

# CAN THE INDEPENDENT COUNSEL STATUTE BE SAVED?

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## I

### INTRODUCTION

For the second time in its twenty-year history, the independent counsel provisions of the Ethics in Government Act<sup>1</sup> face an uncertain future. We are closer than we have ever been to a bipartisan consensus that the statute should be allowed to expire in June 1999. The reasons for the discontent are many and suggest that underneath the surface there is less consensus than at first appears. Some critics continue to maintain that the statute is an unconstitutional intrusion on presidential power,<sup>2</sup> although the numbers making this argument have dwindled significantly. Others claim that it is unfair and was never necessary because the prior system of having the Attorney General appoint special investigators had worked in the past.<sup>3</sup> Still others question whether the statute has functioned in the way Congress intended.<sup>4</sup>

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1. Pub. L. No. 95-521, tit. VI, 92 Stat. 1824, 1867-73 (1978) (codified as amended at 28 U.S.C. §§ 591-599 (1994)). The statute contains a sunset clause that requires Congress to reauthorize it every five years for it to remain in existence. See 28 U.S.C. § 599 (1994). The statute expired in December 1992 because of controversy surrounding the Iran-Contra investigation. It was reauthorized in 1994 after the Whitewater scandal convinced some formerly resistant Republicans of the desirability of independent investigation. See Holly Idelson, *Law/Judiciary: Whitewater Boosts Prospects of Independent Counsel Bill*, 52 CONG. Q. WKLY. REP. 73 (1994).

2. See, e.g., Stephen L. Carter, *The Supreme Court, 1987 Term—Comment: The Independent Counsel Mess*, 102 HARV. L. REV. 105 (1988); Joseph diGenova, *The Independent Counsel Act: A Good Time to End a Bad Idea*, 86 GEO. L.J. 2299 (1998). DiGenova calls the statute “extra-constitutional” and bases most of his argument on Justice Scalia’s dissent in *Morrison v. Olson*, 487 U.S. 654 (1988), the case upholding the statute. See diGenova, *supra*, at 2305. He notes that, despite the Court’s endorsement of the statute, Scalia’s dissent “became the siren song of Republicans who did not like the application of the statute back then, and has now become the siren song of the Democrats who do not like the application of the statute now.” *Id.* at 2299-2300.

3. See, e.g., Julie O’Sullivan, *The Independent Counsel Statute: Bad Law, Bad Policy*, 33 AM. CRIM. L. REV. 463 (1996).

4. See, e.g., KATY J. HARRIGER, *INDEPENDENT JUSTICE: THE FEDERAL SPECIAL PROSECUTOR IN AMERICAN POLITICS* (1992); John Q. Barrett, *All or Nothing, or Maybe Cooperation: Attorney General Power, Conduct, and Judgment in Relation to the Work of an Independent Counsel*, 49 MERCER L. REV. 519 (1998); Katy J. Harriger, *The History of the Independent Counsel Provisions: How the Past Informs the Current Debate*, 49 MERCER L. REV. 489 (1988) [hereinafter Harriger, *History of Independent Counsel Provisions*]; Katy J. Harriger, *Damned If She Does and Damned If She Doesn’t: The Attorney General and the Independent Counsel Statute*, 86 GEO. L.J. 2097 (1998).

All of this dialogue, of course, is colored by the events of the last year. The combination of the controversial Starr investigation and the allegations of campaign finance abuse by the Democrats in the 1996 election has so poisoned the atmosphere that it seems doubtful that a thoughtful and bipartisan effort can be made to remedy the flaws in the statute before it expires. In this article, I make two arguments. The first is an argument that the statute in its current form meets virtually none of the goals Congress intended in 1978. A careful weighing of the costs and benefits of the statute, based on our twenty-year experience with it, suggests that it should be allowed to expire. The second argument is that if, after a "cooling off" period that gives us some distance from the current controversies, it is decided that we need an independent counsel mechanism of some sort, then the statute should be substantially revised in an effort to minimize the costs and maximize the benefits.

## II

### THE GOALS OF THE INDEPENDENT COUNSEL STATUTE

In considering whether the independent counsel statute merits renewal, it is important to look back at Congress's intent in enacting the statute and ask whether the goals have been met. In the largest sense, Congress's goal was to ensure public confidence in investigations of alleged wrongdoing by members of the executive branch. More specifically, Congress sought to accomplish two interrelated purposes with the statute. The first was to remove the presumed conflict of interest that the Department of Justice has when it is called upon to investigate fellow members of the executive branch, particularly when it is called upon to investigate the President, Vice President, or Attorney General. The second was to ensure that the person assigned to carry out this investigation was independent of control by the President or Attorney General.<sup>5</sup> Thus, removing the appearance of conflict of interest in these investigations and ensuring that an investigator would be perceived by the public as independent each worked toward reassuring the public that allegations of this sort were being impartially investigated. The accumulation of these goals was often expressed as the desire to "remove politics" from the investigation of these cases.<sup>6</sup>

In addition to its overarching goals, Congress had several secondary goals in mind, some of which potentially were in conflict with the larger purposes of the statute. Of great significance was the desire to ensure that the statute could withstand constitutional scrutiny. In fact, much of the debate during the five years that Congress considered the proposed statute centered on constitutional questions about whether law enforcement power could be removed from con-

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5. For a more extensive exploration of the legislative history of the statute, see HARRIGER, *supra* note 4, at 13-91.

6. See *Removing Politics from the Administration of Justice: Hearings on S. 2803 and S. 2978 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 93d Cong. (1974).

control by the executive branch.<sup>7</sup> Congress faced a serious dilemma: If it wanted to solve the problems of conflict of interest and appearance of independence, it had to remove or at least limit executive control; the amount of debate and resistance to the notion on constitutional grounds, however, made it very difficult to remove that control completely. There also were secondary concerns about fairness to the targets of investigations and about an “out of control” prosecutor, that worked against creating a truly independent investigator.<sup>8</sup>

In the statute ultimately adopted, Congress compromised on the independence issue. It placed the “triggering” mechanism in the hands of the Attorney General. Initial allegations were to be screened by the Attorney General in a preliminary investigation that would weed out baseless charges and acknowledge the traditional role of executive control over law enforcement.<sup>9</sup> The Attorney General also was given the authority to remove an independent counsel, subject to review by a federal district court.<sup>10</sup> But the actual appointment of an independent counsel was to rest with a special court panel made up of senior judges from the U.S. Courts of Appeals,<sup>11</sup> and it was to this panel that the independent counsel would report at the conclusion of his or her investigation.<sup>12</sup>

### III

#### ASSESSING THE EFFECTIVENESS OF THE STATUTE

Has the independent counsel statute lived up to expectations? Does it adequately address the problems Congress sought to solve? Or rather, as its critics contend, has it created its own set of problems that outweigh any benefits to be gained from its existence? A review of our two decades of experience with the statute suggests that little of what Congress hoped to accomplish has occurred. The only goal that has been met convincingly is the desire to create a constitutional statute.<sup>13</sup> This of course is laudable, and ought not to be dismissed as insignificant. But constitutional policy and good policy are not necessarily the same thing, and a constitutional policy that is for all practical purposes ineffective should not be defended.

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7. See, e.g., *id.* at 83-90 (statement of Robert G. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel, Department of Justice); *Special Prosecutor: Hearings Before the Senate Comm. on the Judiciary*, 93d Cong. 179-85 (1973) (testimony of Robert Taft, Jr., Senator from Ohio); Howard H. Baker, Jr., *The Proposed Judicially Appointed Independent Office of Public Attorney: Some Constitutional Objections and an Alternative*, 29 SW. L.J. 671 (1975); Karen H. Schneider et al., *The Special Prosecutor in the Federal System: A Proposal*, 11 AM. CRIM. L. REV. 577 (1973); Note, *Removing Politics from the Justice Department: Constitutional Problems with Institutional Reform*, 50 N.Y.U. L. REV. 366 (1975).

8. See Harriger, *History of Independent Counsel Provisions*, *supra* note 4, at 498-502 (discussing Congress's attempt to weigh the competing values of independence and accountability).

9. See 28 U.S.C. § 592(a) (1994).

10. See *id.* § 596(a).

11. See *id.* § 49.

12. See *id.* § 594(h)(1)(A).

13. The U.S. Supreme Court upheld the statute as constitutional in *Morrison v. Olson*, 487 U.S. 654 (1988).

### A. Eliminating Conflict of Interest

For constitutional reasons, Congress left the ability to trigger the appointment of an independent counsel in the hands of the Attorney General. That statutory power has become a source of controversy as Attorneys General have been criticized both for their refusal to request the appointment of independent counsels and for their decisions to make such requests.

During the Reagan Administration, both William French Smith and Edwin Meese were criticized for reading their discretion under the statute too broadly. On three separate occasions, private parties seeking to force him to trigger independent counsel investigations sued Smith. None of these suits was successful; appellate courts determined that Congress intended no private right of action to compel the Attorney General to request an appointment. Instead, the courts found the triggering decision to be unreviewable, based as it was on the Attorney General's legitimate discretion in law enforcement matters.<sup>14</sup>

Meese also was subject to considerable criticism for his interpretation of the statute. In its 1987 review of the statute, the oversight subcommittee of the Senate Government Affairs committee concluded that Meese had abused his discretion under the statute, particularly by failing to seek appointments of independent counsels in several cases where the subcommittee believed appointments had been warranted.<sup>15</sup> As a consequence, Congress amended the statute in 1987 to restrict the factors that an Attorney General can consider in conducting a preliminary investigation.<sup>16</sup>

Perhaps no Attorney General has come under more criticism for her interpretation of the statute than has Janet Reno. Prior to the campaign finance controversy, she was criticized for viewing her discretion as too limited and for requesting independent counsels too quickly.<sup>17</sup> Since the advent of the campaign finance imbroglio and her later decisions not to seek independent counsel appointments, she has encountered the opposite criticism.<sup>18</sup>

At the very least, the current arrangement has not resolved the issue of when the perception of a conflict of interest actually exists. The decision to place the triggering mechanism in the hands of the Attorney General helped Congress accomplish the goals of writing a constitutional statute and ensuring that not all allegations against covered officials would be subjected to the extraordinary measure of an independent counsel. On the other hand, it did not resolve the problem of the lack of confidence in the Attorney General's impartiality in investigating these cases or in making judgments about their serious-

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14. See *Dellums v. Smith*, 797 F.2d 817 (9th Cir. 1986); *Banzhaf v. Smith*, 737 F.2d 1167 (D.C. Cir. 1984) (en banc) (per curiam); *Nathan v. Smith*, 737 F.2d 1069 (D.C. Cir. 1984) (per curiam).

15. See S. REP. NO. 100-123, at 7-13 (1987), reprinted in 1987 U.S.C.C.A.N. 2150, 2156-62.

16. See Independent Counsel Reauthorization Act of 1987, Pub. L. No. 100-191, § 2, 101 Stat. 1293 (codified at 28 U.S.C. § 591(d)(1)-(2), § 591(e), § 592(a)(1) & (2)(B) (1994)).

17. See, e.g., Jeffrey Goldberg, *What Is Janet Reno Thinking?*, N.Y. TIMES, July 6, 1997, at § 6, 16; Anthony Lewis, *Reductio Ad Absurdum*, N.Y. TIMES, Dec. 15, 1997, at A23.

18. See Neil A. Lewis, *The Attorney General's Decision: The Reaction; Republicans React Quickly and Angrily to Reno Move*, N.Y. TIMES, Dec. 3, 1997, at A31.

ness. The Attorney General remains the critical gatekeeper in the system; the criticism simply has moved to an earlier stage of the process. The only remedy is an automatic trigger, but no one is willing to accept the inevitable consequence of such a move: the further proliferation of independent counsels.

### B. Creating an Independent Investigator

It is certainly true that Congress was successful in creating an investigative apparatus that is largely free from control by the executive branch. The irony of this "success" is that now one of the popular criticisms of the arrangement is that the independent counsel is accountable to no one. The flaw in the criticism, of course, is that by definition, control must be sacrificed in order to achieve independence. We cannot have it both ways: An accountable independent prosecutor is a contradiction in terms.

Beyond the rhetoric, however, a quite different problem exists. This problem is not a prosecutor who is too independent, but instead a prosecutor too constrained by other institutional actors in the system. In most cases, constraint is a good thing, because in our system of separated powers it is virtually impossible for an actor to exercise unchecked power.<sup>19</sup> There are times, however, when this system of institutional constraints seriously interferes with the ability of an independent counsel to carry out a successful investigation.

Perhaps the two best examples of this problem are the two most prominent cases that have arisen under the act: Iran-Contra and Whitewater. In the Iran-Contra investigation, Lawrence Walsh was hampered by Congress's parallel investigation and its decision to grant immunity to Oliver North and John Poindexter,<sup>20</sup> the Attorney General's continued control over access to classified documents needed to successfully prosecute key parts of the case,<sup>21</sup> judicial decisions that overturned his successful prosecutions,<sup>22</sup> and the President's constitutional authority to pardon those caught up in the case.<sup>23</sup> The Whitewater investigation was hampered by simultaneous congressional investigations and, in the Lewinsky matter, by the President's claims of executive privilege, Secret Service privilege, and attorney-client privilege. While more often than not the courts have ultimately sided with Starr on the legal questions,<sup>24</sup> these battles

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19. See Katy J. Harriger, *Separation of Powers and the Politics of Independent Counsels*, 109 POL. SCI. Q. 261 (Summer 1994).

20. See LAWRENCE E. WALSH, FIREWALL: THE IRAN-CONTRA CONSPIRACY AND COVER-UP 85-95 (1997).

21. See Barrett, *supra* note 4, at 535-37.

22. See *United States v. Poindexter*, 951 F.2d 369 (D.C. Cir. 1991); *United States v. North*, 920 F.2d 940 (D.C. Cir. 1990) (per curiam); *United States v. North*, 910 F.2d 843 (D.C. Cir. 1990) (per curiam).

23. See Carroll J. Doherty, *Iran Contra: Walsh Says Pardon Thwarted New Evidence on Arms Deals*, 51 CONG. Q. WKLY. REP. 325 (1993).

24. See, e.g., *In re Lindsey*, 148 F.3d 1100 (D.C. Cir.) (per curiam), cert. denied *sub nom.* Office of the President v. Office of the Independent Counsel, 119 S. Ct. 466 (1998); *In re Sealed Case*, 148 F.3d 1073 (D.C. Cir.) (per curiam), cert. denied *sub nom.* Rubin v. United States, 119 S. Ct. 461 (1998); *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir.), cert. denied, 117 S. Ct. 2482 (1997).

have been costly to the investigation, both in dollars and time. The delays are significant because it is the time and money associated with independent counsel investigations that seems to most trouble the public.

Finally, both of these investigations were subject to attacks from the White House and Congress that ultimately undermined the credibility of the investigations with the public. This loss of credibility is an important and overlooked "cost" of independence. When the executive branch is responsible for the appointment, it is far more difficult politically to attack a special prosecutor; to do so bears serious consequences, as Richard Nixon discovered. With independent appointment, by contrast, it was possible for President George Bush and Senator Bob Dole, for example, to attack Walsh as being motivated by partisanship, despite the fact that he had extensive Republican credentials.<sup>25</sup> Similarly, there was no political cost to President Clinton—and, as it turned out, much to be gained—in attacking Starr for his alleged partisanship, and it was even easier to make such attacks stick because the special court appointed an independent counsel clearly aligned with the Republican party.<sup>26</sup>

The results on the goal of independence are a mixed bag. Congress has succeeded in limiting direct executive control of the independent counsel. But behind the façade of independence, however, lurks a far more complex reality in which interdependent special prosecutors are constrained, for both good and ill, by the actions of other political actors in the system.

### C. Promoting Public Confidence

Before the Iran-Contra investigation, it could have been argued that the independent counsel statute had achieved the goal of reassuring the public that criminal allegations against public officials were being investigated impartially. It is probable that the broader public generally was unaware of the relatively obscure cases that arose under the statute prior to Iran-Contra. The attentive public, media, and government officials of the opposite party were reassured, however, at least when measured by their willingness to accept the outcomes of those cases without controversy.<sup>27</sup> After Iran-Contra, the situation has changed.

Lawrence Walsh, the Independent Counsel for Iran-Contra, was the target of escalating criticism as his investigation proceeded. Two related events in particular were used to challenge his credibility with the public: the decision to re-indict Caspar Weinberger just before the 1992 presidential election and the revelation in that indictment that George Bush was more involved in decision-making than he had admitted. These preelection events actually led to calls for

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25. See WALSH, *supra* note 20, at 413-89.

26. For discussion of the controversy over Starr's appointment, see David Johnston, *Appointment in Whitewater Turns into a Partisan Battle*, N.Y. TIMES, Aug. 13, 1994, at A1; David Johnston, *Three Judges Spurn Protest on Whitewater Prosecutor*, N.Y. TIMES, Aug. 19, 1994, at A16.

27. See HARRIGER, *supra* note 4, at 168-98.

an independent counsel to investigate the Independent Counsel.<sup>28</sup> The late indictment of Weinberger was portrayed as evidence of the dangerous consequences of allowing a prosecutor unlimited time and money to conduct an investigation.<sup>29</sup> The undermining of Walsh's credibility by his critics made it possible for congressional foes to keep the independent counsel statute from being reauthorized and for lame duck President Bush to pardon most of the targets of the investigation with very little public outcry.<sup>30</sup>

While the facts underlying the Iran-Contra and Whitewater cases are quite different, they share the distinction of being the only two cases under the statute in which the President was implicated in wrongdoing. As such, they understandably garnered far more media attention than other cases involving independent counsels. Challenges to Ken Starr's legitimacy began sooner than they did for Walsh and continued intermittently throughout his investigation, skyrocketing in 1998 after the onset of the Lewinsky matter. The Starr investigation had two principal results. First, the broader public finally achieved awareness of the existence of independent counsels. Second, contrary to Congress's goal of public reassurance, the public acquired very negative perceptions of both Starr and the statute under which he operated.<sup>31</sup> While prosecution is never a popularity contest, this negative public image is extremely important for an independent counsel. If one's primary statutory purpose is to reassure the public that impartial investigation is taking place free from executive control, and the public does not believe that this is in fact what is happening, then the final conclusions of such investigations will not obtain public acceptance. This is most problematic in cases involving the President, where any punishment for wrongdoing is likely to involve political decisionmakers responsible to the public.

Finally, the proliferation of independent counsel investigations and of calls for such investigations actually has further undermined, rather than promoted, confidence in government. Suzanne Garment argues that the independent counsel process has become part of the "scandal system" that has contributed to a "culture of mistrust" in American politics.<sup>32</sup> Referring to the widespread press coverage of independent counsel issues in 1997, Norman Ornstein wrote:

To an alien, unschooled in American politics and government, who views this year's press coverage as representative of America's process and policy focus, it might seem that every major policy figure in Washington spent most of her time calling for more independent counsels, resisting the appointment of independent counsels, raging against existing independent counsels, or investigating allegations of impropriety and lawbreaking as independent counsels. It would be easy for this alien, relying on press

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28. See *Dole Urges Inquiry About Prosecutor*, N.Y. TIMES, Nov. 9, 1992, at A13.

29. See Robert Bork, *Against the Independent Counsel*, COMMENTARY, Feb. 1993, at 21, 25-26.

30. See WALSH, *supra* note 20, at 504-05.

31. See, e.g., Dan Balz & Claudia Deane, *Hit the Road, Jack: People Wish Kenneth Starr Would Go Away, but They Are Divided About Bill Clinton*, WASH. POST NAT'L WKLY. ED., Apr. 13, 1998, at 35; Jeffrey Toobin, *Starr Can't Help It*, NEW YORKER, May 18, 1998, at 32 (noting that a NBC News/Wall Street Journal poll showed only an 18% approval rating for Starr).

32. SUZANNE GARMENT, SCANDAL: THE CULTURE OF MISTRUST IN AMERICAN POLITICS 83-108 (1991).

accounts, to believe that Washington is a nest of corruption—worse than at any time in modern memory—and filled with officials who cannot be trusted to investigate others inside the government.<sup>33</sup>

While the current distrust in government cannot be laid at the feet of the independent counsel statute alone, it does seem clear that in the current political climate there is little reason to believe that it has met the goal of public reassurance intended by Congress. In fact, Cass Sunstein argues quite convincingly that the statute creates perverse incentives that invite “scandal mongering” and “the transformation of political disputes into criminal allegations.”<sup>34</sup> There may have been a time when an independent counsel could operate out of the limelight and free of the public attention and attacks that have become part of our recent past. With Iran-Contra, however, that innocence was lost. “Politics today demand that doubt be cast on the independence, judgment or ability of an Independent Counsel where the actions of that Independent Counsel may interfere with partisan interests,” argues Julie O’Sullivan, so “[t]he object—and predictable consequence—is to undermine what the statute seeks to promote: public confidence in the integrity of the results of an Independent Counsel’s investigation in politically sensitive cases.”<sup>35</sup>

#### D. Ensuring Constitutionality

During the first decade of the statute, most of the debate about it centered on the question of its constitutionality. Despite Congress’s concerted effort to construct an arrangement that could withstand constitutional challenge, there remained critics who insisted that the statute violated the separation of powers. Even though he signed the statute’s reauthorization twice, in 1982 and 1987, Ronald Reagan continued to reject its constitutionality.<sup>36</sup> In *Morrison v. Olson*,<sup>37</sup> the U.S. Supreme Court upheld the statute, with Justice Scalia as the lone dissenter. This decisive decision put to rest most challenges to the Act’s constitutionality, confirming Congress’s belief that placing the triggering mechanism and the power of removal in the hands of the Attorney General would allow adequate control by the executive branch to pass constitutional muster.

The often overlooked consequence of the *Morrison* decision is that it leaves very little room for changing the statute, except in the direction of further executive control. The opinion emphasized the importance of the Attorney General’s role and the temporary and limited nature of the independent counsel’s jurisdiction.<sup>38</sup> Furthermore, it warned against any aggrandizement of judicial power by the special court, cautioning the panel against any action that could

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33. Norman J. Ornstein, *Doing Congress’s Dirty Work*, 86 GEO. L.J. 2179, 2179 (1998).

34. Cass R. Sunstein, *Bad Incentives and Bad Institutions*, 86 GEO. L.J. 2267, 2268 (1998).

35. O’Sullivan, *supra* note 3, at 471.

36. See Mark Willen, *A Constitutional Challenge: Balky Reagan Signs Extension of Independent Counsel Law*, 45 CONG. Q. WKLY. REP. 3166 (1987); *President’s Statement on Independent Counsel Reauthorization Act of 1987*, 23 WKLY. COMP. PRES. DOC. 1526 (Dec. 15, 1987).

37. 487 U.S. 654 (1988).

38. See *id.* at 685-96 (discussing separation of powers concerns).



be interpreted as going beyond the limited administrative duties granted to it under the statute.<sup>39</sup> Consequently, unless Congress wants to reopen the question of constitutionality—the one goal it has met convincingly with the current statute—it should not entertain ideas for reform that further restrict or remove the Attorney General or that expand the supervisory authority of the special court.

#### E. Ensuring Fairness to the Target

In 1978, concerns about the statute's fairness to the targets of investigations were addressed in several ways, centering on the desirability of avoiding the premature airing of charges against covered officials. First, the power to conduct the preliminary investigation was placed in the hands of the Attorney General so that frivolous and unsupported allegations could be screened out.<sup>40</sup> The statute also allowed for the possibility that the Attorney General's report to the special court, the appointment of an independent counsel, and the final report of the independent counsel could be kept secret. The special court was given the authority to decide whether to make any of these documents or decisions public.<sup>41</sup>

The first two cases under the statute, the investigations of Carter Administration staffers Hamilton Jordan and Timothy Kraft for alleged social cocaine use, renewed concerns about the statute's fairness. Both cases led to grand jury investigations, despite the fact that neither would have prompted such an investigation by the Department of Justice had similar minor allegations been made against a regular citizen or a noncovered official. In the 1983 reauthorization of the statute, Congress provided for the award of attorneys' fees to targets who were not indicted at the conclusion of an independent counsel investigation.<sup>42</sup> In addition, Congress gave the Attorney General new discretion to consider the credibility of sources alleging misconduct by covered officials<sup>43</sup> and encouraged the independent counsel to follow the prosecutorial guidelines and policies of the Department of Justice "except where not possible."<sup>44</sup>

There have been allegations against covered officials that have been effectively screened out prior to public exposure, and there have been independent counsels appointed without public announcement.<sup>45</sup> But most cases have been made public, as have the final reports of most independent counsels. Even before the notorious Starr Report, there was concern that the reporting requirement further exposed targets to unfair publicity. The damage done in these in-

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39. *See id.* at 677-84.

40. *See* 28 U.S.C. § 592 (1994).

41. *See id.* §§ 592-594.

42. *See id.* § 593(f).

43. *See id.* § 592(a).

44. *See id.* § 594(f).

45. For a discussion of the Attorney General's discretion in screening cases, see HARRIGER, *supra* note 4, at 123-27. For a list of cases revealing two appointments (in 1989 and 1991) that remain confidential, see Sunstein, *supra* note 34, at 2284-85.

vestigations has affected both reputations and pocketbooks. Targets and others caught up in the investigations have incurred significant costs for legal representation.<sup>46</sup> The reimbursement provisions actually have led some people involved in these investigations to ask to be called targets in order to have some chance of recouping their legal expenses.<sup>47</sup>

Questions of fairness also have been raised about the lack of time and budget restrictions on independent counsels. With a single case, an open checkbook, and no time limit, independent counsels can leave no stone unturned when investigating a covered official. O'Sullivan argues that rather than providing "better justice" for covered officials, the statute creates a situation of unfairness, giving the independent counsel "an excess of time, means and incentive to pursue a far greater number of people, over a wider investigatory landscape, with less justification, and at greater human, financial and institutional cost than is reasonably necessary to promote the reality, or appearance, of evenhanded justice."<sup>48</sup> It is important to note that not all independent counsels in the last twenty years have taken advantage of these opportunities. But as Cass Sunstein notes, by giving independent counsels a single case in the public spotlight and no financial or time limit on his or her ability to pursue it, the statute

eliminates some of the key safeguards built into the ordinary role of the prosecutor. . . . An independent counsel who uncovers nothing is likely to look as if he has more or less wasted his time, or done nothing, whereas an independent counsel who brings a prosecution . . . is likely to look, in at least some circles, like another Archibald Cox, a kind of hero of democratic ideals.<sup>49</sup>

There seems no way around this problem that would not substantially interfere with other goals of the Act. Too much supervision by either the Attorney General or the special court would run afoul of the goals of independence or constitutionality. Placing artificial time and budget restrictions on the independent counsel in order to force the same kind of resource decisions that regular prosecutors make would only provide incentives for targets with something to hide to practice delaying tactics. As long as the independent counsel statute remains in its current formulation, these problems will persist: They are the inevitable consequence of choosing to emphasize the goal of independence over the desire for accountability.

#### F. The Case for Expiration of the Statute

Given the limited success of the independent counsel statute in meeting the goals established for it by Congress, it is difficult to defend another reauthori-

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46. See Kathleen Clark, *Paying the Price for Heightened Ethics Scrutiny: Legal Defense Funds and Other Ways That Government Officials Pay Their Lawyers*, 50 STAN. L. REV. 65 (1997).

47. See Interview with Michael Zeldin, Independent Counsel in Clinton passport files case, Washington, D.C. (June 29, 1998); Interview with Joseph diGenova, Independent Counsel in Clinton passport files case, Washington, D.C. (June 24, 1998).

48. O'Sullivan, *supra* note 3, at 475.

49. Sunstein, *supra* note 34, at 2279.

zation. Twenty-five years have passed since the Saturday Night Massacre, when Archibald Cox was fired and public outcry led to Congress's efforts to find a solution to the executive control of special prosecutors. Twenty years have passed since the passage of the independent counsel provisions. We have sufficient distance from the trauma of Watergate and sufficient experience with the independent counsel statute to know that there is no silver bullet that can solve the problems highlighted by that scandal. In fact, the solution has neither solved the problem of politicized justice nor reassured the public that such a goal is possible.

We find ourselves, on the eve of the next reauthorization, in a political climate so divided and embittered by scandal politics that it is difficult to imagine a serious, deliberative, and bipartisan effort to think carefully about the costs and benefits of statutory independent counsels. Tinkering with the statute as Congress did in its previous reauthorizations will not adequately remedy its flaws. The very concept of an independent counsel must be reconsidered, with the memory of Watergate as only one piece of the evidence we use for that re-assessment. We must include as well what we know from our recent experience with post-Watergate reform and our past experience with two centuries of *ad hoc* appointments of special prosecutors. These experiences suggest that when we need special prosecutors we will get them, and that for most of the cases now covered under the statute, the Department of Justice is capable and equipped to provide a "better justice" than is an independent counsel.<sup>50</sup>

#### IV

##### REFORMING THE INDEPENDENT COUNSEL STATUTE

The independent counsel statute has become a tool by which media and partisan elites jockey for position in the power politics inside the Beltway. Now that both sides of the partisan debate have been hurt by its use, there is far less enthusiasm for it than there was in the past. On the other hand, the experience between 1992, when the statute was allowed to expire, and 1994, when it was reauthorized and then used to appoint Ken Starr to the Whitewater investigation, suggests that neither side is prepared to abandon the notion altogether for very long. Should a movement arise for the maintenance of some kind of statutory mechanism for independent investigation, there are reforms that would make such an arrangement a better one.

##### A. Return Appointment Power to the Executive

The twenty-year experiment with judicial appointment has produced mixed results for both removing conflicts of interest and promoting the appearance of impartiality. As long as the triggering mechanism remains in the hands of the Attorney General, the problem of the appearance of conflict has not been resolved. More recently, the independence of the special court itself and the im-

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50. HARRIGER, *supra* note 4, at 200; O'Sullivan, *supra* note 3, at 475.

partiality of independent counsels have been called into question, politicizing the very process designed to “remove politics” from these cases.<sup>51</sup> Given these two realities, it would be both more honest and more practical to return appointment power to the Attorney General.

The most significant advantage to executive appointment of the independent counsel is the enhancement of accountability. Twenty-five years after the firing of Archibald Cox, there is as much concern about the abuse of power by the independent counsel as there is about the abuse of power by the President. Some of that concern has been based on real issues about how recent prosecutors have used their power, but much of it is manufactured by partisan supporters of the targets. Appointment by the executive branch would hold the independent counsel accountable, but also would make the executive accountable for the actions of the independent counsel. An administration would be hard-pressed to accuse its own investigator of engaging in partisan “witch hunts” or “vast right-wing conspiracies.” Conversely, the public and media and partisan opponents would force the Attorney General to make an appointment in which they had confidence.

#### B. Limit the Coverage of the Act

Far fewer executive branch officials should be automatically covered by the statute. Most of the cases that have been investigated by independent counsels could have been handled by the Department of Justice without a conflict of interest. The only officials for which there should be serious consideration of mandatory coverage are the President, Vice-President, and Attorney General. All other potential cases for independent investigation should fall under a catch-all category that requires the finding of an *actual* conflict of interest by the Attorney General or the Department of Justice before an independent investigation is triggered.

#### C. Raise the Standard for Triggering Appointment

Currently, the Attorney General is required to request the appointment of an independent counsel if she cannot conclude within ninety days that “no further investigation or prosecution is warranted.”<sup>52</sup> This standard is too low, particularly the “no further investigation” provision. It is a rare case that requires no further investigation, especially when the Department of Justice cannot use subpoenas or grand juries<sup>53</sup> and must rely on the voluntary cooperation of all witnesses. The Attorney General’s discretion should be expanded at least enough to allow more time to investigate using the tools that would make such an investigation effective. When she uncovers “evidence of criminal wrongdo-

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51. See O’Sullivan, *supra* note 3, at 470-75.

52. 28 U.S.C. § 592(b) (1994). She may apply to the court panel for one 60-day extension. See *id.* § 592 (a)(3) (1994).

53. See *id.* § 592(a)(2).

ing that merits the empanelling of a grand jury for further investigation," she should appoint a special prosecutor to pursue that investigation.

#### D. Remove the Role of Congressional Committees

The statute currently allows a majority of the members of either party on the Judiciary Committee of either chamber of Congress to write to the Attorney General requesting the appointment of an independent counsel. The Attorney General is not required to comply but is required to respond in writing to that request.<sup>54</sup> Structured along party lines, this provision is an invitation to partisan abuse of the independent counsel process. Removing this incentive to call for independent counsels would not remove the existing right of Members of Congress to publicly encourage the Attorney General to make such an appointment. It would, however, remove the coercion implicit in the current provisions and help reduce the partisan climate within which these cases occur.

#### E. Remove or Clarify the Impeachment Referral Clause of the Statute

The controversy over the Starr Report and the Independent Counsel's subsequent testimony before the House Judiciary Committee has drawn attention to the impeachment referral clause of the statute for the first time. Congress included this provision to create a process similar to that which took place in Watergate. The House Judiciary Committee and the Watergate Special Prosecution Force conducted simultaneous investigations. There was some exchange of information between the two investigations, and Leon Jaworski shared a "road-map" of evidence with the Committee that helped shape the impeachment counts against President Nixon.<sup>55</sup> Such activities, however, are quite different from the relationship between Ken Starr and the House Judiciary Committee in the Lewinsky matter. The clause was not intended to make the independent counsel an official impeachment investigator, nor did it authorize him to be the chief witness in favor of impeachment in congressional proceedings.<sup>56</sup>

Congress should simply remove this clause from the statute. While well intended in principle, it suffers from flaws of both a constitutional and interpretational nature. Constitutionally, it invites Congress to avoid its own responsibility for carrying out careful and deliberate investigations of potentially impeachable offenses.<sup>57</sup> As a matter of interpretation, the clause is so vague that it invites the kind of misreading made by Starr of his authority under the clause. If left in the statute, the impeachment referral clause should be clarified to make clear that it permits only the passing on of allegations, not the actual assertion of the factual and legal arguments for or against impeachment.

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54. *See id.* § 592(g).

55. HARRIGER, *supra* note 4, at 28-29.

56. *See generally* Julie R. O'Sullivan, *The Interaction Between Impeachment and the Independent Counsel Statute*, 86 GEO. L.J. 2193 (1998).

57. *See id.*

## V

## CONCLUSION

The independent counsel provisions of the Ethics in Government Act were a well-intentioned effort to respond to the problems of governance revealed in the Watergate scandal, particularly, the Saturday Night Massacre. Twenty years and twenty investigations later, it is time to ask whether the experiment merits continuation. While much of the criticism of the independent counsel statute has been exaggerated and driven by partisan motives rather than policy evidence, there is real doubt whether the statute is an effective means for addressing the problem of politicized investigations of executive branch officials. Before reauthorizing the statute in 1999, Congress should consider seriously the possibility that most cases do not warrant resort to this extraordinary measure and that most cases can be handled by the Department of Justice. In the few cases meriting special, independent investigation, the Attorney General should be authorized to make the appointment of a special investigator and then be held accountable for the quality of that appointment. Congress may formalize this procedure by statute or, by failing to act, simply return to the system of *ad hoc* appointment used prior to 1978 and from 1992 to 1994. With either result, the outcome would be no more politicized a process than that which the current statute has spawned.