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The Special Prosecutor Act: Proposals
For 1983

Victor H. Kramer* and Louis P. Smith**

I. INTRODUCTION

The special prosecutor provisions of the Ethics in Government Act were enacted by Congress in October 1978.1 The Act contains a sunset clause that terminates the provisions in October 1983.2 Congress is now considering how the special prosecutor provisions have been interpreted and applied to determine whether it should allow the Act to expire, to continue in its present form, or to continue with appropriate changes.

Congress adopted the Act in the wake of Watergate, after extensive public debate and more than five years of legislative hearings.3 In an attempt to ensure the effectiveness of the special prosecutor,4 Congress created an office independent of the Attorney General. Under the Act, if the Attorney General uncovers nonfrivolous allegations that the President, the Vice President, a member of the Cabinet, or any of certain other government officials has committed a federal crime other than a petty misdemeanor, the Attorney General must petition a special three-judge court to appoint a special prosecutor to investigate these charges.

This Article reviews the genesis of the Act and how the law has worked under three Attorneys General. It questions both

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3. Congressional debate over the need for a special prosecutor began in May 1973. See Hearings on the Nomination of Elliot L. Richardson to be Attorney General: Before the Senate Comm. on the Judiciary, 93d Cong., 1st Sess. 143-225 (1973) [hereinafter cited as Hearings on Elliot L. Richardson]. Special prosecutor legislation was introduced in and considered by the 93d, 94th, and 95th Congresses, and finally adopted in October, 1978. See supra note 1. See also infra text accompanying notes 9-29.

4. For a discussion of Congress's motives, see infra text accompanying notes 9-29.

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the fairness of the special prosecutor procedures and the constitutionality of the Act. The Article discusses problems with the Act during its short history, and examines several alternative ways to structure the office of a special prosecutor. Finally, the authors detail a proposal which Congress may wish to consider in its deliberations.

II. HISTORY OF THE ACT

Congress began to call for an independent special prosecutor as the Watergate controversy was nearing its climax. The Senate Judiciary Committee considered the need for a special prosecutor as early as the spring of 1973, and the judiciary committees of both houses of the 93d Congress held extensive hearings on the subject. In the spring of 1974, a subcommittee of the Senate Judiciary Committee, chaired by Senator Ervin, considered proposals to establish a permanent "special" or "public" prosecutor. In June 1974, a Senate Select Committee recommended establishment of a permanent office, independent of the President, to prosecute criminal cases involving high government officials and others.

Following President Nixon's resignation in August 1974, Congress began to study the problem in the calmer atmosphere

5. Attorney General Smith, see infra note 64, and former Attorney General Civiletti have raised such questions. See N.Y. Times, Dec. 7, 1980, § 1, at 44, col. 1 (former Attorney General Civiletti expresses "substantial doubt about the basic fairness of the Special Prosecutor Act").

6. See infra text accompanying notes 48-122.

7. See infra text accompanying notes 157-97. An appendix to this Article sets out the changes the proposal suggests in the present Act.

8. A Watergate special prosecutor, Archibald Cox, had been appointed previously. The Justice Department had set forth Cox's duties and responsibilities. See 38 Fed. Reg. 14,688 (1973). He was subsequently dismissed by Acting Attorney General Bork, pursuant to presidential instructions. Although this dismissal was later held illegal in Nader v. Bork, 366 F. Supp. 104 (D.D.C. 1973), Congress was concerned "how best to prevent future Executive interference with the Watergate investigation." Id. at 109.


of the Ford administration. In May 1976, a proposal called the Watergate Reorganization and Reform Act of 1976 emerged in the Senate.\textsuperscript{13} That bill would have created a Division of Government Crimes in the Justice Department and a mechanism to appoint special prosecutors to investigate allegations that specified high government officials had committed crimes.\textsuperscript{14} Deputy Attorney General Tyler, testifying on behalf of the Ford administration, vigorously opposed both parts of the bill. He pointed out that the Department had already established a Public Integrity Section within its Criminal Division which, he believed, rendered a new Government Crimes Division unnecessary and undesirable.\textsuperscript{15} Tyler also argued that the creation of a special prosecutor's office would infringe upon the executive branch's constitutional responsibility to enforce the law.\textsuperscript{16}

Despite this criticism, Congress continued to press for special prosecutor legislation. In the spring of 1977, after President Carter had assumed office, the Senate Committee on Governmental Affairs published its report on the Public Officials Integrity Act of 1977.\textsuperscript{17} The report recommended sweeping legislation "to preserve and promote the integrity of public officials and institutions."\textsuperscript{18} Like the 1976 bill, this 1977 proposal would have established an Office of Government Crimes within the Department of Justice.\textsuperscript{19} The bill disqualified from serving as the director of the office anyone who had been active\textsuperscript{20} during the preceding five years in "working for a candidate for any elected federal office."\textsuperscript{21} The Office would have had jurisdiction over any "federal criminal violations by any elected or appointed federal employee related directly or indirectly to his

\begin{itemize}
  \item \textsuperscript{13} S. 495, as amended, 94th Cong., 2d Sess. (1976); S. REP. No. 823, 94th Cong., 2d Sess. (1976).
  \item \textsuperscript{15} \textit{The Watergate Reorganization and Reform Act of 1976, Hearings on S. 495 Amended: Before the Senate Comm. on the Judiciary}, 94th Cong., 2d Sess. (May 26, 1976) (Statement of Harold R. Tyler, Jr., Deputy Attorney General, at 1-4) (unpublished) (on file at the \textit{Minnesota Law Review}) [hereinafter cited as \textit{Hearings on S. 495 Amended}].
  \item \textsuperscript{16} Id. at 5-6.
  \item \textsuperscript{17} S. REP. No. 170, 95th Cong., 1st Sess. (1977).
  \item \textsuperscript{18} Id. at 177.
  \item \textsuperscript{19} Id. at 36, 80-81.
  \item \textsuperscript{20} Section 592(a)(2) of the bill defined "active" as holding a "high-level position of trust and responsibility" in a campaign organization or a political party that was working to elect a candidate to any federal office. \textit{Id.} at 80, 176.
  \item \textsuperscript{21} \textit{Id.} at 80.
\end{itemize}
The bill also required the appointment of a special prosecutor if the Department of Justice received nonfrivolous allegations of wrongdoing against any individual holding named high offices in government.23

The Senate committee based its preference for an independent special prosecutor on the premise that an Attorney General cannot "act in a situation where he has a conflict of interest or the appearance thereof," and a conflict of interest arises if the Attorney General receives allegations that the President—who appoints the Attorney General—or an associate of the President has committed a crime.24 Because of this conflict of interest, the Senate committee was convinced that the prosecutor "must have independence," and attempted to achieve this necessary independence by providing that the Attorney General could discharge a court-appointed, temporary special prosecutor only "for extraordinary improprieties."25

The 1976 and 1977 bills contained the basic outline of the legislation that Congress ultimately enacted in 1978. Although the Act Congress passed did not establish an office for government crimes and made substantial changes in special prosecutor provisions, the two earlier bills articulated the recusance theory on which the Act was based: a neutral party, not a friend or political associate, must make the decision whether to prosecute the accused.26 In 1978, two bills incorporating this theory and creating a mechanism for appointing a special prosecutor went forward, one through the House of Representatives,27 and one through the Senate.28 A conference committee resolved the differences between the two bills and produced the Act as it now exists.29

The special prosecutor provisions were enacted as Title 28 of the United States Code, sections 49 and 591-598.30 These provisions are triggered if the Attorney General receives allegations concerning a person in one of six classes. The first four

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22. Id.
25. Id. at 7.
classes consist of the President and Vice-President, members of the Cabinet, individuals in the Executive Office of the President whose salaries are above a specified level, most of the high-ranking officers in the Department of Justice subordinate to the Attorney General, the Director and Deputy Director of Central Intelligence, and the Commissioner of Internal Revenue. The fifth class includes those persons in the first four classes who held those offices at any time during the incumbency of the President, or during the term of the immediately preceding President, if the latter was of the same political party as the incumbent President. The sixth class embraces all officers of the "principal national campaign committee seeking the election or reelection of the President."

Under sections 591 and 592 of the Act, if the Attorney General receives "specific information" that a person in one of the above classes has violated a federal criminal law "other than a violation constituting a petty offense," the Attorney General must conduct a "preliminary investigation." If at the end of the investigation, which cannot exceed ninety days, the Attorney General "finds that the matter is so unsubstantiated that no further investigation or prosecution" is warranted, the Attorney General must file a memorandum with a special three-judge court. Not only does that end the matter, but the memorandum may not be made public without leave of the court.

If, however, the Attorney General finds that the matter does warrant further investigation, he or she must apply to the court for appointment of a special prosecutor. The Act limits the court's discretion in selecting a special prosecutor only by requiring that the selection be "appropriate" and by disqualifying any person who "recently" was a federal government employee. The special court defines the special prosecutor's

33. Id. §§ 591(b)(6).
34. Id. §§ 591(a), 592(a).
35. Id. § 592(b)(1).
36. Id. § 592(b)(3).
37. Id. § 592(c)(1).
38. Id. §§ 593(b), 593(d). An "appropriate" special prosecutor, according to the Senate Governmental Affairs Committee, is one who is "independent, both in reality and in appearance, from the President and the Attorney General." S. Rep. No. 170, 95th Cong., 1st Sess. 66 (1977). Thus, a United States attorney or other Justice Department employee would be an inappropriate selection. Id.
"prosecutorial jurisdiction," but within that jurisdiction the special prosecutor has "full power and independent authority" to exercise all the powers of the Attorney General and the Department of Justice. In exercising these powers, the statute provides that special prosecutors shall, to the extent that they deem appropriate, "comply with the written policies of the Department of Justice respecting enforcement of the criminal laws." Finally, the Attorney General can remove a special prosecutor "only for extraordinary impropriety, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such special prosecutor's duties."

At the close of the Carter administration, there had been eight filings under the Act. The Attorney General had requested the appointment of a special prosecutor in only two of these cases. In one of the remaining six filings, the Attorney General concluded that the "specific information" that President Carter, Vice President Mondale, John White, Chairman of the Democratic National Committee, and other high level officials had solicited political contributions on federal property was "so unsubstantiated that no further investigation" was warranted.

40. Id. § 594(a). The special prosecutor, however, does not have the power to authorize wiretapping and related interceptions. Id. The Attorney General has sole authority over these activities under 18 U.S.C. § 2516 (Supp. III 1979).
41. 28 U.S.C. § 594(f) (Supp. III 1979). The 1977 bill, which was the predecessor of the Act, required the special prosecutor to adhere much more closely to the Justice Department's policies. The 1977 bill would have required compliance "to the maximum extent practicable" with the "written policies of the Department of Justice." S. Rep. No. 170, 95th Cong., 1st Sess. 69, 172 (1977).
44. Id. The Report of Special Prosecutor Christy on Alleged Possession of Cocaine by Hamilton Jordan in violation of 21 U.S.C. § 844(a), May 28, 1980, has been made public, and appears id., at 378-433. The report of special prosecutor Gallinghouse in the Kraft case has never been made public.

Attorney General Civiletti also refused to request a special prosecutor in another filing. See Letters from Attorney General Civiletti to Senators Kennedy, Proxmire, and Laxalt and Representative Conyers (March 11, 1980). Civiletti wrote these letters pursuant to 28 U.S.C. § 595(e) (Supp. III 1979), giving
In view of the publicity attending appointments of special prosecutors, it is highly probable that the request of William French Smith, the present Attorney General, for appointment of a special prosecutor to investigate allegations concerning Raymond J. Donovan, Secretary of Labor, is the only such request made thus far by the Reagan administration. In addition, Attorney General Smith has filed a memorandum with the special court concluding that appointment of a special prosecutor was not warranted in the Richard Allen case.

III. PROBLEMS UNDER THE ACT

A. Workability and Fairness

Experience has demonstrated that the Act may be both unworkable and unfair. For example, it is sometimes difficult to determine whether the information that an Attorney General receives implicating a person covered by the Act is "specific" within the meaning of section 592(a). Suppose a citizens' group files a complaint in a federal court against a political party's national committee, alleging in conclusory terms that a group of politicians, including at least one person covered by the Act, violated a federal election law. The suit thereafter comes to the Attorney General's attention. The Act certainly provides little guidance to the Attorney General in determining whether the allegations in the complaint are "specific." The Act does not give any guidance whether the answer to this question depends upon the facts pleaded in the complaint. Moreover, if the complaint is not "specific," the Act does not say whether the Attorney General must wait until discovery

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reasons why he had concluded that he was "without statutory authority" to request appointment of a special prosecutor to investigate allegations made against G. William Miller, who was at that time Secretary of the Treasury. These letters were made public at the request of the Attorney General pursuant to § 595(e).

46. See Wash. Post, Jan. 14, 1982, § 1, at 10, col. 3.
48. See generally STAFF OF SUBCOMM. ON OVERSIGHT OF GOVERNMENT MANAGEMENT OF THE SENATE COMM. ON GOVERNMENTAL AFFAIRS, 97TH CONG., 1ST SESS., REPORT ON SPECIAL PROSECUTOR PROVISIONS OF ETHICS IN GOVERNMENT ACT OF 1978 (Comm. Print 1981) [hereinafter cited as REPORT].
49. 28 U.S.C. § 592(a) (Supp. III 1979). See S. REP. No. 170, 95th Cong., 1st Sess. 54 (1977) ("The Committee does not expect a special prosecutor to be appointed whenever a single note or telephone call is received suggesting that a high-ranking official is a 'crook.'").
proceeds in the case or must instead communicate directly with plaintiff's counsel to see if counsel has any "specific information."

Even if the Attorney General determines that the allegations of misconduct are "specific," it is difficult for the Attorney General to determine the extent of the subsequent ninety-day preliminary investigations.\(^\text{51}\) It is clear that the Attorney General may not use a grand jury to conduct a preliminary investigation, nor may he or she dispose of the matter by filing an information and entering into a plea bargain.\(^\text{52}\) It is not clear, however, whether the Attorney General may order a full field investigation by the FBI. Nor is it apparent whether investigators may interview potential witnesses several times.\(^\text{53}\)

In addition to these workability problems, the Act may force the Attorney General to request the appointment of a special prosecutor even though such an appointment would not be fair. The Attorney General, for example, apparently must apply for a special prosecutor even though he or she believes there is a strong probability that prosecution will never be warranted.\(^\text{54}\) The Attorney General must apply for a special prosecutor even though the alleged offense, if proved, would not result in a conviction. The Attorney General must even apply for a special prosecutor although the Department of Justice would normally not prosecute the offense under the Department's written rules and standards.\(^\text{55}\) Thus, situations may


\(^{54}\) Under 28 U.S.C. §§ 592(b), 592(c) (Supp. III 1979), the Attorney General must come to the certain conclusion within 90 days that "the matter is so unsubstantiated that no further investigation or prosecution is warranted" or else request appointment of a special prosecutor. Thus, if the Attorney General is fairly certain that the matter will not result in prosecution of the official, but believes further investigation is necessary to make sure, the Act leaves no room for the Attorney General to pursue this avenue. A special prosecutor must perform the task. This was Attorney General Civiletti's predicament in the Jordan case. Report of the Attorney General Pursuant to 28 U.S.C. § 592(c)(1), No. 79-7, at 3, filed in the Special Prosecutor Division, U.S. Court of Appeals for the District of Columbia, November 19, 1979 (made public with leave of court under § 592(d)(2) on November 29, 1979), reprinted in Hearings, supra note 43, at 359, 361.

\(^{55}\) It is entirely conceivable that the Attorney General may find that a matter warrants further investigation under § 592(b), requiring appointment of a special prosecutor, but that there is no chance of ultimately getting a conviction. Evidence crucial for conviction may be missing, for example. In the Jordan and Kraft cases, there was no seizure of cocaine—the subject of the allegations against them—but special prosecutors were nonetheless appointed.
trigger the Act's special prosecutor provisions despite the absence of enough evidence to prosecute or to convict the person involved. The Act thus unfairly exposes people whose cases would ordinarily be summarily dismissed to the intrusive investigations of a specially appointed federal official.

The enormous publicity that accompanies the appointment of a special prosecutor exacerbates this unfair result. Aside from the resulting personal anxiety, this publicity can be financially burdensome. Once a decision to request appointment of a special prosecutor has become public knowledge, accused persons may feel compelled to employ attorneys to institute an investigation on their behalf and thus commit themselves to spending large sums of money.

Congress carefully drafted the Act to ensure that there would be no publicity surrounding the application for a special prosecutor without leave of the court. Moreover, only the Attorney General or the court may reveal the identity or jurisdiction of a special prosecutor once one has been appointed. Despite these strictures, however, applications for appointment of special prosecutors have become public without court approval. While it is true that in many situations, publicity may be inevitable regardless of any precaution, there is little doubt

See Hearings, supra note 43, at 117 (Statement of Rudolph Giuliani). This result completely contradicts a basic principle of federal prosecution. "[B]oth as a matter of fundamental fairness and in the interest of the efficient administration of justice, no prosecution should be initiated against any person unless the government believes that the person probably will be found guilty by an unbiased trier of fact." U.S. DEPARTMENT OF JUSTICE, PRINCIPLES OF FEDERAL PROSECUTION 6 (July 1980). See also Hearings, supra note 43, at 12-13 (Testimony of Benjamin Civiletti) (Justice Department normally does not prosecute individual possession of small amounts of cocaine).

The recent publication date of Principles of Federal Prosecution may explain why the Act does not require the special prosecutor to adhere very closely to the Department of Justice's policies. See supra note 41 and accompanying text. At the time Congress considered the Act, there was no concise statement of federal prosecution policies with which a special prosecutor could comply. S. REP. No. 170, 95th Cong., 1st Sess. 70 (1977).

56. Mr. Jordan's legal fees reportedly exceeded six figures, more than twice his annual salary. Hearings, supra note 43, at 36 (testimony of Lloyd Cutler). See also id. at 95, 117 (Statement of Rudolph Giuliani). As former Attorney General Civiletti has observed, "[a]nyone who has been subjected to a federal criminal investigation knows that it is no laughing matter. It can exact a great cost from the target himself and from the Government as well." Civiletti, Post-Watergate Legislation in Retrospect, 34 Sw. L. J. 1043, 1055 (1981).


58. Id. § 593(b).

59. Appointment of a special prosecutor in the Kraft case was, for example, leaked to the public without court approval. See N.Y. Times, Mar. 25, 1981 § 1, at 1, col. 5, Hearings, supra note 43, at 19 (Testimony of Benjamin Civiletti).
that at least some investigations of government officials would not become public prior to convening a grand jury if there were no specialized appointment procedure. Public revelation seems especially harsh if the reference to the special prosecutor is based on alleged facts that would not ordinarily be put before a federal grand jury if the accused were an ordinary citizen. The reference of the Jordan case to a special prosecutor and the decision not to refer the Allen case, for example, resulted in public controversy beyond the attention which the allegations warranted. The special prosecutor provisions subjected these people to public scrutiny that was premature compared to the privacy that would have been accorded to private citizens or other government officials not covered by the Act.

One last problem of the Act is its inapplicability to cases in which its rationale supports the appointment of a special prosecutor. The Act does not cover many lower-level executive appointees. Moreover, the six classes of people to which the Act applies do not include close family members of a high-ranking official in the executive branch. It is clearly possible for the Attorney General to face a disabling conflict of interest if he or she receives allegations that executive officials' close relatives have violated a federal criminal law. In one case in which such a potential conflict of interest might have been a problem, Attorney General Bell appointed a nonstatutory "special counsel" to handle the "Carter warehouse" investigation.60 In another

60. Paul J. Curran was appointed on March 20, 1979, by Attorney General Bell, as a special counsel to investigate the financial transactions of the Carter family peanut warehouse. Press Release of the Department of Justice, March 20, 1979, see 44 Fed. Reg. 25,837 (1979) (to be codified at 28 C.F.R. Part O); Hearings, supra note 43, at 126 (Statement of Rudolph Giuliani). Curran, a Republican and former U.S. Attorney in the Southern District of New York, investigated allegations that money from $7 million in loans from the National Bank of Georgia to the Carter peanut business was diverted to President Carter's 1976 election campaign. Press Release, supra at 1; N.Y. Times, Mar. 17, 1979, § 1, at 8, col. 3.

Although President Carter was covered by the Act, neither Billy Carter nor Lillian Carter, the other partners in the family business, would fall under the Act. Press Release, supra at 4; see 28 U.S.C. § 591(b) (Supp. III 1979). The Justice Department determined that § 604(2) of the Act prohibited appointment of a statutory special prosecutor because "basic information involving the loan transactions was developed by the Department of Justice prior to . . . the effective date of the Act." Press Release, supra at 3. See Ethics in Government Act of 1978, Pub. L. No. 95-521, tit. VI, § 604, 92 Stat. 1875.

Curran's appointment as a "special counsel" rather than as a "special prosecutor" created some controversy. N.Y. Times, Mar. 21, 1979, § 1, at 1, col. 4; id. Mar. 22, 1979, § 1, at 1, col. 3. See also id. Mar. 23, 1979, § 1, at 16, col. 1. It was argued that Attorney General Bell could have voluntarily appointed a special prosecutor with greater independence. Id. Mar. 22, 1979, § 1, at 16, col. 5. The controversy is an example of executive branch hesitancy to surrender control
case, the Justice Department addressed the Billy Carter-Libya matter through regular channels, drawing criticism that Attorney General Civiletti had a conflict of interest.\textsuperscript{61}

\textbf{B. Constitutional Problems}

The constitutionality of the Act has been the subject of extensive debate. Although the vast majority of commentators have argued that the Act is constitutional,\textsuperscript{62} both Deputy Attorney General Tyler, speaking for the Ford administration,\textsuperscript{63} and Attorney General Smith, speaking for the Reagan administration,\textsuperscript{64} have expressed strong doubts about its over investigations of executive officers. The March 20, 1979, Justice Department statement outlining Curran's powers stated that the Special Counsel's "prosecutive decisions . . . must finally be approved by the Assistant Attorney General for the Criminal Division." Press Release, \textit{supra} at 5. Yet the formal order issued in the Federal Register on May 3, 1979, apparently gave Curran greater independence. 44 Fed. Reg. 25,837-38 (1979) (to be codified at 28 C.F.R. Part 0).

61. A Senate Judiciary special subcommittee conducted an inquiry into the Libyan government's relationship with Billy Carter, the President's brother, and into the Justice Department's investigation of Carter's receipt of loans from Libya and his failure to register as a foreign agent. The subcommittee concluded "there was no evidence that either the investigation or disposition of the case by the Criminal Division was skewed in favor of Billy Carter because he is the brother of the President." \textit{S. REP.} \textit{No. 1015, 96th Cong., 2d Sess.} 62 (1980).

62. Attorney General Civiletti, however, was criticized in the Senate report for predicting to the President that criminal proceedings would not be instituted against Billy Carter. \textit{Id.} at 68, 70-72, 82.

The Office of Professional Responsibility in the Justice Department also issued a report on the investigation of the Billy Carter-Libya matter. While concluding there had been no impropriety, conflict of interest, or appearance of conflict of interest on the part of Mr. Civiletti or the Criminal Division, the report criticized the Attorney General for incorrectly answering a press conference question concerning whether he had ever talked to the President about the Billy Carter case. Acting Attorney General Renfrew, Status Report of the Office of Professional Responsibility on the Investigation Conducted Concerning Various Matters Pertaining to Billy Carter, Aug. 1, 1980 (unpublished) (on file at the \textit{Minnesota Law Review}); \textit{DEPARTMENT OF JUSTICE, FINAL REPORT OF THE OFFICE OF PROFESSIONAL RESPONSIBILITY ON THE INVESTIGATION CONDUCTED CONCERNING VARIOUS MATTERS PERTAINING TO BILLY CARTER} 4, 8-10 (1981) (unpublished) (on file at the \textit{Minnesota Law Review}).


The concerns of Tyler and Smith result because the Act divests the executive branch of part of its prosecutorial authority. In providing for an independent special prosecutor who would have sole responsibility to investigate and to prosecute misconduct within the executive branch, Congress sought to remedy the threatened evil of unaccountable presidential power inherent in White House self-investigation and self-prosecution. Congress, however, arguably went too far in guaranteeing the independence of the special prosecutor, and thus violates the constitutional doctrine of separation of powers. Specifically, by prohibiting the Attorney General from selecting the special prosecutor and vesting this power in a special court, the Act arguably violates the appointment and removal clause of article II, section 2, clause 2. This clause states that the President shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The Constitution clearly does not permit or authorize Congress itself to appoint either "officers" or "inferior officers" of the United States. In *Springer v. Philippine Islands*, the Supreme Court held that the Philippine legislature would violate the separation of powers principle implicit in the Philip-

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66. The separation of powers problem raised by the Act also touches underlying concerns about the limits of congressional power in creating an office under the "necessary and proper" clause, U.S. CONST. art. I, § 8, cl. 18. See E. Corwin, *The President's Removal Power Under the Constitution* 56-58 (1927). It also touches concerns about the President's duty to "take Care that the Laws are faithfully executed" under article II, § 3, and the proper degree of judicial involvement in the investigation and prosecution process under article III. See infra notes 90-95 and accompanying text.


68. 277 U.S. 189 (1928).
SPECIAL PROSECUTOR ACT

pine Organic Act,\textsuperscript{69} which paralleled the United States Constitution, by appointing the directors of a government bank or coal company. The Court reasoned that the directors of these government businesses were charged with executive duties, and that legislative power does not include the power to appoint public agents who exercise executive functions.\textsuperscript{70} Recently, in \textit{Buckley v. Valeo},\textsuperscript{71} the Supreme Court relied on \textit{Springer} to strike down a law allowing congressional officers to appoint members of the Federal Election Commission. The Court noted that Congress gave election commissioners executive duties.\textsuperscript{72} Therefore, the Court held, the commissioners were officers of the United States whom Congress could not appoint under article II, section 2, clause 2.\textsuperscript{73}

Aside from disallowing direct congressional appointment of executive officers, the Supreme Court has had little occasion to decide who may exercise the appointment power. Article II, section 2, clause 2 clearly dictates that the President, with Senate consent, appoint "Officers of the United States." Two issues remain, however. First, is there a substantive difference between "officers," "inferior officers," and mere employees? Second, what standard should the Court use in deciding whether the President alone, the courts, or a department head should appoint an inferior officer?

Traditionally, the Supreme Court has been reluctant to invoke a substantive standard to discern whether an appointee is an "officer" under article II. Instead, the Court generally has looked to the mode of appointment Congress selected to deter-

\begin{itemize}
\item \textsuperscript{69} Organic Act of the Philippine Islands, Aug. 29, 1916, ch. 416, 39 Stat. 545.
\item \textsuperscript{70} 277 U.S. at 202-03.
\item \textsuperscript{71} 424 U.S. 1 (1976).
\item \textsuperscript{72} Id. at 143.
\item \textsuperscript{73} Id. at 140-43. The \textit{Buckley} Court, like the Court in \textit{United States v. Germaine}, 99 U.S. 508 (1878), acknowledged that "all persons who can be said to hold an office under the government" are either "officers," or "inferior officers" under article II, § 2, clause 2. Id. at 510; 424 U.S. at 126. Unlike prior Courts, however, the \textit{Buckley} Court ascribed a substantive meaning to the term "officers" and apparently to the term "inferior officers." "Any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed" in article II. 424 U.S. at 126. Thus, the Court first considered the "substantial powers" federal election commissioners exercised, \textit{id.} at 138, and then determined that they were unconstitutionally appointed. \textit{Id.} at 143. The Court concluded that the commissioners, by the nature of the duty they were to perform, had to be appointed pursuant to article II, and so could not be appointed by members of Congress. Although commentators have criticized the \textit{Buckley} Court's analysis, see, e.g., Burkhoff, \textit{supra} note 62, at 1362-69, \textit{Buckley} does provide further guidance on the permissible location of the appointment power and the nature of an "officer's" duties.
\end{itemize}
mine the type of office the appointee held. The Court’s rationale suggests that the definition of a governmental position is purely a congressional decision.

The Supreme Court has also been reluctant to establish a strict constitutional standard to govern Congress’s power to choose when “the President alone, . . . the Courts of Law, or the Heads of Departments” may appoint an inferior officer under the appointment and removal clause. Dicta in several opinions indicate that the appointment power should be exercised by the authority that is most appropriate in light of the nature of the appointee’s office. In *Ex Parte Hennen,* decided in 1839, the Supreme Court examined the article II provision for appointment of inferior officers in deciding whether a United States district judge had the power to remove his clerk. This appointment power, the Court noted, “was no doubt intended to be exercised by the department of the government to which the officer to be appointed most appropriately belonged.” The Court concluded, therefore, that “Courts of Law” could appoint clerks of federal courts consistently with article II, section 2, clause 2. The Court modified *Hennen’s* dicta in *Ex Parte Siebold,* decided in 1879, adopting a less stringent approach. The *Siebold* Court examined whether a circuit court could appoint federal election supervi-

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74. See, e.g., United States v. Germaine, 99 U.S. 508 (1878). In *Germaine,* the Court reasoned that a surgeon appointed by the Commissioner of Pensions could not be an “officer” because the President did not appoint him with Senate consent. The Court further argued that the Commissioner of Pensions is not the “head of a department,” and so the surgeon could not have been appointed as an “inferior officer.” *Id.* at 510-11. The Court did, however, supplement this rationale, by considering the nature of the surgeon’s employment. In the Court’s view, an officer’s duties are continuing and permanent, whereas the surgeon’s duties were occasional and intermittent. *Id.* at 510-12. Despite this additional argument, it is clear that the *Germaine* Court’s governing rationale was the congressionally accepted mode of appointment, not the nature of employment.

75. Although the Court set out a substantive standard to determine whether Hartwell was an “officer,” the Court looked at both the mode of the clerk’s appointment (he was appointed by a department head), and the “tenure, duration, emolument, and duties” of the office. *Id.* at 393.

76. 38 U.S. (13 Pet.) 230 (1839).

77. For a discussion of whether a power of removal might be unconstitutional, see *infra* notes 100-22 and accompanying text.

78. 38 U.S. (13 Pet.) at 257-58.

79. *Id.* at 261-62.

80. 100 U.S. 371 (1879).
isors. Although the Court noted that Congress would be wise to follow Hennen's "most appropriate department" dicta, the Court refused to strike down an appointment mechanism unless there was an "incongruity of duty" in the arrangement.81 The Court concluded that circuit court appointment of election supervisors would be as congruous, proper, or convenient as appointment by the President or the head of a department.82

The Court's rationale in Buckley v. Valeo supports the dicta in Hennen and Siebold. Although the narrow holding of Buckley merely prohibits Congress from appointing officers of the United States,83 the Court based this holding on the need to protect the constitutional separation of powers doctrine inherent in the appointment and removal clause.84 The Court argued that both this doctrine and the clause would be violated if Congress appointed officers who would be able to exercise executive powers.85 One can argue that the same separation of powers concern should apply in deciding who should appoint an inferior officer of the United States. It may be inappropriate, for example, to allow a court to appoint an officer whose duties are exclusively executive; the court's exercise of appointment power, just like Congress's exercise of appointment power in Buckley, may upset the traditional balance between the separate branches of government. Because of the Buckley Court's rationale and the dicta in Hennen and Siebold, many commentators agree that the separation of powers doctrine prohibits Congress from locating the appointment power in a department in which such a power would be incongruous.86

The special prosecutor provisions do not present a problem concerning the "officer" and "inferior officer" distinction within the appointment and removal clause. Special prosecutors are clearly "inferior officers" under article II. A "Court of Law" appoints them,87 thus making them "inferior officers" under the

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81. Id. at 397-98.
82. Both this "congruity in the duty" standard and Hennen's "most appropriate department" standard appear to be very deferential to congressional decisions. One commentator has argued that the Supreme Court should not even review the congressional decision to vest the appointment of an inferior officer in a particular department because this decision is a political question. E. CORWIN, supra note 66, at 66. Some language in Siebold supports this argument. See 100 U.S. at 398.
83. 424 U.S. at 135.
84. Id. at 120-24.
85. Id. at 132.
86. See, e.g., B. SCHWARTZ, supra note 67, at 46; Burkhoff, supra note 62, at 1369-79.
87. But see Hearings on S. 495 Amended, supra note 15, at 10 (statement of
Supreme Court’s deferential standard. The method Congress selected to appoint these “inferior officers” may, however, violate the appointment and removal clause by placing the appointment power in an “incongruous” department. Article II, section 3 of the Constitution gives the President the responsibility to “take Care that the Laws be faithfully executed.” One of the duties that arises from this charge is the duty to prosecute violations of the laws. In *Buckley*, the Court noted that the authority to initiate civil litigation was not “merely in aid of the legislative function of Congress,” but was inherent in the President’s responsibility under article II, section 3. The Fifth Circuit has also expressly held that prosecutorial power belongs solely to the executive branch with which neither Congress nor the courts can interfere. Thus, one can argue that giving a court the power to appoint an official who will exercise a prosecutorial function is incongruous with the constitutional requirement that the executive branch have sole control over this power.

It is not clear, however, that it is incongruous in all cases.

Harold R. Tyler, Jr., Deputy Attorney General; Memorandum in Support of Plaintiff’s Motion for a Preliminary Injunction, at 12-13, Kraft v. Gallinghouse, No. 80-2952 (D.D.C. 1980), reprinted in Hearings, supra note 43, at 294, 307-08 (this appointment arrangement is defective under article I, § 2, clause 2 because a three judge panel convened solely for the purpose of appointing a special prosecutor is not a “court of law”).

88. See supra notes 74-75 and accompanying text.

89. One could also argue that the dual appointment process, in which the Attorney General petitions for a special prosecutor whom the court then appoints, violates this clause. Article II, section 2, clause 2 does not explicitly provide for two departments to appoint an inferior officer in conjunction with each other. Yet, the Attorney General’s role is not literally one of “appointment.” He or she merely initiates the appointment process. As the President’s chief law enforcement officer, the Attorney General is an appropriate person to perform this task. Further, even if one concedes that the Attorney General “appoints” the special prosecutor, the notion of dual branch participation in the appointment process is not foreign to article II; the Senate confirms presidential nomination of officers.

90. U.S. Const. art. II, § 3.

91. 424 U.S. at 137-38.

92. United States v. Cox, 342 F.2d 167, 171 (5th Cir.) (en banc), cert. denied, 381 U.S. 935 (1965). But see United States v. Nixon, 418 U.S. 683 (1974), in which the Court held that, notwithstanding the Executive branch’s exclusive authority and absolute discretion to decide whether to prosecute a case, the President does not have absolute control over what evidence may be used in a given criminal case. Id. at 693-97. If a valid regulation gives a special prosecutor explicit power to contest the invocation of executive privilege in the process of seeking evidence relevant to the special prosecutor’s duties, the President cannot intervene, asserting that the special prosecutor’s demand for evidence is a nonjusticiable political question. Id.
for courts to appoint executive officers.93 By allowing a circuit court to appoint federal election supervisors, the Court in *Ex Parte Siebold* suggested that the presidential duty to “take care that the Laws be faithfully executed” can be consistent with court appointment of officers who will perform executive tasks.94 It appears to be particularly appropriate for courts to appoint these officers if the executive branch is unable effectively to carry out its prosecutorial duty in doing so. In cases that demand a special prosecutor, the Attorney General arguably cannot effectively choose special prosecutors because of the conflict of interest which allegations of executive misconduct engender.95 To remedy this disability, Congress placed the appointment power in the department that seemed to be most capable of making an independent and well-reasoned decision—the courts.96

One provision of the present Act, however, seems to render the Act unconstitutional, despite the argument for allowing courts to appoint special prosecutors: special prosecutors need not adhere to Department of Justice policy on criminal prosecutions.97 This provision confronts the *Buckley* Court’s concern that the vesting of executive power outside of the executive branch would violate the separation of powers doctrine. The Act creates an executive office whose incumbent is neither appointed by the President nor the Attorney General. The appointee is also not obliged to follow established executive policy. This glaring absence of special prosecutor accountability seriously undermines the basic separation of powers

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93. There is legal precedent, for example, for court review of prosecutorial discretion and abuse of authority despite the warning of United States v. Cox, 342 F.2d 167, 171 (5th Cir.) (en banc), *cert. denied*, 381 U.S. 935 (1965), that neither Congress nor the courts may interfere with the prosecution function. See, e.g., Garris v. United States, 390 F.2d 862 (D.C. Cir. 1968); Spencer v. Criminal Court, 214 Ind. 551, 15 N.E.2d 1020 (1938); Note, *The Special Prosecutor in the Federal System: A Proposal*, 11 AM. CRIM. L. REV. 577, 583-94 (1973). Further, federal courts have the power to fill vacancies in the office of United States Attorney, although the court’s authority in such cases is only temporary. 28 U.S.C. § 546 (1976). The President may remove the court appointee at any time, and, with Senate consent, fill the vacancy.

94. 100 U.S. 371, 397-98 (1879).

95. *See* supra text accompanying notes 24-25.


97. *See* supra note 41 and accompanying text.
doctrine; the President must be able to exercise some control over those performing executive functions.\textsuperscript{98} This arrangement clearly runs contrary to the trend, signalled in *Buckley*,\textsuperscript{99} of increased presidential authority to control prosecution. If one couples the absence of executive control over the appointment of the special prosecutor with this lack of accountability, the special prosecutor provisions arguably violate article II, section II, clause 2 of the Constitution.

Unlike Congress's method of appointing special prosecutors, Congress's restrictions on the President's power to remove special prosecutors do not raise serious constitutional problems.\textsuperscript{100} The Act provides that the Attorney General can only remove a special prosecutor "for extraordinary impropriety, physical disability, mental incapacity, or any other condition that substantially impairs" the prosecutor's performance.\textsuperscript{101} The Attorney General's action is also subject to judicial review.\textsuperscript{102}

Although article II, section 2, clause 2, expressly provides for the appointment of officers, it is silent on the power of removal.\textsuperscript{103} In the face of this silence, Congress, the Court, and

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  \item \textsuperscript{98} This is a necessary corollary of the President's responsibility to "take Care that the Laws be faithfully executed" under article II, section 3. As Hamilton asserted, unified energy in the executive branch is essential to steady and competent administration of the laws, and also forces the President to be accountable to political opinion. The Federalist No. 70 (A. Hamilton).
  \item \textsuperscript{99} See supra text accompanying note 91.
  \item \textsuperscript{100} One of the more interesting aspects of the Special Prosecutor Act is its separation of the power to appoint from the power to remove. The Court has never directly faced the question of whether these powers are inseparable. The Court in *Hennen* did note, however, that "[i]n the absence of all constitutional provision, or statutory regulation, it would seem to be a sound and necessary rule, to consider the power of removal as incident to the power of appointment." 38 U.S. (13 Pet.) at 259. Although this language suggests that Congress can give the two powers to two different departments, there may be a separation of powers problem in doing so.
  \item \textsuperscript{101} Executive removal of a court-appointed special prosecutor may not pose such severe separation of powers dangers. Given the *Buckley* Court's broad concern for executive control of the prosecution function, vesting both the appointment and removal power in a court would offend the integrity of the executive branch. This would cause the President to lose all control over the special prosecutor. Thus, Congress has used a new theory of removal: vesting the power to remove is a matter of congressional decision under the "necessary and proper" clause, governed by the overall separation of powers principles of independence and accountability. Congress may split the appointment and removal authority between the judicial and executive branches if such a split does not threaten the integrity of either.
  \item \textsuperscript{102} 28 U.S.C. § 596(a) (Supp. III 1979).
  \item \textsuperscript{103} For discussion of the removal power, see generally E. Corwin, supra note 66; B. Schwartz, supra note 67, at 47-56; Cross, The Removal Power of the
the executive branch have struggled for years over the scope of the removal power under the Constitution. After some initial debate, it became clear that Congress, and in particular the Senate, cannot remove officers. The Constitution limits direct Senate participation to the confirmation process, in which it may reject presidential selections.

Yet all officers appointed obviously may not serve for life. In *Hennen*, the Supreme Court first articulated a theory of removal which is still generally accepted. Affirming a federal judge's power to remove a court-appointed inferior officer, the Court reasoned that "[i]n the absence of all constitutional provision, or statutory regulation, it would seem to be a sound and necessary rule, to consider the power of removal as incident to the power of appointment."

This doctrine does not, however, answer whether Congress may limit the removal power of another branch. In *Myers v. United States*, the Court considered whether Congress could require Senate consent for presidential removal of first class postmasters. The Court concluded that the President had exclusive power to remove executive officers appointed with Senate confirmation.

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104. In the early years of the constitution, it was argued that the President needed Senate consent to remove the officers that the Senate had confirmed. See Burkhoff, supra note 62, at 1379-88; see also Myers v. United States, 272 U.S. 52, 109-48 (1926).

105. See Comment, supra note 102, at 567.


107. This debate began as early as 1867, when Congress passed the Tenure of Office Act, ch. 154, 14 Stat. 430 (1867), which provided that the Secretaries of State and War could be removed only with Senate consent. President Johnson's refusal to comply with this statute in dismissing Secretary of War Stanton was the basis of his impeachment in 1868. See Burkhoff, supra note 62, at 1388-93.

108. 272 U.S. 52 (1926).


110. 272 U.S. at 176. Chief Justice Taft argued that the President's duty under article II to execute the laws suggested an inherent executive power to control removal of officers. This theory of "inherent executive power" did not go unquestioned. Professor Corwin delivered an exhaustive critique of Taft's theory, arguing that Congress has power to affect removal of officers through the "necessary and proper" clause of article I, § 8, clause 18. Corwin asserted that although presidential power to remove cabinet officers is central to control over the executive branch, this is true because of the "inherent" political and advisory nature of the cabinet positions—not through inherent executive control over any officers appointed by the President or a department head.
authority only to vest the appointment of inferior officers. The Court limited this broad doctrine in *Humphrey's Executor v. United States*, holding that Congress could limit the President's power to remove a Federal Trade Commissioner. The Court noted that *Myers's* broad presidential removal theory applied only to purely executive officers and did not apply to quasi-legislative or quasi-judicial officers, despite the President's power to appoint them. With a quasi-judicial administrative body such as the FTC, unchecked presidential removal power would threaten the most essential quality of the Commission—Independence from presidential or political pressure. The Court continued to narrow *Myers* in *Wiener v. United States*. In *Wiener*, the Court held that the President could not remove a member of the War Claims Commission without cause, even though Congress had enacted no provisions governing or limiting the President's removal power. Like the Court in *Humphrey's Executor*, the *Wiener* Court examined the function of the Commission and concluded that since it was an adjudicatory body, Congress intended to preserve the Commission's independence, and thus implicitly intended to limit the President's removal power.

On their face, the restrictions Congress placed on the President's authority to remove special prosecutors appear to violate the Court's interpretation of article II, section 2, clause 2. Since it is fairly clear that special prosecutors are purely executive officers, the Court's decisions in *Myers* and *Humphrey's Executor*, which protect the President's removal authority in relation to such officers, apparently forbid Congress from circumscribing the President's authority to dismiss them. A more complete analysis reveals, however, that the rationale of both *Humphrey's Executor* and *Wiener* supports Congress's ac-

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111. The Supreme Court also concluded in *Myers* that the Tenure of Office Act of 1867, see *supra* note 107, was invalid in so far as it prohibited presidential removal of executive officers without senate consent. 272 U.S. at 176.


113. *Id.* at 629. The Federal Trade Commission Act, 15 U.S.C. §§ 41, 42, (Supp. IV 1980), stated that "[a]ny commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office."

114. 295 U.S. at 631.


116. *Id.* at 355.

117. *Id.* at 353-55.

118. See *supra* text accompanying notes 110-13.
tions. In these cases, the Court sought to ensure the independence which Congress gave the appointees and which was necessary for their effectiveness. The character of the special prosecutor's office under the Act is, in this respect, like the Federal Trade Commission or the War Claims Commission. Unrestricted power of the President to remove a special prosecutor would completely defeat the independence of the office which Congress clearly sought to achieve. Moreover, this arrangement promotes presidential compliance with article II, section 3 because the President is in a better position to "take Care that the Laws be faithfully executed" if Congress limits presidential power to remove a special prosecutor. With unqualified power to remove the special prosecutor, the President could inhibit the law enforcement process any time an officer of the executive branch became vulnerable to prosecution for an alleged crime.

IV. PROPOSALS FOR CHANGE

When the current Act terminates in 1983, Congress will have several alternatives. It can allow the Act to expire as the present administration strongly recommends. It can reenact the law as written, which no one recommends. Or it can reenact the law in an amended form. One can make a strong argument for having no special prosecutor law. Historically, the executive branch has appointed special prosecutors without specific legislation, either on its own initiative or after congressional request by joint resolution. Since Watergate, however, Congress has not been content to rely on this ad hoc

119. See supra text accompanying notes 114-17.
120. U.S. CONST. art. II, § 3.
122. See, e.g., Nader v. Bork, 366 F. Supp. 104, 107-08 (D.D.C. 1973) (Special Prosecutor Cox was fired when he insisted that the White House comply with a judicial order to produce tapes.).
125. For example, the 68th Congress directed President Coolidge to appoint a special counsel to prosecute the Teapot Dome scandal. S.J. Res. 54, 68th Cong., 2d Sess., 43 Stat. 5 (1924). President Coolidge appointed Atlee Pomerene, a former Senator and a Democrat, and Owen J. Roberts, a Republican (and later a Supreme Court Justice). See generally H.R. REP. No. 1307, 95th Cong.,
process; special prosecutor legislation now seems to be a lasting legacy.

Anticipating that Congress might reject its proposal to allow the Act to die, the Reagan administration has submitted a summary of proposed amendments which, it says, "would preserve the core purpose of the statute while eliminating many of the problems." These amendments would empower the Attorney General, or in the event he or she is disqualified, a Deputy Attorney General, to appoint special prosecutors and to remove them for "good cause." The amendments would cover only the President, Vice-President, Attorney General, and other persons who fall under a "catch-all" provision. Finally, the administration would amend the Act to remove or to ameliorate many of the practical difficulties which this Article has discussed.

The principal fault of this proposal is its failure adequately to preserve the basic purpose of the statute. Congress based the original Act upon the premise that the executive branch cannot properly decide whether or how closely to investigate itself. Thus Congress circumscribed the Attorney General's discretion to appoint a special prosecutor. The present administration's proposal would eliminate these protections against a conflict of interest in the executive branch, returning substantial power and discretion in appointing a special prosecutor to the Attorney General. Moreover, the proposal requires the Attorney General to appoint a special prosecutor only to investigate allegations of criminal conduct made against the three

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2d Sess. 2 n.3 (1978); B. NOGGLE, TEAPOT DOME; OIL AND POLITICS IN THE 1920's (1962).


127. *Id.* at 123-24.

128. *Id.* at 126-27. The administration's catch-all provision would "cover any other government official, or private person, regardless of position where, because of a close familial, personal, business or political relationship, the Attorney General determines that it would create a significant appearance of conflict of interest if such person were investigated criminally by the Department of Justice." *Id.* at 127.

129. *Id.* at 127-28. *See supra* notes 49-61 and accompanying text.

130. *See supra* notes 24-25 and accompanying text.

131. Acknowledging that the Attorney General may at times face a conflict of interest, the Reagan administration's plan turns the appointment decision over to the Deputy Attorney General in certain situations. *Id.* at 123-24. This, however, does not avoid conflict of interest problems. The Deputy Attorney General, as another high-ranking member of the administration, also has a divided loyalty. Thus the Deputy Attorney General confronts the same conflict of interest as the Attorney General.
top executive branch officials. There would be no independent investigation of allegations made against lower executive officials, although the Attorney General may also face serious conflict of interest problems in these cases.

The administration's plan reflects a misunderstanding of the recusance theory underlying the Act. Explaining the plan to a Senate committee, Associate Attorney General Giuliani stated that "the Department recognizes that even if there is no actual conflict of interest in most situations, many people feel that the appearance of conflict alone is enough to justify the statutory Special Prosecutor procedures." This "appearance of conflict" problem has become the focus of the administration's proposal. Its "catch-all" provision would authorize the Attorney General to appoint a special prosecutor to investigate any person, whether or not a government official, if the Attorney General "determines that it would create a significant appearance of a conflict of interest." Reliance on the "appearance of conflict" standard does an injustice to the Act. Use of the standard distracts attention from the real issue, actual conflicts of interest. A similar doctrine, the "appearance of impropriety" standard, has fallen into disfavor as a workable standard of professional conduct in the analogous area of legal ethics. A more precise rule, like that in the American Bar Association's Code of Professional Responsibility, which prohibits a lawyer from representing a cli-

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132. The proposal's "catch-all" provision might cover other officials. See supra note 128. Yet Mr. Giuliani suggests that the catch-all provision would "serve to narrow some of the presently overbroad categories" of the Act, indicating that in his view the provision would be rarely invoked. Hearings, supra note 43, at 127 (Statement of Rudolph Giuliani).

133. Id. at 118.

134. See supra note 128.

135. Congress did consult an analogous standard of the Model Code of Professional Responsibility, which states that "a lawyer should avoid even the appearance of impropriety," Model Code of Professional Responsibility Canon 9 (1979), in drafting the Special Prosecutor provisions. See S. REP. No. 170, 95th Cong., 1st Sess. 6 (1977). The Attorney General's divided loyalty, and the Department of Justice's general difficulty in investigating alleged criminal activity by high-level government officials, however, were equally compelling justifications for the Act. Id. at 5.

ent "if the exercise of his independent professional judgment . . . is likely to be adversely affected by reason of the representation of another client,"137 would be more appropriate. The special prosecutor provisions are best understood as a congressional recognition that the Attorney General's loyalty to the President is a disability whenever the Attorney General must decide whether to investigate or prosecute members of the administration.138

Benjamin Civiletti, while Attorney General in the Carter administration, also proposed changes in the Act.139 He suggested maintaining a system of court-appointed, temporary special prosecutors, but removing many less important White House officials from the Act's coverage.140 In addition, he would require special prosecutors to adhere to Justice Department policy.141 Finally, Civiletti would give the Attorney General more discretion in determining whether to refer matters to special prosecutors,142 allowing the Attorney General not to refer matters to special prosecutors if he or she determines that the Department's information, although "specific,"143 is not "sufficient to constitute a reasonable ground to investigate."144

137. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(B) (1979). The disciplinary rule reads in its entirety as follows:
A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).
"Differing interest" is then defined as "includ[ing] every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest." Id. Definitions (1).

Thus, the law was moving away from "conflict of interest" as a phrase of art as far back as 1970, when the present Code was adopted. The final draft of the new proposed Model Rule of Professional Conduct returns to use of the phrase "conflict of interest," but makes it clear that the concept is to have, in general, as broad an application as the "differing interest," standard in the existing Code. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (Proposed Final Draft 1981).

138. The present Justice Department clearly does not recognize actual conflict of interest as a great problem. Associate Attorney General Giuliani frankly asserted: "The assumption upon which the special prosecutor law is premised—that the Department of Justice should not be trusted to investigate or prosecute certain federal offenses—is simply unfounded." Hearings, supra note 43, at 118 (Statement of Rudolph Giuliani).
140. Civiletti, supra note 56, at 1053-54.
141. Id. at 1055-56.
142. Id.
144. Civiletti, supra note 56, at 1054.
The Attorney General could also conclude the matter if he or she could "say with assurance in a report to the court that the offense is not one that the Department would investigate or prosecute under the standards that govern investigatory and prosecutorial decisions in ordinary cases."\[^{145}\]

The discretion given to the Attorney General under Civiletti's proposal exposes his plan to the same criticism that applies to the Reagan administration's proposal, though to a much lesser degree. Loyalty to the President and other high-level executive officials adversely affects the Attorney General's decision whether the Justice Department standards command investigation or prosecution of the President or presidential appointees. Congress clearly felt that giving prosecutorial discretion in such instances to the Attorney General forces the Attorney General to represent differing interests.\[^{146}\] Civiletti's goal is to minimize both the problem of premature, unwarranted public controversy endemic to appointment of a temporary special prosecutor, and the particular unfairness of generating this controversy if the charges would not be prosecuted in an ordinary case. But to achieve this commendable goal, his proposal would pay an unnecessarily high price, because it would give the Attorney General more discretion than Congress found acceptable.

A subcommittee of the Senate Committee on Governmental Affairs, chaired by Senator Cohen, issued a report last October also proposing changes in the Act.\[^{147}\] The report, in

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\[^{145}\] Id. at 1056.  
\[^{146}\] S. REP. NO. 170, 95th Cong., 1st Sess. 5-6 (1977).  
\[^{147}\] REPORT, supra note 48. Other proposals surfaced during the Senate committee hearings. Senator Rudman suggested a two-tier system. The President, Vice-President, and possibly Cabinet officers would continue to be covered under the present Act. All other officials would fall under a different sort of catch-all provision. When a non-Cabinet official is being investigated, any complaint of conflict of interest lodged with the Attorney General would require assigning the case to a U.S. Attorney (in any jurisdiction) for independent investigation. Both the Attorney General and the Deputy Attorney General would then be prohibited from issuing a nolle prosequi in the case. *Hearings,* supra note 48, at 108-09. While such a plan would assure prosecutorial independence from the Attorney General, it would still place investigation of executive officials in the most politically-minded offices of the Justice Department. United States Attorneys frequently are heavily indebted to their Senators and the political process. *Hearings on S. 2802,* supra note 11, at 74 (testimony of Richard Kleindeinst, former Attorney General). *See also* Remarks of former Attorney General Bell at the University of Virginia Miller Center Conference on the President, the Attorney General, and the Department of Justice (Jan. 4-5, 1980), reprinted in D. MEADOR, THE PRESIDENT, THE ATTORNEY GENERAL, AND THE DEPARTMENT OF JUSTICE 139 (1980) [hereinafter cited as *Conference*].

Lloyd Cutler, Counsel to President Carter, testified before the subcommit-
essence, suggests that Congress adopt some of the recommendations made by the Reagan Administration and by former Attorney General Civiletti. Under the subcommittee's proposal, a special prosecutor would be appointed by the court only when the Attorney General "has reasonable grounds to believe that investigation or prosecution is warranted."\textsuperscript{148} The report also recommends constricting the coverage of the Act, principally by eliminating coverage of those White House officials who are not "truly senior" and hence not "close to presidential or Justice Department decision-making."\textsuperscript{149} Rather than adopt a "catch-all" provision, the subcommittee would add a provision covering only the President's family.\textsuperscript{150}

The subcommittee's proposal, by giving broad discretion to the Attorney General to decide whether to seek court appointment of a special prosecutor, raises the same problem as the proposals of the Reagan Administration and Mr. Civiletti.\textsuperscript{151} Further, the subcommittee report bases its conclusion that the present Act's coverage is overinclusive on the premise that investigation of executive officials whose positions are generally unknown to the public or remote from the Justice Department can pose no danger of real or perceived conflict of interest.\textsuperscript{152} Thus, it reasons, the cost and publicity attached to a special prosecutor's appointment should be an ordeal that only very senior officials should bear.\textsuperscript{153} This Article concurs with the subcommittee's concern over the problems of unfair adverse

\textsuperscript{148} REPORT, supra note 48, at 49.

\textsuperscript{149} Id. at 31-34. The "truly senior officials" are defined as those holding executive level II positions or above. Id. at 33.

\textsuperscript{150} Id. at 35. Further, the subcommittee recommends that the subject of a special prosecutor investigation be authorized to apply to the special court for attorneys fees, id. at 27-28; that the Attorney General be required to conduct a preliminary investigation only when he or she receives "specific information sufficient to constitute a reasonable ground to investigate," id. at 42; that the name of the office be changed to "independent counsel," id. at 29; that the length of time after resignation from office a covered official can remain subject to the provisions be reduced, id. at 35-38; and that the standard of removal be changed to allow the Attorney General to remove the special prosecutor for "good cause." Id. at 54.

\textsuperscript{151} See supra notes 128-32, 139-46 and accompanying text.

\textsuperscript{152} REPORT, supra note 48, at 32-33.

\textsuperscript{153} Id.
publicity. The report's assessment of the Act's proper coverage is less persuasive, however. Less senior officials in the White House may not be well known to the public, yet they have in the past posed serious conflict of interest problems once they were accused of committing crimes. In such cases, the Attorney General's judgment is disabled by the political consequences of the investigation for the President.

Each of the above proposals contains valuable suggestions, but they either fall short of correcting the problems of the Act, or they fail to preserve its underlying purpose. This Article suggests a different approach. Specifically, it proposes that Congress consider changing the Act to require presidential appointment of a special prosecutor, with the rank and title of Assistant Attorney General, for a term which would end on January 20 following each presidential election year. Special prosecutors could hold office for up to four years. They would be nominated by the President and confirmed by the Senate. The President could not nominate anyone who was a member of the same political party as the President, had held a presidential appointment made either by the President in office or by his or her immediate predecessor if of the same polit-

154. See supra notes 56-59 and accompanying text.
155. Recall the Watergate experience which prompted the Special Prosecutor provisions. E. Howard Hunt and Jeb Stuart Magruder, for example, were less senior White House officials who were implicated in the early stages of the Watergate investigation. The subcommittee proposes that the coverage of the Act be limited to officials at or above executive level II. REPORT, supra note 48, at 33. Cf. 28 U.S.C. § 591(b)(3) (Supp. 1979) (covers White House officials at or above level IV). Hunt was Consultant to the White House and Magruder was Deputy Director of White House Communications. C. BERNSTEIN & B. WOODWARD, ALL THE PRESIDENT'S MEN 9 (1974). Apparently, neither of these positions would be compensated at or above level II. See Hearings, supra note 43, at 277-80. Nevertheless, political pressure from the White House certainly affected the investigation of Hunt and Magruder's Watergate activities. Id. at 166-68 (Testimony of Steven Rosenfeld); see S. REP. No. 981, 93d Cong., 2d Sess. 35-36, 44-46 (1974).
156. An appendix to the Article details the special prosecutor provisions of the Ethics in Government Act of 1978 as they would appear under this approach.
157. Proposed § 593(a), infra in Appendix.
158. The President and Senate could reappoint special prosecutors every four years at the expiration of their term in office, but only if they meet certain qualifications for office. See Proposed § 593(a), infra in Appendix.

The concept of a special prosecutor appointed by the President, with Senate confirmation, to serve a fixed term has been suggested since the Act was adopted in 1978. Senator Weicker introduced a bill to create a Public Prosecutor in the Justice Department who would serve a six year term. S. 2272, 96th Cong., 2d Sess., 126 Cong. Rec. S1169-77 (daily ed. Feb. 7, 1980). See infra note 165.
159. Proposed § 593(a), infra in Appendix.
ical party as the incumbent President, or had campaigned for the election of any presidential candidate during the most recent election.160

This proposal would require the Attorney General to transfer to the special prosecutor any information, whether or not specific, suggesting that any person holding office in the executive branch at or above level IV had violated any federal criminal law other than a petty offense.161 The special prosecutor, upon receipt of this information, would be solely responsible for further investigation of that person and, if warranted, for prosecution, without interference from any other official in the executive branch.162 The President could remove the special prosecutor only for the grounds stated in the present Act.163 The proposal would require the special prosecutor to comply with all the written enforcement policies of the Department of Justice.164

Under this proposal, the Assistant Attorney General-special prosecutor would also direct the Department of Justice Public Integrity Section.165 This Section is now an integral part of the Criminal Division in the Department of Justice. It has jurisdiction over all federal offenses "involving public and institutional corruption"166 in the executive, legislative, and judicial branches. In supervising the Public Integrity Section, the Assistant Attorney General-special prosecutor would be subordinate to the Attorney General. Activities pursued as special prosecutor would not, however, be under the Attorney

160. Id.
161. Proposed § 592, infra in Appendix.
162. Proposed § 594(a), infra in Appendix. The proposal retains the Attorney General's control over wiretapping and other undercover procedures mandated by 18 U.S.C. § 2516 (1976 & Supp. III 1979). It does, however, eliminate current sections 594(b) through 594(e) as unnecessary in the proposed scheme, since the special prosecutor and staff will be part of the Department of Justice. It also changes § 594(f) in important respects. See infra text accompanying note 164.
163. Proposed § 596(a), infra in Appendix.
164. Proposed § 594(b), infra in Appendix.
165. Senator Weicker's Public Prosecutor bill would have given the Public Prosecutor authority over criminal investigations concerning members of Congress and many of their employees. Moreover, the Public Prosecutor would exercise this authority independent of the Attorney General's supervision. S. 2272, 96th Cong., 2d Sess., 126 Cong. Rec. S1170-71, S1175 (daily ed. Feb. 7, 1980).
166. Department of Justice Press Release (Jan. 14, 1976) (on file at the Minnesota Law Review). The press release seems to be the only definition printed and available to the public of the responsibilities of the Public Integrity Section.
General's supervision.\textsuperscript{167}

The central objective of this proposal is to preserve the independence of the special prosecutor while restructuring the office to avoid the pitfalls of a temporary, specialized process. One can amend the Act to address the concerns for workability, fairness, and constitutionality outlined earlier, without destroying Congress's recusance theory or reintroducing Attorney General discretion.

This proposal clearly guards the recusance theory underlying the current Act. Under the proposal, Presidents would appoint special prosecutors, but would do so at the beginning of their terms, under no pressure arising from pending allegations against one of their appointees. Moreover, the proposal would limit the President's freedom to choose those who might closely share the President's political ties.\textsuperscript{168} Once in office, the special prosecutor would have complete independence to investigate and to prosecute allegations against covered parties.\textsuperscript{169} Finally, the President could only remove the special prosecutor for extraordinary impropriety.\textsuperscript{170} As Congress has recognized, this protects special prosecutors from presidential pressure and allows them to make decisions independently.\textsuperscript{171}

The proposal also solves the problems of workability inherent under the current Act. Like other proposals, this alternative eliminates the need for the Attorney General to decide whether the information he or she receives, alleging a federal criminal offense by an executive officer, is "specific," or is "so unsubstantiated" that it does not warrant referral to a special prosecutor.\textsuperscript{172} The proposed special prosecutor would receive

\textsuperscript{167} The only substantive changes in the Act not discussed in the text are:

1) The elimination of 28 U.S.C. \textsection 595(b) (Supp. III 1979), regulating a special prosecutor's reports to the court. Since this proposal abolishes court appointment of special prosecutors, it also eliminates the need for these reports. Subsection (a), which gives special prosecutors authority to make activity reports and requires that such reports be sent to Congress is retained, however;

2) the elimination of \textsection 595(e), giving members of Congress authority to request the Attorney General to "apply for the appointment of a special prosecutor." This provision is unnecessary since there will always be a special prosecutor in office; and

3) the limitation of coverage to principal officers of principal national campaign committees seeking the election or reelection of the President under \textsection 591(b)(6), removing insignificant campaign committee officers.

\textsuperscript{168} See supra note 160 and accompanying text.

\textsuperscript{169} See supra note 162 and accompanying text.

\textsuperscript{170} See supra note 163 and accompanying text.

\textsuperscript{171} See supra note 65 and accompanying text.

\textsuperscript{172} Proposed \textsection 592, \textit{infra} in Appendix. See supra notes 45, 49 and accompanying text.
and decide whether to investigate any information that a federal offense had been committed, irrespective of whether the allegations were specific or substantiated after a preliminary investigation. This Assistant Attorney General would thus process allegations in a regular manner, free of interpretive difficulties.

This Article's proposal would also eliminate one of the major problems of the current Act—the unfairness of treating allegations against relatively high level government officials differently from allegations against private citizens and persons not covered by the Act. By specializing the procedures to avoid presidential conflict of interest, the existing statute invites public controversy and thus severely weakens the protections of the innocent. The proposed amendments would require the special prosecutor to adhere to Department of Justice enforcement policies, ensuring that those whom the Attorney General would not ordinarily investigate or prosecute would receive no different treatment from the special prosecutor. Moreover, the proposal would minimize the publicity inherent in the current two step appointment procedure, in which both the Attorney General and a special court must act before a special prosecutor assumes responsibility for a case.

Further, this Article's approach would broaden the coverage of the Act. The existing statute applies to relatively few high level presidential appointees. The proposed amendments apply to all presidential appointees at level IV or above. This would eliminate the inconsistency of using ex-

173. See supra notes 56-59 and accompanying text.
174. Proposed § 594(b), infra in Appendix.
175. There has been criticism even of the breadth of the current Act's coverage. Hearings, supra note 43, at 124-27 (Statement of Rudolph Giuliani); Civiletti, supra note 56, at 1053-54. This proposal obviates these objections, because it eliminates the workability and fairness problems of the Act. This proposal imposes no special burdens on officials covered by the Act.
176. See supra note 31 and accompanying text. The suggested Act proposes to retain section 591(b)(5)-(6). For criticism of the inclusion of persons covered by subsection (5) of the existing Act, see Hearings, supra note 43, at 124; Civiletti, supra note 56, at 1054.
177. Proposed § 591(a)(2), infra in Appendix. The Act would also cover employees in the executive office compensated at level IV or above. Proposed § 591(a)(3), infra in Appendix. At the end of the Carter Administration, between 200 and 240 persons were covered by the Act. Hearings, supra note 43, at 124; Civiletti, supra note 56, at 1054. This Article's proposal would cover approximately 385 additional persons, including all deputy, under and assistant cabinet secretaries, the chairperson and members of most agencies, the general counsel of cabinet departments, and several other government officials appointed by the President. See 5 U.S.C. §§ 5312-15 (Supp. IV 1980). The exact number of people covered by the Act varies because of changes in the size of
isting special prosecutor procedures against alleged crimes by, for example, the Assistant Attorney General in charge of the Office of Legal Policy, who directs less than 30 attorneys, while not using the special prosecutor procedures against the General Counsel of several departments and agencies, who direct two or three times that number of attorneys. In addition, the proposal includes a “catch-all” provision similar to the proposal that Associate Attorney General Rudolph Giuliani suggested to Congress. This provision broadens section 591 to cover allegations against anyone, even non-government officials, if a federal criminal investigation of that person, conducted through normal Department of Justice channels, could involve a conflict of interest. The recusance theory of the present Act arguably demands that an independent prosecutor investigate charges against relatives or business associates of the President or Attorney General.

If adopted, this Article’s proposed changes would largely remove doubts as to the Act’s constitutionality. The proposal would require the President to appoint the special prosecutor with Senate confirmation. By making the special prosecutor an “officer” and not an “inferior officer,” the amendments avoid the problem of court participation in the appointment process and thus do not violate either the separation of powers doctrine or the appointment and removal clause of the Constitution. Moreover, the proposal requires the special prosecutor to adhere to the policies of the Department of Justice in enforcing the criminal law, thus protecting even further the President’s control over purely executive functions. Finally, the amendments adopt the same constitutionally valid removal standards the current Act uses.

Five possible objections to this proposal deserve discussion. First, the proposal would bar those who belong to the President’s political party, who have recently campaigned for

the White House staff, vacancies in covered offices, and application of the Act to covered people after they have resigned from a covered office. See Hearings, supra note 43, at 268-69, 273-80.

178. The statistics come from a telephone interview with Ms. Appenzellar, Librarian of the Department of Justice (Jan. 27, 1982).

179. Proposed § 593(a), infra in Appendix.

180. See supra text accompanying notes 62-122.

181. Proposed § 596(a), infra in Appendix. Because the proposal would require the special prosecutor to comply with Department of Justice enforcement policies, intentional noncompliance with these policies that results in the indictment of a person who clearly would not have been prosecuted if he or she were not covered by the Act would constitute “extraordinary impropriety” and be sufficient grounds for removal.
any presidential candidate, or who have already served the
President in some other office, from being the special prosecu-
tor. These disqualifications would undoubtedly bar able law-
yers from consideration. Nevertheless, the disqualifications are
necessary to preserve the original theory of the Act. The Presi-
dent cannot be allowed to appoint a political supporter or asso-
ciate as special prosecutor. In Congress's judgment, the
Attorney General has a serious and sometimes dangerous disa-
ability if called upon to investigate crimes that associates hold-
ing federal office allegedly committed. Creating the same
disability in a new special prosecutor's office would wholly de-
feat the purpose of the Act.

A second possible objection concerns a problem which one
could term the "grandstanding," or "loose cannon" effect. Under
the current Act, a special prosecutor is a temporary ap-
pointee who only has authority to investigate allegations of a
single, specified crime or a well-defined group of related crimes.
Under the proposal suggested here, the special prosecutor
would investigate and prosecute all allegations of non-petty
crimes by presidential appointees, could hold office for four
years, and could not be fired for anything less than gross in-
competence or misconduct. One can conceive of a politically
ambitious special prosecutor of the opposite political party run-
ning wild. The proposal, however, invokes several safe-
guards to prevent politically motivated prosecutions. Since the
President must appoint someone from the opposite political
party, the President likely would be careful to select a person
of high legal ability with a reputation for integrity. The Presi-
dent also may not appoint a person who has recently mani-
fested political interests and ambitions by campaigning for a
presidential candidate. Finally, the special prosecutor's staff
would consist of careerists, who tend to disfavor political
grandstanding.

Former Deputy Attorney General Harold Tyler raised two
more objections to certain provisions of this plan while testifi-

182. See supra note 180 and accompanying text.
184. Proposed § 591(a), infra in Appendix. The prosecutor would also in-
vestigate and prosecute all crimes involving persons covered by the Act's catch-
all provision. Id.
185. See REPORT, supra note 48, at 51; Hearings, supra note 43, at 132-33 (tes-
timony of Arthur Christy).
186. The special prosecutor's staff will be selected under the procedures
used to select all Department of Justice employees.
ing in 1976 to the Senate Judiciary Committee on the proposed Watergate Reorganization and Reform Act of 1976. Tyler opposed the creation of a new assistant attorney general and a new division in the Justice Department to deal with alleged crimes by government officers or employees. He said that such legislation would not only divide responsibility for the enforcement of criminal laws, but would also "invite jurisdictional conflicts" between the proposed Division of Government Crimes and the existing Criminal Division.

Although Tyler's first argument seems forceful, a division of responsibility in this area is necessary and beneficial. The special prosecutor must have independence. Moreover, crime in government may require a different approach and new techniques in comparison to those used in investigating crime outside government, such as organized crime and racketeering. Finally, the history of criminal law enforcement in the Department of Justice belies the alleged evil of divided law enforcement responsibility. For many years, both the Antitrust and Tax Divisions have had jurisdiction over criminal violations of the tax and antitrust laws. Enforcement of those laws apparently has not suffered from the ills of divided responsibility.

One can raise Tyler's second argument, that "jurisdictional conflicts" would arise between the new Office and the Criminal Division, every time the Department of Justice creates any new Division, Bureau, or Office. Indeed, the Offices of United States Attorneys, each headed by a presidentially-appointed prosecutor, have been an intermittent source of division of responsibility in federal criminal law enforcement and of conflict with the Attorney General since the founding of the Republic. A new Assistant Attorney General in charge of government crimes would likely create no more jurisdictional conflicts than the existing situation creates. Moreover, a statute would clearly define the new special prosecutor's authority, and would thus minimize jurisdictional conflicts.

The last criticism of the proposed amendments focuses on the two roles that the new Assistant Attorney General-special

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189. Id. at 3-4.
190. Id.
191. 28 C.F.R. §§ 0.40-.41, 0.70-.71 (1980).
prosecutor must assume. As a special prosecutor he or she would be independent from the Attorney General; as Assistant Attorney General in charge of the Public Integrity Section, he or she would be subordinate to the Attorney General. Since the volume of work as Assistant Attorney General would probably exceed the officer's workload as special prosecutor by fifty or one hundred to one,\textsuperscript{193} the special prosecutor may unconsciously develop close ties to the Justice Department that will threaten the prosecutor's independence.

This divided loyalties objection, however, is based in part on a misconception of the way in which the Department of Justice works. The Solicitor General, Assistant Attorneys General, and United States Attorneys have far more independence than is generally realized.\textsuperscript{194} Although the Attorney General is frequently described as the top of a pyramid,\textsuperscript{195} it is unusual for a matter to reach the top. Assistant Attorneys General usually make all the final decisions on the disposition of cases.\textsuperscript{196} It is their job to fend off Presidents and Attorneys General when they wish to intercede on behalf of influential persons under investigation.\textsuperscript{197} As a final safeguard, however, the proposed statutory disqualifications for the special prosecutor should eliminate any perceived pro-administration bias. The actual impartiality and courage of that officeholder would depend on those attributes of competence and character that defy defini-

\textsuperscript{193} There have been an estimated 10 filings under the special prosecutor provisions. See supra notes 43-47 and accompanying text. Former Attorney General Griffin Bell estimated that in 1980 there were "probably 1000 to 1200 public officials under investigation" for official crimes. Conference, supra note 147, at 83 (remarks of Attorney General Griffin Bell). The Public Integrity Section investigates official crimes in all three branches of the federal government. See Press Release, supra note 166, at 1.

\textsuperscript{194} Conference, supra note 147, at 89-90, 132, 141, 145 (1980).

\textsuperscript{195} The Attorney General's role has been described, for example, as that of "chief lawyer for the nation." Id. at 130.

\textsuperscript{196} Thurman Arnold, when Assistant Attorney General in charge of the Antitrust Division, said "the first rule is never tell the Attorney General anything." Id. at 141.

\textsuperscript{197} As Justice William Rehnquist wrote when he was Assistant Attorney General for the Office of Legal Counsel, "[t]he plain fact of the matter is that any President, and any Attorney General, wants his immediate underlings to be not only competent attorneys, but to be politically and philosophically attuned to the policies of the administration." Rehnquist, The Old Order Changeth: The Department of Justice Under John Mitchell, 12 Ariz. L. Rev. 251, 252 (1970). See also Leonard v. Douglas, 321 F.2d 749, 751-52 (D.C. Cir. 1963). For a discussion of responses of Assistant Attorneys General and Solicitors General to presidential and Attorney General influence and attempted influence in specific cases see Conference, supra note 147, at 85-89, 132.
tion, because ultimately quality appointments depend on the wisdom and judgment of presidents and their advisors.

V. CONCLUSION

The Watergate controversy instilled in Congress a desire to remove the dangers of executive self-investigation and self-prosecution. When the special prosecutor provisions of the Ethics in Government Act expire in 1983 Congress must decide whether and how to continue to pursue this goal. To eliminate the Attorney General's potential conflict of interest there must be some form of special prosecutor legislation. The Act is unacceptable, however, in its present form. In addition to its constitutional difficulties, the Act is both unworkable and unfair. The several reforms that have been previously suggested attempt to solve these concerns. Yet the Reagan administration's, Civiletti's, and the Senate Subcommittee's proposals give the Attorney General too much discretion, which defeats the recusance theory underlying the Act.

By adopting the proposal detailed in this Article, Congress would not only maintain the independence of the special prosecutor, but would also eliminate the workability, fairness, and constitutional problems that burden the current Act. Passage of these amendments would guard against the problems revealed during Watergate while providing a more effective and equitable method to investigate and to prosecute crimes committed by executive officers or their close associates.

APPENDIX


§ 49. Assignment of judges to division to appoint special prosecutors [Delete].

§ 591. Applicability of provisions of this chapter

(a) The Attorney General shall conduct an investigation pursuant to the provisions of this chapter whenever the Attorney General receives specific information that any of the persons described in subsection (b) of this section has committed a violation of any Federal criminal law other than a violation constituting a petty offense.

(b) The persons referred to in subsection (a) of this section 592 of this title are—

(1) (a) the President and Vice President;
(2) (b) any individual serving in a position listed in sections 5312 through 5315 of title 5;
(3) (c) any individual working in the Executive Office of the President and compensated at a rate not less than the annual rate of basic pay provided for level IV of the Executive Schedule under section 5315 of title 5;
(4) any individual working in the Department of Justice and compensated at a rate not less than the annual rate of basic pay provided for level III of the Executive Schedule under section 5314 of title 5, any Assistant Attorney General, the Director of Central Intelligence, the Deputy Director of Central Intelligence, and the Commissioner of Internal Revenue;
(5) (d) any individual who held any office or position described in any of paragraphs (1) (a) through (4) (c) of this subsection during the incumbency of the President or during the period the last preceding President held office, if such preceding President was of the same political party as the incumbent President; and
(6) (e) any principal officer of the principal national campaign committee seeking the election or reelection of the President; and
(7) (f) any other person, investigation of whom the Attorney General determines would, because of such person's close family, personal, business, or political relationship with the President, Vice President, or Attorney General, involve a conflict of interest if not investigated by the Special Prosecutor.

§ 592. Application for appointment of a special prosecutor

Referrals of information to the special prosecutor

(a) The Attorney General, upon receiving specific information that any of the persons described in section 591(b) of this title has engaged in conduct described in section 591(a) of this title, shall conduct, for a period not to exceed ninety days, such preliminary investigation of the matter as the Attorney General deems appropriate committed a violation of any Federal criminal law other than a violation constituting a petty offense shall refer said information to the Special Prosecutor.

(b)-(f) [Delete].

* The sequence of the sections in the original Act has been retained solely for ease in comparing the Act with the proposed changes. Crossed-out words indicate deletions; underlined words indicate insertions.
§ 593. Duties of the division of the court
Appointment of the special prosecutor
(a)-(e) [Delete].

(a) The Special Prosecutor shall be appointed by the President with the advice and consent of the Senate for a term which shall end at noon on January 20 in each year following election of a President. No person shall be eligible for such appointment if such person

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§ 593. Duties of the division of the court
Appointment of the special prosecutor
(a)-(e) [Delete].

(a) The Special Prosecutor shall be appointed by the President with the advice and consent of the Senate for a term which shall end at noon on January 20 in each year following election of a President. No person shall be eligible for such appointment if such person

(1) has held any other office

(A) in the executive branch during the incumbency of the President;

(B) in the Federal Government if such person was appointed to that office by the incumbent President;

(2) is a member of the same political party as that of the incumbent President; or

(3) campaigned for any presidential candidate in the most recent election.

A special prosecutor who is otherwise qualified may be reappointed by the President.

(b) The Special Prosecutor shall have the rank and receive compensation equal to that of an Assistant Attorney General under section 5315 of title 5.

§ 594. Authority and duties of the special prosecutor
(a) Notwithstanding any other provision of law, the special prosecutor appointed under this chapter shall have, with respect to all matters in such special prosecutor's prosecutorial jurisdiction established under this chapter, full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice, except that the Attorney General shall exercise direction or control as to those matters that specifically require the Attorney General's personal action under section 2516 of title 18. Such investigative and prosecutorial functions and powers shall include—

1. conducting proceedings before grand juries and other investigations;
2. participating in court proceedings and engaging in any litigation, including civil and criminal matters, that such the special prosecutor deems necessary;
3. appealing any decision of a court in any case or proceeding in which such the special prosecutor participates in an official capacity;
4. reviewing all documentary evidence available from any source;
5. determining whether to contest the assertion of any testimonial privilege;
6. receiving appropriate national security clearances and, if necessary, contesting in court (including, where appropriate, participating in in camera proceedings) any claim of privilege or attempt to withhold evidence on grounds of national security;
7. making applications to any Federal court for a grant of immunity to any witness, consistent with applicable statutory requirements, or for warrants, subpoenas, or other court orders, and, for purposes of sections 6003, 6004, and 6005 of title 18, exercising the authority vested in a United States Attorney or the Attorney General;
8. inspecting, obtaining, or using the original or a copy of any tax return, in accordance with the applicable statutes and regulations,
and, for purposes of section 6103 of the Internal Revenue Code of 1954, and the regulations issued thereunder, exercising the powers vested in a United States Attorney or the Attorney General; and

(9) initiating and conducting prosecutions in any court of competent jurisdiction, framing and signing indictments, filing informations, and handling all aspects of any case in the name of the United States.

(b)-(e) [Delete].

(f) The Special Prosecutor shall, to the extent that such special prosecutor deems appropriate, comply with the written policies of the Department of Justice respecting enforcement of the criminal laws, provided such policies were in effect at the time when the matter was referred to the Special Prosecutor by the Attorney General.

§ 595. Reporting and congressional oversight

(a) The Special Prosecutor appointed under this chapter may make public from time to time, and shall send to the Congress statements or reports on the activities of such special prosecutor. These statements and reports shall contain such information as such Special Prosecutor deems appropriate.

(b) [Delete].

(c) The Special Prosecutor shall advise the House of Representatives of any substantial and credible information which such special prosecutor receives that may constitute grounds for an impeachment. Nothing in this chapter or section 49 of title 18 of title 18 shall prevent the Congress or either House thereof from obtaining information in the course of an impeachment proceeding.

(d) The appropriate committees of the Congress shall have oversight jurisdiction with respect to the official conduct of any the Special Prosecutor appointed under this chapter; and such the Special Prosecutor shall have the duty to cooperate with the exercise of such oversight jurisdiction.

(e) [Delete].

§ 596. Removal of the special prosecutor; termination of office

(a) The Special Prosecutor appointed under this chapter may be removed from office, other than by impeachment and conviction, only by the personal action of the Attorney General President and only for extraordinary impropriety, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such Special Prosecutor's duties.

(b) If the Special Prosecutor is removed from office, the Attorney General shall promptly submit to the division of the court and the Committees on the Judiciary of the Senate and the House of Representatives a report specifying the facts found and the ultimate grounds for such removal. The committees shall make available to the public such report, except that each committee may, if necessary to protect the rights of any individual named in the report or to prevent undue interference with any pending prosecution, delete or postpone publishing any or all of the report. The division of the court may release any or all of such report in the same manner as a report released under section 595(b)(3) of this title and under the same limitations as apply to the release of a report under that section.

(c) A Special Prosecutor so removed may obtain judicial review of the removal in a civil action commenced before the division of the court United States District Court for the District of Columbia and, if such removal was based on error of law or fact, may obtain reinstatement or other appropriate relief. The division of the court shall cause such an action to be in every way expedited.
§ 597. Relationship with Department of Justice

(a) Whenever a matter is in the prosecutorial jurisdiction of a special prosecutor or has been accepted by a special prosecutor under section 594(e) of this title, the Department of Justice, the Attorney General, and all other officers and employees of the Department of Justice shall suspend all investigations and proceedings regarding such matter, except to the extent required by section 594(d) of this title, and except insofar as such special prosecutor agrees in writing that such investigation or proceedings may be continued by the Department of Justice. Within thirty days after the first Special Prosecutor appointed under this Act shall have assumed office, the Attorney General shall transfer to the Office of Special Prosecutor the duties and responsibilities of the Public Integrity Section in the Criminal Division of the Department of Justice.

(b) Nothing in this chapter shall prevent the Attorney General or the Solicitor General from making a presentation as amicus curiae to any court as to issues of law raised by any case or proceeding in which a special prosecutor participates in an official capacity as Special Prosecutor or any appeal of such case or proceeding.

§ 598. Termination of effect of chapter

This chapter as amended shall cease to have effect five years after the date of the enactment of this chapter, except that this chapter shall continue in effect with respect to then pending matters before the Special Prosecutor that in the judgment of such the Special Prosecutor require such continuation until that Special Prosecutor determines such matters have been completed.