Independent Counsel Statute

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I served as Attorney General of the United States during the period when the original Independent Counsel Act was enacted in 1978 as a part of the Watergate reform. The statute had been reenacted several times, but always with a sunset provision. The statute was allowed to expire in 1992, but was reenacted in 1994 and will be expiring this year unless renewed.

I am opposed to renewing the statute. I have had experience under the statute as Attorney General and later as counsel for President Bush in the Iran-Contra investigation. I long ago concluded that this statute is unworkable for a number of reasons and represents very poor governmental policy. I am aware that the Supreme Court upheld the constitutionality of the statute in Morrison v. Olson, 487 U.S. 654 (1988). The mere fact that it is constitutional does not mean that it represents good policy.

The statute is badly flawed from the standpoint of fairness and efficiency. It received the consideration of a 14-person commission of experienced public officials in a study recently sponsored by the Miller Center at the University of Virginia. I was co-chair of that Commission on Separation of Powers with Senator Howard Baker. It was the unanimous view of our Commission that the statute should be allowed to expire.

I attach a paper which was prepared in connection with that study, which sets out some of the problems associated with the independent counsel statute and includes sound reasons for a decision not to renew it.

The question arises as to what would be substituted for the statute if it were to expire. Our response is that we would go back to the system that we have always had and under which the Watergate prosecution was conducted, the Teapot Dome oil scandal was handled, and the Carter Peanut Warehouse was investigated. Even Whitewater started under a special counsel appointed by the Attorney General when there was no independent counsel statute; I refer to Mr. Robert Fiske.

The Department of Justice is perfectly adequate to handle any investigation; particularly if we hold the Attorney General and the Department of Justice to a standard of being a neutral zone in the government. There should be no politics in the Department of Justice and the Attorney General should take care not to become involved in political decisions.

Hence, the recommendation of the Miller Center study group that the law of recusal which applies to federal judges be also applied to the Attorney General except that the Attorney General would appoint someone to act for the Attorney General in the case of the pending investigation of those high in government position. This would hold the Attorney General accountable to see that the investigations take place but by someone who is not subject to questions as to propriety.

I will be glad to answer any questions.

INDEPENDENT COUNSEL STATUTE

The independent counsel era began by statute in 1978 as the special prosecutor statute. This was an idea promoted by the American Bar Association, and born of the distrust of government created by Watergate.

The statute, with a five-year sunset provision, has been reenacted a number of times and has been amended from time to time. It was last reenacted in 1994 after having lapsed in 1992. It expires in 1999. One amendment substituted "independent counsel" for "special prosecutor." Other amendments had to do with persons covered under the act and the duties of the Attorney General under the act. An outline of the statute is attached.

Regardless of the amendments, the import of the statute continues to be that the Attorney General and the Department of Justice are not to investigate allegations of crime against the President and Vice President and most of the top people in the executive branch as well as certain political party officials.

With respect to the allegations of crimes involving covered persons, the Attorney General has limited investigative authority and must decide whether to seek independent counsel without convening a grand jury, engaging in plea bargaining, granting immunity or even issuing subpoenas.

Some of the separation of powers issues which are implicated in this statute were held constitutional in Morrison v. Olson, 487 U.S. 654 (1988). The linchpin of the holding was that special counsel is an inferior officer under the Constitution such as could be appointed by the Congress or the courts, and that the Attorney General could remove the special counsel. We consider those issues and others as policy questions, entirely aside from legality issues.

The power and duty to faithfully execute the laws is vested by the Constitution in the President. He does this through the Department of Justice with respect to criminal law. The breadth of the transfer of this duty from the Attorney General to independent counsel under this statute is substantial. The Attorney General is restricted unduly in deciding the need for independent counsel. The Attorney General can remove the special counsel, but only for cause and that cause can be contested in the courts. In the practical world, no special counsel will ever be removed by an Attorney General. The special court appoints the special counsel entirely within the discretion of the court. There are no realistic fiscal or time constraints on the special counsel. In effect, the law creates miniature departments of justice to prosecute a particular person. The special counsel has been given the President's power and duty to faithfully execute the laws.

The statute places persons other than high government officials under the special counsel jurisdiction. Section 591(c) adds to those persons specifically covered in Section 591(b), others when the Attorney General receives information sufficient to constitute grounds to investigate whether the person may have violated a federal criminal law and the Attorney General determines that an investigation or prosecution of the person with respect to the information

received by the Attorney General or other officer of the Department of Justice may result in a personal, financial or political conflict of interest. It can be fairly inferred that this jurisdiction requires a nexus to the investigation of covered persons under Section 591(b), although the statute does not so state.

It was this section which gave the independent counsel in the Whitewater matter jurisdiction over non-federal persons who were not covered in Section 591(b) and who were later prosecuted in the Whitewater matter. There was a court decision regarding the Governor of the state and private parties who were prosecuted, holding that the independent counsel law did in fact cover those persons even though they were not in the executive department of the government because they fell under Section 591(c) and the Attorney General had certified that she had a political conflict of interest. See U.S. v. McDougal, 906 F. Supp. 499 (1995). The unspoken premise was that the President was being investigated, thus the nexus to a covered person.

This peculiar type of conflict (political) is to be contrasted with the other provisions of the Act which disqualify the Attorney General because of personal or financial relationships with covered persons. Section 591(e). The political disqualification is used only in Section 591(c). We are left with the remarkable situation where the Attorney General has an admitted political conflict to warrant the appointment of special counsel for persons not covered in Section 591(b) but who have a close relationship with persons who are covered (the President and others). But the Attorney General in a different matter is not disqualified on financial or personal grounds where the President is the subject despite the fact that the President appoints the Attorney General and the Attorney General serves at the discretion of the President.

Any conflict of interest problem, while at the same time honoring the President's constitutional duty to faithfully execute the laws through the Department of Justice and the preservation of trust in the Department of Justice as an institution, would be eliminated if the Attorney General and other political appointees in the Department of Justice were disqualified on grounds of an appearance of impropriety, as is the case with federal judges. See Title 28, Section 455, U.S. Code. The Attorney General would be directed by the statute in such event to appoint a person not having a conflict of interest, whether in or outside the Department of Justice, to conduct such investigation as might be appropriate.

The special counsel problem, if we agree that it is a problem, seems to present a number of options.

The first is to do nothing.

The second is to repair the statute in one or more ways. There are a number of areas in need of repair. The coverage is much too broad, particularly Section 591(c). It is under that section that the Whitewater special counsel has received jurisdiction over non-federal persons rather than under 591(b), which includes the President and other executive officers. Certainly, federal special counsel jurisdiction over non-federal persons should not rest on the Attorney General being disqualified. Even Section (b) should be modified to include only the President, Vice President and Attorney General and not the retinue of federal officers now included.

Section 592(a)(2), which restricts the Attorney General from convening grand juries, issuing subpoenas, and so forth, needs to be eliminated to give the Attorney General more discretion to investigate allegations. This section puts blinders on the Attorney General with respect to making the determination whether to seek special counsel.

Another area for reform would be in restricting the special court in the selection of special counsel. The Court has total discretion now and should be restricted to appointing counsel as to whom there is no appearance of impropriety. A standing panel nominated by these same judges and confirmed by the Senate would let the public know in advance of the universe from which special counsel might be selected.

One problem with the special counsel statute that probably cannot be repaired is the inherent absence of due process from the procedure itself. This is the isolation of the independent counsel from the executive branch and the isolation of the putative defendant from the safeguards afforded all other federal investigatees. The inherent checks and balances the system supplies heightens the occupational hazards of a prosecutor taking in too narrow a focus, a possible loss of perspective and a single minded pursuit of alleged suspects seeking evidence of some misconduct. This search for a crime to fit the publicly identified suspect is generally unknown or should be unknown to our criminal justice system.

The person being pursued publicly in the investigation is treated differently from other suspects being investigated by federal prosecutors who are afforded the protection of no comment by the prosecution on a pending investigation, including not acknowledging the fact of the investigation. Such disparate treatment can hardly be justified on the ground that the special counsel treats with only those holding political office or their associates.

The final report by the special counsel can be another example of lack of due process by suggesting guilt although there was no indictment. An example is the report of Judge Walsh in the Iran-Contra investigation. This treatment would never be given by the Department of Justice to an ordinary person who was investigated but not indicted. The final report should be eliminated. It is quite enough to indict or close the investigation.

The third option would be to let the statute expire. In that event, however, the standard for recusing the Attorney General should be raised to that of the judiciary, see 28 U.S.C., Section 455, which would require recusal when the President or Vice President or Attorney General are involved and the impartiality of the Attorney General might reasonably be questioned. My experience at the Department was to use the judicial model for recusal of all political appointee officers and in all matters. The statute might provide that the Attorney General, although recused, could appoint special or outside counsel or a Justice Department officer who is not disqualified. This would hold the Attorney General accountable as a responsible official and avoid any possible separation of powers problem. Compare Section 591(e) of present statute.

Griffin B. Bell

Outline of Pertinent Parts

A. Section 591

1. 591(a) -- Preliminary investigation by Attorney General under Section 592 when Attorney General receives information sufficient to constitute grounds to investigate whether any person described in Subsection (b) may have violated any federal criminal law.

2. 591(b) -- Persons covered include President and Vice President plus a host of other federal officials and some political party officials.

3. 591(c)(1) -- Provides open-ended coverage over and above those persons included in 591(b) of any person being investigated or prosecuted by the Department of Justice which may result in a personal, financial or political conflict of interest. This was the authority used for appointing special counsel to prosecute the Governor of Arkansas and private persons. The Attorney General asserted a political conflict of interest as to those persons. U.S. v. McDougal, 906 F. Supp. 499 (1995).

4. 591(c)(2) -- Coverage of members of Congress added in 1994 "when the Attorney General determines that it would be in the public interest to do so."

5. 591(d) -- How to determine need for preliminary investigation and time periods allowed for determining whether grounds to investigate exist (30 days).

6. 591(e) -- When Attorney General is recused, to designate Department of Justice official not disqualified to take over.

B. Section 592 -- Preliminary Investigation and Application for Appointment of Independent Counsel

1. 592(a)(1) -- How investigation is to be conducted and to be done in 90 days. Special Court must be notified of preliminary investigation.

2. 592(a)(2) -- Attorney General prohibited from convening a grand jury, plea bargaining, granting unanimity or using subpoenas during investigation.

3. 592(a)(3) -- Court may extend 90-day period for 60 days upon good cause shown.

4. 592(b) -- Court must be notified if further investigation is not warranted and court shall have no power to appoint an independent counsel in the matter.

5. 592(e) -- If further investigation found warranted, appointment of independent counsel by court to follow.

6. 592(g) -- Committee of the Judiciary in either House of the Congress may request the Attorney General to seek appointment of independent counsel -- Attorney General must report to Committee giving facts to date and reasons why no counsel sought if that is the case.

C. Section 593 -- Duties of the division of the court in the appointing process, qualifications of independent counsel, jurisdiction of counsel, and fees for subject of investigation.

D. Section 594 -- Authority and duties of independent counsel, compensation, expense reimbursement and staff, reports to the court by independent counsel and final report required.

E. Section 595 -- Congressional oversight

1. 595(a) -- Independent counsel has duty to cooperate in oversight, must file annual reports.

2. 595(b) -- Attorney General must also report within 15 days to Congress as to particular cases or investigations.

3. 595(c) -- Independent counsel must advise House of Representatives of information received which may constitute grounds for impeachment.

F. Section 596 -- Procedure for removing

1. 596(a) -- Grounds for removal

a. Reports by Attorney General to court and Congress relative to removal

b. Judicial review of removal order

2. 596(b) -- Termination of office by independent counsel, termination of office by court

G. Section 599 -- Expiration date -- June 30, 1999.

GRIFFIN B. BELL

Griffin Bell is a senior partner in the law firm of King & Spalding in Atlanta, Washington, New York and Houston.

Mr. Bell was born in Americus, Georgia, on October 31, 1918. He attended public schools and Georgia Southwestern College. He graduated cum laude from Mercer University Law School in Macon with an LL.B. degree in 1948, after having been admitted to the Georgia Bar in 1947. He has also received the Order of the Coif from Vanderbilt Law School and honorary degrees from Mercer University and several other colleges and universities.

From 1941 to 1946, Mr. Bell served in the U.S. Army, attaining the rank of major.

Mr. Bell practiced in Savannah and Rome, Georgia before joining King & Spalding in 1953. He was a senior partner and managing partner of King & Spalding when he was appointed to the Court of Appeals by President Kennedy in 1961.

Mr. Bell served on the U.S. Court of Appeals for the Fifth Circuit from October 6, 1961 to March 1, 1976. While serving as a judge, he was a director of the Federal Judicial Center. Upon leaving the court, he returned to King & Spalding as a senior partner. He resigned from the firm on December 31, 1976 to become Attorney General.

Mr. Bell became the 72nd Attorney General of the United States on January 26, 1977, receiving the oath of office from Chief Justice Warren E. Burger. He was nominated by President Carter on December 20, 1976 and confirmed by the Senate on January 25, 1977. He served as Attorney General until August 16, 1979.

Mr. Bell has served as Chairman of the Atlanta Commission on Crime and Juvenile Delinquency, the American Bar Association's Division of Judicial Administration, the ABA's Pound Conference Follow-up Task Force, and the Board of Deacons of Second Ponce de Leon Baptist Church in Atlanta.

During 1980 he was head of the American delegation to the Conference on Security and Cooperation in Europe, held in Madrid. In 1981 he served as Co-Chairman of the Attorney General's National Task Force on Violent Crime. He received the Thomas Jefferson Memorial Foundation Award in 1984 for excellence in law.

In 1985-86 Mr. Bell served as President of the American College of Trial Lawyers. He served on the Secretary of State's Advisory Committee on South Africa from 1985 until January, 1987. Mr. Bell was a Director of the Ethics Resource Center, Incorporated for several years and in 1986 served as its Chairman of the Board. Mr. Bell served as a member of The Board of Trustees of the Foundation for the Commemoration of the United States Constitution during 1986-1989.

Mr. Bell has also served as a Director of the National Science Center Foundation and the American Enterprise Institute. In 1989 he served as Vice Chairman of President Bush's Commission on Federal Ethics Law Reform.

Mr. Bell is a member of the American Law Institute and the American College of Trial Lawyers. He has served as Chairman of the Board of Trustees of Mercer University, and is a member of the Board of Directors of Total System Services, Inc. He was for many years a director of Martin Marietta Corporation and The Hardaway Company.

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