



MAKING COUNSEL INDEPENDENT: *The Independent Counsel Act*

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“Though this be madness, yet there is method in [i]t.”²

With the legal battles currently raging in Washington, D.C. - the endless Congressional investigations (initiated by both political parties), the appointment of special prosecutor Robert Mueller by the Deputy Attorney General and the call for yet more investigations – now is the time to pass the Independent Counsel Reauthorization Act.

When signing the very last Independent Counsel Reauthorization Act of 1994 into law on July 1, 1994, President William Jefferson Clinton proclaimed the legislation *a force for government integrity and public confidence*. Shortly thereafter, the special three-judge panel of the United States Court of Appeals for the District of Columbia Circuit (“Special Division”) appointed several independent Counsel. However, after much partisan debate, Congress simply let the legislation lapse in 1999.

With the Hillary Rodham Clinton email probe, Benghazi and more recently the investigation of possible Russian interference in the 2016 presidential election, there now is a great debate as to whether a special counsel, appointed and answerable to the executive branch, can effectively investigate members of the very branch responsible for appointment and restore much needed confidence in our Governmental institutions.

Unfortunately, there is a great deal of confusion surrounding independent counsel and special prosecutors - many often confuse the two. An independent counsel may only be appointed by the three-judge panel of the Special Division, pursuant to 28 U.S.C. §592 (c). Special prosecutors are appointed by the Attorney General of the United States pursuant to 28 U.S.C. §543. A simple example illustrates the point. Kenneth W. Starr was an independent counsel appointed pursuant to

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The writer, an attorney now in private practice, served in various capacities on the staff of three Offices of Independent Counsel: James C. McKay, In re Attorney General Meese; Donald C. Smaltz, In re Secretary of Agriculture Espy; and David M. Barrett, In re Housing and Urban Development Cisneros.

² William Shakespeare, *Hamlet*.

28 U.S.C. §592(c). Mr. Starr's predecessor, Robert B. Fiske, Jr., a special prosecutor, was appointed by Attorney General Janet Reno pursuant to 28 U.S.C. §543(a). Robert S. Mueller is a *special prosecutor* appointed by the Deputy Attorney General Rod Rosenstein on May 17, 2017.

Representative Michael Turner when calling for an independent investigation regarding Hillary Clinton's email scandal, defends independent counsel stating, "[t]he role of independent counsel is to keep investigations honest and prosecutorial decisions independent of the political, personal, and financial conflicts of interest that undermine accountability in government."

Indeed, several suggest that the investigations of Hillary Clinton and Donald Trump are tainted by politics. This at best, suggests that special counsel cannot fulfill the role outlined by Congressman Turner. Thus, one must only consider the most recent probes to understand the inherent limitations in the appointment of special counsel. As such, many call to revive the Independent Counsel Statute.

As noted the Attorney General of the United States may appoint *special counsel*. Indeed, prior to enactment of the Independent Counsel Statute, executive branch members often appointed special prosecutors or special counsel (on an ad-hoc basis) to investigate allegations concerning executive branch officials. Such counsel were appointed to investigate the Teapot Dome scandal during the Harding and Coolidge administrations, the tax scandals during the Truman administration and Watergate.

Most recently, on May 17, 2017, the Deputy Attorney General (the Attorney General believed that he had a conflict of interest) appointed Robert Mueller as *special counsel* to investigate allegations concerning possible Russian interference in the 2016 presidential election. As a result of the investigation, Paul Manafort, chairman of Donald Trump's campaign, and Rick Gates, a campaign aid, were indicted on several charges including money laundering and tax fraud. Former National Security Advisor, Michael Flynn, was also charged with lying to the Federal Bureau of Investigation ("FBI") about conversations that allegedly took place with the Russian ambassador. This led to speculation that President Trump would possibly dismiss Mr. Mueller as special counsel – a stark reminder of something that occurred during the darkest days of the Watergate scandal.

The 1978 Ethics in Government Act contained the first independent counsel provision. The Watergate scandal provided the main impetus for the enactment of the Ethics in Government Act. As the Watergate scandal intensified, Attorney General John Mitchell resigned. As a condition to Senate confirmation, Congress urged newly appointed Attorney General Elliot Richardson to appoint an independent prosecutor to investigate the allegations surrounding Watergate. Attorney General Richardson appointed Archibald Cox to serve as special prosecutor. When Mr. Cox subpoenaed certain material from the President, including tapes and documents, President Nixon ordered Mr. Richardson to dismiss Mr. Cox.

Faced with the task of firing Mr. Cox, Mr. Richardson resigned. Deputy Attorney General Ruckelshaus was then responsible for executing the president's directive. Rather than fire Mr. Cox,

Mr. Ruckelshaus also resigned. Pursuant to statute, the next highest-ranking official in the Department of Justice was the Solicitor General, Robert Bork. As acting Attorney General, Robert Bork dismissed Mr. Cox at the direction of the President.

The press later dubbed these events the “Saturday Night Massacre.” Under great pressure, the Nixon administration appointed Leon Jaworski special prosecutor and replaced Mr. Cox. To prevent such a scenario from occurring again, Congress passed the Ethics in Government Act in 1978. The last version of the statute (1994) expired on June 30, 1999. As of this writing, there is no longer an Act.

Under the Act the Attorney General determines when to begin the process of appointing an independent counsel, but the Special Division actually appoints the attorneys to serve as independent counsel. The Attorney General must conduct a preliminary investigation upon receiving information that a covered individual may have violated a Federal criminal law, other than a Class B or C misdemeanor.

Either Judiciary Committees in the House or Senate of the United States may request that the Attorney General appoint an independent counsel. The Attorney General must decide to appoint an independent counsel within thirty days from receiving a request from the Judiciary Committee. The Attorney General’s authority is limited during the preliminary investigation stage.

The Special Division must appoint an independent counsel and define the counsel’s jurisdiction. The independent counsel must comply with the Special Division’s prosecutorial jurisdiction. The Special Division, upon the request of the Attorney General, may expand an independent counsel’s prosecutorial jurisdiction.

An independent counsel may request the referral of a *related* matter from the Attorney General or the Special Division. The independent counsel may also have a matter *independently* referred from either the Attorney General or the Special Division.

If an Attorney General refers a matter to an independent counsel based upon the Attorney General’s initiative, the independent counsel may accept the referral if the matter relates to the independent counsel’s original prosecutorial jurisdiction. Whether the independent counsel accepts a referral from the Attorney General based upon the Attorney General’s initiative or upon the independent counsel’s initiative, the independent counsel must notify the Special Division.

Whether a matter is related to an independent counsel’s prosecutorial jurisdiction for purposes of a referral depends on the procedural and factual link between the Office of Independent Counsel’s original prosecutorial jurisdiction and the matter sought to be referred. A matter referred to an independent counsel by the Special Division must meet a higher standard of being demonstrably related. Despite notions to the contrary, an independent counsel has limitations as to prosecutorial jurisdiction.

Several independent counsel were appointed after the 1994 Reauthorization Act. Kenneth Starr

was the first independent counsel appointed under the statute, replacing Robert Fiske the special prosecutor appointed by Attorney General Janet Reno when the independent counsel statute lapsed. The Special Division next appointed Donald C. Smaltz to investigate allegations concerning Secretary of Agriculture Michael Espy. David M. Barrett's appointment followed, to investigate allegations concerning Secretary of Housing and Urban Development Henry Cisneros.

The Special Division appointed Daniel S. Pearson independent counsel to investigate allegations concerning Secretary of Commerce Ronald Brown. Carol Elder Bruce subsequently received an appointment to investigate allegations concerning Secretary of Interior Bruce Babbitt. Finally, Ralph I. Lancaster, Jr. was the last independent counsel appointed pursuant to the statute to investigate allegations concerning Secretary of Labor Alexis Herman.

The Attorney General also requested the appointment of one sealed independent counsel during this time. The Special Division appointed an independent counsel pursuant to this request. At the conclusion of the investigation, the Special Division released the independent counsel's final report to the public, as required by law.

During this time, the Attorney General also investigated Secretary of Transportation Frederico Pena to determine whether a preliminary investigation was warranted under the statute. After her investigation, the Attorney General determined that a preliminary investigation unwarranted and Mr. Pena's investigation was closed without appointment of independent counsel.

Congress made the first provision for independent counsel forty years ago. The concept of independent counsel can be integral to the American legal landscape. While many confuse special counsel with independent counsel – *they are very different*.

Given all that recently transpired, Congress must re-establish offices of independent counsel. Now more than ever, it is the best possible way to serve the interests of justice and to restore integrity to government. The statute served its purpose. The public must become aware of an independent counsel's function in the legal community and, more importantly, the procedures all independent counsel must follow by law.