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THE INDEPENDENT COUNSEL LAW: IS THERE LIFE AFTER DEATH?

That in the state of nature everyone has the executive power of the law of nature, I doubt not but it will be objected, that it is unreasonable for men to be judges in their own cases, that self-love will make men partial to themselves and their friends . . . and hence nothing but confusion and disorder will follow.¹

Throughout the history of the United States, allegations of criminal conduct have been directed against the highest levels of government.² The prosecution of federal officials is the responsibility

¹ John Locke, *An Essay Concerning the True Original, Extent and End of Civil Government*, in SOCIAL CONTRACT 3, 9 (Sir Ernest Barker ed., Oxford Univ. Press 1960) (1947).

² See *In re Olson*, 818 F.2d 34, 40 (D.C. Cir. 1987). During President Truman's administration, the Assistant Commissioner of the Internal Revenue, the Assistant Attorney General of the Tax Division of the Department of Justice and more than 150 Bureau of Internal Revenue officials resigned or were discharged because of widespread corruption. *Id.* Attorney General J. Howard McGrath appointed Newbald Morris as Special Assistant to the Attorney General to lead an investigation into the alleged corruption. *Id.* Attorney General McGrath fired Morris, however, when Morris requested access to McGrath's files and records. *Id.* at 41. President Truman then fired McGrath. *Id.* The Assistant Attorney General in charge of the Tax Division and Truman's Appointments Secretary were not prosecuted. *Id.* Under President Eisenhower, the White House Chief of Staff, Sherman Adams, ultimately resigned after alleged misconduct. *Id.*; S. REP. NO. 417, 102d Cong., 2d Sess. 2-3 (1992) [hereinafter 1992 REPORT]. The infamous "Watergate" scandal began in 1972 with the burglary at the Watergate office building in Washington, D.C. *Id.*; S. REP. NO. 123, 100th Cong., 1st Sess. 1, 2 (1987), reprinted in 1987 U.S.C.C.A.N. 2150, 2151 [hereinafter 1987 REPORT]. President Nixon had "special prosecutor" Archibald Cox appointed to investigate the criminal allegations. *Id.* After Mr. Cox attempted to obtain tape recordings and documents in the President's possession, the President ordered that Mr. Cox be fired. *Id.* Attorney General Elliot Richardson and Deputy Attorney General William French Smith resigned rather than fire Mr. Cox. *Id.* Solicitor General Robert Bork issued the order. *Id.* These departures from the Department of Justice were later described as the "Saturday Night Massacre." *Id.*; 1992 REPORT, *supra*, at 2-3. Congressional hearings, appointment of a second special prosecutor, impeachment proceedings, and President Nixon's resignation all followed. *Id.*; Linda Charlton, *From the "Whiskey Ring" to "Teapot Dome" and on*, N.Y. TIMES, May 1, 1973, at 32. Ulysses S. Grant was linked to unscrupulous gold speculations of the robber barons during his first term. *Id.* In his second term, the "Whiskey Ring" and Credit Mobilier affairs occurred. *Id.* While President Grant was not directly involved in the fraud and bribery, his Vice President and Secretary of War were. *Id.* The Teapot Dome scandal of President Warren Harding's Administration involved illegal leasing of government-owned oil reserves by Secretary of the Interior Albert B. Fall. *Id.* Secretary Fall was tried, convicted, fired, and sentenced to one year in prison. *Id.* Under Lyndon B. Johnson's administration, a close associate of the President, Bobby Baker, was found guilty of larceny, fraud, and tax evasion, and the Supreme Court Justice Abe Fortas resigned after accepting suspect payments. *Id.*; David Wise, *Why the President's Men Stumble*, N.Y. TIMES, July 18, 1982, § 6, at 14. Although portrayed as a man of high character, it was revealed that President John Adams had accepted lavish gifts from a textile manufacturer,

of the executive branch.³ However, a conflict of interest arises when a prosecutor, who is a member of the executive branch, investigates an official from the same branch.⁴ Such a conflict ex-

Bernard Goldfine, and intervened on his behalf when two Federal regulatory agencies were after Goldfine for mislabeling his product. *Id.*; see also *infra* notes 94-95 and accompanying text (describing President Ronald Reagan's administration's involvement in Iran-Contra scandal); *infra* notes 112-14 and accompanying text (President Bush's administration investigated for alleged involvement in "Iraqgate").

³ See *Morrison v. Olsen*, 487 U.S. 654, 706 (1988) (Scalia, J., dissenting). "Governmental investigation and prosecution of crimes is a quintessentially executive function." *Id.*; *Heckler v. Chaney*, 470 U.S. 821, 832 (1985). The Court stated:

[A]n agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to "take Care that the Laws be faithfully executed."

Id. (quoting U.S. CONST. art. II, § 3); *Buckley v. Valeo*, 424 U.S. 1, 138 (1976) (noting that U.S. Constitution entrusts to President, not Congress, responsibility to see laws are faithfully executed); *United States v. Cox*, 342 F.2d 167, 171 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965). The Court stated:

Although as a member of the bar, the attorney for the United States is an officer of the court, he is nevertheless an executive official of the government, and it is as an officer of the executive department that he exercises a discretion as to whether or not there shall be a prosecution in a particular case.

Id. But cf. Morrison, 487 U.S. at 691. The *Morrison* Court placed a limitation on the idea that the functions of the independent counsel are executive in nature by stating "there is no real dispute that the functions performed by the independent counsel are 'executive' in the sense that they are law enforcement functions that typically have been undertaken by officials within the Executive Branch." *Id.* (emphasis added); *Case v. Bowles*, 327 U.S. 92, 96-97 (1946) (allowing Price Administrator, instead of District Attorney or Department of Justice, to commence suits to enjoin violations of Emergency Price Control Act); *In re Sealed Case*, 838 F.2d 476, 526 (D.C. Cir.) (Ginsburg, C.J., dissenting) (admitting that prosecution is executive task but that it is not at "core" of executive branch's functions to extent that it must always be under President's control), *rev'd*, 487 U.S. 654 (1988); *I.C.C. v. Chatsworth Mktg. Ass'n*, 347 F.2d 821, 822 (7th Cir.) (stating that function of initiating judicial proceeding in order to enforce legislative enactment is not exercise of function exclusively reserved to President), *cert. denied*, 382 U.S. 938 (1965), and *cert. denied*, 382 U.S. 1000 (1966); *United States v. Roy*, 694 F. Supp. 635, 637 (D. Minn. 1988) (allowing congressional delegation of authority to sentencing commission to establish sentencing guidelines because rule making is not necessarily exclusive function of executive branch). See generally Stephanie A. Dangel, Note, *Is Prosecution a Core Executive Function?* *Morrison v. Olson and the Framers' Intent*, 99 YALE L.J. 1069, 1070 (1990) (arguing that intent of framers of Constitution and history of prosecution support *Morrison* court's limitation on idea that prosecution is "core" executive function).

⁴ See *Morrison*, 487 U.S. at 677. "Congress of course was concerned when it created the office of independent counsel with the conflicts of interest that could arise in situations when the Executive Branch is called upon to investigate its own high-ranking officers." *Id.*; *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1935). "For it is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will." *Id.*; WATERGATE SPECIAL PROSECUTION FORCE FINAL REPORT 137-38 (1977). "No one who has watched 'Watergate' unfold can doubt that the Justice Department has difficulty investigating and prosecuting high officials, or that an independent prosecutor is freer to act according to politically neutral principals of fairness and justice." *Id.*; *Independent Counsel Provisions of the Ethics in Government Act, August 11, 1992: Hearings Before the Subcomm. on Oversight of Government of the Senate Committee on Governmental Affairs*, 102d Cong., 2d Sess. (1992) [hereinafter *Hearings*] (testimony of Samuel Dash & Irvin B. Nathan on behalf of the American

isted during the "Watergate" scandal of President Richard Nixon's administration.⁵ Watergate involved the burglary of the Democratic national headquarters in Washington, D.C., as well as espionage and sabotage in which officials in the Nixon administration were allegedly involved.⁶ President Nixon ordered Attorney General Elliot Richardson to appoint Archibald Cox as the special prosecutor⁷ to investigate the alleged misconduct of high-level officers of the executive branch, including former Attorney General John Mitchell and White House Chief of Staff H.R. Haldeman.⁸ However, when Mr. Cox requested tape recordings and documents

Bar Association). Archibald Cox, the independent counsel appointed to investigate Watergate, once stated that an individual outside the executive branch was absolutely necessary. *Id.* Otherwise, the divided loyalties would be too much for anyone to handle, and the public would not feel comfortable with the investigation. *Id.*; S. REP. No. 170, 95th Cong., 2d Sess. (1978), reprinted in 1978 U.S.C.A.N. 4216, 4219 [hereinafter 1978 REPORT]. A study regarding the history of Congress, completed with the assistance of the Congressional Research Service, identified a number of instances over the last twenty years where, because of a serious conflict on the part of the Attorney General or the President, an investigation handled outside the Justice Department would have been appropriate. *Id.* The Attorney General and his principal assistants are appointees of the President and members of an elected administration. *Id.* It is a conflict of interest for them to investigate their own campaign or, thereafter, any allegations of criminal wrongdoing by high-level officials of the executive branch. *Id.* The appearance of conflict is as dangerous to public confidence in the administration of justice as the true conflict itself. *Id.* Having men of integrity in the face of a conflict is an insufficient protection for a system of justice. *Id.* at 4222. *But see* 1992 REPORT, *supra* note 2, at 7. "The authority of the [Justice] Department effectively to respond to allegations of wrongdoing by [Justice Department employees, members of Congress, and judges] . . . proves that it can respond to such allegations brought against other high-level officials." *Id.* (quoting Deputy Attorney General George Terwilliger); Frank M. Tuerkheimer, *The Executive Investigates Itself*, 65 CAL. L. REV. 597, 620 (1977). Any weakness the Department of Justice may have in investigating the executive branch is due not to the Department's structure, but to its staffing. *Id.*; Julia C. Ross, *Endangered Species Independent Counsel Law Appears Doomed to Expire Dec. 15*, 78 A.B.A. J., Nov. 1992, at 109. Former Deputy Attorney General George Terwilliger III and Assistant Attorney General Timothy E. Flanigan testified during the congressional hearings that the Justice Department was more than capable of handling such prosecutions on its own. *Id.*; Bruce Fein, *Get Rid of Prosecutors*, USA TODAY, Oct. 19, 1992, at 14. With respect to the Justice Department investigation into billion dollar loans to Iraq before the Kuwaiti invasion, the investigators involved had no reason to compromise the investigations. *Id.* The idea that the executive branch cannot be trusted to investigate itself is historically inaccurate." *Id.*; *Hearings, supra* at 7-8 (testimony of Fred Wertheimer, President of Common Cause). Critics of the independent counsel law have argued that the appointment of a new prosecutor with protections against interference by the executive branch following the firing of Watergate Special Prosecutor Archibald Cox demonstrated that "the system" worked. *Id.* Investigations and prosecutions of the executive branch can be carried out successfully without a separate independent counsel law. *Id.*

⁵ See generally CONGRESSIONAL QUARTERLY INC., WATERGATE: CHRONOLOGY OF A CRISIS (William B. Dickinson ed., 1974) (providing detailed account of Watergate scandal).

⁶ *Id.* at 3-12.

⁷ See *infra* note 49 and accompanying text (explaining term "special prosecutor" was eventually replaced with "independent counsel" in relevant statutes to dispose of Watergate connotation).

⁸ See 1987 REPORT, *supra* note 2, at 2151 (providing brief account of events which led to departure of officials under Nixon administration).

from President Nixon, the President ordered the Attorney General to dismiss Mr. Cox as special prosecutor.⁹ Attorney General Richardson and Deputy Attorney General William Ruckelshaus refused to effectuate the President's order and thereafter resigned.¹⁰ Eventually, Solicitor General Robert Bork executed the order.¹¹ In response to the public outcry, however, President Nixon later appointed Leon Jaworski as special prosecutor.¹²

As a result of Watergate and President Nixon's authority over the appointment of a special prosecutor,¹³ Congress promulgated the Ethics in Government Act¹⁴ (the "Ethics Act") in 1978, which provided for the appointment of a prosecutor who would act independently of the executive branch.¹⁵ However, Congress failed to reauthorize this provision of the Ethics Act¹⁶ before expiring on December 15, 1992, possibly because of a Republican filibuster.¹⁷ This occurred although many organizations, such as the American Bar Association, recognized the need for such an independent counsel.¹⁸

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² See 1978 REPORT, *supra* note 4, at 4218. Leon Jaworski was appointed special prosecutor by President Nixon with assurances of independence in response to the public outcry over the firing of Archibald Cox. *Id.*

¹³ See 1992 REPORT, *supra* note 2, at 3. Watergate's profound disruption to the country and the public trust led Congress to conclude that a new mechanism was needed to prosecute executive officials. *Id.* Congress eventually decided on temporary, outside counsels appointed by a special court, who could be removed by the Attorney General only for good cause. *Id.*; 1987 REPORT, *supra* note 2, at 2151. "This mechanism was the foundation for the Independent Counsel provisions of the Ethics in Government Act." *Id.*; S. REP. NO. 496, 97th Cong., 2d Sess. 1 (1982), reprinted in 1982 U.S.C.C.A.N. 3537 [hereinafter 1982 REPORT]. Following revelations of abuses and illegal activities by the Nixon Administration, Congress considered proposals for a statutory process providing for a special prosecutor outside the Department of Justice. *Id.*; 1978 REPORT, *supra* note 4, at 4218. The interest in establishing an independent special prosecutor was revived after revelations surfaced about Watergate. *Id.*; see also Brian A. Cromer, *Prosecutorial Indiscretion and the United States Congress: Expanding the Jurisdiction of the Independent Counsel*, 77 KY. L.J. 923, 923 (1988-89). President Nixon's conduct was the catalyst behind the passage of the Ethics Act. *Id.*; Kevin R. Morrissey, Comment, *Separation of Powers and the Individual*, 55 BROOK. L. REV. 965, 965 (1984). In response to the serious doubts the Watergate affair prompted regarding the ability of the executive branch to investigate itself, Congress passed the Ethics in Government Act of 1978. *Id.*

¹⁴ Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 [hereinafter Ethics Act] (codified as amended in scattered sections of 2, 5, 18, 26, and 28 U.S.C.).

¹⁵ *Id.* at 1867-74 (provisions providing for independent prosecutor).

¹⁶ See 1992 REPORT, *supra* note 2, at 1. (Independent Counsel Reauthorization Act of 1992).

¹⁷ See Helen Dewar, *G.O.P. Filibuster Threat Kills Independent Counsel Bill*, WASH. POST, Sept. 30, 1992, at A11 (explaining that Republican filibuster prevented Congress from considering bill).

¹⁸ See *Hearings*, *supra* note 4, at 3 (testimony of Fred Wertheimer, President of Common

Cause). Mr. Wertheimer noted the importance of the independent counsel:

This year marks the twentieth anniversary of the Watergate scandal, which generated an extraordinary crisis of public confidence in the integrity of our government and exposed the inherent conflicts of interest which confront the Department of Justice on the case of real or alleged wrongdoing by the highest-level officials in the executive branch. The crisis arising from the firing of the Justice Department's Watergate Special Prosecutor Archibald Cox showed the clear need for an independent mechanism to investigate allegations of criminal activities by the highest-level executive branch officials.

Id. The Iran-Contra scandal was a classic example of a case where an independent counsel was essential to conducting a credible investigation. *Id.* at 6. It was impossible for Attorney General Edwin Meese and the Justice Department to investigate this matter, and deem such investigation credible to the American people. *Id.*; *Hearings, supra* note 4, at 3 (testimony of Samuel Dash & Irvin B. Nathan on behalf of the American Bar Association). The independent counsel law is soundly conceived and has operated effectively since its passage. *Id.* The American Bar Association believes the statute has proven itself in practice and should be reauthorized. *Id.* at 13; 1992 REPORT, *supra* note 2, at 6. In 1992, the subcommittee on Oversight of Government revised the statute's functioning and effectiveness by studying reports, pleadings, court decisions, conducting personal interviews, hearing testimony from representatives of the Department of Justice, the American Bar Association, Common Cause, and the Special Division of the United States Court of Appeals for the District of Columbia. *Id.* On the basis of this research, the Governmental Affairs Committee concluded that the independent counsel law was constitutional, served the country well, and should have been reauthorized. *Id.*; 1987 REPORT, *supra* note 2, at 2157. The independent counsel is an effective and essential procedure to investigate those close to the President. *Id.*; 1982 REPORT, *supra* note 13, at 3540. The statutory provisions that provide for a special prosecutor are necessary to guard against conflicts of interest in the investigation of high-ranking officials. *Id.* History demonstrates that public confidence is served when one outside the control of the Justice Department conducts the investigation. *Id.* at 3541; 1978 REPORT, *supra* note 4, at 4222. The principal that no man can be a prosecutor in his own case overrides the policy that the President and the Attorney General must have power to make discretionary enforcement decisions in situations where the alleged misconduct involves high-level executive officials. *Id.* The existence of a statute providing for an independent counsel guarantees that in a national crisis such an office would come into existence at an early stage. *Id.* The existence of a statute providing for a counsel independent of the executive branch will act as a significant deterrent to situations such as Watergate. *Id.* at 4223; see also Carl Gunn, *Save the Special Prosecutor Law. Some of its Harshest Critics Have Called Upon the Law in Times of Need*, WASH. POST, Sept. 27, 1992, at C7. Some of the harshest critics of the independent counsel law have called upon it in times of need to defend their innocence and reputation. *Id.*; Stuart Taylor, Jr., *Keep the Special Counsel*, N.Y. TIMES, June 22, 1992, at A17; Congress Must Keep Law on Investigations, USA TODAY, Oct. 19, 1992, at A14. An independent counsel is necessary when public officials are accused of misconduct in order to sort facts from politics. *Id.*; *Country Would be Lesser Without it, Independent Counsel Law Needs to be Renewed*, L.A. TIMES, Oct. 19, 1992, at B6. The amount of investigations involved in the Iraq scandal enhanced the case for an independent counsel law. *Id.*; *Premature Death*, NAT'L L.J., Oct. 12, 1992, at 12. Republicans could use an independent counsel under a Democratic administration. *Id.* Weinberg's indictment demonstrates the need for an independent counsel law. *Id.* But see 1992 REPORT, *supra* note 2, at 7. The Department of Justice is strongly opposed to such legislation. *Id.* Deputy Attorney General George Terwilliger testified that the law is an affront to the integrity of the Department because it assumes that professional prosecutors of the Department cannot successfully investigate executive officials. *Id.*; Dewar, *supra* note 17, at A11. A Republican filibuster in Congress terminated any chance of renewal for independent counsel law, and the bill also faced possible veto by President Bush. *Id.*; Fein, *supra* note 4, at 14; Bretton G. Sciaroni, *Law that Deserved to Die*, WASH. POST, Oct. 25, 1992, at C7. The Watergate scandal cannot be a sound basis for the law's rationale because it was resolved without an independent counsel. *Id.* Excesses like the \$40 million investigation into Iran-Contra affair cannot be tolerated. *Id.* Independent counsels are zealots seeking royalties and fame through the prosecution of elaborated figures. *Id.*; Ronald J. Ostrow & Robert L. Jackson,

This Note provides a broad overview of the independent counsel provisions of the Ethics Act. Part One discusses the legislative history of the provisions, their procedural operation, and the subsequent amendments that have been enacted. Part Two examines the constitutionality of the independent counsel provisions in light of the United States Supreme Court's decision in *Morrison v. Olson*.¹⁹ Part Three demonstrates the application of the provisions against the background of prior government investigations and explores certain limitations. Finally, this Note advocates the re-enactment of the independent counsel provisions and suggests modifications to improve their effectiveness.

I. THE LEGISLATIVE HISTORY OF THE ETHICS ACT

The purpose of the Ethics Act was to create and reorganize certain agencies of the Federal Government and to enhance the probity of public officials and institutions.²⁰ The Ethics Act was comprised of seven Titles,²¹ but it was Title VI²² which created the independent counsel provisions and has received the greatest attention since 1978. This is attributable to the significant role that

Efficiency, Ethics of 1978 Independent Counsel Law Questions Congress—Critics Who Want to Kill the Measure Cite the \$33 Million Iran-Contra Case as Example of Excess, L.A. TIMES, Sept. 20, 1992, at A4. The use of independent counsel is too expensive, achieves "paltry" results, and makes criminal cases out of political judgment calls. *Id.*; Dan K. Webb, *Politics Ignored in Iraqgate Decision*, CHI. TRIB., Sept. 2, 1992, at 18. The Reagan and Bush administrations were opposed to the statute. *Id.*

¹⁹ 487 U.S. 654 (1988).

²⁰ See Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824, 1824. The Ethics Act was enacted "to establish certain Federal agencies, effect certain reorganizations of the Federal Government, to implement certain reforms in the operation of the Federal Government and to preserve and promote the integrity of public officials and institutions" *Id.*

²¹ *Id.* at 1824-85. The first three titles of the Ethics Act dealt with legislative, executive, and judicial financial disclosure requirements. *Id.* at 1824-61; see 1978 REPORT, *supra* note 4, at 4237-38. There was a need to increase public confidence in government, demonstrate the high level of integrity of government officials, and deter conflicts of interest. *Id.* Title IV created the Office of Government Ethics to provide guidance for the monitoring of financial disclosure and to issue clear standards of conduct. *Id.* at 4246-47. Title V dealt with restrictions on conduct of ex-officials and ex-employees of the executive branch. *Id.* at 4247; Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824, 1867-85. Title VI created the independent special prosecutor. *Id.*; 1978 REPORT, *supra* note 4, at 4221-23. Congress determined that the Department of Justice could not adequately investigate high-level officials, and that a lawyer should avoid the appearance of conflict of interest. *Id.*; Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824, 1875-85 (codified as amended in scattered sections of 2, 5, 18, 26, and 28 U.S.C.). The last title of the Act (Title VII) established the Congressional legal counsel. *Id.*

²² See Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824, 1867-75 (codified as amended in scattered sections of 2, 5, 18, 26, and 28 U.S.C.) (independent counsel provisions).

Title VI played during the administrations of Presidents Ronald Reagan and George Bush.²³

A. *Operation of the Independent Counsel Provisions*

Under the Ethics Act, the President, Vice-President, executive officers, and other high-ranking government officials were subject to investigation.²⁴ An investigation was commenced if the Attorney General received specific information that a person falling under the scope of the statute “ha[d] committed a violation of any Federal criminal law other than a violation constituting a petty offense.”²⁵ If the information was factually supported, the Attorney General was required to conduct a preliminary investigation²⁶ not exceeding ninety days.²⁷ If the alleged violation was “so unsubstantiated that no further investigation or prosecution [was] warranted,”²⁸ the Attorney General was required to notify the Special Division of the United States Court of Appeals for the District of Columbia that an independent counsel should not be appointed.²⁹ However, if the matter warranted further investigation, the Attorney General was to petition the Special Division for the appointment of an independent counsel.³⁰ Upon such application, the Special Division would appoint an independent counsel, and determine the scope of the counsel’s jurisdiction.³¹

The Ethics Act provided that the independent counsel would have all of the investigative and prosecutorial authority of the At-

²³ See Thomas J. Satery, *The Ethics in Government Act of 1978 and Subsequent Reforms: The Effect of Political and Practical Influences on the Creation of Public Policy*, 13 SETON HALL LEGIS. J. 243, 247 (1990) (stating special prosecutor provisions have received most attention and generated most controversy); see also *infra* notes 92-123 and accompanying text (discussing the application of the Independent Counsel provisions during the Reagan and Bush administrations).

²⁴ See 28 U.S.C. § 591(b) (1993) (such individuals would present most serious conflict of interest).

²⁵ *Id.* § 591(a).

²⁶ *Id.* § 592(b)-(c) (standard for requiring preliminary investigation was subsequently revised because it did not consider credibility of source); see *infra* notes 47-48 and accompanying text (stating prior standard would require investigation even if allegations were groundless).

²⁷ See *id.* § 592(a).

²⁸ See *id.* § 592(b)(1) (standard subjected public officials to unfair investigations and was therefore revised); see *infra* notes 38-45 and accompanying text (discussing particular reasons why standard was unfair and how it was subsequently revised).

²⁹ *Id.* § 592(b)(1).

³⁰ *Id.* § 592(c)(1).

³¹ *Id.* § 593(b).

torney General.³² Congress was given "oversight jurisdiction," which allowed it to petition for the appointment of an independent counsel.³³ Also, the independent counsel could only be removed through an impeachment procedure or if the Attorney General determined that the independent counsel was unable to fulfill his or her duties due to "extraordinary impropriety, physical disability, mental incapacity, or any other condition that substantially impair[ed] the performance of such special prosecutor's duties."³⁴ Removal of the independent counsel, however, was subject to judicial review.³⁵ Lastly, the independent counsel was terminated when it either completed or substantially completed its investigatory or prosecutorial functions.³⁶

B. Amendments

After the Ethics Act enactment, situations arose necessitating revisions to particular independent counsel provisions.³⁷ For example, under section 592, unless the matter was so unsubstantiated that no further investigation was warranted, the Attorney General was required to apply for an independent counsel.³⁸ Under criminal investigations not concerning executive officers, the Department of Justice has broad discretion in deciding whether or not to prosecute individuals.³⁹ However, under section 592, the Attorney General was required to appoint an independ-

³² See 28 U.S.C. § 594(a) (1993). Such power includes conducting proceedings before grand juries, engaging in litigation, appealing any decision, reviewing documentary evidence, receiving national security clearances, and conducting prosecutions. *Id.*

³³ *Id.* § 595(d). Congress could request for the appointment of a special prosecutor. *Id.* § 595(e). The Attorney General was required to report back any action it had taken and, if the Attorney General refused to apply to the Special Division, he or she had to give the reasons underlying this decision. *Id.*

³⁴ *Id.* § 596(a)(1) (such restriction could be unconstitutional infringement on Attorney General's authority); see *infra* notes 80-86 and accompanying text (discussing constitutional problems with legislature restricting removal power of another branch of government).

³⁵ See 28 U.S.C. § 596(a)(3) (independent counsel may obtain review of removal in civil action and seek reinstatement).

³⁶ *Id.* § 596(b)(1)-(2). Investigations and prosecutions are completed or substantially completed to the extent that it would be appropriate for the Department of Justice to complete such investigations and prosecutions. *Id.*

³⁷ See 1982 REPORT, *supra* note 13, at 3539 (discussing criticism resulting from two cases involving officials in President Jimmy Carter's administration).

³⁸ See 28 U.S.C. § 592(c)(1) (stating Attorney General must apply to division of court for appointment of independent counsel).

³⁹ See 1982 REPORT, *supra* note 13, at 3550. The Department of Justice does not have to prosecute every alleged crime, even if there is sufficient evidence. *Id.*

ent counsel.⁴⁰ Thus, under this section, it was unfair that public officials were subject to investigations that others would normally be free from.⁴¹

In 1982, the Ethics Act was amended⁴² to promote public confidence in the investigation of high-level officials.⁴³ For instance, the 1982 amendment revised the standard for appointing an independent counsel to prevent unfair investigations of public officials by requiring the appointment only if the Attorney General found there were "reasonable grounds" to believe that further investigation was warranted.⁴⁴ This meant the Attorney General was to comply with the established policies of the Justice Department.⁴⁵ In addition, the standard for commencing a preliminary investigation was also revised.⁴⁶ The previous standard required "specific information" regardless of the credibility of the source.⁴⁷ The amendment required the Attorney General to also consider the credibility of the source by employing methods normally used by the Department of Justice to determine the reliability of a source.⁴⁸ Also, the 1982 amendment provided that the term "special prosecutor" be replaced throughout the Act with "independent counsel" in an attempt to dispose of the Watergate connotation.⁴⁹

Furthermore, Congress believed that the Ethics Act should encompass the President's family because a conflict of interest could arise if the Attorney General was to investigate a member of the President's family.⁵⁰ Therefore, the Ethics Act was revised to au-

⁴⁰ *Id.* at 3551.

⁴¹ *Id.* Under President Carter's administration, White House Chief of Staff Hamilton Jordan and Carter's Campaign Manager Timothy Kraft were alleged to have illegally possessed cocaine. *Id.* Under the facts involved, the Department of Justice was unlikely to prosecute. *Id.* Although indictments were not issued in either case, the Attorney General had to appoint a special prosecutor. *Id.*

⁴² The Independent Counsel Reauthorization Act of 1982, Pub. L. No. 97-409, 96 Stat. 2039 (codified as amended at 28 U.S.C. §§ 591-99 (1982)).

⁴³ See 1982 REPORT, *supra* note 13, at 3537 (stating another purpose was to remedy present law).

⁴⁴ *Id.* at 3551.

⁴⁵ *Id.*

⁴⁶ *Id.* at 3548.

⁴⁷ See 1982 REPORT, *supra* note 13, at 3547. This meant that any allegation, even an unreliable one, could trigger a preliminary investigation. *Id.* Public confidence would not be served by investigating groundless allegations precipitated by unreliable sources. *Id.* at 3548. The previous standard wasted resources by requiring high priority investigations in situations where there would otherwise be none. *Id.*

⁴⁸ *Id.* at 3548.

⁴⁹ *Id.* at 3554.

⁵⁰ *Id.* at 3544. President Carter's brother, Billy, was alleged to have been involved in illegal dealings with the Libyan government. *Id.* Although there was seemingly no evidence

thorize the Attorney General to use an independent counsel upon determination that an investigation by the Department of Justice "[would] result in a personal, financial or political conflict of interest."⁵¹ In addition, the length of time a person could be subject to investigation under the original statute was deemed by Congress to be unfair,⁵² and it was substantially reduced by the 1982 amendments.⁵³

Another important revision to the independent counsel provisions involved the standard for removal of an independent counsel.⁵⁴ There may be a constitutional issue in limiting the Attorney General's power to remove because removal may be a purely executive function, and thus, not subject to any limitations established by Congress.⁵⁵ Previously, the Attorney General could have removed an independent counsel only for "extraordinary impropriety,"⁵⁶ but under the amendment, this standard was changed to "good cause."⁵⁷ This change, it was believed, enhanced the constitutionality of the statute by expanding the Attorney General's power of removal.⁵⁸

The Independent Counsel Reauthorization Act of 1987 created further amendments to the independent counsel provisions of the Ethics Act.⁵⁹ These amendments included a time limit on "threshold" inquiries conducted by independent counsels, and a recusal requirement in instances where the Attorney General may be per-

that the Department of Justice accorded Billy any special treatment because of his relationship with the President, questions existed as to whether this was really the case. *Id.* In any event, the public may be justified in feeling that the Department of Justice is unable to fairly conduct an investigation of a member of the President's family. *Id.*

⁵¹ *Id.* at 3545.

⁵² See 1982 REPORT, *supra* note 13, at 3546. Under § 591(b)(5) of the Ethics Act, officials were subject to the special prosecutor requirements for the entire incumbency of the President under which he or she served plus the entire incumbency of the next President if they were from the same political party. *Id.* The Senate Governmental Affairs Committee chided this provision as unfair because it held an officer subject to the independent counsel procedure long after the dangers of the conflict of interest passed. *Id.*

⁵³ *Id.* at 3547 (reducing period to President's incumbency plus one year "cooling off" period).

⁵⁴ *Id.* at 3553.

⁵⁵ See *infra* notes 80-86 and accompanying text (discussing Supreme Court's view on the Attorney General's power of removal).

⁵⁶ See 1982 REPORT, *supra* note 13, at 3553 (independent counsel could only have been removed for extraordinary impropriety, physical disability, mental incapacity, or a condition that substantially impaired his or her performance).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ The Independent Counsel Reauthorization Act of 1987, Pub. L. No. 100-191, § 2, 101 Stat. 1293 (codified at 28 U.S.C. §§ 591-99 & 5 U.S.C. app. (1987)).

sonally or financially involved.⁶⁰

II. CONSTITUTIONALITY OF THE INDEPENDENT COUNSEL PROVISIONS

The most controversial aspect of the independent counsel provisions is their constitutionality.⁶¹ Despite previous constitutional

⁶⁰ See Satery, *supra* note 23, at 260-62. Special prosecutors had conducted extended "threshold" inquiries in deciding whether a preliminary investigation would be necessary. *Id.* at 262. More often than not, it was decided that further proceedings were necessary. *Id.* at 260-61. To prevent this problem, a 15-day limit was placed on the threshold investigation. *Id.* at 262. Also, the Attorney General would recuse himself upon receiving information concerning someone with whom he had a personal or financial relationship. *Id.* at 263.

⁶¹ See *Morrison v. Olson*, 487 U.S. 654, 670-96 (1988) (holding independent counsel provisions of Ethics Act do not violate Appointment Clause, Article III, nor principle of separation of powers); Carolyn M. Corry, *On the Constitutionality of the Independent Counsel Provisions of the Ethics in Government Act: Do They Comport with the Separation of Powers?*, 26 DUQ. L. REV. 715, 720-31 (1988) (analyzing constitutional problem as *Morrison* majority did); Peter J. Garofalo, *Requiring the Executive Branch to Share Control Over the Prosecutorial Function: Morrison v. Olson*, 22 CREIGHTON L. REV. 187, 215-20 (1988) (arguing Act forces executive branch to share control over prosecutorial function, but does so without throwing government off constitutional balance); Robert G. Solloway, *The Institutionalized Wolf: An Analysis of the Unconstitutionality of the Independent Counsel Provisions of the Ethics in Government Act of 1978*, 21 IND. L. REV. 955, 978-82 (1988) (claiming provisions violate separation of powers doctrine, and gives Congress unprecedented role in policing executive branch); Keith Werhan, *Toward an Eclectic Approach to Separation of Powers: Morrison v. Olson Examined*, 16 HASTINGS CONST. L.Q. 393, 444-48 (1988) (asserting *Morrison* Court correctly combined formalism and functionalism in its approach, however, a better standard is necessary); Symposium, *A Symposium on Morrison v. Olson: Addressing the Constitutionality of the Independent Counsel Statute*, 38 AM. U. L. REV. 255, 255-93 (1989) (presenting various constitutional and policy reasons explaining why *Morrison* was either correctly or incorrectly decided); Laura L. Cox, Note, *Political Accountability and the Independent Counsel: A Sheep in Wolf's Clothing?*, 57 U. CIN. L. REV. 1471, 1496-98 (1989) (claiming that although *Morrison* Court deviated from its recent "formalistic" approach to separation of powers questions, case was distinguishable and correctly decided); Donald A. Daugherty, Comment, *The Separation of Powers and Abuses in Prosecutorial Discretion: Morrison v. Olson* 108 S. Ct. 2597, 79 J. CRIM. L. & CRIMINOLOGY 953, 995 (1988) (stating *Morrison* Court incorrectly considered only technical, formal aspects of independent counsel provisions, and did not realize that practical implementation resulted in substantial intrusion into President's responsibilities); Peter B. Davidson, Note, *Chipping Away at the President's Control Over His Administration: An Analysis of Morrison v. Olson and Beyond*, 6 J. L. & POL. 205, 221-26 (1989) (claiming that *Morrison* Court reached correct holding by properly rejecting certain precedent, but it failed to give adequate test to resolve constitutional problems involved); J. Andrew Kinsey, Comment, *The Court Upholds the Constitutional Validity of the Independent Counsel Statute—Morrison v. Olson*, 7 N.Y.L. SCH. J. HUM. RTS. 347, 372 (1989) (arguing that although independent counsel provisions remove power from President, it is constitutionally permitted structural change); Alton L. Lightsey, Note, *Constitutional Law: The Independent Counsel and the Supreme Court's Separation of Powers Jurisprudence*, 40 U. FLA. L. REV. 563, 584 (1988) (asserting independent counsel provisions are both unconstitutional and unnecessary because constituted structures already fulfilled purpose of independent counsel); Morrissey, *supra* note 13, at 965, 986-89 (arguing independent counsel provisions wrongly permit Congress to strip President of significant power); Edward Susolik, Note, *Separation of Powers and Liberty: The Appointments Clause, Morrison v. Olson, and Rule of Law*, 63 S. CAL. L. REV. 1515, 1566 (1990) (agreeing with opponents of independent counsel to extent that strict understanding of separation of powers is necessary condition for maximizing liberty).

challenges to these provisions,⁶² it was not until 1987 that the Supreme Court resolved the issue in *Morrison v. Olson*.⁶³

In *Morrison*, Theodore Olson, an official with the Attorney General's Office, was suspected of perjury before the House Judiciary Committee during an investigation of the Environmental Protection Agency.⁶⁴ The Department of Justice requested and was granted the appointment of an independent counsel.⁶⁵ When subpoenas were issued to Mr. Olson, his counsel claimed that the independent counsel provisions were unconstitutional.⁶⁶ The United States District Court for the District of Columbia held that the provisions were constitutional.⁶⁷ The Supreme Court upheld the District Court's ruling.⁶⁸

One of the constitutional issues involved in *Morrison* concerned the Appointments Clause of the Constitution,⁶⁹ which requires that principal officers be appointed by the President.⁷⁰ Counsel for Mr. Olson argued that if an independent counsel is a principal officer, then the Ethics Act was unconstitutional⁷¹ because the independent counsel was not appointed by the President but by the Special Division of the U.S. Court of Appeals for the District of

⁶² See *In re Sealed Case*, 829 F.2d 50, 61 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 1027 (1988). During Independent Counsel Lawrence Walsh's investigation of the Iran-Contra affair, former National Security Council staff member, Lieutenant Colonel Oliver North, argued that the independent counsel provisions were unconstitutional. *Id.* North argued that allowing the Attorney General to remove Walsh only for cause injured North and was unconstitutional. *Id.* However, the United States Court of Appeals for the District of Columbia held that the issues involved could be resolved without addressing the constitutional aspect. *Id.* at 62; see also *Deaver v. Seymour*, 822 F.2d 66, 66 (D.C. Cir.), *cert. denied*, 484 U.S. 829 (1987). Former White House Deputy Chief of Staff, Michael Deaver, also challenged the statute during his investigation, but his challenges failed. *Id.* The court asserted that the constitutional challenge could not be raised in a pre-indictment civil injunctive action. *Id.* at 70.

⁶³ 487 U.S. 654 (1988).

⁶⁴ *Id.* at 666.

⁶⁵ *Id.* at 667.

⁶⁶ *Id.* at 688.

⁶⁷ See *In re Sealed Case*, 665 F. Supp 56, 60-61 (D.D.C. 1987) (holding statute did not violate doctrine of separation of powers), *rev'd*, 838 F.2d 476 (D.C. Cir.), *rev'd*, *Morrison v. Olson*, 487 U.S. 654 (1988).

⁶⁸ *Morrison*, 487 U.S. at 654.

⁶⁹ See U.S. CONST. art. II, § 2, cl. 2. Article II provides, in pertinent part:

[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, in the Courts of Law, or in the Heads of Departments.

Id.

⁷⁰ *Id.*

⁷¹ *Morrison*, 487 U.S. at 671.

Columbia.⁷² However, if the independent counsel was determined to be an inferior officer, the Ethics Act would not violate the Appointments Clause.⁷³

The Supreme Court, relying on *United States v. Germaine*,⁷⁴ reasoned that the independent counsel, Alexia Morrison, was an inferior officer because she could have been removed by a higher executive branch official, had limited duties, and was limited in jurisdiction and tenure.⁷⁵ Justice Antonin Scalia, in a well-known and controversial dissent, argued that the independent counsel was a principal officer.⁷⁶ He thought that the independent counsel should not have been classified as an inferior officer when she was more difficult to remove than most principal officers.⁷⁷ Justice Scalia also stated the majority mischaracterized the extent of an independent counsel's authority.⁷⁸

⁷² See *supra* notes 28-30 and accompanying text (discussing operation of statute).

⁷³ *Morrison*, 487 U.S. at 670-71 (stating initial question is whether independent counsel is principal or inferior officer).

⁷⁴ 99 U.S. 508, 511 (1878) (noting factors to be considered include "the ideas of tenure, duration, emolument, and duties . . .").

⁷⁵ *Morrison*, 487 U.S. at 671-72. The Court noted that although Morrison had independent powers, the power of removal vested in the Attorney General indicated some degree of inferiority in rank. *Id.* at 671. Independent counsel has no authority to formulate government policy or to perform duties unnecessary to operate its office. *Id.* at 671-72. Independent counsel can only act within the scope of the jurisdiction granted by the Special Division. *Id.* at 672. When an independent counsel's single task is over, the office terminates. *Id.*

⁷⁶ *Id.* at 716-19 (Scalia, J., dissenting) (attempting to rebut each reason offered by majority); see also *infra* notes 77-78 (discussing Justice Scalia's reasons for asserting independent counsel is principal officer).

⁷⁷ See *Morrison*, 487 U.S. at 716 (principal officers may be removed by President at will).

⁷⁸ *Id.* The independent counsel has the same powers as Department of Justice officials. *Id.* at 716-17. Justice Scalia also argued that although the independent counsel does not formulate policy for the government, neither does any other officer of the government, barring the President. *Id.* at 718. There is nothing unusually limited about the independent counsel's tenure and jurisdiction. *Id.*

For Supreme Court cases dealing with the appointment of various principal and inferior officers, see *Buckley v. Valeo*, 424 U.S. 1, 127-32 (1976) (holding Congress violated Appointments Clause by creating Federal Elections Commission whose officers were charged with regulating campaign expenditures); *Humphrey's Ex'r v. United States*, 295 U.S. 602, 628-29 (1935) (holding Federal Trade Commission is both quasi-legislative and quasi-judicial agency, and therefore its members act independently of executive and may not be removed by President except for good cause); *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 352-53 (1931) (holding United States Commissioners are inferior officers).

For discussions concerning the distinction between principal and inferior officers, see Corry, *supra* note 61, at 735-43 (arguing precedent supports idea that independent counsel is inferior officer); Garofalo, *supra* note 61, at 218 (agreeing with Court's decision, but admitting independent counsel may not be subordinate officer); Eric R. Glitzenstein & Alan B. Morrison, *The Supreme Court's Decision in Morrison v. Olson: A Common Sense Application of the Constitution a Practical Problem*, 38 AM. U. L. REV. 359, 362-66 (1989) (agreeing with Court's decision while admitting independent counsel may not be subordinate officer); Solloway, *supra* note 61, at 969-73 (arguing method of appointment violates separation of powers based on case law and tradition).

However, the more significant constitutional question in *Morrison* dealt with whether the independent counsel provisions violated the separation of powers doctrine.⁷⁹ Mr. Olson's counsel argued that the restriction of the Attorney General's power to remove an independent counsel was an unconstitutional interference with the President's executive power.⁸⁰ The *Morrison* Court held that this restriction did not violate the separation of powers doctrine.⁸¹ Although the Court recognized the importance of the separation of powers doctrine, the Court stated that this separation was not absolute.⁸² The Court determined that the focus must be on whether the restriction impermissibly interfered with the President's duties and not necessarily whether the individual was a "purely executive" officer.⁸³ Unlike previous cases, which held that the separation of powers doctrine was violated,⁸⁴ in *Morrison*

⁷⁹ See *Morrison*, 487 U.S. at 704 (Scalia, J., dissenting) (stating Court should have focused primarily on separation of powers and secondarily on Appointments Clause and removal power).

⁸⁰ See *Morrison*, 487 U.S. at 685-93. The Court asserted that a restriction on the removal power of the Attorney General is not unconstitutional. *Id.* It considered different lines of precedent in reaching its decision. *Id.* at 685-88. In *Bowsher v. Synar*, 478 U.S. 714 (1986) and *Myers v. United States*, 272 U.S. 52 (1926), attempts by Congress to involve itself in removal of executive officials were found unconstitutional. *Id.* at 686. The Court stated that in *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935), wherein the Court, while not allowing Congress to involve *itself* in the removal of Commissioners of the Federal Trade Commission (FTC), allowed it to restrict the President's power to remove at least in regard to quasi-legislative or quasi-judicial agencies. *Id.* at 687. The Court considered *Wiener v. United States*, 357 U.S. 349 (1958), in which the President could not remove a member of the War Claims Commission just to appoint someone else he wanted to be on the Commission, when the Commissioners were entrusted with power to be free from executive control. *Id.* at 688. Appellees contended that *Humphrey's Ex'r* and *Wiener* apply when there is a "quasi-legislative" or "quasi-judicial" official and Meyers applies when a "purely executive" official is involved like an independent counsel. *Id.* at 688-89.

⁸¹ *Morrison*, 487 U.S. at 685-93.

⁸² *Id.* at 693-94. The Court has not hesitated to invalidate a law which has violated the separation of powers principle. *Id.* "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Id.* at 694 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)).

⁸³ *Id.* at 691. Although the Court admitted that it did rely on terms such as "quasi-legislative" and "quasi-judicial" in past cases, it states that the analyses involved were not meant to create strict categories of officials who may or may not be removed by the President. *Id.* at 689. While the functions served by the officials are relevant, the most important concern is whether the President can perform his constitutional duty. *Id.* at 691. "[We] cannot say that the imposition of a 'good cause' standard for removal by itself unduly trammels on executive authority." *Id.*

⁸⁴ See *Bowsher*, 478 U.S. at 722-23. The Court stated that Congress cannot have an active role in the supervision of executive roles. *Id.* at 722. This would be inconsistent with the doctrine of separation of powers. *Id.* at 723. To allow the Comptroller General to execute the laws is equivalent to allowing a congressional veto. *Id.* at 726. This is constitutionally impermissible. *Id.* at 727; *INS v. Chadha*, 462 U.S. 919, 945-59 (1983). A statute allowing for a congressional one-house veto is unconstitutional because it violates separation

there was no attempt by Congress, in restricting the President's control, to increase its own powers and usurp executive functions.⁸⁵ In his dissent, Justice Scalia argued that because the statute deprives the President of exclusive control over a purely executive function, it impermissibly interfered with the President's powers.⁸⁶

Although there has been much debate over the constitutionality of the statute, the American Bar Association,⁸⁷ Common Cause,⁸⁸ the Committee on Governmental Affairs,⁸⁹ and the Supreme Court of the United States⁹⁰ have endorsed the constitutionality of the independent counsel provisions, and objections such as those made by Justice Scalia have not been left unanswered.⁹¹ Despite

of powers principles. *Id.* at 956-59. All legislation must be presented to the President before becoming law. *Id.* at 945-46. Congress must also concur. *Id.* at 948; see also *Meyers*, 272 U.S. at 161. The power of Congress to remove executive postmasters does not conform with the intent of the framers of the Constitution. *Id.*

⁸⁵ *Morrison*, 487 U.S. at 686 (stating *Morrison* was different than other cases wherein Congress attempted to gain role in removal of executive officials).

⁸⁶ *Id.* at 705 (Scalia, J., dissenting). Justice Scalia stated that Article II of the Constitution, which provides that "the executive Power shall be vested in a President of the United States" means "all" of the executive power, not "some" of it. *Id.* "It is not for us to determine, and we have never presumed to determine, how much of the purely executive powers of government must be within the full control of the President. The Constitution prescribes that they *all* are." *Id.* at 709. It is not relevant how much the statute reduces the control of the President. *Id.* at 708. Complete control over investigations and prosecutions is a constitutional duty of the President. *Id.* at 710.

⁸⁷ See *Hearings*, *supra* note 4, at 9 (testimony of Samuel Dash & Irvin B. Nathan on behalf of the American Bar Association) (arguing that independent counsel provisions strengthen checks and balances system).

⁸⁸ See *Hearings*, *supra* note 4, at 1-2 (testimony of Fred Wertheimer, president of Common Cause) (accepting that constitutional issues were resolved by Supreme Court).

⁸⁹ See 1987 REPORT, *supra* note 2, at 2155.

The committee has found the arguments of the Department of Justice, Mr. Smith, and other critics of the independent counsel statute to be unpersuasive, based upon an examination of the law's effective operation since 1982 and other expert analyses of the constitutional issues, including recent findings by three courts that the statute is likely to withstand constitutional scrutiny.

Id.

⁹⁰ See *Morrison*, 487 U.S. at 696-97.

⁹¹ See *Hearings*, *supra* note 4, at 5 (testimony of Katy J. Harriger). Ms. Harriger testified:

Many of the arguments of critics still follow this incorrect underlying constitutional assumption. In particular, the criticism that the independent arrangement lacks political accountability derives from a theory of the separation of powers embodied in Justice Scalia's dissent in *Morrison*. This theory assumes that government powers are neatly compartmentalized, that the lines between the branches are clearly delineated, and that no overlap or blending of powers is permitted. This theory ignores not only James Madison's understanding of the separation of powers but also the reality of how the separation of powers operates in practice.

Id.; see also William B. Gwyn, *The Indeterminacy of the Separation of Powers and the Federal Courts*, 57 GEO. WASH. L. REV. 474, 489 (1989). Justice Scalia did not support Chief Justice Rehnquist's statement that "[t]here is no real dispute that functions performed by the independent counsel are 'executive' in the sense that they are law enforcement func-

the numerous constitutional challenges to the independent counsel provisions of the Ethics Act, these provisions withstand constitutional scrutiny, and any objections made to the use of an independent counsel pursuant to those provisions must be made on grounds other than a lack of constitutionality.

III. RECENT APPLICATION OF THE INDEPENDENT COUNSEL PROVISIONS

A. *The Iran-Contra Investigation*

During the fourteen years that the independent counsel provisions were in existence, they were used to appoint eleven independent counsels.⁹² The most publicized and controversial of these appointments involved Lawrence Walsh's investigation⁹³ into the trading of arms by members of President Reagan's administration to Iran, in exchange for American hostages.⁹⁴ After five

tions that typically have been undertaken by officials within the Executive Branch." *Id.* (quoting *Morrison*, 487 U.S. at 691 (1988)). The author notes that Justice Scalia must not be aware that executives perform different functions, and that the Constitution gives a prosecutorial role in the impeachment process to the House of Representatives. *Id.*

⁹² See 1992 REPORT, *supra* note 2, at 9. During the first four years (1978-1982), the Independent Counsel Act was used to appoint three independent counsels. *Id.* The first of the three counsels was Arthur Hill Christy (11/79-5/80) who investigated Hamilton Jordan. *Id.* There was no indictment and the investigation incurred \$182,000 in expenses. *Id.* Next to be appointed was Gerald Gallinhouse (12/80-3/81) who investigated Timothy Kraft. *Id.* Again there was no indictment but the cost was only \$3,300. *Id.* Lastly, Leon Silverman investigated Ray Donovan (12/81-9/82 and 6/85-10/87). *Id.* The cost of this investigation was \$326,000 and there was no indictment. *Id.*

In the second five years there were seven independent counsels. *Id.* First, was Jacob A. Stein (4/84-9/84) who investigated Edwin Meese at a cost of \$312,000. *Id.* Mr. Meese was not indicted. *Id.* Next, was the appointment of Alexia Morrison to investigate Theodore Olson (5/86-3/89). *Id.* Olson challenged the constitutionality of the provisions. *Id.* Although there was no indictment, the constitutionality of the statute was upheld with a cost of \$1.5 million. *Id.* A conviction was finally obtained with the appointment of Whitney N. Seymore (5/86-6/89). *Id.* Mr. Seymore convicted Michael Deaver at a cost of \$1.5 million. *Id.* Then came the appointment of Lawrence Walsh (12/86-present) to the Iran-Contra scandal, which has resulted in fourteen indictments and a cost of \$32.5 million. *Id.* Following Walsh came the Wedtech investigation conducted by James McKay (2/87-1/90). *Id.* This resulted in two indictments, one acquittal, and one conviction after trial (overturned on appeal), at a cost of \$2.6 million. *Id.* Lastly, there were two confidential appointments. *Id.* Both investigations ended without indictments and costs of \$17,000 and \$46,000 respectively. *Id.* Since 1988, there has been only one appointment. *Id.* Arlin Adams (3/90-present) is investigating the HUD scandal. *Id.* There have been ten indictments, and two guilty pleas, with eight more trials upcoming, and these costs approximate \$6.9 million to date. *Id.*

⁹³ See Taylor, *supra* note 18, at 5 (opponents and supporters of independent counsel provisions use Walsh's performance to bolster their views).

⁹⁴ See William F. Buckley, Jr., *Making Crimes Out of Misjudgments*, N.Y. DAILY NEWS, Nov. 16, 1992, at 31. The Boland Amendment was circumvented by funnelling funds from the sale of military equipment via Israel to El Salvador to assist the Contras. *Id.*; see also Peter Kornbluh et al., *Ollie Oops: He Says He's Exonerated. The Record Says He's a Crook; Oliver North of the Iran-Contra Scandal*, 23 WASH. MONTHLY 33 (1991). The investigation

years and expenditures totaling \$32.5 million, Mr. Walsh's investigation ended with four convictions, seven guilty pleas, and one dismissal.⁹⁵

The duration and expense of the Iran-Contra investigation brought criticism concerning the Walsh inquiry,⁹⁶ as well as skepticism about the use of the independent counsel provisions.⁹⁷ In

led to charges being filed against Mr. North that included withholding information from Congress, conspiracy, making false statements to officials, and obstruction of Congress. *Id.*

⁹⁵ See *United States v. Clines* 958, F.2d 578 (4th Cir. 1992). Mr. Clines was found guilty of filing false tax returns, which did not include income obtained from the arms deals. *Id.*; *United States v. Poindexter*, 951 F.2d 369, 369-71 (D.C. Cir. 1991). John M. Poindexter was found guilty on five felony counts, including conspiracy and obstruction of Congress. *Id.* Poindexter's conviction was also reversed on appeal. *Id.* at 388; *United States v. North*, 910 F.2d 843, 851 (D.C. Cir. 1990). Out of the twelve counts Oliver North was charged with, he was only convicted of aiding and abetting the administration's effort to deceive Congress; altering and destroying documents; and accepting an illegal gratuity. *Id.* However, his conviction was reversed by the Circuit Court because the lower court allowed North's testimony during Congressional hearings to be used against him at trial even though he had received immunity. *Id.* at 853-68; *United States v. Fernandez*, 887 F.2d 465, 470 (4th Cir. 1989). The case against Joseph Fernandez was thrown out when the Attorney General refused to provide classified information which would have been used in open court. *Id.* The court held that the CIPA blocked this information from being released. *Id.*; Kornbluh, *supra* at 94. Mr. Clines faces the longest prison term of any Iran-Contra defendant, 16 months. *Id.*; Kornbluh, *supra* note 94 at 33. The following individuals pled guilty: Alan D. Fiers, withholding information from Congress; Elliot Abrams, withholding information from Congress; Carl "Spitz" Channell, conspiracy to defraud the United States; Richard R. Miller, conspiracy to defraud the United States; Richard V. Secord, false statements to Congress; Albert Hakim, misdemeanor count of supporting North's salary. *Id.* In addition, Lake Resources, of which Hakim was a principal shareholder, pled guilty to theft of government property. *Id.*; see also Evan Thomas et al., *Pardon Me*, NEWSWEEK, Jan. 4, 1993, at 14-18. Robert C. McFarlane, President Reagan's former national security advisor, pled guilty to withholding information from Congress. *Id.* at 15. He was sentenced to two years probation, 200 hours of community service, and fined \$20,000. *Id.*

On Christmas Eve in 1992, President Bush pardoned Caspar W. Weinberger, Duane Clarridge, Clair George, Robert McFarlane, Elliot Abrahms, and Alan Fiers by way of his power to grant pardons for offenses against the United States under the U.S. Const. art. II, § 2. *Id.* Caspar W. Weinberger, the former Defense Secretary, was awaiting trial in January, 1993 on charges of perjury, making false statements, and obstructing congressional investigators. *Id.* Duane Clarridge, a former CIA agent and former head of covert operations in Latin America, was awaiting trial on charges of making false statements and obstructing inquiries into the Iran-Contra affair. *Id.* The benefit from these pardons is that Mr. Walsh can call these men as witnesses in other Iran-Contra trials, and since they have been pardoned, they may not take the fifth. *Id.* They may also be charged with perjury if they do not tell the truth on the stand. *Id.*

⁹⁶ See David Johnston, *Proud, Unbowed and Unpopular: Special Prosecutor Makes His Case*, N.Y. TIMES, Sept. 27, 1992, at D7. Critics have called Walsh an "inept zealot, spending millions of dollars analyzing the activities of the Reagan administration." *Id.* Senator Alan K. Simpson described him as "a stumbling, bumbling prosecutor." *Id.*; see also David Johnston, *Counsel is Ending Arms-Sale Inquiry*, N.Y. TIMES, Sept. 18, 1992, at A1. Even those who supported Walsh's effort stated that during the investigation he belabored over an issue that undermined President Reagan's final years in office and became less urgent as the contra issue faded and the American hostages were released from Lebanon. *Id.*

⁹⁷ See Claudia MacLachlan, *The End of Independent Counsels?*, NAT'L L.J., July 20, 1992, at 1, 35. "Iran-Contra shows all the flaws of the statute." *Id.* Supporters and opponents of the Independent Counsel law agree that it must be revised, either by adding reporting requirements, deadlines, or some budget oversight. *Id.*

addition, this investigation exposed inherent problems with the Ethics Act,⁹⁸ including access to classified information.⁹⁹ The Classified Information Procedures Act (the "CIPA")¹⁰⁰ barred Mr. Walsh from such classified information and prevented the conviction of Joseph Fernandez, a former CIA station chief in Costa Rica.¹⁰¹ Mr. Fernandez notified the court that he intended to request and introduce classified information during his trial.¹⁰² The circuit court affirmed the district court's refusal to allow the independent counsel to provide Mr. Fernandez with unclassified summaries of the classified documents requested.¹⁰³ The charges against Mr. Fernandez were dismissed because Walsh could not properly try Mr. Fernandez without this information.¹⁰⁴

Because neither the CIPA nor the independent counsel provisions provided for this substitution, the circuit court determined that the independent counsel could not gain access to classified information, which the Attorney General refused to disclose.¹⁰⁵ As a result, in a case involving a high-level official, the CIPA caused the unintended result of shielding an official from prosecution in-

⁹⁸ See *Hearings*, *supra* note 4, at 11 (testimony of Samuel Dash & Irving B. Nathan). Some of the obstacles imposed upon Walsh during his inquiry included national security concerns, classification issues, and immunity problems. *Id.*

⁹⁹ See Sandra D. Jordan, *Classified Information and Conflicts in Independent Counsel Prosecutions: Balancing the Scales of Justice After Iran-Contra*, 91 COLUM. L. REV. 1651 (1991) (discussing interplay between classified information and independent counsel statute).

¹⁰⁰ Pub. L. No. 96-456, 94 Stat. 2025 (1980) (codified at 18 U.S.C. § 4 (1988)). The statute provides in its pertinent part:

§ 4. Discovery of classified information by defendants. The court, upon a sufficient showing, may authorize the United States to delete specified items of classified information from documents to be made available to the defendant through discovery under the Federal Rules of Criminal Procedure, to substitute a summary of the information for such classified documents or to substitute a statement admitting relevant facts that the classified information would tend to prove. The court may permit the United States to make a request for such authorization in the form of a written statement to be inspected by the court alone. If the court enters an order granting relief following such an *ex parte* showing, the entire text of the statement of the United States shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

Id.

¹⁰¹ See *United States v. Fernandez*, 887 F.2d 465, 467 (4th Cir. 1989).

¹⁰² *Id.* at 467; see 18 U.S.C. App § 5. This section of the CIPA provides that a defendant must notify the court of its intent to submit classified information during trial. *Id.*

¹⁰³ See *Fernandez*, 887 F.2d at 465.

¹⁰⁴ See *Jordan*, *supra* note 99, at 1667. The judge dismissed the case because he believed that Fernandez could not be tried fairly without the classified information. *Id.*

¹⁰⁵ See *Fernandez*, 887 F.2d at 470. The court reasoned that because of constitutional concerns this information could not be disclosed to someone who is not fully accountable to the President. *Id.* at 471.

stead of merely keeping certain information confidential.¹⁰⁶ The Attorney General's ability to withhold confidential documents negates the independent counsel's authority and sabotages a prosecution through the use of the CIPA.¹⁰⁷ For an independent counsel to be effective, there must be some type of coordination between these two statutes.¹⁰⁸

B. *Iraqgate*

In order for the Attorney General to have appointed an independent counsel, the source of the information received must have been credible and specific.¹⁰⁹ Although this standard was designed to prevent frivolous investigations, it gave the Attorney General the sole discretion to determine what information was credible and specific enough to merit an investigation.¹¹⁰ Attorney General William Barr's refusal to appoint an independent counsel to the "Iraqgate" scandal illustrates the difficulties with the provision.¹¹¹ Iraqgate involved loans to Iraq, which were used by Saddam Hussein to obtain weapons immediately prior to the invasion of Kuwait.¹¹² President Bush's administration insisted that this was merely poor policy making,¹¹³ but some unanswered ques-

¹⁰⁶ See Jordan, *supra* note 99, at 1672 (administration may utilize statute to protect its members from any embarrassment).

¹⁰⁷ *Id.* at 1666. Because of its power to control the release of classified evidence, the Department of Justice ultimately controls investigations involving high-level officials who have access to classified information. *Id.*

¹⁰⁸ See *id.* at 1674. The author, Sandra Jordan, suggests that an independent counsel should have the power to challenge an affidavit by the Attorney General seeking to block the release of classified information. *Id.* She further suggests that a change in procedure should take place to allow a prosecution to continue while still protecting classified information. *Id.*

¹⁰⁹ See *supra* notes 47-48 and accompanying text (explaining 1982 amendment changed standard for appointment).

¹¹⁰ *Id.*

¹¹¹ See Marcia Chambers, *Sua Sponte*, NAT'L L.J., Nov. 2, 1992, at 15 (Barr's decision is latest example of Justice Department's abuse of prosecutorial discretion); William Safire, *Phone Call Proves the Need for an Independent Iraqgate Counsel*, CHI. TRIB., July 10, 1992, at 21; "Can Justice Investigate its Own Manipulation?", *Iraqgate Puzzle Needs a Special Prosecutor*, NEWSDAY, Oct. 15, 1992, at 56. ("the executive branch can't be counted on to investigate itself"). *But see* Webb, *supra* note 17, at 18 (Barr should be commended for his decision).

¹¹² See John A. Farrell, "Iraqgate" the Search for a Coverup; *Thwarted Queries Focused Suspicion*, BOSTON GLOBE, June 16, 1992, at 1. The Government used U.S. taxpayer money to lend Iraq billions of dollars with few safeguards. *Id.* Christopher Drougoul, the manager of the Atlanta branch of the Banca Nazionale del Lavoro, informed agents that he had given Saddam Hussein four billion dollars in illegal loans and U.S. farm credits. *Id.*

¹¹³ See *id.* "[A]s myopically mistaken our diplomatic efforts may have been, there is no evidence that policy makers were malevolent or corrupt in implementing this policy. It's key that a distinction be made between misjudgment and unethical or illegal behavior." *Id.*

tions led Congress, the media, and the public to believe that something illegal occurred.¹¹⁴

These suspicions resulted in a congressional request to the Attorney General to appoint an independent counsel.¹¹⁵ Mr. Barr, instead, chose to appoint a prosecutor from within the Attorney General's office, Frederick B. Lacey.¹¹⁶ Nevertheless, as a member of the Attorney General's office, Mr. Lacey was under executive control which posed a threat of a biased investigation.¹¹⁷

Mr. Lacey's appointment triggered a heated political battle between Congress and President Bush's administration.¹¹⁸ Attorney General Barr justified the appointment of Mr. Lacey, stating that the information received was not substantial enough to seek independent counsel.¹¹⁹ The main purpose of the independent counsel provisions was to provide impartial investigations of government officials.¹²⁰ Although Attorney General Barr may have

¹¹⁴ See *id.* Drogoul's indictment was delayed for 15 months after the Banca Nazionale del Lavoro was raided. *Id.* When the General Accounting Office of Congress tried to investigate the bank scandal, they did not receive full cooperation from the agencies involved. *Id.* There is also evidence that export licenses granted by the government for the sale of technology to Iraq may have been altered in order to classify goods as merely "commercial" and not "military." *Id.*

¹¹⁵ See *id.* at 11. The House Judicial Committee requested an independent counsel after conducting hearings in which C. Boyden Gray and Robert Mosbacher, chairmen of President Bush's campaign, appeared. *Id.*; Peter Truell, *Democrats Call for Independent Counsel to Probe Handling of U.S. Policy on Iraq*, WALL ST. J., July 10, 1992, at A8. Twenty of the twenty-one members of the House Judicial Committee asked the Attorney General to appoint an independent counsel "to investigate serious allegations of possible violations of federal criminal statutes" by high-ranking officials with regard to dealings with Iraq. *Id.*

¹¹⁶ See Andrew Blum, "Iraqgate" Prosecutor Known as a Maverick, NAT'L L.J., Nov. 2, 1992, at 10 (Frederick B. Lacey, a former federal judge, has taken on public officials, the mob and the teamsters).

¹¹⁷ See William Safire, *Don't Let White House Block Iraqgate Probe*, DET. FREE PRESS, July 10, 1992, at A11. "Barr could claim . . . that no evidence of wrongdoing existed, but such bald-faced cover-up would invite impeachment." *Id.*; William Safire, *Iraqgate: Cover-up in Justice Continues the Attorney General Has Shown He Cannot Investigate Himself or His Coconspirators*, DET. FREE PRESS, Oct. 13, 1992 at A9. "Never in the history of the Republic, . . . has the Nation's chief law enforcement officer been in such flagrant and sustained violation of the law." *Id.* But see Buckley, *supra* note 94, at 31 (admitting Bush Administration dealt with Iraq using bad tactics but not criminal acts).

¹¹⁸ See Robert Pear, *Justice Department Rebuffs Democrats on Special Prosecutor on Iraq Aid*, N.Y. TIMES, Aug. 11, 1992, at A1. "Mr. Barr is playing a dangerous political game in a desperate effort to protect the Bush Administration." *Id.* (quoting Representative Henry B. Gonzalez of Texas, chairman of the House Committee on Banking, Finance and Urban Affairs); Mr. Barr's decision was "stonewalling, plain and simple." *Id.* (quoting Representative Jack Brooks, Democrat from Texas, chairman of the House Judiciary Committee).

¹¹⁹ *Id.* "The criteria for invoking the independent counsel statute are not present." *Id.* (quoting Attorney General William Barr). "[T]here is not a shred of evidence that any department employee acted improperly." *Id.*

¹²⁰ See 1982 REPORT, *supra* note 13, at 1 (purpose of Ethics Act is to promote public confidence in impartial investigation of alleged wrongdoings of government officials).

personally believed that the investigation was unwarranted, he should have appointed an independent counsel, especially in light of the congressional and public requests for such an investigation.¹²¹ The criticism surrounding this investigation provided the public with the impression that the investigation was not objective.¹²² Therefore, opponents would question the outcome of Mr. Lacey's investigation, regardless of whether it was conducted properly.¹²³

A governmental investigation lacking public confidence is valueless.¹²⁴ A change in the independent counsel provisions, to ensure that the Attorney General does not abuse this discretionary power to appoint counsel, is necessary to promote the purpose of the statute.¹²⁵

IV. REAUTHORIZATION OF THE ETHICS ACT

A. *The Necessity of the Independent Counsel*

The Reauthorization Act of 1992 would have extended the existing independent counsel provisions for another five years.¹²⁶ However, because of the threat of a Republican filibuster, the Reauthorization Act of 1992 was never voted on by Congress.¹²⁷ Congress stated that the Reauthorization Act was not voted on because there was not enough time to do so before adjourning.¹²⁸

¹²¹ See *Hearings*, *supra* note 4, at 8 (testimony of Samuel Dash & Irving B. Nathan). Had the Iran-Contra investigation been conducted by the Justice Department, the public confidence in the Reagan Administration would have been destroyed. *Id.* The decision to appoint an independent counsel "avoid[ed] the appearance of any kind of coverup." *Id.*

¹²² See, e.g., Chambers, *supra* note 111, at 15. There is some perception surrounding the Justice Department that it is partial to government officials and the investigatory procedure is corrupt. *Id.*; David Corn, *Beltway Bandits*, *THE NATION*, Oct. 12, 1992, at 388. The Justice Department's response to the Iraqgate scandal was not approved by the public. *Id.*

¹²³ See *Hearings*, *supra* note 4, at 4-5 (testimony of Fred Wertheimer). "The pressures, the tensions of divided loyalty are too much for any man, and as honorable and conscientious as any individual might be, the public could never feel entirely easy about the vigor and thoroughness with which the investigation was pursued. Some outside person is absolutely essential." *Id.*

¹²⁴ See *id.* at 5 ("[T]he appearance of a potential conflict of interest is bound to undermine the credibility of the investigation.")

¹²⁵ See *Hearings*, *supra* note 4, at 17 (testimony of Samuel Dash & Irving B. Nathan). A change in the system is necessary to ensure the public that the Attorney General's decision was not subject to political or personal pressures. *Id.*

¹²⁶ See *infra* notes 129-141 and supporting text (discussing proposals and revisions endorsed by Reauthorization Act of 1992).

¹²⁷ See Dewar, *supra* note 17, at A11. "[T]wenty-eight senate Republicans signed a letter expressing their 'vehement opposition' to [the independent counsel law] and promis[ed] to debate it 'at length' which is a senator's way to serve notice of a filibuster." *Id.*

¹²⁸ *Id.* These Republican senators stated that they have "precious little time to complete

But it was actually the difficulties arising from the Iran-Contra investigation that prevented Congress from voting on the Reauthorization Act. Thus, a careful look at these problems, along with possible solutions, could spur reenactment of the independent counsel provisions in 1994.

B. *The Reauthorization Act of 1992*

In addition to reauthorizing the independent counsel provisions for another five years, the Reauthorization Act of 1992 was designed to strengthen fiscal and administrative controls, and reinforce the Attorney General's power to apply the Ethics Act to members of Congress.¹²⁹ However, it appeared that Congress was not satisfied with the provisions of the Reauthorization Act and felt it better to let the law lapse.¹³⁰

The Reauthorization Act of 1992 would have added section 594(a)(1) to deal solely with fiscal control.¹³¹ Many of the fiscal control measures proposed in 1992 were previously suggested and rejected in 1987.¹³² Under this new subsection, an independent counsel would have to act with due regard for expense and make only reasonable expenditures.¹³³ In addition, a staff person would have been appointed to oversee expenditures.¹³⁴ To alleviate costs, this provision would have also mandated that the General Services Administration house the independent counsels in buildings owned or operated by the federal government.¹³⁵ In addition, sub-

appropriate bills and other must-pass measures before adjournment." *Id.*

¹²⁹ See 1992 REPORT, *supra* note 2, at 1. The purpose of the Reauthorization Act is to renew the act for five more years, strengthen fiscal and administrative controls on independent counsel proceedings, and clarify the authority of the Attorney General to apply the independent counsel process to members of Congress. *Id.*

¹³⁰ See Dewar, *supra* note 17, at A11. In a letter to Senator Dole, Republican senators who threatened to filibuster referred to the act as "pernicious." *Id.* These senators said that a more timely consideration was necessary than could be given before Congress adjourned. *Id.*

¹³¹ See 1992 REPORT, *supra* note 2, at 17 (imposing number of new fiscal and administrative controls on independent counsel).

¹³² *Id.* at 19. It is feared that defendants could use these procedures to circumvent the judicial system. *Id.* This report expressly stated that the provision would not give the criminal defendant the power to bar a subpoena, curtail a proceeding, or otherwise obstruct, limit or delay an investigation or prosecution. *Id.*

¹³³ *Id.* at 18. This provision defines "due regard for expense" as meaning that "an independent counsel must not conduct an investigation or prosecution on the premise that 'price is not object.'" *Id.* "Reasonable expenditures" are those which are necessary and proper to the investigation and prosecution. *Id.*

¹³⁴ *Id.* at 19.

¹³⁵ See *id.* at 13. Independent counsels contacted by the subcommittee explained that being located in a federal building would reduce rental costs and provide services, such as

section (d) of section 594 would have reduced costs further by providing that staff members not be paid more than comparable positions in the Attorney General's office.¹³⁶

In response to the extensive duration of the Iran-Contra investigation, the Reauthorization Act included time restraint provisions.¹³⁷ Proposed subsection (b) of section 594 stated that independent counsels and their staff would not be entitled to travel and subsistence expenses after one year.¹³⁸ In addition, proposed subsection (g) of section 594 provided that the Special Division could terminate an independent counsel if the independent counsel's work had "been completed or so substantially completed that it would be appropriate for the Department of Justice to complete."¹³⁹

The final amendment proposed in the Reauthorization Act of 1992 was section 591(c)(2), which broadened the Attorney General's authority to apply the Act to members of Congress.¹⁴⁰ This amendment would remove the need for the Attorney General to first find that an investigation or prosecution by the Department of Justice "may result in a personal, financial, or political conflict of interest."¹⁴¹

C. Proposed Changes for 1994

Although numerous Republican senators and the Justice Department no longer support the independent counsel provisions, many others support its reenactment.¹⁴² These provisions should

guard protection, which would usually be an additional expense in a commercial building.
Id.

¹³⁶ *Id.* at 13-14.

¹³⁷ See 1992 REPORT, *supra* note 2, at 19-20 (proposed subsection (b) and (g) of § 594).

¹³⁸ *Id.* at 19.

¹³⁹ *Id.* at 21.

¹⁴⁰ *Id.* at 22.

¹⁴¹ See 28 U.S.C. § 591(c). This section concerns the investigation of persons not specifically listed in the Act. *Id.* Furthermore, it provides that there first be a determination that a specific conflict of interest may exist. *Id.*; 1992 REPORT, *supra* note 2, at 22. This new provision eliminates the need for such a determination. *Id.* The proposal would allow appointment if it would be in "the public interest." *Id.*

¹⁴² See Webb, *supra* note 18, at 18. Mr. Webb served as an independent counsel and as an associate independent counsel. *Id.* He believes that the statute serves a necessary function in the governmental system. *Id.*; 1992 REPORT, *supra* note 2, at 6-7. Testimony in support of renewal was heard by representatives of the legal community and the public, including the American Bar Association, Common Cause, Judge George E. McKinnon (presiding judge of the special court), and Professor K.J. Harriger of Wake Forest University. *Id.* But see *id.* at 7. The Department of Justice argued that the law was "premised on the assumption that the professional prosecutors of the Department of Justice could not successfully

be renewed in 1994, although some revisions are necessary.

First, the independent counsel provisions should not be extended to members of Congress. The purpose of these provisions was to eliminate conflicts of interest that could arise when the Department of Justice, a part of the executive branch, investigated and prosecuted other members of the executive branch.¹⁴³ Congress is a separate branch of government, which has no power over the investigations of the Justice Department.¹⁴⁴ Therefore, the possibility of any conflicts of interest are slight.¹⁴⁵ Furthermore, if any personal conflict of interest may arise from a particular investigation, the Attorney General may exercise its right to request an independent counsel.¹⁴⁶

Second, it is not appropriate to place strict time and budget constraints on independent counsels. Most governmental investigations, including those conducted by the Justice Department, take more time and money than investigations conducted in the public sector because more complex issues are usually involved.¹⁴⁷ In addition, each investigation differs and special circumstances may cause one to be longer and more expensive than another.¹⁴⁸ However, in order to assure that taxpayer money is being spent prudently, it is urged that the 1992 fiscal proposals be resubmitted in

investigate and prosecute high government officials." *Id.*

¹⁴³ See 1992 REPORT, *supra* note 2, at 2. "The purpose of this system is to ensure fair and impartial criminal proceedings when an Administration attempts the delicate task of investigating its own top officials." *Id.*

¹⁴⁴ See *Morrison v. Olson*, 487 U.S. 654, 686 (1988) (stating that Constitution prevents Congress from having power to remove executive officials); see also *Myers v. United States*, 272 U.S. 52 (1926) (holding that Constitution forbids Congress right to remove executive official).

¹⁴⁵ See *Hearings*, *supra* note 4, at 7 (testimony of Katy J. Harringer). Professor Harringer researched this legislation for ten years and found no evidence that showed there was reason to extend the coverage of the independent counsel provisions to members of Congress. *Id.*; *Hearings*, *supra* note 4, at 14 (testimony of Samuel Dash & Irving B. Nathan). Similarly, the American Bar Association found no reason why there would be a conflict of interest between the Department of Justice and members of Congress. *Id.*

¹⁴⁶ See 28 U.S.C. § 510. This section allows the Attorney General to delegate his authority. *Id.* The Attorney General is permitted to "make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General." *Id.*

¹⁴⁷ See *Hearings*, *supra* note 4, at 10 (testimony of Samuel Dash & Irving B. Nathan). Because of the nature of these investigations, they often can not be handled expeditiously by either the independent counsel or the Justice Department. *Id.* Unlike the Justice Department, which works from an agency budget, the independent counsel's expenses are dealt with individually for each investigation which causes them to be critiqued more intensely. *Id.* at 11.

¹⁴⁸ See 1992 REPORT, *supra* note 2, at 9. The \$1.5 million cost of the investigation by Alexia Morrison stemmed from the constitutional challenges. *Id.*

1994. These proposals cannot be deemed unreasonable since they simply compel an independent counsel to be more cautious with its spending and do not require that particular financial limitations be followed.¹⁴⁹

Third, the three-year inquiry proposed in subsection (g) of section 594¹⁵⁰ should be eliminated. Subsection (g) makes it mandatory for the Special Division to review the progress of investigations every three years and to determine if termination of any investigation is necessary.¹⁵¹ This subsection is unnecessary since the independent counsel provisions of the Ethics Act already provide that the Special Division may request the Attorney General to terminate an independent counsel if his or her work is deemed to be completed to the extent that the Department of Justice would consider it to be completed.¹⁵²

Lastly, it is suggested that the independent counsel provisions should provide judicial review of the Attorney General's decision not to request an independent counsel.¹⁵³ A court would merely review whether the Attorney General complied with the standard set forth in the statute, and that the information was credible and specific.¹⁵⁴ This mechanism would abate public concern that the Attorney General was biased in deciding not to request the appointment of an independent counsel.¹⁵⁵

CONCLUSION

Since its enactment in 1978, the independent counsel provisions of the Ethics Act provided an important mechanism for assuring

¹⁴⁹ See 1992 REPORT, *supra* note 2, at 12-14. The proposals include compliance with Justice Department policies on spending and filing of annual reports to Congress. *Id.*; *Hearings*, *supra* note 4, at 7 (testimony of Katy J. Harriger). Although fiscal responsibility is necessary, strict financial limitations are not. *Id.*

¹⁵⁰ See 1992 REPORT, *supra* note 2, at 21. This provision would require the Special Division to review each investigation after a three-year period to determine if it should continue. *Id.*

¹⁵¹ *Id.*

¹⁵² See 28 U.S.C. § 596(b)(2) (1993).

¹⁵³ See *Dellums v. Smith*, 573 F. Supp. 1489 (N.D. Cal. 1983), *rev'd*, 797 F.2d 817 (9th Cir. 1986). The District Court held that it had the authority to review the Attorney General's decision not to conduct a preliminary investigation. *Id.* (emphasis added).

¹⁵⁴ See *Hearings*, *supra* note 4, at 17-18 (testimony of Samuel Dash & Irving B. Nathan). The court will review the Attorney General's decision from the report it submitted and appoint an independent counsel if it concludes that the standard was improperly utilized. *Id.* The American Bar Association proposal clearly stated that the court would not be entitled to decide if there should be a prosecution. *Id.*

¹⁵⁵ See *id.* at 17. There is a need to assure the public that this decision was not based on political or personal pressures, but on the standard set in the statute. *Id.*

impartiality in the investigation and prosecution of government officials. Government scandals tarnish the integrity of the political structure, and this should not be compounded by a biased investigation. The independent counsel provisions were effective in eliminating conflicts of interest in governmental prosecutions. However, Congress's failure to reauthorize these provisions may have a devastating effect on such prosecutions in the future. Therefore, Congress should reinstate the independent counsel provisions in 1994.

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