Symposium Introduction: The Future of the Independent Counsel Statute: Confronting the Dilemma of Allocating the Power of Prosecutorial Discretion

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The Future of the Independent Counsel Statute: Confronting the Dilemma of Allocating the Power of Prosecutorial Discretion

by James P. Fleissner

June 30, 1999. On that date, absent reauthorization, the Independent Counsel Statute "shall cease to be effective." This "sunset provision"

was designed in part to ensure that affirmative legislative action, informed by vigorous debate, will be required to extend the life of the great national experiment that is the Independent Counsel Statute. The debate over the statute is well under way, and the outcome of that debate will greatly affect the course of American politics and government. The decision of whether to revert to the pre-independent counsel scheme or to extend, amend, or replace the independent counsel institution is a fundamental choice about the form of our government. Although the debate concerns an institution created by statute, the decision as to who shall wield prosecutorial power, a core executive function, has significant implications for how our constitutional system functions.

With sunset approaching for the Independent Counsel Statute, the nation must confront the dilemma of allocating prosecutorial power. If the power is vested in the Attorney General, there is a risk that the power will be abused when the administration investigates allegations against the President or other high ranking officials. This risk involves the administration's receiving favorable treatment from a prosecutor laboring under a conflict of interest. On the other hand, if the power is vested in an independent prosecutor, there is a risk that the power will be abused by an overly aggressive, unchecked, and perhaps politically motivated prosecutor. This risk involves inappropriate use of the power to investigate and indict by an unaccountable prosecutor.

The dilemma is inescapable. The need to confront the dilemma also is inescapable. A choice must be made, even if that choice is to revert to the pre-independent counsel status quo through legislative inaction. The process of deciding on the allocation of prosecutorial power and deciding on checks and balances is inevitably a process of compromise. There is no way to engineer a perfect system. However, it is possible to make informed choices concerning the design of the system for allocating prosecutorial power. Which risks should be minimized? Which tendencies should be encouraged?

Mercer University's Walter F. George School of Law and the Mercer Law Review hosted a symposium on the Independent Counsel Statute in the hope of making a small contribution to the national dialogue on the future of the law. This edition of the Mercer Law Review is based on those proceedings. On October 27, 1997, Mercer was host to two panels of speakers with great insight into the issues. One panel was comprised of Professor John Q. Barrett of St. John's University School of Law, Professor Kathleen Clark of Washington University School of Law, and Professor Katy J. Harriger of Wake Forest University's Department of Politics. During the morning session of the Symposium, entitled “Perspectives on the Independent Counsel Statute,” Professors
Barrett, Clark, and Harriger each made a presentation, offered commentary on each others' ideas, and took questions from the audience. Articles by each of these three scholars appear in this edition.

The afternoon session of the Symposium was “A Roundtable Discussion on the Independent Counsel Statute.” The roundtable discussion, which was held at the historic Douglass Theatre in Macon, featured four distinguished participants: former United States Attorney General Griffin B. Bell, former Watergate Special Prosecutor Archibald Cox, former White House Counsel Lloyd N. Cutler, and former Iran-Contra Independent Counsel Lawrence E. Walsh. As the transcript of that discussion reveals, these four gentlemen advanced divergent views on many issues and shared common ground on others. Their discussion should be a valuable resource as the debate over the Independent Counsel Statute continues.

In this introduction to the Symposium, an effort is made to frame the issues being debated. Part I offers some remarks about the nature of the power at issue in the debate over the Independent Counsel Statute, namely, the power of prosecutorial discretion. Part II expands on the notion that the allocation of this power presents legislators with a dilemma that forces difficult choices. Part III discusses the fact that the current debate will be conducted in a highly politicized environment, a reality that may cause political expediency to determine the outcome. Part IV summarizes the views of the seven Symposium speakers, examining how the recommendations of the speakers would strike the balance between the competing halves of the discretion dilemma.

I. THE POWER AT ISSUE: PROSECUTORIAL DISCRETION

The importance of the independent counsel debate flows from the importance of the power at stake: the power of the executive branch to exercise prosecutorial discretion. The Supreme Court has stated: “The Attorney General and the United States Attorneys retain ‘broad discretion’ to enforce the Nation’s criminal laws. They have this latitude because they are designated by statute as the President’s delegates to help him discharge his Constitutional responsibility to ‘take Care that the Laws be faithfully executed.’”2 The Independent Counsel Statute, when triggered, transfers the executive branch’s prosecutorial discretion

2. United States v. Armstrong, 116 S. Ct. 1480, 1486 (1996) (quoting U.S. CONST. art. II, § 3). The prosecutor’s decisions are accorded a presumption of regularity and judicial deference unless there is clear evidence that the prosecutor’s actions have impinged on protected statutory or constitutional rights. See Wayte v. United States, 470 U.S. 598, 608 (1985).
over the matter at issue to a different delegate, a court-appointed
independent counsel.\(^3\)

The Supreme Court has rejected constitutional challenges to the
statute based on contentions that it violated separation of powers.\(^4\) The
Court rejected the claim that the statute impermissibly involved the
judiciary in executive matters by giving certain powers, such as the
appointment power, to a court.\(^5\) The Court also rejected the claim that
the statute improperly interfered with executive authority by limiting
the amount of control the President and Attorney General would have
over the independent counsel's prosecutorial discretion.\(^6\) Despite
upholding the statute, the Court acknowledged that "the degree of
control exercised by the Executive Branch over an independent counsel
is clearly diminished in relation to that exercised over other prosecu-
tors."\(^7\) And so, under the Supreme Court's separation of powers
analysis, the independent counsel debate does not present an inter-
branch, constitutional separation of powers issue. Rather, the debate
presents an intra-branch, statutory allocation of power issue. And the
power at issue is a critical power of constitutional stature: the power of
prosecutorial discretion.

Whether held by the Attorney General or an independent counsel,
prosecutorial power is substantial and subject to few constraints. The
power has both affirmative and negative aspects. The prosecutor has
the power to investigate, to subpoena, to arrest, and to indict. A
prosecutor who aggressively uses the tools at his disposal, and perhaps
engages in sharp tactics, has immense power. As Attorney General
(later Justice) Robert Jackson said:

\[
\text{The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous . . . . With the law books filled with a great assortment of crimes, a prosecutor}
\]

\(^3\) 28 U.S.C. § 594(a) (1993) provides:
Notwithstanding any other provision of law, an independent counsel appointed
under this chapter shall have, with respect to all matters in such independent
counsel's prosecutorial jurisdiction established under this chapter, full power and
independent authority to exercise all investigative and prosecutorial functions and
powers of the Department of Justice, the Attorney General, and any other officer
or employee of the Department of Justice, except that the Attorney General shall
exercise direction or control as to those matters that specifically require the
Attorney General's personal action under section 2516 of title 18 [which requires
authorization by the Attorney General for certain electronic surveillance].


\(^5\) Id. at 684.

\(^6\) Id. at 695-96.

\(^7\) Id. at 696 n.34.
stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has committed it; it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him. It is in this realm . . . that the greatest danger of abuse of prosecuting power lies.  

It is prosecutorial power in its affirmative aspect that is emphasized by opponents and critics of the independent counsel. They fear an unchecked prosecutor run amok.

The prosecutor also has the power not to investigate, not to subpoena, not to arrest, and not to indict. The prosecutor may choose not to be aggressive. Professor Kenneth Culp Davis, an outspoken critic of the vast discretion of prosecutors, said, "The affirmative power to prosecute is enormous, but the negative power to withhold prosecution may even be greater, because it is less protected against abuse."  

Supporters of the independent counsel are most concerned with this negative aspect of prosecutorial power. They fear an unchecked prosecutor laboring under a political conflict of interest who would sweep potential wrongdoing under the rug or prosecute low level scapegoats while allowing those most responsible off the hook. These competing fears over who will exercise the executive's prosecutorial discretion both have a basis in reality. The legitimacy of these fears gives rise to a dilemma for those who must decide the future of the Independent Counsel Statute.

II. THE DISCRETION DILEMMA

Should the institution of the independent counsel (or another institution entrusted with similar discretion) be on the books after June 1999? If so, how should prosecutorial discretion be allocated between the independent prosecutor and the Attorney General? Trying to answer these questions presents a dilemma.

A. Delegating Discretion to the Attorney General

If there is no independent prosecutor available, one half of the dilemma presents itself. Without the Independent Counsel Statute, the power of prosecutorial discretion is in the hands of the Attorney General and, indirectly, the President. At the very least, there is a public perception that an Attorney General who is beholden to the President

cannot objectively evaluate the conduct of other high ranking officials. Beyond mere perceptions, there is concern that the Attorney General would convert the presumption of innocence into an almost irrebuttable presumption. Even worse, the Attorney General is in a position to undermine or obstruct effective investigation and prosecution.

In a conflict of interest situation, the Attorney General and others may recuse themselves and delegate prosecutorial power to either a career Department of Justice prosecutor or to an outsider. Of course, the decision whether to make one of these arrangements is within the Attorney General's discretion. If implemented, these arrangements can relieve the conflict of interest, but the Attorney General has the authority to choose the prosecutor, dictate the terms under which authority is delegated, and terminate the appointment. The informal, ad hoc delegation of an investigation to a career or special prosecutor leaves critical elements of the prosecutorial power in the hands of the Attorney General.

Of course, the Attorney General is beholden to an oath to uphold the law even if the administration is hurt. But can we assume that Attorneys General will always fulfill the trust placed in them? History teaches that sometimes the assumption is unwarranted. Is it possible that a well meaning Attorney General could be less than objective in evaluating allegations of wrongdoing? Again, we are suspicious of persons being the judge in their own case.

And if an Attorney General exercises prosecutorial power in its negative aspect to the benefit of the administration, is there a sufficient political check from public outcry and congressional pressure to assure that the laws are faithfully executed? In the aftermath of President Nixon's firing of Archibald Cox, political pressure forced the President to appoint a new special prosecutor and to make other concessions. That episode demonstrates that the political check can be potent. However, the situation was unprecedented, and the force and effectiveness of the public response may have been unique. In that case, the President fired an ad hoc special prosecutor for transparently self-serving reasons. Public outcry will be less effective when the administration's action is less dramatic or the matter at issue less apparent.

The aftermath of the Cox firing was a democratic success story, but public perception of the exercise of prosecutorial discretion by the President and Attorney General in cases affecting the administration has a dark side. Because there is a potential perception of a conflict of interest, there are political incentives for the administration's opponents to promote that perception. With the power to decide in the hands of the Attorney General, any decision not to act will be portrayed as political cronyism. Thus, the appearance of a conflict of interest when an
administration "investigates itself" has a self-fulfilling quality because political opponents naturally will be drawn to depict inaction as if the fix is in.

It is often said that the issue here is the rule of law. On the day President Nixon fired him, Archibald Cox put the issue in those terms: "Whether ours shall continue to be a government of laws and not of men is now for Congress and ultimately the American people." It is accepted as gospel that the President and other government officials are not, and should not be, above the law. Vesting prosecutorial discretion in the Attorney General creates the risk that by exercising the power not to act, the Attorney General will elevate suspected officials above the law. And so, leaving the power with the Attorney General runs the risk of abuse of the power through its negative aspect.

B. Delegating Discretion to an Independent Counsel

If an independent counsel or similar institution is adopted, the risk of abuse of prosecutorial power in its negative aspect is curtailed. Under this scheme, discretion is vested in a prosecutor who is neither chosen by nor beholden to the administration. The executive's prosecutorial power is delegated to someone insulated from both interference from the administration and congressional encroachment on the power. Because the Independent Counsel Statute is the status quo, this discussion will focus on that institutional scheme.

The insulation of the independent counsel creates the other half of the discretion dilemma: the risk of the abuse of prosecutorial power in its positive aspect. Vesting the enormous prosecutorial authority in an independent counsel with few checks or limits and virtually unlimited resources creates the risk of subjecting those investigated to a different level of scrutiny and pursuit than an ordinary citizen might face.

Under the existing Independent Counsel Statute, the power of prosecutorial discretion is transferred from the Attorney General to the independent counsel when the law is triggered. The triggering mechanism has two phases. First, the Attorney General determines the need for a preliminary investigation. In this phase the Attorney General has thirty days to determine whether an allegation is "specific and from a credible source." The statute restricts the Attorney

13. Id. § 591(d) (2).
General to consideration of the specificity of the information and the credibility of the source.\textsuperscript{14} In making this determination, the Attorney General is prohibited from considering the criminal intent of the accused.\textsuperscript{15}

If the "specific information and credible source" determination is made, the preliminary investigation begins. This phase requires a decision within ninety days unless a sixty-day extension is granted.\textsuperscript{16} During the preliminary investigation, the Attorney General's discretion is greatly restricted. The Attorney General is denied authority "to convene grand juries, plea bargain, grant immunity, or issue subpoenas."\textsuperscript{17} The standard in this phase is whether there are "no reasonable grounds to believe that further investigation is warranted."\textsuperscript{18} The Attorney General may not refuse to request an independent counsel based on a lack of criminal intent on the part of the accused unless the lack of criminal intent is established by clear and convincing evidence.\textsuperscript{19} Obviously, the triggering mechanism has a very low threshold. Indeed, the statute's formula is a recipe for referral: it denies the Attorney General the most basic investigative techniques and then requires referral if further investigation is warranted. Although the statute says the Attorney General's decision not to request an independent counsel is not reviewable in the courts,\textsuperscript{20} the Attorney General's discretion ultimately is restricted by the minimal threshold of the triggering mechanism. Notwithstanding the provision limiting judicial review, one commentator has suggested that the courts might still be able to check the Attorney General's discretion.\textsuperscript{21} That same commentator would like to see judicial review of the Attorney General's referral decision made explicit in any future independent counsel law.\textsuperscript{22}

Once the Attorney General requests an independent counsel, the Special Division of United States Court of Appeals appoints the independent counsel.\textsuperscript{23} After the power over a matter is vested in the independent counsel, there are very few formal constraints. Consider the controls available to the President and Attorney General. Although

\begin{itemize}
\item \textsuperscript{14} Id.
\item \textsuperscript{15} Id. § 592(a)(2)(B)(i).
\item \textsuperscript{16} Id. § 592(a)(3).
\item \textsuperscript{17} Id. § 592(a)(2).
\item \textsuperscript{18} Id. § 592(b)(1).
\item \textsuperscript{19} Id. § 592(a)(2)(B)(ii).
\item \textsuperscript{20} Id. § 592(f).
\item \textsuperscript{21} John F. Banzhaf, III, \textit{Upset at Reno's Decision: Take Her to Court}, \textit{FULTON COUNTY DAILY REPORT}, Dec. 12, 1997, at 7.
\item \textsuperscript{22} Id.
\end{itemize}
the independent counsel is limited to the four corners of his jurisdictional charter, the law allows for expansion of the jurisdictional grant, and experience has shown that independent counsel often expand their probes to related matters. The statute states that the independent counsel is supposed to follow Department of Justice policies and file periodic reports on expenditures, but these provisions are hardly fetters. And the removal of an independent counsel by the Attorney General under the provision authorizing the removal for "good cause" is, because of the memory of Nixon's firing of Archibald Cox, very unlikely to happen.

The congressional oversight and reporting provisions are also weak control mechanisms. The prospect of removing an independent counsel by impeachment and conviction is remote. Indeed, the Supreme Court upheld the statute against separation of powers challenges in part because "Congress retained for itself no powers of control or supervision over an independent counsel."

With so few institutional checks on the independent counsel, should we trust that the appointment of persons of great stature and sterling integrity will prevent abuses? The independent counsel also takes an oath to uphold the law. In the case of the Attorney General, we may want to have an institutional mechanism to curb the discretion to exercise power by failing to act. In that case, there is identified a potential motive or bias on the part of the Attorney General to favor the administration. There is a conflict of interest: the interest in effective, impartial prosecution conflicts with the interest of loyalty to the administration. Is there a mirror-image concern with independent counsel? Is there a similar need for institutional checks on the independent counsel to prevent abuse of prosecutorial power through action?

Defenders of the institution of the independent counsel play down the need for additional institutional checks. Defenders emphasize that independent counsel are not political appointees and start without loyalty to or bias against anyone. Independence and impartiality are part and parcel of their statutory role. Defenders would point out that

24.  Id. § 594(e).
25.  See O'Sullivan, supra note 11, at 485-88.
27.  Id. § 594(h).
28.  Id. § 596(a).
29.  Id. § 596(a).
30.  See id. § 596(a)(1).
the existing institutional checks, such as the limits of the jurisdictional grant and the requirement that Department of Justice guidelines be followed, are not without effect. More significantly, defenders claim that independent counsel are checked informally by resistance on many fronts, including resistance by the administration, and that providing additional institutional control mechanisms will provide additional means for undermining the independence of the investigations. When all the formal and informal checks are considered, defenders contend that independent counsel are accountable and in reality are interdependent counsel.

Critics of the independent counsel law believe that additional checks are needed. Critics claim that independent counsel, like Attorneys General, are subject to "motivational problems." It is possible that an independent counsel may be moved to action by political motives. Certainly these allegations are regularly leveled at independent counsel. It is also possible that political persuasion might cause a well meaning independent counsel to be less than objective in evaluating the merits of taking investigative or prosecutorial action. Although independent counsel are not to assume there is a viable prosecution, critics say that the current system tempts independent counsel to go to extraordinary lengths to assure themselves that there is no case before closing up shop.

The structure of the current statute makes independent counsel particularly susceptible to the temptation to take actions ordinary prosecutors would not take. The ordinary pressures of caseloads and resource limits are not present. The only time limit is the statute of limitations. Resource usage must be reported, but there is no real constraint on spending. Indeed, independent counsel may earn outside income, so there is not the usual financial sacrifice that might encourage them not to drag out their public service.

35. However, some persons are covered by the statute only during the incumbency of the President or for a limited period after leaving office. See 28 U.S.C. § 591(b)(6), (7) (Supp. 1997).
Furthermore, an independent counsel may apply a more expansive standard in determining what constitutes an appropriate use of prosecutorial power. Attorney General Janet Reno is fond of saying that she makes prosecutorial decisions based on "the facts and the law." Independent Counsel Kenneth Starr has echoed that remark. If those are the only criteria, with enough resources and time, one might expect a prosecutor to find some allegation that could be proved at trial. Once begun, an investigation can take on a self-perpetuating quality: If anyone linked to the subject of the investigation may be prosecuted on the "facts and the law," then prosecuting that person might lead to a deal for information on the subject.

Of course, prosecutorial decisions are more complex than the facts and law template suggests. There are issues of lateral justice and policy and ethics and economics. But independent counsel are less constrained by these other factors in deciding not to continue an investigation, not to use available investigative tactics, not to bring potential charges against the suspect or others who might have information, and not to throw good money after bad. Using prosecutorial power in its positive aspect suggests thoroughness, justifies one's existence and efforts, allows for an exhaustive final report, and underscores the role of the independent counsel as protector of the rule of law over men. Investigations can gather momentum and be hard to stop. This may be true even if the independent counsel finds little evidence of wrongdoing but wants an exhaustive investigation to vindicate the suspect thoroughly.

Given the limited institutional checks on the independent counsel, what of the check of public opinion? Certainly independent counsel operate under the glare of the press, especially in presidential-level cases. The defenders of those being investigated by independent counsel have tried mightily to use the check of public opinion. Independent counsel have been vilified and demonized as out of control political partisans. When Independent Counsel Lawrence E. Walsh informed attorney Robert Bennett that his client, Caspar Weinberger, would be indicted, Bennett responded by stating that "this means nuclear war."

What he meant, of course, was that an all out political and personal attack would be launched against the independent counsel. The same

40. WALSH, supra note 32, at 410.
sort of offensive strategic doctrine is on display as Mr. Bennett's current client, President Clinton, faces an independent counsel.

Those attacking the independent counsel try to turn the powers and resources of the office into a vulnerability. The attackers want the public to condemn the independent counsel as conducting a witch hunt. The public may ask, "Why is it taking so long and costing so much with so few positive results?" The dynamic of extended independent counsel investigations may well cause the defenders of suspects to denounce the length of the investigation while dragging out the process.

Recent experience casts doubt on whether this political pressure can check independent counsel. What is indisputable is that the inevitable public relations attacks on independent counsel undermine one of the purposes of having independent counsel at all: to create public confidence in the impartial exercise of prosecutorial power. Indeed, an independent counsel under attack may come to view the situation as a war, as "us versus them." The independent counsel may wage a public relations counter-offensive denouncing the denouncers. Aggressive prosecutorial actions, in turn, become more evidence for the critics. It is clear that this cycle of public relations attack and defense will continue to occur often when prosecutorial power is given to an independent counsel.

As has been noted, giving the power of prosecutorial discretion to an independent counsel is often justified as promoting the rule of law. Advocates of the independent counsel concept say that we want to be a nation "of laws and not men." This translates as follows: "If the President can break the law and not be held accountable, then the President rules, not the law. If the President is held accountable for breaking the law, then the law rules, not the President." The type of government we have is thought of in the disjunctive: we have either a government of laws or men. In thinking about what I have termed the discretion dilemma and the problem of allocating the power of prosecutorial discretion, it may be useful to consider the conjunction of law and men in government. As Kenneth Culp Davis wrote:

No government has ever been a government of laws and not men in the sense of eliminating all discretionary power. Every government has always been a government of laws and of men. A close look at the meaning of Aristotle, the first user of the phrase "government of laws and not of men," shows quite clearly that he did not mean that governments could exist without discretionary power.\[supra\] note 9, at 17 (emphasis in original) (footnote omitted).
Thus, while we celebrate the principle of the rule of law over man, we must recognize the role of man in administering the law. The dilemma of how to allocate the power of prosecutorial discretion involves both of these notions. Certainly it is desirable to hold our highest officials accountable to the law. In deciding how to design the prosecutorial mechanism for achieving this end, we must carefully choose between the risk of a prosecutor whose conflict of interest might cause inaction when action is justified and the risk of a prosecutor whose independence might lead to action when inaction is the better course.

The current independent counsel scheme represents a choice in the face of the discretion dilemma. The current statute controls the Attorney General's discretion and limits the conflict of interest problem at the risk of potentially unwise and unchecked exercises of prosecutorial discretion in its positive aspect. This choice affirms the importance of the rule of law and the idea that public officials are not above the law. The current approach gives the independent counsel great discretion with few checks. If an unwarranted prosecution is brought, at least the courts can prevent injustice. As for the use of affirmative prosecutorial power short of the lodging of charges, the risks are deemed outweighed by the potential evil of an Attorney General refusing to hold high ranking officials accountable. This choice of evils is consistent with the previously quoted assessment of Kenneth Culp Davis: "The affirmative power to prosecute is enormous, but the negative power to withhold prosecution may even be greater, because it is less protected against abuse." Thus, the current independent counsel scheme strikes the balance between the competing halves of the discretion dilemma by erring on the side of preventing the abuse of power by inaction and risking the abuse of power through action.

III. POLITICS AND THE FUTURE OF THE INDEPENDENT COUNSEL STATUTE

The debate over the Independent Counsel Statute should be about the public good. As Alexander Hamilton said about debate over ratification of the Constitution, "Happy will it be if our choice should be directed by a judicious estimate of our true interests, unperplexed and unbiased by considerations not connected with the public good." On this score, Hamilton was hardly sanguine. He continued:

42. Id. at 188.
43. THE FEDERALIST No. 1 (Alexander Hamilton).
But this is a thing more ardently to be wished than seriously to be expected. The plan offered to our deliberations affects too many particular interests, innovates upon too many local institutions, not to involve in its discussion a variety of objects foreign to its merits, and of views, passions, and prejudices little favorable to the discovery of truth.44

So it will be with the independent counsel debate.

The process of deciding the future of the Independent Counsel Statute is inevitably bound up with politics. When the Republicans held the presidency, independent counsel were portrayed as tools of the political left. The complaints were most shrill when investigations got close to the President himself. For example, during the Iran-Contra investigation, Senator Robert Dole responded to the indictment of Caspar Weinberger by denouncing Independent Counsel Walsh and "his highly paid assassins" and accusing the independent counsel of attempting to "blackmail" Weinberger into testifying against President Reagan.45 Senator Dole, an ardent opponent of the Independent Counsel Statute, expressed his view in these terms: "In far too many instances, the investigations by independent counsels have turned out to be partisan political fishing expeditions—expeditions which have accomplished nothing more than wasting millions of tax dollars."46 In 1992 when the Independent Counsel Statute was up for reauthorization, Senate Republicans blocked the legislation, and the statute lapsed.47

In 1994, with a Democratic President in office, Congress reauthorized the statute. On June 30, 1994, President Clinton signed the Independent Counsel Reauthorization Act. Upon signing the act into law, President Clinton made a statement that, in retrospect, truly is remarkable:

I am pleased to sign into law ... the reauthorization of the Independent Counsel Act. This law, originally passed in 1978, is a foundation stone for the trust between the Government and our citizens. It ensures that no matter what party controls the Congress or the executive branch, an independent, nonpartisan process will be in place to guarantee the integrity of public officials and ensure that no one is above the law. Regrettably, this statute was permitted to lapse when its reauthorization became mired in a partisan dispute in the Congress. Opponents called it a tool of partisan attack against Republican Presidents and a waste of taxpayer funds. It was neither. In fact, the

44. Id.
45. WALSH, supra note 32, at 417 (quoting Senator Robert Dole).
46. Id. at 429.
47. 7 CQ RESEARCHER 155 (Feb. 1977).
Time tells. After the President and his administration were subjected to the rigors of several independent counsel investigations, President Clinton’s view of the law changed. It has been reported that when he sat down for a chat with Senator Dole after the 1996 election, the President had this to say to the man who had fought the reauthorization of the Independent Counsel Statute: “You were right and I was wrong on the independent counsel.”

Now that Republicans and Democrats have each suffered the political sting of being subject to investigation by independent counsel, will there be a bipartisan consensus that the Independent Counsel Statute should be allowed to lapse? If a consensus forms, will it be based on sound policy grounds or sheer political calculation? Or will ambivalent feelings on both sides of the aisle preclude the formation of any consensus regarding the best path to take? It seems possible that the law will lapse not because of a reasoned judgment that it would be best for the country, but because of political stalemate and gridlock. It may be policymaking by default. If that happens, the issue inevitably will arise again the first time scandal hits the next administration, be it Republican or Democratic. Putting off the development of a consensus on the critical policy issue of how best to allocate prosecutorial discretion will only serve to further politicize the process when the issue recurs.

On a more optimistic note, perhaps the fact that both the Republican and Democratic oxen have been gored will help Congress to address the issues in a more detached, less political manner. As the debate over the Independent Counsel Statute proceeds, the focus should be on determining what is in the national interest. Of course, partisan political considerations will taint the process to some extent, but it is vital that those involved in the process ultimately rise above political considerations on an issue of such great importance to the nation. The dilemma of allocating prosecutorial power must be confronted. Every effort must be made to choose a course of action on the merits.

IV. PERSPECTIVES ON THE DISCRETION DILEMMA: THE VIEWS OF THE SYMPOSIUM PARTICIPANTS

The seven symposium participants represent a diversity of views concerning how the nation should confront the dilemma of allocating

prosecutorial discretion in cases involving allegations against high ranking government officials of the executive branch. The perspectives of the participants present a range of priorities and options for the future of the Independent Counsel Statute.

Katy J. Harriger. Professor Harriger describes and illuminates the discretion dilemma and puts the current debate over the Independent Counsel Statute in historical context. She emphasizes that the choices concerning the balance of "the competing values of independence and accountability" are as difficult now as ever. Professor Harriger traces the use of ad hoc special prosecutors before Watergate, the development of the original version of the Independent Counsel Statute after Watergate, and the fine tuning of the statutory scheme during the reauthorizations of 1982, 1987, and 1994. In the original version of the statute, "Congress opted to weigh in on the side of independence." As Professor Harriger points out, the original version gave the Attorney General almost no discretion in deciding whether to request an independent counsel after allegations were made (a "hair trigger"), barred the use of compulsory process to assist in the decision whether to request an appointment, denied the Attorney General the discretion to name the independent counsel, and allowed the Attorney General to dismiss an independent counsel only for "extraordinary impropriety." Obviously, the original version of the statute was designed first and foremost to check the abuse of prosecutorial discretion in its negative aspect.

Professor Harriger describes how changes to the original Independent Counsel Statute re-allocated discretion between the Attorney General and the independent counsel. One example is the threshold for triggering the statute, which at first was changed to expand the discretion of the Attorney General, allowing consideration of the specificity of allegations and credibility of the source. Later, the allocation of discretion was changed again by limiting the ability of the Attorney General to refuse to refer a matter based on the suspect's innocent "state of mind" to cases in which the evidence on that score is clear and convincing. With respect to other parts of the independent

51. Id. at 490.
52. Id. at 490-514.
53. Id. at 505.
54. Id. at 504-05.
55. Id. at 507-08.
56. Id. at 510.
counsel scheme, such as the vesting of the power to appoint in a panel of judges, the original limitations on the Attorney General's discretion have been maintained.

Professor Harriger sets the stage for the confrontation of the discretion dilemma in the current reauthorization cycle. She stresses that the allocation of discretion involves inevitable trade-offs. She poses the question: "Can independent prosecution coexist with executive branch accountability mechanisms?"\(^{57}\) In answer to this question, Professor Harriger noted the trade-offs and stated, "Some delicate balance must be struck and then found to be acceptable as the least flawed of the available alternatives."\(^{58}\) However, Professor Harriger warns that the answer to the question may be no, citing the perceived failure of the Independent Counsel Statute to achieve its goals. Other than the current version of the Independent Counsel Statute, Professor Harriger sees two plausible alternatives: a return to a "hair trigger" that restricts the Attorney General's discretion to request an independent counsel, or a return to the pre-independent counsel status quo, restoring discretion in the Attorney General.\(^{59}\) According to Professor Harriger, neither of these "seems as acceptable as the current arrangement, however flawed."\(^{60}\)

**John Q. Barrett.** Professor Barrett, who served as Associate Independent Counsel during the Iran-Contra investigation, focuses on the relationship between the Attorney General and an appointed independent counsel.\(^{61}\) As the current Independent Counsel Statute has been interpreted, the Attorney General retains the power to exercise discretion over several matters that may directly affect the ability of the independent counsel to successfully investigate and prosecute. Professor Barrett identified three powers retained by the Attorney General: the power to decide whether to provide legal advice and representation to various agencies within the executive branch, the power to decide whether classified information may be used as evidence pursuant to the Classified Information Procedures Act,\(^{62}\) and the power to deploy the

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57. Id. at 514.
58. Id. at 515.
59. Id. at 516.
60. Id. at 515.
influence of the Solicitor General in litigation. Under current practice, an Attorney General may provide the legal advice and representation of the Department of Justice to executive branch agencies who are at odds with the independent counsel. An Attorney General may influence the Solicitor General to weigh in against an independent counsel or, more likely, withhold support from the independent counsel. And in cases in which access to classified information is necessary, the Attorney General has the power to deny access to the needed information. With respect to the discretionary exercise of these powers, each of which can directly affect the independent counsel's work, the Attorney General retains the ability to undermine and possibly derail a meritorious criminal prosecution.

The Attorney General's role regarding classified information provides a clear example of how the discretion retained by the Attorney General provides the power to prevent the prosecution of covered individuals. As Professor Barrett points out, the Attorney General's exercise of discretion under the Classified Information Procedures Act can give the Attorney General substantial power to block an independent counsel. In the Iran-Contra affair, Independent Counsel Lawrence E. Walsh was forced to dismiss key charges against Oliver North because the Attorney General balked at releasing certain classified information. In another case, the prosecution of Joseph Fernandez, the Attorney General refused to release classified information, and the entire case was dismissed.

Thus, the Attorney General retains the discretion to thwart an independent counsel. The Attorney General, of course, would defend the correctness of his classified information rulings. But the fact remains that current practice under the Independent Counsel Statute gives the Attorney General the discretion to block a prosecution, thereby exercising prosecutorial power in its negative aspect. As Professor Barrett concludes, "This is at odds with the fundamental purpose and the general provisions of the independent counsel law itself."

Professor Barrett suggests that the Independent Counsel Statute might be modified to explicitly empower the independent counsel with respect to the classified information issue and dis-empower the Attorney General with respect to the deployment of the legal resources of the Department of Justice on independent counsel matters. Interestingly,

64. Id. at 535-36.
65. Id. at 536-37.
66. WALSH, supra note 32, at 175-81.
67. Id. at 218-19.
68. Barrett, supra note 61, at 537.
69. Id. at 541-42.
Professor Barrett suggests that amending the law may not be necessary because the Attorney General's discretionary power in these areas is transferred to the independent counsel under the existing law although no independent counsel has forced the issue.\(^7\)

Whatever the route to an empowered independent counsel, Professor Barrett contends that one effect will be to eliminate the ability of the Attorney General to undercut the prosecutorial power of the independent counsel quietly using low-profile methods such as withholding classified information and providing legal support to persons or entities opposing the investigation. An empowered independent counsel would require showdowns between the administration and the independent counsel to be conducted in the open with the administration limited to using the methods clearly granted by the statute, such as firing the independent counsel for good cause.\(^7\) In other words, the administration would be forced to duel the independent counsel in full view using traditional weapons, just like the confrontation between President Nixon and Archibald Cox.\(^7\)

**Kathleen Clark.** Professor Kathleen Clark's article focuses on a proposal for a new ethics-in-government institution that might complement the Independent Counsel Statute or, if the statute lapses, complement the Attorney General. That institution is an inspector general for the White House.\(^7\) Professor Clark describes the primary roles of an inspector general, an institution that has been established in many departments of the government.\(^7\) Inspectors general investigate allegations of wrongdoing, conduct regular audits, recommend new ways of improving the department's operation, and report periodically to Congress.\(^7\) Professor Clark contends that a White House inspector general very well might prevent scandals or limit the size of scandals by discovering wrongdoing and improving poor procedures that might create opportunities for real or perceived wrongdoing.\(^7\)

Of course, Professor Clark acknowledges that criminal investigations and prosecutions will often be appropriate.\(^7\) However, as Professor Clark points out, an effective inspector general may well reduce the

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70. *Id.* at 542.  
71. *Id.* at 547-48.  
72. *Id.* at 548-51.  
74. *Id.* at 560.  
75. *Id.*  
76. *Id.* at 563.  
77. *Id.*
number of occasions in which a criminal investigation is needed. While not resolving the discretion dilemma, the inspector general mechanism should reduce the number of cases in which the alternative dangers of inaction by a partial Attorney General or action by a runaway independent counsel must be confronted. Furthermore, it is possible that the Independent Counsel Statute will be allowed to lapse, which will return the power of prosecutorial discretion to the Attorney General in cases involving high ranking officials in the White House. Professor Clark argues that if that happens, there will be an "even greater need for increased accountability in the White House." An inspector general may serve to help fill that need.

Griffin B. Bell. Former Attorney General Griffin B. Bell is steadfast in the belief that the independent counsel experiment has been a failure. His approach to the discretion dilemma would be to restore prosecutorial discretion to the Attorney General. When allegations are made against high ranking officials and a conflict of interest appears, Judge Bell favors two approaches, both involving the recusal of the Attorney General and any others affected by the conflict. One would be to allow authority to vest in career prosecutors within the Justice Department. The other would be ad hoc appointment of a special prosecutor, who would be appointed and empowered by the Attorney General.

Judge Bell prefers to try to restore confidence in the Department of Justice rather than replace the Department with the institution of the independent counsel. As he said, "We need to trust our institutions and hold our institutions accountable. If we will do that, we have plenty of institutions. We just need to make sure they work well." In recommending a return to the pre-independent counsel allocation of prosecutorial discretion, Judge Bell decries the unfairness of the independent counsel process, which subjects public officials to more intense and public scrutiny than other citizens. Thus, Judge Bell questions the very premise of the Independent Counsel Statute—the belief that the risk of inaction by an Attorney General outweighs the risk of inappropriate action by an unchecked independent counsel.

78. Id.
79. Id. at 564.
80. Symposium, supra note 33, at 464-65.
81. Id.
82. Id. at 465.
83. Id. at 480.
In the event that the Independent Counsel Statute is renewed over his objection, Judge Bell would support a number of changes, including increasing the discretion of the Attorney General with respect to the decision of whether an independent counsel is needed. Judge Bell also endorsed the idea of allocating to the President some discretion in the selection of the independent counsel through the nomination of a standing panel of potential independent counsel subject to confirmation by the Senate. Thus, Judge Bell would significantly rework the statutory scheme to give more discretion to the administration with respect to the decision to seek an independent counsel. But his first choice is to scrap the statute altogether.

Archibald Cox. Former Watergate Special Prosecutor Archibald Cox favors retention of the Independent Counsel Statute but with "radical changes." Professor Cox would significantly limit the number of officials covered by the statute so that the law would apply only to the President, Vice-President, and several other key administration officials. He would also limit the subject matter of independent counsel cases to allegations of serious criminal activity committed while in office or seeking office. Professor Cox favors a somewhat higher triggering standard than the current "whether further investigation is warranted" standard, but does not favor a standard requiring as much as probable cause. Professor Cox also favors a one year time limit for independent counsel investigations, subject to extensions granted by a court.

Professor Cox's recommendations indeed would constitute radical change. He would leave prosecutorial discretion with the Attorney General, except for cases involving criminal misconduct by the President and a handful of other officials. For cases involving lesser officials or allegations of improper conduct that do not relate to obtaining or holding office, discretion would remain with the Attorney General, who presumably would decide to handle the case or delegate the case to career prosecutors or an ad hoc special prosecutor.

84. Id. at 469-70 (statement of Mr. Cutler; Id. at 472-73 (Judge Bell's concurrence).
85. Id. at 478.
86. Symposium, supra note 33, at 468.
87. Id. at 468, 473-74.
88. Id. at 473-74.
89. Id. at 471-72.
90. Id. at 474.
Professor Cox decries the politicization of the current Independent Counsel Statute. He contends that the statute has come to be viewed as a political tool allowing a prosecutor to be unleashed to "hunt" administration officials against whom allegations have been leveled. In terms of the discretion dilemma, Professor Cox focuses on the abuse of prosecutorial power in its positive aspect. Independent counsel, cheered on by the administration's political opponents, are perceived as hunters by the public and may perceive themselves as hunters. And, of course, hunters like trophies. To Professor Cox, the current mentality is at odds with the true purpose for the institution of an independent counsel. Professor Cox sees the true purpose as providing a mechanism for the rare episode when allegations against the highest officials of the government require an "independent counsel of great fairness and stature" as "the only way to assure the public of a truly impartial, fair-minded investigation and finding." Under this view, prosecution should not be the presumed task of an independent counsel. Professor Cox sees such a presumption at work under the current law with unfortunate results.

Professor Cox would preserve the independent counsel mechanism for presidential-level investigations such as Watergate. In these cases, however, even an independent counsel who is completely impartial will almost certainly be viewed by the White House as a partisan bent on bringing down the administration. At the Symposium, Professor Cox maintained that he genuinely would have preferred to clear the President. He was not on a hunt, but Professor Cox acknowledged that President Nixon would never have believed it. Indeed, he did not. Richard Nixon wrote in his memoirs, "If [Attorney General] Richardson had searched specifically for the man whom I would have least trusted to conduct so politically sensitive an investigation in an unbiased way, he could hardly have done better than choose Archibald Cox." Richard Nixon wrote that Archibald Cox and his staff were "partisan zealots abusing the power I had given them in order to destroy me unfairly . . . ." To Nixon, firing Cox "seemed the only way to rid the administration of the partisan viper we had planted in our bos-

91. Id. at 468.
92. Id. at 482.
93. Id. at 468.
94. Id. at 478.
95. Id. at 469.
96. Id.
98. Id. at 912.
Nixon concluded "that Cox had deliberately exceeded his authority; I felt that he was trying to get me personally, and I wanted him out." Nixon obviously believed Cox was on a hunt. During the roundtable discussion, Professor Cox poignantly described his showdown with President Nixon over the tapes and his anguish over how the confrontation would affect the rule of law. Of course, Nixon fired Cox, and the crisis created the impetus for the Independent Counsel Statute. The attitude of President Nixon toward the investigation into his activities clearly illustrates the risk of vesting the power of prosecutorial discretion in the Attorney General and the President in cases in which the administration is fighting for self-preservation. Professor Cox would restrict the Independent Counsel Statute to addressing the very sort of situation that caused its adoption. Whatever lessons have been learned through experience with the Independent Counsel Statute, Professor Cox urges that those lessons not obscure the hard-learned lesson of Watergate.

**Lloyd N. Cutler.** Two-time White House Counsel Lloyd N. Cutler expressed support for renewal of the Independent Counsel Statute with some significant changes. In his remarks at the Symposium, Mr. Cutler, an early supporter of the independent counsel mechanism, said he believes the statute is in the best interests of the nation despite some "second thoughts" based on his experiences in the Clinton White House. According to Mr. Cutler, Watergate demonstrated the problem of allocating the power of prosecutorial discretion to the Attorney General: "The Attorney General's appearance of impartiality and independence is simply gone for our generation." While his second thoughts have not caused him to oppose renewal of the Independent Counsel Statute, they have caused him to propose changes that would increase the power of the administration in deciding when to appoint an independent counsel and provide a greater role in deciding who will be appointed. He would also place a one year time limit on investigations, subject to extension for cause.

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99. *Id.* at 929.
100. *Id.* at 933-34.
101. See Symposium, supra note 33, at 484-85.
102. *Id.* at 463.
103. *Id.*
104. *Id.* at 464.
105. *Id.* at 469-70, 477-78.
106. *Id.* at 475-76.
With respect to the triggering mechanism, Mr. Cutler would expand the Attorney General discretion to use subpoenas and other investigative techniques now forbidden during the preliminary investigation. He would expand the discretion of the Attorney General by raising the threshold for requesting the appointment of an independent counsel. He suggests a standard such as "reasonable grounds for believing that a significant federal crime may have been committed." Mr. Cutler criticizes the existing scheme, which denies the Attorney General common investigative tools and then asks whether further investigation is warranted, as creating too low a threshold.

Mr. Cutler also proposes to give the administration a measure of discretion in the appointment of independent counsel. He is critical of the current scheme that gives discretion to a panel of judges, citing a lack of confidence in the panel's appointments and a perception of politicalization of the panel. Mr. Cutler suggests creating a standing panel of possible independent counsel nominated by the President and confirmed by the Senate. When an independent counsel is requested, the court would select from those on the panel. In the alternative, Mr. Cutler suggests creating an office of Public Prosecutor for investigating public officials. He contends that either of these plans would increase public confidence in the persons selected to serve.

Lawrence E. Walsh. Former Iran-Contra Independent Counsel Lawrence E. Walsh endorses the renewal of the Independent Counsel Statute with some modifications. Judge Walsh believes that the institution of the independent counsel is needed to address the conflict of interest that disqualifies the Attorney General and the Department of Justice from investigating allegations of wrongdoing by the President and other top officials of the executive branch. Judge Walsh is open to narrowing the coverage of the statute to a small group of senior officials and to investigations of crimes committed while in office or in seeking office. But with respect to the investigation of this narrowed category of cases, Judge Walsh is a believer in the value of independent counsel. The Independent Counsel Statute addresses the
conflict of interest problem by disqualifying the Attorney General both from the case and from appointing the independent counsel.\textsuperscript{116}

Judge Walsh is also open to some modification in the triggering mechanism to give the Attorney General more discretion.\textsuperscript{117} He favors giving the Attorney General subpoena power to gather information during the preliminary investigation, but is leery of giving too much investigative authority to the Attorney General during this phase because of the risk that the preliminary investigation would spoil the prospects for a successful prosecution. For this reason, he is opposed to allowing the Attorney General to grant immunity to anyone during a preliminary investigation.\textsuperscript{118}

Judge Walsh also zealously defends the need to preserve the independence of the independent counsel once there is an appointment. He opposes, for example, any artificial time limit on investigations even if extensions for cause were possible. Judge Walsh contends that a time limit would give the discretion to terminate an investigation to a court ill-equipped to make the decision.\textsuperscript{119} On this issue of the independence of the independent counsel, Judge Walsh presents a very different perspective than critics of the statute. He describes "the isolation of the independent counsel," who with a small staff finds himself at odds with the government: "All of a sudden you find it is all against you, that the old alliances have not changed a bit."\textsuperscript{120} Judge Walsh also finds the power of the independent counsel limited by the financial reporting requirements, the press, negative public opinion, Department of Justice policies, the Attorney General's removal power, and the court's mandate concerning the scope of the investigation.\textsuperscript{121} For Judge Walsh, the independent counsel is sufficiently restrained from the abuse of prosecutorial power in its positive aspect. His desire to preserve the institution of the independent counsel is based on the same concern that motivated the original passage of the law: the fear of the abuse of prosecutorial power in its negative aspect resulting in the undermining of the rule of law.\textsuperscript{122}

\begin{itemize}
  \item \textsuperscript{116} Id. at 468.
  \item \textsuperscript{117} Id. at 470-71; see also \textsc{Walsh}, supra note 32, at 526.
  \item \textsuperscript{118} Symposium, supra note 33, at 471.
  \item \textsuperscript{119} Id. at 474-76.
  \item \textsuperscript{120} Id. at 475.
  \item \textsuperscript{121} Id. at 476; see also \textsc{Walsh}, supra note 32, at 526.
  \item \textsuperscript{122} Symposium, supra note 33, at 466-67; see also \textsc{Walsh}, supra note 32, at 517-20.
\end{itemize}
V. CONCLUSION

During the coming year, the future of the Independent Counsel Statute will be decided by the Congress and the President. The participants in the Symposium voiced diverse perspectives concerning the future of the statute and how best to confront the dilemma of allocating the power of prosecutorial discretion. Their views will help to inform the debate over the future of the statute. In the short time since the Symposium, Attorney General Janet Reno refused to request an independent counsel to investigate campaign finance,\textsuperscript{123} the jurisdiction of Independent Counsel Kenneth Starr was expanded to include allegations of perjury and obstruction of justice in the Paula Jones civil suit, an indictment was returned against former HUD Secretary Henry Cisneros, an independent counsel was appointed to investigate Secretary of the Interior Bruce Babbitt concerning allegations of perjury, and a preliminary investigation has begun to determine whether to appoint an independent counsel to investigate Secretary of Labor Alexis Herman. These developments serve to remind us of the enormous importance of the outcome of the debate over the Independent Counsel Statute, a debate that will determine who wields prosecutorial power and under what conditions.

\textsuperscript{123} See Symposium, supra note 33, at 482-84.