The History of the Independent Counsel Provisions: How the Past Informs the Current Debate

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I. INTRODUCTION

The current “feeding frenzy”¹ around the campaign finance scandal invites us to reflect upon the importance of the past. The independent counsel provisions of the Ethics in Government Act² are the product of a particular time and sequence of events that determined their shape and continue to influence their implementation. If we want to understand the current controversy surrounding Attorney General Janet

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¹ Larry Sabato uses this term to apply to a time when “a critical mass of journalists leap to cover the same embarrassing or scandalous subject and pursue it intensely, often excessively, and sometimes uncontrollably.” LARRY SABATO, FEEDING FRENZY 6 (1991).
Reno’s interpretation of the independent counsel provisions, we must look back at the legislative history of those provisions and the larger history of the time.

When we look back, we can see that the issues at the center of the debate about the provisions today were there from the start. The difficult choices that faced the lawmakers then are no less difficult today. In response to the Watergate scandal, Congress sought to write a constitutional statute that balanced the competing values of independence and accountability in a political climate of deep partisan and public distrust. Could Congress create an officer independent of the executive branch without running afoul of the constitutional scheme of separation of powers? Would an officer wielding prosecutorial power independent of the executive branch be an unaccountable persecutor of vulnerable public officials? Could Congress create an arrangement that removed politics from the consideration of criminal allegations against executive branch officers? Could an independent counsel arrangement help restore public confidence in government in the wake of Watergate? The question we must ask ourselves today is not whether Congress could or should have come up with different answers then but whether twenty years later, in a political environment even more steeped in distrust, we can imagine any other balance among these interests.

In this Article, I use the history of the independent counsel provisions to frame the current controversies surrounding the arrangement. I begin with a brief discussion of the uses of special prosecution arrangements prior to Watergate, followed by a fuller discussion of the influence of the Watergate scandal on the creation of the 1978 provisions. After an exploration of the various issues debated by Congress before passage of the provisions, I consider the way in which the implementation of the Act shaped the debates at each consecutive reauthorization in 1982, 1987, and 1994. Finally, I return to the present, linking this history with the current controversies about the Attorney General’s discretion, the independent counsel’s independence, and the alternatives to the independent counsel in a climate of distrust.

II. THE AD-HOC USES OF SPECIAL PROSECUTORS

Special prosecutors were appointed in three major national political scandals in the twentieth century prior to the adoption of the 1978 provisions. In the Teapot Dome scandal of the 1920s, the tax scandal of

the 1950s, and the Watergate scandal of the early 1970s, presidentially appointed special prosecutors investigated allegations of wrongdoing by executive branch officials. It was the Watergate scandal that most directly led to the creation of the Ethics Act provisions, but the experience with the other two scandals offers additional insight into the dilemmas posed by independent prosecution.

A. Teapot Dome

The administration of Warren G. Harding, often characterized as one of the most corrupt of the twentieth century, was plagued by charges of cronyism and corruption. The most historically significant of these charges were attached to the Teapot Dome scandal, which involved allegations of bribery and corruption in the leasing of the federal government's naval oil reserves to private businesses. The scandal grew out of the concerns of powerful conservationists that the Secretary of Interior, Albert Fall, was not adequately enforcing conservation policy. In April 1922 the Senate agreed to investigate the way in which Fall had handled the leasing of the Teapot Dome reserves. Responsibility for the investigation fell on the Senate Committee on Public Lands and Survey, but hearings were postponed until after the 1922 congressional elections.

Secretary Fall resigned in early 1923, but it was not until Harding's death in August of that year that the rumors of corruption turned into charges of bribery. Several months later the Senate finally began its investigation, and as more evidence was uncovered, the committee members began to talk of the need for a special counsel to handle the legal work involved in cancelling the illegal contracts. Coolidge was warned by Republicans on the committee that a special counsel was likely, and he decided to preempt that action by announcing his own appointment of counsel, drawn from both parties, to pursue the necessary litigation. He nominated former Democratic Senator Atlee Pomerene of Ohio and future Supreme Court Justice Owen Roberts, then a prominent attorney from Philadelphia, to be special counsel in the case. The Senate ultimately confirmed the two in February 1924.

6. Id. at 42-49. S. Res. 282, 67th Cong. (1922); S. Res. 294, 67th Cong. (1922). The first resolution authorized the committee to investigate the leases, and the second authorized the subpoenaing of witnesses and documents and the ability to hire outside counsel and cite noncooperating witnesses with contempt.
7. NOGGLE, supra note 5, at 91.
8. Id. at 91-115.
Pomerene and Roberts worked for the next four years on the cases arising from the scandal. The Senate Committee continued its hearings, and a special committee was formed to investigate whether the Attorney General, Harry Daugherty, had obstructed efforts to investigate the case. Daugherty resigned under this cloud of suspicion. In 1931 Albert Fall entered federal prison after having been found guilty of accepting a bribe for the oil leases and after having had his various appeals rejected.  

B. The Tax Scandals

The tax scandals of 1951 and 1952 were similar to the Teapot Dome scandal in that they began with a congressional investigation that led to the appointment of a special prosecutor. Congressional hearings into allegations of misconduct by the Bureau of Internal Revenue and the Tax Division of the Justice Department uncovered widespread tax fixing involving complicity between both agencies. Large numbers of revenue officers were forced to resign, and in 1952 the former Commissioner of Internal Revenue and his assistant were convicted of tax fraud. The assistant attorney general responsible for the Tax Division was fired and later convicted of conspiring to fix a tax case. Despite these efforts by the administration to respond to the scandal, Congress continued its embarrassing investigation, and President Harry S. Truman decided to appoint a special commission to investigate the allegations.  

Truman chose Newbold Morris, a New York attorney with a reputation for fighting corruption, to lead the investigation. Morris's first act was to prepare a questionnaire that was designed to measure income and expenses to test whether the attorneys filling it out were living beyond their means. The special counsel decided to ask all government officials (including the President and Attorney General) to complete the form, not just the attorneys in the two agencies under suspicion. When Truman suggested to Attorney General Howard McGrath that Morris was reaching beyond his assignment, McGrath fired Morris. Truman

9. Id. at 117-27, 210-11. See also Leases Upon Naval Oil Reserves, Senate Committee on Public Lands and Surveys, 68th Cong. (1923).
promptly fired McGrath, and the resulting controversy offered much fodder for the Republicans in the 1952 campaign.12

C. Watergate

The Watergate scandal stands out among American political scandals because it forced Richard Nixon's resignation from the presidency. But beyond that dramatic conclusion, it was significant because it resulted in the criminal convictions of a former Attorney General, a number of high-level White House aides, many lower level executive branch officials, and some private individuals and corporations. The vast majority of these convictions was obtained by a series of special prosecutors appointed by the Attorney General to investigate the charges.13 Above all, the scandal is important to understanding the current independent counsel arrangement because it was the firing of the first Watergate Special Prosecutor, Archibald Cox, which prompted the congressional efforts to create a mechanism for an independent, judicially appointed prosecutor.

The Watergate scandal began with a break-in at the Democratic National Committee headquarters in June 1972 and ended with the resignation of President Nixon in August 1974. In between, a complex story of intrigue and cover-up gradually emerged through the work of enterprising journalists,14 congressional investigators,15 and special prosecutors.16 The full story of the scandal has been told many times,17 so the emphasis here will be on two major aspects of the scandal that most help us understand the current controversy: the

12. GOSNELL, supra note 11, at 501; FERRELL, supra note 11, at 144; NEWBOLD MORRIS, LET THE CHIPS FALL: MY BATTLES WITH CORRUPTION 14-15 (1955). A copy of the questionnaire can be found in the back of Morris's book. Id. at 297-308.
questionable behavior of some Justice Department officials in the early part of the investigation and the "Saturday Night Massacre."

The Watergate burglars were prosecuted for the break-in by the U.S. Attorney's office for the District of Columbia. In January 1973 three of the five pleaded guilty. The two others were tried, but during the trial no evidence of the involvement of anyone higher up emerged. Outside the courtroom, however, the Washington Post continued to uncover evidence of a conspiracy, and in February the Senate agreed to establish a select committee to investigate the allegations. At the sentencing of the burglars in late March, one of the accused (James McCord) informed Judge John Sirica that they had been pressured to plead guilty, that some defendants had committed perjury during the trial, and that there were others involved who had not been prosecuted. McCord sought and received immunity from the Senate committee in exchange for his participation in the hearings. The President's counsel, John Dean, followed suit. Both testified before a grand jury that had been established by the Department of Justice to investigate the mounting allegations of conspiracy. In April Attorney General Richard Kleindienst was forced to resign along with H.R. Haldeman and John Erlichman, the President's closest aides. As these events unfolded, the credibility of the Department of Justice was called into question. Had the Department, either intentionally or unwittingly, participated in the cover-up? Why had the prosecutors pursuing the case against the burglars not been able to discover the conspiracy? These questions forced to the forefront the issue of whether the Department could be trusted to impartially investigate the case.

Elliot Richardson was nominated to replace Kleindienst, and in announcing the nomination, Nixon pointed out that Richardson had the authority to seek a special prosecutor for this case if he deemed it necessary.\textsuperscript{18} The Senate Judiciary Committee made clear that it intended to link Richardson's confirmation with the appointment of a special prosecutor.\textsuperscript{19} At the confirmation hearings, Richardson pledged to make the appointment, and his choice, Harvard Law Professor Archibald Cox, testified before the Committee as to his guarantees of independence. Richardson was confirmed shortly thereafter.\textsuperscript{20}

\textsuperscript{18.} President's Message Announcing Resignations and Appointments, Together with Assignment of Responsibilities Regarding the Watergate Investigation, 9 WEEKLY COMP. PRES. DOC. 431 (Apr. 30, 1973).


\textsuperscript{20.} Nomination of Elliot L. Richardson to be Attorney General: Hearings Before Senate Comm. on the Judiciary, 93d Cong. 4, 146-60 (1973) (Richardson's statement of intent to accept Senate Judiciary Committee approval of special prosecutor; Cox testimony).
The Watergate Special Prosecution Force, with Cox at the helm, was set up through a Justice Department regulation that codified Richardson's promises of independence.\(^{21}\) It was not long into the investigation before it became embroiled in a dispute with Nixon's lawyers over access to presidential tape recordings and official records sought by the Force. Cox won the legal battle\(^{22}\) and refused to accept Nixon's proposed "Stennis Compromise," which would have permitted Senator John Stennis, an esteemed but aging Democrat, to review the tapes aided by transcripts prepared by the White House. This confrontation led to the famed Saturday Night Massacre. On October 20, Cox was fired, upon Nixon's orders, by Acting Attorney General Robert Bork after Attorney General Richardson and his deputy, William Ruckelshaus, had refused to carry out the order and resigned.\(^{23}\)

The overwhelming public outrage\(^{24}\) that followed these events convinced Congress that it must act to insure an independent investigation in this case and set the stage for the discussion of a long-term solution for future cases. Within days of the massacre, both houses of Congress held hearings to consider the establishment of a special prosecutor's office with legislative guarantees of independence.\(^{25}\) A bill creating a judicially appointed special prosecutor, introduced on October 23, 1973 in the House, had 150 sponsors.\(^{26}\) The Senate focused its attention on a bill, introduced by Birch Bayh and fifty-two other senators, that also called for judicial appointment. Bayh urged Congress to "set out as its first order of business, the difficult, but... essential goal of reestablishing the public faith and confidence from which all else

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Richardson was confirmed by the Senate on May 23, 1973. 93 CONG. REC. 16,749-56 (1973).
24. According to Western Union, the number of telegrams that arrived in Washington after the "massacre" was the "heaviest volume on record." BEN-VENISTE & FRAMPTON, supra note 16, at 150. By Monday, 150,000 telegrams arrived in the District. Ten thousand went to the White House, the rest to the Watergate Special Prosecution Force ("WSPF") and Congress. Ten days later the number had risen to 450,000. Id.
proceeds in a democracy. The massacre led to the widespread belief that executive control of the special prosecutor quite clearly could, and in this case quite dramatically did, interfere with the independence of an investigation.

A week after Cox's firing, hoping to preempt congressional action, Bork appointed a new special prosecutor. Congress was initially suspicious of Leon Jaworski, a prominent attorney from Texas, and it continued its hearings. Before ending its hearings on November 20, the Senate Judiciary Committee asked Jaworski to testify before it. Jaworski assured the Committee of his independence, pointing to new regulations that required the consent of the majority of the Judiciary Committee before he could be fired. Congress seemed satisfied with these assurances and stopped talking about creating a judicially appointed office for this case.

There continued to be interest in Congress for creating an independent prosecutor mechanism for future cases and for finding other ways to insulate the Department of Justice from political influence. Thirty-five different bills with 165 sponsors were introduced in Congress over the next few months proposing various solutions to these problems. Combined with the memory of the Saturday Night Massacre were concerns about declining public confidence in government (and Congress

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in particular)\textsuperscript{31} and the very real potential for consequences at the polls come election time.\textsuperscript{32}

\textbf{D. The Lessons of Ad-Hoc Appointments}

As Congress considered legislation to respond to Watergate, it was met with competing historical lessons from the previous ad-hoc appointments surveyed here. All three investigations demonstrated that when a scandal implicates the President or the Attorney General, congressional and public pressure can be brought to bear to insure that an independent investigation takes place. This lesson seemed to imply that there was no need for a legislated response that removed the appointment of a special prosecutor from the executive branch.

On the other hand, a competing and perhaps more powerful lesson was also evident. In two of the three ad-hoc cases, both of which involved the investigation of the sitting President's administration, the special prosecutor had been fired. Proponents of an independent statutory mechanism could point to the demonstrated threat to independence of having the executive control the prosecutor. Doubts about the prosecutor's independence could undermine public confidence in the investigation and defeat the purpose for having an independent investigation. The memory of the Saturday Night Massacre had a profound impact on Congress, and it was ultimately this lesson of the negative consequences of executive control that drove the reform effort.

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\item Public opinion polls showed a marked decline in public confidence in government throughout the 1970s, but the steepest drop was during and immediately after the Watergate scandal. \textit{Gladys Engel Lang & Kurt Lang, The Battle for Public Opinion: The President, the Press, and the Polls During Watergate} 241-46 (1983). The Harris survey found that between 1966 and 1976, the number of those having a great deal of confidence in the executive branch and Congress dropped dramatically. Confidence in the President dropped from forty-one percent to eleven percent. Probably more alarming to Congress was that during that same time, confidence in Congress dropped from forty-two percent to nine percent. There was a slight increase in confidence in both institutions after the 1976 elections, but it remained quite low. \textit{More Confidence in Leadership}, 5 \textit{Current Opinion} 37 (1977).
\item The mid-term election of 1974 was devastating for congressional Republicans. The Democrats gained forty-three seats in the House and three in the Senate, many in what had been solidly Republican districts. \textit{Congress and the Nation} 8-9 (1977). The 1976 election continued the trend, putting a Democrat in the White House and continuing the "retaliation of the electorate against the Nixon loyalists" in Congress. \textit{Gerald M. Pomper, et al., The Election of 1976: Reports and Interpretations} 87 (1977).
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III. THE CONGRESSIONAL DEBATE—1973 TO 1978

During the five years that Congress struggled with a legislative response to Cox’s firing, the debate centered primarily around a constitutional dispute over the meaning of the separation of powers. At the center of the constitutional issue was the tension between two competing values at stake in criminal prosecutions of executive branch officials: independence and accountability. The arrangement that Congress adopted in 1978 and that is essentially unchanged today can best be explained as a reasonable effort by Congress to balance these competing values in a manner that could withstand constitutional scrutiny.

A. The Constitutional Dispute

The central disagreement over special prosecutor legislation was whether the power to appoint a special prosecutor could be removed from the executive branch and placed in the judicial branch. Attached to that concern were secondary issues about the term of office and the power of removal. Where one fell in this debate tended to depend upon whether one viewed the separation of powers doctrine as a flexible one that allowed some blending of powers or a more formalistic one that drew the line more sharply between departments.

Because of the events of Watergate, there was considerable distrust of the executive and a concomitant trust of the judiciary. The role played by Judge John Sirica in the Watergate trial was viewed quite favorably by members of Congress. In addition, judicial appointment seemed the only constitutional alternative to executive appointment.

The arguments for judicial appointment were based in the largest sense on the argument for independence. If special prosecutors were to be truly independent of the executive, then they must not be subject to appointment and removal by the executive. Proponents of this position based their argument on several provisions of the U.S.

33. This view was especially prevalent in the early hearings by the House and Senate Judiciary Committees following the Saturday Night Massacre. Sirica’s refusal to believe the Watergate burglars were telling the whole story contributed to the unraveling of the cover-up. See John Sirica, To Set the Record Straight (1979).

Constitution as well as a body of supporting case law. They began by citing Article I, Section 8, "the necessary and proper" clause. Given the problem of conflict of interest when the executive branch is called upon to investigate itself and the need for public confidence in an impartial investigation in these cases, it was both necessary and proper to vest appointment in someone outside the executive branch. Beyond this broad Article I claim, proponents relied on Article II, Section 2, which gives Congress the power to vest appointment of "such inferior officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." While the appointments clause clearly seemed to exclude Congress from making the appointment, the case law on congressional grants of appointment authority to the judiciary appeared to support this alternative. In no case in which Congress had vested appointment power in the courts had that decision been found to be unconstitutional.

Opponents of a judicially appointed prosecutor also found support in Article II. Section 1 vests "executive power" in the President. While the boundaries of that power are not clearly demarcated, it has generally been presumed to include law enforcement because of the requirement in Section 3 that the President "take care that the laws be faithfully executed." Those who advocated executive appointment of a special prosecutor insisted that Article II compels two conclusions: enforcement of the law is an inherently executive function, and the executive branch has sole constitutional authority for carrying out that function. These advocates could also call upon case law to support their position because the courts had fairly consistently upheld executive authority over law

37. Id. at 73.
40. U.S. CONST. art. II, § 3.
Finally, opponents presented an Article III argument. They claimed that judicial appointment of prosecutors created a problematic blending of judicial and executive power that permitted the unconstitutional supervision of the discretionary powers of prosecutors by the judiciary. 43

A secondary issue to the appointment dispute involved removal of the special prosecutor. Positions here tended to depend upon the position taken on the larger issue of appointment. The incident with Cox demonstrated that independence could not be guaranteed without some protection from summary dismissal, and there was case law to support the notion that Congress could guarantee independence through limitations on removal. 44 But if the judges who appointed the counsel could dismiss them as well, then even supporters of judicial appointment feared that the arrangement might run into constitutional problems because it would imply too much judicial control over prosecution. On the other hand, supporters of executive appointment insisted that no removal restrictions were appropriate because law enforcement was an inherently executive function over which the President must have complete control. Case law did suggest that the executive could remove purely executive officers at will. 45

As is so often the case in constitutional disputes, members of Congress were faced with an interpretive dilemma. They had separate provisions of the Constitution, each with its own supporting case law, that were in conflict on this particular issue. The constitutional ambiguity had the effect of slowing down the process of consideration and creating a climate in which compromise seemed appropriate. It offered nonpartisan cover to those who wanted to oppose the reform but feared doing so in the political climate of the time. And finally, it invited the executive branch to resist the proposed legislation as a matter of defending institutional prerogative rather than as a matter of resisting reform.

42. Ponzi v. Fessenden, 258 U.S. 244 (1922); Springer v. Government of the Phil. Islands, 277 U.S. 189 (1928); United States v. Cox, 342 F.2d 167 (5th Cir. 1965); Newman v. United States, 382 F.2d 479 (D.C. Cir. 1967). But see Ex parte Siebold, 100 U.S. 371 (upholding judicial appointment of election supervisors despite the recognition that they were carrying out executive duties).

43. Special Prosecutor, supra note 36, at 37. Baker, supra note 41, at 679-81. See also United States v. Marzano, 149 F.2d 923, 926 (2d Cir. 1945) (noting, in part, that prosecution and judgment "are separate functions" that "must not merge"). Marzano was cited by Judge Gesell in Nader v. Bork, 366 F. Supp. 104, 109 (D.D.C. 1973), the suit that challenged Cox's firing. Judge Gesell noted the suggestions that the judiciary appoint special prosecutors with distaste because he believed that courts "must remain neutral. Their duties are not prosecutorial." Id.


B. Other Matters of Dispute

In addition to the constitutional concerns, Congress struggled with a set of more pragmatic issues in its consideration of special prosecutor legislation. Although not unrelated to the constitutional concerns, these issues centered around the accountability implications of creating an independent arrangement regardless of who did the appointing.

The central pragmatic dispute was over whether the office should be a permanent or temporary one. A number of the proposals considered in the wake of the Saturday Night Massacre called for the creation of a permanent office with a fixed term and protection against summary dismissal by the President. The basic assumption of these proposals was that the problem of the executive branch investigating itself was an enduring one. Having a permanent office would insure that we were prepared for the next Watergate and would deter public officials from misconduct in the future.\(46\) Others preferred a temporary arrangement in which appointment would be “triggered” when the need arose but no ongoing bureaucratic enterprise would exist. They argued that a permanent independent office created greater problems of accountability and greater infringement on executive power while making it more difficult to attract high-quality attorneys willing to give up their law practices. In addition, critics of a permanent office challenged the notion that Watergate was typical and questioned whether there was sufficient work for a permanent office. Some feared that a permanent office might feel the need to justify its existence by creating work when it was not warranted.\(47\) Instead, they argued that appointment should only be triggered when the need arose and that at the end of the investigation, the office should be shut down. The American Bar Association proposed what it considered a workable triggering mechanism based on particular legal findings of the possibility of criminal misconduct.\(48\)

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46. Proposals ranged from terms of three years to fifteen years. Appointment schemes varied between presidential and judicial appointment, but all contained removal restrictions. These views were particularly prevalent during consideration of the Watergate Reorganization and Reform Act of 1975, which proposed the establishment of a permanent office of public attorney. Watergate Reorganization and Reform Act of 1975, Part I: Hearings on S. 495 Before Comm. on Gov't Operations, 94th Cong. (1975) [hereinafter Watergate Reorganization]. See, e.g., id. at 4-5 (statements of Senator Lowell Weiker); id. at 5 (statements of Senator Walter Mondale); id. at 86 (statements of SamDash); id. at 297 (letter from political scientist James Sundquist).

47. Id. at 103-05 (statements of Leon Jaworski); id. at 120-21 (statements of Henry Ruth); id. at 219 (letter from Peter Dingman).

There were other miscellaneous concerns expressed during the debate that continue to resonate today. Gerald Ford's Attorney General Edward Levi expressed concern about the damage to people's reputations that could result from the public reporting requirements of the proposals and the lack of confidentiality safeguards. He also warned that the creation of a temporary office might lead to the proliferation of prosecutors in multiple cases at the same time. Congressman Henry Hyde warned of the return to McCarthyism, suggesting that an independent permanent office with limits on removal might wield unaccountable and awesome power to ruin people's lives. Philip Lacovara, a former member of the Watergate Special Prosecution Force, argued that "abuses of public office will not be cured by giving unbridled power to an ombudsman with a roving commission to do justice as he sees it." Finally, former Solicitor General Erwin Griswold and political science professor Harold Seidman asked whether an independent office let the President off the hook for faithful execution of the law. Griswold asked, "Is it not better to put the responsibility squarely on the Executive Branch, and then hold the Executive Branch responsible?" Seidman wrote in a letter, "I want the President to be held responsible and accountable for maintaining the honesty and integrity of the executive branch, and I don't want this responsibility to be shared, even in a small way, with the Office of Public Attorney."

IV. CONGRESS ACTS

By the end of hearings on the Watergate Reorganization and Reform Act in 1976, a general consensus had emerged that the creation of a permanent office was a bad idea. Instead, support for an independent arrangement had coalesced around the American Bar Association's proposal for a temporary judicial appointment triggered by the Attorney General. In mark-up of the bill, the Senate Government Operations Committee amended the bill to reflect this new consensus, and the Senate prepared to debate it. But the Department of Justice, led by Levi, mounted an intense lobbying campaign against the bill, insisting


50. Id. at 15-16.

51. Watergate Reorganization, supra note 46, at 261 (letter from Phillip A. Lacovara).

52. Id. at 234 (letter from Griswold).

53. Id. at 288 (letter from Seidman).

that the judicial appointment violated the Constitution.\textsuperscript{55} There were a number of influential senators who shared this concern, and the Department was successful in convincing the Senate to amend the bill yet again, this time providing for a permanent office within the Department of Justice. The amended bill passed overwhelmingly in the Senate in 1976\textsuperscript{56} but languished in the House where a combination of supporters of judicial appointment and opponents of any independent mechanism at all were able to block the Senate proposal.\textsuperscript{57}

The election of a new President in 1976 cleared the way for passage of a special prosecutor arrangement. On February 1, 1977, the Public Officials Integrity Act, which included a temporary special prosecutor mechanism, was introduced in the Senate. In May, when the hearings on the bill began before the Senate Governmental Affairs Committee,\textsuperscript{58} President Jimmy Carter made it clear that he supported the legislation.\textsuperscript{59} Most of the debate during these hearings focused on the financial disclosure portion of the bill rather than on the special prosecutor. Another key difference was the support of the Department of Justice. While it disagreed with some of the details of the arrangement, the Department conceded that in special cases the temporary judicial appointment was not unconstitutional.\textsuperscript{60} The Senate moved quickly and passed the bill within two months of the hearings.\textsuperscript{61}

Again, there was delay in the House, where members were embroiled in their own scandal (Koreagate) and where there continued to be much disagreement over whether any independent mechanism at all was warranted.\textsuperscript{62} The House Judiciary Committee report, issued a year after the Senate had passed the reform bill, revealed continued division over the constitutional issues and over whether the statute ought to

\textsuperscript{55} Mary Link, \textit{Senate Prepares to Debate Watergate Reform Measure,} 34 \textit{Cong. Q. \textbf{Wkly. Rep.}} 1903-04 (1976).


\textsuperscript{57} See Provision for Special Prosecutor, supra note 49.

\textsuperscript{58} See Public Officials Integrity Act of 1977, \textit{Blind Trusts, and Other Conflict of Interest Matters: Hearings Before Senate Comm. on Governmental Affairs,} 95th Cong. (1977) [hereinafter Public Integrity Act].


\textsuperscript{60} Public Integrity Act, supra note 58, at 9 (statement by John Harmon, Office of Legal Counsel, Department of Justice).


apply to Congress as well.63 It was September 1978 before the House passed any post-Watergate reform, and its bill did not include provisions for a special prosecutor. In the conference committee, the special prosecutor provisions were added to the final bill, and the conference report was adopted by both houses and signed into law by the President in October 1978.64

The issues raised in the five-year debate about special prosecutors would have important implications for the way in which the independent arrangement was structured. The provisions that Congress adopted reflected the tensions inherent in our constitutional system of separation of powers. The final product attempted to strike a balance between the traditional expectation that law enforcement was an executive function and the congressional perception that public confidence depended upon independence for a special prosecutor charged with investigating the executive branch. In a more general sense, it was an effort to accommodate both the demands for constitutional accountability and institutional independence. Too much weight on making the prosecutor accountable to the executive would have raised serious doubts about independence, something a majority of Congress was simply not prepared to accept in the wake of the Saturday Night Massacre. On the other hand, too much weight on the value of independence raised serious questions of constitutionality and had the potential for creating an office with a dangerous amount of power. The accommodation of these values occurred through the division of responsibility for implementation between the Attorney General and a panel of judges.

The Attorney General was given the authority to “trigger” the appointment of a special prosecutor. Upon receiving specific allegations of federal criminal law violations by a specified group of high-ranking executive branch officials, the Attorney General was required to conduct a preliminary investigation into the charges.65 The Department had ninety days to conduct the investigation but was not permitted to use the compulsory process to obtain information.66 During this time the Attorney General had to decide whether the charges warranted further investigation or prosecution. If not, they were required to file a report with a special division of the Court of Appeals for the District of

64. 124 CONG. REC. 34,528 (1978) (Senate vote on conference report); 124 CONG. REC. 36,469 (1978) (House vote on conference report); Remarks on the Signing of S. 555 into Law, 14 WEEKLY COMP. PRES. DOC. 1854-56 (Oct. 26, 1978).
66. Id. § 592(a)(1), (2).
Columbia explaining why no further action was warranted. If further action was recommended, then the Attorney General was required to file a report on these findings with the same judicial panel and request the appointment of a special prosecutor. Finally, the Attorney General was given the power to remove the special prosecutor for "extraordinary impropriety." These provisions of the Act reflected Congress's uncertainty about the constitutional question of whether law enforcement functions could be removed from executive control. By placing the power to trigger the Act in the hands of the Attorney General, Congress opted to recognize the accountability issues at the root of this dispute.

The actual appointment of a special prosecutor, however, was placed in the hands of a special court panel established for the purposes of the Act. The panel was to consist of three senior or retired federal circuit court judges, appointed by the Chief Justice of the United States Supreme Court. It had the responsibility of appointing special prosecutors, defining their jurisdiction, receiving the reports of the Attorney General and the special prosecutor, and deciding whether or not to make those reports public. Although the power of removal was vested in the Attorney General, the panel could review any decision of removal if the special prosecutor requested it. The panel did not have the power to review decisions by the Attorney General to request an appointment. In creating the court panel and giving it the power of appointment, Congress clearly sought to guarantee that the actual conduct of an investigation and prosecution (if necessary) would be done by an agent largely independent of the Attorney General. Here Congress opted to weigh in on the side of independence.

V. IMPLEMENTATION AND REAUTHORIZATION

In constructing the particular mechanism that it did, Congress sought to compromise on the competing concerns raised in the debate. A review of both the implementation of the provisions and the debates that arose during each consecutive reauthorization reveals that the problems identified in the first debate continued to plague congressional decision makers. During each reauthorization debate, the experience under the Act in the previous five years served as evidence of whether the

67. Id. § 592(b)(1), (2).
68. Id. § 592(c)(1).
69. Id. § 596(a).
70. Id. § 49.
71. Id. §§ 593(b), 595(b)(3).
72. Id. § 596(a).
73. Id. § 592(f).
provisions were meeting the dual goals of independence and accountabil-
ity. In addition, the concerns about fairness of the arrangement to its
targets and about the politicization of the process were given renewed
attention as implementation made them no longer hypothetical. Finally,
until the Court addressed the issue in 1988, the constitutional debate
about the provisions continued to shape the reauthorization efforts.

A. 1978 to 1982

During the first five years of the life of the provisions, several events
led to a reconsideration of decisions made in 1978. Three special
prosecutors were appointed, two to investigate allegations of cocaine use
by White House staff members during the Carter Administration and
one to investigate alleged connections to organized crime by President
Ronald Reagan's Secretary of Labor Raymond Donovan. In what
seemed an inevitable occurrence given the constitutional debate
surrounding passage of the Act, a civil suit was filed by one of the
targets of a special prosecutor provision challenging the constitutionality
of the Act. Finally, a new Republican administration was elected in
1980, one that was hostile to the Act and prepared to advance a broad
reading of executive powers throughout its dealings with Congress.
Republicans had also gained control of the Senate, making it more likely
that the President's concerns would receive a sympathetic hearing in
that body.

The first two investigations under the Act, of Hamilton Jordan and
Timothy Kraft for allegedly using cocaine in social settings, gave
credence to the administration's claim that the Act had a "hair trigger"
and was thus unfair to the officials covered under the Act. In each of
these cases, the targets were cleared after six-month grand jury
investigations. Critics noted the unwarranted expense of investigations
of this magnitude into allegations that would have been ignored by U.S.
Attorneys had they been made against ordinary citizens. The Depart-
ment of Justice insisted that it needed more discretion in triggering the
Act.76

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75. Arthur Christy, Report of the Special Prosecutor on Alleged Possession of Cocaine
   Gerald Gallinghouse, In Re Investigation of Allegations Concerning Timothy E. Kraft:
   15, 1982; Leon Silverman, Report of the Special Prosecutor, Washington, D.C., June 25,
   1982.
   Before the Subcomm. on Oversight of Gov't Management of the Senate Comm. on
During the reauthorization process, Congress also considered the fact that Timothy Kraft had filed a civil suit challenging the constitutionality of the provisions under which he was being investigated. Kraft's lawyers sought to enjoin the special prosecutor from investigating him, arguing that Gerald Gallinghouse, the special prosecutor, was "exercising Executive power and authority in violation of the Constitution of the United States."  Specifically, the suit challenged the role of the judiciary in supervising a law enforcement official, the presumption that the special prosecutor was an "inferior officer" under the appointments clause, the designation of a panel of judges assembled for appointment purposes as a "Court of Law," and the restrictions on the Attorney General's removal powers.

Kraft v. Gallinghouse was never decided because the special prosecutor cleared Kraft of the charges before a decision could be reached. Consequently, the constitutional debate continued to be a part of the reauthorization debate, and the new administration took up the banner of the side questioning the constitutionality of the provisions. The new Attorney General, William French Smith, raised the issue in a letter to the Senate Legal Counsel in 1981, writing, "In some or all of its applications, the Act appears fundamentally to contradict the principle of separation of powers erected by the Constitution .... If the Department's position is sought in future litigation, we would espouse views consistent with the above and addressed to the specific facts of the case."

The Amendments of 1983 reflected these executive concerns although they failed to go as far as the Reagan Administration had hoped. The Attorney General's discretion to trigger the act was increased, but the appointment by the panel of judges was maintained. The standard for triggering was lowered to allow the Attorney General
to consider both the specificity of the allegations and the credibility of the accuser. The standard for removal was lowered to "good cause." And finally, the special prosecutors were required to follow Department of Justice guidelines in making determinations about whether to pursue cases, "except where not possible." In order to address the concerns about the effect of these investigations on the targets, Congress added a provision permitting the court panel to reimburse attorney fees for targets who were not indicted. It also changed the name of the special prosecutor to the "independent counsel" in order to try to reduce the stigma attached to the special prosecutor title.

Despite these concessions to the critics, Congress was not prepared to abandon the independent counsel arrangement nor alter it fundamentally to allow the Attorney General complete control. The symbolic value of independence from the executive was still perceived as being important and the fact that a hostile President nonetheless signed the reauthorization bill suggests that even the executive branch recognized the political danger of challenging that independence.

B. 1983 to 1987

During the next five-year period, ensuing events shaped the debate for the next round of reauthorization. More independent counsel were appointed, more legal challenges were made, several key lower court decisions interpreting the Act had an impact on implementation, and key changes in leadership in both Congress and the executive branch created new opportunities for confrontation. The effect of these events was to swing the pendulum back towards limiting Attorney General discretion.

Independent counsel were publicly appointed between 1982 and 1987 to investigate a number of covered officials in the Reagan Administration. Cases involving Edwin Meese, Lynn Nofziger, Michael Deaver, and the Iran-Contra scandal were higher profile and more controversial than the earlier cases had been. In addition, in a case that received much less attention, an independent counsel was appointed to investigate whether Justice Department official Theodore Olson had lied to Congress during a House committee investigation into the Environmental Protection Agency in the early 1980s. This case gained public attention only after Olson's constitutional challenge became the vehicle by which

83. Id. § 596(a)(1).
84. Id. § 594(f).
85. Id. § 593(f).
the United States Supreme Court would consider the constitutionality of the Act.

Prior to the 1987 reauthorization hearings, Michael Deaver, Oliver North, and Theodore Olson all mounted legal challenges to the constitutionality of the independent counsel arrangement. In addition to the constitutional challenges, the federal courts were also asked to interpret the provisions dealing with the Attorney General's role in triggering the appointment. During the service of William French Smith, there were three efforts by individuals to force Smith to trigger the appointment of an independent counsel when he had made a determination that no further investigation or prosecution was warranted. Each effort ultimately failed because appellate courts concluded that the Attorney General's decision of whether to seek appointment was a discretionary one that was not reviewable by the courts.

In addition to the legal challenges, the 1987 reauthorization was also influenced by the appointment of Edwin Meese to be Attorney General during Reagan's second term, the Senate's return to Democratic control, and the Iran-Contra scandal that broke into the headlines in late 1986. The fact that the Attorney General had twice been the target of independent counsel investigations and had publicly challenged the constitutionality of the arrangement served only to convince many in Congress of the need for an independent arrangement. With Meese as Attorney General and Carl Levin of Michigan as the new chair of the Senate oversight subcommittee with jurisdiction over the provisions, it was not surprising that the 1987 changes to the statute did not favor the executive position. Furthermore, by this time Reagan's popularity had been seriously diminished by the "political body blow" of the Iran-Contra scandal.

In preparation for the 1987 hearings, the Senate subcommittee staff investigated how the statute had been implemented since 1983. What they discovered was a disturbing pattern of interpretive devices being employed by the Department that the staff believed were not within the

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87. Banzhaf v. Smith, 737 F.2d 1167 (D.C. Cir. 1984); Dellums v. Smith, 797 F.2d 817 (9th Cir. 1986); Nathan v. Smith, 737 F.2d 1069 (D.C. Cir. 1984).
statutory authority of the Attorney General. The committee report concluded that “contrary to the statutory standard, in 50% of the cases handled by the Justice Department since 1982 in which it declined to conduct a preliminary investigation of a covered official, it relied on factors other than credibility and specificity to evaluate the case.” 90

The report also cited problems in the interpretation of the recusal requirements, the “good cause” standard of removal, and the status of the independent counsel and their staff vis-a-vis the Department. 91 In opening the hearings, Senator Levin accused the Department of an “indirect assault” on the statute by “trying to undermine the process through the back door after being so unsuccessful using the front door.” 92

In contrast to the 1982 reauthorization, the 1987 amendments focused on limiting the Attorney General’s conflict of interest. The oversight investigation seemed to suggest that the 1982 enhancements of the Attorney General’s discretion, combined with the appellate court rulings upholding that discretion, had put too great a weight on executive powers at the expense of the value of independent investigation. As a result Congress adopted several “clarifying” amendments designed “to deal with Ed Meese.” 93 These amendments included limiting the criteria used in deciding whether to begin a preliminary investigation to “only” specificity of allegations and credibility of source; 94 limiting threshold inquiries to fifteen days and requiring the Attorney General to inform the court panel when a preliminary investigation has begun; 95 requiring the Attorney General to provide a prior, written recusal decision when he becomes personally involved in a case covered by the provisions, whether he recuses himself or not; 96 and limiting the Attorney General’s ability to use “state of mind” criteria to dispose of cases to only those cases in which a preliminary investigation has provided “clear and convincing” evidence to that effect (in which case a written report to the special panel was required). 97

91. Id. at 11-13.
92. Oversight of the Independent Counsel Statute: Hearings Before the Subcomm. on Oversight and Gov’t Management of the Senate Comm. on Governmental Affairs, 100th Cong. 2 (1987) [hereinafter Oversight].
95. Id. §§ 591(d)(2), 592(a)(1).
96. Id. § 591(e).
97. Id. § 592(a)(2)(B).
The threat of a constitutional challenge hung over the 1987 reauthorization efforts. The D.C. Circuit decisions on the Attorney General's discretion in triggering the Act and several recent Supreme Court decisions about separation of powers issues seemed to favor the executive power argument.\(^9\) Supporters of the arrangement believed that the key to the constitutionality of the statute was the temporary nature of the office, the limited jurisdiction of the independent counsel, and the role of the Attorney General in the process. Thus, proposals to counteract the Attorney General's discretion through the strengthening of the court panel's power to expand the independent counsel's jurisdiction over the Attorney General's opposition were rejected. Instead, the Act was amended to encourage the Attorney General to give "great weight" to a request for expansion of jurisdiction by the independent counsel, but the decision to refuse a request was not reviewable by the court panel.\(^9\)

Finally, it is worth noting that almost fifteen years after the firing of Cox, that event still resonated with members of Congress, and the concern of public confidence was strong enough to get presidential approval for a bill that his administration claimed was unconstitutional. In responding to the Department of Justice proposal for presidential appointment of the independent counsel, Senator Levin called upon the memory of Watergate, accusing the Department of Justice of wanting to return to "where we were in 1973 when we saw headlines about 'Nixon forces firing of Cox; Richardson, Ruckelshaus quit'. . . . what you want to do is say let's just forget what has happened in the 1970's with that Saturday Night Massacre."\(^{100}\) President Reagan signed the amendments into law "over the advice of top aides and despite strong personal reservations" because of the perceived impact on public confidence if he were to veto it.\(^{101}\) In his signing message, he said he was approving the legislation because it was necessary to insure public confidence even though he believed that the new restrictions on the Attorney General only served to "aggravate the infirmities" of the arrangement.\(^{102}\)

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100. Oversight, supra note 92, at 25.
C. 1987 to 1994

The period between the second and third reauthorization was filled with significant events that had a mixed effect on the independent counsel arrangement. The Supreme Court finally spoke on the issue and upheld the statute in *Morrison v. Olson*; the Iran-Contra scandal heated up and the independent counsel investigation of it became controversial itself; the statute was allowed to expire at the end of 1992 and was not reauthorized until 1994; and the new Democratic President, Bill Clinton, helped persuade Republicans in Congress that the much maligned Independent Counsel Statute might actually have some value to the party out of power.

In upholding the constitutionality of the independent counsel provisions, the Supreme Court relied upon essentially the same arguments that proponents of the arrangement made in the 1970s. The Court found that the appointments clause of Article II permitted the judicial appointment of this “inferior officer” because the duties, jurisdiction, and tenure of the counsel were limited by the statute and the Attorney General had the power of removal. Given Congress’s legitimate desire to insure independent investigation, the Court considered judicial appointment of a temporary prosecutor a logical and constitutional way to meet that end. Further, the Court rejected the claims that the arrangement was in conflict with Article III powers because the court panel’s authority was limited largely to powers incident to the appointment power. Finally, the Court addressed the argument that the provisions violated Article II by infringing on the power of the executive to control law enforcement. Noting again the limited nature of the independent counsel’s appointment and the amount of influence the Attorney General has in triggering the law, the Court found that the limits of the President’s ability to control the independent counsel did not impede his ability to faithfully execute the laws.

*Morrison* was important for two reasons. First, for all intents and purposes, it answered the constitutional questions that had plagued the arrangement through the first fifteen years of its life. Certainly, some critics believed the Court was wrong, but with seven Justices behind

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104. Id. at 695-96.
105. Id. at 670-77.
106. Id. at 677-84.
107. Id. at 685-96.
the arrangement, it was politically difficult to use the constitutional argument against the office. On the other hand, the Court's emphasis on the limited nature of the independent counsel's appointment and the significance of the role of the Attorney General in the process meant that those who might like to extend the powers of the court panel or the independence of the counsel also had a difficult case to make. If the Independent Counsel Statute were to die, it would have to be at the hands of Congress and for reasons other than its unconstitutionality.

The Iran-Contra scandal and the independent counsel investigation led by Lawrence Walsh\textsuperscript{109} offered the new avenue through which critics challenged the Act. Led by the efforts of Senate Majority Leader Bob Dole, in late 1992 Congress allowed the independent counsel provisions to expire without reauthorization. The focus of the criticism of the Act became the alleged abuses of power by Walsh, the long period of time he had taken to conduct the investigation, and the amount of money he had spent during the investigation. While the investigation produced fourteen indictments, seven guilty pleas, and four convictions, two of those convictions had been overturned on appeal (Oliver North and John Poindexter), and the cost of the seven-year investigation was almost forty-eight million dollars.\textsuperscript{110}

In 1993 as the new Democratic President became embroiled in the Whitewater scandal, many Republicans in Congress appeared to have a change of heart. Now there was an Attorney General of the other party, and they were unwilling to believe that she was able to conduct an investigation without a conflict of interest. Efforts to reauthorize the Independent Counsel Statute began anew, this time with the support of the President, the Attorney General, and the majority of Congress.\textsuperscript{111}

Finally, in June 1994 the independent counsel provisions were renewed.\textsuperscript{112} The amendments to the Act once again reflected the latest controversies that had arisen since the last reauthorization. This time the focus was on imposing more accountability on the independent counsel. Most significantly, the new provisions added rules on control-


\textsuperscript{110} Investigations by Independent Counsels: Should Congress Make Major Changes in the Law? \textit{CQ Researcher} 156 (1977) [hereinafter Independent Counsels].


ling the costs of investigations, a audits of independent counsel expense records, a requirement for annual reports to Congress from the independent counsel, requirements for complying with Department of Justice procedures involving the handling of classified documents, and a requirement that the appointing court panel review the investigation periodically to determine whether it should continue or be terminated.

VI. THE CURRENT CONTROVERSY

Since the reauthorization of 1994, the pendulum of independent counsel reform has swung from a continued critique of the excesses of independent counsel (this time focused on the investigations of Clinton Administration officials) to a severe critique of the Attorney General’s discretion under the Act prompted by her refusal to request appointment of an independent counsel for the campaign fundraising scandal. Until the fundraising scandal broke, the focus of attention was on the need to rein in independent counsel and to expand the discretion of the Attorney General to trigger the Act. No less a supporter of the independent counsel than Archibald Cox acknowledged that the arrangement was “overused and perhaps sometimes abused.” He argued that the potential for abuse could be reduced by limiting the coverage of the Act, raising the standard for triggering the Act to give the Attorney General more discretion, limiting the time period for an independent investigation, and requiring the independent counsel to work full time on the case. Only a year later, the climate for reform seems quite different. Now attention is focused on the Attorney General’s discretion as she is forced to defend her interpretation of her responsibilities of the Act before congressional overseers calling for her impeachment.

Can the history of the independent counsel provisions help us find solutions to the dilemmas raised by the current debate? It does not provide any easy answers. The original dilemma faced by Congress in the wake of Watergate endures despite the efforts of reformers to resolve it. Can independent prosecution coexist with executive branch accountability mechanisms? At best, we can only say that the coexis-

113. 28 U.S.C. § 594(a), (b), (c) (1994).
114. Id. § 596(c).
115. Id. § 595(a)(2).
116. Id. § 594(f).
117. Id. § 596(b)(2).
120. Id.
tence is an uneasy one, fraught with the kinds of problems that have been revealed through implementation. Attempts to respond to particular problems seem only to aggravate others. Increasing independence raises questions of accountability. Restricting counsel interferes with their independence. Giving the Attorney General more discretion seems only to enhance the potential for conflict of interest. Restricting that discretion leads to unfair and unnecessary appointments. Some delicate balance must be struck and then found to be acceptable as the least flawed of the available alternatives.

At worst, the answer must be no. A less optimistic interpretation of the implementation experience suggests that the 1978 compromise has met none of its intended goals. The Attorney General's potential conflict of interest has not been removed because she must trigger the Act. The independence of the prosecutor cannot be guaranteed without risking the creation of an unaccountable and dangerous law enforcement agent. Public confidence has not been restored and, some have argued, has in fact been harmed by the proliferation of independent counsel appointments. Before 1978 there were three scandals deemed worthy of independent investigation. Since the passage of the Act, there have been nineteen with the campaign finance issue left to be resolved. And quite clearly, "politics" has not been removed from the process of investigating and prosecuting executive branch officials. As control of the White House and Congress has changed, so too has the attraction of the independent counsel arrangement. What was once an unconstitutional invasion of executive power to many Republicans is now the arrangement that can save the Republic from efforts by Asians to buy the White House. What was once a necessary mechanism to insure public confidence and avoid conflict of interest to most Democrats is now a punitive, intrusive, unaccountable arrangement for partisan warfare.

There seem to be two possible alternatives to the current mechanism, and rather than defend one over the other, I want to point out why in the post-Watergate climate of distrust, neither seems as acceptable as the current arrangement, however flawed. First, Congress could severely restrict the Attorney General's discretion in triggering the Act and instead require that it be triggered anytime allegations of criminal misconduct are received against particular officials. This would eliminate the controversy surrounding how Attorneys General interpret the Act that we saw during Ed Meese's tenure and that has reappeared with the campaign finance controversy. The problems of this approach,

121. Garment, supra note 3.
122. Independent Counsels, supra note 110, at 156-57 (number climbed to nineteen with the appointment of an independent counsel to investigate Bruce Babbit).
however, are made clear in the history of implementation. Do we really want a "hair trigger" in the statute? Is it fair to the targets of investigation? Is it a cost-efficient way to handle public misconduct cases? Twenty years without an automatic trigger has produced seventeen investigations costing us $114.5 million thus far.\textsuperscript{123} An automatic trigger at a time of fierce partisan struggle could only multiply the investigations and the expense. Finally, the larger and more important expense is the "cost" to the psyche of the nation of proliferating independent counsel investigations.

Alternatively, we might conclude that the costs of meeting the independence goal are so great that we ought to return control of the investigation of these cases to the Department of Justice. This might involve a statutory requirement that the Attorney General appoint outside counsel in certain cases or simply leave it to her discretion as it was before 1978. In the current climate, the problem with this approach seems self-evident. Will a Congress controlled by a different party accept that appointment or the decision not to appoint? It seems highly unlikely. The one example we have of this approach occurred during the time when the Independent Counsel Statute had expired in 1992 but had not yet been reauthorized. Janet Reno, using her discretionary authority to appoint outside counsel, appointed Robert Fiske to investigate the Whitewater case. He was held in high suspicion by the Republicans in Congress, and his conclusion about the suicide of Vincent Foster was simply not accepted by congressional partisans. As soon as the statute was reauthorized, members of Congress urged the appointment of a new counsel, and Fiske was replaced by Kenneth Starr.\textsuperscript{124} The experience with Fiske suggests that returning appointment authority to the Attorney General is only a legislative likelihood when one party controls both ends of Pennsylvania Avenue and that party has sufficient strength in Congress to override the inevitable objections of the minority party to that arrangement.

In the end, the history of the independent counsel suggests that there are no simple solutions to the problems of executive branch investigation of itself. Our constitutional scheme of separation of powers, the post-Watergate climate of distrust, and the sustained period of divided government all explain why Congress adopted the arrangement that it did and why, despite its obvious flaws, we have been able to come up with no better alternative. Certainly, the current arrangement could be

\textsuperscript{123} Id. at 159.

\textsuperscript{124} See, e.g., Andrew Taylor, Special Counsel May Not Quiet Clamor Over Whitewater, 52 CONG. Q. WKLY. REP. 61-63 (1994); Andrew Taylor, Schedule of Hearings Is Unclear As Starr Takes Over Probe, 52 CONG. Q. WKLY. REP. 2316-17 (1994).
improved, but the history warns us that those changes may well be the cause of the next round of controversy about the statute. It was noble but naive to believe that politics could be removed from the consideration of these cases.