

**AMERICAN ENTERPRISE INSTITUTE AND
THE BROOKINGS INSTITUTION**

**PROJECT ON
THE INDEPENDENT COUNSEL STATUTE**

REPORT AND RECOMMENDATIONS

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THE AMERICAN ENTERPRISE INSTITUTE

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PREFACE

The two of us took different positions on the Independent Counsel Act when we served in the Senate.¹ We have shared, nevertheless, a conviction that the vital goal of achieving public confidence in the impartial administration of justice requires special attention to the manner of conducting investigations and prosecutions, if necessary, of offenses by high officials. In anticipation of the Act's scheduled sunset on June 30, 1999, we concluded we should try, to the best of our abilities, to contribute to the public consideration of improvements to it.

At our request, the American Enterprise Institute and The Brookings Institution, each of whose nonpartisan public policy studies we have long respected, agreed to organize this Project on the Independent Counsel Statute and to lead a major research effort that has informed our work. Of course, the recommendations in the report are those of the individuals who are subscribing to them and not of any organization.

We had planned that the Project would not take a position on the threshold question of whether the statute should be allowed to expire or be reauthorized in some form. Our original purpose was to recommend revisions to the Act, if Congress chose to take that course. It is now evident that the political branches have answered the reauthorization question: the Act will not be renewed. The focus of our report is thus now on the inescapable question of what should follow next month's final sunset of the Act.

We requested a bipartisan group of eight distinguished citizens, with broad experience both in and out of government—Zoë Baird, Drew S. Days, III, Carla Anderson Hills, Bill Paxon, John G. Roberts, Jr., David E. Skaggs, Dick Thornburgh, and Mark H. Tuohey III—to participate in this endeavor. We are grateful for their time and invaluable wisdom and are pleased to join them in the unanimous recommendations that follow.

Robert Dole

George J. Mitchell

¹ Robert Dole opposed reauthorization of the Act in 1994, while George Mitchell supported it.

SUMMARY

Starting in 1978 and continuing with each extension, Congress authorized the Independent Counsel Act (“the Act”) for no more than five years at a time. In that way, Congress assured that the Act, which began as an experiment and continued as one over these last twenty years, would be reappraised periodically in light of experience. Congress, the President, and the Attorney General now have a chance to respond affirmatively to the opportunity presented by the Act’s fourth and likely final sunset at the end of this June.

In the last several months, our bipartisan group—equally divided between Republicans and Democrats who served in administrations from President Ford through President Clinton or in the Congress—has considered alternatives to the Act. These are our unanimous recommendations.

At times, extraordinary mechanisms are required to deal with conflicts of interest, mostly of a political nature, that call upon the Department of Justice to investigate high ranking officials of an administration (or campaign officials who helped to elect it) of which the Attorney General is a part. These political conflicts threaten public confidence in the impartiality or vigor of investigations by regular officers and personnel of the Department of Justice. The Act’s attempted solution was to establish detailed rules to govern appointments of independent counsel and to divest the Attorney General of the power to select them.

The Act reflects a post-Watergate view that the Attorney General could not be trusted to resolve political conflicts of interest. The history of earlier cases, and

also of some recent ones not covered by the Act, shows that Attorneys General can succeed in identifying cases that warrant appointment of special counsel. History also shows that over time they have understood the need to select counsel who command public confidence. We recommend that responsibility for identifying the need to appoint special counsel and for selecting those counsel be restored to the Attorney General.

Once an Attorney General appoints a special counsel to resolve a conflict of interest, the public should be assured that the conflict is genuinely resolved. The challenge of any system for independent or special counsel is to strike the right balance between sufficient independence and sufficient accountability, so the public is assured that an inquiry is both credibly and responsibly resolved.

On the bedrock issue of independence, we recommend that the grant of independent authority to special counsel be essentially that provided in the Watergate Special Prosecution Force regulation, as

strengthened and carried forward in the Act and the Department of Justice's current independent counsel regulations. This would include authority for a special counsel, without approval of the Attorney General or other Justice Department officials, to conduct grand jury proceedings, frame and sign indictments, contest privilege assertions, conduct trials, and appeal decisions, all subject to regular Department standards.

We endorse the proposition, validated by history, that once a special counsel is appointed to resolve a conflict, the counsel should be removed and replaced only for good cause during the course of an investigation. But we have also concluded that at designated intervals, first, two years after a counsel is appointed and then, annually, an Attorney General should have the responsibility to decide whether to terminate an investigation. In either case—removal and replacement of a special counsel for cause or termination of an investigation after a periodic review—the Attorney General is politically accountable for the decision, the reasons for which should be explained in a report to Congress. In a number of other specific areas, we recommend enhancing the Attorney General's ability to check the costs and scope of an appointment.

There is a strong public interest in attempting to strike a balance between independence and accountability in regulations published in advance of the immediate need to appoint a special counsel in a particular matter. Among other reasons, public trust in an investigation will be enhanced if it is conducted under rules that

are the product of careful, balanced consideration, rather than primarily the politics of the moment. Accordingly, we recommend that Congress enact legislation requiring, but not prescribing the content of, Justice Department regulations covering special counsel investigations. The Attorney General's exercise of that responsibility should be illuminated by public discussion. To that end, we have included illustrative regulations to describe major points, recognizing that actual text may be drafted in various ways.

Beyond issues about the appointment or work of special counsel, we have two general observations that also bear on public confidence in the application of law to high officials.

First, public trust in impartial federal law enforcement must begin with a Department of Justice headed by an Attorney General with proven integrity and independence. When regular Justice Department authority is displaced, we risk uneven application of the law and a weakening of the Department. It is important, therefore, to bolster public confidence in the Department of Justice, thereby reducing the need to resort to special mechanisms for investigations. While we do not recommend any particular proposal for better insulating Justice Department decisions from suggestions of political influence, we do underscore the indispensable importance of each Attorney General's integrity and independence.

Second, the nation needs to examine what it expects of the criminal justice system,

as applied to high officials. Too often, political institutions turn to the criminal justice system when civil or administrative actions against public or campaign officials, or accountability through the political process, may provide more fitting responses. These issues are beyond this report's ambit, but even the best system for investigating or prosecuting wrongdoing by high officials will remain under strain unless a better balance between criminal and non-criminal remedies is established.

Our main recommendations, as explained in the report, may be summarized as follows:

- **Appointment of special counsel:** Responsibility and authority to appoint special counsel should be restored to the Attorney General. Using customary investigative tools, the Attorney General should determine whether employing the regular offices of the Department of Justice may result in a conflict of interest and whether appointment of special counsel to resolve the conflict would serve the public interest.
- **Regulations:** Congress should enact legislation that requires the Attorney General to issue standing regulations on the conduct of special counsel investigations. While their content should be left to the Attorney General's discretion, the objective of the regulations should be to help instill public confidence in any subsequent investigations and prosecutions.
- **Jurisdiction:** The Attorney General should define the jurisdiction of any special counsel to clearly address the circumstances causing the conflict of interest and any crimes that may obstruct an investigation. The grant of jurisdiction should not include ambiguous categories such as "related matters" that may invite ever-widening jurisdiction.
- **Enlargement of jurisdiction:** In no case should a special counsel be permitted to investigate matters outside the scope of the appointment order unless specifically authorized by the Attorney General to do so. If enlargement of a special counsel's jurisdiction is proposed, the Attorney General should be guided by its likely impact on the timely completion of the counsel's work.
- **Establishing a budget:** The Attorney General should establish and revise as necessary a budget for the Office of Special Counsel. A defined budget will require a special counsel to prioritize work. At the same time, the Attorney General should assure that such inquiries receive the necessary resources.
- **Grant of independence:** To assure the public that a conflict of interest is genuinely resolved, special counsel should have independent authority, without approval of the Attorney General, to conduct grand jury proceedings, frame and sign indictments, contest privilege assertions, conduct trials, and appeal decisions. On this fundamental issue, the Department of Justice's Watergate regulation, as strengthened and carried forward in the Act and in the Department's 1987 (and still current) independent counsel regulations, should be the standard.

- **Compliance with Department policies and procedures:** Special counsel should be required to adhere to established Department of Justice policies and procedures, except for procedures that would require approval of other Department officials for investigative or prosecutorial actions.
- **Removal of special counsel:** Special counsel should be removed and replaced only for cause. History demonstrates conclusively that such protection is necessary. The Act's special provision for judicial review of removal decisions will lapse with the Act's sunset, but the Attorney General's reasons for removal should be made public. Political accountability of the kind that followed President Nixon's decision to fire Archibald Cox should provide a strong deterrent against abuse.
- **Termination of an Office of Special Counsel:** In addition to the possibility that a special counsel could be removed at any time for cause, the

Attorney General should also be authorized to determine at designated intervals—first, after two years, and then annually— whether an investigation should be terminated, and, if so, to explain publicly the reasons for termination.

- **Annual and final reporting requirements:** In addition to a final report, special counsel should submit annual reports to the Attorney General to enable the Attorney General to decide at the intervals set by regulation whether an investigation should continue. The Attorney General should have the sole power to determine whether to release all or parts of these reports to Congress or the public. With respect to these reports, the Attorney General's duty to provide information to Congress should be exercised in accord with the Executive Branch's general obligation to respond to Congress on matters within the latter's constitutional responsibilities, without a particularized requirement to report on grounds for impeachment.

INTRODUCTION

In 1987, President Reagan signed into law a five-year reauthorization of the Independent Counsel Act (the “Act”). In an accompanying statement, he “fully endorse[d] the goal manifested in the Independent Counsel Act of ensuring public confidence in the impartiality and integrity of criminal law investigations of high-level executive branch officials.” Pub. Papers 1524 (1987). He expressed misgivings, however, about the Act’s constitutionality,² and regret that Congress and the President had not been able to agree on a different framework “to ensure impartial, forthright, and unimpeded” investigations of high officials accused of criminal wrongdoing.

Starting with the initial legislation in 1978, which created a system of court-appointed special prosecutors, and continuing with each extension of authority for appointment of independent counsel (the name substituted in the 1982, 1987, and 1994 reauthorizations), Congress exhibited its own caution by authorizing the Act for no more than five years at a time. In that way, it assured that the Act, which began and continued as an experiment, would be periodically reappraised in light of experience. Congress, the President, and the Attorney General now have a chance to respond affirmatively to the opportunity presented by the Act’s fourth, and likely final, sunset this June. They can best do so by squarely addressing President Reagan’s challenge to consider a different framework for assuring, when warranted, the “impartial, forthright, and unimpeded” investigation and prosecution of high ranking officials.

In the last several months, our bipartisan group, equally divided between Republicans and Democrats who served in administrations from President Ford through President Clinton or in the Congress, has considered alternatives to the Act in the event of its lapse. As more fully described in part II (following a discussion in part I of several lessons from the Act’s history), these are our unanimous recommendations.

At times, extraordinary mechanisms are required in response to conflicts of interest, mostly of a political nature, that may undermine public confidence in the impartiality or vigor of investigations by regular officers and personnel of the Department of Justice. The Act, which is codified at 28 U.S.C. §§ 591-99, sought to resolve those conflicts of interest by establishing detailed rules to govern when an independent counsel should be appointed, and by divesting the Attorney General of the

² President Reagan’s remarks preceded the Supreme Court’s decision in *Morrison v. Olson*, 487 U.S. 654 (1988), upholding the Act’s constitutionality.

power to select one. It designated a sizable group of executive branch (and some federal campaign) officials whose coverage is mandated. Covered officials included not only the President, the Vice President, and the Attorney General, but also the entire Cabinet, several tiers of Justice Department officials, and others. The Act limited the Attorney General's time and tools to sift allegations. It established a low legal and evidentiary threshold for requiring the Attorney General to apply to a Special Division of the U.S. Court of Appeals for the District of Columbia Circuit for appointment of an independent counsel.

The Act's mechanisms for appointing independent counsel were a novel approach to an old problem, premised on the post-Watergate view that the Attorney General's responsibility to resolve conflicts of interest should be drastically curtailed. Our view is different. The history of matters preceding or not covered by the Act shows that Attorneys General, spurred at times by the political process, have succeeded in notable circumstances in identifying cases that warrant the appointment of special counsel. History also shows that over time Attorneys General have understood the need to select counsel to conduct those investigations who would command public confidence. We recommend that responsibility for identifying the circumstances for appointing special counsel and for choosing them, to the extent that those responsibilities had been removed by the Act, be restored to the Attorney General.

Once an Attorney General appoints a special counsel to resolve a conflict of interest, the public should be assured that the

conflict is genuinely resolved. The key is the special counsel's independence. The public should also be assured that the benefits it will gain from a counsel's independence are not overwhelmed by any harm from the counsel's lack of accountability. The bedeviling challenge of any system for independent or special counsel has always been to strike the right balance between independence and accountability.

On the fundamental issue of independence, we recommend that the grant of independent authority which Attorneys General previously endorsed—in the Watergate Special Prosecution Force regulation, as strengthened in the Act and carried forward in the Justice Department's current independent counsel regulations³—apply to special counsel who are appointed by the Attorney General to resolve a conflict of interest. The main elements of that grant, in addition to generally vesting “full power and independent authority,” authorize special counsel, without approval of the Attorney General or other Department of Justice

³ As we will describe in the report, the Watergate Special Prosecution Force regulation, 28 C.F.R. § 0.37 (1973), was promulgated by the Attorney General to establish a charter for the Watergate Special Prosecutor. The Justice Department's current independent counsel regulation, 28 C.F.R. Part 600, was issued in 1987, when the Act's constitutionality was in question, to provide supplemental authority for independent counsel appointed under the Act. The regulation subsequently established authority for independent counsel who were appointed by the Attorney General during a lapse in the Act, as in the case of the first Whitewater independent counsel, Robert Fiske, or when the Act was otherwise inapplicable.

officials, to conduct grand jury proceedings, frame and sign indictments, contest privilege assertions, conduct trials, and appeal decisions.

History demonstrates conclusively that it is also important to preserve the basic idea that special counsel, once appointed to resolve a conflict, should be removed and replaced only for cause during the course of an investigation. With the Act's final sunset, there will no longer be (except for the remaining independent counsel appointed under the Act) a special provision for judicial review of removal decisions. We believe it is sufficient to require the Attorney General to report and explain a removal decision to Congress and then to rely on the kind of political accountability that followed President Nixon's decision to fire Archibald Cox.

In specific areas, we recommend enhancing the Attorney General's ability to check potential excesses by special counsel in spending excessively, expanding their investigations, or otherwise unduly protracting their work. For example, we recommend that at specified intervals—two years after appointment of a special counsel, and then annually—the Attorney General should have the responsibility to determine whether to terminate an investigation. This determination should not be subject to the good cause standard for removal of counsel during an investigation. However, the Attorney General's decision to terminate an investigation should certainly be subject to political accountability, and, here too, the reasons should be explained in a report from the Attorney General to Congress.

To provide clear advance guidance about ground rules, we recommend that Congress enact legislation that requires the Attorney General to issue regulations on the conduct of special counsel investigations. Published regulations were a critically important feature of the Watergate solution. And as noted above, since 1987 the Department of Justice has had standing regulations on the work of independent counsel who are appointed by the Attorney General. A draft bill is explained in part II and is attached as Appendix A.

So that the Department of Justice will have the flexibility to benefit, over time, from accumulated experience, we recommend that Congress not mandate the content of the regulations. Nevertheless, the Attorney General's exercise of that responsibility should be illuminated by public discussion. To that end, in addition to offering recommendations in part II, we have prepared illustrative regulations that are set forth in Appendix B. Our purpose is to facilitate appraisal of the principal ideas expressed in them, recognizing that actual text may be drafted in various ways.

As indicated in its recent communication to Congress, the Department of Justice is considering regulations to govern future proceedings.⁴ We believe this first effort is a step in the right direction. We also believe that on certain matters, notably the

⁴ Letter from Acting Assistant Attorney General Dennis K. Burke to Chairman George W. Gekas, Subcomm. on Commercial and Administrative Law, House Comm. on the Judiciary, April 13, 1999.

independence of special counsel appointed by the Attorney General, the Department's proposal would be improved by adhering more closely to the Watergate regulation's grant of independence, as strengthened in the Act and in the Department's 1987 (and still current) independent counsel regulations.

Beyond the particulars of this report, there are two general observations that we believe are important to make, lest the recommendations be seen in isolation from other matters that also affect public confidence in the application of law to high officials.

First, the enduring basis for confidence in impartial federal law enforcement must be merited trust in a Department of Justice headed by an Attorney General with proven integrity and independence. Identifying, avoiding, and genuinely resolving conflicts of interest are critical to sustaining that trust. An Attorney General's failure to discharge this responsibility can diminish public confidence in the impartial administration of justice. At the same time, routinely turning outside the Department of Justice to resolve potential conflicts risks both uneven application of the law to subjects of investigations and the possibility that the Department may be weakened.

Strengthening public confidence in the Department of Justice should help to reduce

the occasions when resort to extraordinary law enforcement mechanisms is necessary. For that reason, in addition to issues about appointment of special counsel, we considered proposals to establish structures or other devices within the Justice Department to insulate law enforcement decisions from political influence. In the end, we decided not to recommend fixed mechanisms to implement those suggestions, although some may have merit to individual Attorneys General. We underscore, instead, as obvious as the point may be, the indispensable importance of each Attorney General's integrity and independence.

Second, a vital part of the task of enhancing long term public confidence in the criminal justice system, as it applies to high officials, lies in reexamining what that system is asked to do. We believe that too often our political process turns to the criminal justice system to accomplish tasks that are more suitably addressed in other ways. Civil or administrative enforcement of laws that apply to public or campaign officials, or political accountability through congressional or electoral processes, may provide the most fitting responses to many breaches. These issues are beyond the report's ambit, but unless continuing attention is paid to them and reforms are made, even the best system for investigating or prosecuting wrongdoing by high officials will remain under strain.

I. SEVERAL LESSONS FROM HISTORY

The history of the Independent Counsel Act has been well told in legislative hearings and in scholarly literature. Without trying to restate that history at any length, several features of it bear emphasis given the recommendations in this report.

A. Watergate

The debate over the future of any independent counsel system has underscored the importance of understanding how our political and legal institutions worked in 1973 and 1974 during the events of Watergate, with no Independent Counsel Act yet in place. In doing so, it is important to recall the uniqueness of the circumstances in which our political institutions were able to forge a solution. It is also important to recall the reliance that our legal institutions placed on the terms of a written charter, which in Watergate took the form of a published regulation of the Attorney General.

The May 1973 appointment and chartering of a Watergate Special Prosecutor occurred in the special circumstance of a confirmation process. On April 30, President Nixon had announced the resignation of Attorney General Richard Kleindienst and those of the President's closest White House aides, H.R. Haldeman and John Ehrlichman. He also announced the dismissal, in effect, of White House Counsel John Dean. These actions left the Department of Justice leaderless and confirmed for the public and

the Congress that the Watergate matter had reached into the White House.

At the same time, the President announced his intention to nominate Elliot Richardson to succeed Kleindienst as Attorney General. It rapidly became clear that the Senate Committee on the Judiciary would impose a condition for Richardson's confirmation, namely, appointment of a special prosecutor who would operate under a charter of independence.

As a threshold matter, Congress had to decide whether the Attorney General should appoint a special prosecutor under existing law or whether new statutory authority should be enacted to place the appointment responsibility elsewhere. Since creation of the Department of Justice in 1870, the Attorney General has had standing statutory authority, now in 28 U.S.C. § 515, to retain a counsel as a "special assistant to the Attorney General" or as a "special attorney." Under that or related authority, special counsel or prosecutors were appointed within the Department of Justice in 1875 to help conduct the Whiskey Ring revenue fraud prosecutions in the Grant Administration and in 1952 in response to Truman Administration tax scandals. Insofar

as new legislation was concerned, Teapot Dome provided a model for a special law that authorized the President to appoint, with the Senate's advice and consent, special counsel who would operate outside of the Department of Justice.⁵

As applied to Watergate, the Teapot Dome model would have required the House and Senate to pass legislation vesting appointment of a special counsel or prosecutor in a President whose own White House had become the subject of inquiry. Instead, using the opportunity presented by President Nixon's nomination of a new Attorney General, the Senate Judiciary Committee assured itself about the conduct of the investigation that would be conducted by a special prosecutor chosen by the

⁵ In Teapot Dome, a Senate investigation unearthed evidence of bribery of at least one cabinet secretary in the leasing of federal oil reserves. There were demands for civil actions to cancel the leases and for criminal prosecutions. There were also reservations about Attorney General Harry Daugherty's willingness to prosecute the matter. As a result, Congress passed legislation in February 1924 to authorize the President to appoint, with the Senate's advice and consent, special counsel to take charge—outside of the control of the Attorney General—of civil and criminal litigation arising from the scandal. The following month, President Coolidge dismissed Daugherty, who had been appointed, as were the other officials in the scandal, by President Harding. Although the immediate reason for proceeding outside the Department of Justice was resolved by the Attorney General's dismissal, the two special counsel, a Republican and a Democrat, continued on the basis of their statutorily granted independent authority through the more than six years of litigation that followed.

Attorney General under existing statutory authority.

First, the committee was satisfied that Richardson's choice for special prosecutor, Archibald Cox, was a person of integrity and independent judgment. Second, it insisted on a published charter to guarantee the prosecutor's independence, including a provision that permitted his removal by the Attorney General only for "extraordinary improprieties." History had shown the need for such a charter. Neither the first Whiskey Ring special counsel nor the Truman Administration tax scandal counsel had enjoyed a formal pledge of independence or special protection from removal. The first Whiskey Ring special counsel was fired less than seven months after being appointed; special counsel for the Truman Administration tax scandal survived for only 63 days.

The Attorney General's published Watergate regulation, 28 C.F.R. § 0.37 (Appendix) (1973), provided the special prosecutor with "the greatest degree of independence that is consistent with the Attorney General's statutory accountability for all matters falling within the jurisdiction of the Department of Justice." It specifically granted the special prosecutor "full authority" to conduct grand jury proceedings, frame indictments, contest assertions of executive privilege, and conduct prosecutions and appeals. It gave the special prosecutor control over the duration of his assignment, providing that his responsibilities would continue "until such time as, in his judgment, he has

completed them or until a date mutually agreed upon between the Attorney General and himself.”

After Cox was removed, despite the Watergate regulation’s “extraordinary improprieties” standard, Acting Attorney General Bork (with President Nixon’s concurrence) strengthened the provision for Leon Jaworski, Cox’s successor. The amended and reissued regulation provided, in effect, for a legislative veto by requiring the consensus of eight key members of Congress before the President could remove the special prosecutor.

The formal regulation played a critical role at the pivotal moment of confrontation between special prosecutor and President. The prosecutor moved to enforce his subpoena for presidential tapes, and the President argued that the courts lacked jurisdiction over an “intra-branch” dispute between the President and an official exercising executive branch prosecutorial powers. The Supreme Court found that the regulation had delegated “these particular matters to a Special Prosecutor with unique authority and tenure.” *United States v. Nixon*, 418 U.S. 683, 694 (1974). The regulation gave the special prosecutor power to contest the President’s assertion of executive privilege. “So long as this regulation remains in force,” the Court held, “the Executive Branch is bound by it, and indeed the United States as the sovereign composed of the three branches is bound to respect and to enforce it.” *Id.* at 696.

B. The Independent Counsel Act

Over a five-year period beginning in 1974, Congress considered a range of proposals for preventing or resolving the kind of political conflicts of interest that had led to appointment of the Watergate special prosecutors. Some would have created a permanent office of special prosecutor; others advocated only temporary appointments and offered a variety of mechanisms for how such an appointment would be made. A number of leading proposals followed historical precedent and gave to the President, with the advice and consent of the Senate, or the Attorney General the power to appoint a special prosecutor. In the end, Congress took a new route, creating a system where the Attorney General conducts a prescribed limited inquiry and, upon making a specified determination, applies to a court which then appoints a special prosecutor. However, as the history of those five years makes clear, the particular format finally chosen for the Independent Counsel Act was not viewed as the only mechanism then, as it need not be now, for resolving conflicts of interest.

For example, in 1976, the Senate passed a Ford Administration proposal to establish within the Department of Justice a permanent Office of Special Prosecutor. The head of that office would have been appointed by the President with the Senate’s advice and consent. Even when it considered legislation in 1975 and 1976 to establish a system for temporary special prosecutors, the Senate favored a proposal

(recommended by the American Bar Association and reported by the Senate Committee on Government Operations) that would have empowered the Attorney General to appoint special prosecutors, with the court serving in a backup role to ensure that appropriate appointments were made.

In addition to proposals about special prosecutors, Congress considered legislation to remove the Department of Justice from politics by making it an independent establishment. Congress also considered ways to insulate law enforcement decisions within the Department by establishing a Division or Office of Government Crimes to be headed by a Senate-confirmed, presidential appointee. Variations on these ideas were considered, including strictures on removal of the head of such a Division or Office, or requirements for written reports to

Congress if an Attorney General overruled that official. A common theme of these approaches was use of traditional Executive Branch appointment mechanisms.

If nothing else, congressional debate in the several years after Watergate showed that political conflicts of interest might be addressed in various ways, including by executive branch appointments of a special prosecutor as had occurred in Watergate. That, together with two other Watergate lessons—that a system for independent investigation is best effectuated by clear guidance in the form of regulations and that such a system should be already in place should the need arise, rather than dependent for its formation on the chance of a pending nomination or other fortuitous event—undergird the recommendations that follow.

II. RECOMMENDATIONS

Our central recommendations may be summarized as follows. Key aspects of the Watergate special prosecutor experience merit emulation. The Watergate prosecutors were appointed by the Attorney General, not by a court. They functioned under regulations promulgated by the Attorney General, not under rules delineated by statute. And because the special prosecutors were appointed to resolve a political conflict of interest, the Attorney General's regulations assured the public, principally through a grant of independence to the Watergate special prosecutor, that the conflict would be genuinely resolved. That approach was sound then. It is equally so now.

This does not mean that every particular of the Watergate regulation should be carried forward unchanged. The history of special counsel, including of independent counsel under the Act, provides useful lessons about salutary ways in which the balance between the independence and accountability of special counsel might be improved.

Also, rather than crafting regulations in the swirl of each political controversy, there is benefit in having standing regulations that reflect the Attorney General's best long term judgment about how independent investigations should be conducted. Congress therefore should enact a law that requires the Attorney General to issue and maintain standing regulations for special counsel investigations. The specific content of the regulations should be left to the Attorney General, whose objective should be to justify public confidence in any investigations and prosecutions that are conducted under their terms.

**A. The Attorney General's
Responsibility for Appointing
Special Counsel to Resolve
Conflicts of Interest Should Be
Fully Restored**

Inevitably, there will be times when the Attorney General should refrain because of a conflict of interest from investigating or prosecuting a matter through the established offices and regular personnel of the Department of Justice, no matter how effective, impartial and insulated from political pressure they may be. Until passage of the Independent Counsel Act (with the sole exception of Teapot Dome, in which Congress by law directed the President to appoint special counsel), the Attorney General had unconstrained discretion to decide whether to appoint a special counsel and who the counsel should be. The Act stripped the Attorney General of major elements of the first judgment and of any say

in the second. Both responsibilities should be fully restored.

1. When to appoint a special counsel

In the Independent Counsel Act, the Congress made a legislative judgment that a conflict of interest automatically exists whenever any of a prescribed, lengthy list of officials is implicated in any criminal wrongdoing. It barred the Attorney General from using investigative tools, such as grand jury subpoenas for documents or testimony, that might allow the Department of Justice to probe beyond voluntary interviews or document production in screening allegations. It sharply limited the time available to the Attorney General to evaluate charges. It restricted the standards an Attorney General might ordinarily use to assess a subject's criminal intent or decide if a case is strong enough to merit further investigation.

Like many, we believe the Act's reach has been too broad and too arbitrary. Instead of promoting public confidence, the Act has failed to produce public consensus that outside counsel are being appointed when, but only when, it is in the public interest that a matter be removed from the Department of Justice's jurisdiction. Indeed, in our view, a number of the investigations conducted under the Act to date could have been appropriately resolved through the normal procedures of the Department of Justice, without resort to any special appointment.

If the Act has proved an unwieldy instrument for assessing when a matter need

be removed from the Department's regular offices, what should guide the Attorney General in making that important determination? The Act itself suggests the answer. Apart from the mandatory appointment section, it grants the Attorney General discretion to obtain appointment by the court of an independent counsel if "an investigation or prosecution of a person by the Department of Justice may result in a personal, financial, or political conflict of interest." 28 U.S.C. § 591(c)(1). This conflicts standard, coupled with their judgment that appointment of special counsel for a particular matter would serve the public interest, should guide Attorneys General in the exercise of their discretion to appoint special counsel.

Different conflicts will require different remedies. If the Attorney General has a close personal tie to an official under inquiry or has a financial stake in a matter, the usual solution is for the Deputy Attorney General to act in the Attorney General's place. However, allegations against members of the administration (or campaign officials who helped to elect it) of which the Attorney General is a part may create a conflict for all offices and officials of the Department of Justice.

These political conflicts have been central to the Act's concerns. Their resolution will remain one of the most sensitive judgments which any Attorney General is called upon to make. In such circumstances, the Attorney General should determine whether it is in the public interest to employ special counsel from outside the Department to investigate and prosecute, if

necessary, the matters that gave rise to the conflict of interest.

Benchmarks for appointment of special counsel in cases of political conflicts of interest have emerged through experience. The need to appoint special counsel will be greatest when serious allegations are made concerning the President or Attorney General, although allegations against others personally or politically close to either may also merit an appointment in unusual circumstances. In Watergate, alleged wrongdoing of high presidential aides, not at first of the President himself, prompted appointment of a special prosecutor. But even for persons close to a President, we note that no special counsel was used in the case of Vice President Agnew, and the U.S. Attorney in Maryland successfully handled the prosecution. Ultimately, a conflicts decision is a matter of case by case judgment, properly guided by an appreciation of history, public duty, and prosecutorial experience.

There should be no fixed limitation on either the investigatory tools or time the Attorney General may use to evaluate allegations and make conflicts decisions. Of course, as with conflict issues generally, the Attorney General should decide as expeditiously as possible if special counsel should be appointed. There is also good reason for the Attorney General to be mindful of not using investigatory tools that would impede any investigation a special counsel might conduct. The Attorney General's use of grand jury subpoenas for documents and testimony ordinarily will have less impact on a special counsel's future

prosecutorial choices than would the Department's use of plea bargains or grants of immunity to obtain evidence.

Although these general observations may be useful as guidelines, they should not be framed as inflexible rules. One reason is that need for special counsel may not become apparent until well into the Department's investigation. A major break in the Watergate investigation occurred during the sentencing of one of the burglars after a plea bargain. Only then did the true reach of the scandal, with its potential to implicate high level officials, begin to emerge. In this area, there is no substitute for the Attorney General's sound exercise of prosecutorial judgment on a case by case basis.

The remedy for an Attorney General's failure to appoint a special counsel when warranted is the political process with its normal, although not infallible, checks and balances. That process involves the President, whose obligation it may be to direct the Attorney General to appoint a special counsel or to remove the Attorney General (which finally occurred in Teapot Dome); Congress, whose hearings can play a critical role in demonstrating the need for special counsel (also Teapot Dome); and the public, whose electoral judgment is the ultimate check on the neglect or abuse of power.

2. Who should appoint special counsel

When the Attorney General has determined that a special counsel should be named, the Attorney General should name that person.

The history of appointments of special counsel by Attorneys General, at times at the direction or suggestion of Presidents, demonstrates that Attorneys General have appointed persons of ability and integrity. Examples include: the Whiskey Ring in 1875 during the Grant Administration (former Senator John Henderson), the Truman Administration tax scandals in 1952 (New York reformer Newbold Morris), Watergate in 1973 (former Solicitor General Archibald Cox and Texas trial lawyer Leon Jaworski), the Carter Warehouse inquiry in 1979 (former U.S. Attorney Paul Curran), and the first Whitewater prosecutor in 1994 (former U.S. Attorney Robert Fiske). Because appointments are made to resolve political conflicts, there is strong incentive for the Attorney General to pick people whom the Congress and the public will trust and whose disposition of an inquiry will have credibility even with the Administration's political opponents.

If a poor choice is made in the future, the Attorney General or the President will be held accountable. In contrast, the Independent Counsel Act's mechanism for appointment by a three-judge panel allows for no political accountability but ample opportunity for political attack. Rather than removing the appointment system from politics, the Act, ironically, has enmeshed the judicial branch in it.

B. Congress Should Enact a Statute that Requires the Attorney General to Promulgate Regulations for the Conduct of Special Counsel Investigations

The challenge in prescribing ground rules for special investigations, whether for the Watergate Special Prosecution Force or under the Independent Counsel Act, has been to safeguard the independence of special counsel from political pressures while ensuring that they, like other officers of the United States, remain accountable for the proper exercise of the enormous power vested in them.

There is a strong public interest in attempting to strike the balance between independence and accountability in regulations published in advance of any immediate need to appoint a special counsel in a particular matter. First, the regulations' very existence can help assure the public that the Attorney General is prepared to appoint an outside counsel if required to resolve a conflict of interest. Second, trust in any investigation or prosecution that is conducted under the regulations will be enhanced if they are the product of careful, balanced consideration, including public scrutiny, rather than primarily the politics of the moment. Third, the regulations may be indispensable in ensuring that the special

counsel has legal authority to obtain the evidence he or she may need. *See United States v. Nixon*, 418 U.S. at 694-96.

In Watergate, the governing regulations were written specifically for that investigation. The circumstances that facilitated their ad hoc adoption were unusual. The regulations were the product of the interaction among Archibald Cox, Attorney General nominee Elliot Richardson, and the Senate Judiciary Committee during Richardson's confirmation hearing. The amendment that governed Leon Jaworski's tenure was agreed to in the atmosphere of crisis that prevailed in the wake of Cox's firing. Although the regulations set ground rules for investigations that ultimately proved to be independent and credible, they were not problem free. The amended regulation purported to give eight members of Congress a veto over the President's power to remove Jaworski. This curious twist, which presented serious separation of powers issues, was adopted with little discussion.

Standing regulations would tend to slow precipitous changes, without unduly diminishing needed flexibility. "Subject to generally applicable procedural requirements," *In re Sealed Case (North)*, 829 F.2d 50, 56 (D.C. Cir. 1987), they could be modified by the Attorney General.

At present, there are Department of Justice regulations, in 28 C.F.R. Part 600, which Attorney General Meese issued in 1987 after Oliver North, then under investigation by Independent Counsel Lawrence Walsh pursuant to the Act, filed

an action challenging the Act's constitutionality. In order "to assure the courts, Congress, and the American people that this investigation will proceed in a clearly authorized and constitutionally valid form regardless of the eventual outcome of the North litigation," 52 Fed. Reg. 7270 (1987), the Attorney General issued the regulations together with a rule establishing an Office of Independent Counsel: Iran/Contra. The Attorney General appointed Walsh to head that office, enabling him to proceed under dual authority from the court and the Attorney General. Rejecting North's challenge to the Attorney General's authority to issue the regulations, the U.S. Court of Appeals for the District of Columbia Circuit upheld their validity. *In re Sealed Case (North)*, 829 F.2d at 54-57.

The first part of the regulation, 28 C.F.R. Part 600, provides for an Office of Independent Counsel that could be filled any time the Attorney General appointed a counsel and established that counsel's jurisdiction. That general regulation remains in effect. The second part of the 1987 rule established the jurisdiction of the Iran-Contra investigation as it would be conducted under the regulation. 28 C.F.R. § 601.1. The Department's Office of Independent Counsel has been filled three times since Iran-Contra, most recently in 1994 during a period that the Independent Counsel Act had lapsed, when Robert Fiske was appointed to investigate the Whitewater matter. 28 C.F.R. § 603.1. For him, the regulation was not supplemental to the Act but provided his entire authority.

The Department of Justice has advised the Congress that it will discontinue the 1987 regulations when the Act sunsets on June 30, and replace them with new ones. However, another Attorney General could decide to proceed without any regulations. Experiences with special counsel, most notably Watergate, demonstrate that rules that have the force of law are important to the genuine resolution of conflicts of interest. Accordingly, we recommend that Congress require the Attorney General to issue regulations to govern investigations or prosecutions by special counsel appointed by the Attorney General in order to resolve a conflict of interest. Such regulations would remain subject to amendment by the Attorney General.⁶

C. Establishing Parameters for a Special Counsel's Investigation: Jurisdiction and Budget

Two vexing problems under the Independent Counsel Act have been the

⁶ Our draft bill (Appendix ("App.") A-1) contains three subsections: (a) authorizes appointment of special counsel; (b) directs issuance of regulations; (c) provides that regulations shall be issued in 90 days, to increase the chance they are in place prior to any need to appoint a special counsel. Subsection (a) duplicates authority that exists in 28 U.S.C. § 515, and other U.S. Code sections. We have included it so that, for ease of reference, the draft bill is free standing.

tendency of some investigations to sprawl beyond the reason for their initiation and to do so without the discipline of limits on the public resources they consume. Both issues should be addressed by the Attorney General at the beginning of a special counsel's investigation, although, of course, questions about jurisdiction and budget may need to be revisited as the investigation proceeds. Throughout, the Attorney General should be guided by the principle that although an appointment may have been prompted by allegations against a particular official, an investigation which follows should focus on the events that gave rise to the appointment and not become a pursuit of that individual.

1. Defining the Special Counsel's Jurisdiction

A necessary step in the delegation of authority by the Attorney General to any special counsel is the definition of the counsel's investigative and prosecutorial jurisdiction. In Watergate, the investigation's parameters were defined collaboratively by Attorney General nominee Elliot Richardson and Archibald Cox, in the setting of the Judiciary Committee's nomination hearings.

With passage of the Act, two other institutions assumed important roles in establishing the jurisdiction of independent counsel, namely, the Congress in prescribing standards for defining an independent counsel's jurisdiction and the court in writing a jurisdictional order that applied those standards. The Attorney General's role was reduced to supplying the court with sufficient information to assist it in defining the

counsel's jurisdiction. Congress instructed the court 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 mandated that each counsel's jurisdiction embrace "all matters related to that subject matter." 28 U.S.C. § 593(b)(3).

Determining whether a particular matter is "related" to an original grant of jurisdiction has proved to be no easy matter. Disputes over the reach of an independent counsel's jurisdiction consequently have arisen in a number of investigations under the Act. Further, that ambiguity is an invitation to an ever-widening jurisdictional scope. The growth of jurisdictional mandates increasingly has prompted dissatisfaction with the Act.

Our proposed regulation returns to the Attorney General the responsibility for defining the special counsel's jurisdiction. It also does not include "related matters" within the special counsel's jurisdiction. It would (App. B-1, § 1(b)) provide the Attorney General with authority to—

define the Special Counsel's investigative and prosecutorial jurisdiction in a manner that assures that the Counsel has adequate authority to fully investigate and prosecute (1) the subject matter that the Attorney General has determined may result in a conflict of interest and (2) any perjury or other false statements, obstruction of justice, destruction of evidence, or intimidation of witnesses that may impede that investigation or prosecution.

The regulation would achieve two objectives. It would assure that the jurisdiction is not so pinched that it fails to address the investigatory need that warranted, in light of a conflict of interest, a special appointment. It also would guard against a widening of any investigation beyond the matters that gave rise to the appointment into a limitless search for criminal wrongdoing by a particular individual or individuals. In any dispute between a special counsel and the Attorney General about the interpretation of a jurisdictional order, "the Attorney General's construction of the order shall be final."

That constraint should, as a practical matter, work. If subpoenas or other investigatory tools now barred by the Act are used in screening allegations, the Attorney General should be able to describe with greater precision the counsel's jurisdiction. Also, as special counsel will be selected by the Attorney General, the counsel's initial jurisdiction is likely to be negotiated directly between them (without intermediation of a court) with the degree of precision or generality satisfactory to each, as part of the counsel's decision whether to accept an appointment. This is what occurred in Watergate and has since been successfully accomplished when special counsel were directly appointed by Attorneys General.

Any requests from special counsel for referral of additional matters (App. B-3, § 2(d)) should be limited to ones "directly related to the Counsel's investigative and prosecutorial jurisdiction." Of course, the Attorney General might request a special counsel to accept jurisdiction over other

matters. In either case, the Attorney General's discretion should be guided by "the likely impact of a referral on the Special Counsel's ability to complete his or her work in a timely manner." In no case should a special counsel be permitted to investigate or prosecute matters outside the scope of the Attorney General's appointment order "unless specifically authorized to do so by the Attorney General."

2. Establishing a Budget

The second major parameter for a special counsel's investigation should be the counsel's budget. As a practical matter, that boundary has been unlimited for independent counsel. Under the Act, the Attorney General lacks control over the spending of individual independent counsel. The court is neither required nor empowered to do anything with the expense reports that independent counsel must file with it every six months. Moreover, Congress has not subjected the independent counsel system to annual appropriations scrutiny, funding it instead through a permanent indefinite appropriation.

The Watergate regulation pledged that requests of the special prosecutor "shall receive the highest priority," but made clear that the special prosecutor would be required to "submit budget requests for funds, positions, and other assistance." 28 C.F.R. § 0.37 (Appendix) (1973). Our recommendation (App. B-1, § 1(d)) returns to the Watergate model by providing that:

The Attorney General shall establish and revise as necessary a budget for the Office of Special Counsel. In establishing a

budget and providing other resources to a Special Counsel, the Attorney General shall provide the Special Counsel with the funds and facilities that are reasonably necessary to achieve the purposes for which the Special Counsel has been appointed. The Special Counsel shall have the right to submit to the Attorney General budget requests for funds, positions, and other assistance, and such requests shall receive the highest priority.

As in other parts of this system, the objective should be an appropriate balance. Limitations on resources can serve the salutary end of requiring special counsel to judge what is important and what is less so. But the proviso from the Watergate regulation about priority for the requests from the special prosecutor also reflects the importance of assuring that inquiries into the conduct of high officials receive the resources that they merit. Likewise, budgetary requests from the special counsel to the Attorney General should contain information sufficient to support the request without compromising the independence of the special counsel's work.

<p>D. Finding the Right Balance: Independence from Political Influence and Compliance with Department of Justice Policies and Procedures</p>

A fundamental objective of a special counsel investigation should be to assure the public that political influence has been excluded from the administration of federal criminal justice. An important second goal is

to assure that each investigation and its subsequent prosecutions are guided by the same policies and procedures as other Department of Justice proceedings, with exceptions made only when necessary to protect the special counsel from political influences. The first objective is designed to resolve the conflict of interest that gave rise to the appointment of special counsel. The latter is intended to assure that justice for office holders as for others is dispensed evenhandedly.

1. Independence

The bedrock provision of the Watergate regulation was the pledge of independence to the special prosecutor. That pledge, with some changes, became the bedrock provision of the Independent Counsel Act and the Department's independent counsel regulations. Independence is indispensable to resolving the conflict of interest that underlies the appointment of special counsel, however they may be denominated. Among the recurring criticisms of the Act, the ability of special counsel to do their jobs free of any suggestion of political influence has not been one.

The Watergate Special Prosecution Force regulation delegated to the special prosecutor "full authority for investigating and prosecuting" matters within his jurisdiction. The regulation also listed particular investigative or prosecutorial powers for which the special prosecutor would have "full authority." These included grand jury and charging decisions, decisions to contest assertions of executive privilege,

and handling all aspects of trials and appeals. The Watergate regulation also pledged that "[t]he Attorney General will not countermand or interfere with the Special Prosecutor's decisions or actions." 28 C.F.R. § 0.37 (Appendix) (1973). Similarly, the Act and the Department's independent counsel regulations granted to independent counsel (with an exception only for wiretaps) "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice." 28 U.S.C. § 594(a); 28 C.F.R. § 600.1(a).

We believe there is no reason to curtail the grant of independence provided in the Watergate regulation, under which Archibald Cox and Leon Jaworski functioned, or the Department of Justice's 1987 independent counsel regulation, under which Robert Fiske most recently operated. In our proposed regulation (App. B-2, § 2(b)), we incorporate the 1987 regulation.⁷

Our principal concern with the Department of Justice's proposal (letter of

⁷ The Watergate regulation provided that the special prosecutor would have "the greatest degree of independence that is consistent with the Attorney General's statutory accountability for all matters falling within the jurisdiction of the Department of Justice." At the time, it was thought that the statute establishing the Department of Justice required this one limitation on the special prosecutor's independence. In our proposed regulation, we follow the Department of Justice's 1987 independent counsel regulation, which omits the limitation. As noted earlier, the D.C. Circuit upheld the 1987 regulation in *In re Sealed Case (North)*, 829 F.2d at 54-57.

April 13, 1999, pp. 9-10) is that it retreats from the central point of the Watergate regulation and its progeny by reducing their full-blooded guarantees of independence to a more meager protection from “day-to-day supervision of any official of the Department.” It pledges only “a large amount of independence.” It reserves the possibility that “the decision of whether to indict a particular person may be such a substantial step that it would require a Special Counsel to notify, and—in some limited circumstances—possibly seek the approval of, the Attorney General beforehand.” This would not resolve the conflict of interest that gives rise to appointment of special counsel. Indeed, one can question whether the Watergate crimes would have been successfully prosecuted under such strictures. We urge the Attorney General to recognize the indispensability of independence to the very purpose of the appointment of special counsel.

2. Removal

In addition to the affirmative grant of independence, the other critical hallmark of independence, indeed the guardian of it, is freedom from removal, absent good cause. The Watergate regulation provided that “[t]he Special Prosecutor will not be removed from his duties except for extraordinary improprieties on his part.” 28 C.F.R. § 0.37 (Appendix) (1973). Under the Act and the Department’s independent counsel regulations, the standard is “good

cause.”⁸ In 1976, Senator Percy made the basic point: “[w]hat we are trying to get away from is dismissal just because [the special counsel] is too vigilant in exercising the responsibility that he holds. And there we must stand firm, there we want no loopholes.”⁹

We recommend retaining the standard in the Act and the Department’s independent counsel regulation, permitting (App. B-5, § 4(a)(1)) removal “by the personal action of the Attorney General and only for good cause,” or physical or mental impairments. *See* 28 U.S.C. § 596(a)(1); 28 C.F.R. § 600.3(a)(1). We would also retain (App. B-5, § 4(a)(2)) the requirement that the Attorney General file a report with the House and Senate Committees on the Judiciary specifying the facts and grounds for removal. *See* 28 U.S.C. § 596(a)(2); 28 C.F.R. § 600.3(a)(2). We suggest that the report also specify “the steps the Attorney General intends to take to replace the Special Counsel who has been removed,” so that it is clear that removal of an individual counsel is

⁸ When Congress in 1982 replaced the “extraordinary improprieties” standard—which the original Act had borrowed from the Watergate regulation—with a “good cause” standard, it accepted the Department of Justice’s argument that the “good cause” standard “would make the special prosecutor no more independent than officers of the many so-called independent agencies in the executive branch.” *Morrison v. Olson*, 487 U.S. at 692 n.32 (quoting testimony).

⁹ *Provision for Special Prosecutor: Hearings on H.R. 14476, etc., Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 17 (1976).

not tantamount to termination of the investigation.

The Act also provided for judicial review of an Attorney General's decision to remove an independent counsel. With the Act's sunset, no special provision for review will exist, but other methods of accountability should continue. The requirement that the Attorney General specify the facts and grounds for removal to the House and Senate Committees on the Judiciary is designed to bring congressional oversight and public opinion to bear on the Attorney General's decision. If an Attorney General abuses his or her removal power, public accountability should serve as the proper check.

The Department of Justice (letter of April 13, 1999, p. 9) would provide that a special counsel may be removed only by personal action of the Attorney General, but it would omit the limitation on removal except for cause. It would use instead the standard "the Attorney General would use when deciding whether to remove a United States Attorney from further representation of the United States Government in a particular matter." The letter does not describe what that standard is. In any event, we believe it would be a mistake to replace the "good cause" standard that is generally applicable to governmental functions that are to be performed independently. The unfortunate public message that could result from the change is that political independence in the investigation of high officials is no longer desired.

3. Adherence to Department of Justice Policies and Procedures

While a special counsel's independence from political influence is a key objective, that independence should not include license to depart from regular Department of Justice policies and procedures. Adherence to those policies and procedures, particularly those which inform prosecutorial judgment and safeguard the rights of individuals, is an essential safeguard against the possibility that the subjects of special investigations will be treated differently from those who are subject in the ordinary course to Department investigations or prosecutions. Whether based on perception or fact, independent counsel investigations have been criticized for having violated normal constraints on federal investigations or prosecutions, to the detriment of those investigated.

Over the years, the Congress has had difficulty in finding the right statutory language to describe the obligation of independent counsel to comply with Department policies. At present, independent counsel are required to follow those policies "except to the extent that to do so would be inconsistent with the purposes" of the Act. 28 U.S.C. § 594(f)(1). We recommend (App. B-3, § 2 (c)) that the only exception to the requirement of compliance be for procedures that would require a special counsel to obtain approval of other Department of Justice officials for investigative or prosecutorial actions.

E. Termination of an Office of Special Counsel

The Watergate regulations imposed no time constraint on that investigation, providing simply: “[t]he Special Prosecutor will carry out these responsibilities, with the full support of the Department of Justice, until such time as, in his judgment, he has completed them or until a date mutually agreed upon between the Attorney General and himself.” 28 C.F.R. § 0.37 (Appendix) (1973). At the outset, Congress similarly provided negligible authority under the Act for the court or the Attorney General to control the length of investigations. In 1994, in an effort to increase oversight, Congress required the court to determine at prescribed intervals, which after four years would be annual, whether termination is warranted because a counsel’s investigation “and any resulting prosecutions, have been completed or so substantially completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions.” 28 U.S.C. § 596(b)(2).

The statutory mechanism has not constrained the length of investigations. It would be better, we believe, to provide the Attorney General with an opportunity to make a judgment, at periodic intervals, whether to terminate an Office of Special Counsel. Under our recommendation (App. B-5, § 4(c)(1)), two years after appointment of a special counsel, and at the end of any succeeding one-year period, the

Attorney General should have an opportunity to terminate an Office of Special Counsel.

In contrast to the removal and replacement of a special counsel, which could occur at any time but only for cause, the regulation would not circumscribe the reasons for the Attorney General’s periodic judgment whether to terminate an inquiry. It is fair to expect, nevertheless, that the Attorney General would be guided by the principles that governed the initial appointment, namely, whether or not a conflict remains and the public interest is served by continuation of the Office of Special Counsel. If the decision is to terminate an Office of Special Counsel, the Attorney General should be subject to political accountability, aided by a report from the Attorney General to Congress that specifies the reasons for the termination (App. B-6, § 4(c)(2)).

The bargain between the Attorney General and a special counsel would be as follows. Subject to the possibility of removal for cause at any time, a special counsel would have a full opportunity, free of the Attorney General’s control, to pursue the investigation and any prosecutions. At the end of two years, and at the end of every year thereafter, the Attorney General would have an equally unrestricted opportunity to terminate the counsel’s task.

At those defined intervals, the public and Congress will also have a clear moment at which to assess the progress or outcome of the investigation and to hold the Attorney General politically responsible for a decision to terminate or permit the continuation of the

special counsel's tenure. If the Attorney General does not terminate the Office of Special Counsel, the special counsel would continue to proceed under a full charter of independence to pursue the investigation and any prosecutions.

F. Reporting Requirements

Our recommendations on reporting are intended to promote accountability at several levels: through periodic reports from special counsel to the Attorney General; through reports from the Attorney General to Congress on the Attorney General's removal and replacement of special counsel, or on the termination of their investigations; and through recognition of the Executive Branch's general obligation to respond to Congress on matters within the latter's constitutional responsibilities.

We would require (App. B-4, § 3(b)) that special counsel submit annual reports to the Attorney General that include a description of the progress of their investigations and any prosecutions. An important purpose of this report is to serve as the basis for the Attorney General's periodic determination of whether to terminate an Office of Special Counsel. Special counsel should also submit to the Attorney General a final report (App. B-4, § 3(c)), as well as periodic statements of expenditures (App. B-4, § 3(a)).

The Attorney General should be required to file reports with Congress in two specific instances. The Attorney General

should report and explain the basis for a decision to remove a special counsel during the course of an investigation (App. B-5, § 4(a)(2)), or to terminate an Office of Special Counsel following a two-year or subsequent annual review (App. B-6, § 4(c)(2)). These are critical moments of accountability, when a public explanation should be offered.

Finally, we recommend that the provision of the Act, 28 U.S.C. § 595(c), and in the Department's regulations, 28 C.F.R. § 600.2(c), that an independent counsel shall advise the House of Representatives of any substantial and credible information that "may constitute grounds for an impeachment" not be carried forward into regulations adopted after the Act's lapse.

For a special counsel's regular fiscal, annual, and final reports, the Attorney General (not the counsel and, with the lapse of the Act, not a court) should have the power to determine whether to release all or parts of them to Congress or the public (App. B-5, § 3(d)). Congressional oversight is, of course, a central element of accountability. The Attorney General's duty, on behalf of the Executive Branch, to be responsive to Congress on matters within the latter's responsibility should be sufficient assurance that information will be appropriately shared. The proposed regulation specifically makes clear that nothing in it prevents Congress from obtaining information during an impeachment proceeding (App. B-5, § 3(e)(1)), or information required in exercising congressional oversight jurisdiction with respect to the official conduct of a special counsel (App. B-5, § 3(e)(2)).

CONCLUSION

We have joined together in this report in the belief that it is in our national interest to strengthen our institutions of government by recognizing when they perform well and by limiting, to truly extraordinary circumstances, the occasions on which they need to be supplemented. During the course of our nation's history, the Department of Justice has managed to serve the American people well. Merited trust in it should continue to return great dividends to the public.

Nevertheless, in rare instances, when a matter presents a potential conflict between the interests of justice and the political interests of an Administration, the handling of an investigation by specially appointed counsel may contribute importantly to public confidence in the administration of justice. The lesson of history is that Attorneys General of the United States have done well in identifying those times and in appointing special counsel of character and ability to carry out sensitive investigations and prosecutions. History also demonstrates that conflicts which warrant appointment of special counsel are best resolved if the Attorney General's appointees operate under a clear charter, in the form of regulations, that establish their independence, within a framework that provides protection against abuse. It is to those ends that the recommendations in this report are offered.

Robert Dole, *Co-Chair*
Zoë Baird
Drew S. Days, III
Carla Anderson Hills
Bill Paxon

George J. Mitchell, *Co-Chair*
John G. Roberts, Jr.
David E. Skaggs
Dick Thornburgh
Mark H. Tuohey III

APPENDICES

A: Draft Act

B: Illustrative Regulations

C: Project Participants

Draft Act

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Special Counsel Act of 1999".

SEC. 2. APPOINTMENT OF SPECIAL COUNSEL; REGULATIONS ON INVESTIGATIONS AND PROSECUTIONS BY SPECIAL COUNSEL.

(a) Upon a determination of the Attorney General that --

(1) the investigation or prosecution of any person, for an alleged violation of federal criminal law, by any other office or official of the Department of Justice may result in a personal, financial, or political conflict of interest; and

(2) it is in the public interest for the Attorney General to resolve any such conflict of interest by appointing a special counsel to head a temporary Office of Special Counsel within the Department of Justice,

the Attorney General may specially retain a counsel for that purpose under the authority of this section or of any other applicable provision of law.

(b) The Attorney General shall issue (and may amend from time to time thereafter) regulations to govern the conduct of any investigation or prosecution by a special counsel who is appointed by the Attorney General upon the determinations stated in subsection (a).

(c) The first regulations under this section shall be issued and be made effective no later than ninety days from the enactment of this Act.

ILLUSTRATIVE REGULATIONS
FOR PLACEMENT IN AN APPROPRIATE PART,
TITLE 28 OF THE CODE OF FEDERAL REGULATIONS¹⁰

§ 1 -- Applicability of these regulations; appointment and jurisdiction; budget; and other preliminary matters.

(a) These regulations shall govern the conduct of any investigation or prosecution by a Special Counsel who is appointed by the Attorney General upon the determination of the Attorney General that (1) the investigation or prosecution of a person, for an alleged violation of federal criminal law, by any other office or official of the Department of Justice may result in a personal, financial, or political conflict of interest and (2) it is in the public interest to resolve that conflict by appointing a Special Counsel to head a temporary Office of Special Counsel within the Department.

(b) The Attorney General's appointment order shall define the Special Counsel's investigative and prosecutorial jurisdiction in a manner that assures that the Counsel has adequate authority to fully investigate and prosecute (1) the subject matter that the Attorney General has determined may result in a conflict of interest and (2) any perjury or other false statements, obstruction of justice, destruction of evidence, or intimidation of witnesses that may impede that investigation or prosecution. The jurisdiction shall be stated with sufficient particularity to provide clear guidance to the Special Counsel on the extent of the Attorney General's delegation of authority. In the event of disagreement between the Attorney General and the Special Counsel on the scope of the jurisdiction granted by the appointment order, the Attorney General's construction of the order shall be final.

(c) A Special Counsel's identity and prosecutorial jurisdiction shall be made public at the earliest time that the Attorney General determines that disclosure of the identity and prosecutorial jurisdiction of the Special Counsel would be in the best interests of justice. If not previously done, the identity and prosecutorial jurisdiction of a Special Counsel shall be made public when any indictment is returned, or any criminal information is filed, pursuant to the Counsel's investigation.

(d) The Attorney General shall establish and revise as necessary a budget for the Office of Special Counsel. In establishing a budget and providing other resources to a Special Counsel, the Attorney General shall provide the Special Counsel with the funds and facilities that are reasonably necessary to achieve the purposes for which the Special Counsel has been

¹⁰ The Attorney General's current independent counsel regulations are in 28 C.F.R. Part 600.

appointed. The Special Counsel shall have the right to submit to the Attorney General budget requests for funds, positions, and other assistance, and such requests shall receive the highest priority.

(e) Nothing in these regulations shall be construed to limit the authority of the Attorney General to convene grand juries, plea bargain, grant immunity, issue subpoenas, or otherwise investigate an alleged violation of federal criminal law prior to determining whether to appoint a Special Counsel.

§ 2 -- Authority and duties of a Special Counsel.

(a) An Office of Special Counsel shall be under the direction of a Special Counsel appointed by the Attorney General.

(b) A Special Counsel shall have, with respect to all matters in the Special Counsel's investigative and prosecutorial jurisdiction, 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, except that the Attorney General shall exercise direction or control as to those matters that specifically require the Attorney General's personal action under section 2516 of title 18 of the U.S. Code. A Special Counsel's investigative and prosecutorial functions and powers shall include --

- (1) conducting proceedings before grand juries and other investigations;
- (2) participating in court proceedings and engaging in any litigation, including civil and criminal matters, that the Special Counsel deems necessary;
- (3) appealing any decision of a court in any case or proceeding in which the Special Counsel participates in an official capacity;
- (4) reviewing all documentary evidence available from any source;
- (5) determining whether to contest the assertion of any testimonial privilege;
- (6) receiving appropriate national security clearances and, if necessary, contesting in court (including, where appropriate, participating in camera proceedings) any claim of privilege or attempt to withhold evidence on grounds of national security;

(7) making applications to any Federal court for a grant of immunity to any witness, consistent with applicable statutory requirements, or for warrants, subpoenas, or other court orders, and, for purposes of sections 6003, 6004, and 6005 of title 18 of the U.S. Code, exercising the authority vested in a U.S. Attorney or the Attorney General;

(8) inspecting, obtaining, or using the original or a copy of any tax return, in accordance with the applicable statutes and regulations, and, for purposes of section 6103 of the Internal Revenue Code of 1954, and the regulations issued thereunder, exercising the powers vested in a U.S. Attorney or the Attorney General; and

(9) initiating and conducting prosecutions in any court of competent jurisdiction, framing and signing indictments, filing information, and handling all aspects of any case in the name of the United States.

(c) A Special Counsel shall comply with the written or other established policies and procedures of the Department of Justice respecting enforcement of the criminal laws, except for procedures that would require the Special Counsel to obtain approval for investigative or prosecutorial actions from other offices or officials of the Department of Justice unless such approval is required by statute. To determine these policies (and also policies under subsection (f)(3) of this section), a Special Counsel shall consult with other offices and personnel of the Department of Justice.

(d) A Special Counsel may ask the Attorney General to refer to the Counsel any matter that is directly related to the Counsel's investigative and prosecutorial jurisdiction and the Attorney General may request a Special Counsel to accept jurisdiction over additional matters. In either event, the Special Counsel shall advise the Attorney General of the likely impact of a referral on the Special Counsel's ability to complete his or her work in a timely manner. A Special Counsel may not investigate or prosecute matters outside the scope of the Attorney General's appointment order unless specifically authorized to do so by the Attorney General.

(e) A Special Counsel shall have full authority to dismiss matters within the Special Counsel's investigative prosecutorial jurisdiction at any time before prosecution if to do so would be consistent with the written or other established policies of the Department of Justice with respect to the enforcement of criminal laws.

(f) A Special Counsel shall conduct the investigation and any prosecution in a prompt, responsible, and cost-effective manner, including by --

(1) serving in that capacity on a full-time basis (unless the Attorney General specifically agrees otherwise) and to the extent necessary to complete the investigation and any prosecution without undue delay;

(2) (A) conducting all activities with due regard for expense, (B) authorizing only reasonable and lawful expenditures, and (C) promptly, upon taking office, assigning to a specific employee the duty of certifying that expenditures of the Special Counsel are reasonable and made in accordance with law; and

(3) complying with the established policies of the Department of Justice respecting expenditure of funds.

(g) For the purposes of carrying out the duties of the Office of Special Counsel, a Special Counsel shall have the full power of the Attorney General to appoint (other than in the Senior Executive Service), fix the compensation, and assign the duties of such employees as the Special Counsel deems necessary.

§ 3 -- Fiscal, annual, and final reports of Special Counsel; congressional oversight.

(a) On or before June 30 of each year, a Special Counsel shall submit to the Attorney General a statement of expenditures for the 6 months that ended on the immediately preceding March 31. On or before December 31 of each year, a Special Counsel shall prepare a statement of expenditures for the fiscal year that ended on the immediately preceding September 30. A Special Counsel whose office is terminated under §§ 4(b) or (c) of these regulations prior to the end of the fiscal year shall prepare a statement of expenditures on or before the date that is 90 days after the date on which the office is terminated.

(b) A Special Counsel shall submit to the Attorney General annually a report on the activities of the Special Counsel, including a description of the progress of any investigation or prosecution conducted by the Special Counsel. Such report shall provide information adequate to justify the expenditures that the Office of Special Counsel has made and be sufficient, at the intervals provided for in § 4(c) of these regulations, for the Attorney General to make the renewal or termination decision required by that subsection.

(c) In addition to the preceding reports, and before termination of an Office of Special Counsel under §§ 4(b) or (c), a Special Counsel shall submit to the Attorney General a final report which describes the work of the Special Counsel, including the disposition of all cases brought.

(d) Unless prohibited by law, the Attorney General may release to Congress, the public, or to any appropriate person, those portions of any reports under this section that the Attorney General deems appropriate to release.

(e) Nothing in this chapter shall prevent --

(1) the Congress or either House thereof from obtaining information from the office of Special Counsel in the course of an impeachment proceeding; and

(2) the appropriate committees of the Congress from exercising oversight jurisdiction with respect to the official conduct of any Special Counsel under these regulations, and the Special Counsel shall have the duty to cooperate with the exercise of such oversight jurisdiction.

§ 4 -- Removal of a Special Counsel; termination of office; reports by Attorney General about removals or termination.

(a) (1) A Special Counsel may be removed from office, other than by impeachment and conviction, only by the personal action of the Attorney General and only for good cause, physical or mental disability (if not prohibited by any law protecting persons from discrimination on the basis of such a disability), or any other condition that substantially impairs the performance of the Special Counsel's duties.

(2) If a Special Counsel is removed from office under this subsection, the Attorney General shall promptly submit to the Committees on the Judiciary of the Senate and the House of Representatives, a report specifying the facts found, the ultimate grounds for such removal, and the steps the Attorney General intends to take to replace the Special Counsel who has been removed. The Attorney General will not object to the making available of the report to the public by the Committees.

(b) An Office of Special Counsel shall terminate when (1) the Special Counsel notifies the Attorney General that the investigation of all matters within the prosecutorial jurisdiction of the Special Counsel, and any resulting prosecutions, have been completed or so substantially completed that it would be appropriate for other offices or officials of the Department of Justice to complete such investigations and prosecutions and (2) the Special Counsel files a report in full compliance with § 3(c) of these regulations.

(c) (1) Notwithstanding subsections (a) or (b), the Attorney General may terminate an Office of Special Counsel (i) within 60 days following the date that is two years after the date

of the original appointment of the Special Counsel or (ii) within 60 days following the end of any succeeding one year period. At any time that the Attorney General terminates an Office of Special Counsel under this subsection, the Attorney General may provide the Office with a period of not to exceed 90 days for the sole purpose of providing for the orderly transfer of records and open matters to other offices of the Department of Justice and for submitting to the Attorney General a final report under § 3(c) of these regulations.

(2) If the Attorney General terminates an Office of Special Counsel under this subsection, the Attorney General shall promptly submit to the Committees on the Judiciary of the Senate and the House of Representatives, a report specifying the reasons for the termination. The Attorney General will not object to the making available of the report to the public by the Committees.

§ 5 -- Relationship with other components of the Department of Justice.

(a) Whenever a matter is within the investigative or prosecutorial jurisdiction of a Special Counsel, all other offices and personnel of the Department of Justice shall suspend all investigations and proceedings regarding the matter, unless the Special Counsel agrees in writing that they may be continued or unless otherwise permitted by these regulations.

(b) A Special Counsel may request assistance from other offices and personnel of the Department of Justice, and shall be provided assistance by them, including –

(1) access to any records, files, or other materials relevant to matters within the Special Counsel's investigative or prosecutorial jurisdiction, and the use of the resources and personnel necessary to perform the Special Counsel's duties; and

(2) consultation and cooperation with the United States Attorney for the district in which a violation is alleged to have occurred.

(c) If the Attorney General and a Special Counsel agree in writing that it would be consistent with the purposes of the appointment of the Special Counsel for responsibilities under these regulations (except for removal of the Counsel or termination of the Counsel's Office) to be exercised by the Assistant Attorney General in charge of the Criminal Division or another officer of the Department of Justice, the Attorney General may delegate such responsibilities to that official.

(d) Nothing in these regulations shall prevent the Attorney General or the Solicitor General from making a presentation as amicus curiae to any court as to issues of law raised by any case or proceeding in which a Special Counsel participates in an official capacity or on any appeal of such a case or proceeding.

Project Participants

George J. Mitchell

- Senator Mitchell is a member of the law firm of Verner, Liipfert, Bernhard, McPherson & Hand.
- From 1980 through 1994, he served as a United States Senator from Maine; from 1989 until his retirement from the Senate, he was Senate Majority Leader.
- From 1979 to 1980, he served as United States District Judge for the District of Maine after having served as United States Attorney for the District of Maine during 1979.

Robert Dole

- Senator Dole is a member of the law firm of Verner, Liipfert, Bernhard, McPherson & Hand.
- From 1969 until 1996, he served as a United States Senator from Kansas; in 1985 and 1986, and in 1995 and 1996, he was Senate Majority Leader; he served as Senate Minority Leader from 1987 through 1994.
- From 1961 through 1968, he served in the U.S. House of Representatives, before which he served in the Kansas House of Representatives and as County Attorney of Russell County, Kansas.

Zoë Baird

- Ms. Baird has been the president of the Markle Foundation since January 1998.
- She is former Associate Counsel to President Carter and served as attorney/adviser in the Office of Legal Counsel of the U.S. Department of Justice.
- She serves on the President's Foreign Intelligence Advisory Board and has been a member of the congressional Commission on the Roles and Capabilities of the U.S. Intelligence Community.

Drew S. Days, III

- Prof. Days joined the faculty of the Yale University School of Law in 1981 and in 1991 was named to the Alfred M. Rankin Chair.
- From 1993 to 1996, he served as U.S. Solicitor General.
- From 1977 to 1980, he was Assistant Attorney General in charge of the Civil Rights Division.

Carla Anderson Hills

- Mrs. Hills is Chairman and Chief Executive Officer of Hills & Company, International Consultants.
- From 1989 to 1993, she served as United States Trade Representative.
- From 1975 to 1977, she served as Secretary of Housing and Urban Development; from 1974 to 1975, she was Assistant Attorney General in charge of the Civil Division.

Bill Paxon

- Mr. Paxon is Senior Adviser at Akin, Gump, Strauss, Hauer & Feld.
- From 1988 to 1998, he represented New York's 27th District in the U.S. Congress.
- He served as Chairman of the House Leadership in the 105th Congress and Chairman of the National Republican Congressional Committee in 1992.

John G. Roberts, Jr.

- Mr. Roberts is a member of the law firm of Hogan & Hartson where he heads its Appellate Practice Group.
- From 1989 to 1993, he served as Principal Deputy Solicitor General.
- He served as Associate Counsel to President Reagan and as Special Assistant to Attorney General William French Smith.

David E. Skaggs

- Mr. Skaggs is currently Executive Director of the Democracy & Citizenship Program at The Aspen Institute, an effort to help strengthen the American democracy. He is also of counsel at Hogan & Hartson.
- He represented Colorado's 2nd District in the U.S. Congress from 1987 through 1998.
- He is a former member of the Colorado House of Representatives (1981-86), where he served as Minority Leader (1983-86).

Dick Thornburgh

- Mr. Thornburgh is counsel to the law firm of Kirkpatrick & Lockhart.
- In 1978, he was elected governor of Pennsylvania and was re-elected in 1982.
- He served as Attorney General of the United States (1988-91) and as Under-Secretary-General of the United Nations (1992-93).
- From 1969 to 1975, he served as United States Attorney in Pittsburgh, and from 1975 to 1977 as Assistant Attorney General in charge of the Criminal Division.

Mark H. Tuohey III

- Mr. Tuohey is a partner at the law firm of Vinson & Elkins where he specializes in civil and white collar crime litigation.
- From September 1994 through September 1995, Mr. Tuohey acted as Deputy Independent Counsel in the Whitewater investigation.
- He served as an Assistant U. S. Attorney for the District of Columbia (1973-77), as Special Trial Counsel, U.S. Department of Justice (1977-79), as Special Counsel to the Attorney General (1979), and as president of the District of Columbia Bar (1993-94).

Thomas E. Mann

- Dr. Mann is Director, Governmental Studies Program, and W. Averell Harriman Senior Fellow in American Governance at the Brookings Institution.
- Before joining Brookings in 1987, he was executive director of the American Political Science Association.
- He served as Co-Director of the Renewing Congress Project.

Norman J. Ornstein

- Mr. Ornstein is Resident Scholar at the American Enterprise Institute.
- He served as Co-Chair of the President's Advisory Committee on the Public Interest Obligations of Digital Television Broadcasters and was a member of the Board of the National Commission on Public Service (the Volcker Commission).
- He served as Co-Director of the Renewing Congress Project.

Michael Davidson

- Mr. Davidson served as Co-Director for the Campaign Finance Reform Project at the Aspen Institute (1997-98).
- In 1996, he served as Acting General Counsel, Library of Congress.
- From 1979 to 1995, he was Senate Legal Counsel.

Elaine W. Stone

- Ms. Stone was a partner at the Corpus Christi, Texas firm of Perry & Haas (1985-88, 1990-93).
- She served as Counsel for the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings, U.S. Senate (1989).
- She headed the appellate section of the District Attorney's Office, Corpus Christi, Texas (1983-84) and was an associate at the Los Angeles law firm of Munger, Tolles & Olson (1979-82).

Dennis C. Shea

- Mr. Shea is Director, Black, Kelly, Scruggs & Healey, a government relations firm.
- From December 1995 to November 1996, he served as Director of Policy/Senior Policy Adviser to Senator Bob Dole during his presidential campaign.
- He is former Deputy Chief of Staff/Counsel to Senator Dole.