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# Independent Counsel Law Expiration and the Appointment of "Special Counsels"

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# Independent Counsel Law Expiration and The Appointment of "Special Counsels"


## Summary

The provisions of federal law governing the appointments of "independent counsels" expired on June 30, 1999. Since that date, no *new* independent counsels may be appointed by the special three-judge panel upon the request of the Attorney General, as had been provided for under the expired statute. All on-going investigations and pending prosecutions under the authority of an existing independent counsel, however, may be completed if deemed warranted by that independent counsel.

The Attorney General, under the Attorney General's existing authority to administer the Department of Justice, hire staff, and supervise all prosecution of federal offenses, may continue the practice of appointing a "special counsel" or a "special prosecutor" to conduct certain investigations and or prosecutions for the Justice Department on behalf of the United States. The Attorney General issued regulations for the Department of Justice on July 9, 1999, providing for the procedures, circumstances and conditions relative to the appointment of and the conduct of investigations and prosecutions by "special counsels," who would be appointed personally by the Attorney General within his or her own discretion. Unlike statutory "independent counsels," the conduct of investigations and prosecutions by "special counsels" under the Department of Justice regulations would be under the ultimate control of and subject to review and countermand by, the Attorney General.

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# Independent Counsel Law Expiration and the Appointment of "Special Counsels"

The "independent counsel" provisions of federal law, originally enacted in 1978, expired after June 30, 1999. These provisions of law had always included a five-year expiration or "sunset" clause.[1] Reauthorized for the last time on June 30,1994,[2] the independent counsel provisions expired after June 30, 1999, when the law was not reauthorized by the 106th Congress. Upon the expiration of the law, no *new* independent counsels could be requested by the Attorney General to be appointed by (nor may such counsels be appointed on its own accord by) the "Division of the Court," the special three-judge panel of the United States Court of Appeals created to appoint independent counsels. However, the law expressly provided that on-going investigations by then-existing independent counsels could continue until completion at the discretion of that independent counsel.[3] Additionally, the Attorney General of the United States, as in the past, retains general statutory authority to personally name special counsels or special prosecutors to conduct certain investigations and prosecutions on behalf of the United States, and in 1999 regulations on this subject were specifically promulgated by the Department of Justice.

## Independent Counsel Law Enactment and Reauthorization History

The independent counsel provisions of federal law were originally enacted as Title VI of the Ethics in Government Act of 1978,[4] in direct response to the so-called "Watergate" scandal and the attendant allegations of cover-up by highly placed persons in the Nixon Administration.[5] The law established a stand-by mechanism for the temporary appointment of what was then called a "special prosecutor"[6] by a

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[1]P.L. 95-521, Title VI, §601(a), 92 Stat. 1873, October 26, 1978. Originally codified at 28 U.S.C. § 598.

[2]P.L. 103-270, 108 Stat. 732, June 30, 1994.

[3]28 U.S.C. § 599. Under the independent counsel provisions of federal law, 20 independent counsels (or earlier "special prosecutors") had been appointed for various matters by the special three-judge panel upon the request of the Attorney General between 1978 and 1999. *See* CRS Rpt. 98-19A, "Independent Counsels Appointed Under the Ethics in Government Act of 1978, Costs and Results of Investigation," updated April 24, 2001.

[4]P.L. 95-521, Title VI, October 26, 1978.

[5]Maskell, "The Independent Counsel Law," *Federal Bar Journal*, Volume 45, No. 6, at 29-30 (July 1998).

[6]The term "independent counsel" was substituted for the term "special prosecutor" in the 1983 (continued...)

special three-judge panel of a federal court, only upon the specific request of the Attorney General of the United States, in certain instances where a conflict of interest or conflicting loyalties might interfere with the impartial pursuit of justice at the highest levels of government. The special prosecutor/independent counsel provisions were thus originally adopted to deal with the extraordinary circumstance of an inherent conflict of interest that would arise when the Attorney General and the President, supervising the Department of Justice and federal prosecutors, control the investigation and possible prosecution of allegations of criminal wrongdoing by themselves, or by other high-level officials in their own Administration.[7]

The five year "sunset" requirement for the independent counsel law had been an original provision in law enacted in 1978, and thus required a periodic reauthorization and, in a practical sense, a periodic review of the operation of the law. After being amended and reauthorized in 1983,[8] and then again amended and reauthorized in December of 1987,[9] the independent counsel provisions were not reauthorized in the 102nd Congress, and were allowed to expire on December 15, 1992. During the previous five years there had been intensifying criticism of the independent counsel law, engendered in large part by the breadth, length and expense of Independent Counsel Walsh's "Iran-Contra" investigation during the Reagan and Bush administrations. With the increased public attention in 1993-94 to the allegations concerning President Clinton and the First Lady in what became known as the "Whitewater" matter, the Attorney General of the United States, not having a statute under which to request the appointment of an independent counsel by a court, named on her own authority a "special counsel" or "regulatory independent counsel" (Robert Fiske), with authority and powers nearly identical to those of statutory independent counsels to investigate and potentially to prosecute any wrongdoing involved in the "Whitewater" and related matters.[10] In large part because of the "Whitewater" controversy, Congress eventually reauthorized an amended version of the independent counsel law in 1994 in the 103rd Congress.[11] Under an increasing political and public policy attack (the law, as structured, was found to be constitutionally permissible in an 8 - 1 decision by the Supreme Court in 1988 in *Morrison v. Olson*, 487 U.S. 654 (1988)), and after controversial investigations which had now affected administrations of both political parties, the independent counsel law was not reauthorized in the 106th Congress and was allowed to expire after June 30, 1999.

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[6](...continued)
amendments.

[7]S. Rpt. No. 93-981, 93rd Cong., 2d Sess. (June 1974); S. Rpt. No. 95-170, 95th Cong., 1st Sess. (May 1977). For general background of legislative intent, *see* CRS Rpt. No. 87-192A, "Legislative History and Purposes of Enactment of the Independent Counsel (Special Prosecutor) Provisions of the Ethics in Government Act of 1978," March 4, 1987.

[8]P.L. 97-409, January 3, 1983.

[9]P.L. 100-191, December 15, 1987.

[10]59 *Federal Register* 5321-5322, February 4, 1994.

[11]P.L. 103-270, June 30, 1994.

## Special Counsels

While there is no longer any express statutory authority to appoint a special or "independent" counsel or prosecutor, the Attorneys General of the United States have on several occasions in the past exercised their own general discretion and authority to directly name and appoint special counsels or special prosecutors to handle selected investigations or prosecutions for the Department of Justice on behalf of the United States. Such "special counsels" or special prosecutors are generally selected and named personally by the Attorney General under the existing, general statutory authority of the Attorney General to direct the activities and functions of the Department of Justice, to delegate authority to employees, and to appoint staff, including special attorneys.[12]

In recent history, prior to (and directly influencing) the enactment of the independent counsel provisions of the Ethics in Government Act of 1978, special prosecutors Archibald Cox, and later Leon Jaworski, were appointed in 1973 as "Watergate" special prosecutors to investigate the allegations of the Nixon Administration's complicity in or knowledge of, and later "cover-up"of, the break-in of Democratic party headquarters in the Watergate office complex.[13] In 1994, subsequent to the expiration of the independent counsel statute in 1992, and before the statute's reauthorization later in 1994, Attorney General Reno appointed a "special counsel," or a "regulatory independent counsel," Robert B. Fiske, Jr., to investigate the "Whitewater" allegations concerning the possible involvement of President Clinton and the First Lady in improper land dealings in Arkansas.[14]

Other recent examples of "special" Attorney General appointees have included the appointments by Attorney General Barr of special counsels Nicholas Bua (1989) to investigate the so-called "Inslaw Affair," which involved allegations that certain high level Justice Department officials had stolen software from a small computer

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[12] Regulations promulgated pursuant to such Attorney General appointments generally cite as statutory authority, 28 U.S.C. §§ 509, 510, and 543, and 5 U.S.C. § 301.

[13]The appointments of the Watergate special prosecutors were arguably somewhat less than "voluntary" decisions and exercises of discretion to appoint, as the nomination of Eliot Richardson for Attorney General was pending before the Senate Judiciary Committee in 1973 when nominee Richardson promised to appoint an independent, special prosecutor for "Watergate" as a condition for confirmation. *Nomination of Eliot L. Richardson to be Attorney General: Hearings Before the Committee on the Judiciary, United States Senate,* 93rd Cong., 5-7, 18-20 (May 1973). After the so-called "Saturday Night Massacre" and the firing of Special Prosecutor Cox, the resignation of Richardson and removal of his deputy William Ruckelshaus, the political "firestorm" was somewhat abated by the naming within a few weeks of a new special prosecutor, Leon Jaworski. *See* discussion in Gormley, Ken, "An Original Model of the Independent Counsel Statute," 97 *Michigan Law Review* 601, 602-604 (December 1998).

[14]28 C.F.R. § 603.1, see 59 *Fed. Reg.* 5322, February 4, 1994. Upon reauthorization of the independent counsel provisions of federal law, Special Counsel Fiske was replaced by Independent Counsel Kenneth Starr by the special three judge panel of the United States Court of Appeals for the District of Columbia, *In re: Madison Guaranty Savings & Loan,* August 5, 1994.

company; Malcom Wilkey (1992), because of the "unique circumstances and sensitivities of th[e] matter," to conduct a preliminary review of the alleged abuses of the "House Bank" by Members and officers in the House of Representatives;[15] and Frederick Lacey (1992), to conduct a preliminary investigation of any wrongdoing by the Justice Department or the CIA concerning an illegal loan to Iraq from the Atlanta branch of an Italian bank, Banca Nationale del Laroro.[16] These special counsels were appointed at a time when the independent counsel statute was in force, and had been criticized by some as an attempt by the Attorney General, who had expressed philosophical opposition to the independent counsel statute, to avoid the appointment of an independent counsel by the three-judge panel.[17] These special counsels were intended to conduct only what would be considered "preliminary reviews" of the matters, and reported to the Attorney General without conducting any prosecutions of their own. Other special appointments have included the so-called "back-up" independent counsels appointed by the Attorney General during the independent counsel statute's constitutional challenge in the federal courts in the 1980's.[18]

Under the new special counsel regulations issued by the Department of Justice in 1999, discussed below, Attorney General Reno appointed former Senator John Danforth on September 9, 1999 to be a special counsel in investigating the Branch Davidian incident near Waco, Texas, to determine if there had been any misconduct on the part of federal law enforcement personnel either in the use of excessive force, improper use of armed forces, or in withholding or suppressing evidence.[19]

## Regulations of the Department of Justice for Special Counsels

When the independent counsel law expired after June 30, 1999, the Attorney General promulgated specific regulations concerning the appointment of outside, temporary counsels in certain circumstances.[20] Such personnel appointed by the Attorney General from outside of the Department of Justice to conduct investigations and possible prosecutions of certain sensitive matters, or matters which may raise a conflict of interest for Justice Department personnel, are to be called "Special Counsels." Although temporary, outside personnel to investigate and/or prosecute for the United States under these circumstances have also in the past been called "regulatory independent counsels," given their more limited independence from the Attorney General and the Department of Justice than the Independent Counsels under the former statute, it seems appropriate that such personnel are called Special Counsels, since their designation as "independent" counsels might be considered somewhat of a misnomer.

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[15]Department of Justice Press Release, Friday, March 20, 1992.

[16]The Los Angeles Times, October 17, 1992, "Ex-Judge to Investigate Iraq Loans," at A1.

[17]The National Law Journal, February 12, 1996, "Spies, Lies and Politics," at A10; The Recorder, December 29, 1992, "A Limited Legacy; Outgoing AG Barr will be remembered best for his conflicts with Congress over independent counsel," at 1.

[18]28 C.F.R. parts 601 and 602.

[19]Department of Justice Press Release, September 9, 1999.

[20]28 C.F.R. Part 600, §§ 600.1 to 600.10; 64 Fed. Reg. 37038-37044, July 9, 1999.

The most significant departures in the regulations from the former statutory independent counsel schemes are that: (1) the Attorney General, and not an independent body such as the three-judge panel, actually names the person who is to be the Special Counsel; (2) the Attorney General, and not an outside panel, establishes and defines the prosecutorial jurisdiction of the Special Counsel; (3) the general jurisdiction of the Special Counsel is limited to the specific matter referred to him or her (and not also "related" matters as under the statute), as well as collateral offenses arising out of the investigation which "interfere" with the investigation; (4) the Special Counsel is subject to all the notification, and "review and approval" provisions within the internal Department of Justice procedures, policies and practices (but may circumvent certain review and approval procedures by consulting directly with the Attorney General); (5) the Attorney General must be notified concerning significant actions that the Special Counsel is to take, and may countermand any proposed action by the Special Counsel; (6) appeals of cases by the Special Counsel must be approved by the Solicitor General of the United States, a presidential political appointee; and (7) while the statute provided only that Independent Counsel may be removed by the Attorney General for "good cause, physical or mental disability," the Department of Justice regulations provide specifically that a Special Counsel may be removed by the Attorney General for "misconduct, dereliction of duty, incapacity, conflict of interest, or for other good cause, including violation of Department policies."

Potentially the most significant change or difference in the regulations is the overall degree of ultimate control and authority that the Attorney General is to exercise over a Special Counsel investigation/prosecution, in comparison with the statutory Independent Counsel procedures, and former regulations such as those authorizing the Watergate Special Prosecutors. Under the former Independent Counsel statute, as well as under previous regulations authorizing the Watergate Special Prosecutors, the Independent Counsels or Special Prosecutors were intended to exercise a very high degree of independent authority and ultimate control in the decision-making process concerning their investigations, indictments, prosecutions and strategies, including, for example, which documents and/or other evidentiary materials to seek from targets, individuals or Government agencies or offices, and which asserted "privileges," such as "Executive Privilege," to challenge.[21] The Special Prosecutors expressly, and the Independent Counsels as explained in the legislative history of the law, also controlled whether and to what extent they would inform, report to or consult with the Attorney General.[22] Under the new regulations,

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[21]The regulations issued for the Watergate Special Prosecutor, first by Attorney General Eliot Richardson, and then by Acting Attorney General Robert Bork, both provided that the Watergate Special Prosecutor would "have the greatest degree of independence consistent with the Attorney General's statutory authority," and specifically, that the "Attorney General will not countermand or interfere with the Special Prosecutor's decisions or actions." 38 Fed. Reg. 14688, June 4, 1973; and 38 Fed. Reg. 30739, November 7, 1973. Direction and control by the Attorney General was limited under the Independent Counsel statute only to express matters requiring the Attorney General's "personal action" concerning authorization of wire taps and other interceptions of communications. 28 U.S.C. § 594(a), see 18 U.S.C. § 2516.

[22]The Watergate regulations provided: "The Special Prosecutor will determine whether and to what extent he will inform or consult with the Attorney General about the conduct of his

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however, as expressly explained in the background information promulgated by the Department of Justice, — the Attorney General, rather than the Special Counsel, will have the "ultimate responsibility" for any matter referred to the Special Counsel:

> The Special Counsel would be free to structure the investigation as he or she wishes and to exercise independent prosecutorial discretion to decide whether charges should be brought, *within the context of the established procedures of the Department.* Nevertheless, it is intended that *ultimate responsibility for the matter and how it is handled will continue to rest with the Attorney General* (or Acting Attorney General if the Attorney General is personally recused in the matter); thus, the regulations explicitly acknowledge the possibility of review of specific decisions reached by the Special Counsel.[23]

Comparing the new regulations to both the former independent counsel statute and to the regulations which were issued for the Watergate Special Prosecutor, it is apparent that there is a major shift of discretion and ultimate authority back to the Attorney General, even in investigations and prosecutions which could be directed at the President, Vice President, or high-ranking colleagues of the Attorney General in the President's Administration. Thus the "trade-off" in providing greater "accountability" of a Special Counsel to the regular appointed federal officials in the Justice Department, and particularly to the Attorney General, may arguably be that the underlying problems, conflicts of interest and loyalty issues would not necessarily be resolved in the situations which gave rise to the Independent Counsel law in the first place, that is, where there are inherent issues of fairness and appearances of even-handed application of the federal law when the Attorney General, a Presidential appointee, confidant, and a member of the President's cabinet, is making the ultimate decisions concerning law enforcement activities and investigations directed at the President and members of his Administration.[24] As argued by some commentators in the debate concerning whether to re-authorize the independent counsel law, giving the "Attorney General more discretion seems only to enhance the potential for conflict of

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[22](...continued)
duties and responsibilities." 38 Fed. Reg. 14688, June 4, 1973; and 38 Fed. Reg. 30739, November 7, 1973. The Independent Counsel statute provided that the Independent Counsel was to comply with Justice Department procedures, except where such procedures were "inconsistent with the purposes" of the law, such as when they would compromise his or her independence by requiring notification and approval of prosecutorial strategy by Justice Department officials or the Attorney General. See 28 U.S.C. § 594(f)(1); *see* S. Rpt. No. 103-101, 103rd Cong., 1st Sess., 32 (1993), H.R .Rpt. No. 103-224, 103rd Cong., 1st Sess. 21-22 (1993).

[23]64 Fed. Reg. 37038 (July 9, 1999) (Emphasis added).

[24]*See*, for example, Fleissner, James P. "The Future of the Independent Counsel Statute: Confronting the Dilemma of Allocating the Power of Prosecutorial Discretion," 49 *Mercer Law Review* 427, 431-432 (1998): "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." *Note* also Walsh, Lawrence, "The Need for Renewal of the Independent Counsel Act," 86 *Georgetown law Journal* 2379, 2381-82 (July 1998).

interest,"[25] and might arguably exacerbate the type of situation which engendered some severe criticism from several Members of Congress and the media of the Attorney General for her failure to ask for the appointment of a court-appointed independent counsel in the allegations of campaign finance irregularities of the Democratic party, and the fund-raising activities of the President and Vice President during the 1996 election.[26]

## Analysis of the Provisions of the Regulations

### Appointing a Special Counsel - Grounds and Alternatives.

The Department of Justice regulations regarding an appointment of a Special Counsel apply to "matters" which may raise a conflict of interest for the Department of Justice to investigate or prosecute, or generally to "a person" when such conflicts may arise, or in "other extraordinary circumstances," when in the opinion of the Attorney General it is in the public interest to appoint such Counsel. 28 C.F.R. § 600.1. The statute, on the other hand, triggered automatically and applied to expressly designated officials in the Government, regardless of any finding of actual or apparent conflict of interest, where an "inherent" conflict for the Justice Department to conduct the matter was pre-supposed.[27] While the statute spoke in mandatory language (the Attorney General "shall apply to the division of the court for the appointment of an independent counsel if ..." [28 U.S.C. § 592(c)(1)]), in investigating allegations brought to the attention of the Attorney General under the new regulations, the Attorney General has several options, including the naming of a Special Counsel, directing an initial investigation, or keeping the matter within the Justice Department. 28 C.F.R. § 600.2.

During an initial investigation under the regulations there are no limitations on the Attorney General's investigative authority as there had been under statute (which had barred, for example, the granting of immunity, the issuing of subpoenas, plea bargaining or the convening of grand juries).[28] Furthermore, there is no specific time limitation on the Attorney General's review and initial investigation of the matter in the regulations, as compared to the time limitations in the Independent Counsel

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[25]Harriger, Katy J. "The History of the Independent Counsel Provisions: How the Past Informs the Current Debate," 49 *Mercer Law Review* 489, 515 (1998); Fleissner, *supra* at 431: "Without the Independent Counsel Statute, the power of prosecutorial discretion is in the hands of the Attorney General, and indirectly, the President."

[26]*See* discussion in Harriger, Katy J. "Damned If She Does and Damned If She Doesn't: The Attorney General and the Independent Counsel Statute," 86 *Georgetown Law Review* 2097, 2115 (July 1998); Washington Post, June 30, 1999, "As Special Counsel Law Expires, Power Will Shift to Reno," at A6.

[27]28 U.S.C. § 591(b). There also existed under statute, however, a "catch-all" provision where the "conflict of interest" standard was expressed, and which gave the Attorney General discretion to conduct a preliminary investigation and apply for an independent counsel in such circumstances. 28 U.S.C. § 592(c).

[28]28 U.S.C. § 592(a)(2)(A).

statute on initial reviews (30 days), and preliminary investigations (90 days, with a possible one-time extension of 60-days).

The criteria for a determination of whether to appoint a Special Counsel under the regulation, that is, that a "criminal investigation of a person or matter is warranted," is somewhat comparable to the former statute.[29] However, under the new regulations the Attorney General is not as limited in making determinations of "state of mind" and criminal intent of the subject in dismissing a matter during the Attorney General's preliminary reviews and investigation, as was the Attorney General under the statutory provisions. 28 U.S.C. §592(a)((2)(B)(i) and (ii).

The involvement and the discretion of the Attorney General at the early stages of a matter under the Department of Justice Special Counsel regulations are thus significantly broader in comparison to the statutory Independent Counsel provisions. When a "Special Counsel" is appointed under the regulations, the Attorney General is to notify the Chairman and Ranking Minority Member of the House and Senate Judiciary Committees. 28 C.F.R. § 600.9(a)(1).

### Qualifications of the Special Counsel.

The former statute provided that the person to be chosen as an Independent Counsel had to be one who possessed the "appropriate experience" and who would conduct the investigation in a "prompt, responsible and cost-effective manner." 28 U.S.C. §593(b)(2). The new regulations provide that a person chosen as special counsel "shall be a lawyer with a reputation for integrity and impartial decisionmaking." 28 C.F.R. § 600.3(a). This appears to respond somewhat to criticisms of the former statute that politically active partisans were not disqualified and had been chosen by the special court at times to be Independent Counsel. The regulations also expressly provide that the person chosen to be Special Counsel will be someone to assure that prosecutorial decisions "will be supported by an informed understanding of the criminal law and Department of Justice policies." *Id.* Justice Department policies thus appear to be intended to play a more significant and mandatory role in prosecutorial decisionmaking under the regulations than in the statute.[30] The regulations also indicate that the job of Special Counsel will be the principal employment of those persons during their tenure, as the responsibilities of the office are to be the "first precedence in their professional lives," noting that these duties may require "full time" attention. 28 C.F.R. § 600.3(a). This appears to be directed at the criticism that some had concerning Independent Counsel Kenneth Starr

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[29] The Independent Counsel statute provided that such a Counsel should be sought where "there are reasonable grounds to believe that further investigation is warranted." 28 U.S.C. § 592(c). However, under the statute, if the Attorney General conducted a preliminary investigation and did not apply for an Independent Counsel, the Attorney General had to notify the special three-judge panel that there were "no reasonable grounds to believe that further investigation is warranted" (28 U.S.C. § 592(b)(1)). This provision and standard had been criticized by legal commentators as unfair because it required the Attorney General (and the subject) to prove a negative.

[30] *See* also 28 C.F.R. § 600.7(a) and 600.7(d).

who, it was argued, kept a busy private law practice going while he was Independent Counsel.[31]

### Jurisdiction.

One of the main criticisms of the former Independent Counsel statute concerned the vague, and thus potentially broad, jurisdictional grant of authority to Independent Counsels. Such Independent Counsels could investigate the matter that was the original subject of the referral from the Attorney General to the special three-judge panel, as well as matters "related to" that subject matter, and collateral offenses that "may arise out of" the original investigation. 28 U.S.C. § 593(b)(3). This allowed the Independent Counsels to pursue matters that, some (including the Department of Justice) argued went far afield of the actual subject matter underlying the Independent Counsel's original grant of jurisdiction.[32]

The new regulations, however, provide a more narrowly and precisely defined jurisdiction. The Department of Justice regulations provide that in establishing the jurisdiction for the Special Counsel, the Attorney General will provide a "specific factual statement of the matter to be investigated," and that the jurisdiction will include also the authority to investigate and prosecute federal crimes committed "in the course of, and with the intent to interfere with," the Special Counsel's investigation. 28 C.F.R. § 600.4(a). If there are "additional" matters that the Special Counsel wishes to pursue "in order to fully investigate and resolve the matters assigned," or if the Counsel wishes to "investigate new matters," the Special Counsel must consult with the Attorney General, who will then decide whether to include the additional matters within the Special Counsel's jurisdiction, or whether to assign them elsewhere. 28 C.F.R. § 600.4(b). The Justice Department regulations explain that, for example, if the Special Counsel wishes to pursue "otherwise unrelated allegations" concerning a witness that may be "necessary to obtain cooperation," then the Special Counsel would report the matter to the Attorney General, and the Attorney General would then decide whether to grant the Special Counsel jurisdiction over the matter.[33]

### Staff.

It appears from the regulations that the normal and expected way a Special Counsel is to staff his or her office and investigation is through detail of available personnel in the Department of Justice, including the FBI. The Special Counsel may specifically request certain people for detail. The regulations provide that, "[i]f necessary, the Special Counsel may *request* that additional personnel be hired or assigned from outside the Department." 28 C.F.R. § 600.5. (Emphasis added)

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[31]*See* discussion of this issue in Gormley, Ken, "An Original Model of the Independent Counsels Statute," 97 *Michigan Law Review* 671-673 (December 1998).

[32]*See,* for example, *In re Espy,* 80 F.3rd 501, 507-509 (D.C.Cir. 1996); *United States v. Tucker,* 78 F.3rd 1313, 1320-1321 (8th Cir. 1996), *cert. den.* 117 S.Ct. 76 (1996); *United States v. Blackley,* 167 F.3rd 543,545-550 (D.C. Cir. 1999); *United States v. Hubbell,* 167 F.3rd 552, 554-562 (D.C.Cir. 1999).

[33]64 F.R. 37039 (1999).

**Powers and Authority.**

Similar to former Independent Counsel legislation and past regulations, the Special Counsel appointed by the Attorney General will exercise the same power and authority of any United States Attorney, subject to the limitations of the regulations. 28 C.F.R. § 600.6.

**Accountability - Review and Approval by Justice Department or Attorney General of Proposed Actions.**

Under the regulations issued by the Department of Justice there are four types of what could be generally considered "oversight" or supervision of the Special Counsel by either officials in the Department of Justice, or by the Attorney General personally. While it is *not* anticipated under the regulations that there will be "day-to-day supervision of the Attorney General or any other Departmental official," the regulations provide:

(1) that the Special Counsel is subject to the Department of Justice's "review and approval" procedure *prior* to taking certain investigatory or prosecutorial steps, which may require consultation and approval from either Department officials, or in extraordinary circumstances, the Special Counsel may bypass Department officials and go directly to the Attorney General for consultation (28 C.F.R. 600.7(a));

(2) that the Attorney General may review *any* investigatory or prosecutory decisions of the Special Counsel and may countermand such decisions that are so inappropriate or unwarranted under Departmental guidelines (28 C.F.R. § 600.7(b));

(3) that the Special Counsel is required to notify the Attorney General of significant events in the course of his or her investigation in conformance with the guidelines concerning "Urgent Reports" (28 C.F.R. § 600.8(b)); and

(4) that the Special Counsel must submit to the Attorney General for approval a budget within 60 days of taking office, and then annually must submit a "status" report and a new request for a budget, at which time the "Attorney General shall determine whether the investigation should continue ...." (28 C.F.R. § 600.8(a)).

***Review and Approval.*** The regulations provide expressly that the Special Counsel must "comply with the rules, regulations, *procedures, practices and policies* of the Department of Justice." 28 C.F.R. § 600.7(a). (Emphasis added). Failure to follow Department of Justice policy is a specific ground for removal of the Special Counsel by the Attorney General. 28 C.F.R. § 600.7(d). The most significant impact of the departmental procedures, practices and policies upon the "independence" of a Special Counsel might arguably be the procedure, practice or policy of what the Justice Department has called "review and approval procedures." These would require the Special Counsel to seek a "variety of levels of review" concerning "sensitive legal and policy issues" arising in the Counsel's investigations and prosecutions. The Department of Justice has explained the reasons for requiring review and approval:

> Review and approval procedures are the way in which the Department typically addresses the most sensitive legal and policy issues facing its prosecutors. Such matters are usually not dealt with by mandatory substantive rules; rather, the Department recognizes that even the most controversial and risky investigative and prosecutorial steps might in extraordinary circumstances be justified. Therefore, such issues are generally handled by requiring a variety of levels of review and approval *before the step can be taken*. Were Special Counsels to be exempt from these procedural requirements, they would be left without relevant controls and without Departmental guidance in the most sensitive situations.[34]

Such review and approval procedures would appear to ensure that the Department of Justice's institutional interests are furthered and applied in matters which are politically or legally sensitive. The Department of Justice has expressly noted, for example, that the decision to appeal a case must be reviewed and approved by the Solicitor General, and that the long-term interests of the Department in "case law development" might take precedence over a short term interest in vigorously pursuing a legal matter by the Special Counsel.[35] The wide range of matters that are subject to "review and approval" procedures are set out in a "Prior Approvals Chart" in the *United States Attorneys' Manual* [USAM], at Section 9-2.400.[36] Many of the subjects of required prior approval would most likely be of little relevance to the type of investigations that a Special Counsel would undertake. However, there are other subjects and actions concerning investigations and prosecutions which have more possible or potential relevance (in addition to appeals), and which would require prior approval, such as dismissal of a case based on agency refusal to produce documents (USAM, 9-2.159), applications to a court for interceptions of oral, wire or electronic communications (9-7.110, 9-7.111), one-party consent to interception of non-telephonic verbal communication when it relates to a Member of Congress or high level Executive Branch official (USAM, 9-7.302), whether to subpoena a target to the grand jury (USAM, 9-11.150), whether to subpoena, interrogate, arrest or indict members of the news media (USAM, 9-13.400), plea agreements with defendants who are candidates for or Members of Congress (USAM, 9-16.110), search warrant applications for materials in the hands of third parties, such as physicians, attorneys and clergymen (USAM, 9-19.220), before requesting immunity (USAM 9-23.130), whether to enter into a nonprosecution agreement in exchange for cooperation when the person is a high level federal official (USAM, 9-27.640), and investigations or prosecutions of perjury before Congress and contempt of Congress (USAM, 9-69.200). Prior consultation, but not necessarily approval is required in "all criminal matters that focus on violations of federal ... campaign finance laws, federal patronage crimes, and corruption of the electoral process," including the Federal Election Campaign Act. (USAM, 9-85.210)

***Attorney General Review and Countermand.*** In "extraordinary circumstances" the Special Counsel could circumvent or "bypass" the various layers of "review and approval" in the Justice Department and "consult" directly with the

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[34]64 Fed. Reg. 37039 (1999). (Emphasis added)

[35]"There are often sound institutional reasons for review and approval provisions that transcend the merits of any particular case." 64 Fed. Reg. 37039 (1999).

[36]*United States Attorneys' Manual*, September 1997.

Attorney General. 28 C.F.R. § 600.7(a). While this provision refers only to consultation with the Attorney General, the Attorney General in the next paragraph of the regulations is given express, ultimate authority over all and "any investigative or prosecutorial step[s]" pursued by the Special Counsel, and may countermand any proposed step or action by the Special Counsel. Although granting "day-to-day" autonomy from supervision, the regulations expressly provide that the Attorney General may at any time request that the Special Counsel provide an explanation for "any investigative or prosecutorial step," apparently without regard to whether such step is sensitive, controversial or significant, and may find that such action is "so inappropriate or unwarranted under established Departmental practices that it should not be pursued." 28 C.F.R. § 600.7(b). The views of the Special Counsel in such matter should be given "substantial deference," but the ultimate decision is with the Attorney General. If the Attorney General prevents an action by the Special Counsel, the Attorney General is to notify the Chairman and Ranking Minority Member of the House and Senate Judiciary Committees and to provide an explanation for such countermand, upon "the conclusion of the Special Counsel's investigation."[37]

***Notification of Significant Events.*** The Special Counsel is expressly required by the regulations to notify the Attorney General "of events in the course of his or her investigation in conformity with the Departmental guidelines with respect to Urgent Reports." 28 C.F.R. § 600.8(b). Under current Departmental guidelines, as explained in the United States Attorneys' Manual, the "Urgent Report" procedure is used to communicate "major developments" in "new or pending important cases."[38] The types of events which would trigger an "Urgent Report" are those that are politically sensitive, have a high likelihood of media or congressional interest or of interest to the President, including investigations of public figures, allegations of improper conduct by Department of Justice or other high level public figures, questions which present a "serious challenge to Presidential authority," the bringing of public figures before a grand jury or for trial:[39] that is, similar types of allegations and events that might precisely be involved in and be the reason for a "Special Counsel" investigation, and which have resulted in Independent Counsel or Special Prosecutor investigations in the past.

Given that much of what a Special Counsel may be involved with would appear to trigger such notification to the Attorney General, what is the impact of such required notification? While the section on "significant events" does not expressly provide that the Attorney General is to do anything other than to be notified, the Attorney General under an earlier section, as noted above, has been expressly given the authority to order that "any" particular investigatory or prosecutorial step by the Special Counsel not be taken.[40] Clearly, the Department regulations perceive a "pre-clearance" of major and controversial investigative and prosecutorial steps and legal strategies by the Special Counsel with the Attorney General. The Department explanation of the "significant event" notification explains:

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[37]28 C.F.R. § 600.9(a)(3).

[38]*United States Attorneys' Manual,* §§ 3-18.200.

[39]*United States Attorneys' Manual,* §§ 3-18.200, 3-18.220. 3-18.230.

[40]28 C.F.R. § 600.7(b).

> Paragraph (b) requires Special Counsels to notify the Attorney General in certain circumstances. Those circumstances are defined using the same standard as that governing United States Attorneys, who are required to notify the Attorney General or other Department officials before seeking an indictment in sensitive cases and at other significant investigative steps. A Special Counsel will be dealing with issues that are sensitive, with many possible repercussions, and experience has shown that such prosecutions are often as sensitive legally as they are politically. Given this sensitivity, notification of proposed indictments and other significant events in the course of the investigation, with the resulting opportunity for consultation, is a critical part of the mechanism through which the Attorney General can discharge his or her responsibilities with respect to the investigation.[41]

The regulatory standard for the Attorney General to countermand a Special Counsel's anticipated prosecutorial or investigative move, however, indicates that such decision not be arbitrary or capricious, but rather must be grounded upon "established Departmental practices," and a finding by the Attorney General that the Special Counsel's anticipated action is not only outside of or contrary to such practice, but that it derogates such policies to such an extent that it is "*so* inappropriate or unwarranted" that it should not be pursued.[42] As noted above, if the Attorney General does conclude that a proposed action should not be taken by the Special Counsel, the Attorney General is to notify, upon "the conclusion of the Special Counsel's investigation," the Chairman and Ranking Minority Member of the House and Senate Judiciary Committees, and to provide an explanation for such countermand.[43]

### Discipline and Removal.

The Special Counsel will be subject to internal discipline for misconduct and ethical breaches to the same extent as any other employee of the Department of Justice. 28 C.F.R. § 600.7(c). However, the Special Counsel may "be disciplined or removed from office only by the personal action of the Attorney General." 28 C.F.R. § 600.7(d). The Independent Counsel law provided only that Independent Counsel could be removed by the Attorney General for "good cause, physical or mental disability" (28 U.S.C. § 596(a)), while the Department of Justice regulations provide specifically that a Special Counsel may be removed by the Attorney General for "misconduct, dereliction of duty, incapacity, conflict of interest, or for other good cause, including violation of Department policies." 28 C.F.R. § 600.7(d). The explanation of the Justice Department further expanded on these standards and noted that "willful violation of some policies ... and a series of negligent or careless overlooking of important policies" might warrant removal or other disciplinary action.[44] If a Special Counsel is removed, the Attorney General is to notify the Chairman and Ranking Minority Member of the House and Senate Judiciary Committees, and to provide an explanation for such action. 28 C.F.R. § 600.9(a)(2).

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[41] 64 Fed. Reg. 37040 (1999).

[42] 28 C.F.R. § 600.7(b). Emphasis added.

[43] *Id., see* 28 C.F.R. § 600.9(a)(3).

[44] 64 Fed. Reg. 37040 (1999).

### Final Report.

The Special Counsel, at the conclusion of his work, is to provide the Attorney General with a *confidential* report explaining the prosecutions or the Counsel's decisions not to prosecute. 28 C.F.R. 600.8(c). Under the Independent Counsel statute, there had been substantial criticism of certain Independent Counsels' final reports, which were made public by the three-judge panel, in that such reports provided the prosecutor (Independent Counsel) with an unfair opportunity to publicly castigate, and to level criticisms and judgments against the targets of his or her investigation, even if the Independent Counsel was unable or unwilling to indict such persons.

At the conclusion of the investigation of a Special Counsel the Attorney General will "notify" the Chairman and Ranking Minority Member of the House and Senate Judiciary Committees. 28 C.F.R. § 600.9(a). It is anticipated in the regulations that such reports to Congress will be "brief notifications, with an outline of the actions and the reasons for them."[45] Included in the notification will be a description and explanation of any proposed actions by the Special Counsel that the Attorney General determined should not be pursued. The Attorney General may determine that such reports should be released to the public in conformance with Departmental guidelines.

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[45]64 Fed. Reg. 37041 (1999).

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