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# INDEPENDENT COUNSEL LAW IMPROVEMENTS FOR THE NEXT FIVE YEARS

JOHN Q. BARRETT\*

I am a bit like the guy in the Hertz rent-a-car commercial. Our topic is “Should the Independent Counsel Law Be Renewed?” and my answer is, “Not exactly.” I will not be, in other words, defending the status quo. Indeed, the empty chair you see here on the dais nicely contains the only “defender” of the status quo of whom I know.

What I would like to do is remind us of the original rationale for the Independent Counsel statute,<sup>1</sup> for that rationale is still valid and compelling today. I will then address some ways to improve the statute and some of the reasons why continuing it with modifications is preferable to the path of abandoning it.

## LOOKING BEHIND THE DASH

Let me begin by talking about something we can call the problem of “the dash.” This has nothing to do with Professor Sam Dash, who is one of the founding fathers of the Independent Counsel law.<sup>2</sup> This dash, rather, is a

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This Article is adapted from remarks that I made in New Orleans on January 8, 1999, as part of an Association of American Law Schools (AALS) Administrative Law Section panel discussion entitled, “Separation of Powers Revisited: Should the Independent Counsel Law Be Renewed?” Thanks to Eleanor Kinney, Thomas Sargentich, and David Strauss for the opportunity to participate in the New Orleans Panel and their thoughtful comments during the discussion, and to Jean M. Lucido (SJU Law ’00) for research assistance. Although I served as Associate Counsel in the Office of Independent Counsel Lawrence E. Walsh from 1988 to 1993, this Article reflects solely my own views.

1. 28 U.S.C §§ 591-99 (1994). President Clinton signed the Independent Counsel Reauthorization Act of 1994 into law on June 30, 1994. See President’s Statement on Signing the Independent Counsel Reauthorization Act, 1 PUB. PAPERS 1169 (June 30, 1994); 30 WEEKLY COMP. PRES. DOC. 1383 (June 30, 1994).

2. See S. REP. No. 93-981, at 96-100 (1974) (The Final Report of the Select Committee on Presidential Campaign Activities) (recommending establishment of “a permanent Office of Public Attorney,” headed by a Public Attorney who would be chosen by the judiciary, subject to Senate confirmation and appointed for a fixed term, with “jurisdiction to

story, an introductory device, that you may have heard at a funeral or read in an obituary essay, for it seems to be a common introduction to personal and detailed eulogies for the deceased.

The focus of the dash story is a basic gravestone.<sup>3</sup> When you look at such a grave marker, you see only the name of the deceased, his date of birth and his date of death. Between those two dates, you see the dash. And, of course, that is where all the action was. The detailed fullness of the person's life occurred in that space between his birth and his death, and the simple dash on the stone tells you nothing at all about how that life was lived. To learn about the life in its detail and complexity, you will need more than the basic dates of commencement and conclusion. You will need to look, in effect, behind the dash.

As we consider the Independent Counsel statute, which will lapse in June 1999 unless it is reenacted in some form,<sup>4</sup> we resemble the relatives, friends, acquaintances, and students of the departed Independent Counsel who served under the statute since its first enactment in 1978. They were the embodiments of the law, and so we look to their markers to assess what their work tells us about the law itself. And as a political and government culture, we are, in 1999, finally looking at, and behind, the dash, which is the hard part.

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prosecute criminal cases in which there is a real or apparent conflict of interest within the executive branch"). Professor Dash served as Chief Counsel to this Committee.

3. This story appears to originate in "The Dash," a poem that Alton Maiden, a former Notre Dame student and football defensive tackle, was inspired to write by his team's visit to a 12th century cemetery in Ireland. See LOU HOLTZ, WINNING EVERY DAY: THE GAME PLAN FOR SUCCESS 166-67 (1998) (quoting Maiden's poem).

4. See 28 U.S.C. § 599 (1994) (providing that Independent Counsel Reauthorization Act of 1994 "shall cease to be effective five years after [its] date of enactment," which was June 30, 1994). The current law does provide, however, that the Act "shall continue in effect with respect to then pending matters before an Independent Counsel that in the judgment of such counsel require such continuation until that Independent Counsel determines such matters have been completed." *Id.* The currently known Independent Counsel who thus may continue in their work even if the statute expires on June 30, 1999, are David M. Barrett (*In re Henry G. Cisneros*), Carol Elder Bruce (*In re Bruce Edward Babbitt*), Ralph I. Lancaster, Jr. (*In re Alexis M. Herman*), Donald C. Smaltz (*In re Alphonso Michael (Mike) Espy*) and Kenneth W. Starr (*In re Madison Guaranty Savings & Loan Association*, *In re Madison Guaranty Savings & Loan Association (Webster L. Hubbell)*, *In re Madison Guaranty Savings & Loan Association (In re William David Watkins)*, *In re Madison Guaranty Savings & Loan Association (In re Anthony Marceca)*, *In re Madison Guaranty Savings & Loan Association (In re Bernard Nussbaum)*, and *In re Madison Guaranty Savings & Loan Association* [Monica Lewinsky]). In 1992 and thereafter, the three Independent Counsel who then were in business, Arlin M. Adams (*In re Samuel Pierce*), Joseph diGenova (*In re Janet G. Mullins*) and Lawrence E. Walsh (*In re Oliver L. North*), similarly continued their work under an equivalent grandfathering provision in the 1987 Independent Counsel law.

In the previous phases of reconsidering the Independent Counsel law, we have looked at the other parts of the basic marker. At the beginning of this statute in 1978, the post-Watergate perspective looked at something that was done. It looked at the completed work of Watergate Special Prosecutors Archibald Cox, Leon Jaworski, Henry Ruth and Charles Ruff, at Watergate as a finished product. This evaluation looked, in other words, at the end date on the Watergate marker. It also looked ahead to the next time, to the next beginning date when we would need a credible alternative to the next John Mitchell or Richard Kleindienst or L. Patrick Gray. This evaluation also anticipated, in other words, the next birth date of a credible, independent investigator of alleged executive branch criminality. The legislative history, beginning in 1973, of what became the Ethics in Government Act of 1978 is filled with discussion of the *need* for special prosecutor appointments in certain circumstances — the need for something else to be born. That really was the philosophy of many of the legislative founders of this statute. There was very little realistic discussion about how their work would occur — the rich stuff that would, in those cases, occur behind the dash.

In the next generation, the statute was reauthorized twice, in 1982 and again in 1987.<sup>5</sup> On each occasion, the 1980s perspective on the statute again looked more at dates of commencement and conclusion than at, and behind, the dash. Congress looked back on some of the Independent Counsel appointments that had commenced and been concluded during the preceding five years, and they were generally accepted as successful investigations. These were, in other words, dates of death, completed events. Congress also, as it had leading up to the initial enactment of the statute in 1978, looked forward in 1982 and again in 1987 by anticipating the next occasion on which the country would need an Independent Counsel appointment. It looked ahead, in other words, to anticipated dates of birth that might occur at some points during the law's next five years.

Even the 1994 legislative process that culminated in the passage of the Independent Counsel law we have today involved, although to a lesser extent than the previous congressional deliberations, the same kind of looking ahead to the possibility that we might need an Independent Counsel during the life of that law.<sup>6</sup>

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5. See Independent Counsel Reauthorization Act of 1982, Pub. L. No. 97-409, 96 Stat. 2039 (codified as amended at 28 U.S.C. §§ 591-99 (1994)); Independent Counsel Reauthorization Act of 1987, Pub. L. No. 100-191, 101 Stat. 1293 (codified as amended at 28 U.S.C. §§ 591-99 (1994)).

6. See, e.g., *The Independent Counsel Reauthorization Act of 1993: Hearing on S. 24 before the Senate Comm. on Governmental Affairs*, 103d Cong. 11-33 (1993) (testimony of Hon. Janet Reno, Attorney General, U.S. Department of Justice).

But what we have now, in 1999, is a look at the dash. This was somewhat true in 1992, 1993, and 1994, when the statute had expired and needed to be reauthorized and the Clinton administration supported it, but it is completely true now. Today we are in the midst of considering a wide range of very complicated, highly divisive operational issues that have arisen in investigations and prosecutions that have occurred under the Independent Counsel statute. That is the framework for our discussion: we are looking behind the dash. Now, frankly, it was there all along, and we were naive and superficial in our discussion of this statute to the extent that we focused only on concluded, successful independent investigations and others that were anticipated but not yet born. We should have looked at, and behind, the dash that represents the work of Independent Counsel much more from the very beginning of our consideration of this concept. But at least we are facing it now.

#### THE NEED FOR AN INDEPENDENT COUNSEL LAW

Now let us go back to basics. What are the rationales for this statute, from 1973, when the idea was born; in 1978, when the statute was born; and forward?

The starting point involves the lessons of 1973. In that year of Watergate, there was, first, actual executive interference with law enforcement. That was our experience, most tangibly, in the Saturday Night Massacre: a President firing a prosecutor because the prosecutor was getting too close, or doing too well, in investigating corruption at the highest levels of government. Actual executive interference with law enforcement also was present in the White House claims of executive privilege during Watergate, both against Cox and the Watergate grand jury in 1973, resulting in the Massacre, and also against Jaworski and the conspiracy prosecution in 1974, resulting in the Supreme Court's decision in the *United States v. Nixon*.<sup>7</sup> That was real, live, tangible and, in a view that I think is by now almost unanimous, improper executive interference with law enforcement.

The other lesson of 1973 that led to the founding of this statute was the appearance that the United States Department of Justice gave partial law enforcement, favoritism, and less than aggressive scrutiny to President Nixon and his men. Many would say that is what happened at the United States Attorney's Office for the District of Columbia in its initial investigation of the Watergate burglary. Others would point to the conduit of information that ran from the Criminal Division in Main Justice — literally from the desk of the Assistant Attorney General, Henry Peterson — directly to President Nixon at the White House. The prosecutors would pres-

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7. 418 U.S. 683 (1974).

ent witnesses and other evidence to the grand jury. The prosecutors also would tell their supervisors about how the Watergate investigation was progressing. The information would reach Peterson. And Peterson would, in some key instances, share that information with Nixon. Guess what kind of climate that created, what kind of restraint and chill that put on would-be witnesses and the prosecutors and investigators who were working to obtain their full cooperation and truthful testimony?

Those were parts of the lessons of Watergate, but in passing the first Independent Counsel law in 1978 we drew some broader conclusions that were right then and are right now. The statute was enacted to address two basic needs. The first was the need for an investigator who would have actual independence and power when he was conducting a criminal investigation of the President of the United States or one of his most intimate associates. The statute embodied what may be no more than a gut level understanding that is widely shared by people who have worked in federal law enforcement: the pressures and the divided loyalties that come with doing this kind of investigation while employed by the Attorney General and located in the Department of Justice are too much for any man or woman. That was Professor Archibald Cox's description in 1975 of the actual conflict of interest that comes if we leave such investigations in the Department of Justice setting.<sup>8</sup> It is a conflict that is likely, tangible, and powerful. The statute recognized that by permitting an alternative.

The second need that the statute was enacted to address is the need for public trust in government law enforcement. At the start of a major criminal investigation of, say, a President, the public is entitled to ask and will ask whether the appointed investigator is credible to do the job. And during the course of the investigation, the public is entitled to ask and will ask whether the investigator is proceeding with sufficient vigor, thoroughness, even-handedness and freedom from outside pressure. Those are legitimate questions and the Independent Counsel law was enacted to provide some basis for the public to answer those questions in the affirmative.

As we look at the law's coming expiration in 1999, we should remember the history of its enactment, because right now everything or nothing is on the table. The first legislative initiative, right after the Saturday Night Massacre, was an effort to restore the fired Archibald Cox or to put another special prosecutor in his place, in charge of the Watergate investigation. At that time, the idea was born quickly that this special prosecutor should be appointed by judges rather than by the Attorney General. The initiative quickly changed, once Acting Attorney General Robert Bork appointed

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8. See *Removing Politics from the Administration of Justice: Hearings on S. 2803 and S. 2978 before the Subcomm. on Separation of Powers of the Sen. Comm. on the Judiciary*, 93d Cong. 200 (1974) (testimony of Archibald Cox).

Special Prosecutor Leon Jaworski and the Watergate investigation resumed,<sup>9</sup> to a proposal to allow courts to appoint these kinds of prosecutors, or these kinds of investigators, in the future. And that is the general concept that got enacted in 1978 and reenacted on three subsequent occasions.

A third alternative, which was rejected in that initial phase and never really has been considered seriously in the legislative debates since then, is a statute that would create a permanent special prosecutor. In Judge Bork's evocative phrase, this would be the "wolf hanging on the flank of the elk."<sup>10</sup> I think that is a good executive branch perspective. Some think that is what this statute has transmogrified into as we have come to have so many Independent Counsel, but a permanent office is a formal alternative to consider. It would have a structure, a staff, a budget, and maybe, competing demands on its limited time and resources. I think my colleagues on the panel will speak about some of these issues. The arguments about the merits and dangers of such an office certainly should continue.<sup>11</sup>

#### THE SUCCESSES OF THE INDEPENDENT COUNSEL LAW

Now let me talk about the successes of the law. You may have forgotten them — many people today do not notice, or even know about, the law's successes. I can only make a few brief points here, but this statute has a tremendous track record of success.

Over the twenty-plus years of its existence, the Independent Counsel law has vindicated the public trust rationale that led to its enactment. The law is not without its bumps and flaws, but at every point the *availability* of this alternative mechanism to an Attorney General-led, Department of Justice-conducted investigation of senior executive branch officials has enhanced public confidence, and I think it continues to have that value.

In addition, the *uses* of the law in different types of cases have been more or less successful. Consider a spectrum of three types of Independent Counsel investigations.

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9. Remarks of Acting Attorney General Robert H. Bork Announcing His Appointment of Leon Jaworski, 9 WEEKLY COMP. PRES. DOC. 1303 (Nov. 1, 1973); accord 38 Fed. Reg. 30,738 (1973).

10. *Special Prosecutor and Watergate Grand Jury Legislation: Hearings before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary on H.J. Res. 784 and H.R. 10937*, 93d Cong. 263 (1973) (testimony of Robert H. Bork).

11. Let me recommend at this point Professor Ken Gormley's recent *Michigan Law Review* article on the original intent, the original model, of the Independent Counsel statute. See Ken Gormley, *An Original Model of the Independent Counsel Statute*, 97 MICH. L. REV. 601 (1998). It traces this legislative process in great detail and explains how we got to what we chose and why we did not choose these alternative statutory schemes. See *id.* at 609-12, 617-26.

One type is the “covered person, discrete conduct” investigation. “Covered persons” are the executive branch officials from the president on down and others who are, by virtue of their government positions or other ties to the president, covered by the investigative procedures of the Independent Counsel law when allegations that they have committed crimes come to light.<sup>12</sup> An example of a “covered person, discrete conduct” case was the 1980 allegation that Timothy Kraft once snorted cocaine in Studio 54. Would we trust Attorney General Benjamin Civiletti and the Carter Department of Justice to investigate the guy who was running the Carter reelection campaign in 1980, or would we prefer a law that allowed the Attorney General to hand that responsibility to somebody else? The *Kraft* case went to an Independent Counsel, who, after conducting some investigation, indicated that the allegation was of no merit, had no factual basis, and closed it.<sup>13</sup>

Those are the easiest Independent Counsel cases. We forget about them because they come and they go and they are successes, not national crises. But they are part of the track record under this statute.

A second category of cases where Independent Counsel have been appointed are “covered person, sprawling conduct” cases. These are more complicated because they involve more than one incident on one night in one discotheque. They involve allegations such as tax evasion. For instance, an Independent Counsel was appointed once to investigate a senior Department of Justice official, someone working right under an Attorney General, for alleged tax evasion. It is a reported case that has now been long forgotten — there is no reason even to mention the man’s name — because this investigation was handled credibly by an investigator outside the Department of Justice.

A third category, sitting at the low end of anyone’s success spectrum, is obviously what we are preoccupied with right now: a “covered President” case. In our national life, these investigations are just different. They demonstrate exactly the point of the story of the dash: every presidency, and certainly every credible allegation that a president has engaged in criminal conduct, will be a matter of great richness, fullness, messiness and political contention. Those matters will be hard fought, visible, political issues. Whatever the Independent Counsel actually does in his or her bun-

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12. See 28 U.S.C. § 591(b)(1)-(7) (specifying persons as to whom the Attorney General must conduct a preliminary investigation under the Independent Counsel law when she receives information that is sufficient grounds to investigate whether they have committed a significant federal crime).

13. See Edward T. Pound, *U.S. Closes Inquiry on Ex-Carter Aide*, N.Y. TIMES, Mar. 25, 1981, at A1.



ker to investigate such allegations, the external world will have a hard time with those cases, and that is the richness of the dash.

Now let me give you a more recent example that illustrates each category:

First category, "covered person, discrete conduct": An Independent Counsel investigated Eli Segal. He ran the Americorps program under President Clinton, the domestic Peace Corps, while also running a non-governmental foundation that provided financial support for those same activities. Mr. Segal's dual roles raised criminal questions under federal conflict of interest statutes. In a very quiet way, that allegation came to the attention of Attorney General Reno. She requested the appointment of an Independent Counsel and the Special Division picked a former Judge, Curtis Emery von Kann, for the appointment. He did the investigative job fast, declined to prosecute Mr. Segal, and went out of business.

Second category, "covered person, sprawling conduct": *In re Samuel Pierce*. This investigation seems to get some bad mention in passing because it took a long time and because a district judge basically held it open, although dormant — one attorney, one desk, one telephone — for its last two years. But this case involved a covered person, President Reagan's Secretary of Housing and Urban Development (HUD), and a range of HUD programs and employees who allegedly were involved in criminal activity. As the investigations went forward, the Independent Counsel found criminality in a lot of other places and prosecuted quite a few of those cases. That Independent Counsel work is now done, and the final report that is a matter of public record shows quite responsible federal prosecutorial behavior, quite legitimate decisions to indict and quite successful trial outcomes. The investigation did spread widely. It may deserve criticism for not snipping off some of its farthest branches and tossing those tendrils back to the Department of Justice for its handling.<sup>14</sup> But in general, the *Pierce* case — a covered Cabinet officer and related persons, involved in a wide range of conduct — came to a successful and credible outcome through the Independent Counsel's work.<sup>15</sup>

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14. See generally 28 U.S.C. § 594(d)(1) (authorizing Independent Counsel to "request assistance from the Department of Justice in carrying out the functions of the Independent Counsel" and directing that the Department "shall provide that assistance, which may include . . . the use of the resources and personnel necessary to perform such Independent Counsel's duties"); 28 U.S.C. § 596(b)(1)(A) (authorizing an Independent Counsel, as part of notifying the Attorney General that his work has been substantially completed, to refer matters back to the Department of Justice for "complet[ion]").

15. See generally Arlin M. Adams & Larry D. Thompson, *Final Report of the Independent Counsel In re Samuel R. Pierce, Jr.* (D.C. Cir. Spec. Div. Oct. 27, 1998) (Div. No. 89-5).

The third category is, again, “covered President” cases. In this area, one success of the Independent Counsel statute is the case I know best, *In re Oliver L. North*. It turned out to be a “covered President and covered Cabinet” case, even though it was named after the poor “fall guy.”<sup>16</sup> From the start, Iran/Contra was destined to be one of those hard fought, messy cases. As history now knows, it was handled properly, it was litigated responsibly, and it was concluded successfully. Those outcomes are, in part, a testament to the statute that made them possible.

#### CONSTITUTIONAL ISSUES REGARDING THE INDEPENDENT COUNSEL LAW

I now will turn to some of the criticisms of the Independent Counsel law. One realm of serious criticism and ongoing argumentation involves the constitutionality of the law itself. More than ten years after the Supreme Court upheld the constitutionality of the Independent Counsel law in *Morrison v. Olson*,<sup>17</sup> subjects of Independent Counsel investigations, defendants in Independent Counsel prosecutions, criminals who were prosecuted successfully by Independent Counsel and others continue to raise a wide range of constitutional arguments.

Although most of the constitutional arguments against the law were resolved by *Morrison* or by reasonable implications that can be drawn from the Court’s decision, I will flag two of the current constitutional arguments that are, in my view, real ones. One specific issue is the constitutionality of the law’s provision that allows Independent Counsel to obtain expansions of their prosecutorial jurisdiction directly from the Special Division, without the support of the Attorney General.<sup>18</sup> This scenario begins, in other words, with an Attorney General triggering the appointment of an Independent Counsel to handle a defined area of investigative responsibility. Sometime later, the Independent Counsel wants to go, as an investigator or as a prosecutor, beyond the border of his jurisdictional box. But the Attorney General does not agree with that desire and she will not ask the Special Division to expand the Independent Counsel’s jurisdiction. Under the statute, the Independent Counsel can go to the court and from it get the expanded jurisdiction.<sup>19</sup>

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16. See 1 LAWRENCE E. WALSH, FINAL REPORT OF THE INDEPENDENT COUNSEL FOR IRAN/CONTRA MATTERS xiii-xiv, xv, xvii-xviii (1993) (Executive Summary).

17. 487 U.S. 654 (1988).

18. See 28 U.S.C. § 594(e) (“An Independent Counsel may ask the Attorney General or the division of the court to refer to the Independent Counsel matters related to the Independent Counsel’s prosecutorial jurisdiction, and the Attorney General or the division of the court, as the case may be, may refer such matters.”).

19. See *id.*

In my view, that scenario raises a serious separation of powers issue. It involves members of the judicial branch conferring a core executive power, additional power to prosecute, on an Independent Counsel without any executive branch involvement except for the attorney general's original triggering of the Independent Counsel appointment. Although this issue has narrowly avoided adjudication in Independent Counsel Donald Smaltz's prosecution of Ronald H. Blackley, Sr., who once was the Chief of Staff to Secretary of Agriculture Michael Espy,<sup>20</sup> a Special Division order that expanded an Independent Counsel's jurisdiction might be constitutionally doomed. Congress should, when it considers reenacting an Independent Counsel statute, delete this provision and make clear that the only source of Independent Counsel jurisdiction should be a request from the Attorney General.

A second constitutional issue that is less tangible but well worth considering is the "inferiority" question. What made the Independent Counsel constitutional under the Appointments Clause<sup>21</sup> in *Morrison* was the Court's conclusion that, at least at the beginning and the end, appointment and removal, the Attorney General is still the boss of an Independent Coun-

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20. In September 1994, the Special Division, acting in response to Attorney General Reno's request, appointed Independent Counsel Smaltz to investigate alleged crimes by Espy, who then was the Secretary of Agriculture, and others. See <<http://www.oic.gov/wwwroot/myweb/smaltz/app.htm>> (containing text of Order Appointing Independent Counsel, *In re* Alphonso Michael (Mike) Espy (D.C. Cir. Spec. Div. Sept. 9, 1994) (*per curiam*) (Div. No. 94-2)) (Smaltz office web site, visited Feb. 27, 1999). Smaltz later asked the Attorney General to act pursuant to 28 U.S.C. § 594(e) to refer to him, as a matter related to his original prosecutorial jurisdiction, jurisdiction to investigate alleged crimes by Blackley. When Attorney General Reno denied this request, Smaltz asked the Special Division to use its authority under section 594(e) to refer the Blackley matter to Smaltz for investigation. Attorney General Reno filed an objection to this request. On April 1, 1996, the Special Division, explaining that it was "interpreting, but not expanding, the Independent Counsel's original prosecutorial jurisdiction," issued an order stating that Smaltz had jurisdiction to investigate and prosecute certain matters involving Blackley. *In re* Espy, 80 F.3d 501, 507 (D.C. Cir. Spec. Div. 1996). The Special Division found that these Blackley matters were "'demonstrably related' to the factual circumstances underlying the Attorney General's original investigation and request for appointment of an Independent Counsel." *Id.* at 508. Blackley was subsequently indicted, convicted of three counts of making false statements and sentenced to 27 months of imprisonment. On appeal, the D.C. Circuit affirmed that trial court's holding that Smaltz's original jurisdiction authorized his investigation and prosecution of Blackley. See *United States v. Blackley*, 167 F.3d 543 (D.C. Cir. 1999), *aff'g* 986 F. Supp. 607, 610 (D.D.C. 1997).

21. See U.S. CONST., art. II, § 2 ("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."). "Inferior Officers" are defined earlier in the clause as "Officers of the United States[ ] whose Appointments are not herein otherwise provided for . . ." *Id.*

sel. The Attorney General triggers the statute,<sup>22</sup> and she can fire an Independent Counsel who turns out to be a putz.<sup>23</sup> (In New York, you can still use that less-than-polite word if you are not running for office.<sup>24</sup>) And that was enough to demonstrate that an Independent Counsel was an “inferior Officer,” and thus to make it constitutional for a court of law to appoint him.

Professor Akhil Amar recently published an article<sup>25</sup> that considers, among other topics, the Supreme Court’s 1997 *Edmond* decision<sup>26</sup> and some of Justice Scalia’s language therein suggesting a more vigorous Supreme Court analysis of what determines whether a federal official is an inferior Officer under Article II.<sup>27</sup> I think that this is making a lot out of some language that is merely suggestive and quite general, and that the *Morrison* vote of 7 to 1 against Justice Scalia is still more or less where the Supreme Court is today. Remember that Judge Ruth Bader Ginsburg, as a Circuit Judge, wrote the opinion explaining the law’s constitutionality that was vindicated by the Supreme Court majority in *Morrison*,<sup>28</sup> and that Stephen Breyer, as a law professor, endorsed the constitutionality of an early

22. See 28 U.S.C. § 592(b)-(c).

23. Actually, the statute authorizes an Attorney General to remove an Independent Counsel “only by [her] personal action,” and “only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such Independent Counsel’s duties.” 28 U.S.C. § 596(a)(1).

24. Cf. Robert Hardt, Jr. & Gregg Birnbaum, *Al Learns the “Oy” of Yiddish, Takes Heat After He Calls Foe Schumer “Putzhead,”* N.Y. POST, Oct. 22, 1998, at 8.

25. See Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 902-12 (1998); see also Akhil Reed Amar *The Unimperial Presidency*, THE NEW REPUBLIC, Mar. 8, 1999, at 25, 27-28; Akhil Reed Amar, *Should We Ditch the Independent Prosecutor Law?*, Messages #1, #3 and #5, <<http://www.slate.com/dialogues/>> (Feb. 16, 17 & 18, 1999) (dialogue with Professor Ken Gormley); accord Nick Bravin, Note, *Is Morrison v. Olson Still Good Law? The Court’s New Appointments Clause Jurisprudence*, 98 COLUMBIA L. REV. 1103 (1998).

26. See *Edmond v. United States*, 520 U.S. 651 (1997).

27. See *id.* at 662-63 (Scalia, J., joined by Rehnquist, C.J. and Stevens, O’Connor, Kennedy, Thomas, Ginsburg and Breyer, JJ., for the Court):

Generally speaking, the term “inferior officer” connotes a relationship with some higher ranking officer or officers below the President: whether one is an “inferior” officer depends on whether he has a superior. It is not enough that other officers may be identified who formally maintain a higher rank, or possess responsibilities of a greater magnitude. If that were the intention, the Constitution might have used the phrase “lesser officer.” Rather, in the context of a clause designed to preserve political accountability relative to important government assignments, we think it evident that “inferior officers” are officers whose work is directed and supervised at some level by others who were appointed by presidential nomination with the advice and consent of the Senate.

*Id.*

28. See *In re Sealed Case*, 838 F.2d 476, 518-36 (D.C. Cir.) (Ginsburg, Ruth Bader, J., dissenting), *rev’d sub nom. Morrison v. Olson*, 487 U.S. 654 (1988).

bill that proposed a version of what later became the Independent Counsel statute.<sup>29</sup> I do not think that the Supreme Court votes have changed fundamentally since 1988, but this question of “inferiority” is worth continued and careful thought.

#### BEHAVIORAL ISSUES RELATING TO THE INDEPENDENT COUNSEL LAW

There also are behavioral issues for Congress to think about as it considers whether to reauthorize the Independent Counsel statute. I will list a few and then talk about my proposals.

The first behavioral issue to reconsider is the conduct of Members of Congress while an Independent Counsel law is in effect. Some Members have, in the past, sought to force the Attorney General’s hand in the direction of triggering Independent Counsel appointments in various matters. Some Members also have, at times, sought to command an Independent Counsel’s investigative and prosecutorial work. These behaviors have been parts of our experience with the current law, at least in the “covered President,” big headline-type cases, and they generally have not been helpful to Attorneys General or Independent Counsel carrying out their law enforcement responsibilities under the statute.

A second behavioral issue for everyone to reconsider is the widespread practice of demonizing an Independent Counsel. At least in the big cases, the subjects of the Independent Counsel’s investigation, their lawyers, their political allies, their friends and so forth begin, almost from day one, to cast aspersions on Independent Counsel. Some Independent Counsel have compounded that problem by making real public relations mistakes. This kind of criticism is the reality of the messiness of life behind the dash, I think, but each of us may be able to do small things to clean it up, and thus to enhance the quality and credibility of any Independent Counsel’s work.<sup>30</sup>

A third spectrum of behavioral issues to think about hard as we consider whether to let the statute die or to keep it concerns issues about Independent Counsel conduct. You know this list of particulars; there is no need to

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29. See Memorandum by Professors Stephen Breyer & Philip Heymann, Harvard Law School (analyzing “the constitutionality of a proposal that would vest in the district court the power to appoint a new independent Special Prosecutor. The Prosecutor would have exclusive authority to investigate and to prosecute a narrowly defined range of criminal offenses; he would not be subject in any way to control by any other official or agency, including the President; he would be removable only by the district court and then only for ‘extraordinary improprieties.’”), reprinted in *Special Prosecutor: Hearings before the Senate Comm. on the Judiciary*, 93d Cong. 556-60 pt. 2, (1973) (proceedings of Nov. 15, 1973).

30. See generally John Q. Barrett, *All or Nothing, Or Maybe Cooperation: Attorney General Power, Conduct and Judgment in Relation to the Work of an Independent Counsel*, 49 MERCER L. REV. 519, 543-51 (1998).

belabor it. There are things that are real misconduct if and when they happen in any Independent Counsel's office, just as they are when the prosecutor who commits these acts works for the Department of Justice:

- leaks of grand jury information;
- charging cases that lack proof, jury appeal and/or prosecutive merit;
- violating other Department of Justice policies that bind any regular federal prosecutor (which is what an Independent Counsel is supposed to be);
- plain old over-investigating — the proportionality questions about how hard and how far to go as an investigator, given what it is that you are chasing;
- profligate spending;
- bad judgment generally; and, finally,
- personal ambition, in an Independent Counsel himself or at the staff level, that affects conduct of the public's business.

Although each of these behaviors is, if it occurs, deeply problematic, each is just that: an act of personal behavior, not a command of the Independent Counsel law. While the personal failings and mistakes of any Independent Counsel thus are not reasons to abandon the Independent Counsel statute — the Department of Justice, after all, is filled with people, too — they are things to think about in structuring and improving the law's processes.

#### PROPOSALS TO IMPROVE THE INDEPENDENT COUNSEL LAW

I will conclude these remarks by offering a list of some modifications that would improve the Independent Counsel law. The framework in which these pieces fit is a general idea that the Attorney General should be authorized to narrow, lengthen and close, in her discretion, the channel that leads to the appointment of an Independent Counsel. We should trust the Attorney General a lot more on the front end of investigations of alleged crimes by senior executive branch officials, permitting her explicitly to determine whether a matter should travel through that channel. The result of trusting the Attorney General more probably will be that many fewer matters will travel to the point where the statute is triggered. Fewer Independent Counsel will be appointed. But if and when they are appointed, the statute's delegation to Independent Counsel of the Attorney General's full investigative power and authority should remain relatively close to what we have right now. I would add just a few occupational constraints to Independent Counsel in operation as federal investigators and prosecutors.

Some proposals that Congress should consider include the following:

First, Congress should give up the congressional triggers that are built into the current law. The law currently allows the Senate and House Judiciary Committees, or a majority of either Committee's majority party members, or a majority of either Committee's non-majority party members, to send a letter asking the Attorney General to seek an Independent Counsel appointment.<sup>31</sup> The law requires her to report back within thirty days on what she is doing and why with regard to each matter that Congress called to her attention.<sup>32</sup> You have seen this provision used repeatedly in relation to the investigation of 1996 campaign financing activities. It has become a way of jerking the Attorney General's chain. It is not what federal law enforcement has to deal with as statutory matter in other contexts, and it may tempt some Members of Congress not to pursue more formal and detailed oversight activities regarding the executive branch that are important parts of the legislature's historical and constitutional role.

Second, Congress should empower the Department of Justice at the preliminary investigation stage, before the trigger is pulled that will result in an Independent Counsel appointment.<sup>33</sup> Let Department of Justice attorneys work with grand juries. Let them use their subpoena powers. Let Justice plea-bargain. Let it obtain immunity orders that will compel witnesses to testify. If Justice misuses these powers and sabotages or just blows an investigation of senior government officials, the nation will see it — and we can talk about that sorry record when the statute up is for reauthorization the next time. But unless and until a Department of Justice demonstrates its incapacity to do the initial job right, the law should let Justice and the Attorney General do what they truly need to do to make the informed decision that a particular matter really is one of the things that should, as a matter of national need, travel down the channel to an Independent Counsel appointment.

Third, Congress should change the current statute's time limits on Department of Justice preliminary investigations — they now can last only 90 days,<sup>34</sup> which the Attorney General can expand once to 150 days with court permission<sup>35</sup> — into mere notification requirements. In other words, the

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31. See 28 U.S.C. § 592(g)(1) (1994).

32. See *id.*

33. See *id.* § 592(a)(2)(A) ("In conducting preliminary investigations under this chapter, the Attorney General shall have no authority to convene grand juries, plea bargain, grant immunity, or issue subpoenas.").

34. See *id.* § 592(a)(1). In instances where the preliminary investigation commences after Members of Congress have asked the Attorney General to seek an Independent Counsel appointment, see *supra* note 31 and accompanying text, the 90 days begin to run on the day that she receives the congressional letter and she may not seek an extension of time from the court, see 28 U.S.C. § 592(a)(1).

35. See *id.* § 592(a)(3).

law should keep the Department of Justice's work somewhat visible, but it should not create tight drop dead dates that may distort the Attorney General's assessment of whether an Independent Counsel is needed.

Fourth, Congress should change the statutory standard that describes when the Attorney General should seek an Independent Counsel appointment. Under the current law, the Attorney General must, in effect, prove a negative at the end of the preliminary investigation that is limited in duration and power. Unless she determines that there are "no reasonable grounds to believe that further investigation is warranted,"<sup>36</sup> the current law requires the Attorney General to ask the special court to appoint an Independent Counsel.<sup>37</sup> Leaving aside the epistemological question of whether you can prove a negative, the tilt toward appointment gets us more Independent Counsel than we probably need.

A better statute would tilt the other way. Congress and the President should allow the Attorney General to work under a statute that directs her to seek an Independent Counsel only where there is a good affirmative reason to do so. The law should direct an Attorney General to trigger an Independent Counsel appointment when, in her judgment, the Department of Justice has something like "substantial and credible evidence of criminal conduct of a type that is prosecuted by the Department of Justice." In other words, the law should direct the Attorney General to seek an Independent Counsel when she can say "this is a real thing," and it should free her not to seek the appointment when she cannot. Independent counsel investigations are not the places, and Independent Counsel are not the right prosecutors, to decide that our federal criminal statutes should be used in new or novel ways.

Fifth, Congress should make it plain that the Attorney General can pull the Independent Counsel trigger at any time. There reportedly has been considerable debate in the current Department of Justice about how to read the existing statute, which is poorly written in this regard. The debate has concerned whether the law's conflict of interest provision<sup>38</sup> permits an At-

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36. 28 U.S.C. § 592(b)(1) (1994).

37. *See id.* § 592(c)(1).

38. *See id.* ("When the Attorney General determines that an investigation or prosecution of a person by the Department of Justice may result in a personal, financial or political conflict of interest, the Attorney General may conduct a preliminary investigation of such person in accordance with section 592 if the Attorney General receives information sufficient to constitute grounds to investigate whether that person may have violated Federal criminal law other than a violation classified as a Class B or C misdemeanor or an infraction."). Although this provision was rewritten as enacted in the 1994 statute, the 1987 version of the Independent Counsel law that preceded it contained a provision that was substantively the same. From 1978-1987, the first two Independent Counsel laws stated explicitly that the Attorney General could conduct a preliminary investigation and apply for



torney General only to skip past the initial and quick stage at which she must assess the specificity and credibility of the allegations that a covered person has committed federal crime<sup>39</sup> into the preliminary investigation (which is what the current provision says literally),<sup>40</sup> or whether it also permits her to skip or truncate the law's other procedures and move all the way to pulling the trigger that will produce an Independent Counsel appointment (which is how some previous Attorneys General were authorized to act under earlier versions of the Independent Counsel statute).<sup>41</sup> The law should state unambiguously that the Attorney General may, in her discretion, pull the trigger at any time and for any reason.

Sixth, Congress should change the judicial selection process. We currently have the Chief Justice picking three Circuit Judges for two-year terms by no standard in a process that has no accountability.<sup>42</sup> Early on, this statute was in the hands of the so-called Eisenhower Department of Justice veterans. Some of the protagonists included Chief Justice Warren Burger, Judge George MacKinnon, Judge Walter Mansfield, former Judge Lawrence Walsh and distinguished private attorney Leon Silverman. It was, quite visibly, an "old boys' network" of former colleagues and, in some instances, personal friends. It was the nation's good fortune that, throughout their distinguished careers, these men had "the right stuff," including in the days when they began to create the Independent Counsel law's heritage.

The cast of characters began to change when Chief Justice Rehnquist in 1991 replaced Judge MacKinnon as the presiding judge of the Special Division for the Purpose of Appointing Independent Counsel with his D.C. Circuit colleague Judge David B. Sentelle. In July 1994, the so-called "prostate problems" lunch brought Judge Sentelle together with North Carolina Senators Jesse Helms and Lauch Faircloth. This lunch occurred just as the Special Division that Judge Sentelle led was considering Attorney General Reno's request that it appoint her Whitewater Special Prosecutor Robert Fiske to be the Whitewater Independent Counsel under the

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an Independent Counsel appointment if he determined that he or another officer of the Department of Justice investigating a particular person might result in a personal, financial or political conflict of interest. *See* Historical and Statutory Notes, following 28 U.S.C.A. § 591, at 214-15 (1993).

39. *See* 28 U.S.C. § 591(d).

40. *See* 28 U.S.C. § 591(c)(1).

41. *See supra* note 38.

42. *See* 28 U.S.C. § 49. This arrangement generally follows a 1974 recommendation of the Senate Watergate Committee. *See supra* note 2, at 99 ("The Chief Justice should be given the power and duty to select three retired circuit court judges who, in turn, would appoint the public attorney.").

newly enacted 1994 statute.<sup>43</sup> At that time, Fiske's Department of Justice investigation of President Clinton and others had been criticized by many of the President's political opponents, including Senators Faircloth and Helms. Shortly thereafter, Judge Sentelle and his Special Division colleagues decided that Fiske should be replaced by an Independent Counsel not of the Attorney General's choosing and appointed former Judge Kenneth W. Starr to be the Whitewater Independent Counsel. Critics then pointed to the lunch as support for their claims that the Special Division is in league with President Clinton's enemies.

We should get rid of at least some of the corrosive speculation that a Chief Justice and/or one or more of the Judges he selects to serve in the Special Division try to accomplish partisan political objectives as they exercise their responsibilities under the Independent Counsel law. A new law could prescribe that three Chief Judges from the federal Circuits would henceforth be selected randomly to serve for fixed terms as the panel to pick Independent Counsel if and when the Attorney General makes an appointment request during their tenure. A court official could run this selection process just like "Lotto": a drum containing thirteen numbered ping pong balls would spin, and up would pop three indicating which Circuit Chiefs would take on this task. The administrative apparatus of the Special Division could remain in the District of Columbia, which has been the primary venue of most matters that Independent Counsel have investigated, as a collateral responsibility of the Clerk for the D.C. Circuit.

Seventh, the law should require, or at least strongly encourage, the Special Division to pick future Independent Counsel from a roster that is pre-approved by the Attorney General of the United States. Who knows where today's Independent Counsel come from? We know that Walsh, et al., came from Judge MacKinnon, who came from Chief Justice Burger, who came from President Nixon, who once worked for President Eisenhower, who once employed Walsh, MacKinnon and Burger in his Department of Justice, and so on. Some of the later Independent Counsel have been, at their appointments, less well-known and less well-credentialed for work in delicate, high-level matters of federal law enforcement. As a result, they have been criticized for prosecutorial inexperience, suspected of political cronyism, made mistakes of judgment, and so forth. Who needs it?

If the Independent Counsel law instead required the Attorney General once every year — it could be on January first, or July fourth, or whatever symbolism we wanted — to give to the Special Division the names of fifteen or so experienced, available, living people who would thereby become

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43. See generally Peter M. Ryan, *Counsels, Councils and Lunch: Preventing Abuse of the Power to Appoint Independent Counsels*, 144 U. PENN. L. REV. 2537 (1996).

eligible for any Independent Counsel appointment the court needed to make in the next twelve month period, and then the next year to submit an updated list of fifteen names (replacing the deceased and so forth), we would know that any Independent Counsel who later was appointed came from the executive branch with the imprimatur of federal law enforcement.

Eighth, the law should bind the Special Division to the jurisdictional request of the Attorney General. There should be no tinkering by the Special Division around the edges — and certainly no expansion of an “Iran arms sales and diversion of funds therefrom” into “Iran/Contra,” for instance, which is what the court did to Attorney General Meese’s request in December 1986.<sup>44</sup> If the Attorney General asks for an Independent Counsel to be appointed with particular investigative responsibilities, the law should require the court to give her exactly what she asked for.

Ninth, Congress should eliminate the statutory provision that permits the Special Division to expand an Independent Counsel’s investigative jurisdiction notwithstanding the objections of the Attorney General.<sup>45</sup> Even if such a conferral of jurisdiction would be constitutional, the statute should not encourage Independent Counsel to avoid dealing with attorneys general, nor should it allow attorneys general to avoid taking full political heat for the impact they produce when they say no to Independent Counsel requests for expanded jurisdiction, by holding out this possibility.

Tenth, abolish the impeachment reporting requirement.<sup>46</sup> Identifying and explaining what may constitute grounds for an impeachment is properly the job of Congress, not an Independent Counsel. Iran/Contra, for example, had congressional select committees that found facts, did their

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44. On December 4, 1986, Attorney General Meese applied to the Special Division for an Independent Counsel to investigate whether Lt. Col. Oliver L. North, other United States Government officials, or other individuals acting in concert with any of them violated federal criminal laws “from in or around January 1985 . . . to the present, in connection with the sale or shipment of military arms to Iran and the transfer or diversion of funds realized in connection with such sale or shipment.” Application of the Attorney General Pursuant to 28 U.S.C. §592(c)(1) for the Appointment of an Independent Counsel Regarding Iranian Arms Shipments and Diversion of Funds at 1 (D.C. Cir. Spec. Div., filed Dec. 4, 1986) (No. 86-6). Two weeks later, the Special Division, after first reciting the Attorney General’s application verbatim, appointed Lawrence E. Walsh to investigate whether North and others committed any crimes relating to a wider range of matters, including “the provision or coordination of support for persons or entities engaged as military insurgents in armed conflict with the Government of Nicaragua since 1984 . . . .” Order, *In re* Oliver L. North at 1-2 (D.C. Cir. Spec. Div. Dec. 19, 1986) (*per curiam*).

45. See *supra* notes 18 - 20 and accompanying text.

46. See 28 U.S.C. § 595(c) (“An Independent Counsel shall advise the House of Representatives of any substantial and credible information which such Independent Counsel receives, in carrying out the Independent Counsel’s responsibilities under this chapter, that may constitute grounds for an impeachment.”).

work, and took whatever approach they believed justified regarding the conduct of executive branch officials who were subject to impeachment.<sup>47</sup> In other words, Congress took its impeachment shot, or it did not, but in any case it chose and thus bore constitutional responsibility for what it did and did not pursue. The Independent Counsel statute should not, even indirectly, allow Congress to farm out to any Independent Counsel its responsibility for executive branch oversight, and then to wait and see if the Independent Counsel shows up with adverse information and calls it possible grounds for impeachment.

Eleventh, narrow the final report requirement. Professor Ken Gormley, in his recent article, spells out very nicely how that can be done.<sup>48</sup> The law could require a short report of the “what we did, what we spent, and then we went home” format.

Twelfth, require Independent Counsel in known investigations to announce their prosecution declination/investigation closure decisions as they make them.

And finally, thirteenth, Congress should abolish the attorney fee reimbursement provision.<sup>49</sup> Through decisions of the Special Division, the current law has delivered a lot of professional welfare payments to the white collar criminal and government official defense bars of Washington, D.C.<sup>50</sup> It has become a trough that lawyers seek to feed in. And the prospect of this ultimate reimbursement from the government seems to have encouraged all kinds of “lawyering up,” often orchestrated by White House Counsel. It prolongs and complicates Independent Counsel investigations when even the most minor potential witnesses are represented by counsel who look forward to reimbursement. And this provision obviously increases the public tab for an Independent Counsel’s work. A better system would be for Congress itself to make reimbursement decisions after investigations and prosecutions have concluded. When it turns out that someone sympathetic has reasonably incurred and actually paid a huge legal bill because of the Independent Counsel statute, then private legislation can and should bail them out, as it did the head of the White House Travel Office for some

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47. See generally S. REP. NO. 100-216; H.R. REP. NO. 100-433 (Report of the congressional committees investigating the Iran-contra affair, with supplemental, minority, and additional views).

48. See Gormley, *supra* note 11, at 675-78.

49. See 28 U.S.C. § 593(f); see generally Kathleen Clark, *Paying the Price for Heightened Ethics Scrutiny: Legal Defense Funds and Other Ways That Government Officials Pay Their Lawyers*, 50 STAN. L. REV. 65, 80-86 (1997).

50. See Clark, *supra* note 49, at 130-32, Table II (“Legal Expenses Reimbursed under Independent Counsel Statute”).

bills he incurred defending himself against a Department of Justice prosecution.<sup>51</sup>

Those ideas add up to a prescription to continue the Independent Counsel law in a much more cautious way, preserving the value of an independent investigative option that can serve the nation well in extraordinary situations.

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51. See Omnibus Consolidated Appropriation Act of 1997, Pub. L. No. 104-208, § 526, 1996 U.S.C.C.A.N. 1 (10 Stat.) 3009 (appropriating \$500,000 for legal expenses of Billy Dale, the former head of White House Travel Office who had been fired, indicted, prosecuted and acquitted, and five other former Travel Office employees).