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Special Counsels, Independent Counsels, and Special Prosecutors: Options for Independent Executive Investigations

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Summary

Under the Constitution, Congress has no direct role in federal law enforcement and its ability to initiate appointments of any prosecutors to address alleged wrongdoings by executive officials is limited. While Congress retains broad oversight and investigatory powers under Article I of the Constitution, criminal investigations and prosecutions have generally been viewed as a core executive function and a responsibility of the executive branch. Historically, however, because of the potential conflicts of interest that may arise when the executive branch investigates itself (e.g., the Watergate investigation), there have been calls for an independently led inquiry to determine whether officials have violated criminal law. In response, Congress and the U.S. Department of Justice (DOJ) have used both statutory and regulatory mechanisms to establish a process for such inquiries. These responses have attempted, in different ways, to balance the competing goals of independence and accountability with respect to inquiries of executive branch officials.

Under the Ethics in Government Act of 1978, Congress authorized the appointment of “special prosecutors,” who later were known as “independent counsels.” Under this statutory scheme, the Attorney General could request that a specially appointed three-judge panel appoint an outside individual to investigate and prosecute alleged violations of criminal law. These individuals were vested with “full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice” with respect to matters within their jurisdiction. The independent counsel provisions included sunset provisions, but were reauthorized regularly until 1992, when Congress allowed the law to expire. Although it was again reauthorized in 1994, debate over the scope, cost, and effect of the investigations (perhaps most notably the Iran-Contra investigation and the Whitewater investigation) resulted in the law’s expiration and nonrenewal in 1999.

Following the lapse of the statutory independent counsel provisions, DOJ promulgated regulations authorizing the Attorney General (or, if the Attorney General is recused from a matter, the Acting Attorney General) to appoint a “special counsel” to conduct specific investigations or prosecutions that may be deemed to present a conflict of interest if pursued under the normal procedures of the agency. Under these regulations, the Attorney General may appoint an individual from outside the federal government to investigate and prosecute criminal matters within his or her assigned jurisdiction. Two instances in which the Attorney General has invoked this authority include the investigation of the Branch Davidian incident in Waco, Texas, and the current investigation of alleged Russian interference in the 2016 election. Special counsels appointed under this authority are vested “within the scope of his or her jurisdiction, the full power and independent authority to exercise all investigative and prosecutorial functions of any United States Attorney.” Special counsels are not subject to “day-to-day supervision” by any official, but may be asked to report to the Attorney General during the course of their work. The Attorney General must “give great weight to the views of the Special Counsel” but may conclude that particular actions should not be pursued and must notify Congress accordingly if the Attorney General rejects a particular course of action. Additionally, the Attorney General maintains the authority to discipline or remove the special counsel for cause.

Ultimately, under the previous statutory authorization for independent counsel appointments or under the existing regulatory authority to appoint special counsels, the Attorney General holds the sole authority to initiate the appointment for such investigations and prosecutions. However, other alternatives of investigation and oversight of actions by federal officials—whose methods are beyond the scope of this report—are available, such as inspector general investigations and congressional oversight investigations.

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This report analyzes the use of *special prosecutors* and *independent counsels* that were authorized under now-expired provisions of the Ethics in Government Act of 1978,⁷ as well as the use of *special counsels* that are currently authorized by DOJ regulations.⁸ A glossary of terms at the beginning of the report briefly defines these italicized terms (see **Table 1**). The report also addresses constitutional considerations in establishing independent inquiries to address perceived conflicts of interest between investigating officials and the officials being investigated. Other methods of oversight, including investigations by congressional committees or under the authority of agency inspectors general, may also be available with respect to executive branch investigations, but are beyond the scope of this report.

¹ The U.S. Constitution is structured to establish a principle known as “separation of powers,” which assigns particular functions to each of the three branches of government. For a historical background on separation of powers, see CRS Report R44334, *Separation of Powers: An Overview*, by (name redacted).

² See *McGrain v. Daugherty*, 273 U.S. 135 (1927) (describing congressional oversight authority as “an essential and appropriate auxiliary to the legislative function”); *Watkins v. United States*, 354 U.S. 178, 187 (1957) (“The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad.”).

³ See *Morrison v. Olson*, 487 U.S. 654, 706 (1988) (“Governmental investigation and prosecution of crimes is a quintessentially executive function.”).

⁴ See generally Kimberly Robinson, *Comey Firing Could Wake a Constitutional Wolf*, BLOOMBERG LAW (May 11, 2017), available at <https://bol.bna.com/comey-firing-could-wake-a-constitutional-wolf/>; George D. Brown, *The Ethics Backlash and the Independent Counsel Statute*, 51 RUTGERS L. REV. 433 (1999); Niles L. Godes and Ty E. Howard, *Independent Counsel Investigations*, 35 AM. CRIM. L. REV. 875 (1998).

⁵ See Ethics in Government Act of 1978, P.L. 95-521, title VI, 92 Stat. 1867, as amended by P.L. 97-409, 96 Stat. 2039 (1983); P.L. 100-191, 101 Stat. 1293 (1987); P.L. 103-270, 108 Stat. 732 (1994).

⁶ See 28 C.F.R. Part 600.

⁷ See *supra* note 5.

⁸ See 28 C.F.R. Part 600.

Table I. Glossary of Terms

Independent Counsel	Now-expired provisions of the Ethics in Government Act of 1978 (P.L. 95-521, as amended) authorized the Attorney General to request that a three-judge panel within the federal judiciary appoint an independent counsel. Independent counsels had more independence than regular DOJ officials and employees, though the breadth of their investigations led to debate and ultimately to the expiration of the statutory authorization.
Special Counsel	The DOJ's general administrative hiring authority (28 C.F.R. Part 600) authorizes the Attorney General to appoint special counsels. Special counsels exercise more independence than regular DOJ officials and employees, but because the Attorney General generally appoints, supervises, and may remove special counsels, they are considered to be less independent than independent counsels were. (The term "special counsel," when used in the context of independent criminal investigations of executive officials, is entirely distinct from the Office of Special Counsel, an independent federal agency, which investigates certain federal personnel practices.)
Special Prosecutor	The Attorney General historically has appointed special prosecutors to investigate scandals involving public officials. The term "special prosecutor" was also initially used to describe independent investigations authorized by the Ethics in Government Act, though the term was later changed under that statute to "independent counsel." Historically, these appointments were used to provide for the investigation of any related allegations without political interference.

Background on the Use of Independent Investigations of Alleged Wrongdoing

To counter perceptions that executive officials suspected of criminal wrongdoing may be subject to different standards than individuals outside the government, independent investigations have historically been used, in some circumstances, to determine whether officials have violated the law.⁹ The government has used a range of options to conduct these types of inquiries: special prosecutors, independent counsels, and special counsels. It has been noted, however, that "there is no perfect solution" to achieving the goal of avoiding potential conflicts or the appearance thereof that may arise as a result of the executive branch investigating its own officials.¹⁰

While special prosecutors had been used historically in investigations of executive officials, the events commonly known as Watergate led to perhaps the most famous use of an independent investigation in U.S. history.¹¹ Specifically, the break-in and burglary of the Democratic National Committee Headquarters at the Watergate Hotel in 1972 led to widespread allegations of wrongdoing by senior officials in the executive branch and calls for the appointment of a prosecutor who could conduct an investigation independent of political interference.¹² In the midst of the Watergate controversy, Elliot Richardson, whose nomination to be Attorney General

⁹ See Elliot L. Richardson, *Special Counsels, Petty Cases*, N.Y. TIMES (June 5, 1995), available at <http://www.nytimes.com/1995/06/05/opinion/special-counsels-petty-cases.html>; Jim Mokhiber, *A Brief History of the Independent Counsel Law*, FRONTLINE (May 1998), available at pbs.org (noting the use of "special prosecutors" to investigate the Teapot Dome scandal of the 1920s and tax scandals of the 1950s).

¹⁰ See Office of Special Counsel, 64 Fed. Reg. 37,038 (July 9, 1999) (codified at 28 C.F.R. Part 600) (introducing regulations to replace the expired implementing regulations of the independent counsel statute).

¹¹ See generally Joseph S. Hall, Nicholas Pullen, and Kandace Rayos, *Independent Counsel Investigations*, 36 AM. CRIM. L. REV. 809 (1999).

¹² See Mokhiber, *supra* note 9.

was being considered by the Senate Committee on the Judiciary, agreed to name an independent special prosecutor to pursue the Watergate allegations.¹³ Once confirmed by the Senate, the Attorney General, under his own authority, appointed Archibald Cox as special prosecutor for the Watergate investigation in 1973.¹⁴ The President subsequently ordered DOJ officials to fire the special prosecutor later that year,¹⁵ leading to public outcry, the appointment of another special prosecutor, and, ultimately, the initiation of impeachment proceedings by Congress.¹⁶ Following these events, Congress enacted a new mechanism—discussed in the following section—for the use of special prosecutors who would be appointed by a three-judge panel upon the request of the Attorney General.¹⁷

Special Prosecutors and Independent Counsels, as Authorized Under the Ethics in Government Act

Congress enacted the Ethics in Government Act of 1978 out of a broad intent “to preserve and promote the integrity of public officials and institutions.”¹⁸ The statute addressed a number of concerns about the ethical behavior of some public officials in the wake of the Watergate scandal.¹⁹ Most relevantly, Title VI of the statute (hereinafter “the independent counsel statute”) established a mechanism for the appointment of individuals to lead independent investigations and prosecutions in certain circumstances.²⁰ The statute originally designated these individuals as “special prosecutors”²¹ and later renamed them as “independent counsels.”²²

Two of the most commonly known examples of appointments of independent counsels under the statute involved incidents known as Iran-Contra and Whitewater.²³ In 1986, Lawrence E. Walsh²⁴ was appointed as independent counsel²⁵ to investigate potential criminal misconduct of

¹³ *Nomination of Elliot L. Richardson, of Massachusetts, to be Attorney General: Hearing Before the S. Comm. on the Judiciary*, 93d Cong. 4-7, 18-20 (1973).

¹⁴ 38 Fed. Reg. 14,688 (June 4, 1973).

¹⁵ DOJ regulations “gave the Watergate Special Prosecutor very broad power to investigate and prosecute offenses arising out of [the events comprising Watergate],” and provided that the special prosecutor could only be removed “for extraordinary improprieties on his part.” See *Nader v. Bork*, 366 F. Supp. 104 (D.D.C. 1973), *vacated by Nader v. Levi*, No. 1954-73, 1975 U.S. Dist. LEXIS 16791 (D.D.C. 1975) (concluding that the discharge of the special counsel was unlawful under the regulations).

¹⁶ See Mokhiber, *supra* note 9.

¹⁷ See Ethics in Government Act of 1978, P.L. 95-521, title VI, 92 Stat. 1867.

¹⁸ *Id.* at 1824 (1978).

¹⁹ In part, the statute required disclosure of certain financial interests by specified government employees; established the Office of Government Ethics within the executive branch; and provided criminal regulation of certain outside employment and lobbying activities by former government officials. *Id.* at 1824-67.

²⁰ *Id.*

²¹ See *id.* § 601, 92 Stat. 1867.

²² See P.L. 97-409, § 2(a)(1)(A).

²³ See generally NAT’L ARCHIVES AND RECORDS ADMIN., *Records of Independent Counsels*, available at <https://www.archives.gov/research/guide-fed-records/groups/449.html>.

²⁴ Walsh formerly had served as a federal judge, private litigator, deputy attorney general, and negotiator in peace talks for the Vietnam War. See Neil A. Lewis, *Lawrence E. Walsh, Prosecutor in Iran-Contra Scandal, Dies at 102*, N.Y. TIMES (Mar. 20, 2014), available at https://www.nytimes.com/2014/03/21/us/politics/lawrence-e-walsh-iran-contra-prosecutor-dies-at-102.html?_r=0.

²⁵ See 28 C.F.R. § 601.1.

government officials related to the sale of arms to Iran and alleged diversion of profits from the sale to support the “the military activities of the Nicaraguan contra rebels” in violation of federal law.²⁶ That investigation resulted in criminal charges for 14 individuals, most of whom were convicted, though some convictions were overturned on various grounds.²⁷ In 1994, Kenneth Starr²⁸ was appointed as independent counsel²⁹ to investigate potential violations of federal criminal or civil law related to President Clinton or First Lady Hillary Rodham Clinton’s relationship with Madison Guaranty Savings & Loan Association, Whitewater Development Corporation, or Capital Management Services, as well as any allegations arising out of that investigation.³⁰ That investigation led to a myriad of charges for a number of individuals, but did not include indictments of the President or First Lady.³¹

Appointment Process

Appointment of independent counsels under the statute occurred in two steps, requiring the involvement of both the Attorney General and a panel of federal judges.

Role of the Attorney General

The independent counsel statute generally directed the Attorney General to conduct a preliminary investigation upon receiving information about potential wrongdoing by certain officials in the executive branch or from presidential campaign committees.³² If, within 30 days of receiving such information, the Attorney General determined that the information was specific and from a credible source,³³ the Attorney General was required to conduct a preliminary investigation for a period of up to 90 days.³⁴ The statute did not require the Attorney General to acknowledge or notify any other parties that such information had come to his attention, but did require that the Attorney General inform the court that he had commenced a preliminary investigation.³⁵

²⁶ Lawrence E. Walsh, *Final Report of the Independent Counsel for Iran/Contra Matters, Vol. I: Investigations and Prosecutions* (Aug. 4, 1993), available at <https://archive.org/stream/WalshReport/Walsh%20Report%20volume%201%20Investigations%20and%20Prosecutions#page/n0/mode/2up>.

²⁷ *Id.* at xiv-xv.

²⁸ Starr formerly had served as a law professor, private litigator, and as Solicitor General. *Biography*, Baylor University, available at <http://www.baylor.edu/inauguration/index.php?id=75013>. He was later succeeded by Robert W. Ray and Julie F. Thomas as independent counsels related to that investigation.

²⁹ 28 C.F.R. § 603.1.

³⁰ *Id.*

³¹ Robert Ray, *Final Report of the Independent Counsel in Re Madison Guaranty Savings & Loan Association* (Jan. 5, 2001), available at <https://www.gpo.gov/fdsys/pkg/GPO-ICREPORT-MADISON/content-detail.html>; Neil A. Lewis, *Final Report By Prosecutor on Clintons is Released*, N.Y. TIMES (Mar. 21, 2002), available at <http://www.nytimes.com/2002/03/21/us/final-report-by-prosecutor-on-clintons-is-released.html>.

³² 28 U.S.C. § 591. The individuals subject to investigation generally included the President; Vice President; designated heads of federal agencies; certain high-level officials in the Executive Office of the President; certain senior executive officials in DOJ, the Central Intelligence Agency, or the Internal Revenue Service; and officers of campaign committees for the President. *See id.* § 591(b). Other individuals, including Members of Congress, could be investigated under certain circumstances as well. *See id.* § 591(c). The statute allowed for investigations of potential violations of “any Federal criminal law other than a violation classified as a Class B or C misdemeanor or an infraction.” *See id.* § 591(a).

³³ *Id.* § 592(d).

³⁴ *Id.* § 592(a).

³⁵ *Id.* § 592(a)(1).

The conclusions reached based upon that initial investigation determined whether an independent counsel would be appointed to investigate the underlying allegations further.³⁶ The statute required that the Attorney General request appointment of a special prosecutor by the special division of a federal court (discussed below) under three sets of circumstances. First, if the 90-day window for the preliminary investigation passed without a determination that further investigation or prosecution was not warranted, the Attorney General was required to request the appointment by the court.³⁷ Second, if the Attorney General’s initial investigation determined that further investigation or prosecution was warranted, the Attorney General was also required to request the appointment by the court.³⁸ Finally, if the preliminary investigation indicated that further action was not warranted, but additional information was subsequently revealed which led the Attorney General to determine that further investigation or prosecution was indeed warranted, the Attorney General was mandated to conduct a preliminary investigation based on that information.³⁹ Following that investigation, the statute required the Attorney General to seek appointment of an independent counsel under the same circumstances—*i.e.*, if no determination had been made within 90 days or if the Attorney General determined further investigation was warranted.⁴⁰ The Attorney General’s decision to request an appointment under the statute was not subject to judicial review.⁴¹

While the Attorney General was not authorized under the statute to appoint the independent counsel, he was required to provide the court with “sufficient information to assist” the court in the selection of the appointed individual and to define the jurisdiction of the inquiry.⁴²

Role of the Court

While the Attorney General conducted the initial investigation to determine whether an independent investigation was warranted, the independent counsel statute required that a special division of the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit), composed of three federal judges or Justices, appoint the independent counsel.⁴³

The Chief Justice of the U.S. Supreme Court assigned three federal judges or Justices to that division for two-year assignments.⁴⁴ The statutory rules regarding assignment of the three-judge panel required that the panel include a judge from the D.C. Circuit and that not more than one judge or Justice be from any single court.⁴⁵ Any judge or Justice serving in the special division of the court that appointed the independent counsel was barred from participating in any judicial

³⁶ If the Attorney General determined from the initial investigation that “there were no reasonable grounds to believe that further investigation [was] warranted,” he or she was required to notify the three-judge panel, which would then have no authority to appoint a special prosecutor for the allegations. *Id.* § 592(b)(1). The Attorney General was required to provide a summary of the information received and the results of the preliminary investigation. *Id.* § 592(b)(2).

³⁷ *Id.* § 592(c)(1)(B).

³⁸ *Id.* § 592(c)(1)(A).

³⁹ *Id.* § 592(c)(2).

⁴⁰ *Id.*

⁴¹ *Id.* § 592(f).

⁴² *Id.* § 592(d).

⁴³ *Id.* § 593(a) (cross-referencing 28 U.S.C. § 49).

⁴⁴ *Id.* § 49.

⁴⁵ *Id.* § 49(d).

proceeding involving the independent counsel while he or she was still serving in that position or any proceeding involving the exercise of the independent counsel's official duties.⁴⁶

Based on recommendations from the Attorney General regarding the selection and jurisdiction of the independent counsel, the three-judge panel had the final authority to make the appointment and define the prosecutorial jurisdiction.⁴⁷ The court was expressly barred from appointing "any person who holds or recently held any office of profit or trust under the United States."⁴⁸

Scope of Authority

"[W]ith respect to all matters in [the] independent counsel's prosecutorial jurisdiction," Congress granted the independent counsel "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice...."⁴⁹ Examples of the independent counsel's enumerated authorities included

- conducting investigations and grand jury proceedings;
- engaging in judicial proceedings, including litigation and appeals of court decisions;
- reviewing documentary evidence;
- determining whether to challenge the use of testimonial privileges;
- receiving national security clearances, if appropriate;
- seeking immunity for witnesses, warrants, subpoenas, and other court orders;
- obtaining and reviewing any tax return; and
- carrying out prosecutions in court, including filing indictments.⁵⁰

Furthermore, the independent counsel could request DOJ assistance in the course of his or her investigation, including access to materials relevant to the jurisdiction of the inquiry and the necessary resources and personnel to perform his or her assigned duties.⁵¹

Removal

Other than impeachment, the independent counsel could be subject to removal "only by the personal action of the Attorney General and only for good cause, physical or mental disability ..., or any other condition that substantially impairs the performance of such independent counsel's duties."⁵² In other words, the independent counsel was generally not subject to the control and oversight of any other official within the executive branch.⁵³ If the Attorney General exercised his

⁴⁶ *Id.* § 49(f).

⁴⁷ *Id.* § 593(b).

⁴⁸ *Id.* § 593(b)(2).

⁴⁹ *Id.* § 594(a).

⁵⁰ *Id.*

⁵¹ *Id.* § 594(d).

⁵² *Id.* § 596(a)(1).

⁵³ The standard of removal "for good cause" indicates that the independent counsel could not be removed at will, but rather for reasons related to the specific performance of his or her assigned duties. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 502-03 (2010) (describing the "good cause" standard as an "unusually high standard" which included willful violations of law, willful abuse of authority, or failure to comply with rules without (continued...))

removal authority, he or she was required to notify the special division of the court responsible for the initial appointment and the Committees on the Judiciary of both the House of Representatives and the Senate, identifying his reasons for removal.⁵⁴

Termination of Independent Counsel Inquiries

The inquiry led by the independent counsel under the statute could be terminated under two methods. First, the statute directed that the office of the independent counsel would terminate upon notification by the independent counsel to the Attorney General that the investigation and any subsequent prosecutions had been completed.⁵⁵ Second, the statute permitted the special division of the court—by its own choice or by the recommendation of the Attorney General—to terminate the office at any time if the investigation had been completed or sufficiently completed, allowing the DOJ to formally complete the inquiry under its own processes.⁵⁶ In either case, the independent counsel was required to submit a report to the special division of the court detailing the work completed.⁵⁷ The report was required to include “a description of the work of the independent counsel, including the disposition of all cases brought.”⁵⁸

Statutory Reauthorizations and Eventual Lapse of the Independent Counsel Statute

When the independent counsel statute was originally enacted in 1978, Congress provided that its authority would lapse five years after enactment.⁵⁹ Investigations that had already started pursuant to the provisions were permitted to continue, but no new investigations could be initiated at that time.⁶⁰ Rather than allow the statute to lapse, Congress reauthorized the law, with some amendments, several times. It was reauthorized in 1983⁶¹ and 1987,⁶² and remained in effect until 1992, when Congress allowed the law to expire. The statute was again reauthorized in 1994, following concerns related to the investigation of the Whitewater controversy during the interim years.⁶³ However, concerns over whether the independent counsel possessed too much power, which arose after the extensive independent counsel investigations of the Iran-Contra affair and the Whitewater controversy, resulted in the law’s ultimate expiration and nonrenewal in 1999.⁶⁴

(...continued)

reasonable justification). *But see* Morrison v. Olson, 487 U.S. 654, 692 (1988) (explaining that the independent counsel statute’s “good cause” requirement for removal nonetheless allows the Attorney General “ample authority to assure that the counsel is competently performing his or her statutory responsibilities in a manner that comports with the provisions of the Act”).

⁵⁴ 28 U.S.C. § 596(a)(2).

⁵⁵ *Id.* § 596(b)(1). If the investigation or prosecutions were not fully completed, but were sufficiently completed to allow DOJ to complete them under normal processes, the independent counsel could also terminate the inquiry. *Id.*

⁵⁶ *Id.* § 596(b)(2).

⁵⁷ *See id.* § 596(b).

⁵⁸ *Id.* § 594(h)(1)(B).

⁵⁹ P.L. 95-521, § 601 (then codified at 28 U.S.C. § 598).

⁶⁰ *Id.*

⁶¹ Ethics in Government Act Amendments of 1982, P.L. 97-409, 96 Stat. 2039 (1983).

⁶² Independent Counsel Reauthorization Act of 1987, P.L. 100-191, 101 Stat. 1293 (1987).

⁶³ Independent Counsel Reauthorization Act of 1994, P.L. 103-270, 108 Stat. 732 (1994).

⁶⁴ *See generally* Brown, *supra* note 4.

Special Counsels, as Authorized Under Current DOJ Regulations

Following the expiration of the independent counsel statute, DOJ promulgated regulations in 1999, which are currently still in effect, to establish procedures for the appointment of special counsels pursuant to the Attorney General's general administrative hiring authority.⁶⁵ DOJ described these regulations as “strik[ing] a balance between independence and accountability in certain sensitive investigations.”⁶⁶ DOJ acknowledged at the time the regulations were promulgated, however, that “there is no perfect solution” to achieving that goal.⁶⁷

Thus far, it appears the special counsel regulations have been used infrequently.⁶⁸ In 1999, shortly after the regulations were promulgated, the Attorney General appointed former U.S. Senator John Danforth as special counsel to investigate events related to the government actions that occurred six years earlier at the Branch Davidian compound in Waco, Texas.⁶⁹ The special counsel's investigation found no wrongdoing on the part of federal law enforcement officials.⁷⁰ In May 2017, Deputy Attorney General Rod Rosenstein (acting in place of Attorney General Jeff Sessions, who had recused himself from the investigation) appointed former Federal Bureau of Investigation Director Robert S. Mueller III as special counsel to investigate efforts of the Russian government “to influence the 2016 election and related matters.”⁷¹

It may be noted that the Attorney General has general statutory authority to appoint DOJ staff to conduct or coordinate particular investigations.⁷² DOJ has used this authority previously to appoint “special counsel” to investigate particular matters. This authority differs from the special counsel regulations because it involves assignment of an internal agency official rather than an individual from outside the government.⁷³ For example, in 2003, then-Deputy Attorney General James Comey (acting in place of then-Attorney General John Ashcroft, who had recused himself from the investigation) used this statutory authority to appoint Patrick Fitzgerald to lead an investigation of whether White House or other federal officials unlawfully leaked the identity of a Central Intelligence Agency officer to a reporter.⁷⁴ Fitzgerald was serving as a U.S. Attorney when named as “special counsel,” which would have precluded his appointment under the special counsel regulations.⁷⁵ While “special counsel” thus may be appointed under either the general statutory authority or under the specific special counsel regulations, those named under the regulations are considered to be more independent, given that they are not appointed from within the agency.

⁶⁵ 28 C.F.R. Part 600.

⁶⁶ See Office of Special Counsel, 64 Fed. Reg. 37,038.

⁶⁷ See *id.*

⁶⁸ Matt Zapotosky, *Explaining the Precedent for and Role of a Special Counsel*, ORLANDO SENTINEL (May 19, 2017).

⁶⁹ Lorraine Adams, *Reno Asks Danforth to Run Waco Probe*, THE WASHINGTON POST (Sept. 8, 1999).

⁷⁰ Jim Yardley, *A Special Counsel Finds Government Faultless at Waco*, N.Y. TIMES (July 22, 2000).

⁷¹ Office of the Deputy Att’y Gen., *Appointment of Special Counsel to Investigate Russian Interference with the 2016 Presidential Election and Related Matters*, Order No. 3915-2017 (May 17, 2017), available at <https://www.justice.gov/opa/press-release/file/967231/download>.

⁷² 28 U.S.C. §§ 509, 510, 515.

⁷³ 28 C.F.R. § 600.3(a).

⁷⁴ Letters from James B. Comey, Acting Attorney General, to Patrick J. Fitzgerald, U.S. Attorney (Dec. 30, 2003 and Feb. 6, 2004), available at https://www.justice.gov/archive/osc/documents/2006_03_17_exhibits_a_d.pdf.

⁷⁵ *Id.*; see also 28 C.F.R. § 600.3.

Appointment and Selection by the Attorney General or the Acting Attorney General

Under the DOJ regulations that supplanted the independent counsel provisions, the authority to appoint and select a special counsel resides solely with the Attorney General (or his surrogate, if the Attorney General has recused himself from the matter), rather than being shared with the judicial branch.⁷⁶ The regulations generally state that the Attorney General “will appoint a Special Counsel” to conduct certain investigations or prosecutions.⁷⁷ To make such an appointment, the Attorney General must determine that (1) a criminal investigation is warranted; (2) the normal processes of investigation or prosecution would present a conflict of interest for DOJ, or other extraordinary circumstances exist; and (3) public interest requires a special counsel to assume those responsibilities.⁷⁸ When DOJ promulgated the special counsel regulations, it explained the type of conflicts that might lead to the appointment of a special counsel: “[t]here are occasions when the facts create a conflict so substantial or the exigencies of the situation are such that any initial investigation might taint the subsequent investigation, so that it is appropriate for the Attorney General to immediately appoint a Special Counsel.”⁷⁹

After receiving information that could warrant consideration of an independent investigation, the Attorney General generally has discretion under the regulations to determine whether and when the appointment of a special counsel would be appropriate.⁸⁰ The Attorney General may appoint a special counsel immediately; may require an initial investigation to inform his decision about whether to appoint a special counsel; or “may direct that appropriate steps be taken to mitigate any conflicts of interest, such as recusal of particular officials,” to permit the investigation to be concluded within “the normal processes.”⁸¹

In the event that the Attorney General has recused himself from a particular matter upon which a special counsel appointment might be appropriate, the regulations contemplate that the Acting Attorney General will take responsibility for the appointment process.⁸² Federal law provides that the Deputy Attorney General would serve as the Acting Attorney General.⁸³

Individuals who may be appointed as special counsels under these regulations must be chosen from outside the federal government.⁸⁴ Such individuals must be “a lawyer with a reputation for integrity and impartial decisionmaking, and with appropriate experience to ensure both that the investigation will be conducted ably, expeditiously and thoroughly, and that investigative and prosecutorial decisions will be supported by an informed understanding of the criminal law and Department of Justice policies.”⁸⁵ Furthermore, the special counsel may hold other professional

⁷⁶ See 28 C.F.R. 600.1.

⁷⁷ *Id.* § 600.1.

⁷⁸ *Id.* § 600.1.

⁷⁹ See Office of Special Counsel, 64 Fed. Reg. 37,038, 37038.

⁸⁰ 28 C.F.R. § 600.2.

⁸¹ *Id.* § 600.2.

⁸² *Id.* § 600.1.

⁸³ 28 U.S.C. § 508(a). If the Deputy Attorney General is likewise recused, the appointment authority would pass to the Associate Attorney General. *Id.* § 508(b). See also Exec. Order 13,787, 3 C.F.R. 16,723 (Mar. 31, 2017) (identifying the order of succession within DOJ if the Attorney General or other senior officials are unable to serve).

⁸⁴ 28 C.F.R. § 600.3(a).

⁸⁵ *Id.* § 600.3(a).

roles during his or her service, but is required to agree that the duties of the appointment will take “first precedence.”⁸⁶

Scope of Jurisdiction and Authority

Like the appointment and selection process, the sole authority to determine the scope of the special counsel’s inquiry rests with the Attorney General.⁸⁷ The jurisdiction of the inquiry is determined by “a specific factual statement” about the matter to be investigated, which is provided by the Attorney General to the special counsel at the outset of the appointment.⁸⁸ Beyond that general jurisdiction, the special counsel is also authorized “to investigate and prosecute federal crimes committed in the course of, and with intent to interfere with, the Special Counsel’s investigation, such as perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses.”⁸⁹ While these are the original parameters of a special counsel’s jurisdiction, additional matters may be assigned to the special counsel as the inquiry proceeds.⁹⁰ To expand the jurisdiction, the special counsel must find such an expansion is necessary to complete the original assignment or necessary “to investigate new matters that come to light in the course of his or her investigation.”⁹¹ Upon such finding, the special counsel’s jurisdiction may be expanded only after consultation with the Attorney General, who then has the authority to determine whether to assign the additional matters to the special counsel or “elsewhere.”⁹²

Within the jurisdiction identified by the Attorney General, the special counsel has relatively broad authority to carry out his or her inquiry. According to the regulations, “the Special Counsel shall exercise, within the scope of his or her jurisdiction, the full power and independent authority to exercise all investigative and prosecutorial functions of any United States Attorney.”⁹³

Oversight and Removal

The DOJ special counsel regulations limit the special counsel’s relatively broad authority to conduct an inquiry by first subjecting his or her conduct to DOJ rules, regulations, procedures, practices, and policies.⁹⁴ Special counsels are directed to consult with the appropriate offices within DOJ or the Attorney General directly if necessary.⁹⁵ Additionally, special counsels are subject to discipline for misconduct and breach of ethical duties that are generally applicable to DOJ employees.⁹⁶

⁸⁶ *Id.* § 600.3(a). The regulations state “that it may be necessary to devote their full time to the investigation, depending on its complexity and the stage of the investigation.” *Id.*

⁸⁷ *Id.* § 600.4.

⁸⁸ *Id.* § 600.4(a).

⁸⁹ *Id.* § 600.4(a). The special counsel also has authority to appeal any decisions arising in the course of the inquiry. *Id.* The regulations explicitly state that special counsels “shall not have civil or administrative authority unless specifically granted such jurisdiction by the Attorney General.” *Id.* § 600.4(c).

⁹⁰ *Id.* § 600.4(b).

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* § 600.6.

⁹⁴ *Id.* § 600.7(a).

⁹⁵ *Id.*

⁹⁶ *Id.* § 600.7(c).

Second, the DOJ regulations contemplate some oversight of the special counsel by the Attorney General.⁹⁷ Specifically, they direct the special counsel to “determine whether and to what extent to inform or consult with the Attorney General or others within the Department about the conduct of his or her duties and responsibilities.”⁹⁸ While the regulations indicate that special counsels “shall not be subject to the day-to-day supervision of any official,”⁹⁹ the rules authorize the Attorney General to “request that the Special Counsel provide an explanation for any investigative or prosecutorial step.”¹⁰⁰ If, after giving the views of the special counsel “great weight,” the Attorney General’s review of such actions leads him to “conclude that the action is so inappropriate or unwarranted under established Departmental practices that it should not be pursued,” the Attorney General must notify the Chairman and Ranking Members of the Judiciary Committees in Congress of that decision with an explanation.¹⁰¹

Aside from review of particular actions, the regulations also grant the Attorney General authority to discipline or remove the special counsel. This authority may be exercised “only by the personal action of the Attorney General.”¹⁰² In other words, to comply with the regulations,¹⁰³ the Attorney General himself must remove the special counsel, not the President or a surrogate (unless, as noted previously in this report, the Attorney General has recused himself in the matter under investigation).¹⁰⁴ A decision to remove the special counsel must be made with “good cause,” such as misconduct, a dereliction of duty, incapacity, or the existence of conflicts of interest.¹⁰⁵ The Attorney General must report his decision to remove the special counsel, with an explanation of that decision, to both the Chairman and Ranking Members of the Judiciary Committees of Congress.¹⁰⁶

Review and Conclusion of Special Counsel Inquiries

Although the special counsel regulations do not provide an explicit timeline for inquiries or a special counsel appointment, they do require the special counsel to report to DOJ periodically about the budget of operations for the inquiry as well as with status updates in some circumstances. Specifically, the special counsel must provide a proposed budget within 60 days of the appointment.¹⁰⁷ The special counsel must also provide annual reports regarding the status of

⁹⁷ *See id.* § 600.7. Special counsels are required to comply with DOJ rules, regulations, procedures, practices, and policies and are directed to consult with the appropriate offices within DOJ or the Attorney General directly if necessary. *Id.* § 600.7(a). Additionally, special counsels are subject to discipline for misconduct and breach of ethical duties that are generally applicable to DOJ employees. *Id.* § 600.7(c).

⁹⁸ *Id.* § 600.6.

⁹⁹ *Id.* § 600.7(b).

¹⁰⁰ *Id.* § 600.7(b).

¹⁰¹ *Id.* § 600.7(b).

¹⁰² *Id.* § 600.7(d).

¹⁰³ Commentators have noted the possibility that, regardless of the regulations, the President arguably may still be able to remove special counsels. *See* Neal Katyal, *Trump or Congress Can Still Block Robert Mueller. I Know. I Wrote the Rules*, THE WASHINGTON POST (May 19, 2017); Josh Blackman, *Could Trump Remove Special Counsel Robert Mueller? Lessons from Watergate*, JOSH BLACKMAN’S BLOG (May 23, 2017), <http://joshblackman.com/blog/2017/05/23/could-trump-remove-special-counsel-robert-mueller-lessons-from-watergate/>.

¹⁰⁴ *Id.* § 600.7(d).

¹⁰⁵ *Id.* § 600.7(d). *See supra* note 53 for an explanation of the “good cause” standard.

¹⁰⁶ *Id.* § 600.9(a)(2).

¹⁰⁷ *Id.* § 600.8(a)(1).

the investigation and budget requests 90 days prior to the beginning of the fiscal year.¹⁰⁸ The Attorney General is required to review the special counsel’s annual report and determine whether the investigation should continue and with what budget.¹⁰⁹

When the special counsel’s inquiry concludes, the special counsel must provide a confidential report to the Attorney General with explanations of the decisions made in the course of the inquiry in favor of or declining to prosecute any charges.¹¹⁰ The regulations do not expressly provide for disclosure of this report to any other parties.

Constitutional Issues Relating to the Investigation of Allegations of Wrongdoing by Executive Officials

Under separation-of-powers principles provided structurally within the U.S. Constitution, each branch of government is assigned particular functions that may not be delegated to, nor usurped by, another branch.¹¹¹ Congress may initiate and conduct congressional investigations and hearings to conduct oversight of executive agencies or consider the need for possible remedial legislation,¹¹² but it may not engage in criminal prosecutions on behalf of the United States—a function generally provided to the executive branch.¹¹³

Accordingly, designing a mechanism to provide for criminal inquiries of executive officials by officers independent from the executive branch has raised questions about whether such a goal can be accomplished in accordance with constitutional mandates. This issue was addressed directly in response to the now-expired independent counsel statute in *Morrison v. Olson*, a 1988 U.S. Supreme Court decision involving a constitutional challenge to the authority of Congress to vest the appointment of an independent counsel outside the executive branch and limit the removal authority of the President.¹¹⁴ *Morrison* ultimately upheld the independent counsel statute as constitutional,¹¹⁵ although, perhaps notably, the Court’s analysis has been criticized in the decades since the decision.¹¹⁶

In *Morrison*, noting that the constitutional text of the Appointments Clause permitted Congress to “vest the Appointment of such inferior Officers, as they think proper, in the President alone, *in the*

¹⁰⁸ *Id.* § 600.8(a)(2).

¹⁰⁹ *Id.* § 600.8(a)(2).

¹¹⁰ *Id.* § 600.8(c).

¹¹¹ Under what is commonly known as the nondelegation doctrine, Congress cannot delegate its authority to another branch of government. *See* *Touby v. United States*, 500 U.S. 160, 164-65 (1991) (quoting *Mistretta v. United States*, 488 U.S. 361, 371 (1989)) (“The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government.”).

¹¹² *See* *McGrain v. Daugherty*, 273 U.S. 135 (1927) (describing congressional oversight authority as “an essential and appropriate auxiliary to the legislative function”); *Watkins v. United States*, 354 U.S. 178, 187 (1957) (“The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad.”).

¹¹³ *See* *Morrison v. Olson*, 487 U.S. 654, 706 (1988) (“Governmental investigation and prosecution of crimes is a quintessentially executive function.”).

¹¹⁴ 487 U.S. 654 (1988).

¹¹⁵ *Id.* at 659-60.

¹¹⁶ While the Court’s holding in *Morrison* remains the controlling opinion, at least one lower court, in an opinion that has been vacated pending en banc review, has more recently afforded significant weight to the dissent’s analysis. *See* *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 20 (D.C. Cir. 2016) (vacated).

Courts of Law, or in the Heads of Departments,”¹¹⁷ Chief Justice Rehnquist, writing on behalf of the majority, concluded that independent counsels are “clearly” inferior officers.¹¹⁸ Such officers, according to the Court, could constitutionally be appointed by the court under the statute because they (1) could be removed by a higher-ranking official; (2) had a limited scope of authorized duties; and (3) held an office with limited jurisdiction.¹¹⁹ The Court likewise concluded that Congress had not interfered with executive authority by providing for the independent counsel’s removal only for good cause for similar reasons.¹²⁰

Morrison was decided 7-1, with Justice Scalia dissenting from the Court’s opinion and Justice Kennedy not participating in the case. In dissent, Justice Scalia argued that the independent counsel statute should be read as a violation of the separation of powers because, under his reading, the Constitution vested authority for criminal investigations and prosecutions exclusively in the executive branch.¹²¹ Under this rationale, Justice Scalia warned that the Court must be very careful to guard against the “gradual concentration of the several powers in the same department” that can be likely to occur as one branch seeks to infringe upon another’s distinct constitutional authorities.¹²²

In the years since *Morrison*, especially in the wake of the Whitewater investigation, a number of legal scholars have also criticized the independent counsel statute on both policy and constitutional grounds.¹²³ While *Morrison* remains good law, it is unclear whether the Court would necessarily view a reauthorization of the independent counsel statute or a similar statute in the same vein as it did in *Morrison*.¹²⁴

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¹¹⁷ U.S. CONST. art. II, § 2, cl. 2 (emphasis added).

¹¹⁸ *Morrison*, 487 U.S. at 671.

¹¹⁹ *Id.* at 671-72. Perhaps notably, the Court expressly indicated its decision did not mean “that Congress’ power to provide for interbranch appointments of ‘inferior officers’ is unlimited.” *Morrison*, 487 U.S. at 675 (“In this case, however, we do not think it impermissible for Congress to vest the power to appoint independent counsel in a specially created federal court.”).

¹²⁰ *Id.* at 686.

¹²¹ *Id.* at 703-05 (Scalia, J., dissenting).

¹²² *Id.* at 699 (quoting Federalist No. 51, p. 321 (J. Madison)) (“Frequently an issue of this sort will come before the Court clad, so to speak, in sheep’s clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf.”).

¹²³ See *Starr Opposes Independent Counsel Act*, CNN.COM (Apr. 14, 1999), available at <http://www.cnn.com/ALLPOLITICS/stories/1999/04/14/test.top/>; Julie O’Sullivan, *The Independent Counsel Statute: Bad Law, Bad Policy*, 33 AM. CRIM. L. REV. 463 (1996); Julian A. Cook III, *Mend It or End It? What To Do With the Independent Counsel Statute*, 22 HARV. J. L. & PUB. POL’Y 279 (1998); Ken Gormley, *Monica Lewinsky, Impeachment, and the Death of the Independent Counsel Law: What Congress Can Salvage from the Wreckage – A Minimalist View*, 60 MD. L. REV. 97 (2001).

¹²⁴ See *PHH Corp.*, 839 F.3d at 20 (noting that Justice Kagan, who joined the Court after the *Morrison* decision, regards Justice Scalia’s dissent in *Morrison* as “one of the greatest dissents ever written and every year it gets better”).

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