



PennState
Dickinson Law

DICKINSON LAW REVIEW
PUBLISHED SINCE 1897

Volume 104
Issue 4 *Dickinson Law Review - Volume 104,*
1999-2000

6-1-2000

Preserving Integrity: Why Pennsylvania's Independent Counsel Law is Working

John M. Coles

Follow this and additional works at: <https://ideas.dickinsonlaw.psu.edu/dlra>

Recommended Citation

John M. Coles, *Preserving Integrity: Why Pennsylvania's Independent Counsel Law is Working*, 104 Dick. L. Rev. 707 (2000).

Available at: <https://ideas.dickinsonlaw.psu.edu/dlra/vol104/iss4/8>

This Comment is brought to you for free and open access by the Law Reviews at Dickinson Law IDEAS. It has been accepted for inclusion in Dickinson Law Review by an authorized editor of Dickinson Law IDEAS. For more information, please contact lja10@psu.edu.

Preserving Integrity: Why Pennsylvania’s Independent Counsel Law is Working

I. Introduction

All power is inherent in the people, and all free governments are founded on their authority and instituted for their peace, safety and happiness. For the advancement of these ends they have at all times an inalienable right to alter, reform, or abolish their government in such a manner as they may think proper.¹

The Pennsylvania Constitution proudly proclaims in its Declaration of Rights that all power rests with the people.² The United States Constitution reflects this same basic principle through protections secured in the Bill of Rights.³

Much of the Bill of Rights preserves the liberties of the people by limiting the authority of the government.⁴ In order to protect against the tyranny of the few, the Founding Fathers adopted a governmental system based upon the separation of powers.⁵ This fundamental structure is an essential component of the system of checks and balances, designed to prevent the unhealthy concentration of power in any one branch of the system. Many states, including Pennsylvania, also use this “three branch” framework to take advantage of its accompanying safeguards.⁶

Despite these structural protections and lofty constitutional pronouncements, occasionally trusted public officials still engage in

1. PA. CONST. art. I, § 2.

2. *See id.*

3. *See* U.S. CONST. amend. I-X.

4. *See id.*

5. *See* U.S. CONST. art. I-III. These articles divide the federal government’s power into a legislative branch (Article I), an executive branch (Article II), and a judicial branch (Article III). *See id.*

6. *See* PA. CONST. art. II, IV, and V. Article II outlines the powers of the Pennsylvania legislature, known as the General Assembly. *See id.* Article IV grants the executive power to the governor, while Article V vests the judicial power in the courts of Pennsylvania. *See id.*

questionable conduct. Unfortunately, this remains a persistent problem for both the states and the federal government today. The most delicate and difficult investigations are those involving allegations against public officials who maintain control over law enforcement agencies or the government's prosecutorial machine.

At the federal level, these individuals include the president, members of the executive branch, and the attorney general and members of her Justice Department staff. It was because of this inherent conflict of interest that Congress originally passed the Ethics in Government Act in 1978.⁷ This legislation provided for the appointment of an independent counsel to investigate high-ranking executive branch officials accused of possible wrongdoing.⁸

The recent impeachment of President William Jefferson Clinton was the culmination of such an investigation.⁹ The Clinton impeachment trial in the United States Senate was the result of nearly five years of investigative work, weeks of bitter, partisan hearings before the House Judiciary Committee, and a largely party-line vote to approve articles of impeachment against the president.¹⁰ Throughout this process, the impeachment proceedings involved all three branches of the federal government—executive¹¹, legislative¹², and judicial.¹³

7. See Joseph S. Hall, et al., *Independent Counsel Investigations*, 36 AM. CRIM. L. REV. 809 (1999). The Ethics in Government Act was codified as amended at 28 U.S.C. §§ 591-599 (1994). See *id.* Because this legislation provides for the appointment of an independent counsel to investigate certain officials within the federal government, it will hereinafter be referred to as the "federal independent counsel statute." See *id.*

8. See 28 U.S.C. §§ 591-599 (1994).

9. See Peter Baker & Juliet Eilperin, *Clinton Impeached: House Approves Articles Charging Perjury, Obstruction; Mostly Partisan Vote Shifts Drama to Senate*, WASH. POST, Dec. 20, 1998, at A1. See also Steven Thomma, et al., *Clinton Impeached; Action is 2d Ever in U.S. History*, PHILA. INQUIRER, Dec. 20, 1998, at A1; U.S. CONST. art. II, § 4 (providing that the president may be removed from office "on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.")

10. See Baker & Eilperin, *supra* note 9, at A1. See also Peter Baker & Helen Dewar, *Clinton Acquitted: 2 Impeachment Articles Fail to Win Senate Majority; Five Republicans Join Democrats in Voting Down Both Charges*, WASH. POST, Feb. 13, 1999, at A1; Steven Thomma, et al., *Clinton Acquitted: 2 Articles Fail to Get a Majority in Senate*, PHILA. INQUIRER, Feb. 13, 1999, at A1.

11. Obviously, much of the energies of the executive were put into defending the articles of impeachment in the trial before the Senate.

12. Under the United States Constitution, the House of Representatives possesses the sole power of impeachment. See U.S. CONST. art. I, § 2, cl. 5. The Senate has the sole power to try impeachments. See *id.* art. I, § 3, cl. 6.

13. The United States Constitution requires the Chief Justice of the United States to preside over any Senate trial against the president. See U.S. CONST. art. I, § 3, cl. 6. Therefore, Chief Justice William Rehnquist presided over the Clinton

This national spectacle helped lead to Congress' decision not to renew the federal independent counsel law for another five years.¹⁴ Instead, Congress allowed the law to expire on June 30, 1999.¹⁵ There are no immediate plans for its revival.¹⁶

The need for an independent investigation of an executive or a top law enforcement official is not unique to the federal government, however.¹⁷ On February 18, 1998, Pennsylvania Governor Thomas J. Ridge signed into law legislation creating a system by which an independent counsel can be appointed in Pennsylvania.¹⁸ The Pennsylvania law, largely modeled on its federal predecessor, provides a mechanism for the appointment of an independent counsel to investigate the state attorney general or a member of his staff.¹⁹

Will the Pennsylvania law suffer the same fate as its federal counterpart? What characteristics, if any, make Pennsylvania's legislation more likely to stand the test of time? Part II of this comment will discuss the reasons why the Pennsylvania General Assembly chose to enact an independent counsel statute. Part III will look at the provisions of the state statute and briefly will examine the federal statute. Part IV will analyze why the Pennsylvania statute likely will enjoy a better fate than the federal law after which it was modeled.

II. History of the Pennsylvania Statute

On June 13, 1995, Pennsylvania Attorney General Ernest D. Preate, Jr., plead guilty to a felony charge of mail fraud.²⁰ That same day, Preate sent Pennsylvania Governor Tom Ridge his letter

impeachment. The usual presiding officer in the Senate is the vice president of the United States, who would have a possible conflict of interest during any impeachment trial. See U.S. CONST. art. I, § 3, cl. 4.

14. See Robert Suro, *As Special Counsel Law Expires, Power Will Shift to Reno*, WASH. POST, June 30, 1999, at A6. The federal independent counsel law had a five year sunset provision and automatically expired when Congress failed to renew it. See 28 U.S.C. § 599 (1994).

15. See Suro, *supra* note 14, at A6.

16. See *id.*

17. The Pennsylvania General Assembly passed the independent counsel statute largely in response to a scandal involving Attorney General Ernest D. Preate, Jr. See *infra* Part II.

18. See 18 PA. CONS. STAT. §§ 9301-9352 (1999). See also *Inside the Capitol*, PATRIOT-NEWS (Harrisburg), Feb. 20, 1998, at B3 (reporting on signing of Independent Counsel Authorization Act).

19. See 18 PA. CONS. STAT. §§ 9301-9352.

20. See Robert Moran, *Preate Pleads Guilty to Mail Fraud*, PHILA. INQUIRER, June 14, 1995, at A1. See also *Preate Pleads Guilty, Resigns*, PATRIOT-NEWS (Harrisburg), June 14, 1995, at A1.

of resignation, effective June 23, 1995.²¹ On December 14, 1995, a federal court sentenced Preate to 14 months in prison and fined him \$25,000.²²

The charges against Preate stemmed from his acceptance of illegal campaign contributions from video poker operators.²³ Preate never reported the contributions, which were made to help offset costs incurred during Preate's reelection campaign when he served as Lackawanna County district attorney in the mid-1980s and during his first campaign for attorney general in 1988.²⁴ In return for the campaign money, Preate allegedly promised not to enforce state gambling laws against the operators.²⁵

The charges against Preate were outlined first by the Pennsylvania Crime Commission, which conducted a two-year investigation of the video poker situation.²⁶ Along with the Crime Commission's investigation, federal authorities began looking into Preate's ties to the video poker industry.²⁷ By early 1995, federal prosecutors informed Preate that he was being targeted for possible racketeering violations and for conspiring with the video operators.²⁸ While Preate's subsequent guilty plea was related only to the charges involving the video poker operators, the prosecutors in the case said they were prepared to offer evidence that Preate had attempted to sell his office to a number of "other illegal enterprises."²⁹

Preate served 11 of his 14 months in a federal prison in Minnesota and was released to a halfway house in December 1996,

21. See Moran, *supra* note 20, at A1.

22. See Pete Shellem, *Preate Gets 14 Months in Jail*, EVENING-NEWS (Harrisburg), Dec. 14, 1995, at A1. See also Robert Moran, *Preate Gets 14 Month Term, \$25,000 Fine*, PHILA. INQUIRER, Dec. 15, 1995, at A1. For an excellent recounting of the events that led to Preate's guilty plea and sentencing, see Pete Shellem, *Chronology*, PATRIOT-NEWS (Harrisburg), Dec. 15, 1995, at B4.

23. See Robert Moran, *Guilty Plea is Expected from Preate*, PHILA. INQUIRER, June 10, 1995, at A1. See also Peter J. Shelley & Pete Shellem, *Chronology of a Plea*, PATRIOT-NEWS (Harrisburg), June 14, 1995, at A8.

24. See Moran, *supra* note 23, at A1; Shelley & Shellem, *supra* note 23, at A8.

25. See Shelley & Shellem, *supra* note 23, at A8.

26. See *id.* See also PA. CRIME COMM'N, AN INVESTIGATION INTO THE CONDUCT OF LACKAWANNA COUNTY DISTRICT ATTORNEY/ATTORNEY GENERAL ERNEST D. PREATE, JR. (1994).

27. See Shelley & Shellem, *supra* note 23, at A8.

28. See *id.*

29. See Shellem, *Preate Gets 14 Months in Jail*, *supra* note 22, at A1. Specifically, a mistakenly released transcript of an October 1995 hearing that was supposed to be closed showed that federal prosecutors were prepared "to prove that Preate received cash contributions from the late Philadelphia Mayor Frank Rizzo and had laundered contributions through the Republican State Committee." *Id.*

where he served the final month of his sentence.³⁰ In addition to the jail time, the Pennsylvania Supreme Court suspended Preate's license to practice law.³¹ The five-year suspension was retroactive to his 1995 guilty plea, and Preate can apply to have his license restored in August of 2000.³²

Largely as a result of the Preate scandal, the Pennsylvania General Assembly began to consider ways to restore accountability and public confidence to the Office of the Attorney General.³³ Proposed legislation focused on the need to provide for an independent entity to conduct investigations and prosecutions of the attorney general and members of his staff.³⁴ The problems of the Preate era suggested that such a mechanism was needed because, under usual circumstances, it is the attorney general himself who is normally charged with conducting criminal investigations and prosecutions.³⁵

Legislation creating the Office of the Independent Counsel was introduced in the Pennsylvania General Assembly as early as May 1994, over a year before Preate's resignation.³⁶ The legislation died at the end of that session and was reintroduced in both chambers early in 1995.³⁷ That time, the law passed both chambers in

30. See Pete Shellem, *Preate to be Released Today for the Holidays*, PATRIOT-NEWS (Harrisburg), Dec. 19, 1996, at A1.

31. See Office of Disciplinary Counsel v. Preate, No. J-4-99 (Pa. filed June 23, 1999). See also *Preate Loses License for 5 Years; 2 Justices Say He Should Have Been Disbarred*, PATRIOT-NEWS (Harrisburg), June 24, 1999, at B3.

32. See *Preate Loses License for 5 Years*, *supra* note 31, at B3.

33. See Peter J. Shelly, *Panel Approves Prosecutor Bill*, PATRIOT-NEWS (Harrisburg), May 26, 1994, at B3. See also Pete Shellem, *Preate Aide Says Plan is Politically Motivated*, PATRIOT-NEWS (Harrisburg), Apr. 7, 1994, at B1; Peter J. Shelley & Adam Bell, *House Vote Asks for an Independent Prober of Preate*, PATRIOT-NEWS (Harrisburg), Oct. 5, 1994, at B1.

34. See sources cited *supra* note 33.

35. See William Cornell, *Public Corruption: State Requires an Independent Counsel*, PATRIOT-NEWS (Harrisburg), Sept. 3, 1996, at A7.

36. During the legislative session of 1993-94, Representative Jeffrey E. Piccola introduced House Bill 2741, which passed the House 194-4 on October 4, 1994, but later died in the Senate. See H.B. 2741, 178th Leg., 2nd Sess. (Pa. 1994). Senator David W. Heckler introduced similar legislation as Senate Bill 1707. See S.B. 1707, 178th Leg., 2nd Sess. (Pa. 1994). That bill was never voted out of the Senate Judiciary Committee. See *id.*

37. During the legislative session of 1995-96, Representative Piccola reintroduced the legislation as House Bill 981. See H.B. 981, 179th Leg., 1st Sess. (Pa. 1995). House Bill 981 passed the House 197-0 on November 20, 1995. See *id.* It was subsequently amended in the Senate, where it passed by a 50-0 vote on November 26, 1996. See H.B. 981, 179th Leg., 2nd Sess. (Pa. 1996). The legislation was returned to the House, but the General Assembly's adjournment prevented the House from considering the Senate's amendments. See *id.* See also Jeanette Krebs, *Counsel Idea Dies of Neglect*, PATRIOT-NEWS (Harrisburg), Nov. 29, 1996,

different forms, but it died when the legislature failed to reconcile the two versions before the General Assembly adjourned at the end of 1996.³⁸ The legislation was reintroduced in early 1997, and it finally passed both chambers in February 1998, when the legislature included its language as part of a wiretapping surveillance statute.³⁹ Pennsylvania Governor Tom Ridge signed the Independent Counsel Authorization Act into law on February 18, 1998.⁴⁰

III. The Statutes

A. *The Pennsylvania Statute*

Pennsylvania's independent counsel statute is modeled after its federal predecessor.⁴¹ The law establishes a systematic investigative process that must be followed in order to appoint an independent counsel.⁴² An independent counsel may be appointed in order to investigate certain "covered persons," namely the attorney general, any deputy attorney general, or any individual working in the attorney general's office classified as a "public employee."⁴³ The statute also covers former employees of the current attorney general's office and top-ranking officials of the attorney general's campaign committee.⁴⁴

at B1. Senator Heckler also introduced similar legislation in the Senate as Senate Bill 1127, which again died in the Senate Judiciary Committee. *See* S.B. 1127, 179th Leg., 1st Sess. (Pa. 1995).

38. *See* Krebs, *supra* note 37, at B1.

39. Representative Albert Masland introduced House Bill 1378, which died in the House Judiciary Committee. *See* H.B. 1378, 180th Leg., 1st Sess. (Pa. 1997). Senator Jeffrey Piccola introduced Senate Bill 969 which passed first consideration in the Senate but died in the Senate Appropriations Committee. *See* S.B. 969, 180th Leg., 1st Sess. (Pa. 1997). Senator Piccola won a special election to fill a vacant Senate seat and moved from the House to the Senate in November of 1995, where he continued to be a strong advocate of the independent counsel legislation. *See* Stephanie Ebbert, *Independent Counsel Bill OK'd*, PATRIOT-NEWS (Harrisburg), Nov. 21, 1995, at B16. The Independent Counsel Authorization Act was amended into Senate Bill 635, originally legislation dealing with wiretapping surveillance, during the 1997-98 legislative session. *See* S.B. 635, 180th Leg., 1st Sess. (Pa. 1997). Senate Bill 635 passed the Senate (in its final form) on February 10, 1998, by a vote of 36 to 12. *See id.* The House concurred by a vote of 115 to 82 on February 11, 1998. *See id.* The legislation was placed in the hands of the governor on February 12, 1998. *See id.*

40. *See* 18 PA. CONS. STAT. §§ 9301-9352 (1999). *See also* *Inside the Capitol*, *supra* note 18, at B3.

41. *See* 18 PA. CONS. STAT. §§ 9301-9352 (Pennsylvania's independent counsel law). *See also* 28 U.S.C. §§ 591-599 (1994) (the federal independent counsel law).

42. *See* 18 PA. CONS. STAT. §§ 9301-9352.

43. *See id.* § 9312(c).

44. *See id.* The provision allowing for investigation of a member of the

1. *The Initial Investigative Process*—The first step in the appointment process begins when the governor's Office of General Counsel appoints a special investigative counsel to conduct a preliminary investigation of a covered person.⁴⁵ The goal of the preliminary investigation is to determine whether or not an independent counsel should be appointed.⁴⁶ Under the law, the Office of General Counsel is authorized to appoint a special investigative counsel when sufficient information exists that a "covered person" may have committed an offense higher than a misdemeanor of the second degree or an offense involving a breach of the public trust.⁴⁷ The general counsel also may appoint a special investigative counsel to look into alleged violations of the Pennsylvania Election Code or of the Public Official and Employee Ethics Law.⁴⁸ The attorney general also is required to request that the general counsel appoint a special investigative counsel when it is clear that an investigation or prosecution by the attorney general or a member of his staff may result in a personal, financial, or political conflict of interest.⁴⁹

The general counsel has 30 days from the date on which he receives the information, that would suggest that an investigation may be necessary, to appoint the special investigative counsel.⁵⁰ The special investigative counsel then reviews all matters that are within the scope of the investigation and makes a determination as

attorney general's campaign committee is especially relevant, given that Attorney General Preate's wrongdoing arose out of his campaign financing. *See supra* Part II.

45. *See* 18 PA. CONS. STAT. § 9312. The general counsel, which is an executive branch position appointed by the governor, was chosen as the starting point of the process for constitutional reasons. *See Morrison v. Olson*, 487 U.S. 654, 694-95 (1988). In *Morrison v. Olson*, the United States Supreme Court upheld the federal independent counsel law. *See id.* at 696-97. The Court held that in order to preserve the constitutional separation of powers, the "trigger" for the appointment of any independent counsel must lie in the executive branch, which has the duty to execute the laws and prosecute criminal cases. *See id.* at 694-95. At the federal level, the trigger mechanism lies with the attorney general. *See* 28 U.S.C. §§ 591-592. The most closely analogous executive branch position in Pennsylvania is the general counsel. *See* PA. STAT. ANN. tit. 71, § 732-301 (West 1990) (establishing the Office of the General Counsel and providing for the appointment of a general counsel to serve as legal adviser to the governor). Under the Pennsylvania statute, the process begins when the general counsel receives information that is "sufficient to constitute grounds to investigate" whether one of the covered persons may have committed a covered offense. *See* 18 PA. CONS. STAT. § 9312(a).

46. *See* 18 PA. CONS. STAT. §§ 9312-9315.

47. *See id.* § 9312(a).

48. *See id.*

49. *See id.* § 9312(b).

50. *See id.* § 9313.

to whether an independent counsel is required.⁵¹ This preliminary investigation may last no longer than 90 days, although it may be extended once for an additional 60 days.⁵²

2. *Appointment of an Independent Counsel*—The special investigate counsel must report the results of his investigation to a special three-judge panel that is created by the Independent Counsel Authorization Act.⁵³ This “Special Independent Prosecutor’s Panel” is composed of one judge of the Commonwealth Court of Pennsylvania and two judges from the Pennsylvania Courts of Common Pleas.⁵⁴ The panel members are chosen by lot.⁵⁵ If the special investigative counsel determines that there are no reasonable grounds for further investigation, he must notify the special panel of his determination.⁵⁶

If, however, the special investigative counsel determines that there are sufficient grounds to proceed with further investigation, then the special investigative counsel must apply to the three-judge panel to ask for the appointment of an independent counsel.⁵⁷ The information that the special investigative counsel submits to the three-judge panel must be sufficient to allow the panel to select an appropriate independent counsel and to define that person’s prosecutorial jurisdiction.⁵⁸ The special investigative counsel’s

51. See 18 PA. CONS. STAT. § 9313 (1999).

52. See *id.*

53. See *id.* §§ 9311, 9314-9315.

54. See *id.* § 9311. The first (and current) three judges who were chosen for this panel include its chair, Judge Rochelle S. Friedman from the Commonwealth Court, Judge Paul W. Tressler from the Montgomery County Court of Common Pleas, and Donald E. Machen from the Allegheny County Court of Common Pleas. See 204 PA. CODE § 215.1 (1999).

55. See 18 PA. CONS. STAT. § 9311(a).

56. See *id.* § 9314. Specifically, the statute provides that

[i]f the special investigative counsel upon completion of a preliminary investigation under this chapter determines that there are no reasonable grounds to believe that further investigation is warranted, the special investigative counsel shall promptly so notify the panel, and the panel shall have no power to appoint an independent counsel with respect to the matters involved.

Id.

57. See *id.* § 9315.

58. See *id.* § 9316. Specifically, the statute provides that

[a]ny application for the appointment of an independent counsel under this chapter shall contain sufficient information to assist the panel in selecting an independent counsel and in defining that independent counsel’s prosecutorial jurisdiction so that the independent counsel has adequate authority to fully investigate and prosecute the subject matter and all matters related to that subject matter.

Id.

decision to ask for an independent counsel is not reviewable by any court.⁵⁹

Once the panel receives the application, the panel then has the responsibility to appoint an independent counsel and to define his prosecutorial jurisdiction.⁶⁰ The appointment must occur within 30 days after the receipt of the application from the special investigative counsel.⁶¹ Once appointed, the independent counsel's jurisdiction is limited to that outlined in his grant of authority from the three-judge panel.⁶²

If the independent counsel learns of information about possible criminal violations not covered by his prosecutorial jurisdiction, then he must submit that information to the general counsel.⁶³ The general counsel then begins a new preliminary investigation under the statute, and the entire review process starts again.⁶⁴ This safeguard insures that the independent counsel's jurisdiction will be expanded only after a careful review, including the consent of the three-judge panel.⁶⁵ In the event the preliminary investigation finds that there are no grounds for expanding the independent counsel's investigation, then the independent counsel is required to turn over any information outside of his jurisdiction to the appropriate law enforcement agency.⁶⁶

3. *Authorities and Duties of the Independent Counsel*—Once the three-judge panel appoints the independent counsel, that person has full authority to conduct investigations and initiate any

59. *See id.* § 9318.

60. *See* 18 PA. CONS. STAT. § 9319(a) (1999). When appointing the independent counsel, the three-judge panel is to appoint an individual who has appropriate experience and who will conduct the investigation and any prosecution in a prompt, responsible and cost-effective manner. The panel shall seek to appoint as independent counsel an individual who will serve to the extent necessary to complete the investigation and any prosecution without undue delay. The panel may not appoint as an independent counsel any person who holds any office of profit or trust with the Commonwealth. No person who is serving as a special investigative counsel may be appointed or serve as an independent counsel in the matter for which they had been appointed to investigate as special investigative counsel. If an independent counsel is appointed, the independent counsel may only accept the appointment when such appointment would not conflict with the rules governing professional conduct.

Id.

61. *See id.*

62. *See id.* § 9319.

63. *See id.* § 9319(b).

64. *See id.*

65. *See* 18 PA. CONS. STAT. § 9319(b) (1999).

66. *See id.*

necessary legal proceedings, including proceedings before grand juries.⁶⁷ The independent counsel has the authority to engage in any necessary litigation, including civil and criminal trials.⁶⁸ The counsel has the authority to hire additional personnel and to request assistance from the Pennsylvania State Police.⁶⁹

In addition to the authority to initiate necessary legal proceedings, the statute requires the independent counsel to submit a report to the three-judge panel every six months that details and explains major expenses, as well as estimates future expenses.⁷⁰ When the independent counsel finishes his work, he must submit a final report⁷¹ that fully describes all prosecutions to the three-judge

67. See *id.* § 9331. The statute says

[i]nvestigative and prosecutorial functions and powers shall include, but are not limited to:

1. Conducting proceedings before grand juries and other investigations.
2. Participating in court proceedings and engaging in any litigation, including civil and criminal matters, that the independent counsel considers necessary.
3. Appealing any decision of a court in any case or proceeding in which the independent counsel participates in an official capacity.
4. Reviewing all documentary evidence available from any source.
5. Determining whether to contest the assertion of any testimonial privilege.
6. Receiving appropriate security clearances and, if necessary, contesting in court, including where appropriate, participating in an in camera proceeding, any claim of privilege or attempt to withhold evidence on grounds of security.
7. Making applications to any State court for a grant of immunity to any witness, consistent with applicable statutory requirements, or for warrants, subpoenas or other court orders, and exercising the authority vested in the Attorney General or a district attorney.
8. Inspecting, obtaining or using the original or a copy of any tax return in accordance with applicable statutes and regulations.
9. Initiating and conducting prosecutions in any court of competent jurisdiction, framing and signing indictments, filing information and handling all aspects of any case in the name of the Commonwealth.
10. Consulting with the district attorney for the county in which any violation of law with respect to which the independent counsel is appointed was alleged to have occurred.

Id.

68. See *id.*

69. See *id.* §§ 9333-9334.

70. See 18 PA. CONS. STAT. § 9337 (1999).

71. The statute says that the Office of Independent Counsel is terminated when the counsel "notifies the [three-judge] panel that the investigation of all matters within the prosecutorial jurisdiction of the independent counsel or accepted by the independent counsel have been completed" and the independent counsel "files a final report" as directed under the statute. See *id.* § 9343.

panel.⁷² The statute says that all other information is confidential and is not subject to public disclosure.⁷³

4. *Ongoing Investigations*—Since the Pennsylvania independent counsel law was signed into law in February 1998, the three-judge panel has appointed two independent counsels.⁷⁴ The first was appointed in February 1999 to investigate a senior deputy attorney general on allegations she violated Pennsylvania's wiretapping and surveillance act by playing secretly recorded surveillance tapes for her boyfriend.⁷⁵ The independent counsel filed four felony and four misdemeanor charges against the deputy in September 1999.⁷⁶ However, a district justice dismissed six of the eight charges in December 1999, leaving only one felony and one misdemeanor charge.⁷⁷ The independent counsel then accepted a plea agreement to admit the deputy attorney general into a one-year probation program for first-time offenders which, if successfully completed, will result in the clearing of all wiretap violations.⁷⁸

In a second probe, the three-judge panel appointed an independent counsel in July 1999 to investigate two members of the attorney general's staff.⁷⁹ Reports had the probe focused on a private law practice where one of the staffers was a partner and the other was of counsel to the firm, after they had worked in the

72. See *id.* § 9337.

73. See *id.*

74. See Peter J. Shelly, *State's Counsel Starts Job*, PITTSBURGH POST-GAZETTE, Mar. 1, 1999, at A1. See also Pete Shellem, *Attorney to Face Wiretap Charges*, PATRIOT-NEWS (Harrisburg), Sept. 23, 1999, at A1.

75. The three-judge panel appointed Anthony M. Mariani, a former federal prosecutor from Pittsburgh, on February 4, 1999, to investigate Senior Deputy Attorney General Marsha V. Mills. See 204 PA. CODE § 215.1 (1999). See also Shellem, *Attorney to Face Wiretap Charges*, *supra* note 74, at A1. The panel granted an extension of the independent counsel's jurisdiction on June 25, 1999. See 204 PA. CODE § 215.1.

76. See Jack Sherzer, *Official to Face Wiretap Charges*, PATRIOT-NEWS (Harrisburg), Sept. 24, 1999, at B1.

77. See Pete Shellem, *6 of 8 Charges Dropped in Tapes Case*, PATRIOT-NEWS (Harrisburg), Dec. 17, 1999, at B9.

78. See Pete Shellem, *Wiretap Charges Result in Probation*, PATRIOT-NEWS (Harrisburg), Mar. 29, 2000, at B8.

79. The three-judge panel appointed William F. Manifesto, a Pittsburgh criminal defense attorney, to investigate Chief Deputy Attorney General Douglas Yauger and Executive Deputy Attorney General Donald Minahan. See 204 PA. CODE § 215.1. See also Pete Shellem, *Probe Focuses on 2 Lawyers for State; Pair Under Investigation by Independent Counsel*, PATRIOT-NEWS (Harrisburg), Aug. 23, 1999, at A1. Yauger was the head of the state attorney general's Bureau of Consumer Protection, but resigned amid the investigation on September 17, 1999. See Shellem, *Attorney to Face Wiretap Charges*, *supra* note 74, at A1.

attorney general's office.⁸⁰ Allegations included that the pair had improper contact with individuals still working at the Bureau of Consumer Protection⁸¹ after they had left that office.⁸² The alleged contact apparently included sharing files and referring cases.⁸³ The attorney general's office later rehired the two, which is when the probe began.⁸⁴

Because the independent counsels have yet to file any reports detailing their investigations and prosecutions, it is difficult to tell exactly how the process has worked.⁸⁵ It is worth noting, however, that there have been no reports of any significant structural problems. Once the independent counsels file their required reports, the General Assembly, as well as the public, should have a better idea just how well the statute is operating in practice.

B. *The Federal Statute*

The Pennsylvania independent counsel statute is modeled closely after the federal independent counsel legislation.⁸⁶ For this reason, the two statutes have very similar provisions.⁸⁷ As many people have become aware, the federal statute also provided for the appointment of an independent counsel to investigate top officials in the executive branch of the federal government.⁸⁸

Under the federal statute, the United States attorney general conducted the preliminary investigation and, if warranted, made an application to a special division of the United States court of

80. *See Report Says Attorney General's Deputies Will be Investigated*, PA. L. WKLY., Aug. 30, 1999, at 2.

81. The Bureau of Consumer Protection is an agency under the direction of the state attorney general, who appoints the bureau's director. *See* PA. STAT. ANN. tit. 71, § 732-201(c) (West 1990).

82. *See Report Says Attorney General's Deputies Will be Investigated*, *supra* note 80, at 2.

83. *See id.*

84. *See id.*

85. *See* 18 PA. CONS. STAT. § 9337(a) (1999) (requiring the independent counsel to file reports and outlining confidentiality).

86. *See id.* §§ 9311-9352. *See also* 28 U.S.C. §§ 591-599 (1994). Congress originally passed the Ethics in Government Act, which contained the process for appointing an independent counsel, in 1978. *See* Hall, et al., *supra* note 7, at 809. Congress' action came in the wake of the Watergate crisis. *See id.* at 811-12.

87. *See* 18 PA. CONS. STAT. §§ 9311-9352 (Pennsylvania's independent counsel law). *See also* 28 U.S.C. §§ 591-599 (the federal independent counsel law).

88. *See* 28 U.S.C. § 591. The most recent version of the statute also allowed for an independent counsel to investigate members of Congress. *See* 28 U.S.C. § 591(c)(2). However, the potential conflict of interest is not quite as serious when a member of Congress is the target of an investigation, as legislative branch officials lack the direct control over prosecutions that is found in the executive branch.

appeals in Washington, D.C., for the appointment of an independent counsel.⁸⁹ In the event the attorney general herself was the object of the pending investigation, the attorney general had a statutory obligation to recuse herself and to allow the most senior member of the Justice Department who had not been forced to recuse himself to handle the preliminary investigation and make the application to the Special Division for appointment of an independent counsel.⁹⁰

Independent Counsel Kenneth Starr's investigation into President Clinton's Whitewater land deal and the subsequent investigations it spawned is the most recent example of an investigation conducted under the federal independent counsel statute.⁹¹ As a result of the investigation of President Clinton, the independent counsel uncovered evidence that he felt may have shown grounds for the impeachment of the president.⁹² The federal statute required the independent counsel to turn over that information to the House of Representatives for its consideration.⁹³ The independent counsel's report to Congress formed the basis from which the House of Representatives drafted the articles of impeachment against President Clinton.⁹⁴

The long partisan drama that ensued dramatically reduced the popularity of the federal statute.⁹⁵ Following the Clinton impeachment, the statute lacked enough support to be renewed for

89. See 28 U.S.C. § 592.

90. See *id.* § 591(e).

91. See generally Robert W. Gordon, *Imprudence and Partisanship: Starr's OIC and the Clinton-Lewinsky Affair*, 68 *FORDHAM L. REV.* 639 (1999).

92. See Peter Baker & Susan Schmidt, *Starr Submits Report to House Counsel; Cites Substantial and Credible Evidence of Impeachable Acts*, *WASH. POST*, Sept. 10, 1998, at A1.

93. See 28 U.S.C. § 595(c).

94. See Baker & Eilperin, *supra* note 9, at A1.

95. In fact, a large number of constituencies argued that Congress should not renew the law. See Dick Polman, *Independent Counsel Law is Dying Friendless*, *PHILA. INQUIRER*, June 27, 1999, at E1. Those opposed to the law included members of Congress, the Justice Department, the American Bar Association, and even Independent Counsel Kenneth Starr himself. See George Lardner, Jr. & Dan Morgan, *Senate Chairman Favors End to Independent Counsel Law*, *WASH. POST*, Dec. 11, 1998, at A29; Dan Morgan & George Lardner, Jr., *U.S. Sours on Counsel Law: Justice Department to Testify Statute is Fundamentally Flawed*, *WASH. POST*, Mar. 2, 1999, at A1; Laurie Kellman, *Justice Department: Counsel Law Should Expire - The Clinton Administration Withdrew Support for the Independent Prosecutor Legislation*, *PHILA. INQUIRER*, Mar. 3, 1999, at A2; George Lardner, Jr., *ABA Advocates End to Independent Counsels*, *WASH. POST*, Feb. 9, 1999, at A3; Roberto Suro & Guy Gugliotta, *Starr to Oppose Independent Counsel Statute: Process is Called Legally Dubious*, *WASH. POST*, Apr. 14, 1999, at A1.

another five years.⁹⁶ The statute expired on June 30, 1999, and there are no plans to revive it anytime soon.⁹⁷

IV. Analysis of the Pennsylvania Statute

Despite the demise of the federal independent counsel statute, it appears that the Pennsylvania statute may not endure the same fate. First, this section will examine why the Pennsylvania statute is necessary in order to close a loophole to allow for the criminal investigation and prosecution of the state attorney general or a member of his staff.⁹⁸ Then this section will examine why the circumstances surrounding the Pennsylvania statute make it more likely that the statute will be successful in achieving its goal without suffering from the shortcomings that have come to be associated with the federal statute.⁹⁹

A. *Why the Statute is Necessary*

Under the Commonwealth Attorneys Act,¹⁰⁰ the attorney general has extensive powers to prosecute criminal cases.¹⁰¹ The office is an elected position, so its occupant holds considerable political power as well.¹⁰² The attorney general's authority allows him to prosecute state officials or employees, or he may refer such matters to a county district attorney for purposes of prosecution.¹⁰³

96. See Suro, *supra* note 14, at A6. Following the statute's expiration, the responsibility for conducting investigations of allegations against executive branch officials, including the president, reverted back to the Justice Department. See *id.* Under new regulations, the attorney general has the sole power to appoint and remove special investigative counsels. See *id.*

97. See *id.*

98. See *infra* Part III.A.

99. See *infra* Part III.B and C.

100. See PA. STAT. ANN. tit. 71, §§ 732-101 to -506 (West 1990).

101. See *id.* § 732-205.

102. See PA. CONST. art. IV § 4.1. The attorney general was not always elected, however. Pennsylvania amended its constitution in 1978 to allow for election, rather than the appointment of the attorney general by the governor. See *id.* Following the Preate scandal, a number of legislators suggested returning to the appointment method of selection. See *DeWeese: Make Post Appointed*, PATRIOT-NEWS (Harrisburg), June 12, 1995, at B1. It seems that an elected official, as opposed to one who is appointed, likely has more accountability, as he must ultimately answer to the people.

103. See PA. STAT. ANN. tit. 71, § 732-205. Specifically, the Commonwealth Attorneys Act provides that the attorney general has the power to prosecute "[c]riminal charges against State officials or employees affecting the performance of their public duties or the maintenance of the public trust and criminal charges against persons attempting to influence such State officials or employees or benefit from such influence or attempt to influence." *Id.* § 732-205(a)(1). The statute says

However, there is no provision in the Commonwealth Attorneys Act to provide an outside trigger mechanism for a situation where possible prosecution by the attorney general¹⁰⁴ may result in a conflict of interest.¹⁰⁵

Prior to the passage of the independent counsel statute, if such a conflict existed, the attorney general did have the choice himself to appoint a special deputy to investigate a particular matter.¹⁰⁶ This, however, did not seem to be a reasonable solution. Even if the attorney general did not actually oversee the investigation, there could still be a public perception that the investigation was not truly independent. Therefore, the investigation might lack both fairness and impartiality simply because the attorney general selected the investigating deputy.

Another possible option would be to have a county district attorney prosecute such a case.¹⁰⁷ However, this is also likely not an acceptable alternative. Most district attorneys enjoy a working relationship with the attorney general. Their offices may be working together on a number of other prosecutions and investigations. In addition, many district attorneys have a personal or political relationship with the attorney general that could also hinder a truly independent and unbiased prosecution.¹⁰⁸

The only other possible prosecutorial avenue would be to have federal authorities lead the investigation.¹⁰⁹ While this could be an acceptable alternative if the investigation involves a federal crime, state officials could be powerless to prosecute crimes arising purely

that the attorney general has "concurrent prosecutorial jurisdiction with the district attorney" for such cases. *See id.* § 732-205(b).

104. Of course, in most of these instances, it would probably be more appropriate to say that the real problem exists when there needs to be a prosecution of the attorney general or a member of his staff.

105. *See* PA. STAT. ANN. tit. 71, § 732-205.

106. *See id.*

107. *See id.* § 732-205(b) (giving the attorney general and district attorneys concurrent jurisdiction for cases involving criminal charges against state officials or employees and allowing the attorney general to refer such cases to a district attorney).

108. The attorney general and county district attorneys have concurrent jurisdiction over certain kinds of prosecutions. *See id.* In addition, the attorney general is the "chief law enforcement officer of the Commonwealth," while the district attorney is the "chief law enforcement officer in the county in which he is elected." *Id.* § 732-206(a). Naturally, individuals in these capacities would need to communicate with each other and occasionally coordinate their activities. This can lead to the establishment of both personal and political relationships that could lead to a conflict of interest.

109. This, of course, is what happened with the Preate investigation. *See supra* Part II.

under state law. Therefore, another mechanism would still be needed to provide a means to investigate and prosecute criminal activity that would have to be tried in state court. This is critical because state crimes include a wide variety of offenses not covered in federal statutes.¹¹⁰

Therefore, some additional legislation was necessary in order to close this apparent "loophole" in the Commonwealth Attorneys Act. While these problems were always present, the Preate scandal exposed just how serious they were. Thus, the members of the General Assembly began working to pass the independent counsel statute.¹¹¹

Closing this loophole was one of the most important objectives of the Pennsylvania statute's prime sponsors. Representative Jeffrey E. Piccola pushed for passage of the legislation during his tenure in the House of Representatives.¹¹² He continued his strong support of the law after he won a special election and became a member of the Senate of Pennsylvania in 1995.¹¹³ Senator Piccola said that "the state law closes the loophole created by existing legislation and provides for a truly independent investigative procedure."¹¹⁴ Piccola also pointed out that "this is a good law for the attorney general, as well, who will know that a mechanism is in place by which he will be able to avoid any possible conflicts of interest."¹¹⁵

Other supporters offered similar comments during the floor debate prior to passage of the independent counsel law. Representative Thomas R. Caltagirone argued that

[a] local district attorney would have neither the jurisdiction nor the resources to investigate criminal conduct by members of the Office of Attorney General occurring in more than one county, and the close working relationship between the Office of Attorney General and many local district attorneys makes such investigations unlikely.¹¹⁶

110. See 18 PA. CONS. STAT. §§ 101-9352 (1999) (the Pennsylvania Crimes Code).

111. See *supra* notes 36-40 and accompanying text.

112. See *supra* notes 36-40 and accompanying text.

113. See *supra* note 37.

114. Interview with Jeffrey E. Piccola, Senate of Pennsylvania, in Harrisburg, Pa. (Dec. 28, 1999).

115. *Id.*

116. H. 178-56, 2nd Legis. Sess. 1626 (Pa. 1994) (remarks of Representative Caltagirone). The House was debating House Bill 2741. See *supra* note 36.

Therefore, Caltagirone continued, passage of the legislation would “address[] this specific problem by providing the appointment of a special investigative counsel and special independent prosecutors to examine allegations of violations of State criminal law by the Attorney General and his assistants.”¹¹⁷ Thus, the independent counsel statute insures the people of Pennsylvania that an investigative mechanism exists, if needed, to make sure that the attorney general and his staff, who prosecute Pennsylvanians who violate the law, will themselves live within the law.

B. The Covered Persons

Perhaps the most important reason why the Pennsylvania statute is more likely to succeed than the federal statute is the position of the individuals the Pennsylvania statute is designed to cover. The state statute is narrowly tailored to cover investigations and prosecutions of the attorney general, members of his staff, and top officials from his campaign committee.¹¹⁸ This list is limited to those individuals who have a possible conflict of interest with the attorney general.¹¹⁹

While the federal statute applied to a broad range of individuals, it is best known for its use against the president.¹²⁰ After all, it was the Clinton impeachment that ultimately led to Congress' decision not to renew the statute.¹²¹ There are, however, considerable differences between a state attorney general and the president; some of the systemic problems with the federal statute simply are not present at the state level.

For example, the state attorney general, let alone members of his staff who are covered by the statute, does not hold the same kind of key political position within the lawmaking process as does the president. The president, as the chief executive, is a vital structural part of the legislative process itself.¹²² Pennsylvania's

117. H. 178-56, 2nd Legis. Sess. 1626 (Pa. 1994) (remarks of Representative Caltagirone).

118. See 18 PA. CONS. STAT. § 9312(c) (1999).

119. See *id.*

120. See *supra* notes 7-16 and accompanying text.

121. See *supra* notes 7-16, 91-97, and accompanying text.

122. The Constitution requires the president to sign all bills before they become law, subject to Congress' authority to override any such vetoes with a two-thirds majority vote in both houses. See U.S. CONST. art. I, § 7. The president usually has many legislative proposals and initiatives of his own. See U.S. CONST. art. II, § 3 (requiring the president to report to Congress on the state of the union and to “recommend to [Congress] Consideration such Measures as he shall judge necessary and expedient . . .”).

attorney general, while vested with a significant power with his authority to investigate and prosecute violators of state law, lacks the critical position within the day-to-day lawmaking process that makes the president such a tempting target for an investigation.¹²³

For this reason, an investigation of the president immediately is couched in a spirit of partisanship.¹²⁴ Political allies of the president claim that even a proposed investigation is politically motivated and is destined only to harass the administration so as to prevent the president from achieving his legislative goals. An investigation of a state attorney general, however, is not as likely to effectively dominate the state political landscape. The lawmaking process, which involves the General Assembly and the governor, should be able to continue with minimal distraction.¹²⁵

In addition to his important role in the legislative process, the president also possesses a wide array of other constitutional powers,¹²⁶ while the state attorney general's responsibilities are limited to the authority granted him under Pennsylvania law.¹²⁷ The attorney general's power to prosecute is only a fraction (albeit a sizable one) of the total whole of executive power. Conversely, the president has broad powers in the areas of foreign affairs and the national economy, and he has input into the many executive agencies with responsibilities that range from environmental protection to veterans' issues to agricultural concerns.¹²⁸ The president has the power to appoint cabinet secretaries (including the United States attorney general), American ambassadors, and

123. See PA. STAT. ANN. tit. 71, §§ 732-201 to -208 (West 1990) (creating the Office of the Attorney General and outlining the powers its occupant holds). See also PA. CONST. art. II-IV (detailing the powers and duties of the General Assembly, the governor, and the methods for passing legislation). This is not to say, however, that the attorney general is not a key figure within Pennsylvania politics. The attorney general often has been viewed as a potential gubernatorial candidate. In fact, Attorney General Ernie Preate was a candidate for governor in 1994 and was defeated in the Republican primary by then-Congressman Tom Ridge. See Joseph J. Serwach, *It's Singel vs. Ridge*, PATRIOT-NEWS (Harrisburg), May 11, 1994, at A1. The significant distinction to draw is that while the state attorney general holds an inherently political office, the attorney general himself is not a part of the daily processes of lawmaking and government decision-making in the same way as the president of the United States. Perhaps the greatest test of the Pennsylvania statute would be how it would work if the governor and the attorney general had conflicting political agendas.

124. See Robert W. Gordon, *supra* note 91, at 701-21.

125. See PA. CONST. art. II-IV (detailing the powers and duties of the General Assembly, the governor, and the methods for passing legislation).

126. See U.S. CONST. art. II (vesting the executive power in the president and outlining his express powers).

127. See PA. STAT. ANN. tit. 71, §§ 732-201 to -208.

128. See U.S. CONST. art. II.

federal judges.¹²⁹ The office of the state attorney general, although clearly political in nature, lacks the president's formidable arsenal of executive authority. The fact that Pennsylvania's attorney general is now an elected position¹³⁰ is further evidence that the office is independent from the governor, who holds the balance of executive power.¹³¹ These factors should help to discourage any frivolous, politically motivated charges against the state attorney general and to minimize disruption when any investigation is in progress.

C. Safeguards

Another reason why Pennsylvania's statute is likely to succeed is the number of safeguards built into the statute in order to prevent its abuse.¹³² The statute has provisions that require independent counsels to follow strict ethical standards and to comply with tight reporting deadlines. In addition, there are limitations on the independent counsel's ability to expand the jurisdiction of his prosecutorial inquiry.

Independent counsels appointed under the Pennsylvania statute are required to comply with a number of particular ethical standards.¹³³ First, an investigative counsel who has conducted a preliminary investigation may not serve as the independent counsel.¹³⁴ In addition, neither the independent counsel nor any member of the counsel's law firm is permitted to represent any person being investigated under the statute.¹³⁵ These limitations continue for a period of time after the independent counsel leaves office.¹³⁶ The general counsel may remove the independent counsel for "good cause."¹³⁷ The statute defines good cause as a failure to

129. See *id.* art. II, § 2, cl. 2 (giving the president the authority to "appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States . . ."). Such appointments are subject to the "Advice and Consent of the Senate." See *id.*

130. See *supra* note 102.

131. See PA. CONST. art. IV (vesting the executive power in the governor).

132. Congress also included many of these same kinds of safeguards in the federal statute. See 28 U.S.C. §§ 591-599 (1994). However, the Starr investigation, the impeachment of President Clinton, and Congress' subsequent decision not to renew the federal independent counsel statute are ample evidence that they did not work as intended. See *supra* notes 7-16, 91-97, and accompanying text.

133. See 18 PA. CONS. STAT. § 9339 (1999).

134. See *id.* § 9319(a).

135. See *id.* § 9339.

136. See *id.*

137. See *id.* § 9343.

comply with the ethical rules that govern the independent counsel, the attorney general, or county district attorneys.¹³⁸

The statute also requires the independent counsel to make periodic reports to the three-judge panel and to the General Assembly.¹³⁹ The reports to the panel must be made every six months and are to include a summary of expenses, and, at the end of the counsel's tenure, a summary of all prosecutions.¹⁴⁰ In addition, the statute requires that the independent counsel report to the General Assembly concerning the status of any investigations or prosecutions, as well as how much money the investigation has cost.¹⁴¹

The statute also places tight financial and time constraints on the Office of the Independent Counsel.¹⁴² If the counsel's reported expenditures reach \$2 million, the three-judge panel may determine on its own whether termination of the office would be appropriate.¹⁴³ The statute allows the panel to terminate the office on its own motion two years after the counsel's appointment, and at the end of each succeeding year.¹⁴⁴ In addition, the statute requires the independent counsel to prepare a statement of expenditures for each fiscal year and to send that statement to the auditor general for an audit.¹⁴⁵ The auditor general must report the results of each audit to the General Assembly.¹⁴⁶

The statute also places significant restrictions on the independent counsel's ability to expand his prosecutorial jurisdiction.¹⁴⁷ For example, if the independent counsel learns of information about possible criminal violations by persons who are not covered under his prosecutorial jurisdiction, the independent counsel may submit that information to the general counsel.¹⁴⁸ At that time, the entire review process begins again.¹⁴⁹ Only after going

138. See 18 PA. CONS. STAT. § 9343(a)(1) (1999). The statute says that “[a]n independent counsel appointed under this chapter may be removed from office only by the personal action of the General Counsel and only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of the independent counsel's duties.” *Id.*

139. See *id.* §§ 9337, 9342-9343.

140. See *id.* § 9342.

141. See *id.* § 9343(b).

142. See *id.*

143. See 18 PA. CONS. STAT. § 9343(b) (1999).

144. See *id.*

145. See *id.* § 9344.

146. See *id.*

147. See *id.* § 9319(b).

148. See 18 PA. CONS. STAT. § 9319 (1999).

149. See *id.*

through all of the statutorily required steps, including approval by the three-judge panel, can the independent counsel's prosecutorial jurisdiction be expanded.¹⁵⁰ The statute limits any independent counsel, at all times, however, to investigating only those persons covered under the statute.¹⁵¹ An investigation of any individuals not covered by the statute would have to be referred to the appropriate law enforcement agency.¹⁵²

As a final safeguard built into the statute, the Pennsylvania law, like its federal predecessor, contains a sunset provision.¹⁵³ The law will expire five years after it went into effect, which will be in March of 2003.¹⁵⁴ At that time, the General Assembly will have the opportunity to review the law and make a decision as to whether or not to renew it.

All of these safeguards, which include considerable legislative oversight, help to insure that this much-needed statute will not be abused. The ethical requirements, time and money constraints, and limitations on the number of covered persons all help to make sure that the statute will function as intended. The presence of these safeguards hopefully will prevent the kinds of excesses that grew out of the federal statute.

V. Conclusion

Pennsylvania's decision to enact an independent counsel law to provide a means to investigate the attorney general and members of his staff, if and when necessary, was a good one. The law closes a major loophole in existing statutes. It also provides a mechanism under which a fair and impartial investigation of criminal wrongdoing can be conducted with public confidence. This statute is well designed to serve that end.

150. *See id.*

151. *See id.* § 9312(c).

152. *See id.* § 9319(b). In fact, the statute presents several limitations here, saying that

[i]f the independent counsel discovers or receives information about possible violations of criminal law by persons other than those provided for in section 9312 [the "covered persons"] and which are not covered by the prosecutorial jurisdiction of the independent counsel and a request for expansion under this subsection has not been made by the General Counsel or the request for expansion under this subsection has been denied by the panel, the independent counsel shall submit the information to the appropriate law enforcement authority.

Id.

153. *See* 18 PA. CONS. STAT. § 9352 (1999).

154. *See id.*

Those administering this law, however, must remain mindful of the excesses which led to the demise of its federal model. The impeachment of President Clinton revealed many of the federal independent counsel law's shortcomings. The circumstances surrounding the Pennsylvania law make it much more likely to succeed.

By limiting the scope of independent counsels' inquiries, tightly focusing the statute only on those individuals who absolutely must be covered, and providing protections to prevent politically motivated investigations, the Pennsylvania law is well on its way to functioning as the General Assembly intended. If it does, it will help to preserve the integrity of our republican form of government, and it will serve the people of Pennsylvania well.

John M. Coles