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*INDEPENDENT COUNSEL PROVISIONS: AN  
OVERVIEW OF THE OPERATION OF THE LAW*

Jack Maskell, American Law Division

Updated March 20, 1998

**Abstract.** This report provides a brief overview and "walk through" of the statutory mechanisms of the independent counsel law, including the role in the independent counsel process of the Attorney General of the United States, and the special three-judge panel of the United States Court of Appeals. The current independent counsel law has a five-year "sunset," and will expire in June 1999.

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## Independent Counsel Provisions: An Overview of the Operation of the Law

March 20, 1998

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## **ABSTRACT**

This report provides a brief overview and "walk through" of the statutory mechanisms of the independent counsel law, including the role in the independent counsel process of the Attorney General of the United States, and the special three-judge panel of the United States Court of Appeals. The current independent counsel law has a five year "sunset," and will expire in June of 1999.

# Independent Counsel Provisions: An Overview of the Operation of the Law

## Summary

The statutory mechanisms of the independent counsel law are triggered by the receipt of information by the Attorney General of the United States which alleges a violation of any federal criminal law (other than certain misdemeanors or "infractions") by a person covered by the Act. Certain high-level federal officials, for whom an *inherent* conflict of interest may exist in normal Justice Department criminal law enforcement, are "automatically" covered by the law. Additionally, the Attorney General has discretion to seek an independent counsel for any person for whom there may exist a personal, political or financial conflict of interest for Justice Department personnel to investigate; and the Attorney General may seek an independent counsel for any Member of Congress (rather than have the Department of Justice conduct the proceedings) when the Attorney General deems it to be in the "public interest."

After conducting a limited review of the allegations (a 30-day threshold examination of the credibility and specificity of the charges, and a subsequent 90-day preliminary investigation, with a possible 60-day extension), the Attorney General, if he or she believes that "further investigation is warranted," applies to a special "division of the court," a federal three-judge panel appointed by the Chief Justice of the Supreme Court, requesting that the division of the court appoint an independent counsel. The Attorney General of the United States is the *only* officer in the government who may apply for the appointment of an independent counsel. The special division of the court actually selects and appoints the independent counsel, and designates his or her prosecutorial jurisdiction, based on the information provided the court by the Attorney General. The independent counsel has the full range of investigatory and prosecutorial powers and functions of the Attorney General or other Department of Justice employees. Although Congress may call on the Attorney General to apply for an independent counsel by a written request from the House or Senate Judiciary Committee, or a majority of members of either party of those committees, the Attorney General is not required to begin a preliminary investigation or to apply for an independent counsel in response to such a request, but must provide certain information to the requesting committee.

There is no specific term of appointment for independent counsels, and they serve for as long as it takes to complete their duties concerning that specific matter within their defined and limited jurisdiction. Once a matter is completed, the independent counsel is to file a final report. The special division of the court may find that the independent counsel's work is completed, and may terminate the office. A periodic review of an independent counsel for such determination is to be made by the special division of the court. An independent counsel, *prior* to the completion of his or her duties, may be removed from office (other than by impeachment and conviction) only by the Attorney General of the United States for cause, mental or physical impairment, or other impairing condition, and such removal may be appealed to the court.

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# Independent Counsel Provisions: An Overview of the Operation of the Law

The statutory provisions for the appointment of an independent counsel (formerly called "special prosecutor") were originally enacted as Title VI of the Ethics in Government Act of 1978,<sup>1</sup> and are codified at 28 U.S.C. §§ 591-599. The statute "lapsed" due to its five-year sunset provision and the absence of congressional reauthorization by the end of 1992, but was again reauthorized in 1994. The current provisions of the law will expire, if not reauthorized, on June 30, 1999. The mechanisms of the Ethics in Government Act concerning the appointment and the activities of an independent counsel were upheld against constitutional challenges by the Supreme Court in *Morrison v. Olson*.<sup>2</sup>

## Background, Operation and Coverage of the Act

The Attorney General of the United States is the only officer designated by statute who may apply for the appointment of an independent counsel.<sup>3</sup> The statutory mechanisms are triggered by the receipt of information by the Attorney General alleging violations of any federal criminal law (other than Class B or C misdemeanors or "infractions") by one of the persons covered by the Act.<sup>4</sup> If, after conducting a limited review of the matter, the Attorney General determines that there are "reasonable grounds to believe that further investigation is warranted," the Attorney General applies to a special federal three-judge panel requesting that the panel appoint an independent counsel.

The original intent of the Act was to provide a mechanism to avoid the inherent or structural conflicts of interest, or the appearances of conflicts or of "conflicting loyalties," which could arise where the Attorney General or the President must supervise or conduct criminal prosecutions of themselves, or of high level officials or

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<sup>1</sup>P.L. 95-521, as amended and reauthorized by P.L. 97-409, P.L. 100-191, and P.L. 103-270.

<sup>2</sup>487 U.S. 654 (1988). For a general discussion of that decision, see CRS Report 92-134, "*Morrison v. Olson*: Constitutionality of the Independent Counsel Law," June 30, 1988, revised February 5, 1992.

<sup>3</sup>28 U.S.C. §§ 591, 592. The Supreme Court noted that separation of powers concerns raised by the appointment by a *court* of a prosecutor to perform *executive* law enforcement functions are mitigated by the fact that an independent counsel may be appointed "only ... upon the specific request of the Attorney General." *Morrison v. Olson*, 487 U.S. *supra* at 695.

<sup>4</sup>28 U.S.C. § 591(a).

colleagues in the President's Administration.<sup>5</sup> Since under our Constitution, and under our scheme of government with its separation of powers, the executive branch enforces the federal law, the persons automatically covered by the Act were those classes of persons which experience, such as the Teapot Dome and Watergate scandals, indicated could create the greatest potential for inherent conflicts of interest, or of conflicting loyalties, when the executive branch, through its normal enforcement mechanisms, had to conduct a criminal law enforcement activity directed at itself or its high ranking officials.

Persons automatically covered by the Act include (1) the President and Vice President; (2) persons serving in positions listed in 5 U.S.C. § 5312 (cabinet level positions); (3) an individual working in the Executive Office of the President compensated at a rate equivalent to level II of the Executive Schedule under 5 U.S.C. § 5313; (4) any Assistant Attorney General, or Justice Department employee compensated at or above a level III of the Executive Schedule under 5 U.S.C. § 5314; (5) the Director and Deputy Director of the C.I.A., and the Commissioner of the I.R.S.; (6) persons holding those positions specified in (1)-(5) for one year after leaving their positions; and (7) the chairman and the treasurer of the national campaign committee seeking the election or reelection of the President, and any officer of that committee exercising authority at the national level, during the incumbency of the President.<sup>6</sup>

In addition to investigating information concerning possible violations of federal criminal law by persons specifically designated or "automatically" covered in the Act, for whom there may exist an inherent conflict of interest in federal law enforcement, the Attorney General also has discretionary authority to request the appointment of an independent counsel for other persons, including specifically Members of Congress. The Attorney General may conduct a preliminary investigation and apply for an independent counsel concerning alleged violations of law by any person not specified in the automatic coverage, if the Attorney General determines that an investigation by him or her, or by other Department of Justice officials, may result in a "personal, financial, or political conflict of interest."<sup>7</sup> This discretionary "catchall" provision was added to the law in 1983 to allow the Attorney General the discretion to apply for an independent counsel even in those circumstances where the official was not "automatically" covered, but where the Attorney General felt that the best interests of justice would call for the appointment of someone independent from the control and authority of the President or from the Attorney General.<sup>8</sup>

The Attorney General is now also expressly authorized to request an independent counsel for a Member of Congress, even if no explicit "conflict of interest" is found

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<sup>5</sup>For a general discussion, see CRS Report 87-192, "Legislative History and Purposes of Enactment of the Independent Counsel (Special Prosecutor) Provisions of the Ethics in Government Act of 1978," March 4, 1987.

<sup>6</sup>28 U.S.C. § 591(b).

<sup>7</sup>28 U.S.C. § 591(c)(1).

<sup>8</sup>Note S.Rept. 97-469, 97<sup>th</sup> Cong., 1<sup>st</sup> Sess., at 9 (1981).

or determined under the "catchall" provision of § 591(c)(1).<sup>9</sup> Under a provision enacted in the 1994 reauthorization law, the Attorney General's discretion is broadened,<sup>10</sup> and the independent counsel process may be invoked for a Member of Congress, and a preliminary investigation conducted, upon the finding by the Attorney General that it "would be in the public interest" to do so.<sup>11</sup>

## Threshold Inquiry/Examination

Once information alleging a violation by a covered federal official is received by the Attorney General, the Attorney General has 30 days from the time the information is first received to determine if a "preliminary investigation" should be conducted.<sup>12</sup> During this "threshold inquiry" period, the Attorney General will examine the sufficiency of the allegations presented to determine if there exist grounds to investigate. The law specifies that in determining the "sufficiency" of the information as to whether grounds to investigate exist, the Attorney General may consider only the factors of "the degree of specificity of the information" and the "credibility of the source of the information."<sup>13</sup> The Attorney General is specifically prohibited during this time, when examining the specificity of charges and the credibility of the source, from dismissing a complaint because he or she determines that the official involved "lacked the state of mind required for the violation of criminal law."<sup>14</sup>

## Preliminary Investigation

If the Attorney General determines during the 30-day period that the allegations received are specific and credible enough, or if no determination is made within the 30-day time limit, then the Attorney General is to conduct a "preliminary investigation." The preliminary investigation must be completed within 90 days,

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<sup>9</sup>Members of Congress have not been "automatically" covered by the provisions of the Act since the legislative branch, under the separation of powers principles in the Constitution, does not and may not appoint prosecutors, fire prosecutors (other than by impeachment and conviction), or supervise or control criminal investigations by the Department of Justice or by the United States Attorneys, as do the President and the Attorney General. No "inherent" or structural conflict, therefore, was seen or has been experienced in having the Department of Justice and the United States Attorneys generally continue to investigate and prosecute Members of Congress.

<sup>10</sup>H.Rept. 103-511, 103<sup>rd</sup> Cong., 2d Sess., at 10 (1994): "It broadens the standards for invoking the process with respect to Members from requiring a conflict of interest to requiring the Attorney General to find it would be in the public interest."

<sup>11</sup>28 U.S.C. § 591(c)(2). H.Rept. 103-511, *supra* at 10: "This broader standard would allow the Attorney General to use the independent counsel process for Members of Congress in cases of perceived as well as actual cases of conflicts of interest."

<sup>12</sup>28 U.S.C. § 591(d)(2).

<sup>13</sup>28 U.S.C. § 591(d)(1). See S.Rept. 97-496, 97<sup>th</sup> Cong., 2d Sess., at 11, 12 (1982); S.Rept. 100-123, 100<sup>th</sup> Cong., 1<sup>st</sup> Sess., at 15 (1987); see also *Nathan v. Smith*, 737 F.2d 1069 (D.C. Cir. 1984) as to the specificity of the allegations required.

<sup>14</sup>28 U.S.C. § 592(a)(2)(B)(i). See S.Rept. 100-123, *supra* at 10-11, 18.



unless a one-time extension of 60 more days is granted by the division of the court upon the request of the Attorney General.<sup>15</sup>

The law provides that "the Attorney General shall conduct ... [a] preliminary investigation ... [u]pon receiving information that the Attorney General determines is sufficient to constitute grounds to investigate" that a person covered by the Act has engaged in conduct violative of federal criminal laws;<sup>16</sup> and that "the Attorney General shall, upon making that determination [that the information received is credible and specific enough], commence a preliminary investigation with respect to that information."<sup>17</sup> Although the language of the statute speaks in mandatory terms ("shall conduct" and "shall commence"), two United States Courts of Appeals cases have found that the statutory scheme provides no private right of action for members of the public, and no standing to sue for members of the public, to require the Attorney General to conduct a preliminary investigation.<sup>18</sup>

The purpose of the preliminary investigation is to determine if there are "reasonable grounds to believe that further investigation is warranted."<sup>19</sup> The authority and power of the Attorney General during these preliminary and threshold stages are intentionally limited to prevent extensive participation in substantive decision making by the Attorney General, and so to avoid the potential conflicts of interest at which the law was directed in the first instance. The Attorney General, during the preliminary investigation, is not allowed to convene a grand jury, plea bargain, issue subpoenas, or grant immunity,<sup>20</sup> and may not base a determination that "no reasonable grounds exist to warrant further investigation" on a finding that an official lacked the state of mind required for a crime, unless there is "clear and convincing evidence,"<sup>21</sup> an occurrence which Congress believed would be a "rare case" given the limited investigatory powers of the Attorney General.<sup>22</sup>

One of the factors for the Attorney General to consider in determining whether a matter warrants further investigation is the "written or other established policies of

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<sup>15</sup>28 U.S.C. § 592(a)(1),(3).

<sup>16</sup>28 U.S.C. § 591(a) and (c).

<sup>17</sup>28 U.S.C. § 591(d)(2).

<sup>18</sup>*Banzhaf v. Smith*, 737 F.2d 1167 (D.C. Cir. 1984); *Dellums v. Smith*, 797 F.2d 817 (9<sup>th</sup> Cir. 1986); see also *Nathan v. Smith*, 737 F.2d 1069 (D.C. Cir. 1984), at 1077 (J. Bork, concurring).

<sup>19</sup>Note 28 U.S.C. §§ 592(c)(1)(A), 592(a)(1).

<sup>20</sup>28 U.S.C. § 592(a)(2).

<sup>21</sup>28 U.S.C. § 592(a)(2)(B)(ii).

<sup>22</sup>See H.Rept. 100-452, 100<sup>th</sup> Cong., 1<sup>st</sup> Sess., at 24-25 (1987). See also H.Rept. 103-511, *supra* at 11: "Congress believes that the Attorney General should rarely close a matter under the independent counsel law based upon finding a lack of criminal intent, due to the subjective judgments required and the limited role accorded the Attorney General in the independent counsel process."

the Department of Justice" concerning the conduct of criminal investigations.<sup>23</sup> This consideration was originally added to the law in 1983, and the language clarified in 1987, to deal with the triggering of the independent counsel provisions in matters which may not have warranted action by the Justice Department under its own policies. Congress was expressly concerned with the triggering of the statute during the Carter administration for allegations about certain presidential aides and social cocaine use which, even if true, the Department of Justice, within its prosecutorial discretion, would not have normally prosecuted.<sup>24</sup>

## Congressional Requests for an Independent Counsel

A request to the Attorney General to apply for an independent counsel in a particular matter may be made by the Judiciary Committee of either House of Congress, or by a majority of the members of either the majority or non-majority party of those committees.<sup>25</sup> The Attorney General is *not* required to apply for an independent counsel pursuant to such request, nor is the Attorney General required to conduct a "preliminary investigation" because of such request. The Attorney General must, however, within 30 days after the receipt of the request, report to the requesting committee as to whether an investigation has begun, the date upon which any such investigation began, and reasons regarding the Attorney General's decisions on each of the matters referred. If the Attorney General makes any applications or notifications to the division of the court because of a preliminary investigation of the matter referred to him by Congress, the material shall be supplied to the committee which made the referral. If the Attorney General does not apply for an independent counsel after a preliminary investigation, then the Attorney General must submit a report detailing the reasons for such decision.<sup>26</sup>

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<sup>23</sup>28 U.S.C. § 592(c)(1).

<sup>24</sup>See S.Rept. 97-496, *supra* at 3, 15: "In determining whether `reasonable grounds' exist, the bill directs the Attorney General to comply with the written or other established policies of the Department of Justice with respect to the enforcement of criminal laws. The Attorney General must justify his decision that a special prosecutor should not be appointed upon a showing to the court that the Department of Justice does not, as a matter of established practice, prosecute the alleged violation of federal criminal law. Alternatively, he may state to the court that it is the practice of U.S. Attorneys for the district in which the violation was alleged to have occurred not to prosecute this violation." In 1987 this provision was clarified to make sure that the Attorney General did not "misuse" the provision to dismiss a matter at this stage when the Attorney General found that the "evidence collected" did not offer a "reasonable prospect of conviction," rather than basing a dismissal on the standard of whether the matter warranted further investigation. See S.Rept. 100-123, *supra* at 11. "Hearings held within the Committee indicate that the Attorney General has misused this provision to justify replacing the statutory standard for requesting an independent counsel ... with a Departmental policy related to indictments -- which asks whether there is a `reasonable prospect of conviction.'" *Id.* at 19.

<sup>25</sup>28 U.S.C. § 592(g)(1).

<sup>26</sup>28 U.S.C. § 592(g)(3).

## Recusal of Attorney General

If the information received under this statutory scheme "involves" the Attorney General or "a person with whom the Attorney General has a personal or financial relationship," then the Attorney General "shall" disqualify or "recuse" himself or herself from the matter, designating the next most senior officer in the Department of Justice to take over the Attorney General's functions under the law.<sup>27</sup> The disqualification should be in writing, stating reasons, and filed with any application or notification submitted to the division of the court.<sup>28</sup>

## Application to the Division of the Court for an Independent Counsel

After the preliminary investigation, if the Attorney General finds "reasonable grounds to believe that further investigation is warranted," or after 90 days if no determination is made, the Attorney General "shall apply" for the appointment of an independent counsel by a special panel of the United States Court of Appeals.<sup>29</sup> The law specifically provides that the Attorney General's determination whether to apply to the special division of the court for an independent counsel "shall not be reviewable in any court."<sup>30</sup>

When the Attorney General applies to the division of the court for an independent counsel, the application must contain "sufficient information to assist the division of the court 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."<sup>31</sup> The application and supporting materials may not be released to the public without the approval of the division of the court.<sup>32</sup>

## Appointment by Division of Court

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<sup>27</sup>28 U.S.C. § 591(e)(1).

<sup>28</sup>28 U.S.C. § 591(e)(2).

<sup>29</sup>28 U.S.C. § 592(c). As noted, the Senate report in 1987 emphasized that the standard to be used by the Attorney General for determining whether to apply for an independent counsel is whether there exists "reasonable grounds to believe that further investigation is warranted," and not whether the case offered a "reasonable prospect for conviction." See S. Rept. 100-123, *supra* at 11. The Committee noted that the standard concerning the "prospects of conviction" is generally applied by the prosecuting authority at the stage when the prosecutor is considering an indictment, rather than at the early stages of determining whether an independent counsel should be appointed to investigate the allegations made. *Id.* at 11, 18-19.

<sup>30</sup>28 U.S.C. § 592(f).

<sup>31</sup>28 U.S.C. § 592(d). The Senate Report on the then "special prosecutor" legislation, S. 555, 95<sup>th</sup> Congress, noted that "in many cases the Attorney General might have suggestions as to the names of individuals who would make good special prosecutors, which information would be of assistance to the division of the court." S.Rept. 95-170, 95<sup>th</sup> Cong., 2d Sess. 56 (1977).

<sup>32</sup>28 U.S.C. § 592(e).

The division of the court, which is a panel of three judges from the United States Courts of Appeals (one being from the District of Columbia Circuit) serving two-year terms on the panel, actually names and appoints the independent counsel, and defines the counsel's prosecutorial jurisdiction upon application and request of the Attorney General.<sup>33</sup> The Senate Report on the 1978 Ethics in Government Act explained that the court appointment of the independent counsel (then called a "special prosecutor") was necessary "in order to have the maximum degree of independence and public confidence in the investigation conducted by that special prosecutor."<sup>34</sup>

## Prosecutorial Jurisdiction

As noted, the three-judge panel sets out the prosecutorial jurisdiction of the independent counsel based on the information provided in the request by the Attorney General. The Senate Report on the Ethics in Government Act noted that defining the prosecutorial jurisdiction by the court is an "important part of the responsibility of the ... court ... for the control ... and the accountability of such a special prosecutor."<sup>35</sup> The Supreme Court, in upholding the law against constitutional challenges in *Morrison v. Olson*, *supra*, noted, however, that because of separation of powers concerns, the court's duties must be merely "ministerial," and that the division of the court's discretion in defining the independent counsel's jurisdiction was thus not unlimited, but "must be demonstrably related to the factual circumstances that gave rise to the Attorney General's investigation and request for the appointment ...."<sup>36</sup>

The independent counsel statute provides that the prosecutorial jurisdiction shall be such as to "assure that the independent counsel has adequate authority to fully investigate and prosecute the subject matter with respect to which the Attorney General has requested the appointment of the independent counsel, and all matters related to that subject matter."<sup>37</sup> Furthermore, the independent counsel is to be authorized to pursue so-called collateral matters which "arise out of" the investigation of the original matter, such as "perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses."<sup>38</sup> Matters pursued within the original grant of jurisdiction from the three-judge panel must thus be "demonstrably related" to the subject matter of the Attorney General's request, either in the nature of collateral offenses such as perjury or obstruction of justice which "arise out of" the investigation or prosecution of the original matter, or things which are otherwise "related" to the "subject matter of the Attorney General's original request" for an independent counsel.<sup>39</sup>

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<sup>33</sup>28 U.S.C. § 593(b).

<sup>34</sup>S.Rept. 95-170, *supra* at 56.

<sup>35</sup>*Id.*

<sup>36</sup>487 U.S. at 679.

<sup>37</sup>28 U.S.C. § 593(b)(3).

<sup>38</sup>*Id.*

<sup>39</sup>*United States v. Wade*, 83 F.3d 196, 197-198 (8<sup>th</sup> Cir. 1996); *Morrison v. Olson*, *supra* at 679; *United States v. Crop Growers Corp.*, 954 F. Supp. 335, 341 (D.D.C. 1997).

Other or new matters may be pursued by the independent counsel either upon a "referral" of "related" matters, or by an "expansion" of the independent counsel's existing prosecutorial jurisdiction. Although the independent counsel may ask the Attorney General *or* the court to refer matters to him or her which "are related to the independent counsel's prosecutorial jurisdiction,"<sup>40</sup> the statute requires that any "expansion" of the prosecutorial jurisdiction of an existing independent counsel be made by the division of the court only "upon the request of the Attorney General ... and such expansion may be in lieu of an additional independent counsel."<sup>41</sup> When requested by the independent counsel, upon the independent counsel's discovery of matters not covered by his or her original jurisdiction, the Attorney General will conduct a preliminary investigation, giving due consideration to the independent counsel's request, to determine if the jurisdiction should be expanded.<sup>42</sup> If the Attorney General decides not to expand the jurisdiction, the division of the court has no authority to do so on its own.<sup>43</sup>

### **Authority, Powers of Independent Counsel**

The law provides that the independent counsel will have "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice" including, but not limited to, conducting grand jury investigations, granting immunity to witnesses, inspecting tax returns, receiving appropriate national security clearances, and challenging in court any privilege claims or attempts to withhold evidence on national security grounds.<sup>44</sup> The Department of Justice must provide assistance and access to materials which the independent counsel requests, and personnel may be detailed from the Department of Justice upon request of the independent counsel.<sup>45</sup>

### **Appropriations, Cost Controls and Audits**

The appropriation for the funding of the offices of the independent counsels is an open-ended appropriation within the Department of Justice. Public Law 100-202

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<sup>40</sup>28 U.S.C. § 594(e).

<sup>41</sup>28 U.S.C. § 593(c); note *Morrison v. Olson*, *supra* at 680, n.18; *In re Olson*, 818 F.2d 34, 47 (D.C.Cir. 1987). There may, of course, be some disagreement as to whether a new matter requested by the independent counsel is within the independent counsel's original prosecutorial jurisdiction, and is thus a "related matter" for the court itself (or the Attorney General) to refer under 594(e), or whether jurisdiction over the matter requested is an "expansion" of existing jurisdiction, that is, the matter is "not covered by the prosecutorial jurisdiction of the independent counsel," such that the Attorney General must expand jurisdiction under § 593(c). See *In re Espy*, 80 F.3d 501 (D.C.Cir. 1996); *United States v. Tucker*, 78 F.3d 1313 (8<sup>th</sup> Cir. 1996).

<sup>42</sup>*In re Meese*, 907 F.2d 1192 (D.C.Cir. 1990).

<sup>43</sup>28 U.S.C. § 593(c)(2)(B).

<sup>44</sup>28 U.S.C. § 594(a).

<sup>45</sup>28 U.S.C. § 594(d).

established a "permanent indefinite appropriation" within the Justice Department "to pay all necessary expenses of the investigations and prosecutions by independent counsel."<sup>46</sup> The Comptroller General is directed "to perform semiannual financial reviews of expenditures" of the independent counsels from this appropriation.<sup>47</sup>

Numerous fiscal and administrative provisions and cost control measures were added to the independent counsel law in the Independent Counsel Reauthorization Act of 1994. Procedures for expenditure certifications, requirements to follow Department of Justice policies with regard to the expenditure of funds, requirements to use federal office space unless other space may be obtained for less cost, provisions limiting compensation of independent counsels and staff, and provisions regulating travel and per diem expenses of the independent counsel and staff, were enacted as part of P.L. 103-270.<sup>48</sup>

The independent counsel is required to make a mid-year and end-of-year financial statement of expenditures.<sup>49</sup> The mid-year statements are to be reviewed, and the end of year statements are to be audited by the Comptroller General of the United States, and the results reported to specified congressional committees.<sup>50</sup> The independent counsel is also required to make reports every six months to the division of the court which identify and explain major expenses of the office, and summarize all other expenses incurred.<sup>51</sup>

## Removal of an Independent Counsel

An independent counsel may be removed (other than through impeachment and conviction) only by the Attorney General for "good cause, physical or mental disability" or other impairing condition.<sup>52</sup> This removal may be challenged by the independent counsel in the United States District Court for the District of Columbia.<sup>53</sup> Any removal action must be fully explained by the Attorney General to the special division of the court and to the House and Senate Judiciary Committees.<sup>54</sup>

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<sup>46</sup>P.L. 100-202, § 101(a), December 22, 1987, 101 Stat. 1329, see now 28 U.S.C. § 591, note. See also Appendix, *Budget of the United States Government, Fiscal Year 1999*, at 599-600.

<sup>47</sup>*Id.*

<sup>48</sup>See 28 U.S.C. § 594(b),(c),(l).

<sup>49</sup>28 U.S.C. § 596(c)(1).

<sup>50</sup>28 U.S.C. § 596(c)(2).

<sup>51</sup>28 U.S.C. § 594(h)(1)(A).

<sup>52</sup>28 U.S.C. § 596(a)(1).

<sup>53</sup>28 U.S.C. § 596(a)(3).

<sup>54</sup>28 U.S.C. § 596(a)(2).

The special division of the court may also "terminate" the office of independent counsel if the counsel's work is completed.<sup>55</sup> The 1994 reauthorization law also provided that the division of the court will review after two years, and then yearly after the succeeding two year period, whether the work of the independent counsel is completed or so substantially completed that the Department of Justice may appropriately finish the work.<sup>56</sup> The Supreme Court, in *Morrison v. Olson, supra*, concerned about the potential interference that the original termination authority could have over an executive branch investigation, interpreted the original termination authority of the special division narrowly as one which does "not give the Special Division anything approaching the power to *remove* the counsel while an investigation or court proceeding is still underway - [as] this power is vested solely in the Attorney General."<sup>57</sup>

## Disclosure of Information, Reporting

Much of the initial and preliminary matters concerning the independent counsel, his or her appointment, and jurisdiction may be kept confidential.<sup>58</sup> The legislative history of the Ethics in Government Act indicates that this confidentiality "is crucial to the general scheme of this chapter" to protect high-level public officials from the publicity of unsubstantiated allegations which may trigger the investigatory process.<sup>59</sup> However, the legislative history expressly recognized that there "will be other situations where the public will be aware of the allegations of criminal wrongdoing and there will be a great deal of public attention centered on whether a special prosecutor will be appointed, who that special prosecutor will be, and what the jurisdiction of that special prosecutor will be."<sup>60</sup> In such instances, the Committee noted that certain confidentiality may not serve "any purpose," except that the actual application from the Attorney General might still be kept confidential in the interest of not further publicizing unsubstantiated allegations contained therein, and that the decision to release information would be left to the division of the court on a case-by-case basis.<sup>61</sup> The division of the court may release the identity of the independent counsel and his or her prosecutorial jurisdiction if requested by the Attorney General or in the court's own initiative if deemed in the public interest.<sup>62</sup>

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<sup>55</sup>28 U.S.C. § 596(b)(2).

<sup>56</sup>28 U.S.C. § 596(b)(2), as added by P.L. 103-270, Section 3(h).

<sup>57</sup>487 U.S. at 682.

<sup>58</sup>28 U.S.C. §§ 592(e) (notifications, applications filed with court); 593(b)(4) (identity and jurisdiction of independent counsel).

<sup>59</sup>S.Rept. 95-170, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess., to accompany S. 555, "Public Officials Integrity Act of 1977," at 57-58 (1977).

<sup>60</sup>*Id.* at 58.

<sup>61</sup>*Id.*

<sup>62</sup>28 U.S.C. § 593(b). The identity and jurisdiction of the independent counsel must be disclosed upon the return of an indictment or filing of any criminal information.

A final, detailed report from the independent counsel is required prior to the termination of the independent counsel's office setting forth the work of the counsel and any reasons prosecutions were not brought in any matter.<sup>63</sup> This report is made to the division of the court, and may be released by the division of the court, in part or in whole, to the Congress or to the public.<sup>64</sup>

Upon completion of an investigation, the files of the office of an independent counsel, after grand jury and national security information are identified, are turned over to the Archivist of the United States, and are to be maintained in accordance with the federal records laws.<sup>65</sup> Access to these records will generally be governed by the provisions of the Freedom of Information Act.<sup>66</sup>

## Congressional Oversight

The independent counsel is now directed by statutory language to submit to the Congress an annual report on the activities of such independent counsel, including the progress of investigations and any prosecutions. Although it is recognized that certain information will need to be kept confidential, the statute states that "information adequate to justify the expenditures that the office of the independent counsel has made" should be provided.<sup>67</sup>

The conduct of an independent counsel is subject to congressional oversight and an independent counsel is required to cooperate with that oversight.<sup>68</sup> The Conference Report on the Ethics in Government Act of 1978 noted that "a special prosecutor is required to file periodic reports with Congress and cooperate with the oversight jurisdiction of the House and Senate Judiciary Committees, thereby insuring accountability."<sup>69</sup> The independent counsel provisions also provide that the independent counsel "shall advise" the House of Representatives of any "substantial and credible information" which may constitute grounds for an impeachment of a federal official.<sup>70</sup> In addition to oversight of the independent counsel, the statute as amended in 1988, provides that the Attorney General must respond to the appropriate

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<sup>63</sup>28 U.S.C. § 594(h)(1)(B).

<sup>64</sup>28 U.S.C. § 594(h)(2).

<sup>65</sup>28 U.S.C. § 594(k)(1),(2).

<sup>66</sup>28 U.S.C. § 594(k)(3)(A).

<sup>67</sup>28 U.S.C. § 595(a)(2), as added by P.L. 103-270, Section 3(g).

<sup>68</sup>28 U.S.C. § 595(a)(1).

<sup>69</sup>H.Rept. 95-1756, 95<sup>th</sup> Cong., 2d Sess. 78 (1978). See also "Ethics in Government Act Amendments of 1982," S.Rept. 97-496, 97<sup>th</sup> Cong., 2d Sess., 3 (1982).

<sup>70</sup>28 U.S.C. § 595(c). The Constitution provides for removal by impeachment and conviction of the "President, Vice President and all civil Officers of the United States." *United States Constitution*, Art. II, Section 4. The Senate version of the independent counsel (special prosecutor) bill required only information for impeachment of the President, Vice President or a judge or justice (S. Rpt. No. 95-170, *supra* at 71), but this was expanded to "an impeachment," presumptively including "all civil officers," in conference. H. Rpt. No. 95-1756, *supra* at 50.



congressional committee within 15 days of a request from that committee for specific information on a case which has been made a matter of public knowledge.<sup>71</sup>

## Sunset Provision

The provisions of law relating to the independent counsel have had, since the time of their original enactment, a five year "sunset." That is, the provisions of law expire five years after enactment, and thus need reauthorization every five years. The current provisions, reauthorized and amended by the Independent Counsel Reauthorization Act of 1994, P.L. 103-270, June 30, 1994, will expire on June 30, 1999, unless reauthorized.<sup>72</sup>

## Division of the Court

The "division of the court" referred to in the Ethics in Government Act of 1978, is a special three-judge panel of the United States Court of Appeals for the District of Columbia made up of federal jurists appointed for two-year terms on the panel by the Chief Justice of the United States Supreme Court.<sup>73</sup> One of the federal judges chosen must be from the District of Columbia Circuit. The panel is formally called the Division for the Purpose of Appointing Independent Counsels. The current panel, as of this writing, consists of Judge David B. Sentelle (D.C. Cir.), Judge John D. Butzner (4th Cir.); and Judge Peter T. Fay (11th Cir.).

## Independent Counsels/Special Prosecutors

The following list provides the names of the independent counsels appointed by the Division of the Court for Appointing Independent Counsels under the statutory provisions of the Ethics in Government Act of 1978, as amended, and sets out in summary fashion the areas or subjects of investigation.<sup>74</sup> This list includes those independent counsels whose appointments were made a matter of public record. Noted also as "sealed" are those independent counsels whose identity and/or prosecutorial jurisdiction have been kept confidential. Under the provisions of the Ethics in Government Act relating to the appointment of independent counsels, the information on the appointment of independent counsels and the targets of an investigation was generally to be kept confidential unless the division of the court had deemed it to be in the public interest to release, or unless and until an indictment or criminal information had been returned.<sup>75</sup> The independent counsels appointed under the Ethics in Government Act provisions have included:

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<sup>71</sup>28 U.S.C. § 595(b).

<sup>72</sup>28 U.S.C. § 599.

<sup>73</sup>28 U.S.C. § 49.

<sup>74</sup>For a summary of the results, costs, and the time frame of the investigations and prosecutions, note CRS Report 98-19, "Independent Counsels Appointed Under the Ethics in Government Act of 1978, Costs and Results of Investigations."

<sup>75</sup>28 U.S.C. § 593(b)(4).

1. Arthur H. Christy (appointed November 29, 1979). Investigated allegations concerning President Carter's Chief of Staff Hamilton Jordan, regarding alleged cocaine use.

2. Gerald J. Gallinghouse (appointed September 9, 1980). Investigated allegations concerning President Carter's national campaign manager Tim Kraft, regarding alleged cocaine use.

3. Leon Silverman (appointed December 29, 1981). Investigated allegations concerning President Reagan's Secretary of Labor Raymond J. Donovan, regarding bribery of labor union officials and certain connections to organized crime. Further investigation commenced on June 11, 1985, upon referral to investigate alleged false testimony before grand jury.

4. Jacob A. Stein (sworn in April 2, 1984). Investigated allegations concerning President Reagan's nominee for Attorney General Edwin Meese, regarding his finances, financial disclosure and other allegations including trading in public offices.

5. Alexia Morrison (appointed May 29, 1986). Alexia Morrison was appointed after the resignation of independent counsel James C. McKay, to investigate allegations concerning former assistant Attorney General Theodore B. Olson for allegedly giving false testimony to Congress regarding the EPA "superfund" inquiry.

6. Whitney North Seymour Jr. (appointed May 29, 1986). Investigated charges concerning former President Reagan aide Michael K. Deaver, regarding alleged violations of post-employment conflict of interest laws in representing certain foreign clients before the White House after leaving government employment.

7. Lawrence E. Walsh (appointed December 19, 1986). Investigated Lt. Colonel North, and others, in relation to the "Iran Contra" matter concerning sale of arms to Iran and the alleged diversion of profits from the sale to support the Contras in Nicaragua in violation of federal law.

8. James C. McKay (appointed February 2, 1987). Appointed to investigate allegations concerning former White House staffer Franklyn C. Nofziger and potential violations of post-employment "revolving door" conflicts of interest in relation to alleged "influence peddling" and lobbying activities performed for Wedtech Corporation. On May 11, 1987, Mr. McKay was referred the additional matter of Attorney General Edwin Meese's conduct concerning the Wedtech Corporation, Mr. Meese's financial holdings and potential conflicts of interest, Mr. Meese's involvement in the Aqaba Pipeline project and other matters.

9. James R. Harper, appointed August 17, 1987 to replace Carl S. Rauh (appointed December 19, 1986). The subject of the investigation was sealed.

10. Sealed. Independent counsel appointed May 31, 1989.

11. Larry D. Thompson, appointed July 3, 1995, to replace Arlin M. Adams, appointed March 1, 1990. Investigating allegations of criminal conspiracy to defraud the United States by Samuel R. Pierce, former Secretary of the Department of

Housing and Urban Development in the Reagan Administration, and others, concerning the programs of the Department of Housing and Urban Development.

12. Sealed. Appointed April 19, 1991.

13. Michael F. Zeldin, appointed on January 11, 1996, to succeed Joseph E. diGenova, who was appointed December 14, 1992, to investigate whether Janet Mullins, Assistant to President Bush for Political Affairs, violated any federal laws concerning the search of then presidential-candidate Bill Clinton's passport files during 1992 presidential campaign.

14. Kenneth W. Starr (appointed August 5, 1994). Appointed to continue the investigation of allegations commonly referred to as "Whitewater," begun by the Attorney General-appointed Special Counsel Robert B. Fiske, Jr., regarding any possible violations of law relating in any way to President Clinton and the First Lady Hillary Rodham Clinton's relationship with Madison Guarantee Savings and Loan Association, the Whitewater Development Corporation, or Capital Management Services, as well as any collateral matters arising out of the investigation of such matters including obstruction of justice or false statements.

15. Donald C. Smaltz. Appointed September 9, 1994, to investigate any potential criminal conduct concerning allegations that Secretary of Agriculture Mike Espy received various gifts and entertainment from companies or organizations which are regulated by or have official business with the Department of Agriculture.

16. David M. Barrett. Appointed May 24, 1995, to investigate allegations pertaining to the Department of Housing and Urban Development Secretary Henry G. Cisneros and false statements allegedly made to the FBI during background check.

17. Daniel S. Pearson. Appointed July 6, 1995, as independent counsel to investigate allegations concerning financial dealings of Secretary of Commerce Ronald H. Brown.

18. Sealed. Appointed November 27, 1996.

19. Carol Elder Bruce. Appointed March 19, 1998, to investigate allegations of false statements to Congress by Interior Secretary Bruce Babbitt concerning the rejection of a proposed Indian gambling casino in Wisconsin.