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A Forecast For Revision: The Fate of the Ethics in Government Act in 1999

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I. Introduction

The position of independent counsel was originally created by Congress because of the actions of President Richard Nixon on Saturday October 20, 1973.[1] During the "Saturday Night Massacre," Nixon ordered his Attorney General, Elliot Richardson, to fire special prosecutor Archibald Cox, who was demanding that the President turn over tapes of White House conversations.[2] Richardson refused to comply with the order and resigned. Nixon replaced Richardson with Robert Bork, who promptly carried out the demand that Cox be fired.[3] These events lead Congress to conclude that the Executive branch could not be trusted to conduct an impartial investigation of its own members. As a remedy, the Ethics in Government Act of 1978[4] was passed, which created the position of independent counsel.

The Act contains a sunset provision that forces Congress to reauthorize it every five years, and 1999 is a sunset year.[5] As Congress debates whether to let the Act expire, renew it without change, or amend it, the controversies of the Kenneth Starr investigation will certainly loom over the deliberations. Since its passage, there have been twenty independent counsels

appointed,[6] but none have been remotely as controversial or publicized as Ken Starr's investigation of President Clinton. In 1992, after Lawrence Walsh's Iran-Contra investigation, a Republican led filibuster in the Senate defeated reauthorization of the Ethics Act.[7] The Act was revived by Congress in 1994 when information about Clinton's Whitewater dealings began to surface.[8] Ken Starr has undoubtedly created more negative press for the position of independent counsel than any predecessor, including Walsh. One of the main reasons Congress is likely to significantly amend the Act this year, if not let it lapse, is because of the controversy surrounding the Starr investigation.

Section II of this article will discuss the possibility of Congress allowing the Act to lapse. Sections III through VII will examine five substantive changes to the Ethics Act that Congress may make this session, or may include in a future version of the Act. Section III will deal with changes that would limit the scope of independent counsel investigations. Section IV will examine changes that would limit the length and budget of independent counsel investigations. Section V will analyse possible changes to the triggering mechanism of the Act. Section VI will look at changes to the appointment procedure for independent counsels. Finally, Section VII will examine the possibility of raising the qualification requirements for appointment to the position of independent counsel. The risks

and benefits, along with the likelihood of adoption of each of these changes will be examined.

Considering the current political climate, it is highly likely that the Ethics Act will be allowed to lapse this summer. However, mistrust between the two major political parties will not be as easy to abandon as the Act. Therefore, a future Congress, if controlled by an opposing party, is likely to enact a revised version of the Ethics Act rather than allow the Department of Justice to investigate allegations of wrongdoing within the Executive branch. Over the past twenty-one years, the position of independent counsel has become entrenched in the American political system. Nevertheless, the Act may be placed on the legislative shelf for a few years because of recent abuses. Yet, once the public outrage has subsided, a revised version will probably be enacted by a mistrusting Congress in response to allegations of criminal activity by the Executive branch. In other words, the return of some form of independent counsel seems as inevitable as the next White House scandal.

II. Allowing the Ethics Act to Lapse.

Three reasons why expiration of the Ethics Act is a definite possibility are the Starr investigation, Donald Smaltz's prosecution of Secretary Mike Espy, and the American Bar Association's abandonment of support for the statute. Each

of these events hang like black clouds over the Act which even the most drastic reforms may not be able to remove.

Kenneth Starr's investigation of President Clinton began in 1994.[9] His appointment to the office was questionable from the outset. Starr was chosen to replace special prosecutor Robert Fiske.[10] At the time of his appointment, Starr had absolutely no experience as a prosecuting attorney, yet he was appointed to head the most powerful and visible prosecutorial office outside of the Department of Justice.[11] Starr's probe progressed from Bill and Hillary's suspect investments in Whitewater,[12] to the handling of FBI files by the White House,[13] to "Travel-gate,"[14] to Vincent Foster's death,[15] and finally to the President's testimony concerning his affair with Monica Lewinsky.[16] The total bill for the five-year investigation is over 40 million dollars.[17]

Along the way, serious questions arose concerning Starr's handling of the investigation. Starr has been accused of leaking information to the press on numerous occasions, in flagrant violation of grand jury secrecy rules.[18] Also, he has been accused of mistreatment of witnesses, and questioning witnesses without allowing them benefit of counsel.[19] These allegations have not only raised questions about the lack of supervision of the Office of Independent Counsel, but have also raised questions about whether the Ethics Act works to take politics

out of investigations of the Executive Branch. In the end, the investigation by Ken Starr looked more like a man-hunt than a non-partisan inquiry, which does not bode well for the survival of the Ethics Act.

Other flaws in the Ethics Act that the Starr investigation has exposed relate to the lack of limitations on the scope, budget and length of inquiries. These flaws alone may prove fatal because Congress, so soon after the "impeachment debacle," appears to lack the political energy to fight to salvage the Act.[20] Senator Carl Levin (D-Mich.) has been a strong supporter of the Ethics Act in the past.[21] However, he recently stated that "Starr has done severe damage to the independent-counsel law by the extremes to which he has taken it . . . he has made it very difficult to see the legitimate purpose that led to the creation of the law in the first place."[22] Mark Bredemeier of the Kansas City Star put it succinctly, saying that in the wake of the Starr investigation, the "Vegas odds are against [the Ethics Act's] survival."[23]

Another investigation that decreased the chances for renewal of the Ethics Act was Donald Smaltz's investigation of Secretary of Agriculture Mike Espy. While the questionable tactics of Ken Starr have received more press, Smaltz's investigation is often cited as the best example of what is wrong with the Ethics Act.[24] Smaltz was appointed in 1994 to

investigate allegations that Espy accepted corporate gifts.[25] After spending four years and nearly 20 million dollars, Smaltz found that Espy had accepted 33 thousand dollars worth of football, basketball, airline tickets and luggage from corporations and agri-businesses.[26] Undoubtedly, Espy acted unethically by taking these gifts, and he lost his job in 1994 as a result of his actions.[27] However, Smaltz did not resign as independent counsel after Espy was removed from office. He went on to bring a thirty-eight count indictment against the former Secretary, which lead to a seven week trial during which Smaltz called seventy witnesses.[28] Espy's lawyers called no defense witnesses, and characterized the prosecution's case as "a joke."[29] After deliberating for two days, the jury acquitted Espy of all charges.[30]

During the trial, Smaltz produced absolutely no evidence that Espy used his political office to the advantage of those corporations that gave him gifts.[31] Such evidence is essential for a successful prosecution under the "unlawful gratuities" statute, upon which the case against Espy was based.[32] This lack of evidence leads to the conclusion that Smaltz indicted Espy merely because he saw it as his only hope of "succeeding" in his position as independent counsel. This may be fundamental flaw in the Ethics Act. It creates a situation where the prosecutor

gets embroiled in a battle of egos with the federal official he or she is assigned to investigate. Such a battle in a political arena inevitably leads to reckless use of power and frivolous litigation.[33] As Ted Wells, one of Espy's lawyers stated, "[t]hese prosecutors become obsessed with returning an indictment to justify the millions they spend."[34] In short, the Ethics Act makes investigations of public officials worse than partisan, it makes them personal.

After the trial, Espy characterized the independent counsel as "someone with all the money, all the power, very little supervision, no timetable and able to unleash powerful hordes of prosecutors on you and your family."[35] The issues of budget, power and length of investigations can be dealt with through revision of the Act. However, it is doubtful that any amount of revision would stop independent counsels from believing that they are hired hunters, and success can only be achieved by bringing down the game. For this reason, allowing the Ethics Act to lapse may be the best, and most likely Congressional outcome this summer.

The final nail in the coffin of the Ethics Act may be that the American Bar Association ("ABA"), the primary advocate of the bill in 1978, voted recently to support the expiration of the Act.[36] On February 8th of this year the ABA's House of Delegates, by a vote of 384-49, voted to lobby Congress to allow

the Act to lapse.[37] Philip Anderson, the President of the ABA, said that the group was changing its position because the Act had failed in its primary purpose to take politics out of the investigation of public officials.[38] Loss of its "parent" lobby group seriously increases the possibility that the Act will not survive this summer.[39] Congress listened to the ABA in 1978 when it drafted and passed the Ethics Act, and Anderson says he has "every reason to believe they will listen to us now."[40]

Taken together, the investigations of Kenneth Starr and Donald Smaltz, and the loss of support from the ABA, have created a climate in Washington where few politicians can justify a vote for renewal of the Ethics Act, even in a substantially revised form. Senator Don Nickles, the Republican whip, stated recently that the law is "either going to be rewritten significantly, or it will be allowed to lapse. In all likelihood, the latter."[41] In February of this year Senator Daniel Patrick Moynihan (D-N.Y.) said the bill was "a post-Watergate liberal notion, and . . . a disaster."[42] There is definitely a black cloud hanging over the Ethics Act, and it is not likely to fade away anytime soon. Thus, there is a strong possibility that the sun will set on the Act in June 1999.

III. Limiting the Scope of Independent Counsel Investigations.

Even if the Ethics Act is allowed to lapse this summer, it would probably be revived in the future, as it was in 1994 after lapsing in 1992.[43] The purpose of the Act is to "ensure that serious allegations of unlawful conduct by federal executive officials are subject to review by counsel independent of any incumbent administration."[44] This is a legitimate and important purpose that should be advanced through legislation. Concern about conflicts of interest during investigations of the Executive branch will surely resurface, and when they do Congress will almost certainly try to breath new life into the Office of Independent Counsel. However, the Ethics Act of the future will be significantly different from the present Act. One fundamental change to the Ethics Act that Congress is likely to make is placing stricter limitations on the scope of the investigations by independent counsel. This change would involve tightening the rules on who and what the prosecutor could investigate.

Under § 591(b) of the Act, an independent counsel may be appointed to investigate about seventy high-ranking executive branch officials.[45] However, the persons covered under § 591(b) represent only the "tip of the iceberg." Under § 591(c)(1), if a Department of Justice ("DOJ") investigation of any person "may result in a personal, financial, or political conflict of

interest," then an independent counsel may be appointed.[46] Also, § 593(b)(3) mandates that the prosecutorial jurisdiction of the independent counsel be broad enough to allow investigation of the specified subject matter, and "all matters related to that subject matter."[47] These two subsections greatly expand the number of persons subject to independent counsel investigation. For example, almost no one in the Whitewater investigation was covered by the Act except under §§ 591(c)(1) and 593(b)(3).[48] Under these provisions, individuals with only the most tenuous link to an executive branch official are nevertheless subject to prosecution by the independent counsel.

Sections 591(c)(1) and 593(b)(3) allow the independent counsel to be easily side-tracked from the main purpose of their investigation. James C. McKay, a former independent counsel during the Reagan administration, wishes there were "some way to limit the ability of an independent counsel to expand his or her investigation, to keep their eye on the original target they were . . . appointed to investigate."[49] Removing § 591(c)(1) from the statute, and taking away the jurisdiction to investigate "all matters related"[50] to the specific subject matter of the appointment, would go a long way toward the realization of Mr. McKay's wish. With these changes, the independent counsel would be forced to focus on the federal official he or she was assigned to investigate. Any tangential investigations would

have to be turned over to the Department of Justice or other law enforcement agency.

Removing § 591(c)(1), and restricting the jurisdictional scope of § 593(b)(3), would not undermine the ability of the independent counsel to fully investigate crimes by executive branch officials. The prosecutor would still be able to subpoena persons not covered by the Act in order to get information relating to the actions of the covered individual. The only difference would be that if non-covered persons implicated themselves in testimony, it would not be the job of the independent counsel to bring those individuals to justice. Similarly, if incriminating evidence against someone other than the public official was discovered, the independent counsel would not have to decide whether or not to begin an investigation. The only action the independent counsel could take would be to alert some other law enforcement agency of the existence of the evidence.

The suggestion that §§ 591(c)(1) and 593(b)(3) be revised should not be viewed as evidence of an opinion that no independent counsels have been capable of good judgment regarding the scope of their investigations. Robert Fiske, who was the first independent counsel appointed to investigate Whitewater, stated that he received information from a former municipal judge in Arkansas that could have been used to begin

several separate investigations.[51] Although Fiske had the right as independent counsel to act on this information, he decided such investigations would be "too far removed from what [he] was supposed to be doing."[52] By making the suggested changes to §§ 591(c)(1) and 593(b)(3) of the Act, the independent counsel would not have the burden of deciding when a potential investigation would be too far afield. Only investigations of officials covered by § 591(b) would be permitted. The benefits of making these changes greatly outweigh the benefits of keeping the status quo. Because the potential for abuse of §§ 591(c)(1) and 593(b)(3) has been clearly demonstrated by the Starr and Smaltz investigations, Congress is likely to seriously consider revising these sections in any future version of the Ethics Act.

It is possible that Congress will find § 591(b) too broad in scope as well. Both Archibald Cox and Lawrence Walsh have suggested that the Act be revised to cover only the President, Vice President, and the top Cabinet officers.[53] This change, combined with the removal of § 591(c)(1) and revision of § 593(b)(3), would reduce the amount of covered persons from hundreds to about five. Obviously, this would constitute drastic revision of the Act.

Reducing the covered persons under § 591(b) would in turn decrease the opportunities for being distracted by investigations not related to the independent counsel's original

purpose. However, investigations of lower level Executive branch officials and appointees may hold the most potential for conflict of interest problems. Such individuals are not as publicly visible as the higher Executive officers, and therefore the temptation within the Department of Justice to sweep indiscretions under the rug, and to tolerate questionable activity may be greatest at this level. The indictment and conviction of several members of the Housing and Urban Development staff by independent counsels Arlin Adams and Larry Thompson would not have been possible under a more narrowly tailored § 591(b).[54] This is not to say that the DOJ would not have vigorously investigated the matter. Yet, the potential for a conflict of interest in a DOJ investigation of lower level Executive branch officers is substantial enough that the appointment of an independent counsel is warranted. The benefits of appointing independent counsel to investigate matters involving lower level Executive branch officers and appointees are greater than any foreseeable risks. Therefore, Congress should leave § 591(b) unchanged in any future version of the Ethics Act.

Section § 591(a) establishes that the independent counsel has the right to investigate whether any covered person "may have violated any Federal criminal law other than a violation classified as a Class B or C misdemeanor or an infraction."[55]

There have been calls to revise this provision in order to further restrict the type of wrongdoing an independent counsel may investigate.[56] The change with the greatest likelihood of adoption is limiting the investigations to crimes involving abuses of power while the individual is in office, or while they are trying to be elected or appointed to an office. Such a limitation would have put the investigation of the Whitewater land deal outside of Ken Starr's jurisdiction.[57] However, the President's affair with a White House intern could easily be categorized as an abuse of power while in office.

The Office of Independent Counsel was created because of President Nixon's abuses of power while in he was in office.[58] The Ethics Act was passed to insure that future Executive branch officials would not be allowed to abuse the power of their positions because of political alliances with the Department of Justice.[59] However, the current Act goes much further than necessary to achieve this goal. The Act should be narrowed so that violations of federal law that occur before the official is in office or attempting to win office are not investigated by independent counsel. Former Attorney General Griffin Bell, Archibald Cox and Lawrence Walsh have all spoken out for such a limitation.[60] The election process and appointment procedures in this country are quite efficient at uncovering and exposing past wrongdoing by potential public officials. The President and

Vice-President subject themselves to years of intense press scrutiny of their past conduct when they decide to seek office. Similarly, potential cabinet officials must run the gauntlet of Senate confirmation hearings before they are allowed to serve. If allegations of past crimes surface during these procedures, the administration would suffer great public and political criticism if it acted to impede or suppress an investigation after appointment or election.[61]

The office of independent counsel was created to prevent abuses of power and collusion between the Department of Justice and Executive branch officials. It was not created to act as a safeguard against the election or appointment of white-collar criminals to high political office. Therefore, the Act should be narrowed to cover only crimes committed while in office, or while attempting to be appointed or elected to office. This revision stands a good chance of adoption by Congress. Because allegations of past crimes are likely to be exposed during the election or confirmation process, there is less chance that a politicized Department of Justice could cover them up. Therefore, Congress may find that because adequate protections against collusion exist in this area, independent counsels should not be appointed to investigate past crimes by covered persons.

It has also been suggested that the Ethics Act should apply only to crimes that involve abuses of the political office of the covered person, and not to personal or unrelated crimes.[62] Some commentators have stated that limiting the crimes within the jurisdiction of the independent counsel is the best way to avoid excessive and politically motivated prosecutions.[63] Other scholars have suggested limiting independent investigations to matters of national security.[64] This sort of limitation is reasonable for the same reason that limiting coverage to crimes committed while in office or attempting to win office is reasonable: it significantly restricts the scope of investigations, while still advancing the main purpose of the Act. If such a revision were adopted, investigations such as that of the Secretary of Housing and Urban Development ("HUD") in 1995 would not be handled by independent counsel.[65]

David Barrett was appointed to investigate whether HUD Secretary Henry Cisneros lied to the Federal Bureau of Investigations during his Senate Confirmation hearing about the amount of money he gave to a former mistress in order to keep her from exposing their relationship.[66] Barrett's three year, two million dollar investigation ended with 18 felony indictments against Cisneros.[67] Because the alleged payments had nothing to do with Cisneros' role as a Cabinet member, under the proposed revision of § 591(a) of the Ethics Act, the investigation would

have been handled by the Department of Justice. However reasonable this revision may seem, it seems unlikely that it will be adopted by Congress. The fear that the DOJ may suppress investigations of Executive branch officials is not associated only with crimes relating to abuses of power. Because the potential for conflict of interest exists with all investigations of crimes committed in office or while seeking office, the Act should not be limited to cases involving abuse of power.

In summary, any future version of the Ethics Act will probably not contain § 591(c)(1), which makes it possible for independent counsel to be appointed to investigate persons outside the Executive branch. Section 593(b)(3) is likely to be revised to deny independent counsel the prosecutorial jurisdiction to investigate "all matters related" to the primary subject matter of the appointment.[68] Section 591(b), which designates about seventy high-ranking officials who are subject to independent counsel investigation, will probably not be changed significantly, if at all. Finally, § 591(a) will probably be amended to limit the scope of investigations to crimes committed while in office or while attempting to enter office. These changes reflect the lessons that have been learned over the past five years about how broad the scope of independent counsel investigations should be. Hopefully,

Congress will recognize these lessons, and will act accordingly during deliberations this summer.

IV. Limiting the Length and Budget of Independent Counsel Investigations.

Much of the criticism of the Office of Independent Counsel has focused on the length and expense of the investigations in relation to the crimes being investigated.[69] To use examples previously cited, David Barrett spent two million dollars over three years in order to find out how much Secretary Cisneros actually paid his mistress.[70] Donald Smaltz spent four years and 17 million dollars tracking down the corporations that gave gifts to Secretary Espy.[71] Lloyd Cutler, a prominent Washington attorney and long time supporter of the Ethics Act, cited both of these investigations as reasons why tighter time limitations should be added to the Act.[72] Cutler believes that investigations such as these, with "very simple factual matrixes," should be completed within one year, subject to extension if cause is shown.[73] The problem with such a revision is that the covered person, knowing that a definite deadline exists, may attempt to delay production of documents, testimony and other evidence.[74] It would create a situation where it is in the best interest of the covered person to be as uncooperative as possible in order to bring about the expiration of the investigator's time limit.

Under § 596(b)(2) of the current statute, the Special Division of the Court of Appeals that appoints independent counsels must determine after two years whether termination is appropriate.[75] If the investigation is allowed to continue, the Special Division must reconsider termination after another two years, and thereafter at the end of every year.[76] If stricter limitations on the scope of independent counsel investigations are adopted, then § 596(b)(2) should not be revised. Limiting the scope of investigations would also significantly decrease their length, because the independent counsel would have far fewer investigative options, and therefore fewer reasons for petitioning for an extension after two years. Members of Congress may be extremely tempted to force independent counsels to act within a limited amount of time after watching several investigations drag on unnecessarily over the past five years.[77] However, the more rational approach would be to limit the jurisdictional scope, which would serve to significantly reduce the length of investigations as well.

With regard to the budget for independent counsels, the law currently mandates that a "permanent indefinite appropriation [be] established within the Department of Justice to pay all necessary expenses of investigations and prosecutions by independent counsel."[78] The independent counsel is required to prepare and submit a statement of expenditures every six months,

as well as a complete fiscal year statement.[79] Establishing a specific budget for each independent counsel investigation would be even more difficult and problematic than establishing definite time limits. A budget would have to be established based only on evidence from the initial investigation by the Attorney General. Because of this lack of evidence on which to base a determination, the proposed budget would be so speculative as to be pointless. Also, like specific time limitations, a set budget would act as an incentive for the covered person to make it as difficult as possible for the independent counsel to gather evidence.[80] Furthermore, just as limiting the scope of investigations would reduce their length, it would reduce their expense as well. For these reasons, Congress should not mandate that a specific budget be established for each independent counsel investigation.

Placing specific time and budget limitations within the Ethics Act would be a futile, if not counter-productive exercise. Such limits would give the covered person an incentive to be uncooperative, and every request for extension, unless patently unreasonable, would likely be granted to the independent counsel. Establishing stricter limitations on who and what an independent counsel may investigate will serve to substantially decrease the time and cost of the investigations. If Congress fixes the problems with the scope of independent

counsel investigations, they will simultaneously fix the problems with their length and expense.

V. Revising the Triggering Mechanism of the Ethics Act.

Under §§ 591 and 592 of the Ethics Act, the appointment procedure for independent counsel begins when the Attorney General receives specific evidence from a credible source that a covered person may have committed a federal crime.[81] The Attorney General has 30 days after receiving the information to determine whether the source is credible, and the evidence sufficiently specific.[82] If these conditions are met, then a ninety-day preliminary investigation by the Department of Justice begins.[83] The purpose of this preliminary investigation is to determine whether there are "reasonable grounds to believe that further investigation is warranted."[84] During this investigation, the Attorney General has no authority to "convene grand juries, plea bargain, grant immunity, or issue subpoenas."[85] If reasonable grounds for further investigation exist, the Attorney General must notify the Special Division of the Court of Appeals that an independent counsel investigation is warranted.[86] The two central criticisms of the triggering mechanism are that the restrictions on the authority of the Attorney General during the preliminary investigation are too harsh, and that the level of evidence

necessary to trigger the appointment of independent counsel is too low.[87]

In *Morrison v. Olson*, the Supreme Court held that the Ethics Act did not violate either the separation of powers doctrine, or the Appointments Clause of the Constitution.[88] In his now famous dissent,[89] Justice Scalia warned that because the Attorney General is prohibited from using even the most "routine investigative techniques" during the ninety-day preliminary investigation, the appointment of an independent counsel is a virtual certainty.[90] Without the benefit of subpoena power, the Attorney General must rely on "what people will say to her and her staff voluntarily."[91] The reason for limiting the authority of the Attorney General is to insure that the bulk of the investigative work concerning the actions of a covered person is handled by the independent counsel. Granting greater authority to the Attorney General during the preliminary investigation would undermine the goal of avoiding the "appearance of impropriety" during investigations of Executive branch officials.[92] Therefore, if there is the slightest possibility that a person covered by the Act committed a federal crime, the investigative power of the Department of Justice should be transferred to an independent counsel in order to avoid such an appearance of impropriety.

The reasons for limiting the authority of the Attorney General during preliminary investigations are undeniably valid. Because of the possibility for suppression of evidence and witness tampering, the DOJ should not have the power to convene grand juries, plea bargain or grant immunity. However, the Ethics Act should be amended so that the DOJ would retain the power to subpoena witnesses during preliminary investigations.[93] Even if the Attorney General is stripped of all other authority, he or she should be able to compel truthful testimony in order to determine whether the appointment of an independent counsel is warranted. Because there would be no authority to grant immunity or plea bargain, there is no chance that giving the DOJ subpoena power would allow it to improperly influence witnesses or suppress evidence. In fact, the testimonial evidence compiled by the Attorney General during the preliminary investigation could save the independent counsel substantial time and money in a future investigation by eliminating the need to subpoena certain witnesses again.[94] Because it is difficult to see any negative ramifications stemming from allowing the DOJ to issue subpoenas during preliminary investigations, the Ethics Act should be revised accordingly.

Justice Scalia also commented that the Ethics Act's threshold of "no reasonable grounds to believe that further investigation is warranted" was too low.[95] He stated that it

would be "surprising if the Attorney General had any choice but to seek appointment of an independent counsel" with such a minimal evidentiary requirement.[96] Because of this low threshold, Congress has the ability to "effectively compel[] the investigation of . . . high level" Executive branch officials solely to injure them politically.[97] Lloyd Cutler supports raising the threshold, which he says currently is about "one micro millimeter high."[98] Culter suggests changing the evidentiary requirement to "reasonable grounds for believing that a significant federal crime may have been committed."[99] Archibald Cox also suggests raising the threshold to "something between probable cause and the present formula."[100] However, increasing the evidentiary requirement also increases the ability of the DOJ to protect the covered person from investigation. Also, if the requirement is set too high the bulk of the investigating would be done by the DOJ, and the independent counsel "wouldn't have much of anything to do."[101] This would obviously be contrary to the goals of the Ethics Act. On the other hand, the threshold is currently so low that it can be used as a weapon against the Executive branch by members of Congress and other political adversaries. With such a bare threshold, the temptation exists to throw any scrap of evidence that implicates a political enemy toward the Attorney General's office to see if an independent counsel investigation will

result.[102] Even if no indictments are brought against the officer, just being investigated can do serious harm to the reputation of a politician.

Devising a new evidentiary standard for the Act that is higher, but not too high, will not be easy. Achieving the right balance in the formula will require masterful statutory drafting skills.[103] While the task will be difficult, it should be done. Even with the benefit of a slightly higher standard, the DOJ would still have to seriously consider the political and electoral ramifications of not recommending the appointment of an independent counsel. Whenever the Attorney General fails to recommend the appointment of independent counsel, the public perception is that the DOJ is simply protecting one of its own. This perception can be as politically damaging as any investigation, and it will arise regardless of the evidentiary threshold that is applied. Therefore, the level of evidence required to trigger the appointment of independent counsel should be raised in order to deter the use of the Ethics Act as a political weapon.

In summary, revising the Ethics Act to allow the DOJ to retain subpoena power would give greater legitimacy to preliminary investigations. Under the current Act, a preliminary investigation is little more than a mere formality before the inevitable appointment of independent counsel.

Congress is likely to make this revision because it has few, if any, foreseeable risks and has been promoted by many prominent legal scholars.[104] Adoption of a higher evidentiary threshold, while a more difficult assignment, is nevertheless likely because of the level of criticism the current standard has received. These changes will do little to increase the "appearance of impropriety" within the DOJ, but they will help to make the Ethics Act a more efficient and beneficial law.

VI. Revising the Independent Counsel Appointment Procedure

Under § 49 of the Ethics Act, the Chief Justice of the United States Supreme Court has the duty of assigning three justices to serve on a Special Division of the Court of Appeals for the District of Columbia.[105] The justices' serve for a term of two years, and no two justices may be from the same court.[106] This Special Division is responsible for the appointment of independent counsel upon the recommendation of the Attorney General.[107] This summer, members of Congress who support changes to this system of selection will no doubt quote freely from the prophetic dissent of Justice Scalia in *Morrison*:

> An independent counsel is selected, and the scope of his or her authority prescribed, by a panel of judges. What if they are politically partisan, as judges have been known to be, and select a prosecutor antagonistic to the administration? There is no remedy for that, not even a political one. Judges, after all, have life tenure, and appointing a surefire enthusiastic prosecutor could

> hardly be considered an impeachable offense. So if there is anything wrong with the selection, there is effectively no one to blame.[108]

This passage has proved to be prophetic because of the controversy surrounding the appointment of independent counsel Ken Starr. As stated above, the Ethics Act was reenacted in 1994, after a two-year lapse. During that lapse, Attorney General Reno had appointed special prosecutor Robert Fiske to investigate the Whitewater land deal.[109] Fiske's investigation was well under way in 1994 when the Ethics Act was taken out of the political dustbin.[110] However, the Special Division had to decide whether to grant Fiske the position of independent counsel under the newly revived Act. Judge Sentelle, a member of the Special Division, had lunch on Capitol Hill with conservative Republican Senators Faircloth (R.-N.C.) and Helms (R.-N.C.) while the decision on Fiske was being made.[111] In a rather shocking move, the panel did not appoint Fiske, but chose to replace him with Ken Starr.[112] Soon thereafter, Judge Sentelle's wife received a job in Senator Faircloth's office.[113] These events created the appearance that Ken Starr's appointment was politically motivated, and created doubt that the selections of the Special Division would be any less partisan than those of the Department of Justice.

The only reasonable replacement for Special Division appointment of independent counsel is Presidential appointment

with Senate confirmation. Yet, holding Senate confirmation hearings several times during an administrative term would disrupt the normal business of the Congress. Because of this problem, it has been suggested that a standing panel of several independent counsels be appointed and confirmed along with the Cabinet members of a new administration.[114] Such a procedure would serve to eliminate questions regarding the constitutionality of the Office of Independent Counsel.[115] Although the Supreme Court held in *Morrison* that the Ethics Act was constitutionally valid, criticism still persists about the Act being a violation of the Appointments Clause and the Separation of Powers Doctrine.[116] These criticisms would be silenced if the President were given the power to appoint independent counsel.

Although Judge Sentelle's actions during the Starr appointment did appear to represent partisan maneuvering, he was only one judge among three. There is very little likelihood that three judges chosen from three different courts would hold the same political views and would conspire to promote those views during the appointment of independent counsel.[117] Furthermore, while concerns about the constitutionality of the Ethics Act could be addressed by allowing Presidential appointment, those concerns are moot so long as *Morrison* continues to be good law. For these reasons, it seems that very

little could be gained from abandoning the Special Division appointment procedure for independent counsel. Instead, Congress should, and probably will focus more on limiting the scope of the prosecutor's investigative jurisdiction, and broadening the power of the DOJ during preliminary investigations. Removing politics completely from independent counsel investigations is a goal that cannot be realized. Having a Special Division of the Court of Appeals appoint prosecutors is no more likely to be politicized than any other appointment process. Thus, this particular section of the Ethics Act should not be subjected to revision this June.

VII. Raising the Requirements for Appointment.

Although the Special Division should continue to appoint independent counsel, the rules governing who they may appoint should be more clearly defined within the Act. The qualifications necessary to become independent counsel are set out in § 593(b)(2) of the Act.[118] That section is worded so broadly that it is functionally meaningless. It states that the Special Division must appoint an individual with "appropriate experience" who will be prompt and responsible during investigations.[119] With only these ambiguous guidelines in place, the decision of who to appoint as independent counsel is entirely left to the discretion of the Special Division.

The appointment of Starr and Smaltz to the position of independent counsel demonstrate that the Special Division should be required to use more than just their discretion as a guide. As stated above, Starr had no experience as either a prosecutor or as a defense attorney at the time of his appointment. Thus, he was forced to learn how to effectively prosecute a case as he went along. Lack of prosecutorial experience is unacceptable, because as former independent counsel Whitney North Seymour[120] pointed out, "We simply cannot afford the spectacle of on-the-job training in such a sensitive position."[121] Also, prior to his appointment, Starr had given legal advice in connection with Paula Jones' case against President Clinton through his law firm, Kirkland & Ellis.[122] This fact should have eliminated Starr from consideration for the job of independent counsel.

Donald Smaltz was a relatively unknown Los Angeles attorney when he was appointed to investigate Secretary Espy.[123] While his lack of prosecutorial experience may not have been as pronounced as Starr's, Smaltz's evidence gathering tactics during the investigation could hardly be described as responsible.[124] Furthermore, the fact that Smaltz was not well known makes it appear that he actively lobbied for the position, rather than being asked to serve by the Special Division. The concern is then raised that Smaltz wanted the position for the purpose of carrying out a political agenda. Revising § 593(b)(2) of the

Act to increase the qualifications necessary to serve as independent counsel could work to eliminate such concerns.

The Ethics Act should be revised to mandate that only individuals with extensive prosecutorial experience may be appointed as independent counsel. Also, substantial political activity or aggressive support for one party over another should be grounds for removal from consideration. Furthermore, the Special Division should inquire about possible candidates through appropriate legal channels and then ask those individuals if they are interested in serving as independent counsel. The system of nomination should be changed in this way in order to avoid, in Justice Scalia's words, the "post[ing of] a public notice inviting applicants to assist in an investigation and possible prosecution of a certain prominent person."[125] Inviting the entire legal community to apply for the job of prosecuting certain politicians will inevitably lead to independent counsel who use their position for political purposes. The candidates should not ask for the position of independent counsel. Instead, they should be asked to serve by the Special Division.

The qualifications of independent counsel as outlined in the current Act should be defined with greater specificity and clarity in any future version of the Act. Because of the excesses of the Starr and Smaltz investigations, Congress will

likely revise § 593(b)(2) of the Act to insist that individuals serving as independent counsel have extensive prosecutorial experience. Hopefully, Congress will also devise a way to pool candidates for the position in a way that minimizes the possibly for appointment of individuals with a political agenda.

VIII. Conclusion

Given the overwhelmingly negative public reaction to the Starr and Smaltz investigations, and the abandonment of support from the A.B.A., the Ethics Act has only the slimmest chance of being renewed by Congress this summer. Kathleen Clark, a law professor at Washington University who has written extensively on the Act, said she doesn't "know anybody who thinks the independent counsel statute is going to be renewed."[126] However, the need for independent investigations of Executive branch officers will not disappear in June along with the Act. Just as Congress revived the Act in 1994 when controversies began to surface within the White House, so will a future Congress attempt to reinvent the Office of Independent Counsel when the next Executive branch scandal begins to unfold. Congress has learned several hard lessons over the past five years about independent counsel investigations, and those lessons will certainly influence the construction of any future version of the Ethics Act.

The most important lesson of the past five years has been that the scope of independent counsel investigations under the current Act is too broad. Future prosecutors must be limited to investigating only the alleged criminal actions of the specific covered person while in office or while seeking office. All ancillary investigations should be handled by other law enforcement agencies. Because restricting the jurisdictional scope will lead to less costly and time consuming investigations, there is no need for a future version of the Ethics Act to include specific limitations on budget and length. The DOJ also needs to be given greater authority during preliminary investigations. Specifically, the Attorney General should retain the power the subpoena witnesses, and the evidentiary threshold at which the appointment of independent counsel is mandated should be raised. Finally, Congress should insist that future independent counsel appointees be experienced prosecutors who are relatively nonpartisan. With these changes, the Ethics Act would more effectively achieve its primary goal of taking politics out of investigations of Executive branch appointees and officers. This is a valid goal that deserves legislative attention.

The irony of the current situation is that the Ethics Act, a Congressional attempt at preventing Executive abuses of power, will probably be abandoned this summer because of prosecutorial

abuses of power. The reason for the failure of the current Act is axiomatic: power corrupts, and absolute power corrupts absolutely. After 21 years of independent counsels, the solution is clear: address the problem of abuses of power by independent counsel, and independent counsel will then be better able to prevent and investigate abuses of power by the Executive branch.

[1] See Jerome J. Shestack, *The Independent Counsel Act: From Watergate and Beyond,* 86 Geo. L.J. 2011, 2013 (1998).

[2] See *Id.* Subsequently, a U.S. district court found that the removal of Cox from office violated the Department of Justice rules regarding the position of Special Prosecutor. See Nader v. Bork, 366 F. Supp. 104, 108 (D.D.C. 1973).

[3] See *Id.* It is interesting to note that after firing Cox, Bork appointed Leon Jaworski as Special Prosecutor. Jaworski accepted the position on the condition that he could not be fired without the consent of Congress. The investigation continued, and Nixon eventually turned over the now infamous "White House Tapes" and resigned from office. Commentators have pointed to Jaworski's success as evidence that the Ethics in Government Act of 1978 was a Congressional overreaction. See *Politics over Principle*, Washington Times, February 12, 1999 at A26.

[4] Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (Codified as 28 U.S.C.A. §§ 49, 591-599(1994) (West 1998)) (hereinafter "Ethics Act").

[5] 28 U.S.C.A. § 599.

[6] See Donald C. Smaltz, *The Independent Counsel: A View from the Inside*, 86 Geo. L.J. 2307, 2324-25 (1998).

[7] See *Supra* note 3, Washington Times Op/Ed at A26.

[8] See *Supra*, note 4.

[9] See Bill Rankin, *Special Report: The Clinton Crisis: The Atlanta Judge: 11th Circuit jurist sits on Starr Panel,* The Atlanta Journal and Constitution, Sept. 13, 1998 at C02.

[10] See Todd S. Purdum, *Former Special Counsels See Need to Alter Law That Created Them,* N.Y. Times, August 11, 1998. This article was ordered to be printed in the Congressional Record by Senator Daniel Patrick Moynihan. See 144 Cong. Rec. S10914-16. Robert Fiske was appointed by Janet Reno to investigate the Whitewater land during a period when the Ethics Act was in Lapse. See *Id.*

[11] See *Id.*

[12] See Chuck Raasch, *Washington Gearing Up for a Long, Hot Summer of Scandal Investigating,* Gannet News Service, March 20, 1997. The Whitewater scandal arose out of the Clinton's involvement in questionable business transactions involving land along the White River in Arkansas while Bill Clinton was Governor of that state.

[13] See *Id.* Also known as "filegate," this scandal involved the collection by the Clinton administration of over 900 sensitive F.B.I. files on former White House employees.

[14] *Id.* This incident involved the Clinton administration's handling of the firings of White House travel office employees.

[15] See *Id.* Vincent Foster was working as White House counsel when he apparently committed suicide in 1993. Foster was a friend of the Clinton's and a former partner in the Rose law firm in Arkansas along with Hillary. Both Fiske and Starr concluded, after investigation, that Foster's death was a suicide.

[16] See John Hassell, *Its Starr's Call: Pack Up or Press On,* Newark Star-Ledger, Feb. 13, 1999 at O10.

[17] See Viveca Novak, *Nation: Was This a Bad Idea? A verdict clearing Espy is the Latest Sign that the Independent-Counsel Statute is Likely to Perish,* Time, Dec. 14, 1998 at 36.

[18]See *End Sought to Special Counsel Law,* The Arizona Republic, Feb. 9., 1999 at A8.

[19] See *Reno Considers Handing Over Inquiry on Starr,* Minneapolis Star Tribune, Feb. 19, 1999 at 09A. Starr and his staff have been accused of using excessive force and coercion in their questioning of Monica Lewinsky on January 16, 1998. They allegedly held and questioned Lewinsky without benefit of council for several hours during that meeting. At the time of this writing, Attorney General Janet Reno is considering whether to appoint a special prosecutor to investigate these and other allegations of wrongdoing by Starr's office.

[20] *Judge Starr, Counsel Law Separately,* Allentown Morning Call, Feb. 16, 1999 at A08.

[21] See Congressional Record--Senate Proceedings and Debates of the 103rd Congress, First Session Wednesday, November 17, 1993 "Independent Counsel Reauthorization Act," 139 Cong. Rec. § 15846, 15854.

[22] See Hassel, *Supra* note 16 at O10.

[23] Mark J. Bredemeier, *Independent Counsel Law Deserves to be Sacked,* Kansas City Star, Feb. 17, 1999 at B7.

[24] See Novak, *Supra* note 17 at 36. Also, for an excellent and in depth report on the excesses of the Smaltz investigation, see David Grann, *Espy and the Criminalization of Politics,* The New Republic, Feb. 2, 1998.

[25] See Carl T. Rowan, *Who Can Play by These Rules?* New York Post, Dec. 7, 1998 at 29.

[26] See *Endless Prosecutions, Interminable Investigations Were not the Intent of the Independent Prosecutor Law,* Los Angeles Times, Dec. 7, 1998 at A11.

[27] See *Persecutor Law Guilty as Charged,* New York Daily News, Dec. 4, 1998 at 54.

[28] See *Id.* at 54.

[29] Alan C. Miller, *Espy Special Prosecutor Joins Calls for Reform,* Pittsburgh Post-Gazette, Dec. 6, 1998 at A14.

[30] See *Id.* at A14.

[31] See Rowan, *Supra* note 25 at 29.

[32] See *Id.*

[33] See Constance Johnson, *High Crimes and Special Prosecutors,* U.S. News and World Report, Nov. 8, 1993 at 47. Robert Bennett, who represented Casper Weinberger during the Iran-Contra investigation, said "There's an old saying: Beware of the lawyer with one case." Bennett believes that the "trouble with independent counsels is that you give one case and enormous power to a single individual, and the pressures to find wrongdoing are overpowering. You don't get much credit saying that nothing wrong occurred." *Id.* Bennett's statements illustrate why independent counsel investigations often become battles of ego.

[34] Lance Gay, *Lawyers Bash Special-Counsel Law,* The Memphis Commercial Appeal, Dec. 7, 1998 at A2.

[35] Neil A. Lewis, *Jury Acquits Espy on All Corruption Charges,* Austin American-Statesman, Dec. 3, 1998 at A1.

[36] See *Supra* note 18 at A8.

[37] See *Id.*

[38] See Linda Deutsch, *ABA: End Independent Counsel Law,* AP Online, Feb. 9, 1999.

[39] See *Supra* note 3 at A26.

[40] Deutsch, *Supra* note 38.

[41] *Supra,* note 20 at A08.

[42] *Id.*

[43] See *Supra* note 4.

[44] Dellums v. Smith, 577 F. Supp. 1449 (N.D. Cal. 1984).

[45] 28 U.S.C.A. § 591(b).

[46] 28 U.S.C.A. § 591(c)(1).

[47] 28 U.S.C.A . § 593(b)(3).

[48] See *A Roundtable Discussion on the Independent Counsel Statute,* 49 Mercer L. Rev. 453, 473 (1998).

[49]Purdum, *Supra* note 10.

[50] 28 U.S.C.A. § 593(b)(3).

[51] See Purdum, *Supra* note 10. The former municipal judge was David Hale, who became one of Ken Starr's chief witnesses against President Clinton. Starr's reliance on Hale is seen by critics as another indication that his investigation is politically motivated. Hale has been closely linked with Richard Scaife, a vocal political adversary of the Clinton administration and the head of Pepperdine University. Starr has been offered a faculty position at Pepperdine after he concludes his independent counsel investigation. See also Congressional Record--Senate Proceedings and Debates of the 105th Congress, Second Session, *Independent Counsel*, Feb. 11, 1998 at 625-26.

[52]Purdum, *Supra* note 10. It may seem misleading to cite Fiske's investigation as an example of responsible use of power when Fiske was appointed under the DOJ's "special prosecutor" rules rather than under the Ethics Act. However, the power granted to special prosecutors is roughly equal to that of independent counsel. Therefore, the citation is at least somewhat justified.

[53] See *Supra* note 48 at 473-74.

[54] See Johnson, *Supra* note 33 at 47. Adams and Thompson won 11 convictions against members of the HUD office.

[55] 28 U.S.C.A. § 591(a).

[56] See *Supra* note 48 at 473-74.

[57] See Raasch, *Supra* note 12.

[58] See Shestack, *Supra* note 1 at 2013.

[59] See Alexander I. Tachmes, *Independent Counsels Under the Ethics in Government Act in 1978: A violation of the Separation of Powers Doctrine or an Essential Check on Executive Power?*, 42 U. Miami L.Rev. 753 (1988).

[60] See *Supra* note 48 at 472-74.

[61] Morrison v. Olson, 487 U.S. 654, 729 (1988). This argument is based on the comments of Justice Scalia in his dissent. Scalia states that "when crimes are not investigated and prosecuted fairly, nonselectively and with a reasonable sense of proportion, the President pays the cost in political damage to his administration." *Id.*

[62] See Purdum, *Supra* note 10. This limitation has been strongly supported by Lawrence Walsh. He has stated that "[T]he enormous expense of an independent counsel's investigation and the disruption of the Presidency should not be inflicted except for something in which there was a misuse of power. That's not out of consideration for the individual; it's out of consideration for the country." *Id.*

[63] See George D. Brown, *The Gratuities Offense and the RICO Approach to Independent Counsel Jurisdiction*, 86 Geo. L.J. 2045, 2068 (1998). In this article, Professor Brown analogizes the Independent Counsel statute to the RICO statute. He believes that there should be a specific list of crimes and perpetrators that would be subject to independent counsel investigation.

[64] See Brett M. Kavanaugh, *The President and the Independent Counsel*, 86 Geo. L.J. 2133 (1998).

[65] See *Cisneros Stands Properly Accused*, Newsday, Dec. 29, 1997 at A24.

[66] See Clarence Page, *Reno's Reluctance: Attorney General has Experienced Independent Counsels Run Amok,* Dallas Morning News, Dec. 11, 1997 at 35A.

[67] See Novak, *Supra* note 17 at 36.

[68] 28 U.S.C.A. 593(b)(3).

[69] See Novak, *Supra* note 17 at 36; Purdum, *Supra* note 10; Allentown Morning Call, *Supra* note 20 at A08.

[70] See Page, *Supra* note 61 at 35A.

[71] See Grann, *Supra* note 24.

[72] See *Supra* note 48 at 475-76.

[73] *Id.* at 475.

[74] See *Id.* at 475. The possibility of tactical delay by the Executive branch was express by Lawrence Walsh during the symposium on the Ethics Act at Mercer Law School.

[75] 28 U.S.C.A. § 596(b)(2).

[76] *Id.*

[77] See Congressional Record -- Senate Proceedings and Debates of the 103rd Congress, First Session, Nov. 17, 1993, 139 *Cong. Rec.* S15884, 15887. Former Senator Bob Dole was a strong advocate for term limits on the position of independent counsel. Sen. Dole used Lawrence Walsh's 7 year investigation of Iran-Contra as an example of why such term limits were necessary. A proposed amendment to the Ethics Act was submitted in 1993 that would have limited investigations to 2 years, after which the prosecutor would have had to ask Congress for more time and money on a yearly basis. This proposal, sponsored by Representative George Gekas (R.-Penn.) was defeated by the Democratically controlled House. See Martin F. Nolan, *Monstrous Prosecutors,* The Boston Globe, Jan. 25, 1999 at A15. Many current Senator's will probably use the Smaltz and Starr investigations as examples of why term limits are still needed at the present time.

[78] Pub. L. 100-200 § 101[a] [Title II), Dec. 22, 1987, 101 Stat. 1329-9.

[79] 28 U.S.C.A. § 596(c).

[80] See *Supra,* note 48 at 475. These arguments against setting a specific budget for the independent counsel are based on the statements of Lawrence Walsh. Walsh spoke generally about the dangers of attaching arbitrary limitations upon the independent counsel.

[81] 28 U.S.C.A. § 591(d)(1); 28 U.S.C.A. § 592(a)(2)(B)(i).

[82] 28 U.S.C.A. § 591(d)(2).

[83] 28 U.S.C.A. § 592(a)(1). The Attorney General may appeal to the Special Division for an extension of the preliminary investigation of up to 60 days. 28 U.S.C.A. § 592(a)(3).

[84] *Id.*

[85] 28 U.S.C.A. § 592(a)(2).

[86] 28 U.S.C.A. § 592(c)(1). An independent counsel will also be appointed if the time limit for the preliminary investigation and any extension have elapsed. 28 U.S.C.A. § 592(c)(1)(B).

[87] See *Supra* note 48 at 469-70.

[88] Morrison, *Supra* note 61. Under the separation of powers doctrine, one branch of the government is "not permitted to encroach on the domain or exercise the powers of another branch." Blacks Law Dictionary, 6th ed., 1990 at 1365. The Appointments Clause of the Constitution states that the President shall "nominate, and by and with the advise 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 . . . but the Congress may by law vest the Appointment of such inferior officers, as they think proper, in the President alone." U.S. Const. art. II, 2. The Court in *Morrison* found that it was not a violation of the separation of powers doctrine for independent counsel, who are appointed by the Judicial branch, to be given essentially all of the executive power of the DOJ. The Court also found that independent counsel are "inferior officers" under the Appointments Clause, and therefore the Ethics Act is constitutional in that respect as well.

[89] Former independent counsel Joseph E. diGenova has stated that "[e]verything that [Scalia] predicted in that dissent has come true." Joseph E. diGenova, *The Independent Counsel Act: a Good Time to End a Bad Idea*, 86 Geo. L.J. 2299, 2300 (1998).

[90] *Id.* at 702.

[91] *Supra* note 48 at 469.

[92] See Gregory K. Sloat, *The Real Scandal is Possible Perjury and Certain Apathy,* Minneapolis Star Tribune, Feb. 21, 1998 at 23A. Former Speaker of the House Tom Foley once posited that even the "appearance of impropriety" demanded an independent counsel investigation. This phrase has since been used frequently to describe what circumstances will trigger implementation of the Ethics Act.

[93] See Katy J. Harringer, *Damned if She Does and Damned if She Doesn't: The Attorney General and the Independent Counsel Statute,* 86 Geo. L.J. 2097 (1998) (Harringer proposes that the discretion and power of the Attorney General be expanded during the preliminary investigations); See Lawrence E. Walsh, *The Need for Renewal of the Independent Counsel Act,* 86 Geo. L.J. 2379 (1998) (Walsh specifically states that the Attorney General should be given the power to subpoena witnesses during the preliminary investigation.)

[94] See *Supra*, note 48 at 469-470.

[95] 28 U.S.C.A. § 592(a)(1).

[96] Morrison, *Supra* note 61 at 701.

[97] *Id.* at 703.

[98] *Supra* note 48 at 470.

[99] *Id.*

[100] *Id.* at 472.

[101] *Id.*

[102] See *Morrison,* Supra note 61 at 703. Scalia implies that the investigation of Morrison may have been politically motivated by saying that the only reason the independent counsel was assigned was because "the Attorney General cannot affirm, as Congress demands, that there are no reasonable grounds to believe that further investigation is warranted." *Id.*

[103] See *Supra*, note 48 at 471-72. With regard to establishing a test, Archibald Cox stated "I would try and find something between probable cause and the present formula . . . I confess I have not come up with it, but if we could sit down and talk about it for a couple of hours I could come up with a formula." *Id.* at 472.

[104] See *Supra*, note 47 at 472.

[105] 28 U.S.C.A. § 49(a).

[106] *Id.* Senior circuit court judges and retired justices are to be given priority during the establishment of the Special Division. 28 U.S.C.A. § 49(c). Also, the judges are allowed to continue working in their own courts while they serve as justices on the Special Division court. 28 U.S.C.A. § 49(b).

[107] *Id.*

[108] Morrison, *Supra* note 61 at 729-30.

[109] See Purdum, *Supra* note 10.

[110] See *Id.*

[111] See *Was Starr Pick Tainted? Judge Lunched With anti-Fiske Senators,* Newsday, Aug. 12, 1994 at A17. It should be noted that Senators Faircloth and Helms and Judge Sentelle are all natives of North Carolina and were friends long before the appointment of Ken Starr became an issue.

[112] See *Id.*

[113] See *Supra* note 48 at 477.

[114] See *Id.* at 478. This suggestion for revision has been advanced by Lloyd Cutler as well as former Attorney General Griffin Bell.

[115] See *Supra* note 83.

[116] See Nick Bravin, *Is Morrison v. Olson Still Good Law? The Court's New Appointments Clause Jurisprudence,* 98 Colum. L. Rev. 1103 (1998). Bravin argues that because of the Supreme Court's decision in Edmond v. United States, 117 S.Ct. 1573 (1997), the independent counsel should be considered a "principal officer" under the Appointments Clause of the Constitution. As such, independent counsel must be appointed by the President and confirmed by the Senate. Because the Ethics Act allows the Judicial branch to appoint independent counsel, Bravin believes the Act is unconstitutional.

[117] However unlikely collusion between the judges of the Special Division may seem, it should be pointed out that of the 11 judges who have served, 7 have been Republican appointees. See Novak, *Supra* note 17 at 36.

[118] 28 U.S.C.A. § 593(b)(2).

[119] *Id.*

[120] Purdum, *Supra* note 10. Seymour was appointed as independent counsel in 1986. He won a perjury conviction of Michael Deaver, who was President Reagan's deputy chief of staff.

[121] *Id.*

[122] See *Supra* note 111 at A17. Before his appointment, Starr was acting as counsel for the Independent Women's Forum, a conservative organization. Starr had agreed to write a friend-of-the court brief for the Forum in relation to the Paula Jones case. This information was not revealed to the Special Division until after Starr's appointment. However, even after the information was made public, the Special Division refused to reconsider Starr's appointment.

[123] See Grann, *Supra* note 24. Smaltz vigorously investigated allegations that Secretary Espy's brother, Henry, made false statements to his local bank. The charges were thrown out of court even before reaching a jury, but not before Henry lost his job as Mayor. The charges against Henry Espy had no visible connection to the alleged wrongdoing of Michael Espy. Smaltz also subpoenaed two thousand workers at Tyson foods who had filed workers compensation claims against the company. His reasoning was that these workers were more likely to be angry with the corporation and therefore more willing to testify against it. Several of these workers have claimed that Smaltz and his assistants were abrasive and threatening during questioning. These are only two of the examples of why Smaltz's investigative tactics should not be called "responsible."

[124] See *Id.*

[125] Morrison, Supra note 61 at 730.

[126] Deborah Mathis, *Independent Counsel Statute in Jeopardy,* Gannett News Service, Sept. 5, 1998.