



Independent Counsels, Special Prosecutors, Special Counsels, and the Role of Congress

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Summary

This report provides information on the procedure for the appointment of an “independent counsel,” a “special prosecutor,” or a “special counsel” to investigate and prosecute potential or possible violations of federal criminal law by officials in the executive branch of the federal government and in federal agencies. Specifically examined is the role or authority of Congress in requiring an independent or special counsel investigation of executive branch officials.

Under the Constitution and its separation of powers principles and structure, Congress has no direct role in federal law enforcement, nor in triggering or initiating the appointment of any prosecutor for any particular matter (other than the advice and consent role of the Senate regarding certain nominations made by the President). Congress, however, has recognized inherent authority to conduct oversight hearings and legislative investigations by its committees into misconduct, mismanagement, or any other malfeasance relating to the officers and agencies of the executive branch of government to assure the government’s proper functioning, to assure the proper expenditure of funds that Congress appropriates, and to explore the need for remedial legislation. Revelations from such investigations and oversight, in addition to providing information for remedial legislation, may contribute to the public pressure on the Administration or Department of Justice to appoint an “independent” counsel or prosecutor to investigate uncovered evidence or allegations of wrongdoing by persons in the Administration.

Congress may also have a legislative role in designing a statutory mechanism for the appointment of “independent counsels” or “special prosecutors,” as it did in title VI of the Ethics in Government Act of 1978. Under the provisions of that law relating to the appointment of “independent counsels” (called “special prosecutors” until 1983), the Attorney General was directed to petition a special three-judge panel of the U.S. Court of Appeals to name an independent counsel upon the receipt of credible allegations of criminal misconduct by certain high-level personnel in the executive branch of the federal government whose prosecution by the Administration might give rise to an appearance of a conflict of interest. In 1999, Congress allowed the “independent counsel” provisions of law to expire. Upon the expiration of the law in June of 1999, no new “independent counsels” or “special prosecutors” may be appointed by a three-judge panel upon the application of the Attorney General.

The Attorney General retains the general authority to designate or name individuals as “special counsels” to conduct investigations or prosecutions of particular matters or individuals on behalf of the United States. Under regulations issued by the Attorney General in 1999, the Attorney General may appoint a “special counsel” from outside of the Department of Justice who acts as a special employee of the Department of Justice under the direction of the Attorney General. The Attorney General, however, may also appoint an individual as a special counsel, and may invest that individual with a greater degree of independence and autonomy to conduct investigations and prosecutions, regardless of any “special counsel” regulations, as Attorneys General did in 1973, 1994, and 2003. In 1973, Attorney General Elliot Richardson named Archibald Cox to be the “special prosecutor” for the “Watergate” investigation; in 1994, during an earlier expiration of the independent counsel provisions of law, Attorney General Janet Reno named a “regulatory” independent counsel Robert Fisk to investigate allegations concerning the matter known as “Whitewater”; and in 2003, Attorney General Ashcroft recused himself from the investigation of the leak of the identity of a CIA agent, and Deputy Attorney General Comey named U.S. Attorney Patrick Fitzgerald to be special counsel “with all the authority of the Attorney General” to pursue that matter.

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Allegations of misconduct by federal officials in the executive branch of the federal government often lead to a renewed interest in the mechanisms of the appointment of a “special prosecutor,” an “independent counsel,” or a “special counsel” to investigate and possibly to prosecute cases of perceived or potential criminal misconduct against government officials. Specifically, in the context of the appointment of a special prosecutor, an independent counsel, or a special counsel, questions have arisen concerning the particular role of Congress in this process.

Role of Congress; Investigations and Legislation

Congress may initiate and conduct congressional investigations and hearings through various committees—including standing committees, select committees, or joint committees—into a wide range of the details, scope, authority, and impact of programs, policies, and conduct of executive branch officials and agencies of the federal government. Congress has a recognized inherent authority for oversight of the executive agencies and departments of government to ensure their efficient and proper functioning according to the laws that Congress has passed, to assure the proper expenditure of funds that Congress appropriates, and to explore and consider the need for possible remedial legislation.¹

Under separation of powers principles provided structurally within the Constitution, however, any *criminal* prosecutions on behalf of the United States relating to liability of any officer or employee of the government, or concerning the conduct of any other persons who may violate federal law, are considered to be executive functions under Article II of the U.S. Constitution, and ultimately under the authority of the President to “take Care that the laws be faithfully executed.”² Within the structure of the U.S. Government and the executive branch, all law enforcement functions involving criminal prosecutions on behalf of the United States are to be conducted by the Department of Justice, under the direction of the Attorney General of the United States, or his or her designee.³

Congressional hearings and investigations, in addition to providing general oversight and information for possible remedial legislation, may bring to light information and facts which may contribute to the public pressure on the Administration or the Attorney General to appoint an “independent” counsel or prosecutor to investigate matters in which high-level officials of the Administration might be implicated. In 1973, during the press and congressional revelations in the “Watergate” matter, the nomination of then-Defense Secretary Elliot Richardson to be Attorney General was pending before the Senate for advice and consent. The Senate Committee reviewing the nomination obtained from Mr. Richardson an agreement that he would name an “independent” special prosecutor to pursue the “Watergate” allegations,⁴ and Mr. Richardson, as

¹ *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927); *Watkins v. United States*, 354 U.S. 178, 200 (1957); *Eastland v. United States Servicemen’s Fund*, 421 U.S. 491, 509 (1975); *Nixon v. Administrator of General Services*, 433 U.S. 435 (1977), concerning Congress’ implied oversight and investigative authority incident to its Article I, legislative powers. See, generally, CRS Report RL30240, *Congressional Oversight Manual*, by Todd Garvey et al.; CRS Report R41079, *Congressional Oversight: An Overview*, by Walter J. Oleszek.

² U.S. CONST., art. II, §3. *Morrison v. Olson*, 487 U.S. 654, 685 - 697 (1988), holding that federal law enforcement is an Article II, executive function.

³ See 28 U.S.C. §§516, 519, 547.

⁴ Hearings, Senate Committee on the Judiciary, *Nomination of Elliot L. Richardson to be Attorney General*, 93rd Cong., at 5-7, 18-20 (May 9, 1973).

Attorney General, then appointed under his own authority former federal judge Archibald Cox as “special prosecutor.”⁵ In 2003, responding to public pressure and congressional calls for independent scrutiny of the allegations concerning possible White House connections to the leaking of the identity of a covert CIA employee, the Justice Department in the Bush Administration named a current U.S. Attorney, Patrick Fitzgerald, as a “special counsel” with full independent authority and autonomy to pursue the matter.⁶

“Independent Counsel” or “Special Prosecutor” Legislation

In addition to congressional investigation and informational functions, Congress may have a legislative role in creating in law a mechanism for the appointment of independent counsels or special prosecutors in certain circumstances, as was done in 1978 largely in response to the incidents collectively known as “Watergate.”⁷ Originally enacted as title VI of the “Ethics in Government Act of 1978,”⁸ these provisions of law had authorized the appointment of “independent counsels” (or “special prosecutors,” as they were known before 1983) by a special three-judge panel of the U.S. Court of Appeals for the District of Columbia upon the application of the Attorney General.

Those parts of the Ethics in Government Act relating to independent counsels regularly had five-year “sunset” provisions, and were eventually allowed by Congress to expire after June 30, 1999.⁹ Since the law’s expiration no “independent counsel” or “special prosecutor,” as those terms have been used since 1978, may now be appointed by an independent judicial panel upon the request of the Attorney General to investigate or prosecute a matter on behalf of the United States.

Under the former independent counsel law, *only* the Attorney General of the United States was authorized to request an appointment of an “independent counsel,”¹⁰ and that mechanism was one of the reasons that the Supreme Court had found the former provisions of law constitutional against separation of powers and Appointment Clause challenges.¹¹ Although the former independent counsel statute had been phrased in mandatory terms (the Attorney General “shall apply” for an independent counsel in certain specified circumstances), the decision to seek the

⁵ 38 Fed. Reg. 14688 (June 4, 1973).

⁶ See transcript of the Department of Justice Press Conference, Deputy Attorney General James Comey, December 30, 2003, at http://www.justice.gov/archive/osc/documents/2006_03_17_exhibits_a_d.pdf (Appendix D), and letters from Deputy Attorney General James B. Comey, to Patrick J. Fitzgerald, United States Attorney, December 30, 2003, and February 6, 2004.

⁷ For background information, see, for example, Maskell, *The Independent Counsel Law*, FEDERAL BAR JOURNAL, Vol. 45, No. 6, at 29-30 (July 1998).

⁸ P.L. 95-521, title VI, 92 Stat. 1867 (October 26, 1978). Appointees of the special judicial panel had originally been called “special prosecutors,” but were re-named “independent counsels” in the provisions’ reauthorization and amendment in 1983. P.L. 97-409, §2(a)(1), 96 Stat. 2039-41 (Jan. 3, 1983).

⁹ The law was reauthorized for the last time on June 30, 1994, P.L. 103-270, 108 Stat. 732, and expired under the five-year “sunset” provision on June 30, 1999.

¹⁰ 28 U.S.C. §592.

¹¹ *Morrison v. Olson*, *supra* at 694-695, noting Congress’ limited role in the statutory scheme and the fact that the judicial branch entity “has no power to appoint an independent counsel *sua sponte*; it may only do so upon the specific request of the Attorney General.... ”

appointment of an independent counsel was always a matter within the Attorney General's discretion, and was *not* reviewable in court.¹²

The role of Congress under the former independent counsel law was very limited. Under the former provisions of law, Congress could not “order” or “trigger” the appointment of a prosecutor or independent counsel, because of constitutional separation of powers principles, but majorities of either party within the House or Senate Judiciary Committees could have requested action by the Attorney General.¹³ The Attorney General was not required to apply for the appointment of an independent counsel in response to such congressional request; and if the Attorney General did not make such application, he or she was directed merely to respond to Congress with the reasons an independent counsel was not appointed.¹⁴

The mechanisms for appointing counsels under the former law were “triggered” when the Attorney General received “specific” and “credible” information alleging that certain high-level officials in the Administration had committed serious federal offenses, or when the Attorney General determined that an investigation of allegations of a violation of a federal criminal statute by any person would create “a personal, financial, or political conflict of interest” for the Department of Justice to investigate or prosecute.¹⁵ Thus, while addressing the conflict of interest inherent in an administration's investigation of one of its own members was the principal purpose of the statute, the law also provided a so-called “catch-all” provision, added in 1983, to allow the Attorney General to request an independent counsel for anyone, whether or not the person was in the President's Administration, when the Attorney General perceived a conflict of interest for the Department of Justice to investigate or prosecute the matter.

It is possible, in theory, that Congress could reauthorize the independent counsel law, or provisions of law somewhat similar to the former independent counsel law, to instruct the Attorney General to seek the appointment of an “independent counsel” under certain circumstances. It may be noted in this regard that the independent counsel law had, in fact, been allowed to expire previously for a period of time: in 1992 the law expired under its five-year “sunset” provision when it was not reauthorized in the 102nd Congress. It was not until the publicity in the so-called “Whitewater” matter that Congress eventually reauthorized the law again in 1994.¹⁶

“Special Counsels” and Department of Justice Regulations

When the independent counsel law expired after June 30, 1999, the Attorney General promulgated specific regulations concerning the appointment of outside, temporary counsels in certain circumstances.¹⁷ Such personnel appointed by the Attorney General from outside of the Department of Justice to conduct investigations and possible prosecutions of certain sensitive matters, or matters which may raise a conflict of interest for Justice Department personnel, are called “special counsels.” These special counsels are appointed by, are answerable to, and may

¹² 28 U.S.C. §592(f). *Morrison v. Olson*, *supra* at 695.

¹³ 28 U.S.C. §592(g)(1).

¹⁴ 28 U.S.C. §592(g)(2) and (3).

¹⁵ 28 U.S.C. §591(a), (b), and (c).

¹⁶ P.L. 103-270, 108 Stat. 732, June 30, 1994.

¹⁷ 28 C.F.R. Part 600, §§600.1 to 600.10; 64 Fed. Reg. 37038-37044, July 9, 1999.

have their prosecutorial or investigative decisions countermanded by, the Attorney General. The “special counsels” under these regulations have, therefore, by express design, less “independence” from the Attorney General and the Department of Justice than did the “independent counsels” under the Ethics in Government Act of 1978, or the “special prosecutors” appointed by the Attorney General for the Watergate matter. One special counsel that was appointed under the new regulations, former Senator John Danforth, was appointed by Attorney General Reno on September 9, 1999, to be special counsel to investigate the “Branch Davidian incident” near Waco, Texas, to determine if there had been any misconduct on the part of federal law enforcement personnel.

Under the Justice Department regulations, the appointment of a “special counsel” is completely discretionary with the Attorney General. The criteria for the Attorney General’s decision is whether a prosecution or investigation of a “matter” or of a person may raise a conflict of interest for the Department of Justice, or whether there exist “other extraordinary circumstances,” and when, in light of these conflicts or circumstances, the Attorney General finds that it is in the “public interest” to appoint such counsel.¹⁸ The most significant departures in the “special counsel” regulations from the former statutory “independent counsel” schemes are that (1) the Attorney General, and not an independent body such as the three-judge panel, actually names the person who is to be the special counsel; (2) the Attorney General, and not an outside panel, establishes and defines the prosecutorial jurisdiction of the special counsel; (3) the general jurisdiction of the special counsel is limited to the specific matter referred to him or her (and not also to “related” matters), as well as collateral offenses arising out of the investigation which “interfere” with the investigation; (4) the special counsel is subject to all the notification, and “review and approval” provisions of the internal Department of Justice procedures, policies, and practices (but may circumvent certain review and approval procedures by consulting directly with the Attorney General); (5) the Attorney General must be notified concerning significant actions that the special counsel is to take, and may countermand any proposed action by the special counsel; (6) appeals of cases by the special counsel must be approved by the Solicitor General of the United States, a presidential political appointee; and (7) Justice Department regulations provide that a special counsel may be removed by the Attorney General for “misconduct, dereliction of duty, incapacity, conflict of interest, or for other good cause, including violation of Department policies,” while the statute provided that independent counsels could be removed by the Attorney General for “good cause, physical or mental disability.”

Other “Special Counsels”

In addition to the specific special counsel regulations promulgated in 1999, the Attorney General of the United States, under the general statutory authority of the Attorney General to hire staff and oversee the conduct of federal criminal investigations and prosecutions, may appoint staff to the Department of Justice on a part-time or intermittent basis, or may re-assign current prosecutorial personnel already employed by the Department, to conduct and coordinate particular criminal investigations and possible criminal prosecutions.¹⁹

¹⁸ 28 C.F.R. §600.1, also §600.2. If the Attorney General is recused from a matter, then the Acting Attorney General will appoint when deemed warranted. For a broader discussion of the “special counsel” regulations, see CRS Report RL31246, *Independent Counsel Law Expiration and the Appointment of “Special Counsels”*, by Jack Maskell.

¹⁹ 28 U.S.C. §§509, 510, and 515.

With the increased public attention in 1993-1994 to allegations concerning the President and First Lady in what became known as the “Whitewater” matter, the Attorney General of the United States, not having a statute under which to request the appointment of an independent counsel by a court, named on her own authority a “special counsel” or “regulatory independent counsel,” with authority and powers nearly identical to those of statutory independent counsels to investigate and potentially to prosecute any wrongdoing involved in the “Whitewater” and related matters.²⁰

On December 30, 2003, Deputy Attorney General James B. Comey, in his capacity as Acting Attorney General (upon recusal of Attorney General Ashcroft), designated Patrick Fitzgerald, U.S. Attorney for the Northern District of Illinois, as the “special counsel” to investigate the alleged unauthorized disclosure of a CIA employee’s identity. Special Counsel Fitzgerald was delegated significantly more independence in his authority and operations than a special counsel would have under the existing regulations promulgated in 1999.²¹ It may be noted that the Government Accountability Office ruled that the expenses for the investigation by Special Counsel Fitzgerald, although he was not appointed under the standing “special counsel” regulations promulgated by the Department of Justice, and was a current and existing U.S. Attorney, could be paid from the permanent, indefinite appropriation for independent counsels in the Department of Justice.²²

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²⁰ 59 Federal Register 5321-5322, February 4, 1994. After the reauthorization of the independent counsel statute in 1994, the special three-judge panel appointed a new, statutory independent counsel.

²¹ See letters from James B. Comey, Acting Attorney General, to Patrick J. Fitzgerald, United States Attorney, December 30, 2003, and February 6, 2004, setting out the broad delegation of authority of Fitzgerald and distinguishing his designation from the appointment of a special counsel under the existing DOJ regulations at 28 C.F.R. Part 600.

²² United States Government Accountability Office, B-302582, *Special Counsel and Permanent Indefinite Appropriation*, September 30, 2004.