

Back from the grave: the life, death, and revival of the independent counsel law, 1978–1994

Abstract

This article furnishes a detailed case study of an American law which was established to create a semi-independent method for examining wrongdoing within the executive branch of the Federal government, thereby preventing a conflict of interest. Though the Independent Counsel Law was created in 1978 with strong support and eventually renewed twice, allegations of intrusiveness, ineffectiveness, and waste of government resources resulted in its lapse in 1992. The Independent Counsel Law was resurrected just two years later amid charges involving President Bill Clinton's land deals. In addition to covering events associated with the law's rollercoaster ride from 1978 through 1994, the essay presents arguments for and against the renewal of the Independent Counsel Law.

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Introduction

This essay examines the independent counsel law, enacted as part of the Ethics in Government Act in 1978, eliminated by congressional fiat in December 1992, and brought back from the legislative graveyard in June 1994. The law was created as a post-Watergate reform following the October 1973 "Saturday night massacre," when Special Prosecutor Archibald Cox was removed from his inquiry into the latter scandal. The purpose of the provision was to employ procedures for probing alleged wrongdoing within the executive branch, thereby preventing self-examination of a presidential administration and hence a potential conflict of interest.

The present study analyzes the law's establishment, reviews its application over a fourteen-year period, discusses the ramifications of the law's demise, traces its renewal, and evaluates arguments of its use as a device for impartially investigating the conduct of executive branch officials. As a law which has been alternately vigorously defended and vehemently attacked, the independent counsel statute embodies the political, legal, and personal issues which have occurred over the last two decades. Because its procedures involve all three branches of American national government, we may likewise uncover trends in power relations together with the parameters of shared constitutional authority.

Tracing the law's enactment

Between 1974 and the 1978 passage of the Ethics in Government Act, there were at least three attempts to formulate a process for investigating administration behavior using a special prosecutor. Eastland traces these efforts below (1992: 55)¹:

In the beginning, as introduced in 1975, it provided for a permanent office of public attorney outside the executive branch that would investigate administration wrongdoing. As first amended, in 1976, it provided for a triggering mechanism whereby a temporary special prosecutor would be appointed by either the Attorney General or the court to investigate administration misconduct. And as amended again, also in 1976, it provided for a permanent office of special prosecutor within the executive branch, with that person appointed by the President subject to Senate confirmation and charged with investigating criminal allegations involving high-ranking officials of all three branches. It was the second of these that would rise again, in somewhat different form, as Title IV of the Ethics in Government Act of 1978: this was the most exact precursor of the eventual special prosecutor law.

Harringer¹ delineates the creation of the special prosecutor law during the 97th Congress. The Senate passed its version of the law on June 27, 1977 by a 74-5 vote. More than a year ensued until the House of Representatives approved the post-Watergate reform bill. A conference report, which favored Senate specifications for the special prosecutor passed by voice vote on October 7, 1978, with the House voting to approve the legislation by 370-23. Harringer holds that (1992: 71): the provisions of the act reflected congressional acknowledgement of the uncertainty surrounding the extent to which the president was to control law enforcement activities. Thus the attorney general was given authority to trigger the act and to remove the special prosecutor. The court panel, however, was given responsibility for appointment of the special prosecutor, this provision derived from the belief that the prosecutor must be, and must be perceived to be, independent of the executive.

First life: 1978-1992

President Ronald Reagan signed a bill to extend the independent counsel law on January 3, 1983, though several amendments altered the original independent counsel statute. For instance, the discretion of the attorney general in initiating the act was augmented; the standard for eliciting the act was lessened so that the attorney general could consider the credibility of allegations: the test for removal of the independent counsel was lowered to "good cause;" and the special prosecutor was asked to follow Department of Justice prosecutorial guidelines whenever possible.²

The 1987 reauthorization of the independent counsel law was influenced by growing antagonism between the executive and legislative branches following the 1986 elections, by inter-chamber disputes within Congress, by the influence of groups such as the American Bar Association and Common Cause, and by continuing constitutional challenges. The consequence, according to Harringer, was (1992: 85) "a set of amendments that attempted to meet three of the essential goals of the original legislation: to control the attorney general's conflict of interest, to remain constitutionally sound, and to maintain an arrangement that would meet the symbolic need to reassure the public."

Between the act's establishment and its demise in 1992-- a span of 14 Years--thirteen independent counsels were appointed to investigate a variety of charges. Below is a summary of the nine public cases^{3,4}:

1. Prosecutor Arthur Christy was appointed in 1979 to investigate charges of cocaine use by Carter White House Chief of Staff Hamilton Jordan. No indictment resulted. The total cost of the Case was \$182,000.
2. Prosecutor Gerald Gallinghouse was appointed in 1980 to determine whether Carter national campaign manager Tim Kraft had used cocaine in 1978. No grounds for indictment were found. The total cost of the case was \$3300.
3. Prosecutor Leon Silverman was chosen in 1981 to uncover whether Regan Labor Secretary Raymond Donovan had taken illegal payoffs and had links to organized crime when he was a construction executive. No indictment ensued. The total cost of the investigation was \$326,000.
4. Prosecutor Jacob Stein was selected in 1984 to determine whether Regan aide Edwin Meese had accepted financial favors from friends appointed to federal jobs or had committed crimes in previous financial dealings. Meese was cleared of all 11 allegations against him. The case cost \$312,000.
5. Prosecutor Alexia Morrison was chosen in 1986 to find out whether Theodore Olsen, a former assistant attorney general, lied to Congress concerning the withholding of documents on toxic waste cleanup by the Reagan administration. Olsen was cleared of Obstruction charges three years later. The total cost of the investigation was \$1,526,000.
6. Prosecutor Whitney North Seymour was appointed in 1986 to determine whether former Reagan aide Michael Deaver violated federal ethics laws by lobbying White House after he left. Though cleared on that charge, Deaver was convicted on three counts of perjury and received a three-year Suspended sentence. The cost of the probe was \$1,460,000.
7. Prosecutor Lawrence Walsh Was chosen in 1986 to from the sale of Weapons to Iran to support the contras in Nicaragua. Of the 14 people charged in the Iran-Congra Probe, seven plead guilty, four were convicted, one Case was dismissed, two Pretrial pardons occurred, and one person served jail time. The cost of the investigation, which lasted Seven years, was over \$37 million.
8. Prosecutor James McKay was appointed in 1987 to determine whether former Regan white House aide Lyn Nofziger had improperly lobbied the administration after leaving in 1982. Convicted on three counts of illegal on appeal. The cost of the investigation was \$2,491,000.
9. Prosecutor Arlin Adams was chosen to probe charges that former Housing and Urban Development Secretary to defraud the U.S. government through the department's Moderate Rehabilitation program. At present, two former HUD employees have been indicted. The cost of the case has exceeded \$3.5 million.

Although twice renewed during the Reagan presidency, the independent counsel act expired on December 15, 1992. Both political parties participated in the act's elimination, as the law was concurrently attacked for its ostensible intrusiveness and ineffectiveness.

Purgatory: 1992-1994

Circumstances which transpired in the months after its termination demonstrated the necessity, not the nuisance, of the independent counsel statute. These events include the following:

1. FBI Director William Sessions was fired by President Clinton, partly due to continuing doubts about the validity of an informal

Justice Department probe during the waning weeks of the Bush administration, which cleared Sessions of misconduct charges.

2. Deep distrust remained over "Iraq gate," the Justice Department's handling of a criminal inquiry into an Atlanta bank's loan of \$4 billion to Iraq shortly before its invasion of Kuwait in 1990.
3. In the spring of 1993, the Clinton White House engaged in purposes of its travel office for apparently patronage purposes. The administration's internal report on the affair through harsh was summarily dismissed as a whitewash by Republicans.
4. Questions over the authority of the independent counsel led to the termination of an investigation into possible criminal activity by Bush White House and State Department personnel regarding the search of Bill Clinton's passport files during the 1992 presidential campaign.
5. With President Bush's pardon of former Defense Secretary Casper Weinberger and several other Reagan officials who were indicted for their part in the Iran-contra fiasco, which came nine days after the termination of the independent counsel statue, the active part of the investigation ended.
6. With new charges about Bill and Hillary Clinton's ties to the Arkansas Whitewater scandal, opponents doubted the ability of the Justice Department to fairly uncover the facts.

Resurrection

Almost a year after the expiration of the independent counsel law, the Senate, on November 18, 1993, approved its renewal by a 76-21 vote. Idelson notes that the bill passed with strong bipartisan backing, partly because "the first Democratic administration in a dozen years has helped pique new Republican interest in the statute." On February 10, 1994, the House passed the bill to restore special prosecutors by a 356-56 margin. Of this tally, 243 Democrats, 112 Republicans, and one Independent voted in favor, while 54 Republicans and only two Democrats opposed the measure.⁶ A conference committee approved a final version of the legislation on May 17, 1994. The Senate and House approved the report on May 25 and June 21, respectively.⁷

President Clinton, the first chief executive to promote the legislation since its inception, signed the Independent Counsel Reauthorization Act of 1994 into law on June 30, 1994. He claimed that the law⁸ "ensures that no matter what party controls the Congress or the executive branch, an independent, non-partisan process will be in place to guarantee the integrity of public officials and ensure that no one is above the law."

One immediate result of the law's rebirth was a change in the personnel investigating the Whitewater affair. On August 5, 1994, Robert Fiske, appointed by Clinton administration Attorney General Janet Reno, was ousted and replaced by former Solicitor General Kenneth Starr. Lebaton asserts that the⁹ "change came as a complete surprise, and it was a sharp disappointment for the Administration, promising as it did yet another extension of the Whitewater investigation and its potential for political trouble." Marcus reports that Starr's selection¹⁰ "generated some criticism by lawyers and others who questioned the choice of a counsel with such Republican credentials and a public stance against Clinton's central argument for dismissing the civil lawsuit filed by Paula Corbin Jones." However, the panel of federal judges who made the move contended that¹¹ "it is in the best interest of the appearance of independence that a person not affiliated with the incumbent administration be appointed."

Evaluating arguments about the law

One argument made by opponents of the independent counsel statute is that it impedes on the power of the executive branch, specifically the president. Yet, the individual selected by a special three-judge panel is often given a simultaneous appointment within the Justice Department. The independent counsel is removable by the president, albeit for only good cause, physical disability, or mental incapacity. In its 7-1 decision upholding the constitutionality of the independent counsel arrangement, the Rehnquist-led Supreme Court in 1988 rejected the assertion that the act violated the separation-of-powers principle.

A second contention against the independent counsel is that inquiries are precipitated for political reasons and are excessively partisan in nature. This claim is mitigated by the fact that the attorney general may separately conduct a probe of an accused executive branch official, rather than simply responding to requests from House or Senate Judiciary Committee members. Secondly, it should be further noted that the attorney general has sole discretion to begin an inquiry which may result in an independent counsel being assigned where other than high-ranking officials are involved. Thirdly, statistics on the number of independent counsels named since 1978 and the outcome of their pursuits do not support partisanship assertions: in only three public cases completed over the last sixteen years did convictions ensue.

A third objection to the renewal of the independent counsel law is that inquiries are viewed as especially costly and a waste of money. If the costs from the nine public investigations summarized above are totaled,¹² the sum is in excess of \$46 million. However, this figure is skewed by Iran-Contra case, which ran over \$37 million. Other probes have cost as little as \$3300. Two changes in the independent counsel law as approved in 1994 specifically address criticism over expenses. First, the new law requires special prosecutors to adhere to Justice Department spending policies concerning salaries, office space and travel with few exceptions. Second the 1994 version of the act mandates the special court to review the independent counsel's activities two years after appointment to determine whether further work is needed. If the case continues, the review would be conducted two years later and annually thereafter.

A final argument forwarded by opponents of the independent counsel law is that it covers only allegations of executive branch malfeasance. Yet, the 1994 version of the law explicitly allows the attorney general to seek an independent counsel to investigate a member of Congress if it would be in the public interest to do so. Granted, Congress has its own ethics committees to probe allegations of wrongdoing. But the Senate committee isn't even a permanent one, and both the House and Senate ethics committees have had a proclivity to wait until external court action was completed before disciplining offenders. Including Congress as a possible target of scrutiny will promote equity rather than politicize the task of the independent counsel.

Conclusion

More than fifty years ago, Richard Nixon, in defending himself against Watergate cover-up charges, stated that the American people have a right to know whether or not their president is a crook. It was that sad episode in American history which gave impetus to the creation of the independent counsel law. Today, the demand to impartially evaluate claims of executive or legislative branch crimes still exists, only the personnel have changed. The independent counsel law stood successfully for fourteen years as a shining example of what is right with our system of divided powers and separate institutions. The statute's renewal--no small feat--has revived the perception of fairness in ferreting out misconduct and restored the faith of the populace in those individuals selected to make, execute, and enforce the nation's laws.

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