The Independent Counsel Statute: A Matter of Public Confidence and Constitutional Balance

Senator Carl Levin
Elise J. Bean
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Senator Carl Levin with assistance from Elise J. Bean*

The federal statute establishing a system for independent counsels,1 addresses one of the most delicate tasks facing any government: the investigation of the government’s own top officials when they are suspected of criminal wrongdoing. As the statute’s expiration date draws near2 and the 100th Congress considers whether to make the law a permanent part of the United States’ criminal justice system,3 this article reviews some of the historical, political and constitutional justifications for the independent counsel statute.

I. HISTORICAL PERSPECTIVE: THE LEGACY OF WATERGATE

The primary impetus for the independent counsel statute was the Watergate scandal that engulfed the Nixon presidency. By 1973, persons close to President Richard M. Nixon, including former Attorney General John Mitchell and former Chief of Staff Robert Haldeman, were suspected of having engaged in criminal conduct.4 The press and public called for a thorough investigation of the bur-

* Senator Levin chairs the Subcommittee on Oversight of Government Management which has legislative jurisdiction in the Senate over the independent counsel statute. He has worked with the statute since its enactment in 1978. Ms. Bean is counsel to the Subcommittee.


geoning scandal.\textsuperscript{5}

In response, Elliot Richardson, the attorney general who eventually followed Mr. Mitchell, issued regulations creating a new office within the Department of Justice, the Office of Watergate Special Prosecutor.\textsuperscript{6} Reaching outside the Department's ranks, Mr. Richardson selected Archibald Cox to serve as the special prosecutor.\textsuperscript{7} The regulations provided Mr. Cox with independent authority to investigate the Watergate crimes and protected him from removal except in the event of "extraordinary improprieties on his part."\textsuperscript{8}

As part of his investigation, Mr. Cox initiated proceedings to obtain certain tape recordings and documents in the possession of President Nixon.\textsuperscript{9} President Nixon ordered Mr. Cox to desist.\textsuperscript{10} When Mr. Cox refused, on Saturday, October 20, 1973, President Nixon ordered Attorney General Richardson to fire Mr. Cox.\textsuperscript{11} Mr. Richardson resigned instead, as did the Deputy Attorney General William D. Ruckelshaus.\textsuperscript{12} However, Solicitor General Robert H. Bork obeyed the President's order and terminated Mr. Cox from his post.\textsuperscript{13} The abrupt departure of Messrs. Cox, Richardson and Ruckelshaus from the Department of Justice was later described in the press as the "Saturday Night Massacre."\textsuperscript{14}

Three days later, on October 23, 1973, Acting Attorney General Bork abolished the Office of the Watergate Special Prosecutor.\textsuperscript{15} He instructed Mr. Cox's staff that the Criminal Division of the Justice Department would assume control over the Watergate investigation.\textsuperscript{16}

The public outcry at these events was immense and justifiably

\textsuperscript{5} See generally A N.Y. TIMES BOOK, THE WHITEHOUSE TRANSCRIPTS (1974).
\textsuperscript{6} 28 C.F.R. § 0.37 (1973).
\textsuperscript{7} Justice Department Internal Order 518-73 (May 31, 1973).
\textsuperscript{8} 28 C.F.R. § 0.37 (1973).
\textsuperscript{9} The subpoena issued to obtain these materials was eventually upheld by the Supreme Court. United States v. Nixon, 418 U.S. 683 (1974).
\textsuperscript{10} See REPORT, supra note 4, at 9.
\textsuperscript{11} Id.
\textsuperscript{12} Id.
\textsuperscript{13} Id.
\textsuperscript{16} See REPORT, supra note 4, at 10-11.
so. Congress called for hearings\textsuperscript{17} and introduced legislation\textsuperscript{18} to authorize a court-appointed special prosecutor to replace Mr. Cox. Acting Attorney General Bork faced skeptical questioning regarding whether he would permit the criminal probe to continue without interference. In the meantime, President Nixon authorized Mr. Bork to appoint a new special prosecutor, and he selected Leon Jaworski, former assistant to Mr. Cox.\textsuperscript{19} Mr. Bork also issued regulations re-establishing the special prosecutor’s office, three weeks after he had abolished it.\textsuperscript{20} The new regulations restricted removal of the special prosecutor to an even greater extent than before, essentially requiring prior notice to and approval by certain Congressional leaders.

Special prosecutor Jaworski resumed the effort to obtain the tape recordings and documents, and President Nixon eventually surrendered them. Mr. Jaworski later initiated criminal proceedings and obtained guilty pleas from Messrs. Mitchell, Haldeman and others. President Nixon subsequently resigned under pressure. His successor, President Gerald Ford, granted him a pardon to preclude any criminal prosecution.

These events profoundly shook the American public’s confidence in our government and our criminal justice system. The bitter legacy of Watergate was a new level of public cynicism and distrust. The public had learned that persons close to the President can commit crimes, that a President may try to limit the activities of the prosecutor investigating these crimes, and that Justice Department officials may succumb when the President orders a disobedient prosecutor to be removed, notwithstanding regulations protecting that prosecutor’s independence. The result was and is a loss of public confidence in criminal investigations by the Department of Justice when the subjects are persons close to the President.

Watergate encapsulated for the United States a problem which potentially faces every government: how to maintain public confidence in the government’s prosecutors and criminal justice system

\textsuperscript{17} Extensive hearings were held during the following weeks by both Houses of Congress. See, e.g., \textit{Special Prosecutor Hearings Before the Senate Comm. on the Judiciary}, 93d Cong., 1st Sess. (1973); \textit{Special Prosecutor and Watergate Grand Jury Selection: Hearings on H.R.J. Res. 784 \\& H.R. 10937 Before the House Subcomm. on Criminal Justice of the Comm. on the Judiciary}, 93rd Cong., 1st Sess. (1973).


\textsuperscript{19} See \textit{Report}, supra note 4, at 11.

when those prosecutors are asked to investigate their own colleagues and political leaders. The United States' solution was to enact the Independent Counsel Statute.

II. INDEPENDENT COUNSEL STATUTE

The independent counsel statute is part of the Ethics in Government Act of 1978, which is a direct response to many of the problems associated with Watergate. It seeks to preserve and promote public confidence in the integrity of the federal government by, inter alia, establishing procedures for financial disclosure by public officials, imposing outside earnings and post-employment restrictions on government employees, and creating a government-wide office to monitor agency ethics programs. Title VI of the Act establishes the system for “independent counsels” to investigate allegations of criminal wrongdoing by officials who are close to the President. Its purpose is to ensure that these criminal proceedings are conducted in a fair and impartial manner.

Reduced to its essentials, the statute has three mechanisms to guarantee the independence of the independent counsels. First, a court—not the President—selects the individuals who serve as independent counsels. Second, the scope of the independent counsels'...
inquiries is defined by the court and the conduct of their investigations is placed outside the direct control of the Department of Justice. Finally, independent counsels, unlike most other executive branch officials, are removable from office only for good cause and not at the President's will. Together, these mechanisms enable the independent counsel to conduct activities with a measure of independence from the chief executive.

At the same time, the independent counsel is not without constraints. He or she may be appointed by the court only when the attorney general determines in writing that an independent counsel is needed. Moreover, he or she holds only a temporary post and may be discharged by the attorney general for good cause. The statute also requires the independent counsel to follow whenever possible the established law enforcement policies of the Department of Justice. Further, as an officer of the court, the independent counsel,

27. Id.
28. 28 U.S.C. § 594(a) (1982), which provides in relevant part that: an independent counsel appointed under this chapter shall have, with respect to all matters in such independent counsel's prosecutorial jurisdiction . . . full power and independent authority to exercise all investigative and prosecutorial functions of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice . . .

Id. Such investigations and prosecutorial functions include for example, conducting proceedings before grand juries, participating in court proceedings and engaging in any civil or criminal litigation the independent counsel deems necessary, conducting appeals, and making applications to any federal court for a grant of immunity for a witness. Id.

In addition, whenever a matter is within the prosecutorial jurisdiction of an independent counsel, the Department of Justice and the Attorney General must suspend all investigations and proceedings regarding that matter, unless the independent counsel requests assistance, or agrees in writing that such an investigation may continue. 28 U.S.C. § 597(a) (1982).

29. 28 U.S.C. § 596(a) (1982). The statute explicitly authorizes the Attorney General to discharge independent counsels. In the event of such a discharge, the Attorney General must submit, to the court and to the Committees on the Judiciary of both the House and the Senate, a report specifying factual findings and ultimate grounds for removal. These reports, as a general matter, must be made public. 28 U.S.C. § 596(b) (1982). An independent counsel who is removed from office has the right to obtain judicial review of the action and may be able to obtain reinstatement or other appropriate relief. 28 U.S.C. § 596 (1982 & Supp. III 1985).

30. 28 U.S.C. § 592(c)(1) (1982), which provides that:
If the Attorney General upon completion of the preliminary investigation, finds reasonable grounds to believe that further investigation or prosecution is warranted, or if ninety days elapses from the receipt of the information without a determination by the Attorney General that there are no reasonable grounds to believe that further investigation or prosecution is warranted, then the Attorney General shall apply to the division of the court for the appointment of a special prosecutor.

Id.

like all federal prosecutors, is subject to judicial supervision.

This balancing of independence and accountability is the result of lengthy deliberations by Congress. The independent counsel statute was enacted five years after the Saturday Night Massacre. Its final form follows multiple proposals, bills, hearings and debate.33

Congress concluded, correctly I believe, that public confidence in the criminal justice system could be maintained if, in the rare cases when persons close to the President are suspected of criminal misconduct, criminal proceedings are conducted by temporary outside counsels, who are appointed by an impartial body, removable only for good cause, and possessing meaningful independence. Appointment, removal and direct control over the proceedings were the key legislative considerations, and mechanisms in these three areas, geared to protect the prosecutor's independence, form the foundation of the independent counsel law.

The independent counsel system has now been in place for nine years. To date, it has successfully handled cases involving our highest government officials and, on occasion, matters of great political sensitivity. For example, when Edwin Meese, III, was nominated to be attorney general and a variety of possible criminal allegations were levelled against him, an independent counsel examined the allegations and declined prosecution, clearing the way for Mr. Meese's confirmation.34 Currently, independent counsels are investigating, inter alia, allegedly improper influence peddling by Michael Deaver,35 former Chief of Staff to the President, and Franklyn Nofziger,36 former Assistant to the President, as well as allegations of obstruction of justice, conspiracy to defraud and other criminal conduct by high


34. See, e.g., Werner, Senate Approves Meese to Become Attorney General, N.Y. Times, Feb. 24, 1985, § 1, at 1, col. 6.

35. In re Deaver, No. 86-2 (D.C. Cir. Independent Counsel Division).

36. In re Nofziger, No. 87-1 (D.C. Cir. Independent Counsel Division).
government officials associated with the Iran-Contra matter.  

The Senate Governmental Affairs Committee, through its Subcommittee on Oversight of Government Management, recently reviewed these and other activities under the independent counsel statute and determined the law to be an effective and valuable addition to the United States Code. At a Committee hearing, the American Bar Association testified that:

[T]he ABA is convinced that it is imperative for the administration of justice and the continued public confidence in the fairness of our system of justice that the Congress reauthorize the independent counsel provisions of the Ethics in Government Act . . . . [T]he basic mechanism of the independent counsel law is soundly conceived and has functioned effectively since its passage in 1978 and its re-enactment in 1982.  

Archibald Cox stated at the same hearing that the law is "essential to preserving public confidence in the fair and ethical behavior of public officials." Of course, this favorable analysis of the law is not universal. The Governmental Affairs Committee also heard from critics. On the whole, however, the Committee found the criticisms unpersuasive. In a report on S. 1293, a bill to renew the independent counsel statute, the Committee states plainly that the statute "has served the country well" and that it "provides an effective and essential procedure to investigate persons close to the President."  

III. CONSTITUTIONAL CONCERNS: CHECKS AND BALANCES

Despite the apparent success of the independent counsel statute in restoring public confidence in the criminal investigation of persons close to the President, some commentators have questioned its consistency with the Constitution. I believe it comports wholeheartedly

37. In re Iran-Contra, No. 86-6 (D.C. Cir. Independent Cir. Counsel Division).
39. Id. at 186 (statement of Archibald Cox, Professor of Law, Harvard University).
40. See, e.g., id. at 20 (testimony of John R. Bolton, Assistant Attorney General, Legislative Affairs, Department of Justice, arguing that the appointment, direction and control, and removal provisions of the statute violate the principle of separation of powers).
42. Id. at 8.
43. Prior to the enactment of the 1978 Ethics in Government Act, initial constitutional objections to the special prosecutor provisions concerned the impropriety of allowing judicial
with our constitutional system of government by furthering the principle of checks and balances.

The Framers of the Constitution designed the federal government with a wary eye toward preventing any one person or branch from attaining absolute authority. They created three branches of government and assigned them separate yet intertwining responsibilities so that each would serve as a check against the others. For example, the legislature was given primary responsibility for enacting rules of law, but the executive was given the power to veto unwise statutes. The executive was given primary responsibility to enforce the laws, but the legislature was given the power to reject nominees for top executive positions and to restrict enforcement activities through the power of the purse. The judiciary was given primary responsibility to apply the laws in specific cases and controversies, but the executive and legislature were given roles in the selection and impeachment of judges.

As these intertwining responsibilities illustrate, “separation of
powers” is not an end in itself. The separation of powers among the branches is part of a larger constitutional principle favoring checks and balances. The three branches are given separate powers so that each serves as a check on the others. The ultimate goal is a constitutionally mandated balance of power among the principal actors in government, so that none dominates and assumes disproportionate control.

Critics of the independent counsel statute often charge that the law undermines the principle of separation of powers. They argue that the Constitution assigns the power to enforce the laws to the executive branch, that criminal prosecutions are an inherent part of that enforcement power, and that it is therefore unconstitutional to assign prosecutorial responsibilities to an independent counsel, who is not appointed by and removable at the will of the President.

This constitutional argument is unpersuasive for several reasons. First, since the Constitution mandates maintaining checks and balances among the branches of government, it makes sense that the executive branch not exert absolute control over criminal prosecutions, particularly in the rare cases where its own top officials are alleged to have committed serious crimes. In such rare circumstances, the other branches may participate to ensure a fair and impartial investigation, authorizing a counsel with some independence from the chief executive to conduct the proceedings. Such participation by the other branches serves as a check against the extreme case in which the executive branch might shield its top officials from prosecution, even where they deliberately flout the laws and judgments of Congress and the courts, committing serious crimes.

It is worth noting that, in creating the independent counsel system, Congress did not reserve a major role for itself or aggrandize the legislature at the expense of the other branches of government. For example, Congress does not decide when an independent counsel

45. See supra note 43.
46. Id.
47. Some critics of the independent counsel law argue that the Constitution already provides a remedy for this extreme case: impeachment of the offending officials by Congress. U.S. Const. art. II, § 4. The existence of the impeachment process does not mean, however, that other ways of checking the executive branch’s prosecutorial power to prevent abuse are constitutionally prohibited. Moreover, impeachment is not a criminal proceeding and does not subject officials to prosecution; it only removes them from office. U.S. Const. art. I, § 3, cl. 7; see also Kurland, Watergate, Impeachment, and the Constitution, 45 Miss. L.J. 531, 538 (1974). Impeachment also does not apply to former officials, while the independent counsel law subjects current and recent occupants of high government office to the same criminal justice system that applies to all other persons. 28 U.S.C. § 591(b)(1)-(8), (c) (1982).
is needed; that decision is left to the executive branch.48 Congress does not select the independent counsels or define their inquiries; those decisions are placed within the province of the judiciary.49 Congress also plays no role in removing an independent counsel from office.50 In fact, the only statutory role given to Congress is an advisory one suggesting when an independent counsel should be appointed and, on occasion, questioning the actions of independent counsels already in office.51 This is similar to the oversight role Congress currently has with respect to criminal proceedings handled by the Department of Justice.

The role assigned to the judiciary is also a limited one, though crucial to ensuring the integrity of the process. A special court, whose members are selected by the Chief Justice of the United States Supreme Court, is charged with appointing the persons who serve as independent counsels and defining the scope of their inquiries.52 By lodging this appointment power with a court of law, Congress relies directly on Article II, Section 2 of the Constitution which states in pertinent part: "the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."53

Congress determined, correctly I believe, that the selection of the person to serve as independent counsel is key to ensuring the independence of the proceedings and is a decision which should be made by an impartial yet knowledgeable body, such as a court.54 Authorizing the court to describe the scope of the counsel's inquiry is

48. Under the independent counsel statute, when the attorney general receives sufficient information to constitute grounds to investigate a person under the Act, he must first conduct a preliminary investigation. 28 U.S.C. § 592(a)(1) (1982). Upon completion of this preliminary investigation, if the attorney general determines that further investigation or prosecution is warranted, he is directed to apply to the court for the appointment of an independent prosecutor. 28 U.S.C. § 592(c)(1) (1982).
49. 28 U.S.C. § 593(b) (1982).
54. Courts have had considerable experience in appointing prosecutors, who then serve as officers of the court and are subject to judicial supervision; indeed, the courts' authority to make such appointments has been upheld. See, e.g., Young v. United States ex rel. Vuitton et Fils S.A., 107 S. Ct. 2124 (1987) (holding that a court may appoint temporary counsel from outside government to prosecute criminal contempt case); United States v. Solomon, 216 F. Supp. 835 (S.D.N.Y. 1963) (holding that a statute may authorize a court to appoint a person to serve as U.S. Attorney in the event a vacancy arises in that office).
an inherent part of the appointment power, since the court appoints the independent counsel to a temporary office, whose tenure must be defined by the completion of a particular task. It is also an important decision, since it defines the authority of the independent counsel to investigate the alleged wrongdoing.

The court's power to appoint and define the inquiries of independent counsels is a minimal intrusion into the executive's law enforcement authority, especially when compared to the powers retained by the executive branch under the independent counsel law. For example, only the attorney general can request appointment of an independent counsel.\(^5\) The court cannot appoint one without such a request,\(^6\) and the attorney general's decision in this matter is final and unreviewable by any court or legislative body.\(^7\) Thus, there can be no independent counsel unless the executive branch determines there is a need for one.

Another power at the department's disposal is its statutory right to present in court its views on any legal dispute in an independent counsel case.\(^8\) The department has used this authority successfully to limit the scope and direction of independent counsel inquiries.\(^9\) The law also permits the Attorney General to remove any independent counsel from office, if good cause exists for discharge. Although this authority is less than the power to terminate at will, it remains a significant source of control over independent counsels who may abuse their positions.\(^10\)

The principle of separation of powers is part of the greater constitutional concern for checks and balances to insure that no one part of the federal government assumes disproportionate power. The independent counsel law serves this end by creating checks and balances among the branches in the rare instance when the executive branch

\(^{59}\) See, e.g., Briefs filed by the Department of Justice, United States v. Deaver, No. 87-096 Crim. (D.D.C. June 19, 1987) (successfully opposing enforcement of subpoena issued by independent counsel directing Canadian diplomat to testify); In re Olson, 818 F.2d 34 (D.C. Cir. 1987) (successfully opposing independent counsel request to investigate persons whom the Attorney General had previously determined should not be pursued).
\(^{60}\) The good cause removal standard in the independent counsel law, in fact, represents less of a restriction on removal than the Justice Department accepted in regulations governing the Watergate special prosecutor. Compare 28 U.S.C. § 596(a) with 28 C.F.R. § 0.37 (1973). See also, Bowsher v. Synar, 106 S. Ct. 3181, 3188 (1986) (stating that after appointment, an official fears only the authority that can order removal).
is asked to investigate and possibly prosecute its own top officials. The law's limited intrusions into executive authority, consisting of a court-appointed temporary counsel, removable for good cause but with independent authority to investigate wrongdoing by persons close to the President, are not only consistent with our constitutional system of government, but also further the constitutional principle of checks and balances.

III. CONCLUSION

The independent counsel statute serves two purposes and serves them well. It restores public confidence in our criminal justice system, severely shaken after the debacle of Watergate, and it furthers the Framers' goal of instilling appropriate checks and balances within the federal government. The statute merits a permanent place in American law.