

# LAW AND CONTEMPORARY PROBLEMS

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## FOREWORD

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As this edition of *Law and Contemporary Problems* devoted to the independent counsel statute ("the Act"<sup>1</sup>) goes to press, Congress seems unlikely to renew the Act when it expires on June 30, 1999.<sup>2</sup> Currently plagued by mixed press reporting on the Starr investigations of President Clinton,<sup>3</sup> as well as the not-guilty verdict entered in Donald Smaltz's prosecution of Mike Espy,<sup>4</sup> and criticized numerous times over its life by politicians on both sides of the aisle—usually on the occasion of an independent counsel investigation of elected officials from the criticizer's own political party—the Act has few supporters in Congress for renewal in its present form. Both the Clinton Justice Department, which supported the Act's passage in 1994, and the American Bar Association, once a long and ardent supporter of the statute, have testified before Congress that they favor letting the statute lapse.

Notwithstanding its apparent demise, the Act continues to be well worth studying. One reason is that the Act has expired before, prior to the beginning of President Clinton's first term, only to be revived. Mounting questions over the Clintons' involvement in the Whitewater property deal refused to go away, first compelling Attorney General Reno to appoint a so-called regulatory independent counsel, Robert Fiske, and subsequently leading the President to en-

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1. The independent counsel statute was enacted as part of the Ethics in Government Act of 1978, Pub. L. No. 95-521, tit. VI, 92 Stat. 1824, 1867-73 (codified as amended at 28 U.S.C. §§ 591-599 (1994)).

2. See, e.g., *Independent Counsel Act Likely to Die in June—Lawmakers Call It a "Disaster"*, CINCINNATI POST, Feb. 16, 1999, at A5.

3. See, e.g., *Reno to Call for Demise of Independent Counsel Law*, SACRAMENTO BEE, Mar. 17, 1999, at A10.

4. See, e.g., Bill Miller, *A Harsh Verdict for Espy's Prosecutors: Jurors Say Independent Counsel Wasted Tax Dollars, Didn't Make a Case*, WASH. POST, Dec. 5, 1998, at A1.

dorse reenacting the lapsed independent counsel statute. The Act may well see a similar future this time around, for it is one available response to a perennial problem of government: convincing citizens that high-level government officials alleged to have committed wrongdoing are investigated vigorously. Should political momentum move in the direction of reviving the Act, it will occur under the psychological pressure of a looming crisis of confidence—thus, when the time for sober reflection on the Act and various reforms that might improve it will be unavailable. It is wise, therefore, to undertake that reflection now.

Even if the Act is not soon revived, our experience with it constitutes an innovation in government that deserves careful study. As noted, the Act was a sincere attempt to respond to a genuine dilemma for a country that values the rule of law. Because it is difficult to fight something with nothing, dissatisfaction with the Act has prompted those studying it to think long and hard about alternative solutions to that dilemma so that they can make concrete counter-proposals for addressing it, rather than simply opposing renewal of the Act. This has forced scholars, politicians, and others to articulate and then defend alternatives, a process that can only enrich our understanding of how best to address the problem of wrongdoing by high-level government officials.

This volume brings together a set of essays by individuals with diverse experiences with the Act. United States Senator Orrin Hatch's<sup>5</sup> long-time interest in the Act is coupled with his responsibilities, as Chairman of the Senate Judiciary Committee, for overseeing the Department of Justice. His committee has held numerous hearings over many years inquiring into the Department's handling of various investigations, some of which have resulted in referrals to an independent counsel, others of which have not, often despite calls for such referrals from outside the Department. His committee, along with the House Judiciary Committee, also has the distinction of holding the power under the Act to demand a preliminary inquiry that potentially could lead to the appointment of an independent counsel.<sup>6</sup>

Professor Katy Harriger<sup>7</sup> is the country's foremost political science student of the statute. Her book, *Independent Justice*, provides a comprehensive assessment of the motivations leading to the passage of the original Act, the arguments raised over the initial Act and various alternatives to it, as well as an analysis of its history since its first passage in 1978.<sup>8</sup>

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5. See Orrin G. Hatch, *The Independent Counsel Statute and Questions About Its Future*, 62 LAW & CONTEMP. PROBS. 145 (Winter 1999).

6. See 28 U.S.C. § 592(g) (1994). The Attorney General must begin a preliminary investigation when a matter is referred by a majority of the committee, or by a majority of either party's members on the committee. See *id.*

7. See Katy J. Harriger, *Can the Independent Counsel Statute Be Saved?*, 62 LAW & CONTEMP. PROBS. 131 (Winter 1999).

8. KATY J. HARRIGER, *INDEPENDENT JUSTICE: THE FEDERAL SPECIAL PROSECUTOR IN AMERICAN POLITICS* (1992).

Jack Miller<sup>9</sup> served for many years as private counsel to former President Nixon. In addition, he filed briefs *amicus curiae*, including a brief in *Morrison v. Olson*,<sup>10</sup> in support of the claim, raised by several targets of independent counsel investigations, that the Act is unconstitutional. His contribution is co-authored by John Elwood, who has recent experience in the Criminal Division of the Department of Justice.

My<sup>11</sup> experience with the independent counsel statute comes from three perspectives. I served as chief counsel of the Senate Judiciary Committee, and later as Acting Assistant Attorney General for the Office of Legal Counsel. Finally, I recently provided legal counsel to Vice President Al Gore during a preliminary investigation under the Act; Attorney General Reno ultimately declined to refer that matter to an independent counsel.<sup>12</sup>

Perhaps the most valuable contribution of this edition is the legal history of the Act written by B.J. Priester, Paul Rozelle, and Mirah Horowitz.<sup>13</sup> The Act is so often in the middle of one political maelstrom or another that it is easy to forget that it constitutes a law, one that raises legal issues of interpretation and implementation. This legal history provides the first comprehensive review of the legal issues that have arisen over time under the different versions of the Act, as well as a documentation of how Congress, the Justice Department, and the courts have responded to those issues.

Together, these articles provide rich perspective on the merits of the Act, on suggestions for its improvement, and on arguments that the Act should be permitted to lapse permanently. To facilitate the use of this volume by contemporary and future readers, the current version of the Act—that is, the provisions in force from 1994 to 1999—is reproduced in the Appendix.<sup>14</sup> This edition of *Law and Contemporary Problems* makes an important contribution to the literature discussing the independent counsel statute.<sup>15</sup>

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9. See Herbert J. Miller, Jr. & John P. Elwood, *The Independent Counsel Statute: An Idea Whose Time Has Passed*, 62 LAW & CONTEMP. PROBS. 111 (Winter 1999).

10. 487 U.S. 654 (1988).

11. See Christopher H. Schroeder, *Putting Law and Politics in the Right Places—Reforming the Independent Counsel Statute*, 62 LAW & CONTEMP. PROBS. 163 (Winter 1999).

12. See, e.g., Ronald J. Ostrow & Robert L. Jackson, *Reno Rejects Outside Probe of '96 Campaign*, L.A. TIMES, Dec. 8, 1998, at A1.

13. See Benjamin J. Priester et al., *The Independent Counsel Statute: A Legal History*, 62 LAW & CONTEMP. PROBS. 5 (Winter 1999).

14. See *Appendix*, 62 LAW & CONTEMP. PROBS. 185 (Winter 1999).

15. As part of a joint project on the Act, chaired by former Senate Majority Leaders Robert Dole and George Mitchell, the American Enterprise Institute and the Brookings Institution have compiled a comprehensive bibliography on the independent counsel statute. This, along with the transcripts of the recent congressional hearings on the Act, are available on the project's Web page at <[http://www.brook.edu/gs/ic/ic\\_hp.htm](http://www.brook.edu/gs/ic/ic_hp.htm)>.