

## Legal Sidebar

# Special Counsels, Independent Counsels, and Special Prosecutors: Investigations of the Executive Branch by the Executive Branch

05/11/2017

---

Under constitutional principles and authorities, Congress has no direct role in federal law enforcement and is limited in its ability to *initiate* appointments of any prosecutor for any particular matter in which there may be allegations or concerns about wrongdoing by public officials. Instead, criminal investigations and prosecutions have generally been viewed as a core executive function and are a responsibility of the Executive Branch. However, because of the potential conflicts of interest that may arise when the Executive Branch investigates itself, as a historical matter there have often been calls for an independently led inquiry to determine whether executive officials have violated criminal law. In the past, Congress has authorized *independent counsels*, who were requested by the Attorney General and appointed by a judicial panel, but that authority lapsed in 1999. Currently, the Attorney General has regulatory authority to appoint a *special counsel* to investigate allegations that may present a conflict of interest for the Department of Justice (DOJ).

It may be noted that the terms *independent counsel* and *special prosecutor* differ from *special counsel*, although the three are commonly used interchangeably. The distinction between these terms, however, depends upon which legal authority is being utilized, as discussed below. (Additionally, the use of the term *special counsel* in this context is entirely distinct from the [Office of Special Counsel](#), an independent federal agency tasked with investigating certain federal personnel practices.)

**Historic Use of *Independent Counsel* and *Special Prosecutors*.** Under the [Ethics in Government Act as originally enacted](#), the Attorney General could request that a three-judge panel of a federal court temporarily appoint someone as an *independent counsel* (also referred to as a “special prosecutor”) who had the authority to independently investigate certain cases of government wrongdoing. The law provided the independent counsel with “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” with respect to matters within his or her jurisdiction. Enacted after the Watergate scandal, the law provided an avenue for impartial investigation and prosecution of allegations of misconduct by individuals within the administration.

The independent counsel provisions were [upheld as constitutional](#) by the U.S. Supreme Court in 1988, following a challenge asserting that they interfered with the President’s constitutional authority to oversee its officials. In *Morrison v. Olson*, the Court ultimately concluded that the limited nature of the special prosecutor’s jurisdiction and authority meant that the position did not “interfere impermissibly with [the President’s] constitutional obligation to ensure the faithful execution of the law.”

The independent counsel provisions required reauthorization every five years, which occurred until 1992, when Congress allowed the law to expire. A [new version of the independent counsel law](#) was enacted in 1994, following concerns related to the investigation of the “Whitewater” controversy during the interim years. However, debate over the scope and effect of the independent counsel investigations that followed, including concerns over whether the independent counsel possessed too much power, resulted in the law’s expiration and nonrenewal in 1999.

**Current Regulatory Authority to Appoint and Review Conduct of a *Special Counsel*.** Under [regulations](#) promulgated by the DOJ in 1999 pursuant to the Attorney General's general administrative hiring authority, the Attorney General currently may exercise his or her authority to appoint *special counsel* to conduct specific investigations or prosecutions. DOJ [described these regulations](#) as “strik[ing] a balance between independence and accountability in certain sensitive investigations.”

[To make such an appointment](#), the Attorney General must determine that a criminal investigation is warranted; that the normal process of investigation or prosecution would present a conflict of interest for DOJ or other extraordinary circumstances exist; and that public interest requires a special counsel to assume those responsibilities. DOJ has explained that “[t]here are occasions when the facts create a conflict so substantial, or the exigencies of the situation are such that any initial investigation might taint the subsequent investigation, so that it is appropriate for the Attorney General to immediately appoint a Special Counsel.” Appointment of a special counsel, though, is a matter of the Attorney General's discretion. [Alternatively](#), the Attorney General may conduct a preliminary investigation of the matter before deciding whether a special counsel appointment is warranted, or “he or she may direct that appropriate steps be taken to mitigate any conflicts of interest, such as recusal of particular officials,” to permit the investigation to be conducted within “the normal processes.”

Under the [regulations](#), the jurisdiction of the special counsel is initially established by the Attorney General and may be expanded as necessary at the request of the special counsel after consultation with and approval from the Attorney General. The Special Counsel has, “within the scope of his or her jurisdiction, the full power and independent authority to exercise all investigative and prosecutorial functions of any United States Attorney.” There appear to be, however, no time limits on the special counsel's authority, aside from [annual reporting requirements](#) for budgetary purposes. Additionally, the [regulations](#) indicate that the special counsel is not subject to “day-to-day supervision,” but may be asked to report to the Attorney General about “any investigative or prosecutorial step” (though the regulations do not provide specific examples). The Attorney General may “conclude that the action is so inappropriate or unwarranted under established Departmental practices that it should not be pursued.” Furthermore, the Attorney General also maintains the [authority to discipline or remove](#) the special counsel, with possible reasons including “misconduct, dereliction of duty, incapacity, conflict of interest, or for other good cause.”

It may be noted that, if the Attorney General is personally recused in the matter, DOJ has indicated that the Acting Attorney General would oversee the appointment and accountability of the special counsel. By [statute](#), the Acting Attorney General would be the Deputy Attorney General. While the current regulations are generally regarded as an alternative for investigation that would avoid potential conflicts or appearance thereof that may arise as a matter of the executive branch investigating its own officials, DOJ [has acknowledged](#) that “there is no perfect solution” to achieving that goal.

Posted at 05/11/2017 04:24 PM