

# ESSAY

## The Political Price of the Independent Counsel Law

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### I. Introduction

In August 1994, pursuant to Title VI of the Ethics in Government Act,<sup>1</sup> a Special Division of the Judiciary appointed Kenneth Starr as “independent counsel” in Clinton’s financial dealings involving the Whitewater Development Company.<sup>2</sup> Starr replaced Special Prosecutor Robert Fiske Jr., who had been appointed by Attorney General Janet Reno eight months earlier.<sup>3</sup> At the request of President Clinton, Reno appointed Fiske to begin investigating Whitewater while Congress continued to debate whether to reenact Title VI of the Ethics in Government Act, commonly known as the independent counsel law.<sup>4</sup>

In June 1994, President Clinton reenacted the law in its current form by signing the Independent Counsel Reauthorization Act.<sup>5</sup> According to the rationale behind the Act, the appointment of an independent counsel by a Special Division of federal judges removes any institutional conflict of interest that is created when a prosecutor investigating the executive branch is appointed by the executive branch.<sup>6</sup> Although this institutional conflict was present when Attorney General Reno appointed Fiske to in-

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1. 28 U.S.C. §§ 591-599 (1993).

2. See Kenneth Jost, *Independent Counsels*, CQ RESEARCHER, Feb. 21, 1997, at 155.

3. See *id.* at 153.

4. See Jane Mayer, *How Independent is the Counsel?*, THE NEW YORKER, Apr. 1996 at 58.

5. Pub. L. No. 103-270, 108 Stat. 737 (codified as amended at 28 U.S.C. §§ 591-599 (1993)).

6. See S. REP. NO. 95-170, at 54 (1977).

investigate President Clinton, only a small number of congressional Republicans voiced unhappiness with his investigation.<sup>7</sup> Further, Congress specifically included a provision in the 1994 reauthorization of the Act which allowed Fiske to automatically take over as independent counsel.<sup>8</sup> Notwithstanding this provision, the Special Division decided that the appearance of a conflict of interest was too great to allow Fiske to continue and subsequently replaced him with Kenneth Starr.<sup>9</sup>

The Special Division's appointment of Starr, however, did not eliminate concerns of conflicting interests. Starr and the events surrounding his appointment raised a new set of political and financial conflicts of interest. For example, *The Washington Post* reported that prior to Starr's appointment, David Sentelle, the presiding judge of the Special Division, was seen lunching with North Carolina Senators Jesse Helms and Lauch Faircloth, two of Fiske's most vehement critics.<sup>10</sup> In addition, *The New Yorker* pointed out that Starr publicly opposed President Clinton's bid for limited immunity in the Paula Jones case.<sup>11</sup> These alleged political conflicts of interest prompted *The New York Times* to call for Starr's resignation.<sup>12</sup>

Starr stayed on, however, and continues to devote his time to organizations that cause his impartiality to be questioned. In 1995, Starr was retained by the Bradley Foundation, a conservative lobbying group, to work on a school voucher case in Wisconsin.<sup>13</sup> Starr's critics argue that it was inappropriate for him, as independent counsel investigating the President, to lobby publicly for an issue being debated in the presidential campaign.<sup>14</sup> In addition, at the time of his appointment, Starr represented International Paper Company, which had previously sold land to the Whitewater Development Company.<sup>15</sup> Even though the transaction was unrelated to the investigation, there was speculation that Starr purposely withheld his involvement with the company.<sup>16</sup> Eventually, Starr was forced to withdraw from any further dealings with International Paper Company.<sup>17</sup>

Unlike other federal employees, Starr has financially prospered while working for the government. As independent counsel, Starr receives a per

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7. See Mayer, *supra* note 4, at 59.

8. See *id.*

9. See *id.*

10. See *id.*

11. See *id.* at 62.

12. See Jost, *supra* note 2, at 153.

13. See Mayer, *supra* note 4, at 59.

14. See Jost, *supra* note 2, at 153.

15. See Mayer, *supra* note 4, at 59.

16. See *id.*

17. See *id.*

diem rate equivalent to an annual compensation of \$115,700.<sup>18</sup> This amount is in addition to the more than \$1 million a year he receives from Kirkland & Ellis, the law firm where he continues to pursue his private practice.<sup>19</sup> Moreover, the Kirkland & Ellis compensation includes payments from companies, like Brown & Williamson and Phillip Morris, that have a financial stake in the outcome of Starr's investigation.<sup>20</sup> Accordingly, his annual income of \$1.1 million, a compensation unprecedented in amount and source for a federal prosecutor, has led to calls for Starr's resignation.<sup>21</sup>

Kenneth Starr's political and financial conflicts of interest are the result of the flaws that exist in the Ethics in Government Act of 1978. The Act creates a federal prosecutor, appointed by the judiciary, to ensure that investigations of "principal" executive officers are handled in an impartial manner.<sup>22</sup> At the inception of the Act, two separate but related purposes were behind the independent counsel arrangement. First, a federal prosecutor not accountable to the executive branch would create an impartial check against overreaching executive power.<sup>23</sup> Second, an impartial check against overreaching executive power would help restore public confidence in the integrity of the executive branch.<sup>24</sup> In practice, however, the Act has done more harm than it has accomplished good. Independent counsels have become partisan tools that limit executive power. Further, the partisanship of the independent counsels have, in turn, lowered public confidence in the entire political process. Accordingly, the Act is in need of revision.

This essay focuses on three areas that, if reformed, will remedy the inherent flaws in the current independent counsel arrangement. First, the independent counsel law's scope is injuriously broad. Second, the Act's current procedures for initiating an investigation are too easily triggered. Third, and most important, the arrangement fails to contain a provision that controls the amount or source of money an independent counsel can receive. If correctly reformed, these three areas will protect against the misuse of executive power and help restore public confidence in the integrity

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18. See Jost, *supra* note 2, at 152 n\*.

19. See Walter Pincus & George Lardner, Jr., *Ken Starr's Paycheck Gets Fatter: The Independent Counsel Takes in a Cool Million-Plus from his Private Law Firm*, THE WASHINGTON POST, Sept. 22, 1997 (National Weekly Edition), at 11.

20. See Mayer, *supra* note 4, at 62.

21. See Stephen Labaton, *Whitewater Counsel Defends Continuing His Private Practice*, N.Y. TIMES, Apr. 9, 1996, at A19.

22. See *id.*

23. See Terry Eastland, *The Independent Counsel Regime*, THE PUBLIC INTEREST, Summer 1990, at 69.

24. See *id.* at 70.

of the political system, the two goals the Act was originally intended to achieve.

## II. Background

### A. Political Climate Leading to the Creation of the Independent Counsel Law

At the time Title VI of the Ethics in Government Act of 1978 was being considered by Congress, its supporters contended that the law was essential to correct a flaw in the political system.<sup>25</sup> Specifically, supporters contended that the law was necessary to combat the conflict of interest that existed when an executive officer, namely a Department of Justice prosecutor, was in charge of investigating a superior in the executive branch, namely the President of the United States.<sup>26</sup> Critics of the law, on the other hand, opined that this conflict of interest was not a flaw in the political system but, rather, was "like those [conflicts] that arise when judges decide disputes involving judges' pay or when Congress exempts itself from laws that it makes," as part of the constitutional balancing of power.<sup>27</sup> In either case, a brief review of the history that preceded Title VI's enactment is necessary to understand its passage.

During the Nixon Administration, Attorney General Elliot Richardson appointed Archibald Cox, as a "special prosecutor" of the Department of Justice, to investigate the Watergate burglary.<sup>28</sup> While investigating the burglary, Cox learned of, and subsequently subpoenaed, audio tapes that President Nixon had secretly recorded.<sup>29</sup> Fearing the damage he would incur from the release of the tapes, Nixon offered Cox a compromise to full disclosure.<sup>30</sup> Contingent on Cox's commitment not to seek any further tapes, Nixon offered to turn over a transcript of the recordings from which national security matters would be redacted.<sup>31</sup> Cox rejected Nixon's compromise.<sup>32</sup> In an attempt to avoid disclosure, Nixon ordered Richardson to fire Cox.<sup>33</sup> Both Richardson and his Deputy Attorney General William D. Ruckelshaus chose to resign rather than fire Cox.<sup>34</sup> At Nixon's request,

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25. *See id.* at 69.

26. *See supra* note 6 and accompanying text.

27. Eastland, *supra* note 23, at 69.

28. *See* Robert Bork, *Against the Independent Counsel*, COMMENTARY, Feb. 1993, at 22.

29. *See id.*

30. *See id.*

31. *See id.*

32. *See id.*

33. *See id.*

34. *See id.*

Solicitor General Robert Bork, the third and last Department of Justice employee in the line of succession, terminated Cox.<sup>35</sup> These resignations and firings have come to be referred to as "The Saturday Night Massacre" and are considered the catalyst for the independent counsel law.<sup>36</sup>

Title VI, therefore, was born out of public discontent. The public feared that misconduct like President Nixon's might go unpunished if a presidential appointee was in charge of investigating the President. Under the then existing system, supporters argued, Department of Justice prosecutors were too close to "principal" executive officers to conduct impartial investigations.<sup>37</sup> Under Title VI, however, a federal prosecutor appointed by the judiciary could investigate the chief executive officer without any fear of retaliation and, in turn, help restore public confidence in the integrity of the executive in the process.<sup>38</sup>

Critics of the independent counsel agreement opined that a change in the system was unnecessary. They argued that our constitutional system gives the government adequate safeguards to protect against what historian Arthur Schlesinger termed "imperial" executive power.<sup>39</sup> In making their argument, opponents of the law pointed to three safeguards in the original system that protect against the misuse of executive power: the power of Congress to impeach, the executive branch's historical use of "outside" or "special" prosecutors, and practical institutional limitations.<sup>40</sup>

First, Congress alone has the power to commence impeachment proceedings against an executive officer.<sup>41</sup> Therefore, even without the independent counsel law, Congress has the power to remove a President, or any executive officer, convicted of "[t]reason, [b]ribery, or other high [c]rimes and [m]isdemeanors."<sup>42</sup> The Constitution requires a majority vote in the House of Representatives to begin the impeachment process.<sup>43</sup> Once the House decides to begin the impeachment process, the Senate is responsible for conducting a trial.<sup>44</sup> In practice, however, no executive officer has ever been successfully impeached, and, only two presidents, Andrew Johnson and Richard Nixon, have been the subject of serious impeachment ef-

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35. *See id.*

36. *See id.*

37. *See Eastland, supra* note 23, at 69.

38. *See id.*

39. *See generally* ARTHUR SCHLESINGER, *THE IMPERIAL PRESIDENCY* (1973).

40. *See infra* notes 41-65 and accompanying notes.

41. *See* SCHLESINGER, *supra* note 39, at 10.

42. U.S. CONST. art. II, § 2.

43. *See id.*

44. *See id.*

forts.<sup>45</sup> Therefore, except for the most extreme cases, impeachment is not a realistic option for controlling misuse of executive power.

Second, opponents of the independent counsel law argued that the President or the Attorney General already had the ability to appoint a prosecutor to investigate any executive official accused of criminal misconduct.<sup>46</sup> Historically, the President has used "outside" or "special" prosecutors to investigate executive officers with minimal conflicts of interest.<sup>47</sup> Unlike the current independent counsel, however, the federal prosecutors of the past were appointed and controlled by the executive.<sup>48</sup> For instance, in 1875, President Ulysses S. Grant appointed John B. Henderson as special counsel to investigate and prosecute the President's personal secretary in the St. Louis Whiskey Ring case.<sup>49</sup> In 1902, President Theodore Roosevelt appointed Francis J. Heney to prosecute the President's former Commissioner of the General Land Office for land fraud.<sup>50</sup> Further, in 1924, President Calvin Coolidge appointed a special prosecutor to investigate criminal misconduct in the Teapot Dome scandal.<sup>51</sup> And, most recently, President Nixon's Attorney General Elliot Richardson appointed outside prosecutor Archibald Cox to investigate the Watergate burglary.<sup>52</sup> Opponents of the law argued that the success of these examples proved that an outside or special prosecutor appointed by the executive branch could adequately check the misuse of executive power by investigating and prosecuting criminal misconduct, all without changing the existing system.

Lastly, a number of institutional limitations exist that safeguard against imperial executive power. Theodore Sorensen, in his book *Watchmen in the Night: Presidential Accountability after Watergate*,<sup>53</sup> writes that there are four institutional limitations that prohibit the President from wielding imperial executive power: the executive branch's bureaucracy, the press, Congress, and the judiciary.<sup>54</sup> First, Sorensen contends that the bureaucracy of the executive branch can be a powerful check against ex-

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45. See TERRY EASTLAND, *ETHICS, POLITICS AND THE INDEPENDENT COUNSEL: EXECUTIVE POWER, EXECUTIVE VICE 1789-1989* 8 (National Legal Center for the Public Interest ed., 1989).

46. See *id.*

47. See *id.*

48. See *id.*

49. See *id.*

50. See *id.*

51. See *id.*

52. See *id.*

53. Theodore Sorensen, *WATCHMEN IN THE NIGHT: PRESIDENTIAL ACCOUNTABILITY AFTER WATERGATE* (1975).

54. See *id.* at 34.

ecutive power.<sup>55</sup> For instance, agency heads, once in office, are not always supportive of the president. Rather, these political appointees begin to rely on "Congress for their funds, career personnel for advice and ideas, and particular constituent groups for support."<sup>56</sup> As an example of this phenomenon, Sorensen points to the Internal Revenue Service's insistence on rejecting President Nixon's request to audit a list of his enemies.<sup>57</sup> Second, Sorensen contends that aggressive reporting and investigative journalism safeguard against imperial executive power.<sup>58</sup> Third, Sorensen disagrees with Representative Don Edwards' analysis of the power of Congress to force President Nixon to turn over evidence ("He's got the Army, Navy, and Air Force, and all we've got is the [House Sergeant-at-Arms]").<sup>59</sup> Instead, Sorensen points out that the power of Congress to "establish new agencies and abolish old ones, withhold confirmation of presidential appointees, withhold funds, limit the number and salary of his White House Aides, and block his use of the armed forces, can be a powerful check on executive power."<sup>60</sup> Finally, Sorensen contends that the courts are an important check on executive power.<sup>61</sup> Historically, the courts have, among other things, limited the president's power to seize industrial plants,<sup>62</sup> regulate commerce in national emergencies,<sup>63</sup> enjoin newspaper publication of "leaked" government documents,<sup>64</sup> and most recently, required the President to defend against civil suits while in office.<sup>65</sup> The combination of these four institutional safeguards, therefore, help to ensure that the executive branch does not misuse its power.

Nevertheless, in the aftermath of Watergate, no amount of safeguards could curtail congressional action. In 1978, President Carter signed Title VI of the Ethics in Government Act into law.<sup>66</sup> A provision of the law, known as the sunset provision, forces Congress to reevaluate the law every 5 years.<sup>67</sup> In 1982, the statute was reenacted with minor amendments.<sup>68</sup> In

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55. *See id.*

56. *Id.*

57. *See id.* at 37.

58. *See id.* at 40. Recently, many politicians have demanded that the press allow elected officials a certain amount of privacy. In response to these demands, Sorensen astutely warns that "[i]rresponsible journalists can hurt; but irresponsible President's can destroy." *Id.*

59. *See id.*

60. *Id.* at 43-44.

61. *See id.* at 47-52.

62. *See* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

63. *See* *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

64. *See* *New York Times Co. v. United States*, 403 U.S. 713 (1971).

65. *See, e.g.,* *Clinton v. Jones*, 117 S.Ct. 1636 (1997).

66. *See* 28 U.S.C. §§ 49, 591-599 (1993).

67. *See* 28 U.S.C. §§ 599.

1987, the law was reenacted, but in 1992, Congress allowed it to lapse.<sup>69</sup> Two years later, following the public outrage over President Bush's pardons of Iran-Contra convicts and growing distrust with President Clinton's Whitewater dealings, Congress passed, and President Clinton signed, The Independent Counsel Reauthorization Act of 1994.<sup>70</sup> Accordingly, the independent counsel law will be reevaluated in 1999.<sup>71</sup>

### B. Procedural Requirements of the Independent Counsel Law

The Ethics in Government Act of 1978, as currently amended, sets forth the procedure for appointing an independent counsel.<sup>72</sup> The Act was originally intended to allow an impartial prosecutor to investigate certain high ranking government officials accused of violating federal criminal laws.<sup>73</sup> In order to achieve this impartiality, Congress vested power to appoint an independent counsel in the judiciary, thereby significantly limiting the executive branch's role in choosing and overseeing an executive employee, a federal prosecutor.<sup>74</sup>

In most cases, Congress commences an independent counsel investigation by forwarding to the Attorney General information which alleges a violation of a federal criminal law by a certain executive official.<sup>75</sup> Once the Department of Justice receives this initial request for an independent counsel, the Attorney General must decide whether the information is "sufficient to constitute grounds to investigate."<sup>76</sup> If the Attorney General finds that the information fails to satisfy the initial standard, then a report must be filed explaining the reason a preliminary investigation is not warranted.<sup>77</sup> If, however, the Attorney General finds that the information satisfies this initial standard, then a preliminary investigation must be initiated.<sup>78</sup>

Upon completing a preliminary investigation, or 90 days after one has been initiated, the Attorney General must report to the Special Division of the courts,<sup>79</sup> which is composed of three federal Judges appointed by the Chief Justice of the United States Supreme Court for 2 year terms and is in

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68. *See id.* (The most important change at that time was in the name of the prosecutor, from "special prosecutor" to "independent counsel").

69. *See id.*

70. *See id.*

71. *See id.*

72. *See* 28 U.S.C. §§ 591-599.

73. *See supra* note 6 and accompanying text.

74. *See* 28 U.S.C. § 49.

75. *See* 28 U.S.C. § 592.

76. *Id.*

77. *See id.*

78. *See id.*

79. *See id.*



charge of appointing an impartial prosecutor.<sup>80</sup> If the Attorney General's report concludes that "there are reasonable grounds to believe that further investigation or prosecution is warranted," then the Special Division will select an independent counsel.<sup>81</sup> At the time of selection, the Department of Justice must suspend all other investigations and proceedings regarding the matter.<sup>82</sup>

Once appointed, the Act grants the prosecutor "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 . . . ."<sup>83</sup> In summary, the independent counsel's powers include "initiating and conducting prosecutions",<sup>84</sup> conducting grand jury proceedings,<sup>85</sup> participating in civil and criminal court proceedings,<sup>86</sup> and "appealing any decision in which [he or she] participates in an official capacity."<sup>87</sup> The Act further states that an independent counsel shall, where possible, "comply with the written or other established policies of the Department of Justice respecting enforcement of the criminal laws."<sup>88</sup>

The length of an independent counsel's tenure is determined by any of the three possible events: the completion of any investigation or prosecution,<sup>89</sup> impeachment and conviction,<sup>90</sup> or termination by the Attorney General "for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of [the] independent counsel's duties."<sup>91</sup> If the Attorney General removes the independent counsel, he or she is required to submit a report to the Special Division and Congress stating the grounds for termination.<sup>92</sup>

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80. *See supra* note 29 and accompanying text.

81. *See* 28 U.S.C. § 592(c)(1)(A).

82. *See* 28 U.S.C. § 597(a).

83. 28 U.S.C. § 594(a).

84. 28 U.S.C. § 594(a)(9).

85. *See* 28 U.S.C. § 594(a)(1).

86. *See* 28 U.S.C. § 594(a)(2).

87. 28 U.S.C. § 594(a)(3).

88. 28 U.S.C. § 594(f).

89. *See* 28 U.S.C. § 596(b)(1). Before the completion of any investigation or prosecution, or every 6 months, the independent counsel is obligated to file a report describing the completed work, including the disposition of all cases. *See id.*

90. *See* U.S. CONST. art. II, § 4 (Impeachment Clause).

91. 28 U.S.C. § 594(h)(1)(A).

92. *See* 28 U.S.C. § 596(a)(2).

### C. Constitutionality of the Independent Counsel Law

Title VI of the Ethics in Government Act of 1978 was challenged on constitutional grounds ten years after its inception in *Morrison v. Olsen*.<sup>93</sup> In *Morrison*, the Court held that the Act, taken as a whole, does not violate the Appointments Clause of the United States Constitution,<sup>94</sup> or separation of powers principles.<sup>95</sup> In upholding the constitutionality of the independent counsel statute, the *Morrison* Court found that an independent counsel is an "inferior" executive officer and Congress has the power to appoint "inferior" executive officers.<sup>96</sup> The Court reasoned that because an independent counsel is subject to removal by the Attorney General, empowered to perform limited duties, and limited in tenure and jurisdiction, an independent counsel is an "inferior" executive officer.<sup>97</sup> Since Congress has the ability to vest power to appoint "inferior" executive officers in the judiciary under the current interpretation of the Appointments Clause, the *Morrison* Court held that Congress had the constitutional power to request that the judiciary, and not the executive, appoint an independent counsel.<sup>98</sup>

In addition, the *Morrison* Court found that the Act did not impermissibly interfere with the President's exercise of his constitutionally appointed functions.<sup>99</sup> The Court held that the independent counsel removal restrictions left the Executive Branch "sufficient control over the [prosecutor] to ensure that the President is able to perform his constitutionally assigned duties."<sup>100</sup> Therefore, the *Morrison* decision stands for the proposition that Congress has the power to limit the President's removal power of purely executive officers, as long as the appointee is an "inferior" executive officer and the removal restrictions are not of such nature that they impede the President's ability to perform his constitutional duty.<sup>101</sup>

In the aftermath of the *Morrison* decision, opponents of the independent counsel law argue that the Court incorrectly characterized an independent counsel as an "inferior" executive officer.<sup>102</sup> The Court reasoned that to determine if an executive officer is "inferior" or "principal," it must de-

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93. 487 U.S. 654 (1988).

94. U.S. CONST. art. II, § 2, cl. 2 (Appointments Clause).

95. See *Morrison*, 487 U.S. at 693-97. Separation of Powers principles are derived from the boundaries that exist between the separate powers that the Constitution gives to each branch of government.

96. See *Morrison*, 487 U.S. at 673, 691.

97. See *id.* at 671-73.

98. See *id.* at 674-75, 677.

99. See *id.* at 696.

100. See *id.* at 696.

101. See *id.*

102. See *supra* note 55-56 and accompanying text.

cide whether he or she is accountable to the executive.<sup>103</sup> Applying this reasoning, the *Morrison* Court found that an independent counsel is subordinate to high executive officials because of the removal provisions, therefore, an independent counsel must be "inferior."<sup>104</sup> In practice, however, the high executive removal standard has created a federal prosecutor answerable to no one.<sup>105</sup>

Further, opponents of the law contend that even if inferior, the President must be able to remove a purely executive officer, unencumbered by any legislative restrictions, because the executive branch has the sole power of carrying out the laws. This reasoning follows the "formal" or "positivist" approach to the separation of powers doctrine, emphasizing the separateness of the branches.<sup>106</sup> Positivists believe that the Supreme Court's *Morrison* decision was incorrect and that the Court should have followed its previous reasoning in *Bowsher v. Synar*<sup>107</sup> and *INS v. Chadha*.<sup>108</sup> In both *Bowsher* and *Chadha*, the Court was sympathetic to the argument that Congress was aggrandizing its power at the expense of the executive.<sup>109</sup> For instance, in *Chadha*, the Court held that the judicial branch's role cannot be abridged by action of another branch, and conversely, functions that are the appropriate jobs of the other branch's cannot be given instead to the judicial branch.<sup>110</sup> In the case of the independent counsel statute, opponents argue that the law violates separation of powers principles because Congress is interfering with the president's untrammelled right to enforce the laws of the United States.<sup>111</sup> Justice Scalia, the lone dissenter in *Morrison*, reasoned that separation of power principles required the President to maintain complete control over the investigation and prosecution of violations of the law and that the independent counsel law allowed Congress to unconstitutionally distribute that power to the judiciary.<sup>112</sup> Accordingly, *Morrison* critics contend that the independent counsel arrangement unconstitutionally places executive power in the hands of the judiciary.

On the other hand, supporters of the independent counsel believe that the Court was correct in finding that an independent counsel is an "infe-

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103. See *Morrison*, 487 U.S. at 679-82.

104. See *id.*

105. See *id.*

106. See Katy J. Harringer, *Separation of Powers and the Politics of Independent Counsels*, POL. SCI. Q., Summer 1994, at 262.

107. 478 U.S. 714 (1986).

108. 462 U.S. 919 (1983).

109. See Harringer, *supra* note 106, at 163.

110. See *Chadha*, 462 U.S. at 965-66.

111. See Harringer, *supra* note 106, at 262.

112. See *Morrison*, 487 U.S. at 108-09 (Scalia, J., dissenting).

rior" executive officer. Supporters believe that the independent counsel's limited tenure and lack of authority to formulate policy is decisive.<sup>113</sup> Following this reasoning, appointment of an "inferior" executive officer by the judiciary would not violate the Appointments Clause.

In addition, proponents of the law agree with the *Morrison* Court's findings that the independent counsel law does not violate separation of powers principles. This reasoning follows the "functional" or "dialectical" approach to the separation of powers doctrine, allowing adaptation and emphasizing the "ambiguities of the distribution of powers in the system."<sup>114</sup> Functional scholars opine that a law does not violate separation of powers principles if it allows the executive branch to retain a certain level of power.<sup>115</sup> Accordingly, functionalists point to the attorney general's removal power, "for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of [his or her] duties," to support their contention that the statute does not unconstitutionally impede the exercise of executive power.<sup>116</sup>

### III. Discussion

Since the inception of the independent counsel law in 1978, there have been approximately nineteen independent counsel investigations which have cost a total of \$120 million.<sup>117</sup> Most of these investigations have been expensive, time consuming and have resulted in no charges being filed. To date, Independent Counsel Kenneth Starr has spent 3½ years and well over \$35 million on the Whitewater investigation.<sup>118</sup> Lawrence Walsh spent 7 years investigating the Iran-Contra scandal.<sup>119</sup> Independent counsel Michael Zeldin, after 3 years and \$2.8 million, concluded that the allegations that President George Bush's White House aides illegally searched Bill Clinton's passport files had no merit.<sup>120</sup> These statistics are especially amazing when compared to the previous two centuries. Between 1776-1978 only five "outside" or "special" prosecutors were appointed to investigate executive misconduct.<sup>121</sup>

The above statistics beg the question of whether modern day politicians are committing more acts of criminal misconduct than at any other

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113. See *Morrison*, 487 U.S. at 671-72.

114. Harringer, *supra* note 106, at 262.

115. See *id.*

116. See 28 U.S.C. § 596(a)(1).

117. See Jost *supra* note 2, at 157.

118. See *id.*

119. See *id.* at 157.

120. See *id.*

121. See *id.* at 154.

time in our country's history. Even though the answer to this question is most likely "no," the question is asked anew with each independent counsel appointment. In turn, public confidence in the integrity of executive officials continues to decline. Therefore, the law that was created to check executive power and restore public confidence in the integrity of executive officials has gone too far. In the rush for a solution, the drafters failed to foresee the negative repercussions of the Act, an "unprecedented extension of congressional power [while] unjustifiably weaken[ing] the executive branch."<sup>122</sup> Accordingly, some commentators believe that Congress should allow the law to lapse when it comes up for reenactment in 1999. A less extreme solution, however, should not be overlooked. Instead of scrapping the law, several simple amendments could help the independent counsel law fulfill its original purpose. By adjusting the scope, initiation procedures, and compensation provisions, the current adverse effects could be eliminated.

#### A. Scope

Recently, the most serious attempt to restructure the independent counsel arrangement has focused on its broad scope with regard to targets, crimes, and jurisdiction. Unlike the normal prosecutorial system where the prosecutor begins with the crime and then looks for the criminal, "[Independent] C[ounsel]s start with the names of officials who have come under suspicion and then are asked to search the law books for a suitable 'crime.'"<sup>123</sup> The independent counsel prosecutorial system requires that an independent counsel be appointed when allegations of misconduct are made against the President or Vice President; Cabinet officers; top White House aides and officials in the Justice Department, Central Intelligence Agency, and Internal Revenue Service; and officers of the President's campaign committee.<sup>124</sup> In addition, "[t]he law gives independent counsels jurisdiction over all but the most minor federal crimes."<sup>125</sup> Finally, the law allows independent counsels to easily expand their investigations beyond the initial accusations.<sup>126</sup> Accordingly, independent counsel investigations authorized by the current Act cover too many executive officials, involve too many federal crimes and are too easily expanded into unforeseen areas.

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122. Eastland, *supra* note 23, at 68.

123. Mortimer B. Zuckerman, *A Good Idea Gone Wrong*, U.S. NEWS & WORLD REPORT, Dec. 16, 1996, at 80.

124. See Jost, *supra* note 2, at 151.

125. *Id.*

126. See *id.*

### 1. *Executive Officials Covered by the Independent Counsel Law*

Critics of the Act contend that too many executive officers are covered by the law.<sup>127</sup> The current independent counsel law is applicable if there is information that any of the 120 executive officials referenced in the statute committed an act of criminal misconduct.<sup>128</sup> In order to understand the need to limit the number of executive officers covered by the law, one must look no further than the original purpose of the independent counsel arrangement. The Act was originally created to avoid situations where an executive prosecutor was investigating executive officers who controlled the prosecutor's job security.<sup>129</sup> In particular, Congress believed that a Department of Justice prosecutor was too close to the Attorney General and President to be an impartial investigator.<sup>130</sup> Failing to take into account this purpose, however, the drafters of the independent counsel arrangement included executive officials who had no relationship to Department of Justice prosecutors. In practice, such an over-extensive approach has limited the Act's benefits and led to serious adverse effects. In response to this problem, former Watergate Special Prosecutor Archibald Cox has suggested that the independent counsel law be limited to the President, Vice President, key Cabinet officers and high ranking White House staff.<sup>131</sup> Cox argues that beyond the suggested scope, "the opportunities for politically motivated abuse of the law increase, while . . . the credibility of the investigation . . . diminishes."<sup>132</sup> Although Cox's reasoning is accurate, the law could be effectively narrowed even more than he suggests. Strictly adhering to the reasoning behind the law, only those executive officers who have some employment control over the Department of Justice prosecutor need be covered by the law. Thus, Congress could avoid the current problems and refocus on the Act's original intent by revising the independent counsel law such that its use is limited to the President, Vice President, and key White House and Department of Justice staff, all of whom have significant control over the prosecutor's job.

### 2. *Federal Crimes*

In addition to criticizing the expansive scope, opponents of the independent counsel statute argue that it covers too many crimes. The independent counsel statute covers any violations of federal criminal law other

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127. *See id.*

128. *See id.*

129. *See id.*

130. *See id.*

131. *See* Archibald Cox, *Curbing Special Counsels*, N.Y. TIMES, Dec. 12, 1996, at A37.

132. *Id.*

than petty offenses.<sup>133</sup> Once again, Congress should look to the evil that the independent counsel law was created to combat. After The Saturday Night Massacre, legislators were interested in creating an impartial prosecutor who would safeguard against imperial executive power.<sup>134</sup> In their effort, drafters of the independent counsel statute created a law that included far more crimes than were necessary to effect the desired goal. In addition to serious federal violations, the independent counsel law covers minor misconduct that could not be considered a misuse of executive power.<sup>135</sup> Further, the independent counsel arrangement covers misconduct that occurs before the executive official entered office—once again, conduct that has nothing to do with misuse of executive power.<sup>136</sup> In instances where the law is applied based on minor crimes or prior misconduct, the negative effects of the law will likely far outweigh the benefits. Accordingly, Congress should revise the statute to only cover crimes that can be considered misuses of state power, abuse of power, or improper influencing, committed while in office, as those are the types of conduct for which the Act was originally designed to prevent.

### 3. *Easily Expanded Jurisdiction*

Critics of the independent counsel law further argue that its jurisdiction is too easily expanded. Currently, the independent counsel arrangement allows the prosecutor to follow an investigation for as long, and as far, as it is deemed necessary by the independent counsel.<sup>137</sup> “How frightening it must be,” Justice Scalia wrote in his *Morrison* dissent, “to have your own independent counsel and staff appointed, with nothing else to do but investigate you until investigation is no longer worthwhile.”<sup>138</sup> The current Whitewater investigation is a prime example of Scalia’s nightmare. Since the initial allegations, Kenneth Starr’s jurisdiction has been expanded to cover three completely unrelated issues: whether former White House aides lied to federal investigators or Congress in connection with the White House travel office, whether White House Aides illegally searched FBI files, and whether President Clinton obstructed justice or committed perjury in regards to his relationship with White House intern Monica Lewinsky.<sup>139</sup> Accordingly, Congress should limit an independent

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133. See Jost, *supra* note 2, at 151.

134. See Bork, *supra* note 28, at 21.

135. *Id.*

136. See Jost, *supra* note 2, at 149.

137. See Judy Bachrach, *They Who Serve and Suffer*, VANITY FAIR, Dec. 1996, at 148.

138. *Morrison*, 487 U.S. at 732 (Scalia, J., dissenting).

139. See Jeffrey Rosen, *Kenneth Starr, Trapped*, N.Y. TIMES, June 1, 1997 (Magazine), at 42.

prosecutor's jurisdiction in order to avoid the nightmare foreseen by Justice Scalia. Critics have suggested that future investigations should be limited to the initial allegations and charges directly related to them.<sup>140</sup> In fact, Representatives Jay Dickey and John Conyers Jr. adopted this approach in recent legislation, but so far Congress has refused to consider it.<sup>141</sup> Nonetheless, the Dickey-Conyers approach is a step toward resolving the problem.

In order to stop independent counsels from prolonging investigations and comprehensively addressing the problem, Congress should go one step further and set limits on the length of any investigation. Congress could reasonably limit the independent counsel by amending the law such that charges relating to the initial allegations or related misconduct would have to be brought within one year from the date the investigation is initiated. This would provide ample time for an investigation, and still provide protection against abuse.

## B. Initiation Procedures

The independent counsel law's broad scope is only partly responsible for the law's adverse effects. A more serious problem is posed by the ease with which an investigation can be initiated. Because the benefits of allowing easy initiation procedures are outweighed by the risks of encouraging opposing politicians to dig up or plant stories, the independent counsel initiation procedures are in need of revision. There are two possible solutions to this problem: legislative restraint and legislative revision.

### 1. Legislative Restraint

Critics of the independent counsel law contend that legislative restraint is not a viable option, an opinion amply supported by the events that have transpired during the current Clinton Administration. In the past four years, five new independent counsel investigations have been initiated.<sup>142</sup> The reason for the popularity of the law is simple: the independent counsel law has become the most recent "weapon in the ethics wars constantly fought by the parties."<sup>143</sup> Using the independent counsel law, it is easier to discredit the opposing party's character than it is to debate them on the issues.<sup>144</sup> Further, once independent counsels are requested, whether based on frivolous or meritorious claims, the party in control of the executive

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140. See Jost *supra* note 2, at 151.

141. See *id.*

142. See *id.* at 155.

143. *Id.* at 151.

144. See Gloria Borger, *It's the Law, Not the Lawyers*, U.S. NEWS & WORLD REPORT, Mar. 27, 1995, at 33.



branch suffers a loss in credibility. Mortimer Zuckerman, Editor of U.S. News & World Report, articulated this problem when he wrote, “[t]he real crime today is too often that of being unpopular with the predominant personalities in Congress or being caught in a political tug of war between legislative and executive branches controlled by different parties.”<sup>145</sup> Considering the lack of adverse political consequences for requesting an independent counsel—and many for the targeted individual—it is doubtful that any legislator will weigh the costs and decide to refrain from making a frivolous request. Therefore, legislative restraint is not likely to be a viable option.

## 2. *Legislative Revision*

Legislative revision is a far more promising means to control the ease with which an investigation is initiated. Under the current independent counsel scheme, the Attorney General has limited discretion to refuse to apply for an independent counsel.<sup>146</sup> According to the law, the Attorney General must conduct a preliminary investigation if allegations “[are] sufficient to constitute grounds to investigate.”<sup>147</sup> In practice, however, the independent counsel arrangement limits the Attorney General’s discretion even more than the standard suggests. Instead of making findings and drawing conclusions with the benefit of testimony or documents obtained through subpoenas, the Attorney General must do so through non-compulsory voluntary investigations.<sup>148</sup> In practice, such limitations mean “no credible preliminary investigation is possible, and referral to a court is almost automatic.”<sup>149</sup>

At no time has the fact that the Act is hair-triggered been more evident than in the commencement of an investigation of President Clinton’s Secretary of Housing and Urban Development, Henry Cisneros.<sup>150</sup> In March of 1995, David M. Barrett was appointed as independent counsel in charge of investigating Cisneros for failing to disclose payments to his former mistress.<sup>151</sup> At the time of the appointment, the Clinton White House argued that this “was like calling in a SWAT team to investigate a traffic violation.”<sup>152</sup> Attorney General Janet Reno responded by claiming

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145. Zuckerman, *supra* note 123, at 80.

146. *See* Jost, *supra* note 2, at 149.

147. 28 U.S.C. § 59(a).

148. *See* Jost, *supra* note 2, at 149.

149. *See id.* (quoting Joseph E. DiGenova, the original independent counsel in the Clinton passport case).

150. *See* Anthony Lewis, *Reductio Ad Absurdum*, N.Y. TIMES, Dec. 15, 1997, at A23.

151. *See id.*

152. *See* Borger, *supra* note 144, at 33.

that she was just following the law.<sup>153</sup> Reno's response demonstrates the need for Congress to revise the law to make it easier for the Attorney General to reject calls for an independent counsel in situations where the public good is heavily outweighed by the expense.

### C. Compensation Provisions

The most apparent flaw in the independent counsel statute is its compensation provisions, or more properly stated, its lack of effective compensation provisions. Although it sufficiently combats the institutional conflict of interest, the independent counsel compensation provisions create new opportunities for conflicting interests, as evidenced by the sources and size of Kenneth Starr's income.<sup>154</sup> Specifically, the law provides no check against influence peddling. An independent counsel is free to accept funds from any source outside the government.<sup>155</sup> Therefore, it is easy to imagine how an option of financial stability for the independent counsel could lead to conflicting interests as significant as those the law was designed to eliminate. For example, Kenneth Starr receives ten times his government salary from corporations, some of which have a financial stake in the outcome of the investigation.<sup>156</sup> The most honest person might feel a certain amount of pressure to assist these companies. Accordingly, Congress should revise the independent counsel compensation provisions to prevent sources outside the federal government from contributing to the income of an independent counsel. In conjunction with the other proposed limits, which would mean fewer independent counsels, the federal government should be able to pay enough to attract competent attorneys.

## IV. Conclusion

Because of partisan politics, the independent counsel statute will likely be difficult to revise. Since a majority in the House and Senate is needed to revise the law, the political party that controls Congress is the political party that controls reformation. Additionally, because Congress initiates independent counsel investigations, the political party that controls Congress is historically the party that benefits from the law. For instance, the current Republican Congress will not want to revise the law because they have successfully used it to weaken President Clinton's Administration. In fact, Chairman of the House Judiciary Committee, Representative Henry Hyde, recently suggested that the law should not be re-

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153. *See id.*

154. *See supra* notes 18-21 and accompanying text.

155. 28 U.S.C. § 594(b).

156. *See Pincus & Lardner, supra* note 19, at 11.

formed, reasoning that it is not a "good idea to change the ground rules at a time when there is an independent counsel frenzy going on, . . . . Accusations could be made that we're trying to pull the rug from under the independent counsels while they're working."<sup>157</sup>

Inaction, on the other hand, cannot be blamed entirely on the Republican Congress. Immediately following the Iran-Contra scandal, Republicans became increasingly irritated with independent counsel Lawrence Walsh.<sup>158</sup> In response to this frustration, Republicans publicly objected to reauthorizing the independent counsel law.<sup>159</sup> Democrats, however, were not willing to give up this political weapon as they were experiencing a rise in popularity due to the investigations of executive Republicans.<sup>160</sup> Accordingly, the country may have to wait until the same political party controls both the executive and legislative branches of government before real changes are implemented.

In any event, there is still a serious need for an impartial prosecutor as a safeguard against the misuse of state power. The Act must be revised to allow for an independent counsel in only the most extreme cases. Currently, the Act's broad scope and easy initiation procedures allow for its use in even trivial cases. Further, the Act's compensation provisions fail to remedy the problem of perceived and actual bias. Unless revised, the independent counsel law will likely continue to weaken the executive branch and lower public confidence in the integrity of executive officials, not to mention scaring off the most qualified individuals for executive positions. To alleviate these problems, Congress should make it more difficult to initiate an investigation by giving the Attorney General more discretion. In addition, once an investigation has been initiated, Congress should limit its scope such that the law is only applicable to the President, Vice President, and key White House and Justice Department officials. Congress should also ensure that the independent counsel is limited to misuses of state power that occur while executive officials are in office, and that all charges are related to initial allegations or related misconduct. Further, unless appropriate charges are brought within one year from the date that an investigation is initiated, or good cause for an extension is asserted, Congress should require that the investigation be terminated. Lastly, to minimize perceived and real conflicts of interest, Congress should limit an independent counsel's compensation to his or her federal salary. If all of these steps

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157. Editorial, *GOP Heads Independent Counsel*, THE FLA. TIMES UNION, Sept. 23, 1997, at A4.

158. See Terry Eastland, *Democrats Change Their Minds on Independent Counsel Law* WALL ST. J., Jan. 22, 1997, at A15.

159. See *id.*

160. See *id.*

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are taken, a revised independent counsel system will safeguard against overreaching executive power and restore public confidence in the integrity of executive officials.