to resign rather than fire Cox, contrary to the instructions of president Nixon, because Cox’s actions did not meet the extraordinary impropriety standard.

153 *Morrison v Olson*, 2620, n. 33.

154 *Swan v Clinton*, 100 F3d 973 (DC Cir 1996).

155 See *Humphrey’s Executor v US* and *Weiner v US*, supra.

156 Lawrence Lessig and Cass Sunstein, *The President and the Administration*, 94 Colum. L. Rev. 1, 111. They attribute this argument in part to the Court’s reasoning in *Bowsher v Synar*, 478 U.S. 714, 727 (1986), where the Court discussed the removal power of Congress with regard to the Comptroller General. The statute said that the Comptroller General could be removed for inefficiency, abuse of office, neglect of duty, or malfeasance, which is very similar to the FTC standard of inefficiency, neglect or malfeasance. Congress called the removal power broad. If the standard is analyzed the same way, then it would stand to reason that the Court may find that the good cause standard would allow removal of the Independent Counsel for a wide range of conduct.
Reports

The Independent Counsel is required to file a yearly report with Congress. This requirement was added by the 1994 Amendments. The Act previously required the Counsel to file reports when appropriate. The length and scope of the investigations presumably led to this change, as the investigations began to span several years and cost millions. Congress needed to be periodically updated.\(^{157}\)

In addition to yearly reports, the Independent Counsel must file a final report. Prior to 1994, the report had to discuss a description of work completed, including the disposition of any cases bought, and the reasons for not prosecuting any matter within the prosecutorial jurisdiction of the counsel. The 1994 Amendments removed the requirement of discussing the reasons for non-prosecution. Once the report is filed, the attorneys for those investigated may obtain the portions of the report dealing with their clients. Any criticisms or responses the subject may have are attached to the report as an appendix and then it is released publicly. In certain circumstances, the report or portions of it that are confidential will not be released.\(^{158}\) Some past Independent Counsels, such as Lawrence Walsh and Jacob Stein, believe the reporting requirement is necessary to justify expenditures and inform the public of just what the Independent Counsel has accomplished.\(^ {159}\) Others, such as Larry Thompson, who investigated the Department of Housing and Urban Development, believe the report is time-consuming, expensive, and wasteful.

\(^{157}\) 28 USC § 595.
\(^{158}\) Wilkinson and Ellis, 1544.
\(^{159}\) Wilkinson and Ellis, 1556. Walsh’s report exceeded four hundred pages and the appendix containing responses by those investigated was about one thousand pages.
Reimbursement of Fees

The Act awards attorneys’ fees to those who are not indicted, a provision which was added by the 1983 Amendments. The grant of fees may have been a result of the Jordan and Kraft investigations previously discussed, in which both incurred enormous attorneys’ fees. Jordan is said to have incurred over $100,000 in legal fees, more than twice his annual salary. The 1994 Amendments qualified the award of fees, by making the applicant address whether the cost would have been incurred but for the requirements of The Act. To recover fees, an applicant must show that (1) he is the subject of the investigation, (2) fees were incurred during the investigation, (3) fees would not have been incurred but for the requirements of The Act, and (4) fees are reasonable. The Special Division publishes all fee applications, and substantial amounts may be awarded. For example, the Special Division awarded Ronald Reagan $562,111.08 out of $777,651.79 requested for the Iran Contra Investigation, because Independent Counsel Walsh reported that he did not have proof beyond a reasonable doubt that the President knew about the activities of Oliver North. The Special Division, when awarding fees, generally excludes fees incurred in communicating with the media, because that is not a necessary expense incurred in defending a criminal prosecution.

Persons Covered By The Act

Each round of amendments brought changes to the scope of persons covered by The Act. The President, Vice-President, Cabinet Officials, some deputy

160 28 USC § 593(f).
161 O'Keefe and Safirstein, 147, fn 130.
162 In re North (Reagan Fee App.), 94 F3d 685 (DCCir 1996).
163 Ibid. See also In re Mullins, 84 F3d 459 (DC Cir 1996)(award of $223,186.66).
164 Ibid.
cabinet officials, the Director of Central Intelligence, the IRS Commissioner, and some national campaign officials have always been covered. The 1983 Amendments narrowed some of the executive officials to those within a certain pay scale. However, at one point an amendment was proposed to extend coverage of The Act to the presidential spouse, children, and relatives. This was during the time that President Carter's brother Billy was somehow involved with the government of Libya, commonly referred to as "Billygate." The current statute also includes members of Congress, but no Independent Counsels have yet been appointed to investigate a member of Congress. The current statute also limits the scope of The Act to one year after leaving the covered position. Previously, The Act had tied coverage to when the President left office. The policy arguments for restricting coverage of The Act continue and will be further addressed in a subsequent chapter.

The foregoing has discussed the policy changes made in response to the application of The Act. The application of The Act in the last few years has generated additional arguments which will be discussed in Chapter 5. The next chapter discusses several "hot" legal issues which have arisen in the course of Independent Counsel Starr's investigation of the Clintons.

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165 Ibid., fn. 155.

166 28 USC § 591.
CHAPTER 4

HOT ISSUES

Independent Counsel Starr’s investigation of the Whitewater land deal and related matters has raised several legal issues which have become front page news: the use of executive privilege to keep advisors from answering relevant questions about the Monica Lewinsky investigation, the scope of governmental attorney-client privilege relating to the same investigation, the confidentiality attributed to the secret service-presidential relationship, and the scope of the attorney-client privilege when the client is deceased. One final issue is raised by the resolution of all these privileges. If a sitting President is guilty of violating the law, may he be prosecuted? In a legal sense, these are cutting edge issues which either push the boundaries of existing law or are destined to make new law. In a policy sense, these issues reflect normative considerations of the balance between the protection accorded our leaders and the information the public deserves. Aside from the theoretical questions, these privilege issues vividly demonstrate the defensive tactics of an administration under fire. Asserting a privilege is one of the most effective ways to delay an Independent Counsel’s investigation because it takes time and resources to fight.

The Office of the Independent Counsel is a legal entity. It pursues its investigation by using the legal process and it prosecutes its claims in the court system, using grand juries to indict its suspects. Under the United States Constitution, all those
accused of crimes and all those being investigated are entitled to due process. This means that when subpoenaed, a party may object based on numerous grounds, privilege included, and is entitled to a hearing on his objections. Whether or not the objection is valid, the parties are required to file briefs and argue the merits of the objection at a hearing. This may take anywhere from ten to thirty days, depending on the type of motion and the notice requirements. The lower court, generally a federal district court, issues a ruling, which may not be immediate, adding anywhere from one to one hundred twenty days to the process. If the administration loses a motion in the district court, it may move for reconsideration before appealing the ruling, which may add an additional ten to forty days to the process, to allow for briefing and argument. After the ruling on the motion for reconsideration, the administration may then file an appeal, if it is not happy with the ruling. The Independent Counsel may also file an appeal. In general, the parties have additional time to file a notice of appeal, and a briefing schedule is then set by the court. The appellate process may take anywhere from thirty days to a year, although some proceedings may be expedited. After the circuit court rules, the parties may seek a hearing before the Supreme Court, which may hear the matter on a shortened timetable. In rare situations, the Supreme Court may dispense with appellate review altogether and hear a case straight from a district court. Consequently, all of these reviews cause significant delay, and these delays are to the benefit of the persons being investigated.

Although many of the complaints aimed at the Independent Counsel statute revolve around the time that the Independent Counsel spends investigating, and the expenses incurred during that investigation, the assertion of privileges by those being investigated are a substantial factor in such time and expense. Although due process allows the President and those on his behalf to assert these privileges, one has to wonder

167 U.S. Constitution, Fourth and Fourteenth Amendments.
what the effect would be if every assertion of privilege was heard on an expedited basis. If justice were swift, would these investigations become more manageable, and consequently more reasonable?

This chapter examines the privileges discussed above, as well as the possibility of prosecuting a sitting President. Each of the privileges discussed has been recently asserted in the Whitewater investigation and its related matters. Executive privilege, the governmental-attorney privilege, and the Secret Service "protective function privilege" have been asserted in the Monica Lewinsky investigation. The extent of the attorney-client privilege in the case of a deceased client was raised in the investigation of White House Counsel Vince Foster's suicide. All of these privilege issues have been or will be heard by the Supreme Court.

**Executive Privilege**

During Independent Counsel Starr's investigation of Monica Lewinsky, Starr sought to compel the testimony of Bruce Lindsey and Sidney Blumenthal before the grand jury. Bruce Lindsey is a deputy counsel with the White House and Sidney Blumenthal was a journalist who is currently an advisor to the President and Mrs. Clinton. Miss Lewinsky and others are being investigated for suborning perjury, obstructing justice and/or intimidating witnesses concerning the *Jones v Clinton* sexual harassment case.168 Both Lindsey and Blumenthal allegedly had information relating to whether federal crimes were committed by Lewinsky or others regarding the *Jones v Clinton* case.169 Specifically, the Independent Counsel wanted to know whether the

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168 Paula Jones, a former Arkansas state employee, sued President Clinton for sexual harassment arising from an incident which allegedly took place in a hotel room while he was Governor of Arkansas. The grant of jurisdiction to the Independent Counsel specifies this as the scope of the investigation. See *In re Madison Guaranty Savings & Loan Assoc.* (DC Cir Spec Div January 16, 1998).

169 Ms. Lewinsky filed an affidavit in the Jones case swearing that she never had sexual relations with President Clinton. Contrary evidence came to the attention ...(continued)(continued...)
President instructed Ms. Lewinsky to obstruct justice, if he suborned perjury by knowing and encouraging her to file a false affidavit, or whether he discussed any instructions or suggestions he may have made to her with either Lindsey or Blumenthal. If he had, it would be highly relevant to the investigation.

Bruce Lindsey was called before the grand jury three times, on February 18, 28, and on March 12, 1998. At each session, he asserted executive privilege in response to several questions. He also asserted governmental attorney-client privilege. Sidney Blumenthal appeared before the grand jury on February 26, 1998 and asserted executive privilege on a number of questions as well. He is not an attorney, thus the attorney-client privilege was not available to him.

Starr moved to compel the testimony of both men. In a detailed opinion, the District Court granted his motion. The White House appealed, and Starr applied to the Supreme Court for a writ to hear the issues immediately. In requesting the writ, Starr argued that the matter contained a question of overriding concern, namely "the circumstances under which the Executive Branch may withhold information from a federal grand jury investigating allegations of misconduct against the President, other Executive Branch officials, and various private individuals."170 The Supreme Court denied the application for an expedited hearing. The White House subsequently abandoned its claim of executive privilege as to both men, but retained its governmental...


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attorney-client privilege claim as to Lindsey. An appeals court has agreed to hear the Lindsey case at the end of June, 1998.\textsuperscript{171}

The guiding case on executive privilege is \textit{United States v Nixon}.\textsuperscript{172} In \textit{Nixon}, the Supreme Court addressed whether President Nixon could assert executive privilege as to certain recorded conversations and documents relating to conversations between himself and his advisors regarding the Watergate break-in. Balancing the need for confidentiality among those in decision-making capacities and the need for information relevant to a grand jury investigation, the Court acknowledged that there has always been an understanding that some communications between high government officials should be confidential. "Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision-making process."\textsuperscript{173} As an example, the Court cited the meetings of the Constitutional Convention in 1787, which were conducted in complete privacy. The notes of the meetings were kept confidential for 30 years.\textsuperscript{174} However, the need for evidence in a pending grand jury investigation is equally, sometimes more important that the President’s need for confidentiality.

Nixon argued that his privilege was and should be absolute, based on both the need for confidentiality in Executive Branch decision-making and the independence of the Executive Branch under the Constitution.\textsuperscript{175} The Court concluded that the President was entitled to the privilege, but not the absolute privilege Nixon sought. If the asserted privilege was based on military or diplomatic secrets, the Court would grant the utmost deference to the President, as it has done in the past. But in \textit{Nixon}, the President


\textsuperscript{172} 418 U.S. 683 (1974).

\textsuperscript{173} Ibid., 704.

\textsuperscript{174} Ibid., 704, n. 15.

\textsuperscript{175} Ibid., 713.
asserted only a general interest in confidentiality. This alone would not suffice to render a communication privileged. However, if the asserted general interest in confidentiality related to the effective discharge of the President’s powers, it would be constitutionally based, but it would need to be weighed with the effect it has on the fair administration of criminal justice.\footnote{Ibid., 712.} In Nixon’s case, his generalized interest in confidentiality did not prevail over the fundamental demands of due process of law in the fair administration of criminal justice. Thus, the Court held that “[t]he generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.”\footnote{Ibid., 713.} Procedurally, the holding in \textit{United States v Nixon} instituted a test: when a President invokes executive privilege, the court must treat the subpoenaed material as presumptively privileged and require the Special Prosecutor to show that the material is essential to the justice of the pending criminal case.\footnote{Ibid.}

The District Court in the Lewinsky case followed the dictates of the Supreme Court and treated Lindsey and Blumenthal’s\footnote{The scope of the privilege extends to “communications authored or solicited and received by those members of an immediate White House Advisor’s staff who have broad and significant responsibility for investigating and formulating the advice to be given to the President on the particular matter to which the communications relate.” \textit{In re Sealed Case}, 121 F2d at 752.} testimony as presumptively privileged.\footnote{Memorandum Opinion and Order, \textit{United States v Clinton}, filed May 26, 1998, reprinted on \textit{http://www.washingtonpost.com}, 3.} The District Court then analyzed the interest the President sought to protect. Although purely personal conversations that did not touch on the President’s constitutional duties or on policy decisions would not be covered by the privilege, many private matters are discussed in the context of official policymaking, and those conversations would be covered. For example, the President’s discussions of the Lewinsky matter and how it would be handled when British Prime Minister Tony Blair
visited the United States would be privileged.\textsuperscript{181} The District Court could not classify the conversations as purely personal, non-privileged communications, because it had sworn statements from the White House that the conversations involved official matters such as possible impeachment proceedings, foreign and domestic policy matters, and the assertion of official privileges.\textsuperscript{182} Unlike \textit{Nixon}, where documents were involved and the Court could examine the documents in camera to determine their content, the subject of the Lewinsky motions was testimony. As such, the District Court had to treat the testimony as presumptively privileged, requiring the Independent Counsel to make a showing of need.

In order to show need, the Independent Counsel must show: 1) that each discrete group of the subpoenaed materials likely contains important evidence; and 2) that this evidence is not available with due diligence elsewhere.\textsuperscript{183} The District Court determined that Starr had made such a showing, based in an in camera review of the evidence gathered so far. The opinion does not detail the findings made by the District Court discussing Starr's showing of need, due to the confidentiality of grand jury proceedings.\textsuperscript{184} The District Court did comment, however, that if there were instructions to obstruct justice or efforts to suborn perjury, they would likely take the form of conversations with close advisors, and may constitute some of the most relevant evidence in the investigation, whether exculpatory or inculpatory.\textsuperscript{185} Consequently, the motion was granted.

The Lewinsky case seems an appropriate case in which to deny the use of executive privilege. From the allegations made thus far, it stems from the personal

\begin{footnotes}
\item[181] Ibid., 4.
\item[182] Opinion, 5.
\item[183] Ibid., 754.
\item[184] Fed. Rule Crim. Pro. 6(e)(2).
\item[185] Opinion, 10.
\end{footnotes}
conduct of the President, and his subsequent efforts to deal with his conduct. It would not be difficult for the Independent Counsel to show need in such a situation. However, the interesting questions begin when the investigation revolves around national security or military issues. For example, both the Senate and the House are investigating dealings between the Clinton Administration and the Chinese government which resulted in assisting the Chinese in perfecting rocket launchers for nuclear weapons, and allowing launches of U.S. satellites on Chinese rockets.\footnote{Walter Fincus and John Mintz, \textit{White House: Chinese Launches Aid U.S.}, Washington Post, June 19, 1998, A04.} If an Independent Counsel is appointed, surely his efforts to compel testimony on certain issues will invoke claims of executive privilege. Under \textit{Nixon}, such claims may be successful.

**Governmental Attorney-Client Privilege**

In addition to asserting executive privilege, Bruce Lindsey asserted governmental attorney-client privilege. The attorney-client privilege protects communications between attorneys and their clients that are intended to be confidential and are made for the purpose of obtaining legal advice.\footnote{Tax Analysts v IRS, 117 F3d 607, 618 (DC Cir 1997).} As Deputy Counsel to the Office of the President, Lindsey claimed that he advised the President on how to keep pending litigation from affecting his constitutional duties, whether or not to assert privileges, and advised him with respect to potential impeachment proceedings. If Lindsey had been Clinton’s private attorney, this information would unquestionably be privileged. However, Lindsey is paid by the government, and there is an argument that government attorneys work for the public, thus officials for whom they work should not be able to claim the privilege to conceal information from the public.

Only one Court of Appeal has explicitly held that a governmental attorney-client privilege exists. However, it may not be asserted in grand jury
proceedings. In *In re Grand Jury Subpoena*, the Eighth Circuit Court of Appeals addressed the private conduct of President and Mrs. Clinton in the Whitewater matter. The Independent Counsel had subpoenaed all documents created by government attorneys related to the Whitewater matter, and the White House refused to produce some of its notes which were responsive to the subpoena, asserting a governmental attorney-client privilege. The notes were taken during meetings between Mrs. Clinton, White House attorneys, and her personal attorneys. The court ruled that while such a privilege may exist in other circumstances, no privilege exists in a federal criminal investigation.

The District Court in Lindsey’s case did not follow the reasoning of the Eighth Circuit and held that a governmental attorney-client privilege does apply in the federal grand jury context. However, the privilege is not absolute in criminal cases, as it is in civil cases. The court held that “in the context of a federal grand jury investigation where one government agency needs information from another to determine if a crime has been committed, the court finds that the governmental attorney-client privilege must be qualified in order to balance the needs of the criminal justice system against the government agency’s need for confidential legal advice.” The court compared the attorney-client privilege to the executive privilege and concluded that the standard should be the same. Absent such consistency, the President’s legal advisors will simply recharacterize their legal advice as political advice in order to be evaluated under the more lenient standard governing executive privilege. Consequently, for the same reasons the court granted the Independent Counsel’s motion to compel based on executive

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188 112 F3d 910 (8th Cir 1997).
189 Ibid., 914.
190 Ibid.
191 Opinion, 15.
privilege, it granted the Independent Counsel’s motion based on the governmental attorney-client privilege.

While abandoning its executive privilege claim, the White House is pursuing its governmental attorney-client privilege claim. It seeks to overturn the holding that the privilege is qualified, as the executive privilege, and establish the standard as absolute in all contexts, including before a grand jury.

**Attorney Client Privilege After Death**

In another controversial move, Independent Counsel Starr brought a motion before the court to compel disclosure of three pages of notes taken by Vince Foster’s attorney while on the phone with Foster nine days before he committed suicide. Starr believes the notes may assist in the investigation of the White House travel office. Foster’s lawyer refused to turn over the notes, and asserted the attorney-client privilege on behalf of his deceased client. The District Court ruled that the notes were privileged, a ruling which was overturned by the District of Columbia Court of Appeals. The Supreme Court overturned the D.C. Circuit, holding that the privilege remained intact.

In oral argument before the Supreme Court, Foster’s attorney argued that the privilege should survive the client’s death, because to end the privilege at death would chill discussion between a lawyer and client, especially a client who may be sick or close to death. If a client knows that his communications with an attorney may be disclosed after his death, he may not be honest with the attorney. Honesty is important in an attorney-client relationship and confidentiality is what encourages that honesty and builds a relationship of trust. The attorney-client privilege exists in part to assure the client that the attorney has his best interests in mind and will protect those interests. If the client fears disclosure, he will not speak freely to the attorney. Starr’s office argued that their

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need to review the notes outweighed any attorney-deceased-client privilege. The only way to get to certain information would be by relaxing the privilege. Once a person dies, there is no means for questioning him or her about the underlying events, which is a subject the privilege does not protect.

The Supreme Court, in a six to three opinion, held that the privilege remained intact. Justices O’Connor, Scalia, and Thomas dissented. The Majority reasoned that the majority of cases addressing the privilege held or assumed that the privilege remained intact after death. Although it may be waived in some testamentary cases, the privilege is still presumed to exist. In the Foster case, the Court held, the Independent Counsel did not show that the rule should be overturned. Further, the purpose behind the privilege weighed against disclosure to the Independent Counsel. Consequently, Starr will not have access to Foster’s attorney’s notes.

The Dissent argued that exceptions to the privilege should be made when there is a compelling law enforcement need for the information, and suggested that when the privilege is asserted in the criminal context, and a showing is made that the communications at issue contain necessary factual information not otherwise available, a court should be permitted to determine whether the privilege should be forgone.

Protective Function Privilege

In the Monica Lewinsky investigation, Independent Counsel Starr seeks the testimony of several Secret Service agents who staff the President’s detail. The Secret Service has instructed the involved agents not to answer certain questions, based on what it calls the “protective function privilege.” Although no such privilege currently

194 Ibid., 15 (dissent).
exists, the Secret Service is attempting to establish it. The Secret Service argues that the proposed privilege should cover: 1) observations of conduct, 2) overheard statements, and 3) observations of individuals made by Secret Service employees while performing a protective function in proximity to the President. It would also extend to hearsay communications of privileged information, meaning actions or statements not personally witnessed by the agent, but communicated to the agent by another person. The proposed privilege would not need to be invoked by the President, but by the Secretary of the Treasury. The privilege would be absolute, with two exceptions: the first for compelling circumstances, such as overriding national security concerns, and the second, where an officer or agent observes conduct or hears statements that are, at the time, sufficient to provide reasonable grounds to conclude that a felony has been, is being, or will be committed.

The reasoning behind this proposed privilege is that Secret Service agents must be able to be close to the President at all times in order to protect him. If a President believes his actions and conversations will not be protected, then he is likely to push the agents away, creating substantial risk. Because the Secret Service uses a “cover and evacuate” strategy rather than a “counter-offensive” strategy, the proposed privilege becomes a matter of life and death. The “cover and evacuate” strategy means that the

195 This is a case of first impression. No party has cited any previous occasions when Secret Service agents have been compelled to testify in front of a grand jury as to potential criminal conduct they may have witnessed while in close proximity to the President. However, Secret Service agents have testified in judicial and non-judicial proceedings with respect to President Nixon’s taping system and John Hinkley’s attempted assassination of President Reagan. No protective function privilege was asserted in those proceedings. Order, *US v Robert Rubin, In re Grand Jury Proceeding*, entered May 22, 1998, reprinted at [http://www.washingtonpost.com](http://www.washingtonpost.com), 3-4.


197 Ibid.
Secret Service protects the President by forming an all-encompassing zone of protection on a twenty-four hour, three hundred and sixty-five days a year basis.\textsuperscript{198} It responds to an attack by protecting and evacuating the President from the area, rather than shooting back at the offender. For this reason, the lack of close proximity could mean death.

Secret Service Director Merletti, in a declaration filed with the District Court, stated the historical bases for the Secret Service's position that close proximity is a matter of life and death. In both the McKinley and Kennedy Assassinations, the Secret Service believes that it could have saved the President by being only a few feet closer. President McKinley was assassinated in 1901, at the Pan-American Exposition. A Secret Service agent was supposed to be positioned directly next to McKinley in the public receiving line. At the request of the president of the Pan-American Exposition, he was positioned next to the President and the Secret Service agent was moved. Shortly after, the President was shot at very close range, by a man who had a gun wrapped in a handkerchief. The Secret Service believes it may have been able to save the President had it been in closer proximity.\textsuperscript{199} Similar circumstances existed with the Kennedy Assassination. Usually, Secret Service agents would be positioned on the running board of the President's limousine while it was traveling. At the instruction of the President, the agents were ordered off of the running boards on the fateful day of his assassination. The Secret Service believes it may have been able to prevent the assassination.\textsuperscript{200} In contrast, when John Hinkley Jr. tried to assassinate President Reagan, agents were able to immediately shield the President's body and evacuate him from the situation.\textsuperscript{201}

According to Merletti, these examples show the importance of close proximity to the President and the necessity for a President's trust in the ability and discretion of the


\textsuperscript{199} Ibid., ¶ 10.

\textsuperscript{200} Ibid., ¶ 11.
agents on his detail. This trust would be compromised if an agent were compelled to testify about what he saw and heard while protecting the President. As additional support for its position, the Secret Service offered a letter written by Former President George Bush, in which he supported their position that a President would be uncomfortable having the agents nearby if the agents were forced to testify about what they might have seen or heard. The potential for such testimony may damage the confidence the President has in the discretion of the Secret service.  

The District Court granted Starr's Motion to Compel, denying the claim of protective function privilege and refusing to establish such a privilege. In evaluating whether a new privilege should be established, a court must consider: 1) whether the asserted privilege is historically rooted in federal law; 2) whether any states have recognized the privilege; and 3) public policy interests. In this case, there is no history of such a privilege, no state has recognized such a privilege, and the public policy interest in such a privilege is not compelling.

The protective function privilege is not historically rooted in federal law. In fact, no federal court has ever recognized such a privilege. Neither did Congress when it enacted the statute which requires that the President and Vice President accept the protection of the Secret Service. To the contrary, the District Court reasoned, Congress imposed a duty on all executive branch personnel to report criminal activity by government officers and employees to the Attorney General, unless the Attorney General directs otherwise.

...(continued)
Nor has any state ever recognized a protective function privilege. The District Court considered this an important factor, stating “[t]he fact that every state has a governor in need of protection and that no state has ever recognized a protective function privilege provides a compelling reason for not creating the new privilege.”

Lastly, the District Court considered the public policy issues, which the Secret Service argued extensively. While acknowledging that the President’s safety is of paramount national importance, the court did not accept the argument that the President would be placed in greater peril if the Secret Service agents protecting him were able to testify about what they saw and heard. “When people act within the law, they do not ordinarily push away those they trust or rely upon for fear that their actions will be reported to a grand jury.” The court cites instances when Secret Service agents have written books and granted interviews of their experiences, and says that there is no indication that these instances have caused Presidents to push their protectors away.

Furthermore, a Secret Service agent has a legal duty both as a government employee under §535(b) and as a law enforcement officer to report criminal activity. Thus, the policy arguments do not justify establishing such a privilege.

The White House appealed the District Court’s Order, and the Independent Counsel applied for expedited hearing from the Supreme Court. The Supreme Court denied the expedited hearing.

May a Sitting President be Prosecuted?

The investigation into Whitewater and the related Lewinsky matter raise an important question: If the Independent Counsel finds that the President has committed a crime, may he prosecute the President for that crime? The answer may be “no”. The

\[\text{Order, 5-6.}\]
\[\text{Order, 6-7.}\]
\[\text{Order, 7.}\]
Constitution provides that the President shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors. However, it says nothing about prosecuting a sitting president without bringing articles of impeachment against him. Similarly, the Ethics in Government Act provides that the Independent Counsel may send a report to Congress containing all evidence that constitutes grounds for impeachment, but does not provide that the President may be prosecuted for crimes absent impeachment. The Justice Department and others have opined that impeachment is the only proceeding available to remove a President, both because the Constitution provides that remedy and because the President has a “unique role at the head of the executive branch.”

However, a President may be civilly sued for private conduct. Public officials generally have immunity from suit for money damages arising out of their official acts. It is supposed to enable certain officials to perform their jobs effectively without worrying about personal liability arising from one of their decisions. The President has such immunity with regard to his official acts. But he does not have the same immunity for unofficial acts. The immunity depends on the function performed, not the identity of the person who performed it. In *Clinton v Jones*, the Supreme Court held 1) that the President is not granted temporary immunity from civil damages

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209 U.S. Constitution, Article II.
213 Ibid.
214 Ibid.
litigation arising out of events that occurred before he took office, and 2) it is not necessary to stay the trial of the action until the President is out of office. Consequently, while the Independent Counsel may not prosecute the President until he has been impeached and convicted by Congress, the government may possibly take civil action against him for actions which are unofficial. The distinction between official and unofficial while the President is in office is blurry, and legal battles are inevitable. Further, the political consequences would prevent any such lawsuit and it is unclear who could actually institute such an action. Thus, impeachment appears to be the only real remedy available for a President who violates the law.

As shown by the discussion above, Starr’s investigation of the Whitewater affair and related matters has raised several controversial legal issues. The Clinton Administration is taking full advantage of the challenges these issues present, which lengthens the investigation(s) considerably. If the only remedy against the President is impeachment, then time is on his side. Given the time these challenges are taking, and the additional time it would take for Congress to evaluate any report and institute impeachment proceedings, this President will likely be out of office. However, he could be prosecuted for these crimes when out of office, unless pardoned by the next President. In any case, if the President’s goal is to keep his Presidency intact until the next election, he has a good chance of success.

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Ibid.
CHAPTER 5

PROBLEMS AND SOLUTIONS

The foregoing Chapters have discussed the law which created the Independent Counsel, its history, its constitutionality, policy changes throughout the years, and the current issues which are making headlines. This Chapter seeks to analyze The Act in terms of its application. What problems arise during implementation and what can Congress do to solve those problems? The press is full of criticism about the current Independent Counsel investigation of the Whitewater and Lewinsky matters, but much of that is simply politics. However, there have been many real criticisms of the provisions of The Act which deserve discussion. The criticisms discussed here are divided into two categories: statutory and overall. The statutory criticisms address problems that Congress can either solve or improve upon by amending The Act. The second category of criticisms address the overall value of the statute, many of which call for its repeal. Finally, this Chapter will propose and discuss several solutions to the problems raised and discuss whether The Act should and will be reauthorized.

Statutory Criticisms

There are six main criticisms of The Act, which are categorized in the following manner: appointment of the counsel, scope of the investigation, time spent on the investigation, cost of the investigation, removal of the counsel, and concurrent Congressional investigations.
Appointment

The main criticism directed at the appointment of the Independent Counsel is that the standard is too easy to meet. As discussed earlier, in order to commence a preliminary investigation, the Attorney General needs specific and credible information that a covered official has committed a federal crime. Once the preliminary investigation is over, unless the Attorney General determines that no further investigation is warranted, she must appoint an Independent Counsel. But she is handicapped by her inability to use the normal tools of a prosecutor, such as the subpoena power. The ease with which a counsel may be appointed has created too many investigations, the most recent example being the appointment of an Independent Counsel to investigate Labor Secretary Alexis Herman.

Secretary Herman is alleged to have received commissions on the value of work she assisted a certain businessman in obtaining, by using her connections as a White House Official. The businessman, Laurent J. Yene, claims that he agreed to pay her a 10% commission on any profits his company made with her assistance during the period 1995 through 1996. The Justice Department, after initial investigation, believes that Yene’s company made about $45,000 from this business, which would have entitled Herman to $4,500.\textsuperscript{217} Despite the small amount of alleged gains, the Attorney General was forced to request an Independent Counsel. In Reno’s request to the Special Division, she discussed the efforts made to investigate the allegations, which included reviewing many documents and conducting over one hundred interviews. The investigation uncovered some financial transactions which may have corroborated Yéné’s testimony. Consequently, Reno concluded she had reasonable grounds to believe further investigation was warranted. However, she stated in the request “[a]lthough our investigation has developed no evidence clearly demonstrating

Secretary Herman's involvement in these matters, and substantial evidence suggesting that she may not have been involved, a great deal of Yene's story has been corroborated; we thus are unable to conclude that he is not credible. This, coupled with the strictures and limited investigative tools available under The Act, have led me to conclude that there are reasonable grounds to believe that further investigation is warranted, in order to determine whether Secretary Herman violated any federal criminal law other than a Class B or C misdemeanor or an infraction.218 Although Reno had no conclusive evidence that Herman was involved in illegal activities, she still had to request the appointment of an Independent Counsel. This criticism is further reinforced by the appointment of six other Independent Counsels since August of 1994.219

Scope of Investigation

Many criticisms are directed at the scope of the counsel's investigation, in terms of power, subjects, and crimes. The Independent Counsel has unlimited power, which is focused on one cause. He has the resources and authority of the Attorney General, yet only himself to impose limits. Former Independent Counsel Jacob Stein, now attorney for Monica Lewinsky, is quoted as saying, "I was astonished at the authority I had, and I felt it was a personal test of my own sanity in the exercise of that authority. I don't know whether others thought that I passed the test. But I had more authority than anybody should have."220 Some former Independent Counsels believe that if you put too many checks on the Independent Counsel, he will not be truly


220 Wilkinson and Ellis, 1549-50.
independent. Others, including Lawrence Walsh, claim there are already at least two checks on the Independent Counsel: the Special Division’s grant of jurisdiction and the Attorney General’s power to remove the Independent Counsel for cause. Although the first check is often been challenged by defense counsel, the second has yet to be exercised.

In addition to unlimited power during the investigation, the Independent Counsel appears to be able to investigate almost anyone. His authority is not limited to those who are named in his grant of jurisdiction, nor those who are covered officials under The Act. Without considering the referral jurisdiction, The Act already covers too many officials. The history of The Act indicates that it is concerned with the very highest level of government officials. The Act’s provision allowing for referral of related matters then allows the Independent Counsel to bring people into the investigation who may not even be government officials and who have absolutely no connection with the original crime being investigated. For example, the Monica Lewinsky investigation was deemed a related matter to the Jones v Clinton case, which was a related matter to the Whitewater investigation. They are all connected by the Clinton Administration’s alleged efforts to encourage witnesses to lie. However, Monica Lewinsky is not one of the officials covered by The Act, nor should she be. She has no relationship to the Whitewater land deals, yet now she is the subject of a grand jury investigation where she may be indicted and tried for covering up an alleged affair with the President. The scope of those who are subject to investigation is virtually limitless.

The last criticism directed at the scope of The Act is that it covers too many crimes. Currently, one can be investigated for any federal crime which is not a Class B or C misdemeanor or an infraction. However, the genesis of the statute was the

221 Wilkinson & Ellis, 1550, citing former Independent Counsels Larry Thompson & Robert Fiske.
222 Wilkinson & Ellis, 1548.
firing of a special prosecutor who was investigating the President’s involvement in the burglary of the Democratic National Headquarters, and its subsequent cover-up. The Watergate break-in was a textbook example of a President abusing his power as President, and using his office to engage in criminal activity. The crimes currently being investigated do not reach that level of criminality. Rather, they are often political questions which become criminalized. If the President had intimate relations with a White House intern, is that a criminal matter or a political matter? The fact that he may have encouraged her to lie may make it a criminal matter, but it is arguably not a proper line of inquiry for an Independent Counsel. Is Labor Secretary Herman’s alleged profit of $4,500 enough to justify an investigation that may cost millions? What about the investigation of Hamilton Jordan for alleged drug use? Some of these investigations may be better left to the Justice Department, while others may be better left to the press and the President’s political opponents. The country’s resources should be spent investigating the truly serious crimes.

Time Spent

As discussed, Independent Counsel investigations can take years to complete, and most do. Several of the current investigations have been ongoing since 1994 and 1995, namely the investigations of Mike Espy, the Clintons, and Henry Cisneros. Lawrence Walsh’s investigation spanned seven years. The Act does not limit the time spent investigating, although the Special Division is required to review whether the counsel’s investigation should be terminated after 2 years, and then every year thereafter. This is not a limit on time, because, as previously mentioned, the investigation can only be terminated when all prosecutions are substantially completed. If the investigation is still ongoing, the Special Division does not have the power to terminate it.
In response to such criticism, former Independent Counsel Larry Thompson claims that limiting a counsel’s investigation is an unrealistic proposal because the counsel is investigating criminal activity, which generally includes cover-ups of relevant information, and possibly obstruction of justice. Lawrence Walsh agrees, noting that the Independent Counsel is pitted against some of the best defense counsel in the country, many of which are well-versed in diversionary tactics. In some cases, Walsh comments, the Independent Counsel is up against those in government who are well-trained at hiding information. For example, in the Iran-Contra investigation, Walsh was up against the CIA, who are known to produce a hundred thousand documents and hold back the ten that explain the hundred thousand. However, the time engulfed by these investigations damages those involved, and at some point will exceed the public interest in the investigation altogether.

Cost of Investigation

With Lawrence Walsh’s investigation topping forty-seven million dollars and most costing somewhere in the millions, the cost of investigations is frequently criticized. Although the counsel is subject to audits and a member of his staff must certify all expenditures made, the supposed controls do not seem to make a difference. The public hears only about the millions of dollars being spent during the investigations, and has no choice but to believe it is a waste of money. There is very little effort to explain to the public why it costs so much to investigate, nor are the audit results publicized to provide more information. When millions are spent and the evidence gathered is withheld, criticism is inevitable.

Ibid., 1550.

Ibid.
Removal of the Counsel

Many believe that the Attorney General's power to remove the Independent Counsel for cause is illusory. Politically, it is untenable, because any action the Attorney General takes towards removing the counsel will be attributed to the administration being investigated and seen as an attempt to obstruct justice. Legally, the Attorney General has no precedent to guide her in determining good cause. Is good cause leaking information learned in a grand jury proceeding to the press, as some have alleged of Independent Counsel Starr? Perhaps, but it may require yet another investigation to determine if good cause exists. Consequently, the Attorney General's power to remove the counsel for good cause is no power at all.

Concurrent Congressional Investigations

Congress has the power to conduct its own investigations and has been doing so for over two hundred years. Since 1792, Congress has been investigating matters of public interest, such as the failed Sinclair expedition, where American Soldiers were killed by Native Americans in the Northwest Territory, \(^{225}\) the Teapot Dome Scandal, Watergate, Iran Contra, and Whitewater, and most recently illegal campaign contributions. Sometimes, Congress investigates the same matter as an Independent Counsel. Concurrent investigations mainly cause problems for the Independent Counsel, and The Act does not address this situation. For example, Lawrence Walsh's investigation of Iran Contra overlapped with Congress' hearings on Iran Contra and it was Walsh's investigation that suffered. Although the Congressional attorneys handling the House and Senate investigations tried to cooperate with Walsh, their objectives differed and problems arose with witnesses and documents. The biggest problem Walsh had was Congress' grant of immunity to many of those involved in the arms for hostages

\(^{225}\) Wilkinson and Ellis, 1566.
transactions. Once Congress grants immunity, it is difficult for the Independent Counsel to secure a conviction, because the information the immunized party gives cannot be used against him, absent certain exceptions. Congress’ grant of immunity to those involved in the Iran Contra affair really damaged Walsh’s investigation and led to the overturning of several convictions. Although this problem may not seem as crucial as some of the others mentioned, it rendered much of the time and resources spent on the Iran Contra investigation useless.

**Overall Criticisms**

The Act as a whole is criticized for creating a monster – an investigator with unlimited power, no checks and balances, focused in on one target. The question is not whether he will hit this target, but when and who will he bring down with his target. It is, many claim, a witch hunt. Former Independent Counsel Jacob Stein put it this way: “Whatever the starting point, the matter in hand spreads out and out, encompassing ever vaster horizons, and if it were permitted to go further and further in every direction, it would end by embracing the entire universe.”

In addition to ever-expanding, the “witch hunt” becomes partisan. The Act is used by the political party which is not in the White House to attack the party which is. Justice Scalia made reference to this in his dissent in *Morrison v Olson*. Further, the party that is being investigated inevitably accuses the other of conspiring with the Independent Counsel, implicating the counsel, the Special Division, members of Congress, and our judicial system. Lawyers for the accused fuel the fire, even attacking the counsel personally, as if he were running for a hotly contested political office.

Finally, the investigation attracts an undue amount of attention from the media. Allegations of high-level officials engaging in criminal conduct, especially when

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it relates to sexual misconduct, are front-page stories. For example, for the past seven months, the airwaves have been bombarded with stories about the Lewinsky matter. Inevitably, the matter grows in stature while other foreign and domestic policy matters suffer.

These overall criticisms lead to the observation that we would be better served by repealing The Act and allowing the Attorney General to appoint special prosecutors, as was the case before The Act. Consequently, critics argue, if the President wanted to remove a prosecutor, he would be deterred by fear of public reproval or impeachment, but would not be limited by statute.\textsuperscript{227}

\textbf{Statutory Solutions}

\textbf{Appointment and Removal}

In order to solve the problems associated with appointing and removing the Independent Counsel, the Attorney General must be given more discretion. In particular, when the Attorney General evaluates a request for an Independent Counsel, she should be allowed to weigh the seriousness of the alleged crime and the cost involved in conducting an independent investigation. Although some would argue that the current restrictions ensure that the Attorney General will not exert undue influence on the investigation, we have seen that such minimal discretion leads to unnecessary investigations. In addition, the standard for requesting appointment after the preliminary investigation has been conducted should be raised. The current standard of “reasonable grounds to believe further investigation is warranted” should be raised to something akin to a “probable cause to believe a crime was committed” standard. In investigating the allegations, the Attorney General should be permitted to use subpoenas to compel

\textsuperscript{227} Theodore Olson, Terry Eastland, and Archibald Cox support this view.
testimony and documents. Consequently, if an Independent Counsel is appointed, it will be for good cause.

In addition to raising the appointment standard, the removal standard should be defined. The removal provisions in The Act should be amended to specify what good cause means. Suggestions include: violating the Rules of Professional Conduct, abusing prosecutorial power, making false statements, and exceeding specified time limits. These types of limits would make the counsel more accountable and give the Attorney General a standard to rely on so that a counsel who abuses his power may be reigned in.

Scope

The scope of The Act should be restricted to fewer officials and far fewer crimes. One suggestion is to limit the coverage of The Act to the President, Vice President, Cabinet Officials, and Campaign Officials. Lower-level Executive Branch officials and members of Congress do not need to be included in The Act. There are others who can and have investigated them with success.

The crimes within the scope of The Act should be narrowed to very serious ones, such as those which relate to the functioning of the office and the power vested in it. An abuse of power or misuse of office for financial or political gain are examples of crimes which should be covered. Failed land deals, casual drug use, or sexual antics are not crimes which an Independent Counsel should investigate.

Time Limits

In response to criticisms about the length of investigations, either the term of the Independent Counsel should be limited to two years or 30 months, at most, or a full-time Independent Counsel should be appointed to handle all investigations. The former Independent Counsels who have suggested self-imposed time limits may think
that these suggested limits are arbitrary, but at some point an investigation loses its value. Walsh's investigation outlasted the administration he was investigating. A full-time counsel would impose similar limits on the person inhabiting that office as a normal prosecutor faces—limited time, resources, and several ongoing investigations. This proposed solution may provide the counsel with some perspective, which would diminish the "witch-hunt" quality of current investigations.

Cost

In addition to imposing a time limit, imposing real cost controls would improve the image of the investigation and provide a more efficient means to implement The Act. If the counsel had a budget, he would have to make the same prosecutorial decisions as other prosecutors, specifically who to pursue with the resources available. The counsel could not then spin an endless web because he would not have the funds to do so.

Concurrent Congressional Investigation

The only real solution to the Congressional investigation problem is to limit Independent Counsel investigations when a Congressional investigation is ongoing, or force Congress to consult the Independent Counsel before granting immunity to witnesses. The Independent Counsel should not be appointed in situations where a Congressional inquiry will serve a greater good, such as in the campaign contribution matter, where a large number of people may have made illegal contributions and the inquiry reveals a whole system of wrongdoing, rather than one or two high-level officials who have broken the law.

In sum, these proposed statutory solutions will tailor The Act to what its original purpose was, namely to appoint an independent person to investigate the few matters that the Justice Department cannot.
Overall Solutions

In response to the overall criticisms of The Act, making the proposed statutory solutions would change the perception of it. The Independent Counsel would only be appointed when very high-level officials have committed a serious crime which implicates the office as well as the person. Investigations would be limited and more efficient and the public would be better informed. The Office of the Independent Counsel would come to be known as a serious office designed to enforce the maxim that no man or woman is above the law.

Part of the overall solution is for the counsel to inform the public of how The Act works, what he is spending the public’s money on, and what success he has had. For example, Donald Smaltz, Independent Counsel investigating Mike Espy, has a web page. The page gives a history of the investigation, the contact address of the counsel’s office, as well as providing copies of documents, including: the Attorney General’s request for appointment of an Independent Counsel, the Special Division’s order appointing the Independent Counsel, the twelve indictments and one civil complaint filed to date, the press releases issued by the counsel, the counsel’s three annual reports to Congress, and the text of testimony and speeches delivered by the counsel. This is a great way to communicate with people about the counsel’s activities. Each counsel should be required to have one.

The Act itself is not likely to be repealed in 1999, nor should it be. Even if it was repealed and the Attorney General appointed special prosecutors as she saw fit, we would see many of the same problems. There would still exist pressure regarding removal, there would still be substantial resources expended, and the administration would still attack the special prosecutor as partisan. In response to questions about The Act’s repeal, Senator Henry Hyde recently commented “I can’t predict what is going to

http://www.oic.gov/smaltz/index.htm
happen in the coming year, but my guess would be that we will reauthorize an Independent Counsel statute...”

The fact is that we do not have the one attribute which would render the Independent Counsel statute unnecessary—trust. In Hyde’s words, “[t]he fact is, human nature is human nature. I wouldn’t have trusted Ed Meese to prosecute Ronald Reagan and I don’t trust Janet Reno to prosecute Bill Clinton.” Hyde’s lack of trust is shared by many. The deficiencies in The Act can be cured, but the principle behind it cannot. We need an independent person to investigate high-level government officials because they cannot be trusted to fairly investigate themselves. If that ever changes, then there will be no need for a counsel and The Act should be repealed. But change is not forthcoming.

For now, the Independent Counsel serves an important function. It stands for the proposition that no one is above the law, although in practice it may not always live up to that proposition. Changes in The Act may bring a sense of justice to the office which it currently lacks. The lessons of Watergate have not been forgotten, nor have they been proven needless, but they do need to be addressed in a fair, just manner. The Office of the Independent Counsel can be a fair, just office if properly reformed.

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229 Wilkinson and Ellis, 1597.
230 Ibid.


Lessig, Lawrence and Cass Sunstein, *The President and the Administration*, 94 Colum. L. Rev. 1, 111.


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