

U.S. practice on "special prosecutors" has evolved through three stages.

Stage One: Ad Hoc Special Prosecutors (Pre 1977)

The first U.S. special prosecutor, Archibald Cox, was appointed by President Nixon in 1973 to investigate the Watergate scandal. At the time, there was no law regulating the appointment of special prosecutors and the decision was largely ad hoc and political. Nixon appointed Cox because his administration was implicated in Watergate and he thought that an outside prosecutor's findings would have more credibility than those of his own Justice Department. Cox was formally appointed by Nixon's Attorney General, Elliot Richardson. Richardson selected Cox because of his outstanding credentials (Harvard Law School professor, former Solicitor General, etc.) and because of his longstanding ties to the Democratic party, which made it clear that he would be independent of Nixon, a Republican.

Cox's powers were largely undefined and when he tried to compel Nixon to turn over tape recordings made by Nixon of certain White House conversations, Nixon claimed executive privilege and refused to turn over the tapes. When Cox refused to back down, Nixon ordered Richardson to fire him. Richardson refused and was himself fired by Nixon. On the same day, Richardson's Deputy and successor, William French Smith, also refused and was also fired by Nixon. Finally, Robert Bork, the Solicitor General and third highest ranking official in DOJ, fired Cox.

Eventually, a new Special Prosecutor, Leon Jaworski, was appointed by a new Attorney General. Jaworski also wound up in protracted litigation with Nixon over the tapes and sued Nixon to compel the tapes' release. Nixon argued that the Special Prosecutor did not have the power to compel the President to provide evidence. Eventually, the case went to the Supreme Court, which held that Nixon did have to turn the tapes over to Jaworski. Nixon was eventually forced to resign under threat of impeachment by the Senate. As a result of the Special Prosecutor's investigation and prosecution, several high ranking administration officials were convicted and served prison sentences.

Stage Two: The "Independent Counsel" Statute (1977-1991)

As a result of Watergate, in 1977 Congress passed the Ethics in Government Act (EGA) which for the first time defined procedures for the appointment of a special prosecutors. Specifically, the Act provided that upon receiving allegations relating to certain "covered persons", the Attorney General was required to conduct a preliminary investigation. If the preliminary investigation suggested that further investigation was warranted, the AG was required to petition three judge panel established by the statute and known as the "Special Division," to appoint an "independent counsel." Several aspects of the Act require further explanation.

a) Covered Persons

The Act defined two categories of "covered persons" - (1) "mandatory" covered persons and (2) "discretionary" covered persons. Mandatory covered persons were those persons for whom a conflict of interest was presumed to exist by virtue of their close relationship to the President, DOJ or Attorney General. These included the President, Vice President, Cabinet, the Executive Office of the President, and high-level officials in DOJ, the CIA, IRS and the President's National election campaign. The Act required that an Independent Counsel be appointed to conduct any investigations regarding such mandatory covered persons.

Discretionary coverage, by contrast, allowed the AG to seek an independent counsel to investigate allegations regarding officials not considered "mandatory covered persons" if he felt that such an independent investigation would be appropriate. Such discretionary coverage was available for members of Congress when appointing an independent counsel would be "in the public interest" or for any person if the AG determined that investigation or prosecution of that person by DOJ could result in a personal, financial, or political conflict of interest.

b) Preliminary Investigation by AG

The Act was triggered when the AG received "information sufficient to constitute grounds to investigate" whether a covered person had committed a serious federal crime. Upon receipt of such information, the AG was required to consider (1) the specificity of the information and (2) the credibility of its source. If the information was either not specific or not credible, the AG was required to close the matter. If the information was not found to be lacking in either specificity or credibility, the AG was required to undertake a preliminary investigation and to notify the Special Division of the commencement of the investigation.

The Act also required the AG to make an initial determination as to whether he should recuse himself immediately from any further proceedings under the Act. The Act provided that AG recusal was required when the allegations involved the AG directly or any person "with whom the AG had a personal or financial relationship." If the AG recused himself, then the next most senior DOJ who was not conflicted would perform the same functions under the Act that the AG would have performed but for his conflict of interest.

After the initial determination regarding the credibility and specificity of the allegations, the Act required the AG to complete a "preliminary investigation" within 90 days. The purpose of the preliminary investigation was to determine whether there were "reasonable grounds to believe that further investigation is warranted." If so, an independent counsel would be appointed by the Special Division to conduct that investigation. If not, no independent counsel would be appointed. The preliminary investigation was similar to ordinary criminal investigations conducted by DOJ except that the AG was not permitted to use the grand jury, issue subpoenas or enter into plea bargains.

c) Request by Congress for Appointment of 1C

The Act also provided that the Judiciary Committee of either chamber of Congress, or a majority of either the majority or non majority party members on the Committee, could request that the AG invoke the Act to appoint an Independent Counsel. Upon such a Congressional request, the Act's triggering mechanisms then functioned as they would with any other receipt of information, with three differences: (1) after completing the initial determination as to the credibility and specificity of the allegations, the Attorney General was required to file a report with Congress explaining why a preliminary investigation would or would not commence; (2) if a preliminary investigation was undertaken, copies of all papers filed with the Special Division Court also had to be given to Congress and [3] if the AG declined to apply to the court for appointment of an Independent Counsel, he was required to file a report with Congress explaining his decision. In order to protect the rights of suspects, the ACT prohibited Congress from disclosing any information that it received in connection with the investigation.

d) Appointment of the Independent Counsel

The process of appointing an independent counsel began with the filing of an application by the AG with the Special Division. The Act required the application to "contain sufficient information to assist the Special Division in selecting an independent counsel and in defining the

independent counsel's jurisdiction... to fully investigate and prosecute the subject matter and related matters."

Upon receipt of the application, the Special Division was required to appoint an independent counsel and, in doing so, was required to consider "experience, responsibility, cost-efficiency and promptness." The Special Division was also required to define the precise scope of the IC's jurisdiction with reference to the statutory provision that the scope should include "the subject matter with respect to which the Attorney General has requested the appointment of the independent counsel, and all matters related to that subject matter and any federal crimes that may arise out of the investigation or prosecution" of the subject matter (such as perjury, obstruction of justice, destruction of evidence or witness tampering).

The Act also provided that if the Independent Counsel uncovered information unrelated to the scope of the original investigation but warranting further investigation, the Independent Counsel could further this information to the Attorney General with a request that the scope of the initial investigation be expanded to include the new subject matter. The Attorney General then followed the ordinary preliminary investigation procedure in deciding whether to request that the Special Division expand the Independent Counsel's jurisdiction. (This is what happened in Ken Starr's investigation of Whitewater, the scope was expanded by the Special Division to include the allegations of perjury related to the Monica Lewinsky affair.)

e) The Independent Counsel

The Act provided that the 1C would have "full power and independent authority to exercise all investigative and prosecutorial functions and powers of DOJ and the AG including:

- convening grand juries;

- granting immunity;

- prosecuting;

- litigating and appealing in federal court;
- dismissing cases before prosecution.

The Act also provided that the 1C would be "separate and independent of DOJ and required DOJ to cease any investigations of matters within the jurisdiction of the independent counsel. But, it also provided that the 1C could seek DOJ's assistance in pursuing the investigation, including the detailing of DOJ staff to the 1C and consulting with US Attorneys.

The Act set no time limit on the IC's investigation and simply provided that the IC's office would be closed when the 1C notified the AG that the investigation had been completed and filed a report summarizing the results of the investigation or when the Special Division determined that that investigation had "been completed or so substantially completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions."

The Act provided that the 1C could be removed involuntarily by the AG, but only "for good cause." If the AG sought to remove the 1C, he was required to file a report with the Special Division and with Congress explaining the basis for removal and the 1C was permitted to seek judicial review of the AG's decision. The Act also provided that the 1C could be removed by Congress through impeachment and conviction.

The Act also included provisions for the IC's pay and expenses (both of which were covered by DOJ). The Act also included conflict of interest provisions prohibiting anyone associated with the IC's law firm from representing anyone in the investigation and from representing any subjects of the investigation for certain periods of time after the conclusion of the investigation. The Act also included provisions whereby subjects of the investigation who were not charged could apply to have their attorneys' fees reimbursed.

After the Whitewater/Lewinsky Affair, the Act was allowed to lapse under a sunset provision in 1999 and has not been renewed.

Stage Three: "Special Counsel" f 1999-Present

Current U.S. practice is governed by the Code of Federal Regulations (CFR), Chapter 6. The CFR eliminates the judicial "Special Division" provided for by the EGA, the concept of "covered persons" and the opportunity for Congress to request that an independent counsel be appointed. In general, it provides the AG much wider discretion in deciding whether to appoint an independent prosecutor and gives the AG much greater influence over the investigation than the EGA. The main provisions of the CFR relating to the appointment of a Special Counsel are the following:

(a) Grounds for Appointing a Special Counsel

Section 600.1 of the CFR provides that the AG will appoint a Special Counsel (SC] when the AG determines that criminal investigation is warranted and that (a) investigation by the Department of Justice would present a conflict of interest or "other extraordinary circumstance" and that "under the circumstances it would be in the public interest to appoint and outside Special Counsel." The AG's decision is unreviewable.

(b) Alternatives Available to AG

Section 600.2 provides that, when matters are brought to the attention of the AG indicating that appointment of a special counsel may be appropriate, the AG may:

(a) appoint a Special Counsel;

(b) direct that a preliminary investigation be conducted in order to better inform the AG's decision;

(c) conclude that under the circumstances the public interest would not be served by appointment of a special counsel and that the matter can be

handled byIf the AG reaches this conclusion, the AG may direct that appropriate steps be taken to mitigate the conflict, such as recusal of particular officials.

(c) Qualifications of the SC

Section 600.3 of the CFR provides that an SC shall be a lawyer from outside the US government "with a reputation for integrity and impartial decision making, and with appropriate experience to ensure that 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 DOJ policies."

(d) Jurisdiction

Section 600.4 of the CFR provides that the jurisdiction of the Special Counsel is established by the AG and includes the authority to investigate and prosecute federal crimes committed in the course of, and with intent to interfere with the SC's investigation, such as perjury, obstruction of justice, etc. The jurisdiction of the SC can be expanded by the AG if the SC and AG conclude that additional jurisdiction is necessary "in order to fully investigate and resolve the matters assigned, or to investigate new matters that come to light in the course of his investigation."

(e) Staffing

Section 600.5 of the CFR provides that the SC may request that DOJ assign appropriate DOJ officials to assist in the Special Counsel's investigation and DOJ must assist to the extent possible.

(f) Power and Authority

CFR 600.6 provides that the SC shall exercise within the scope of his jurisdiction the full power

and independent authority to exercise all investigative and prosecutorial functions of any United States Attorney.

(g) Conduct and Accountability

CFR 600.7 provides that the SC shall comply with all the rules and policies of DOJ and shall consult with appropriate DOJ officials for guidance with respect to established policies.

CFR 600.7 also provides that the SC shall not be subject to the day to day supervision of DOJ. But it also provides that the AG may request that the SC provide an explanation for any investigative or prosecutorial step and may conclude that the action is so unwarranted under current DOJ guidelines that it should not be pursued. In making such a determination, the AG is required to give great weight to the views of the SC. If the AG concludes that a proposed action should not be pursued on these grounds, the AG is required to notify Congress of such a determination.

CFR 600.7 also provides that the SC may be disciplined or removed from office only by the personal action of the AG and that the AG may remove a Special Counsel for "misconduct, dereliction of duty, incapacity, conflict of interest, or for other good cause, including violation of Departmental policies."

(h) Budget, Notification and Reports by the SC

CFR 600.8 provides that the SC shall be provided "all appropriate resources" by DOJ and that within 60 days of appointment, he shall develop a proposed budget for the AG's review and that, based on the proposal, the AG shall establish a budget for the operations of the SC's office. 600.8 also provides that 90 days before the beginning of each fiscal year, the SC shall report to the AG the status of the investigation and provide a budget request for the following year. 600.8 also provides that at the conclusion of the SC's work, the SC shall provide the AG with a confidential report "explaining the prosecution or declination decisions reached by the SC."

(i) Notification and Reports by the AG

CFR 600.9 requires the AG to notify the Chairman and Ranking Minority Member of the Judiciary Committee of each House of Congress, with an explanation for each action:

- Upon appointing a Special Counsel;

- Upon removing a Special Counsel;

- Upon conclusion of the Special Counsel's investigation, including an explanation of the instances in which the AG determined that a proposed action by the SC was so inappropriate or unwarranted under DOJ policies that it should not be pursued.