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Independent Counsel or Special Prosecutor for the Enron Investigation

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Summary

There have been within the media, as well as in other public commentary, calls for the appointment of, variously, an "independent counsel," a "special prosecutor," or a "special counsel" to conduct the criminal investigation of the so-called "Enron matter." There is at the current time no statutory mechanism existing under federal law for the appointment of an "independent counsel," as that provision of law was allowed to expire and was not reauthorized by Congress after June 30, 1999. No "independent" counsel or special prosecutor may, therefore, be appointed by a neutral three-judge panel upon the request of the Attorney General, as had been provided for in the Ethics in Government Act of 1978. The Attorney General himself, however, may name his own "special counsel," and may establish the framework and limits of this counsel's prosecutorial jurisdiction for an investigation which would be conducted under the ultimate control and review of the Attorney General, under regulations promulgated by the Department of Justice in June of 1999. The Attorney General may name such a counsel when, in his discretion, he perceives a potential conflict of interest for the Justice Department to conduct the investigation, or in other extraordinary circumstances, when it would be "in the public interest" to name such a counsel. Furthermore, the Attorney General would not be prohibited from issuing *new* regulations to appoint a more independent, Watergate-style special prosecutor, similar to regulations authorizing the appointment of and the investigations by Archibald Cox and Leon Jarworski, if such were deemed needed by the Attorney General. Finally, Congress could enact legislation similar to the Independent Counsel law, to direct the Attorney General to seek the appointment of an independent counsel in certain circumstances.

Background. The financial collapse and bankruptcy of the Enron Corporation have spurred a multitude of investigations within the Federal Government, including several congressional investigations and hearings into various aspects of the potential causes of the failure, its impact on workers and the financial markets, and concerning the need for

possible remedial legislation.[1] Any *criminal* prosecutions on behalf of the United States relating to the failure of the Enron Corporation, however, are to be conducted by the Department of Justice, under the direction of the Attorney General of the United States or his designee.[2] As of this writing, the Department of Justice "task force established in January [2002] to investigate all the matters that have arisen from that collapse"[3] has obtained its first criminal indictment in the Enron matter, on March 7, 2002, charging obstruction of justice by Arthur Andersen, LLP, in alleging that the accounting firm intentionally destroyed documents sought by the Securities and Exchange Commission relating to Andersen's audits and consulting work for Enron.[4]

Because of various allegations of the "purchase" by Enron of favorable Government treatment or access through large and continuing campaign contributions to elected officials and political parties, and the extensive lobbying efforts by the Enron Corporation and those affiliated with Enron or with the accounting firm Arthur Andersen, there have been various public calls for an "independent counsel," a "special prosecutor," or a "special counsel" to conduct the criminal investigation and prosecution of the Enron matter on behalf of the United States, rather than the regular Department of Justice personnel. It has been noted in this context that the Attorney General of the United States has already "recused" himself from personal participation in the Enron matter because of the extent of political campaign contributions that the Attorney General had received from those associated with the Enron Corporation,[5] and that the entire Houston office of the United States Attorney has been recused from the Enron investigation because of personal or family ties to the Enron Corporation, its officers or employees.[6] In light of these and other alleged connections and personal communications among the Enron Corporation, its officers, and highly placed persons in the Bush Administration, it has been argued that the public interest, particularly the need for public confidence in the thoroughness and impartiality of the Government's investigation and prosecution of the Enron matter, requires an investigation which is "independent" of the ultimate control and direction of the President and his personally appointed officials in the Department of Justice.[7]

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[1] *See, McGrain v. Daugherty,* 273 U.S. 135, 174 (1927); *Watkins v. United States,* 354 U.S. 178, 200 (1957), *re* Congress' oversight and investigative authority incident to its legislative powers.

[2] 28 U.S.C. §§ 516, 519, 547. Federal law enforcement is an Article II, executive function. *Morrison v. Olson,* 487 U.S. 654, 685 - 697 (1988).

[3] News Conference with Deputy Attorney General Thompson, Thursday, March 14, 2002, at 1.

[4] Indictment, *United States v. Arthur Andersen, LLP,* CR H-02-121 (S.D. Tex., Mar. 7, 2002).

[5] Department of Justice Statement, January 10, 2002.

[6] Department of Justice, U.S. Attorney's Office, Southern District of Texas, News Release, January 10, 2002.

[7] Independent counsels have been called for by some non-partisan watchdog groups – including Fred Wertheimer's Democracy 21, and the Center for Public Integrity, *see* Los Angeles Times, Saturday January 12, 2002; in media commentary – *note* Professor Erwin Chemerinsky, "Independence is Essential in Enron Probe," Los Angeles Times, January 23, 2002, at p. 13: "The close ties between Enron and the Bush administration demand that the investigation be handled outside the Bush Justice Department. A special prosecutor independent of the Bush administration

(continued...)

Opponents of the idea of seeking an "independent" investigation outside of the normal channels in the Department of Justice, note that no specific allegations of wrongdoing by anyone in the Bush Administration, *vis-a-vis* the Enron Corporation, have been made. It is noted that without such specific allegations, no independent counsel would have been automatically "triggered," even under the expired independent counsel statute. There is presented in the current fact situation, therefore, it is argued, no issue of the inherent "conflict of interest" of having an Administration control an investigation "of itself," since there are no such allegations being investigated against anyone in the Administration. Absent such a conflict of interest, there is missing the principal justification that had given rise to the original "special prosecutor" (and later named "independent counsel") legislation in the aftermath of the Watergate scandal, and the investigations that followed under that law.[8]

Independent Counsel Law; Expiration. No "independent counsel" or "special prosecutor," as those terms have been used since 1978, may now be appointed by an independent judicial panel, upon the request of the Attorney General, to investigate or prosecute a matter on behalf of the United States.[9] The provisions of law which had authorized the appointment of such "independent counsels," originally enacted in the "Ethics in Government Act of 1978," were not reauthorized by Congress, and expired after June 30, 1999.[10] Since the law's expiration, no *new* "independent counsels" can be requested by the Attorney General to be appointed by (nor may such counsels be appointed on its own accord by) the special three-judge panel of the United States Court of Appeals, although independent counsels appointed before the law's expiration in 1999 were expressly allowed to finish their investigations.[11]

Under the former independent counsel law, the mechanisms for appointing counsels would have been "triggered" when the Attorney General received "specific" and "credible" information alleging that certain high-level officials in the Administration had committed

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[7] (...continued)
is the only way that the public can be confident that the investigation is conducted properly and not influenced by cronyism and partisan politics"; New York Daily News, "Enron: Countdown to Scandal," January 13, 2002, p. 8; Marianne Means, The Houston Chronicle, "Unleash Independent Counsel on Enron," January 19, 2002, at p. 40; and by some public officials – including Senator Fritz Hollings , *note* Chicago Tribune, February 6, 2002, at p. 1.

[8] Samuel Dash, "Enron Probe is on Track for Now," Milwaukee Journal Sentinel, January 20, 2002; former independent counsel Joseph DiGenova argued that such matters should remain in the Justice Department: "This is garden-variety fraud. Any good prosecutor can investigate this case," *see* Fort Worth Star Telegram, February 8, 2002, at 10; President Bush and the Justice Department have rejected calls for an independent or special counsel, noting that the Enron matter is a "business problem," and does not raise conflict of interest issues for the Department of Justice. Chicago Tribune, February 6, 2002, p. 1; Los Angeles Times, February 5, 2002, p.1.

[9] Under the Ethics in Government Act of 1978, P.L. 95-521, Title VI, appointees of the special judicial panel had originally been called "special prosecutors," but were re-named "independent counsels" in the provisions' reauthorization and amendment in 1983.

[10] These provisions of law had always included a five-year "sunset" clause, and the law was reauthorized for the last time on June 30, 1994. P.L. 103-270, 108 Stat. 732, June 30, 1994.

[11] 28 U.S.C. § 599.

serious federal offenses, or when the Attorney General determined that an investigation of allegations of a violation of a federal criminal statute by any person would create "a personal, financial, or political conflict of interest" for the Department of Justice to investigate or prosecute.[12] Thus, while addressing the conflict of interest inherent in an administration's investigation of one of its own members was the principal purpose of the statute, the law also provided a so-called "catch-all" provision, added in 1983, to allow the Attorney General to request an independent counsel for anyone, whether or not the person was in the President's Administration, when the Attorney General perceived a conflict of interest for the Department of Justice to investigate or prosecute the matter.

It is possible that Congress could reauthorize the independent counsel law, or provisions of law somewhat similar to the former independent counsel law, to instruct the Attorney General to seek the appointment of an "independent counsel," named by an impartial third-party panel, under certain circumstances.[13] It may be noted in this regard that the independent counsel law had, in fact, been allowed to expire previously for a period of time: in 1992 the law expired when it was not reauthorized in the 102nd Congress. It was not until the publicity of the so-called "Whitewater" matter, and the allegations concerning the President's and First Lady's possible involvement in the Arkansas land deal, that Congress eventually reauthorized the law again in 1994.

Special Counsels and Department of Justice Regulations. When the independent counsel law expired after June 30, 1999, the Attorney General promulgated specific regulations concerning the appointment of outside, temporary counsels in certain circumstances.[14] Such personnel appointed by the Attorney General from outside of the Department of Justice to conduct investigations and possible prosecutions of certain sensitive matters, or matters which may raise a conflict of interest for Justice Department personnel, are to be called "Special Counsels." These special counsels are appointed by, are answerable to, and may have their prosecutorial or investigative decisions countermanded by, the Attorney General. The "special counsels" under these regulations have, therefore, by express design, less "independence" from the Attorney General and the Department of Justice than did the "independent counsels" under the Ethics in Government Act of 1978, or the "special prosecutors" appointed by the Attorney General for the "Watergate" matter. One Special Counsel has thus far been appointed under the new regulations, that is, former Senator John Danforth, appointed by Attorney General Reno on September 9, 1999, to be special counsel to investigate the "Branch Davidian incident" near Waco, Texas, to determine if there had been any misconduct on the part of federal law enforcement personnel.

Under the Justice Department regulations, the appointment of a "Special Counsel" is completely discretionary with the Attorney General. The criteria for the Attorney

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[12] 28 U.S.C. § 591(a), (b), and (c).

[13] Although the former statute was phrased in mandatory terms ("shall apply"), the decision to seek the appointment of an independent counsel was always a matter within the Attorney General's discretion, and was not reviewable in court. 28 U.S.C. § 592(f). Congress could not, in any event, actually ever "order" the appointment of a prosecutor or independent counsel, under constitutional separation of powers principles. *Morrison v. Olson, supra* at 693-694.

[14] 28 C.F.R. Part 600, §§ 600.1 to 600.10; 64 Fed. Reg. 37038-37044, July 9, 1999.

General's decision is whether a prosecution or investigation of a "matter" or of a person may raise a conflict of interest for the Department of Justice, or whether there exist "other extraordinary circumstances," and when, in light of these conflicts or circumstances, the Attorney General finds that it is in the "public interest" to appoint such Counsel.[15]

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

Ad Hoc Special Counsels or Special Prosecutors. In addition to the current Justice Department regulations for "special counsels," the Attorneys General of the United States have on several occasions in the past exercised their own general discretion and authority to directly name and appoint "special prosecutors" or counsels to handle selected investigations or prosecutions for the Department of Justice on behalf of the United States. Such "special prosecutors" or counsels are selected and named personally by the Attorney General under the existing, general statutory authority of the Attorney General to direct the activities and functions of the Department of Justice, to delegate authority to employees, and to appoint staff, including special attorneys.[16] It is thus possible in theory, although unlikely in a practical, political sense (particularly in light of the absence, as of this writing, of evidence of any particular Government corruption in the Enron matter),[17] that despite the current Justice Department regulations on "special counsels," the Attorney General could issue new, "Watergate-style" regulations to appoint a special prosecutor with significant autonomy and independence of action from the Justice Department.

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[15] 28 C.F.R. § 600.1, also § 600.2. If the Attorney General is recused from a matter, then the Acting Attorney General will appoint when deemed warranted. For a broader discussion of the new "special counsel" regulations, *see* CRS Rpt. RL31246, "Independent Counsel Law Expiration and the Appointment of Special Counsels," January 15, 2002.

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

[17] *See,* generally, CRS Rpt. RL31288, "Soft Money, Allegations of Political Corruption, and Enron," February 12, 2002.

In recent history, prior to (and directly influencing) the enactment of the independent counsel provisions of the Ethics in Government Act of 1978, special prosecutors Archibald Cox, and later Leon Jaworski, were appointed in 1973 as "Watergate" special prosecutors to investigate the allegations of the Nixon Administration's complicity in or knowledge of, and later "cover-up"of, the break-in of Democratic party headquarters in the Watergate office complex. The regulations under which these special prosecutors were appointed provided a great deal of autonomy to their investigations and prosecutorial decisions, and provided for removal only for "gross improprieties."[18] In 1994, subsequent to the expiration of the independent counsel statute in 1992, and before the statute's reauthorization later in 1994, Attorney General Reno had appointed a "special counsel," or a "regulatory independent counsel," Robert B. Fiske, Jr., with autonomy and authority similar to the statutory independent counsels, to investigate the "Whitewater" allegations concerning the possible involvement of President Clinton and the First Lady.[19]

Other recent examples of "special" Attorney General appointees have included the appointments by Attorney General Barr of special counsels Nicholas Bua (1989) to investigate the so-called "Inslaw Affair," which involved allegations that certain high level Justice Department officials had stolen software from a small computer company; Malcom Wilkey (1992), because of the "unique circumstances and sensitivities of th[e] matter," to conduct a preliminary review of the alleged abuses of the "House Bank" by Members and officers in the House of Representatives;[20] and Frederick Lacey (1992), to conduct a preliminary investigation of any wrongdoing by the Justice Department or the CIA concerning an illegal loan to Iraq from the Atlanta branch of an Italian bank, Banca Nationale del Laroro.[21] These special counsels were appointed at a time when the independent counsel statute was in force, and had been criticized by some as an attempt by the Attorney General, who had expressed philosophical opposition to the independent counsel statute, to avoid the appointment of an independent counsel by the three-judge panel.[22] These special counsels were intended to conduct only what would be considered "preliminary reviews" of the matters, and reported to the Attorney General without conducting any prosecutions of their own. Other special appointments have included the so-called "back-up" independent counsels appointed by the Attorney General during the independent counsel statute's constitutional challenge in the federal courts in the 1980's.[23]

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[18] 38 Fed.Reg. 14688, June 4, 1973, and 38 Fed. Reg. 30739, November 7, 1973.

[19] 28 C.F.R. § 603.1, 59 *Fed. Reg.* 5322, February 4, 1994. Upon reauthorization of the independent counsel law, the special three judge panel of the United States Court of Appeals for the District of Columbia replaced Special Counsel Fiske with Independent Counsel Kenneth Starr, *In re: Madison Guaranty Savings & Loan*, August 5, 1994.

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

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

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

[23] 28 C.F.R. parts 601 and 602.