

# INDEPENDENT PROSECUTORS IN THE UNITED STATES

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*Independent prosecutors in the United States are appointed to handle discrete matters, with their role involving both investigation and prosecution. Commonly, independent prosecutors are used to investigate and prosecute misconduct by senior government officials. However, their role goes beyond this. This article outlines what an independent prosecutor is, when an independent prosecutor is needed, how they are appointed and their powers and responsibilities.*

*Aux Etats-Unis, les procureurs indépendants sont nommés pour régler des situations délicates et sensibles, notamment lorsque des hauts fonctionnaires sont impliqués. Cet article rappelle que leur fonction est traditionnellement double puisqu'ils disposent à la fois de pouvoirs d'investigation et de poursuite, mais qu'ils peuvent dans des circonstances particulières, se voir également conférer d'autres missions.*

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## **I INTRODUCTION**

There are two methods by which individuals suspected of a crime may be tried. The United States uses the accusatory method, in which an attorney who represents the federal, state, county or city government prosecutes the crime. In contrast to the inquisitorial method, where judges or other officials are involved in the criminal prosecution (including the examination of witnesses or the accused), in the accusatory method, judges are not involved in the prosecution itself.

On the federal level, criminal cases are prosecuted by the United States Attorney's Office, which operates under the direction of the Attorney General. There are 93 United States Attorneys ("US Attorney") throughout the United States, Puerto Rico, the Virgin Islands, Guam, and the Northern Mariana Islands. There is a US Attorney assigned to each of the judicial districts (except Guam and the Northern Mariana Islands, which have one US Attorney who serves in both

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districts). These US Attorneys are appointed by the President and confirmed by a majority vote of the Senate.

US Attorneys (and their counterparts at the state and local level) work with law enforcement to investigate criminal conduct. The government (federal, state, local) generally brings criminal charges in one of two ways: by a "bill of information" secured by a preliminary hearing or by a grand jury indictment. However, the federal government must obtain an indictment unless the defendant waives his or her right to indictment by a grand jury. The purpose of both preliminary hearings and grand juries is to determine whether there is probable cause to require the defendant to stand trial. If no probable cause exists, the defendant cannot be forced to stand trial. If a defendant goes to trial, either the judge or the jury will find the defendant guilty or not guilty. The prosecution has the burden of proof and must establish guilt beyond a reasonable doubt.

Aside from these more "general" prosecutors, there is also a role in the United States for "independent" or "special" prosecutors, who are specially appointed to handle certain discrete matters. This paper provides an overview of the role of the independent prosecutor in the United States, which includes both investigating and prosecuting specified matters. In particular, the paper endeavors to answer the following questions:

- (1) What is an independent prosecutor?
- (2) When is an independent prosecutor needed?
- (3) How is an independent prosecutor appointed?
- (4) What powers and responsibilities does an independent prosecutor have?

This paper uses two terms – "Independent Counsel" and "Special Counsel" depending on the statutory or regulatory scheme governing the independent prosecutor's appointment. The terms "independent prosecutor" and "special prosecutor" are used interchangeably as general terms.

The most commonly known type of independent prosecutor in the United States is an independent prosecutor who is appointed by the Attorney General to investigate and prosecute misconduct by senior government officials. Oftentimes, because these investigations involve high-ranking members of the federal government, they typically implicate matters of national significance. However, there is also a lesser known role played by independent prosecutors in criminal contempt proceedings in the federal trial courts. Pursuant to Federal Rule of Criminal Procedure 42(a), the court is required to "request that the contempt be prosecuted by an attorney for the government, unless the interest of justice requires the appointment of another attorney." If the government declines the court's

request, either due to a conflict or due to disinterest, the court is required to appoint another attorney to prosecute the contempt. *Id.* These criminal contempt actions typically only have a local or individualized significance.

This paper first discusses the role of independent prosecutors for matters of national significance, both from a current and historical perspective. The paper then discusses the more limited role of the independent prosecutor in criminal contempt proceedings. Finally, the paper concludes with a few questions for consideration with respect to the issues implicated by the use of independent prosecutors.

## **II MATTERS OF NATIONAL SIGNIFICANCE**

In 1999, when the Independent Counsel Reauthorization Act of 1994 ("Independent Counsel Act") expired (discussed below), the Department of Justice ("DOJ") promulgated new regulations providing for the appointment of an independent prosecutor called a "Special Counsel." These regulations provide for the Attorney General to appoint a "Special Counsel" if the Attorney General determines a particular investigation is "warranted," a conflict of interest prevents the DOJ from conducting the investigation, and that it would be in the public interest to appoint an outside Special Counsel to investigate the matter. 28 C.F.R. § 600.1.<sup>1</sup> When a matter is brought to the attention of the Attorney General, he has three options (1) appoint a Special Counsel; (2) direct an "initial investigation" in order to make an informed decision to appoint a Special Counsel; or (3) conclude that under the circumstances, the public interest would not be served by appointing a Special Counsel and that the investigation should proceed under the "normal processes of the" DOJ 28 CFR § 600.2.

If a Special Counsel is appointed, the Attorney General is required to provide the Special Counsel with a "specific factual statement of the matter to be investigated." 28 CFR § 600.4. In addition, the Special Counsel is empowered to

investigate and prosecute federal crime committed in the course of, and with intent to interfere with, the Special Counsel's investigation, such as perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses; and to conduct appeals arising out of the matter being investigated and/or prosecuted.

28 CFR § 600.4(a). The Special Counsel is prohibited from exceeding the boundaries of the factual investigative authority outlined by the Attorney General unless the Attorney General includes additional matters within the Special

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<sup>1</sup> The regulations governing the appointment of a Special Counsel were promulgated in 1999 pursuant to 5 USC § 301, 28 USC §§ 509, 510, 515-519.

Counsel's authority. 28 CFR § 600.4(b). Generally speaking, the Special Counsel is vested with the "full power and independent authority to exercise all investigative and prosecutorial functions of any United States Attorney." 28 CFR § 600.6. Therefore, a Special Counsel's investigation could result in a presentation before a grand jury, the return of an indictment, and/or trial before a federal district court. Finally, only the Attorney General can discipline or remove the Special Counsel. 28 CFR § 600.7(d). "The Attorney General may remove a Special Counsel for misconduct, dereliction of duty, incapacity, conflict of interest, or for other good cause, including violation of [DOJ] policies." *Id.*

The most recent Special Counsel appointment was Patrick Fitzgerald, who was appointed by Acting Attorney General James B. Comey<sup>2</sup> on December 30, 2003, to investigate the alleged unauthorized disclosure of CIA spy Valerie Plame's identity. *See* December 30, 2003 Letter from J. Comey to P. Fitzgerald. Mr. Fitzgerald, who is the US Attorney for the Northern District of Illinois, was delegated "all the authority of the Attorney General" with respect to the investigation into the alleged unauthorized disclosure.

In addition, Mr. Fitzgerald was also involved in the prosecution of Lewis "Scooter" Libby, who was Vice President Cheney's Chief of Staff, for obstruction of justice and perjury during the grand jury investigation into the leak of Plame's identity. A jury convicted Libby of one count of obstruction of justice, two counts of perjury, and one count of making false statements to investigators, and a judge sentenced Libby to 30 months in prison followed by two years of probation and fined him \$250,000. Although President Bush commuted Libby's prison sentence, he left in place the felony conviction, the fine, and the terms of probation. Mr. Fitzgerald has not been authorized to conduct any new investigations and there is no Special Counsel currently appointed to investigate any other matter.

The predecessor to the Office of Special Counsel was the Office of the Independent Counsel. Perhaps the most famous Independent Counsel (a/k/a special prosecutor) was Kenneth Starr who was appointed in 1994 pursuant to the Independent Counsel Act to continue the Whitewater investigation. The Whitewater investigation began as an investigation into possible unlawful conduct by President Clinton in the financing of a real estate transaction that occurred before his election. Once Mr. Starr was appointed, the scope of the investigation was expanded to include possible crimes in connection with the discharge of employees of the White House travel office, the possible misuse of Federal Bureau

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2 Attorney General John Ashcroft recused himself from the Plame matter due to conflicts of interest. Therefore, Acting Attorney General Comey assumed the responsibility of appointing a Special Counsel.

of Investigation files for political purposes, the death of an assistant counsel to the President, and Monica Lewinsky. Although the Independent Counsel Act lapsed in 1999 and there is no independent counsel statute currently in effect, a brief review of the Act and the independent counsel's rights and responsibilities under the Act is instructive.

The original authority for the appointment of an Independent Counsel is found in the Ethics of Government Act of 1978, which was passed in the wake of the Watergate scandal. The Watergate investigation involved conduct by President Nixon, and was lead by a special prosecutor who had been appointed by the Attorney General, who had been appointed by President Nixon. At the time, many were troubled that a DOJ-lead investigation could not be truly independent because the DOJ fell within the executive branch, and therefore within the authority of the President. In fact, these concerns seemed to be realized when President Nixon ordered the firing of Archibald Cox, the special prosecutor investigating Watergate, and his own Attorney General and his deputy resigned in protest in the "Saturday Night Massacre." Following Watergate, Congress sought to pass legislation that would provide for an Independent Counsel who would be free from the conflicts of interest present during the scandal.

The Independent Counsel Act, which is the most recent reauthorization of the Ethics of Government Act of 1978, established a process for the appointment of the Independent Counsel by a federal appellate court panel ("Special Division") that sets forth the parameters and scope of the investigation based on a preliminary assessment by the Attorney General that there are "reasonable grounds to believe that further investigation is warranted." 28 USC. §§ 49, 592(c)(1)(A) (1994). The Special Division was selected by the Chief Justice of the United States Supreme Court and had complete discretion in choosing the Independent Counsel and defining the Independent Counsel's jurisdiction. 28 USC. §§ 49, 593(b) (1994). Some have argued that Congress intended the Special Division to perform an oversight function, but, that in practice, once the Special Division appointed the Independent Counsel and established the Independent Counsel's jurisdiction, the Special Division did little more than "rubber-stamp the special prosecutor's actions." Erwin Chemerinsky, *Learning the Wrong Lessons from History: Why There Must be an Independent Counsel Law*, 5 WID L SYMP J 1, 10 (2000) (quoting Ken Gormley, *An Original Model of the Independent Counsel Statute*, 97 MICH L REV 601, 680 (1998)).

Under the Independent Counsel Act, the Independent Counsel was granted "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." 28 USC § 594(a) (1994).

At the conclusion of his investigation, the Independent Counsel was required to report to the Special Division about the investigation. In addition, the Independent Counsel was permitted to "advise the House of Representatives of any substantial and credible information ... that may constitute grounds for impeachment." 28 USC § 595(c) (1994).

Despite the lapse of statutory authority for the Office of Independent Counsel, the need for independent prosecutors continues. There is some debate as to whether a Special Counsel appointed pursuant to the DOJ regulations is a viable alternative to an Independent Counsel appointed pursuant to an independent counsel statute. The primary concern is one of true independence – if the Special Counsel is a part of the Justice Department, he or she is subject to the same pressures present in the Watergate scandal. However, as demonstrated by Mr. Starr's activities as Independent Counsel, an independent counsel statute may not necessarily guarantee impartiality. In particular, Mr. Starr was criticized for being overzealous in his investigation of President Clinton, in part because of his extensive connections to the Republican party. As a result, some believed Mr. Starr's investigation took on a biased, partisan tone, which essentially eviscerated the purpose of the Independent Counsel Act.

There have been recent public calls for the Attorney General to appoint an independent prosecutor under DOJ regulations to investigate and prosecute the use of torture on detainees. On March 17, 2009, the American Civil Liberties Union sent a letter to Attorney General Eric Holder formally requesting the "Appointment of an Independent Prosecutor for the Investigation and Prosecution of Any Violations of Federal Criminal Laws Related to the Interrogation of Detainees." The letter specifically requested the appointment of outside Special Counsel because investigation and prosecution by a government attorney would present a conflict of interest. As of the writing of this paper, no independent prosecutor or independent panel has been appointed to investigate harsh interrogations of terror suspects.

### ***III MATTERS OF LOCAL OR INDIVIDUALIZED SIGNIFICANCE***

Federal Rule of Criminal Procedure 42 governs criminal contempt proceedings in the federal trial courts. United States District Judge Emmet G. Sullivan (District of Columbia) recently invoked Rule 42 to appoint an independent prosecutor to investigate whether government attorneys prosecuting former Alaska Senator Ted Stevens for ethics violations should themselves be prosecuted for criminal contempt. *United States v Stevens*, No. 08-231 (DDC Apr. 7. 2008) (order appointing Attorney Henry F Schuelke, III). After a trial that resulted in a guilty verdict, the court found that prosecutors had repeatedly violated their discovery

obligations under *Brady v Maryland*, which requires the government to disclose all potentially exculpatory evidence to the defence. Ultimately, Judge Sullivan granted the Government's Motion to Set Aside the Verdict and Dismiss the Indictment, which was filed by a new team of prosecutors under the direction of Attorney General Holder.

Of course, Rule 42 has been invoked in less high-profile situations, including out-of-court criminal contempt actions for willful violations of court orders. *See, eg, In re: Russell Reed*, 161 F.3d 1311 (11th Cir 1998).

#### **IV QUESTIONS TO CONSIDER**

- ◆ What is necessary to ensure a fair, impartial, and thorough investigation into allegations of criminal conduct by senior government officials?
- ◆ Does the current DOJ regulatory scheme protect against conflicts of interest? In other words, can there be a truly independent investigation under this regulatory scheme?
- ◆ How can we balance the tension between the desire for independence and the desire for accountability?
- ◆ How much power is too much power? What sorts of safeguards would be most effective (*eg*, limiting the number of high government officials subject to investigation, limiting the conduct which can be investigated, limiting the scope, expense and time of an investigation, limiting or expanding the Attorney General's discretion in the initial review, and limiting or expanding reporting requirements)?

