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SPECIAL PROSECUTOR PROVISIONS OF ETHICS IN GOVERNMENT ACT OF 1978

A REPORT

PREPARED BY THE

SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT

OF THE

COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

OCTOBER 1981

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LETTER OF TRANSMITTAL

U.S. SENATE,
OVERSIGHT OF GOVERNMENT MANAGEMENT,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, D.C., October 26, 1981.

Hon. WILLIAM V. ROTH, JR.,
Chairman, Committee on Governmental Affairs, Dirksen Senate Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: The Subcommittee on Oversight of Government Management transmits the following report on the special prosecutor provisions of the Ethics in Government Act of 1978.

As a result of our hearings and investigations, the Subcommittee recommends that the special prosecutor law be retained because it guards against both actual and perceived conflicts of interest in the investigation of allegations against high-ranking Executive officials. We believe, however, that the statute requires significant amendment.

It is ironic that these provisions, which were intended to ensure that public officials were not above the law, have created inequities in the enforcement of criminal laws. In both cases that have arisen, White House officials were subjected to exhaustive, costly, and lengthy investigations when the same allegations made against an average citizen would not even have been pursued. The restrictions of the present law severely impede the ability of the Attorney General to dispose of minor allegations of dubious merit without petitioning the court for a special prosecutor.

The Subcommittee also determined that the coverage of the present Act is flawed because it does not include members of the President's family, who surely pose the greatest danger of conflict of interest, but does cover some officials who are not in a position to influence a Department of Justice investigation.

In proposing changes in the present law, the Subcommittee has been guided by the principle of providing equitable treatment to officials accused of criminal activity. We have, therefore, recommended that the Attorney General be permitted to apply the written prosecutorial guidelines of the Department of Justice, which govern ordinary criminal cases, in deciding whether the appointment of a special prosecutor is warranted. The Subcommittee also has recommended that the trigger for a preliminary investigation, as well as for the appointment of a special prosecutor, be raised to a more realistic level.

Two other changes would also make the law less burdensome. The Subcommittee has proposed that the name "special prosecutor" be changed to "independent counsel" to remove the pejorative connotation of the investigation, and that attorneys' fees be awarded to the subject of such an investigation in certain circumstances.

While the Subcommittee believes that the special prosecutor law should not be repealed, we also suggest that Congress would be remiss in not amending the law to remedy its flaws. The implementation of the Subcommittee's recommendations would substantially improve the current Act.

Sincerely,

WILLIAM S. COHEN, *Chairman.*

CONTENTS

	Page
Letter of transmittal	III
I. Summary	1
II. Introduction	5
III. The Special Prosecutor Provisions	9
A. Brief History of the Special Prosecutor Law	9
B. Structure of the Act	10
C. Experience Under the Act	12
IV. Discussion	17
A. Overview	17
B. The Special Prosecutor Provisions Are Necessary to Establish Public Confidence in the Investigation of Senior Officials	17
C. The Present Law Is Presumed to be Constitutional	20
D. The Statement Made by the Department of Justice Concerning the Constitutionality of the Act Invites Challenges by the Next Subject of an Investigation	21
E. The Costs of the Special Prosecutor Provisions Are High	24
1. Costs to the Government	24
2. Costs to the Subject of the Investigation	26
F. Coverage of the Act is Overinclusive and Underinclusive	31
1. The Act's Coverage is Overinclusive	31
a. The Act Covers Too Many Executive Officials	31
b. The Act Covers Too Many Campaign Officials	33
2. The Act's Coverage of Persons is Underinclusive	34
3. Coverage of Individuals Subject to the Act Continues Too Long	35
a. Length of Time Covered is Extensive	35
b. Length of Coverage Turns on Which Political Party Wins the Presidential Election	36
4. The Present Scope of Crimes Covered by the Act is Not Too Broad	38
G. Provisions Governing the Preliminary Investigation Stage of the Process Should Be Amended	40
1. By Failing to Consider the Credibility of the Source of the Allegation, the "Specific Information" Standard at Times Requires the Attorney General to Investigate Frivolous Allegations	40
2. The Preliminary Investigation Period Prescribed by the Present Law is at Times Too Short	43
3. The Law Should Specifically Restrict the Use of Investigative Tools During the Preliminary Investigation	44
H. The Standard Which Triggers the Appointment of a Special Prosecutor is Too Low	46
I. The Powers of the Special Prosecutor Are Extensive	50
V. Conclusion	57

I. Summary

A. The special prosecutor law should be retained but needs improvements

The Subcommittee believes that the concept underlying the special prosecutor law is sound. By establishing a mechanism to ensure impartial and thorough investigations of allegations against high-ranking Executive branch officials, the Act guards against both actual and perceived conflicts of interest and assures the public that government officials are not above the law. Therefore, the Subcommittee supports continuation of the special prosecutor law and rejects the appeals by the Justice Department and other critics for its repeal.

Our endorsement of the special prosecutor law, based on our hearings and investigations, does not mean that we believe the present Act is perfect. To the contrary, we found significant problems in its implementation and believe that it should be amended. It would indeed be unfortunate if the flaws and inequities in the present statute remained uncorrected and thus provided ammunition for those who would abandon the entire law.

B. The special prosecutor law should be presumed to be constitutional

In the absence of a specific court test, the Subcommittee believes that the special prosecutor law should be presumed constitutional. We are concerned that the Department of Justice's stated belief that the Act is unconstitutional will invite an immediate challenge to the Act the next time that it is invoked. Because of the near certainty of a court test, the next special prosecutor may be reluctant to serve.

While we cannot undo the Attorney General's statement, we have received assurances from the Justice Department that the law will be enforced and that the Department will provide the necessary resources to the next special prosecutor to defend the statute's constitutionality, should the need arise.

C. The present law has led to an uneven application of justice

The Subcommittee's primary concern centers on the fairness of the existing law. It is ironic that this Act, which was intended to ensure that high-ranking public officials were not above the law, has created inequities in the enforcement of criminal laws.

In both the cases that have arisen under the Act, allegations of criminal activity by high-ranking White House officials were investigated which, had they been made against private citizens, would not even have been pursued. The strict requirements of the present Act leave the Attorney General with little discretion and force him to

disregard standard Department of Justice policies. Permitting the Attorney General to follow clearly established and defined prosecutorial guidelines would substantially lessen the problem of uneven application of the law.

D. THE PRESENT ACT IS TOO EASILY TRIGGERED BY MINOR ALLEGATIONS

The restrictions and vagueness of the special prosecutor law severely limit the ability of the Attorney General to dispose of minor allegations without petitioning the court for a special prosecutor.

The Subcommittee proposes several changes in the existing law to provide the Attorney General with more flexibility in order to reduce the number of unnecessary special prosecutor investigations. For example, we recommend that the Attorney General be allowed to consider the credibility of the accuser in determining whether a preliminary investigation must be conducted, and that a special prosecutor be appointed only for those cases in which the Attorney General reasonably believes that further investigation or prosecution is warranted. Safeguards against abuse of this authority would, however, be maintained through the reporting requirements of the Act and the limitations on the Attorney General's investigative powers.

E. SPECIAL PROSECUTOR INVESTIGATIONS ARE COSTLY TO BOTH THE GOVERNMENT AND THE PUBLIC OFFICIAL INVOLVED

Another inequity caused by the Act is the substantial financial burden it imposes on the subject of a special prosecutor investigation as well as on the government. Raising the trigger for the appointment of a special prosecutor will eliminate some unnecessary investigations and their consequent costs. But there will still be some cases in which a public official has to bear substantial attorneys' fees to defend himself during an extensive investigation that probably would not have resulted if he were an ordinary citizen.

To solve this problem, the Subcommittee recommends that the court be given discretion to award attorneys' fees to the subject of a special prosecutor investigation. The Subcommittee believes, however, that the public official should be reimbursed only for those fees which would not have been incurred by a private citizen in a similar situation.

F. THE TERM "SPECIAL PROSECUTOR" IS PEJORATIVE AND SHOULD BE CHANGED

Any special prosecutor investigation of a public official will, of course, attract substantial press interest that a private citizen would not have to endure. Such scrutiny is perhaps part of the price of public service. The Subcommittee believes, however, that much of the adverse publicity resulting from a special prosecutor investigation could be diminished by simply changing the name from "special prosecutor" to "independent counsel." This change would remove the Watergate connotation of a special prosecutor investigation and would help spare the subject of such an investigation adverse public reaction. Equally important, the name "independent counsel" more accurately indicates that the investigation is being handled outside of normal government channels by an impartial investigator.

G. THE COVERAGE OF SELECTED OFFICIALS IS INAPPROPRIATE TO THE GOALS OF THE ACT

Another flaw of the Special Prosecutor Act is its coverage. The special prosecutor mechanism is intended to eliminate the actual or perceived conflicts of interest that arise when the Attorney General or the Department of Justice is called upon to investigate an official who is close to either the President or the Attorney General. The coverage provisions of the present Act, however, are not appropriate to this goal. For example, members of the Council on Environmental Quality are covered by the Act, but not members of the President's immediate family who surely pose a greater danger of conflict of interest.

The Subcommittee recommends that the law be amended to include members of the President's family and to exclude officials who are unlikely to be perceived as close to the President. We feel confident that the public will accept a Department of Justice investigation of officials not in a position to influence the investigation. In those instances where an official not covered by the Act does create an actual conflict of interest, the Attorney General has adequate authority to appoint an outside prosecutor to handle the case.

The law also needs to be amended so that coverage does not depend on which political party wins the election, as is now the case. Under the present law, an official can conceivably be covered for as long as 16 years even if he resigns after one year of service. To remedy this problem, we recommend that all covered officials remain subject to the Act for the incumbency of the President they serve, plus one year.

H. THE LAW TOO SEVERELY LIMITS THE ABILITY OF THE ATTORNEY GENERAL TO REMOVE A SPECIAL PROSECUTOR WHO ABUSES HIS POSITION

In their efforts to guarantee the complete—and necessary—independence of a special prosecutor, the authors of this Act may have failed to include sufficient safeguards to prevent a special prosecutor from abusing his position. Thus far, we have been fortunate that honorable, capable, and fair individuals have been appointed as special prosecutors. The possibility of an irresponsible, politically motivated, or publicity-seeking special prosecutor cannot, however, be dismissed.

Under the current law, not only are the powers of a special prosecutor extensive, but it also is very difficult—in fact, nearly impossible—for him to be removed from office. The Subcommittee believes that the Attorney General should be permitted to remove a special prosecutor upon showing of "good cause" as long as this decision is made public, is reported to the Congress, and is subject to judicial review.

The Subcommittee's review of the Act, our findings, and our recommendations are set forth in detail in the report that follows. We hope that Congress will adopt our recommendations for improving the special prosecutor law and thus take our nation a step closer to the elusive goal of "Equal Justice Under the Law."

85-745 O - 81 - 2

II. Introduction

On May 20 and 22, 1981, the Senate Subcommittee on Oversight of Government Management held hearings on the special prosecutor provisions incorporated in Title VI of the Ethics in Government Act of 1978.[1]

The Subcommittee's investigation began as a result of the many criticisms levied against the special prosecutor law. Although the special prosecutor concept, in general, and the precise process adopted by Title VI have generated much controversy since their inception, criticism escalated in response to the cases which have arisen under the Act in the three years since its enactment.

Approximately one year after the Act was passed, the first special prosecutor was appointed to conduct an investigation of alleged cocaine use by one of the highest-ranking White House officials, Hamilton Jordan, the White House Chief of Staff. After a six-month investigation which was accompanied by extensive media attention, Mr. Jordan was exonerated by the special prosecutor. The second appointment of a special prosecutor, once again to investigate alleged cocaine use, followed within four months, and again there was prolonged media attention. The allegations led to the resignation of Timothy Kraft, subject of the investigation, as the manager of President Carter's re-election campaign. This investigation, like the Jordan case, also ended in a decision by the special prosecutor not to seek a criminal indictment in the case.

In addition to many stories in the press detailing the developments of each investigation, the events generated strong editorial comments in major newspapers. Some writers argued that the value of the special prosecutor law was "trivialized" when it was used to investigate charges of drug use and similar "private, off-duty peccadillos." [2] Others viewed the law as well-intentioned yet far too sweeping.[3] Conversely, some writers argued that the Jordan and Kraft cases indicated that the Act was working precisely as it was intended, and that the special prosecutor appointment was essential to clear the name of the subject of the investigation.[4]

The Subcommittee was particularly concerned by criticisms raised against the Act by present and past Department of Justice officials, as well as by many persons who had authored or supported the special prosecutor provisions in the past. Some of the contentions made by

[1] Public Law 95–521, title VI, 28 U.S.C. §§ 591–98.
[2] See, e.g., "The Law's Heavy Hammer," Washington Star, Dec. 1, 1979, hearing record, pp. 456, 457.
[3] See, e.g., "The Special Prosecutor Rides Again," Washington Post, Sept 16, 1980, hearing record, p 457
[4] See, e.g., "Why the Jordan Case is Special," the New York Times, Nov. 30, 1979, hearing record, p. 455.

these critics focused on specific aspects of the present law; for example, that the Act's coverage is too broad, the Act triggers a special prosecutor investigation too easily, the period for preliminary investigation is too short. Other criticisms attacked the special prosecutor process on broader bases, charging that the investigations required by the Act were "a ridiculous waste of time," [5] that the Act creates an unfair, more stringent application of criminal laws to elected officials, and that the Act institutionalizes distrust of the Attorney General and the Department of Justice.

A precipitating factor in the Subcommittee's decision to hold oversight hearings on the special prosecutor provisions was an announcement made by Attorney General William French Smith expressing his doubts concerning the constitutionality of Title VI of the Act. In a letter dated April 17, 1981, to Michael Davidson, the Senate Legal Counsel, the Attorney General responded to Mr. Davidson's inquiry with respect to the position of the Department of Justice in *Kraft* v. *Gallinghouse*, in which Timothy Kraft challenged the constitutionality of the Special Prosecutor law.[6] Mr. Smith advised the Senate Legal Counsel that although the Department of Justice would have no opportunity to express its views on the issue to the court as the *Kraft* case had been dismissed, he wished to formally apprise Congress of the Department's position on the special prosecutor provisions.

In his correspondence, the Attorney General stated that:

> After a careful review of the Act within the Department of Justice and an analysis of its practical effect over the past few years, I have serious reservations concerning the constitutionality of the Act. In some or all of its applications, the Act appears fundamentally to contradict the principle of separation of powers erected by the Constitution.[7]

Because Congress expressly retained oversight of the special prosecutor provisions under the terms of Title VI,[8] and because of a prime function of this Subcommittee is to assure the smooth management and implementation of government programs and policies, the Subcommittee believed that the law was in need of a thorough review.

The timing of events was also a factor in the decision of the Subcommittee to conduct an investigation and hold hearings on the special prosecutor provisions. The dismissal of the Kraft investigation on March 24, 1981, brought the first time in over a year in which there was no pending special prosecutor investigation. The Subcommittee believed that this was a prime opportunity to assess the efficacy of the law without jeopardizing an ongoing special prosecutor investigation.

The Subcommittee's investigation prompted two days of hearings focusing on the efficacy to date of the special prosecutor provisions and on the criticisms levied against the Act. At these hearings, the Subcommittee received testimony from the following persons: The Honorable Benjamin R. Civiletti, Former United States Attorney General; Mr. Lloyd N. Cutler, Esq., Former Counsel to the President; Mr.

[5] Taylor, Robert E., "Doubts About the Law for Prosecuting Federal Officials," Wall Street Journal, Oct. 30, 1980, hearing record, p. 452.
[6] Hearing record, pp. 130–31.
[7] Hearing record at 131.
[8] 28 U.S.C. § 595.

Philip B. Heymann, Esq., Former Assistant Attorney General, Criminal Division, United States Department of Justice; Mr. Samuel Dash, Esq., Director, Georgetown University Law Center Institute of Criminal Law and Procedure, and Former Chief Counsel, Senate Watergate Committee; The Honorable Rudolph W. Giuliani, Associate Attorney General, United States Department of Justice; Mr. Arthur H. Christy, Esq., Special Prosecutor in the Hamilton Jordan investigation; Mr. Steven B. Rosenfeld, Esq., Chairman, Committee on Federal Legislation, Association of the Bar of the City of New York; Mr. Fred Wertheimer, Esq., President, Common Cause.

The testimony presented at these hearings, as well as other information and evidence received during the course of the Subcommittee's investigation, provides the basis for the findings and recommendations set forth in this report.

III. The Special Prosecutor Provisions

A. Brief History of the Special Prosecutor Law

The special prosecutor provisions embodied in the Ethics in Government Act of 1978 are the culmination of a series of proposals considered by Congress as early as 1973 to assure independent investigation of alleged criminal wrongdoing by high-ranking executive officials.

Following revelations of possible abuses and illegal activity by Nixon Administration officials, there were many calls in Congress for the appointment of a special prosecutor, independent of the Department of Justice, to investigate the Watergate case and related activities. During the spring of 1973, the Senate Judiciary Committee explored the need for a special prosecutor during the confirmation hearings of Elliot Richardson to be Attorney General.[9] Mr. Richardson eventually appointed Archibald Cox as special prosecutor, and drew up a charter governing the special prosecutor's activities. This agreement provided that the Attorney General would not interfere in Mr. Cox's decisionmaking, and that the prosecutor would not be removed "except for extraordinary improprieties."[10] Despite Congressional skepticism on the actual degree of control by the Attorney General, Mr. Richardson was confirmed.

The firing of Mr. Cox by Acting Attorney General Bork because of Mr. Cox's refusal to compromise on obtaining access to presidential material for his investigation revived calls for legislation to assure the independence of the special prosecutor. Many proposals were introduced in the 93rd to 95th Congress, and despite variations in form, they shared the common theme of the need for an independent investigator, free from the "divided loyalties" inherent in being subject to the control of the executive branch. The variations were principally in the areas of appointment and removal powers over the special prosecutor, and the duration of the office. Some proposals vested appointment and removal power in the courts, while others gave this authority to the President, subject to defined limitations. Still others provided for appointment with the advice and consent of the Senate. The Senate Watergate Committee recommended the establishment of a permanent office of Public Attorney, in the nature of an ombudsman to watch over the executive branch. Other proposals preferred a temporary special prosecutor, to be appointed in prescribed instances of alleged criminal activity and in instances of potential conflict of interest.

Extensive hearings were held on these proposals in both the Senate

[9] See hearings on nomination of Elliot Richardson to be U.S. Attorney General, before the Committee on the Judiciary, U.S. Senate, 93d Congress, 1st session, May 9–22, 1973.
[10] See hearings before the Committee on the Judiciary, U.S. Senate, 93d Congress, 1st session, On Special Prosecutor, (1973), p. 2.

and the House of Representatives in 1975 and 1977.[11] During these hearings, there was a general consensus on the following facts:

(1) The Department of Justice had not in the past allocated sufficient departmental resources to handle cases of official corruption and cases arising out of the federal election laws;

(2) The Department of Justice has difficulty investigating and prosecuting crimes allegedly committed by high-ranking executive branch officials because the Department of Justice is poorly equipped to handle cases involving senior executive branch officials; and

(3) It is too much to expect any person, for example the Attorney General, to investigate his superiors without presenting dangers of conflicts of interest.[12]

To address these concerns, the Senate Governmental Affairs Committee adopted S. 555, which was incorporated into the Ethics in Government Act of 1978. In its report, the Committee stated that:

> The solution to these problems is not merely the enactment of more criminal laws. It is essential that the President, the Attorney General, and other top officials in the Department of Justice be men of unquestioned integrity. However, it is also essential that we have a system of controls and institutions which make the misuse and abuse of power difficult, if not impossible.[13]

To establish such a system of controls, Congress passed Title VI of the Ethics in Government Act of 1978 which provides for a court-appointed special prosecutor on an ad hoc, temporary basis to investigate allegations of criminal activity by high-ranking federal officials.

B. STRUCTURE OF THE ACT

Title VI of the Ethics in Government Act prescribes the requirements for the appointment, authority, conduct, and removal of a special prosecutor.[14] Under the Act, the Attorney General must conduct a preliminary investigation whenever he receives "specific information" that any federal officers or campaign official designated under the Act has violated any federal criminal law other than a petty offense.[15] According to the Act's legislative history, "specific information" includes all allegations of wrongdoing except generalized allegations with no factual support.[16] For example, a solitary phone call claiming that a named cabinet officer is "dishonest" would not trigger a preliminary investigation of an official covered by Title VI.

Upon completion of the preliminary investigation, which may not exceed 90 days, and which must not reach the dimensions of a full-blown investigation,[17] the Attorney General must report to the Special

[11] See, e.g., hearing before the Committee on Governmental Affairs, U.S. Senate, 95th Congress, 1st session, on S. 555 (1977), hearings before the Subcommittee on Criminal Justice of the Judiciary, House of Representatives, 95th Congress, 1st session, on H.R. 2835 and related bills (1977), hearings before the Committee on Governmental Operations, U.S. Senate, 94th Congress, 1st session on S. 495 and S. 2036 (1975).
[12] Report of the Committee on Governmental Affairs, U.S. Senate, 95th Congress, 1st session, on S. 555 (1977 at 3, 4.
[13] Id. at 4.
[14] Supra fn. 1, hearing record, pp. 224–32.
[15] 28 U.S.C. § 592.
[16] Supra fn. 12 at 52.
[17] *Id.* at 54.

Prosecutor Division of the United States Court of Appeals for the District of Columbia, established by Title VI. After the investigation, there are three courses of action which may ensue:[18]

(1) If the Attorney General finds that the matter under consideration is, at the completion of the investigation, "so unsubstantiated that no further investigation or prosecution is warranted," he must so notify the court by memorandum, in which case the court has no power to appoint a special prosecutor.

(2) If the Attorney General finds that any further investigation or prosecution is warranted, he must apply to the court for the appointment of a special prosecutor, in which case Title VI requires the court to appoint, and define the jurisdiction of, a special prosecutor.

(3) If the Attorney General makes no determination at the close of the 90-day period from the receipt of the allegation, he must apply for a special prosecutor, in which case the court must appoint a special prosecutor.

Once appointed, the special prosecutor has extensive authority with respect to all matters within his jurisdiction. Title VI vests the special prosecutor 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.[19] These powers include, but are not limited to, conducting grand jury investigations, granting immunity to witnesses, inspecting tax returns, and contesting claims of privilege or national security in cases of attempts to withhold evidence. In addition, the Department of Justice must provide assistance to the special prosecutor, for example, providing resources or access to files, upon request by the special prosecutor. The Act provides for removal of the special prosecutor in only limited situations: the Attorney General may remove the special prosecutor only on the grounds of extraordinary impropriety, or physical or mental incapacity. In such cases, the Act provides that the special prosecutor may obtain judicial review of his removal.[20]

The Act also establishes procedures for judicial and Congressional oversight of the special prosecutor.[21] At the end of his investigation, the special prosecutor must file a report with the court setting forth a full description of his work, disposition of all cases brought, and reasons for decisions not to prosecute matters within his jurisdiction. Moreover, a special prosecutor must send periodic reports on his activities to Congress. He must advise the House of Representatives of any substantial, credible evidence that may constitute grounds for impeachment. The Act also provides the appropriate Congressional committees with oversight jurisdiction with respect to the official conduct of the special prosecutor.

Other provisions of the Act strictly limit disclosure of information regarding the preliminary investigation and special prosecutor phases of the process.[22] Material filed with the court is revealable only by leave of the court. Further, a special prosecutor's appointment, iden-

[18] 28 U.S.C. § 592.
[19] 28 U.S.C. § 594.
[20] 28 U.S.C. § 596.
[21] See 28 U.S.C. § 595.
[22] Id.

85-745 O - 81 - 3

tity and jurisdiction may be made public only upon request of the Attorney General or by order of the court. Finally, under a sunset provision, the special prosecutor provisions expire in October, 1983, unless reenacted by Congress.[23]

C. EXPERIENCE UNDER THE ACT

To date, a special prosecutor has been appointed pursuant to Title VI of the Ethics in Government Act on two occasions.[24] Both cases involved alleged possession and use of cocaine by Carter Administration officials, and both cases resulted in a decision by the special prosecutor not to prosecute the subject of the investigation. As Title VI specifically states that a special prosecutor's identity and prosecutorial jurisdiction shall be made public only upon the request of the Attorney General or upon a determination by the court,[25] it possible that a special prosecutor could be appointed at any given time without disclosure to the public.

The first instance in which a special prosecutor was appointed under the Act involved allegations of cocaine use by then White House Chief of Staff Hamilton Jordan. In June of 1979, two owners of Studio 54 Discotheque in New York City, Steven Rubell and Ian Schrager, were indicted for allegedly skimming money from Studio 54's operation and for alleged income tax evasion.[26] The following month, attorneys for Messrs. Rubell and Schrager informed the U.S. Attorney's Office in New York that they would divulge information concerning drug use by Hamilton Jordan in return for a dismissal of indictments against their clients. On August 23, 1979, the attorneys met with representatives of the Department and Justice and alleged that Mr. Jordan had used cocaine at Studio 54 on June 27, 1978. The Department of Justice refused to dismiss or reduce the charges against Messrs. Rubell and Schrager.

On August 23, 1979, United States Attorney General Benjamin Civiletti ordered a preliminary investigation of the cocaine use allegations pursuant to 28 U.S.C. § 592(a).[27] The preliminary investigation was required by the Act because Hamilton Jordan, as White House Chief of Staff, held a position subject to the special prosecutor provisions, and the specific conduct alleged would constitute a violation of federal criminal law other than a petty offense.

On November 19, 1979, Attorney General Civiletti made application to the Special Prosecutor Division of the United States Court of Appeals for the District of Columbia [28] to appoint a special prosecutor. In his application, Mr. Civiletti stated that:

> As a result of the preliminary investigation it is my conclusion that the matter is so unsubstantiated that prosecution is not warranted.

[23] 28 U.S.C. § 598.
[24] Letter dated May 21, 1981, from the Department of Justice to Senator William S. Cohen, hearing record, p. 235–65, p. 244.
[25] 28 U.S.C. § 593(b).
[26] See Report of Special Prosecutor on Alleged Possession of Cocaine by Hamilton Jordan, filed by Arthur H. Christy, May 28, 1980, hearing record, pp. 378–433.
[27] Application of Attorney General for Appointment of Special Prosecutor, filed Nov. 19, 1979, hearing record, pp. 359–63.
[28] Id.

> However, in view of the limitations imposed on the Department during the course of a preliminary investigation, I am unable to find that this matter is "so unsubstantiated that no further investigation . . . is warranted." [29]

The application further stated that:

> Information from a number of pertinent witnesses has not been obtainable in the preliminary investigation without compulsory process. Final resolution will require that information, an assessment of the credibility of several witnesses, under oath, and the evaluation of evidence. Then determinations can be made concerning whether an indictment of the type alleged, in light of the available evidence, warrants any further action. The statute requires here that such investigation be conducted now by a special prosecutor appointed by the Court.[30]

The preliminary investigation focused only on the Studio 54 allegations, but there were three other FBI investigations of alleged cocaine use by Mr. Jordan. None of these allegations led to an application for a special prosecutor.

In his application to the court, Attorney General Civiletti recommended that the jurisdiction of the special prosecutor be limited to investigation and prosecution of the Studio 54 cocaine use allegation only, and the investigation of whether anyone deliberately made false statements to the Department of Justice in attempts to initiate or mislead the preliminary investigation. The Attorney General further recommended to the court that if such cases of fraud were found, that these be referred to the Department of Justice for further investigation or prosecution.

On November 29, 1979, the court appointed Arthur H. Christy as special prosecutor to investigate the allegation that Mr. Jordan possessed cocaine in the Southern District of New York on June 27, 1978.[31] Despite the Attorney General's recommendation for a limited jurisdiction, the court defined the special prosecutor's jurisdiction as investigation of the Studio 54 allegation, and "any other related or relevant allegation of a violation or violations of 21 U.S.C. § 844(a) by Hamilton Jordan." [32]

Special Prosecutor Christy conduced a six-month independent investigation of the allegations. He held approximately 100 interviews of about 65 persons. The information developed during the course of Mr. Christy's investigation was presented to a grand jury sitting in the Southern District of New York. On May 21, 1980, after due deliberation, the Grand Jury reported that there was insufficient evidence for an indictment of Hamilton Jordan, and voted unanimously a No True Bill.[33]

On May 28, 1980, Arthur Christy submitted a report describing his work as special prosecutor and stating his conclusions to the court

[29] Id. at 361.
[30] Id.
[31] Order appointing special prosecutor, issued Nov. 29, 1979, hearing record, p. 357.
[32] Id.
[33] See letter dated June 22, 1981, from Arthur H. Christy to Senator William S. Cohen, hearing record, pp. 146–63, at 153.

as required by the Act. In that report, Special Prosecutor Christy stated that:

> Based on all of the information developed during the course of the investigation, it is my conclusion that there is insufficient evidence to warrant the bringing of criminal charges against Hamilton Jordan for possession of cocaine in violation of 21 U.S.C. § 844(a).[34]

Pursuant to the recommendation of the special prosecutor, no charges were filed against Mr. Jordan.

The Kraft case

The second instance in which a special prosecutor was appointed pursuant to Title VI again involved allegations of cocaine use by a White House official and, in fact, arose out of the Jordan case.

In his report filed with the court outlining the conclusions of the Jordan investigation, Arthur Christy filed a confidential addendum which was transmitted to Attorney General Civiletti. In his report, the precise content of which is nondisclosable pursuant to 28 U.S.C. § 592(d)(2), Mr. Christy revealed allegations of drug possession against Timothy Kraft, then campaign manager for the Carter-Mondale Presidential Committee. Mr. Kraft was covered by the special prosecutor provisions in his capacity as a former White House Appointments Secretary and former Assistant to the President for Personal and Political Coordination, as well as in his capacity as Campaign Manager.[35]

In his testimony regarding this case, Attorney General Civiletti stated that because Mr. Christy was familiar with the allegations, he had sought to extend Mr. Christy's appointment to handle the Kraft case, yet this attempt failed. He further stated that Mr. Christy "was generally of the view that they were not of substantial merit [or], prosecutorial merit," and that the case did not, "under the ordinary principles and standards of the Department of Justice, . . . merit extensive investigation or prosecution." [36] On August 26, 1980, however, Attorney General Civiletti applied to the court for a special prosecutor to further investigate the allegations because he was unable to conclude that the matter was so unsubstantiated that no further investigation or prosecution was warranted.

On September 9, 1980, the court appointed Gerald J. Gallinghouse of New Orleans to investigate allegations that Kraft possessed and used cocaine in New Orleans on or about August 10, 1978, and in San Francisco on or about November 18, 1978, as well as any related matters.[37]

In view of the extensive publicity which the case generated in the news media, and because Mr. Kraft was involved in the Carter-Mondale Presidential Committee, the special prosecutor postponed his grand jury investigation until after the 1980 presidential election. In a letter to the Subcommittee, Mr. Gallinghouse stated that he delayed

[34] Supra fn. 26, hearing record at 383.
[35] Testimony of former Attorney General Benjamin R. Civiletti before the Subcommittee on Oversight of Government Management, May 20, 1981, hearing record pp. 8, 18; see also, supra fn. 26.
[36] Id.
[37] Order appointing special prosecutor, issued Nov. 29, 1980, hearing record, p. 375.

the investigation in order to ensure fair administration of justice, to avoid suggestions of partisan political considerations, to achieve public confidence in the fairness and impartiality of the investigation, and to protect the constitutional due process rights of Mr. Kraft and prospective witnesses.[38]

The investigation was further delayed when attorneys for Mr. Kraft filed a civil action for injunctive relief and declaratory judgment in the United States District Court for the District of Columbia. In particular, the action challenged the constitutionality of the special prosecutor provisions and contended that Mr. Gallinghouse was ineligible to serve as special prosecutor.[39] Meanwhile, Mr. Kraft had resigned his position as campaign manager due to the continued publicity surrounding the allegations.

The special prosecutor investigation continued until March 1981 when Mr. Gallinghouse concluded that there was no factual or legal basis for a criminal charge against Mr. Kraft. Pursuant to this finding, the pending civil actions were rendered moot and were thus dismissed.[40]

Other investigations under the act

In addition to the two investigations which led to the appointment of a special prosecutor, there have been six cases in which the Attorney General conducted a preliminary investigation after receiving specific information that a person covered by the special prosecutor provisions committed an offense which triggered the Act.[41] The circumstances of only one of these investigations, the so-called White House Luncheon case, have been publicly disclosed.

On November 3, 1978, the Federal Bureau of Investigation received an allegation from an informant that on August 10, 1978, President Carter and Vice President Mondale may have illegally solicited or received political contributions at a White House luncheon for the purpose of eliminating debts incurred by the Democratic Party. The informant stated that further information would appear in New York magazine during that month. An article dealing with the luncheon did indeed materialize, and although it did not expressly state that solicitations or receipts of funds were illegally made, the clear implication was that political contributions could be traced to the luncheon.

Because the allegation and magazine article indicated that a federal criminal law might have been violated, the Department of Justice conducted a preliminary investigation of the matter.

On February 1, 1979, Attorney General Griffin Bell filed a report, as required by the Act, concluding that no special prosecutor should be appointed. Attorney General Bell stated that:

> In sum, there is no factual substantiation of any solicitation or receipt by the President, the Vice President or Mr.

[38] Letter dated May 15, 1981 from Gerald J. Gallinghouse to Senator William S. Cohen, hearing record, pp. 284–354, at 288.
[39] Id., hearing record at 296. 28 U.S.C. § 593(d) disqualifies persons who "recently held any office of profit or trust under the United States. Plaintiffs argued that because Mr. Gallinghouse had served as U.S. attorney for the eastern district of New Orleans from 1970 until 1978, he was ineligible to serve as special prosecutor.
[40] Id. hearing record at 351.
[41] Supra fn. 24, hearing record at 244.

McCleary [Deputy Assistant to the President for Political Liaison] at the White House on August 10, 1978. There is no evidence of conduct on their part that would fall within the scope and purpose of the Statute. Moreover, there is no indication from the preliminary investigation that further investigation could reasonably be expected to disclose evidence of a violation which could warrant prosecution under this Statute. The case is without merit.

Therefore * * * I find the matter is so unsubstantiated that no further investigation or prosecution is warranted, and that no special prosecutor should be appointed.[42]

As Title VI provides that the court shall have no power to appoint a special prosecutor in instances where the Attorney General has determined that no further investigation or prosecution is warranted,[43] no special prosecutor was appointed in the White House Luncheon case, and no further investigation was made.

At the hearing, Associate Attorney General Rudolph Giuliani testified that there have been five other preliminary investigations which have not led to appointment of a special prosecutor.[44] Due to the restrictions on disclosure of such investigations provided for in Title VI, however, these cases are nondisclosable without leave of the Special Prosecutor Division of the Court.

[42] Id., hearing record at 264.
[43] 28 U.S.C. § 592(b)(1).
[44] Testimony of the Honorable Rudolph Giuliani, Associate Attorney General, Department of Justice, before the Subcommittee on Oversight of Government Management, May 22, 1981, hearing record at 92.

IV. Discussion

A. Overview

In the three years since the enactment of the Ethics in Government Act, the special prosecutor provisions have been the subject of much criticism and debate. Much of the publicity which the Act has received stems from the controversial nature of the two cases in which special prosecutors have been appointed. Many critics, however, view the Jordan and Kraft cases as illustrations which verify their broader concerns with the wisdom and fairness of the Act in general, and particularly with certain aspects of the special prosecutor provisions as currently written which may give rise to an uneven application of the law against public officials.

The hearings held by the Subcommittee provided an open forum at which both supporters and critics of the special prosecutor law had an opportunity to express their opinions on the efficacy of the law to date, as well as on possible recommendations to improve the present structure of the Act.

The discussion which follows considers these issues which were raised at the hearing:

- the need for an institutionalized system of controls to prevent actual or perceived conflicts of interest in the investigation of wrongdoing by Government officials;
- the constitutionality of the special prosecutor provisions and the practical effect of the Department of Justice's statement regarding its constitutionality;
- the costs of the special prosecutor process to both the Government and the subject of the investigation;
- the coverage of the Act, in terms of persons subject to the Act, length of time persons remain subject to the Act, and number of crimes covered by the Act;
- the standard under the present law which triggers a preliminary investigation;
- the length and nature of the preliminary investigation;
- the level of discretion and the factors considered in the Attorney General's determination of whether a special prosecutor should be appointed;
- the extensive powers of the special prosecutor and the potential for abuse of this office.

B. The Special Prosecutor Provisions Are Necessary To Establish Public Confidence in the Investigation of Senior Officials

The basic purpose of the special prosecutor provisions is to assure public confidence in the impartial investigation of alleged wrongdoings by government officials. Prompted by the events of Watergate, Con-

gress recognized that actual or perceived conflicts of interest may exist when the Attorney General is called on to investigate alleged criminal activities by high-level government officials.[45]

When conflicts exist, or when the public believes there are conflicts, public confidence in the prosecutorial decisions is eroded, if not totally lost. Thus, Congress determined that a statutory mechanism providing for a temporary special prosecutor was necessary to insulate the Attorney General from making decisions in these instances.

Based on testsimony which we received from authors and supporters of the Act, as well as from officials who have been involved in its implementation, the Subcommittee finds that dangers of conflict of interest were not unique to Watergate, but rather are inherent in our system of government. The Attorney General is a political appointee of the President, at times a close advisor to the President, and part of an Administration that may aspire to re-election or have other political objectives. Thus, from a political perspective, it is understandable that an Attorney General might seek to avoid any embarrassment which the investigation of a senior official would bring to his Administration.

Moreover, even when an Attorney General makes totally unbiased decisions in investigating officials, the public may perceive actions as having political motivations. In testimony before a Senate Judiciary subcommittee in 1975, former Special Prosecutor Archibald Cox stated that:

> The pressure, the divided loyalty, are too much for any man, and as honorable and conscientious as any individual might be, the public could never feel entirely easy about the vigor and thoroughness with which the investigation was pursued. Some outside person is absolutely essential.[46]

Many witnesses who testified at our hearing reaffirmed this concern that the public will not accept an Attorney General's actions as impartial, even where decisions were actually made with total objectivity. For example, Samuel Dash, former Chief Counsel to the Senate Watergate Committee testified that:

> There is no way around the unfortunate fact of human life, that if the Attorney General attempts to put himself into the prosecution of a high Government official in his own Government, it will be looked upon by the public as favoritism, and it won't be trusted, whatever decision he makes.
>
> I think that I make the point in this statement that it is a no-win situation for the Attorney General. If he does the honest and fair thing where there is an unfair or wrong charge against a public official, and he determines that it should be dismissed, his action will be distrusted by many members of the public. And he will be accused of favoritism, and the public official will not be given the really clean bill of health that he is entitled to.[47]

[45] See generally, Senate report, supra fn. 12 at 2. The Supreme Court has also acknowledged this problem when it stated that "one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will." *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935).

[46] Prepared statement of Herbert J. Miller, on behalf of the American Bar Association May 20, 1981, hearing record, p. 437.

The Subcommittee concludes that an institutionalized system of controls is necessary to create public confidence in the investigation of high-level officials.

Historical experience demonstrates that public confidence is served only when these investigations are conducted by a person totally outside the control of the Attorney General and senior officials of the Department of Justice. For example, in the so-called "Carter Peanut Warehouse Case," Attorney General Griffin Bell appointed Paul J. Curran "special counsel" to investigate allegations of questionable loan transactions between the Carter family business and the National Bank of Georgia and of possible illegal diversion of funds borrowed by the warehouse to the Carter 1976 election campaign. Because, under the terms of his appointment, all Mr. Curran's prosecutorial decisions were subject to review by the Head of the Criminal Division, Attorney General Bell drew much criticism in Congress and the media. Once Attorney General Bell granted Mr. Curran total independence and Mr. Curran issued a detailed report clearing President Carter and his brother Billy of all criminal wrongdoing, public confidence in the thoroughness of the investigation was restored.[48]

The Subcommittee rejects the contention, made by the Department of Justice at our hearing, that the special prosecutor provisions are unnecessary because the Attorney General already has adequate statutory authority to appoint an outside investigator. Experience shows that attorneys have, in the past, been unwilling to appoint an independent prosecutor to handle investigations. For example, no special prosecutor was appointed to investigate allegations of attempted bribery of Carter Administration officials by fugitive financier Robert Vesco, or of perjury by former Treasury Secretary G. William Miller during his confirmation hearings. Since a number of these activities were under investigation by the Department of Justice before the effective date of the Ethics in Government Act, the Attorney General technically was not required to appoint a special prosecutor. Still, the failure to refer the allegations to special prosecutors may have sacrificed public confidence in the thoroughness of the investigations.[49]

The strong reluctance of the Attorney General to appoint outside counsel in these cases demonstrates that the decision must not lie with the Attorney General. The special prosecutor provisions achieve this goal by establishing defined circumstances in which the Attorney General must conduct a preliminary investigation, appoint a special prosecutor, and report his activities to the Court.

The intent of the special prosecutor provision is not to impugn the integrity of the Attorney General or the Department of Justice.

[47] Testimony of Samuel Dash, director, Georgetown University Law Center Institute of Criminal Law and Procedure, and former chief counsel, Senate Watergate Committee before the Subcommittee on Oversight of Government Management, May 20, 1981, hearing record, p. 70.

[48] *Investigation of Carter's warehouse and the National Bank of Georgia, report to the Congress of the United States.* Paul J. Curran, special counsel, submitted Mar. 23, 1979; see also. Shapiro, Ira, "Ham Jordan and Tim Kraft Suffered for a Good Cause," *Washington Post*, Apr. 5, 1981, hearing record, pp. 459–62.

[49] The Special Prosector Provisions of the Ethics in Government Act of 1978, The Association of the Bar of the City of New York, Committee on Federal Legislation, May 22, 1980, hearing record, pp. 174, 178–79.

Throughout our system of justice, safeguards exist against actual or perceived conflicts of interest without reflecting adversely on the parties who are subject to conflicts. In many areas when Congress and the courts have identified situations where conflicts may arise, they have imposed reasonable restrictions on the parties involved in order to assure fair decision-making, and public acceptance of the decisions. For example, Congress has placed restrictions on officials who deal with the government after they have left public service, and the Courts have required corporate officials to disclose their personal financial affairs when acting on behalf of the corporation.[50]

Safeguards are particularly evident in our judicial system, where great dangers exist that the public may reject decisions involving fact-finding, guilt or innocence, or the enforcement of laws and sanctions when it perceives that conflicts are present. For example, statutory mandates or ethical guidelines require judges and lawyers to recuse themselves from participation in cases where they have special relationships with the parties or issues in a given case.[51] Recusal is also required or encouraged where the conflict is more apparent than real. This policy in no way questions the integrity of the jurists or counsels involved. Rather, in the public's perception, their integrity increases when judges and counsels withdraw in order to ensure impartiality.

Thus, the Subcommittee finds that the need for an independent special prosecutor still exists. While we do believe, based on the Subcommittee's findings set forth in this report, that the present law requires amendments in certain areas, these are offered to refine, not diminish the law. Therefore, we recommend that Congress not repeal the Act, but rather that it incorporate the changes recommended by the Subcommittee, and extend the Act beyond its sunset date of October, 1983.

C. THE PRESENT LAW IS PRESUMED TO BE CONSTITUTIONAL

Prior to the hearing, Attorney General William French Smith publicly announced that he had "serious reservations" concerning the constitutionality of the special prosecutor provisions of the Ethics in Government Act, primarily on the grounds that it violates the separation of powers doctrine established by the Constitution. He stated the view of the Department of Justice, expanded by Associate Attorney General Giuliani at the hearing, that the Act ignores the constitutional mandate that the Executive Branch must enforce the laws and prosecute Federal offenses by lodging these duties in an officer who "is not appointed by, accountable to, or save in extraordinary circumstances, removable by the Attorney General or the President." [52]

The Subcommittee's investigation and hearing did not focus extensively on the constitutionality of the special prosecutor provisions, as the Subcommittee recognizes that the final resolution of this issue

[50] See, e.g., Public Law 95–521, title V, 18 U.S.C. § 207; State ex rel. *Hayes Oyster Co.* v. *Keypoint Oyster Co.*, 64 Wash. 2d 388, 391 P.2d 979 (1964); see also, Model Bus. Corp. Act § 41.

[51] See, e.g., 28 U.S.C. § 455, hearing record at 113–15; ABA Code of Judicial Conduct Cannon 3 (judges); ABA Code of Professional Responsibility Cannon 5 (attorneys: actual conflict), Cannon 9 (attorneys: appearance of conflicts).

[52] Supra fn. 6, hearing record at 131.

must await decision by the courts. Prior to passage of the Ethics in Government Act, Congress extensively considered this issue.[53] It concluded then that a judicially appointed special prosecutor, removable by the Attorney General in limited circumstances, is constitutional. The Subcommittee reaffirms this finding based upon the analysis submitted to Congress at that time, as well as the arguments in support of constitutionality submitted to the Subcommittee by Common Cause and the Bar Association of the City of New York.[54] Thus, the Subcommittee's findings and recommendations set forth in this report assume that the present special prosecutor process is constitutional, and we recommend that the present statutory process for appointment, authority and removal of a temporary special prosecutor be retained with modifications.

D. THE STATEMENT MADE BY THE DEPARTMENT OF JUSTICE CONCERNING THE CONSTITUTIONALITY OF THE ACT INVITES CHALLENGES BY THE NEXT SUBJECT OF AN INVESTIGATION

While the Subcommittee recognizes the legitimate prerogative of the Attorney General and the Department of Justice to express its views on the constitutionality of statutes currently in force, the Subcommittee is gravely concerned that Attorney General Smith's announcement doubting the constitutionality of the present law will undermine the operation of the provisions in the next case which arises under the Act.

Because of the reservations expressed by the Attorney General, the Subcommittee believes that it is virtually inevitable that the next subject of a special prosecutor investigation will move to enjoin the special prosecutor on the grounds that the provisions are unconstitutional. Consequently, the person chosen by the court to act as special prosecutor may be reluctant to serve. In the event of such an action, the special prosecutor would be unable to carry out his duties during the pendency of the case and potentially lengthy appeals. Moreover, all other cases which may have required a special prosecutor under the Act would also be delayed—or never pursued—during this long judicial review process. As the special prosecutor provisions have an expiration date of October 1983, a serious danger exists that the effectiveness of the Act will be rendered entirely void. Former Special Prosecutor Christy expressed this concern at the hearing, saying that many attorneys would be reluctant to serve in the face of a constitutional challenge. [55]

Of course, the Subcommittee recognizes that challenges by the subject of the investigations may have been inevitable even in the absence of the Attorney General's announcement, as the Kraft case illustrates. The Subcommittee believes, however, that the Attorney General's statement gives added weight to a subject's challenge to the Act.

[53] See, e.g., hearings on S. 555, supra fn. 11; hearings on special prosecutor, supra fn. 10.

[54] See Memorandum of Common Cause as Amicus Curiae In Support of the Constitutionality of the Special Prosecutor Law, *Kraft* v. *Gallinghouse*, Civil Action No. 80–2952 (D.D.C. 1980), hearing record, pp. 319–47; Report of the Bar Association of the City of New York, supra, fn. 49.

[55] Testimony of Arthur H. Christy before the Subcommittee on Oversight of Government Management, May 22,1981, hearing record, p. 145.

Even more disturbing to the Subcommittee is evidence which we received during our investigation indicating that the Department of Justice was reluctant to assist the special prosecutor in defending the constitutionality of the present law when it was challenged by Timothy Kraft in a suit filed in U.S. District Court. In his response to questions submitted by Senator Cohen, Gerald Gallinghouse, special prosecutor in the Kraft investigation, described the unwillingness of the Department of Justice to assist him in this regard:

> We were unsuccessful in our efforts to prevail upon the Department of Justice officials to provide representation for the special prosecutor in the pending civil proceeding for the purpose of upholding the constitutionality of the Special Prosecutor Section of the Ethics in Government Act. At first, Deputy Attorney General Charles B. Renfrew orally assured us that he would recommend that the Department of Justice represent the special prosecutor in the civil action, but a few days later we were orally advised that Attorney General Civiletti had decided that the Department of Justice attorneys would not be authorized to serve as counsel for the special prosecutor in this civil litigation.
>
> We were then required to seek legal representation from Washington, D.C. law firms, but their prevailing charges (at least $150 an hour) precluded our engaging private attorneys to represent the special prosecutor who was not authorized to commit the Department of Justice to payment of such fees.
>
> We were very fortunate in being provided with effective assistance without cost to the Government by the extremely competent attorneys serving on the staff of Common Cause, particularly Ms. Ellen G. Block, Mr. Kenneth J. Guido, Jr., and Mr. Donald J. Simon, who filed a scholarly and convincing brief in support of the constitionality of the statute.[56]

This refusal to assist the special prosecutor is especially alarming to the Subcommittee in light of section 594(d) of the Act which states that the

> . . . Department of Justice shall provide that assistance, which may include access to any records, files, or other materials relevant to matters within such special prosecutor's prosecutorial jurisdiction, and the use of the resources and personnel necessary to perform such special prosecutor's duties.[57]

The Subcommittee interprets this section as requiring the Department of Justice to lend its resources, through providing either constitutional arguments or financial assistance, to the office of the special prosecutor in order to defend the statute against constitutional challenges. Failure to do so effectively renders the special prosecutor powerless. While respectfully commending the persuasive brief which Common Cause filed on behalf of the constitutionality of the statute,

[56] Supra fn. 38, hearing record at 288, 289.
[57] 28 U.S.C. § 594(d).

the Subcommittee believes that the special prosecutor, an officer of the government, should not be required to turn to outside parties to defend the governing statute, especially when there is an express statutory mandate that the Department of Justice provide him with resources necessary to perform his role as special prosecutor.

While recognizing the problems which may arise, Associate Attorney General Giuliani assured Congress that the Department of Justice will, despite its questions regarding constitutionality, assist the special prosecutor in implementing the Act. In response to a question from Senator Cohen, Mr. Giuliani stated:

> Mr. GIULIANI. . . . I think there would, however, be a problem. You put your finger on it. I don't really know, in terms of the position that the Department would take—precisely the position it would take before the court. I think in a way, though, the act, even as it is presently constituted, contemplates that the special prosecutor certainly has the resources to make those arguments in favor of the constitutionality of it for himself. He is supposed to be, under the present version of the act, an independent official who carries on his activities on his own.
>
> Senator COHEN. But one can be a prosecutor, not a constitutional scholar. And that individual might need the services of the Department of Justice.
>
> In Mr. Gallinghouse's case, he called upon Common Cause to provide some legal assistance, even though the section of the act, 594(d), states the special prosecutor may request assistance from the Department of Justice. "The Department of Justice shall provide assistance in the use of resources and personnel necessary to perform such special prosecutor duties."
>
> So in that case, there is a mandate that you shall provide, but it was not provided as far as the constitutional issue was concerned. I am sure he has the resources to go out and hire other counsel, but it raises the question of what the duty and what will be the response of the Department of Justice in the future?
>
> Mr. GIULIANI. The Department of Justice will implement the act. To the extent that it is required to assist the special prosecutor, it will do so. And just to suggest a solution to that problem, the special prosecutor is funded out of the Department of Justice budget. The best answer to that, if, in fact, the Department cannot honestly take the view that it believes that the act is constitutional, is to provide him with the funds necessary to hire outside counsel to assist in making that argument. And the Department of Justice would urge its views on the court, and then it would be determined where it is supposed to be determined, by a court.[58]

[58] Supra fn. 44, hearing record at 111–12.

The Subcommittee expects that the Attorney General and the Department of Justice will honor this assurance given to Congress. Failure to do so would severely undercut the operation and purpose of the special prosecutor law.

E. THE COSTS OF THE SPECIAL PROSECUTOR PROVISIONS ARE HIGH

One major goal of the Subcommittee's investigation was to determine the costs incurred by the Government and subject of the investigation once the special prosecutor provisions have been triggered. The Subcommittee's concerns were primarily whether the costs exceeded those which would have been incurred in an investigation of the same allegations in the absence of the special prosecutor provisions, and whether the public confidence instilled by the special prosecutor provisions justified the cost to both parties involved.

1. Costs to the Government

According to Department of Justice statistics, the cost of the special prosecutor phase of the Hamilton Jordan investigation to the Department of Justice was $215,621.[59] Mr. Christy supplied figures to the Committee showing expenses of $163,836; however, this figure represents only costs incurred directly by Mr. Christy's office and paid out of his fund.[60] The Department of Justice figure includes the amounts provided to Mr. Christy's funds plus certain expenses paid directly out of Department funds. These expenses included salaries of the Federal Bureau of Investigation (FBI) and Drug Enforcement Administration (DEA) agents working with Mr. Christy ($27,393), certain travel expenses incurred directly by the FBI ($1,158) and others ($2,215), rent, communications, and utilities ($1,628), office equipment ($5,185), renovation of office space ($7,700), and FBI-provided support services ($7,393).[61]

In addition, the preliminary investigation stage of the Jordan case cost the Department of Justice $43,937.[62]

As Mr. Gallinghouse has not yet filed his final report in the Kraft case, the cost figures of the special prosecutor phase of that case are not available at this time. The Department of Justice incurred $29,129 in the preliminary investigation of the Kraft allegations.[63]

Two other factors in determining total cost are the number of work hours expended and the personnel assigned to each investigation. The following Department of Justice statistics indicate that both cases involved substantial Departmental resources:[64]

[59] Supra fn. 24, hearing record at 245–46.
[60] Supra fn. 33, appendix A, hearing record at 163.
[61] Supra fn. 59.
[62] Id.
[63] Id.
[64] Id. at 245–48.

	Estimated Number of Work Hours Expended In Each Investigation	*Number of Staff Assigned To Each Investigation*
Jordan:		
	Preliminary investigation:	Preliminary investigation:
	Criminal Division attorneys—240 hrs.	2 Criminal Division attorneys
	FBI special agents and special clerks—1,583 hrs.	20 FBI special agents 2 FBI special clerks Support personnel as needed
	Special prosecutor:	Special prosecutor:
	DEA special agent—440 hrs. FBI special agents—986 hrs.	4 attorneys 3 investigators 1 administrative assistant
Kraft:		
	Preliminary investigation:	Preliminary investigation:
	Criminal Division attorney—200 hrs. FBI special agents and special clerk—678 hrs.	1 attorney 8 FBI special agents Support personnel as needed
	Special prosecutor:	Special prosecutor:
	FBI special agents—567 hrs. Attorneys—unknown [1]	8 FBI special agents Attorney and support staff Unknown [1]

[1] Mr. Gallinghouse has not yet filed a final report or final vouchers; therefore, these figures are unavailable.

Attorney General Civiletti characterized the Special Prosecutor procedure in these cases as "an enormous waste of public funds."[65] Similarly, Associate Attorney General Giuliani noted "the extraordinary cost and waste of procedures occasioned by the existing legislation." He testified that because the Attorney General's preliminary investigation receives the highest priority, even where similar allegations would otherwise not warrant such treatment, these cases directed scarce Government resources from cases in which they are more sorely needed. He also noted that "After the appointment of a special prosecutor, another investigation, often duplicating the first, must be conducted."[66]

The Subcommittee believes that the costs incurred by the government in special prosecutor investigations are excessive because the present Act often requires prolonged investigations of allegations which would not otherwise be investigated or prosecuted under "normal circumstances," i.e., if the individual were not covered by the Act. These excessive costs are a direct result of the Act's very low appointment standard and the Act's failure to allow the Attorney General to use prosecutorial guidelines in clear-cut cases. Testimony at the hearing substantiated this finding:

> Senator COHEN. The Department of Justice has informed the Subcommittee that in the Jordan case, 1,823 work hours were expended in the preliminary investigation and an additional 1,426 hours were expended in the special prosecutor in-

[65] Prepared statement of former Attorney General Civiletti, May 20, 1981, hearing record, p. 28.
[66] Supra fn. 44, hearing record at 95.

vestigation. It took $43,937 expended in the preliminary investigation; $215,621 in the special prosecutor investigation.

The question I have is whether or not these costs would have been incurred normally, assuming that the Attorney General had handled the case from the beginning to the recommendation. Would you have incurred those kinds of expenses ordinarily?

Mr. CIVILETTI. No, not in the Jordan case. We would have done the preliminary investigation if it yielded the special circumstances that the special prosecutor yielded, we would have closed the case and that would have been it.

The Curran special counsel investigation cost $500,000 to $750,000. That was a very expensive investigation because of all of the books and records. I think it was conducted extremely well by Curran. It was not within the scope of the act. I think Judge Bell made the correct decision in appointing Curran because of the relationship of the Carter Warehouse to the Administration, but I think in that instance the department would have spent the same amount of money as Curran spent. Not so in either Jordan or Kraft.[67]

The Subcommittee finds that public confidence is not served by prolonged, costly investigations conducted in cases where there is no conflict of interest, which would not lead to prosecution even if the allegations were verified, or in cases where an early investigation reveals little credence for the allegations themselves. Such futile exercises can result only in a waste of valuable public resources.

The Subcommittee believes that the most effective means to reduce excessive government costs is through limitations on the coverage of the Act and through amendments to the present standards which trigger a preliminary investigation and the appointment of a special prosecutor. Specific recommendations in these areas are discussed later in this report. By so screening the cases which lead to the special prosecutor process, the excessive costs to the government would be reduced without compromising public confidence in the investigation of high-level officials.

2. Costs to the subject of the investigation

The Subcommittee finds that an official subjected to a special prosecutor investigation incurs extensive burdens both financially and professionally. When a special prosecutor is appointed, the subject of the investigation must often bear staggering legal expenses and potentially devastating publicity, even if the special prosecutor ultimately decides to forego prosecution.

Both special prosecutor investigations to date, as well as testimony, substantiate this finding. Testimony indicated that Hamilton Jordan incurred legal fees "exceeding six figures," which was more than twice his annual salary.[68] Timothy Kraft also incurred extensive legal fees, including attorney fees for his case filed in U.S. District Court challenging the appointment of Gerald Gallinghouse as special prosecutor.

[67] Supra at fn. 35, hearing record at 21–2.
[68] Testimony of Lloyd Cutler, Esq., before the Subcommittee on Oversight of Government Management, May 20, 1981, hearing record, p. 36.

Moreover, both investigations subjected the officials to extensive, adverse publicity throughout the entire course of each case. Because of such negative publicity and innuendo, Timothy Kraft resigned from his position as President Carter's campaign manager prior to the 1980 presidential election. Gerald Gallinghouse's decision to postpone his investigation until after the November election provides ample evidence of the extensive publicity which a special prosecutor investigation can generate. Mr. Gallinghouse informed the Subcommittee that he believed postponement was necessary to assure the fair administration of justice and to eliminate suggestions of partisanship from the case.[69]

An official subjected to a special prosecutor investigation is unfairly stigmatized far beyond the price he or she should pay for public office. The Department of Justice wrote the following concerning the effects on the subject of such an investigation:

> Unfortunately, an innocent person can never emerge whole from a criminal investigation in which he was cleared. This is a price society must pay for an open criminal justice system that provides due process at all stages, as well as a free press. But where normal standards of prosecutorial discretion are eliminated for a certain class of cases and the added stigma and publicity of a 'Special Prosecutor' is present, the cost to innocent people becomes greater than is necessary and serious questions of fairness and justice must be raised. The only two Special Prosecutor investigations to date appear to support this conclusion. A notion often proffered in support of the statutory procedures, that only a Special Prosecutor can credibly clear a suspect, simply does not stand up on closer reflection. Whether intended or not, the appointment of a Special Prosecutor invariably gives credence and added significance in the public eye to otherwise weak or insignificant allegations. The damage done to innocent people is clearly aggravated rather than alleviated by the statutory mechanism. It is doubtful whether the two subjects of special prosecutor investigations to date are grateful that they had a special prosecutor investigate and "clear" them.[70]

Testimony at the hearing suggested three methods by which to modify the costs imposed on officials who are subject to a special prosecutor investigation: reimbursement, regularization of the special prosecutor process, and additional publicity safeguards.

a. Reimbursement.—The Subcommittee recommends reimbursement of attorneys' fees to the subjects of a special prosecutor investigation. This recommendation received near-unanimous support at the hearing.[71]

As the purpose of this amendment is to compensate for the extraordinary costs caused exclusively by this statute, the Subcommittee finds that reimbursement should not cover costs which would have been incurred in a similar investigation of a private citizen.

To accomplish this goal, the Subcommittee recommends that the subject of a special prosecutor investigation be authorized to apply to

[69] Supra fn. 38.
[70] Supra fn. 24, hearing record at 236–37.
[71] This recommendation was proposed by Lloyd Cutler and the Bar Association of the City of New York. See hearing record at 51–3, 194.

the court for attorneys fees. In making its determination, the court should consider to what extent the fees incurred were caused by the special provisions, i.e., whether such fees would have been incurred by a private citizen in a private investigation of the same allegations. The court should award only those fees, if any, which it determines would not have been incurred in the absence of the special prosecutor laws.

b. Regularization of the special prosecutor process.—Some supporters of the law argue that it is not the law itself, but rather the past implementation of the law and the public perception of the appointment of a special prosecutor which creates much of the hardships on public officials. This view contends that the Department of Justice's refusal to appoint special prosecutors in cases not arising under the Act signaled to the press and public that the appointment of a prosecutor was an "extraordinary step" which "implied probable guilt of wrongdoing," and that routinization of the special prosecutor could mitigate the stigma of the investigations.[72]

A central recommendation raised at the hearing to achieve this goal was changing the name of the special prosecutor. Senator Levin stated that

> One of the parts of this that troubles me the most is the name "special prosecutor," the only place I know of in the Federal system that the word "prosecutor" is even used. I think in other places we use just U.S. attorneys, special counsel, and a few other names, not "prosecutor." The word "special" gives it a special meaning. If that office were titled, an ordinary prosecutor, I don't think there would be a stigma attached to the appointment of that person, as it is now.[73]

This recommendation was unanimously endorsed at the hearing. Suggested names for the special prosecutor included "special counsel," "outside counsel," "special investigator," and various combinations of these terms.

The Subcommittee agrees that the public may interpret the appointment of a special prosecutor as implying the guilt of the subject of the investigation. At the hearing, Attorney General Civiletti expressed this concern:

> Senator Levin. The appointment of a special prosecutor gives an investigation a very different character in the public eye than simply being under investigation. Would you not agree?
>
> Mr. Civiletti. Yes; it accelerates the prejudice. There is a certain prejudice attached today with indictments of people, not just investigations, but even with a public figure if he is under investigation, that is a very serious matter for him, and in the public perception, but indictments really do bring substantial prejudice to the individual.
>
> I think the appointment of a special prosecutor accelerates that prejudice and is almost akin to putting the subject under an indictment-like cloud of prejudice.[74]

[72] Shapiro article, supra fn. 48, hearing record at 459–62.
[73] Hearing record, p. 41.
[74] Supra fn. 35, hearing record at 19.

The guiding purpose underlying the special prosecutor provisions is to increase public confidence in investigations of officials, not to prejudice the public against officials who may ultimately be cleared of all allegations. The Subcommittee finds that this connotation of guilt can, in fact, diminish rather than enhance public confidence in Government officials, and consequently, Government as a whole, as the stain of a special prosecutor investigation may be indelibly etched on the official's reputation.

While, as previously set forth, the Subcommittee concludes that a special prosecutor mechanism is necessary, we believe that this stigma can be reduced in some measure by eliminating the spector of indictment, or even guilt, which the term "special prosecutor" raises in the public's mind. Thus, the Subcommittee recommends that the name of the special prosecutor be changed to "independent counsel." This name would alert the public that an unbiased investigation is being conducted, separate from the Department of Justice, yet would not connote that an indictment has or will be brought. Moreover, the proposed name does not imply that the alleged activity is of the same magnitude of Watergate, as does the term "special prosecutor," which is closely associated with that series of events.

c. Additional publicity safeguards.—A third proposal discussed at the hearing would amend the disclosure provisions of the present Act.

The present law strictly prohibits disclosure of any papers filed with the court without leave of the court. The identity and the prosecutorial jurisdiction of the special prosecutor can be made public only upon request of the Attorney General or "upon a determination by the court that disclosure . . . would be in the best interest of justice."[75]

The Subcommittee believes, for a number of reasons, that the present law correctly places disclosure decisions in the discretion of the court or in the Attorney General. First, we believe that the present law strikes a good balance between the privacy concerns of the official under investigation and the public interest. The court may release information regarding the investigation in those cases where not doing so would simply escalate rumors and suspicion, or where it finds that the public acceptance of the conclusions would be increased through disclosure. Conversely, the court can decide not to disclose applications filed by the Attorney General, reports filed by the special prosecutor, or other documents in those instances in which harm to the subject's reputation outweighs the public's need to know. Attorney General Civiletti's explanation of his decision to disclose the application of the Attorney General in the Jordan case, but not in the Kraft case, illustrates this point:

> In the Kraft case, prior to the application for a special prosecutor, there was no significant public disclosure of the fact that there were serious allegations against Kraft. There may have been a tidbit or a gossip column item over the 3-year period, but nothing significant.
>
> So it was our conviction in the Jordan case, that it was already in the public domain and that it would have created a greater sensation to have it dragged out in bits and pieces

[75] 28 U.S.C. § 593(b).

through perseverance by the press, and, on the other hand, in the Kraft case that there was no compelling need to make it public since it had not been made prior to the time of appointment.[76]

Second, we find that vesting authority to disclose information regarding the investigation in the discretion of the court provides an essential check against abuses of authority by the Attorney General or the special prosecutor. In those instances in which the court believes that either of these parties have abused their discretion, or violated the terms of the Act, it can disclose information to Congress or the public. The Subcommittee further finds that this safeguard will become even more vital to the Act in light of our recommendations to incorporate credibility into the preliminary investigation standard, to raise the appointment standard, and to allow the Attorney General to consider prosecutorial guidelines in referring cases to a special prosecutor.

Third, the Subcommittee is concerned about how the public would perceive changes in the disclosure requirements. There is a serious danger that the public would view the official or the government as being able to "cover up" the fact that an investigation has taken place. This public perception could undermine the very purpose of the special prosecutor process. By allowing the court, which has traditionally been held in high public esteem, to disclose the identity of a special prosecutor and other facts of an investigation, no perception of a coverup exists.

Finally, the Subcommittee believes that additional privacy restrictions would not be effective in practice. At the hearing, former Attorney General Civiletti and Mr. Cutler recognized this problem:

> I do not think you could succeed for more than a week in having a special prosecutor and having them go about conducting his business if he was really doing that. If he was assembling his team, getting his office space, interviewing the witnesses, and so forth without the press finding out about it, I think it would be illusory if you think that you can keep the fact that a special prosecutor is appointed or special counsel is appointed out of the public domain, just as a practical matter.
>
> It will become public in a short time, in any event, and then the same kind of charge would be made that the appointment was either prematurely made or made too late. When you are making those kinds of decisions, I don't think you can become too concerned about the suspicion from time to time, or ascertain from time to time, that the appointment was either too early or too late, based on some political reason. There is always something going on politically. I do not think you can be worried about that.
>
> I prefer the flexibility that is within the statute now, to allow the Attorney General to apply to the court and state his reasons for making the matters which he files with the court, be it a nonrequest for special prosecutor or a request, public, and let the court pass on them. And, otherwise, that they be

[76] Supra fn. 35, hearing record at 19.

> entirely secret, as in the statute now. I think that was designed fairly well.[77]

While the Subcommittee does not recommend a change in the disclosure provisions of the Act, we do recognize that disclosure of a special prosecutor's appointment and related facts of an investigation have severe implications on the subject of an investigation, as well as on witnessses who may be named in the documents filed with the court. Thus, the Subcommittee strongly encourages the court and the Attorney General to carefully consider all factors involved in granting and requesting disclosure of facts under this section, balancing at all times the consequence on the official with the public interest.

F. COVERAGE OF THE ACT IS OVERINCLUSIVE AND UNDERINCLUSIVE

The Subcommittee finds that a major problem in the present statute is the extreme overbreadth of its coverage. Testimony at the Subcommittee's hearing indicated that coverage is one of the foremost sources of criticism of the present law, raised even by strong supporters of the concept and present structure of the special prosecutor provisions. The coverage issue may be classified into three major areas:

- Number of Officials Covered by the Act
- Length of Time Persons Remain Subject to the Act
- Number of Crimes Covered by the Act

1. The act's coverage is overinclusive

a. The act covers too many executive officials.—Section 591(b) of the Act defines the federal, executive, and campaign officials who are covered by the Act. All specified individuals are potential subjects of an investigation by a special prosecutor, as the Attorney General must conduct a preliminary investigation whenever he receives specific allegations of criminal activity by any of these officials.

Those positions covered include the President, Vice President, all Cabinet members, top Department of Justice officials, and the heads of the Central Intelligence Agency and the Internal Revenue Service. Moreover, all individuals working in the Executive Office of the President compensated at a rate equivalent to level IV or above of the Executive Schedule are also subject to the Act.[78]

In determining the proper coverage of the Act, it is necessary to review the original purpose of the special prosecutor provisions. This purpose is to assure impartial investigations of alleged wrongdoings by Executive officials by eliminating actual conflicts of interest or the appearance thereof. Such actual or perceived conflicts arise when the Attorney General or the Department of Justice is called on to investigate an official who is close to the President or to the Attorney General.

An examination of the positions covered by the Act reveals that coverage is indeed extensive. Department of Justice statistics indicate that there are currently 124 Federal executive positions covered by the Act, 93 of which are in the Executive Office of the President.[79] In his testi-

[77] Id., hearing record at 20.
[78] 28 U.S.C. § 591(b).
[79] Letter dated Aug. 3, 1981, from the Department of Justice to Senator William S. Cohen, hearing record, p. 288–89.

mony, Attorney General Civiletti characterized many of these individuals as unknown to the public, as well as remote from the Department of Justice.[80] For example, the Act covers three postions in the Council on Environmental Quality and many positions in the Council on Wage and Price Stability. The Act also covers the Director of Staff for the First Lady. The Subcommittee finds that investigations of individuals holding these positions, who are close to neither Presidential nor Department of Justice influence or decision-making, would create little danger of conflict of interest, or the public perception thereof, if conducted by the Department of Justice. Thus, the Subcommittee finds that their inclusion is inconsistent with, and unnecessary within the philosophy of the Act.

The Subcommittee believes that coverage of officials whose investigation would not raise conflict of interest problems is particularly important in light of the significant implications of a special prosecutor investigation on both its subject and the Government. As discussed earlier, a preliminary investigation subjects covered individuals to the extreme expense and stigma of a criminal investigation when non-covered individuals would often not be investigated for an identical alleged wrongdoing, on an identical set of facts. Moreover, the Act creates additional costs for the Department of Justice in terms of expending investigative and prosecutorial resources on cases which may not otherwise warrant attention. These additional costs, to both the Department and the subject of the investigation, should be borne only in situations which create realistic dangers of conflicts of interest. The coverage of Executive officials who do not present potential conflicts of interest is inherently inconsistent with the purpose of the Act, and thus they should be excluded from its scope.

One justification proffered for retaining the law's present coverage of Executive officials is that all members of the group currently covered by the Act are part of "the Administration" and that the Department of Justice is inherently reluctant to investigate or prosecute Executive appointees due to potential embarrassment to the Administration which such an investigation may generate.[81] The Subcommittee finds, however, that the logical extension of this rationale would require all officials in an Administration to be covered by the Act, as all such appointees are members of the same "team," and investigation of any one member would reflect on the Administration as a whole. While the Subcommittee agrees that this "team" rationale extends to senior officials, we do not believe that it can be used to justify coverage of lower-level officials, whose influence on and association with the President and Attorney General are much more limited.

Thus, the Subcommittee finds that the present number of officials covered by the Act is too broad.

The Subcommittee acknowledges that any statutory coverage will always be underinclusive or overinclusive in certain circumstances. For example, investigation of a non-covered official may present real conflicts of interest, while a covered official may, in a given case, be investigated impartially by the Attorney General. The line drawn by

[80] Supra fn. 35, hearing record at 10.
[81] See prepared statement of the Honorable Rudolph Giuliana, Associate Attorney General, May 22, 1981, hearing record, p. 125.

Congress should, however, cover those officials whose investigations create the great danger of actual or perceived conflicts of interest.

The Subcommittee recommends that the Act cover the President, Vice President, Cabinet members, and a more limited number of other Executive officials.

The Subcommittee rejects the Department of Justice's contention that investigations of Cabinet officials do not raise conflict of interest problems because "other Cabinet agencies are on a wholly different chain of command from the Department of Justice." [82] Instead, the Subcommittee finds that Cabinet members present potential conflict of interest problems because they are close to the President and are fellow colleagues of the Attorney General. The Subcommittee further finds that the public perception of conflict of interest would be particularly high if these officials were investigated by the Attorney General.

The Subcommittee also recommends that the number of middle-level Exective officials covered by the Act be reduced. The Subcommittee believes that coverage should be tied to executive-level pay scales, as under present law, because this provides a reasonable indicator, albeit imperfect, of authority. We recommend, however, that only those officials in the Executive Office of the President holding executive level II positions or above should be covered by the Act, in order to cover only truly senior officials who are close to either Presidential or Department of Justice decisionmaking.

In addition, the Subcommittee recommends that the Act should continue to cover any Assistant Attorney General, and individuals working in the Department of Justice compensated at or above level II of the Executive Schedule. The Subcommittee believes that the close association of these top-level Department of Justice officials with the Attorney General creates an actual or perceived conflict of interest when the Attorney General must investigate them. The "team" rationale does justify coverage of these officials, as the Attorney General may be reluctant to investigate top members of his Departmental team.

The Subcommittee further recommends that the Act continue to cover the Director and Deputy Director of the Central Intelligence Agency and the Commissioner of Internal Revenue as it is crucial to assure the public that investigations of officials in these highly sensitive areas—so easily subject to abuse and covert activity—be impartial.

In recommending this reduced coverage, the Subcommittee points out that the Attorney General has adequate authority under existing law to recuse himself from investigations of other officials not covered by the Act in which he perceives that there is a conflict of interest. Also, there is adequate authority and precedent for the Congress to call for the appointment of an independent prosecutor to investigate allegations of wrongdoing by other Government officials who are not covered by the Act. The Subcommittee encourages both the Attorney General and Congress to exercise their authority in this regard whenever it would enhance public confidence in Government.

b. The act covers too many campaign officials.—Section 591(b)(6) of the Act provides that "any officer of the principal national campaign

[82] Id. at 126.

committee seeking the election or re-election of the President" is a potential subject of a special prosecutor investigation.

The Subcommittee finds that this provision of the Act is overinclusive through its failure to define the term "officers." The Subcommittee agrees with the observation of Lloyd Cutler at the hearing that, "Proliferation of important sounding titles is a recognized campaign phenomenon." [83] Many of the scores of campaign "officers" do not hold positions which realistically present problems of conflict of interest if they were subject to a Department of Justice investigation, and thus these persons should not be covered by the Act.

In order to correct this problem, the Subcommittee recommends that coverage of campaign officials be limited to the Chairman, Treasurer, and members of the corporate board of the Presidential election or re-election campaign, and any official who exercises authority in the national campaign, such as the campaign manager or director.

Once again, we recognize that cases may arise in practice which present real conflicts of interest yet are not covered by the Act. However, the Subcommittee believes that the Act is especially vulnerable to manipulation during political campaigns, and thus coverage in this area should be clarified.

2. The act's coverage of persons is underinclusive

Ironically, while much of the criticism levied against the Act concerns the overinclusion of officials subject to the special prosecutor provisions, the Subcommittee's investigation also revealed that the Act's coverage is underinclusive in some regards. As now written, the Act fails to include a class of persons who are close to the President and perhaps the present greatest danger of actual or perceived conflicts of interest—the President's family.

The so-called "Billygate Affair," in which the President's brother, Billy Carter, was suspected of having an improper relationship with the Libyan government, illustrates the problems which may arise when the Department of Justice handles investigations of the President's family. Although the report of a Senate Judiciary Subcommittee concluded that "there is no evidence that either the investigation or disposition of the case by the Criminal Division (of the Department of Justice) was skewed in favor of Billy Carter because he is the brother of the President," [84] throughout the investigation, there were many stories in the press speculating whether the President's brother would be impartially investigated by the Attorney General, whether he would or had received favored treatment by either the Department of Justice or the White House, and whether the President had known or approved of the relationship which his brother allegedly held with the Libyans.[85] Such speculation does not instill public confidence in the integrity of government.

The Subcommittee investigating the allegations did question, moreover, some of the decisions made by Attorney General Civiletti during the course of his involvement in the case.[86] The Subcommittee questioned the judgment of the Attorney General in withholding the substance of intelligence information from subordinates who had knowledge of the investigation, thus prolonging the case. Also, the Subcommittee noted, without passing judgment on the motivation or integrity of the decision, that the Attorney General directed his subordinates to take no action toward disposition of the case for ten days, during which time the Attorney General consulted with the President and informed him that no prosecution would be brought if Billy Carter registered under the Foreign Agents Registration Act.[87]

In raising this example, this Subcommittee in no way intends to impugn the integrity of Attorney General Civiletti, or to pass judgment on his decisions. The Subcommittee does find, however, that the public perceived a conflict of interest to exist in that case, regardless of whether or not one existed in fact.

The Carter Administration recognized the substantial appearance of impropriety which government relationships with the President's family can bring. In response to the Billy Carter investigation, President Carter issued to the Heads of all Executive agencies and departments guidelines concerning official dealings with members of the President's family.[88] These guidelines prescribed the government's treatment of, and dealings with, the President's family in outlined circumstances. Most notably, the guidelines cautioned government employee that there should be a "strong presumption" against business dealings, for example, granting government contracts to the President's family members. The stated purpose of these guidelines was to:

> Caution government employees against dealing with members of the President's family in ways that create either the reality or the appearance of impropriety. The primary responsibility to avoid impropriety of course rests with the President and members of his family. The President has cautioned members of his family not only to observe these guidelines, but also not to place government employees in a position where the appearance of impropriety can occur.[89]

The Subcommittee finds that public perception of impropriety and favoritism are especially great when a member of the President's family is the subject of a criminal investigation. Thus, to assure public confidence in the impartiality of these investigations, the Subcommittee strongly recommends that the coverage of the special prosecutor law be extended to the members of the President's family during the President's incumbency. For this purpose, "President's family" shall be defined as the President's spouse, parents, the President's children and their spouses, and the President's brothers and sisters and their spouses.

3. Coverage of individuals subject to the act continues too long

a. Length of time covered is extensive.— One of the most alarming findings made by the Subcommittee is the extensive time for which

[83] Prepared statement of Lloyd Cutler, Esq., former counsel to the President, May 20, 1981, hearing record at 51.
[84] Inquiry Into the Matter of Billy Carter and Libya, Report of the Judiciary Subcommittee to Investigate Individuals Representing Interests of Foreign Governments to the U.S. Senate, Oct. 2, 1980, p. 62.
[85] Articles cited in Judiciary Subcommittee report, supra fn. 90 at 8.
[86] Id. at 67–8.
[87] Id.
[88] 45 Federal Register 65177 (1980).
[89] Id., The subcommittee considers these guidelines laudatory, consistent with the underlying purpose of the special prosecutor law. The Carter guidelines, however, did not take the form of an Executive order, and thus are not binding on subsequent administrations. In the interest of public confidence, the subcommittee urges all administrations to voluntarily adopt similar guidelines.

a covered official can remain subject to the special prosecutor provisions. At the hearing, there was wide agreement that this aspect of the law should be changed.

Section 591(b)(5) provides that an individual who held a covered position, except campaign officials, continues to be covered "during the incumbency of the President or during the period the last preceding President held Office, if such preceding President was of the same political party as the incumbent President." [90] Under this provision, an official can remain covered by the Act for as long as 16 years after he or she has left office: eight years if the President under which he serves is re-elected, and eight more years if the next President is of the same political party. The language of the Act does not restrict coverage to only those acts committed while in office; rather, it extends to all qualifying allegations at any time during the period specified. Thus, a mid-level official could resign, and continue to be covered for this entire period, even if he has no contract with the Administration after he leaves office. At the hearing, Mr. Rosenfeld testified that his Association found this aspect of the law "absolutely incredible." [91]

The hypothetical case of Senator Edward M. Kennedy winning the 1980 Presidential election illustrates the vast scope of both the coverage and the length provisions of the Act. It is safe to hypothesize that had Kennedy won, there would have been an extensive replacement of Executive officials. In such circumstances, however, all specified Carter positions would continue to be covered, as well as all the Kennedy appointees until the year 1988, if Kennedy won re-election. Attorney General Civiletti testified that "there can be no realistic fear or perception of favoritism if an individual has been out of office that long." [92] The Subcommittee finds that, as a practical matter, the dangers of conflict of interest raised by a Department of Justice investigation of an office holder in the distant past is at best attenuated. Moreover, this aspect of the Act raises the larger policy question of how long an official should remain subject to the standards of a public servant after he or she leaves office.

Testimony at the hearing revealed that the current special prosecutor provisions create a different application of criminal law to those individuals covered by the Act. For example, a preliminary investigation and report to the Court must be made in cases where no such action would be taken for a private individual. Although some supporters of the Act view this as a necessary price individuals must pay to hold office, the Subcommittee believes that officials should not bear this obligation long after they have ended their tenure in public office. Such treatment can serve only as a great disincentive to public service.

Thus, the Subcommittee finds that the Act covers officials for too long a period in certain instances.

b. Length of coverage turns on which political party wins the Presidential election.—Closely related to the extensive duration of coverage of the Act, and equally alarming to the Subcommittee is the fact that

[90] 28 U.S.C. § 591(b)(5).
[91] Testimony of Steven B. Rosenfeld, chairman, Committee on Federal Legislation, Association of the Bar of the City of New York, before the Subcommittee on Oversight of Government Management, May 22, 1981, hearing record, at 172.
[92] Supra fn. 35, hearing record at 10.

coverage of officials turns on which political party wins the Presidential election. Under the Act, an official is covered for the term of the succeeding President if that President is of the same political party as his own. If, however, the succeeding President is of another party, the official is no longer covered.

Critics of the Act, for example, former Attorney General Levi, have characterized this standard of coverage as the "politicalization" of the administration of justice" [93] and argue that nowhere else in our system does the application of criminal law turn on which political party is in power. Two excerpts from the hearing reflect the finding of the Subcommittee that there is no evidence to substantiate the belief—which is the basis of this provision of the Act—that one political party will be more lenient in prosecuting members of its own political party. Testimony suggests, in fact, that indeed even the opposite may be true:

> Senator COHEN. Let me just say this. I don't think an Attorney General under the Reagan administration would prosecute a former official under the Carter administration. I think there would be more pressure on the Attorney General not to prosecute, for fear it would look like it was an act of vindictiveness.
>
> Mr. CIVILETTI. There is a reverse kind of psychology or reluctance, or perhaps the other way around, with your own administration. There is a tendency to be super clean, or to go out, all out with vigor, above and beyond the ordinary practice.
>
> Senator COHEN. I believe Mr. Dash will testify later as to the reasons why you need a special prosecutor, so you do not "bend over backward" to prosecute in cases which you ordinarily would not.
>
> Mr. CIVILETTI. That's correct. Unfair the other way. But as to the length of time the Act applies, I do not think it should be hinged, as it now is, on the present administration and the successor administration, any term to which that President succeeds. I think it really ought to relate to a reasonable period of time after the public official leaves public service, 2, 3, 4 years. Something of that kind. And of course, for as long as they are in public service. I think that is really the better key, or better test.[94]

Also at the hearing, Senator Cohen recalled Mr. Cutler's artful characterization of this phenomenon of a new Administration's reluctance to prosecute its predecessors of the opposite party.

> Senator COHEN. I want to go back a bit. In 1973, in hearings before the Senate Government Operations Committee, you submitted some testimony, and I would like to quote it.
>
> "Moreover, because of the live-and-let-live principle of elected politics, they, the Attorney General and the President, may be similarly reluctant to investigate the conduct of their predecessors and the campaign finances of the opposing

[93] Telephone interview with former Attorney General Edward Levi, May 1981.
[94] Supra fn. 35, hearing record at 21.

parties. They tend to follow the rule of the Chinese Warlords that you don't kill your prisoners because in two or three years time you will become a prisoner yourself."

Now under the present Act the individuals are covered during the term of the next President only if he or she is of the same political party. I am wondering if you still subscribe to the statement that a following administration may underinvestigate their predecessors of the opposing party.

Mr. CUTLER. I think there are dangers that they will underinvestigate. As in the case of campaign financing, that is certainly true. Or that they will overinvestigate.[95]

The Subcommittee finds that fairness requires a standardized period of coverage for all officials. Thus, we recommend that all officials be covered by the Act for the incumbency of the President under which an official serves plus one year. This proposal recognizes that the danger of conflict of interest, both actual and perceived, is greatest throughout the entire Administration in which an official serves, as the same President has chosen the Attorney General and the subject of a potential investigation.

The one-year provision imposed on all officials under the proposal would reduce the dangers of conflicts for a period of "residual influence" which the official may have after he or she leaves office. Moreover, it addresses the dangers, revealed in testimony, that a new Administration may over-prosecute or under-prosecute its predecessors, particularly during the transitional period of changing Administrations. Finally, this coverage is politically neutral and does not create a disincentive to public service by covering officials long after they leave office.

In instances where an official continues to hold office into the next Administration of a new President in merely a transitional capacity, the official shall not be deemed to have "served under" the new President, for purposes of this section. In this way, those "holdovers" to a new Administration will continue to be covered for the one year "residual" period only, rather than the entire incumbency of the new President.

4. The Present Scope of Crimes Covered by the Act Is Not Too Broad

Testimony at the hearing also focused on the number of crimes which can give rise to a preliminary investigation. Under the present law, the Attorney General must conduct a preliminary investigation whenever he receives specific allegations that a covered official has violated a federal crime law.

Critics of this aspect of the Act argue that inclusion of misdemeanors will result in a significant number of meritless preliminary investigations, substantial risks that the process will be invoked for trivial matters, and an undue proliferation of special prosecutors working outside the regular prosecutorial process.[96] They cite the two experiences to date, the Jordan and Kraft cases, as evidence that the Act can be invoked for minor offenses which often are uninvestigated or prosecuted when the alleged offender is a private citizen.

[95] Supra fn. 68, hearing record at 38.
[96] See id.

Testimony received by the Subcommittee included the present coverage of crimes by the Act:

(1) Limit the Act to only felonies.

(2) Create a two-tier approach under which all felonies are covered for high-level officials; whereas only crimes related to office would trigger the Act for lower-level officials.

(3) Cover all felonies and violation of election laws.

Attorney General Civiletti and the Department of Justice strongly advocated the first option of covering only felonies. Explaining this position, Mr. Civiletti stated that "felonies are commonly understood to be serious offenses associated with moral turpitude. Removal of the misdemeanor class of offenses from the coverage of the Act will help ensure that special prosecutors are appointed only in the serious cases that justify a special process." [97]

The Subcommittee rejects this recommendation on the grounds that there are some non-felony offenses which, in certain circumstances, are prosecuted and investigated on a routine basis. Moreover, the Subcommittee agrees with the view of Lloyd Cutler that it is not the nature of the crime but rather the relationship of the parties involved which creates the need for an impartial investigation by a special prosecutor. Mr. Cutler testified that:

> I would favor retaining the coverage of all misdemeanors and felonies for the reason I think that the chairman inferred, that the issue is the issue of equal treatment rather than the seriousness of the crime. If the ordinary citizen would be prosecuted for giving an illegal amount of money to a candidate, or for possessing cocaine, or for not paying his income taxes or filing a false return, or whatever else it might be, whether that happens to be a misdemeanor which is true of most campaign finance offenses, I believe, or a felony, is immaterial. The real issue is whether the public can be satisfied that the person under investigation or accused is being given the same treatment, no harsher, no more gentle, than anyone else.[98]

The Subcommittee also rejects the second alternative which creates a two-tier approach of crimes covered by the Act. This alternative was rejected by Congress prior to passage of the current law. The Subcommittee believes that the standard of coverage for lower-level officials would create serious interpretation problems of what constitutes crimes "related to office." We further reject this option because it is inconsistent with the Subcommittee's finding that it is the relationship, not the type of offense, which creates the conflict of interest. Moreover, this alternative would be rendered moot by the Subcommittee's recommendation to exclude lower-level officials from coverage under the Act.

Although the third option would provide for a special prosecutor in cases of misdemeanors which are serious offenses, and often investigated or prosecuted as in the case of a public official, the Subcommittee believes the conflict of interest remedies should not turn on the

[97] Supra fn. 65, hearing record at 30.
[98] Supra fn. 83, hearing record at 35–6.

classification of the crime, but rather that the Act should adopt a flexible approach.

In lieu of these alternatives, the Subcommittee finds that amending the mechanism which triggers a preliminary investigation and the appointment of a special prosecutor will more effectively remedy the problems cited by these critics. For example, our recommendation, to incorporate prosecutorial guidelines into the standard, described below, would assure that the Attorney General must investigate allegations of criminal wrongdoing by high-level officials, while not unduly subjecting the officials to extended investigation for crimes which are not ordinarily prosecuted. By not adopting a rigid classification of crimes which give rise to special prosecutor treatment, this approach avoids the potential problems of under-inclusiveness and over-inclusivess inherent in such classification. Instead, the Subcommittee finds that the scope of crimes covered under present law is proper as long as the standards which give rise to preliminary investigations and appointment of special prosecutors under the Act are raised.

G. PROVISIONS GOVERNING THE PRELIMINARY INVESTIGATION STAGE OF THE PROCESS SHOULD BE AMENDED

At its hearing, the Subcommittee received substantial testimony concerning the preliminary investigation stage of the special prosecutor process. The discussion of this aspect of the law revealed three areas of controversy:

- the "specific information" standard which triggers the preliminary investigation
- the length of the preliminary investigation
- the investigative tools available to the Attorney General during the preliminary investigation

1. By failing to consider the credibility of the source of the allegation, the "specific information" standard at times requires the Attorney General to investigate frivolous allegations

The Act requires the Attorney General to conduct a preliminary investigation upon receiving "specific information" that any of the persons covered by the Act has engaged in criminal wrongdoing.[99]

Many witnesses criticized this standard as being too low, resulting in preliminary investigations of allegations with no factual base whatsoever. For example, Lloyd Cutler characterized the standard as reversing the well-established principle in our system of justice that there is a presumption of innocence until guilt has been proved.[100] Proponents of this view argue that this standard requires the Attorney Genueral to develop facts to disprove an allegation, rather than having the Attorney General base an investigation on a set of facts which indicates that there has been a violation of federal criminal law.

The Subcommittee finds that the present "specific information" standard is indeed too low by not allowing the Attorney General to consider the credibility of the person making the allegations in determining whether a preliminary investigation is required. Rather, any statement, regardless of the source, alleging that a covered official

[99] 28 U.S.C. § 592(a).
[100] Supra fn. 83, hearing record at 47–8.

engaged in criminal activity automatically triggers a preliminary investigation.

The following exchange between Senator Levin and Professor Dash vividly illustrates how even one witness, known to be unreliable by the Department of Justice, could force the appointment of a special prosecutor or a preliminary investigation:

> Senator LEVIN. Now it's a one-on-one situation. I file a very anonymous kind of complaint. I was at a party. I saw him, Jordan, smoke a marijuana cigarette. I saw him and I insist I did, and I have been convicted of perjury five times and I hate Ham Jordan and it is proven that I hate Ham Jordan. And you are saying that that is one-on-one, one person's word against another. The Attorney General is going to have to forward that one?
>
> Mr. DASH. As Attorney General, in an ordinary case I wouldn't trust you as far as I could throw you and I would not prosecute it, as an ordinary case. But as a public official, the statute says I cannot make those decisions. It is taken out of my hands.
>
> Senator LEVIN. The statute lets the Attorney General not interview the other 20 witnesses, you said.
>
> Mr. DASH. This is not unsubstantiated.
>
> Senator LEVIN. A witness says: I saw him smoke. It is substantiated.
>
> Mr. DASH. I said if it is substantiated, you have no discretion.
>
> Senator LEVIN. That's what you call substantiated?
>
> Mr. DASH. That is, by definition, substantiated. Credibility has nothing to do with substantiation.
>
> Senator LEVIN. Would any reasonable person put any stock in someone who has clear hatred, he beat him in an election, whatever?
>
> Mr. DASH. That weight is not given to the Attorney General. It has been removed from that discretionary decision. He is not given discretion.
>
> Senator LEVIN. Why not? That is so unsubstantiated in my view——
>
> Mr. DASH. It is not unsubstantiated.
>
> Senator LEVIN. Do you think an Attorney General can make a decision to say that that is not substantiated?
>
> Mr. DASH. No.
>
> Senator LEVIN. So it is in the evidence, no matter how incredible. That is substantiated, if it is eyewitness.
>
> Mr. RASH. If it is evidence of an eyewitness, it is substantiated.
>
> Senator LEVIN. No matter how incredible?
>
> Senator COHEN. If it is inherently unreliable, nonetheless because it is a specific allegation by an eyewitness, it is substantiated. Doesn't that effectively take the Attorney General out of the picture automatically?
>
> Mr. DASH. I think I would have to stand by that, yes.
>
> If you are going to draw lines then you are putting the

Attorney General in the discretionary area of making credibility decisions, and I think the statute rightly decides not to do that.

Senator LEVIN. You are saying that there is no discretion as to what is substantiated or not. That is an absolutely defined word. You would ask 100 lawyers whether or not that is substantiated evidence, where you have one on one. The one eyewitness has got four perjury convictions and is a known animus for Ham Jordan. One hundred lawyers would say that is substantiated testimony; that's what you're saying.

Mr. DASH. Yes.

Senator LEVIN. I don't agree. I am a lawyer. I don't know if I would be one of the 100. I would not say that is substantiated testimony. Perhaps you are right.[101]

The Department of Justice has adopted this "credibility" versus "substantiation" distinction. Associate Attorney General Giuliani testified that in applying the special prosecutor provisions to the allegations which it has received over the past two and one half years, the Department of Justice has interpreted the statute as automatically requiring the Attorney General to conduct a preliminary investigation regardlesss of the credibility of the witness. He criticized this aspect of the law as wasteful of Departmental resources as the law requires "unwarranted investigations in situations where no one else would be investigated." [102]

The Subcommittee believes that public confidence is not served by investigating such meritlesss allegations made by sources known to be unreliable. Rather, the law's failure to allow the Attorney General to consider the credibility of the accuser can only invite abuse of the special prosecutor provisions, unfairly tarnish the reputations of our public officials, and waste scarce Departmental resources.

As the Kraft case illustrates, even a special prosecutor investigation which ultimately results in a decision not to prosecute can severely damage or curtail the career of a public servant. Because of these high costs, the Subcommittee is particularly disturbed by this potential for manipulation which exists in the present law. As any specific allegation triggers a preliminary investigation, this mechanism could easily be used by an accuser for a variety of motives, including reprisal, or even political advantage. The Jordan case, in which the allegation of Jordan's cocaine use was part of a plea bargaining attempt, illustrates how the mechanism can be used to gain leverage with the Department of Justice in charges against the accuser himself.

To remedy this problem, the Subcommittee believes that the present standard should be raised to require the Attorney General to conduct a preliminary investigation whenever he receives *specific information sufficient to constitute a reasonable ground to investigate* that any of the persons covered by the Act has committed a violation of any Federal criminal law other than a violation constituting a petty offense. In determining whether reasonable grounds exist, the Attorney General should consider two factors: 1) the degree of specificity of the information, and 2) the credibility of the person making the allegation. Thus, under our proposed standard, generalized allegations of wrongdoing, for example, an allegation that a covered official is an "embezzler" without additional specific facts of a particular instance of embezzlement, would not give rise to a preliminary investigation. Similarly, an allegation of wrongdoing made by a witness known to be unreliable would not trigger a preliminary investigation. The Subcommittee regards this change as essential to safeguard against abuse and invocation of the special prosecutor process based on frivolous changes. Equally important, this change assures that a preliminary investigation will be triggered in only those cases which would be investigated under ordinary circumstances, thus establishing a fair, even application of criminal law to officials and non-officials alike.

[101] Supra fn. 47, hearing record at 81–2.
[102] Supra fn. 44, hearing record at 109–10.

2. The preliminary investigation period prescribed by the present law is at times too short

Under the present law, the preliminary investigation cannot exceed 90 days. At the close of this period, the Attorney General must, if he has not already done so, report to the court and either request a special prosecutor or notify the court that no special prosecutor is required because the allegations are "so unsubstantiated that no further investigation or prosecution is warranted." [103]

Based on testimony we have received, the Subcommittee finds that the 90-day time limitation may, in some circumstances, be insufficient to allow the Attorney General to complete a preliminary investigation. The consequences of so short a time frame is that in some cases, the Attorney General will be unable to find that no further investigation is warranted and thus be forced to apply for a special prosecutor, simply because he has not been able to exhaust all investigative leads within the prescribed period.

The strict time limitation imposed on the investigation ignores the reality that fact gathering is a time consuming endeavor, particularly in light of the sensitive nature of cases involving public officials. Former Attorney General Civiletti testified that it is impractical and unrealistic to restrict these investigations to 90 days, when many criminal investigations commonly take between two and five years before an indictment is brought.[104]

The Subcommittee believes, however, that there are serious dangers in extending this investigation period for all cases. First, the Subcommittee agrees with concerns expressed by Mr. Dash at the hearing that the public may perceive a prolonged investigation as an attempt by the Attorney General to "bury something," [105] or that the Attorney General is needlessly prolonging an investigation for a variety of purposes—to divert public attention, to cover up allegations during a political campaign, or simply to allow the matter to "go away" quietly. Such public perceptions could easily undermine the purpose of the Act which is to instill public confidence in these investigations.

Further, the Subcommittee finds that the underlying purpose of the preliminary investigation is not to conduct an exhaustive investi-

[103] 28 U.S.C. § 592.
[104] Supra fn. 35, hearing record at 16.
[105] Supra fn. 47, hearing record at 79.

gation, or to allow the Attorney General to definitely conclude, based on all available evidence, that prosecution should go forth or be declined. Rather, the preliminary investigation is designed to be an initial stage of investigation only, the purpose of which is to eliminate meritless allegations.

Consistent with this purpose, the Subcommittee finds that there should be no blanket extension of the preliminary investigation period. Because of the serious consequences which a special prosecutor appointment has on the subject of the investigation, however, the Subcommittee believes that the special prosecutor process should not be triggered simply because the Department of Justice has been unable to complete the fact-finding necessary to make a proper determination within an inflexible time frame.

The Subcommittee, therefore, recommends that the Act be amended to allow the Attorney General to apply to the court for a limited extension when he believes that additional time would allow him to resolve the investigation, and no special prosecutor would be required. The Subcommittee is greatly concerned, however, that filing for extension not become a routine practice. This could lead to public cynicism and use of extensions by the Department to buy time or cover up evidence. This is neither the intent of the Subcommittee, nor is it consistent with the function of the preliminary investigation. Rather, the Subcommittee recommends that the court be able to grant a single extension of the preliminary investigation upon showing of good cause by the Attorney General. In making his application, the Attorney General should specifically state the grounds upon which he requests an extension. In any case, the extension should not exceed 60 days, as an extension beyond this period could give rise to abuse of discretion or intentional delay by the Department of Justice.

3. The law should specifically restrict the use of investigative tools during the preliminary investigation

The nature of the preliminary investigation has also elicited substantial criticism over the past year. The legislative history of the Act clearly states that the Attorney General is not authorized to convene a grand jury, subpoena witnesses, plea bargain, or engage in other "prosecutorial functions." [106] Some critics of the Act argue that these tools are essential to any investigation, and that prohibiting their use by the Attorney General precludes him from conducting a thorough investigation of the allegations which he receives.

In both the Jordan and Kraft cases, the Attorney General was required to apply for a special prosecutor, because, in part, he lacked sufficient powers to exhaust all investigation. In the Jordan case, for example, Attorney General Civiletti's inability to compel testimony from witnesses was a primary basis for finding that the case required further investigation by a special prosecutor.[107]

In investigating this aspect of the law, the Subcommittee was indeed concerned that the Act should not so tie the hands of the Attorney General that all cases would trigger appointment of a special prosecutor. Such an automatic procedure would render the preliminary investigation useless.

[106] Id. at 54–5.
[107] Supra fn. 27.

The Subcommittee found, however, that even some of the law's strongest critics do not favor vesting the Attorney General with investigative tools, on the basis that the Attorney General would be exceeding his screening function under the Act. For example, the Department of Justice wrote the following recommendation to the Subcommittee:

> Given this legislative history, the Department of Justice has refrained from using grand jury process, plea bargaining or immunities in the course of preliminary investigations. Assuming *arguendo* that Congress wishes to maintain the present special prosecutor procedures, it is probably good policy to continue these limitations on the preliminary investigations. Given the premise of the statutory procedures—that the special prosecutor, not the Department, should make the principal decisions in the case—the limitations are consistent with the statutory scheme. Moreover, since under the present statutory scheme the Department has no power to indict in a case covered by the Act, it could be argued that use of the grand jury solely for purposes of a preliminary investigation is improper. Of course, the Department is not and should not be procluded from using grand jury process where the allegations triggering the special prosecutor provisions derive, but are separable, from a non-statutory investigation.[108]

The Subcommittee agrees with the Department of Justice's view that it would be inconsistent with the policy underlying the special prosecutor provisions to vest the Attorney General with the powers of subpoena, immunity, grand jury process, or plea bargaining during the preliminary investigation stage. To do so would allow the Attorney General to perform functions which should properly be performed by an independent prosecutor and would severely undermine public confidence that the Attorney General is being insulated from prosecutorial decisions where conflicts of interest exist. Total removal of the Attorney General from these decisions is crucial to maintain the integrity of the Act.

Moreover, the Subcommittee finds that the present Act perhaps does not go far enough in prohibiting the use of these investigative tools during the preliminary investigations. In fact, Attorney General Civiletti testified that he interpreted the Act as possibly allowing compulsory process and grand juries during the preliminary investigation "for preliminary investigator purposes and nonuse for prosecuting decisional purposes." [109]

[108] Supra fn. 79, hearing record at 271–2.
[109] Supra fn. 35, hearing record at 17. Attorney General Civiletti distinguished between his inability to use compulsory process in the Jordan case and an Attorney General's use of these investigative tools in other cases under the Act:

"I think that it leaves them [Attorney Generals] with the ability to compel evidence, documents, or testimony where evidence is not crucial, where there are not key witnesses where they are not overriding someone's fifth amendment right by the grant of immunity, where they are seeking the production of documents, where they are seeking routine testimony, or perhaps eyewitness testimony of witnesses who are not involved in the transactions in some form, but simply by standard type eyewitness or innocent participants.

"So that the assessment in the Jordan case, my assessment was that in the preliminary investigation there, with the nature of unavailable witnesses, we could not use compulsory process. I did not have to reach the question of whether in any case we could use compulsory process." Id.

The Subcommittee finds that the Act should not allow the Attorney General to use these tools for any purposes, either investigative or prosecutorial. Opening the door to these powers by the Attorney General presents great potential for circumvention of the Act, and would create strong dangers of perceived conflicts of interest. To assure this result, the Subcommittee recommends a clarifying amendment to the text of the Act stipulating that the Attorney General does not possess the authority to convene grand juries, plea bargain, grant immunity or issue subpoenas in conducting a preliminary investigation.

H. THE STANDARD WHICH TRIGGERS THE APPOINTMENT OF A SPECIAL PROSECUTOR IS TOO LOW

The Subcommittee finds that the present standard results in an uneven application of justice by triggering the appointment of a special prosecutor to investigate allegations supported by little or no evidence or allegations not ordinarily prosecuted by the Department of Justice.

Under the present law, after conducting a preliminary investigation, the Attorney General must apply for a special prosecutor unless he can state to the court that the matter is "so unsubstantiated that no further investigation or prosecution is warranted." [110]

This standard received extensive criticism at the Subcommittee's hearings. For example, Mr. Cutler characterized this standard as "but one millimeter high," and other witnesses testified that the standard left little practical opportunity for the Attorney General to dismiss a case after conducting a preliminary investigation.[111]

The purpose of the preliminary investigation is to enable the Attorney General to perform a screening function,[112] but, if the standard for the appointment of a special prosecutor is too low, it renders the preliminary investigation meaningless.

In conducting the preliminary investigation, the Attorney General is acting as all prosecuting attorneys do when allegations of criminal conduct first come to their attention. At this stage, a prosecutor must determine whether the allegations meet the threshold which indicates that the case should be investigated further. The standard which triggers the appointment of a special prosecutor under the present law is, however, far lower than the standard employed at this stage of investigation by other prosecutors across the country in both the federal and state court systems.

The Subcommittee received testimony that a higher standard allowing the Attorney General to exercise some measure of discretion would have eliminated much of the prolonged media coverage and extensive costs to both the government and the subject of the investigation in the Jordan case, as Attorney General Civiletti could have closed the case with simply a report to the court, rather than having to seek appointment of a special prosecutor.

Moreover, even when an allegation is supported by sufficient evidence, the Department of Justice does not investigate or prosecute every allegation of criminal wrongdoing that it receives. Rather it exercises discretion. It is a widely accepted principle in our criminal

[110] 28 U.S.C. § 592(b).
[111] Supra fn. 68, hearing record at 35.
[112] See supra fn. 12 at 53–56.

justice system that a prosecutor enjoys wide latitude in determining when, whom, how, and even whether to prosecute for apparent violations of criminal law.[113] Decisions on whether to prosecute a violation of a federal criminal law on a given set of facts depend on a variety of factors including the availability of non-criminal alternatives to prosecution, federal interest served by prosecution, the deterrent effect of the prosecution, the nature and seriousness of the offense, and the subject's culpability and past record.[114] This reasonable discretion is regularly practiced by the Department of Justice, U.S. Attorneys, and prosecutors throughout the federal system.

Many witnesses at the hearing criticized the present act as ignoring this legitimate use of prosecutorial discretion and the prosecutorial guidelines which the Department of Justice has developed to standardize its discretion and policies of law enforcement.[115] These critics of the Act argue that the standard which triggers a special prosecutor, by disregarding these guidelines, often results in the appointment of a special prosecutor to investigate alleged criminal violations which are not, or are rarely, prosecuted by the Department of Justice. Again, the Jordan and Kraft cases illustrate this charge.

In both the Jordan and Kraft cases, the official was alleged to have possessed cocaine in violation of 21 U.S.C. section 844(a). At the hearing, the Subcommittee received testimony from both present and past officials of the Department, and the special prosecutor in the Jordan case, that the Department of Justice rarely prosecutes alleged violations of this federal criminal law. The following statement by Special Prosecutor Christy clearly supports the finding that the facts of the Jordan case would not have led to prosecution if Jordan had not been covered by the special prosecutor provisions:

> It is my understanding that possession of cocaine in the quantity alleged in the Jordan case would not have been in 1978 and would not now be the basis of prosecution in the Southern District of New York. I do not know what the practice was in other Districts in 1978, but I doubt there were many where possession of the amount of cocaine alleged in the Jordan case would have formed the basis for prosecution. Since the publication of "Principles of Federal Prosecution," published by the Department in July 1980, I believe there is greater discretion for a United States Attorney to decline to prosecute this type of possession case. The factors to be considered in a possession case are the amount of cocaine involved, the availability of the cocaine involved, the availability of the cocaine as evidence, the purpose of possession and the likelihood of obtaining a conviction. Possession of a small amount for personal use should not require prosecution or further investigation.[116]

[113] See, e.g., *Oyler* v. *Boles*, 368 U.S. 448 (1962); *Newman* v. *United States*, 382 F.2d 479 (D.C.Cir 1967); *Powell* v. *Katzenbach*, 359 F.2d 234 (D.C.Cir. 1965) cert. denied, 384 U.S. 966 (1960).
[114] See, generally, U.S. Department of Justice, "Principles of Federal Prosecution," 5–14 (July 1980); supra, fn. 65, hearing record at 30–1.
[115] See Civiletti testimony, supra fn. 35; Cutler testimony, supra, fn. 70, testimony of Phillip Heymann, former Assistant Attorney General, Criminal Division, U.S. Department of Justice before the Subcommittee on Oversight of Government Management, May 20, 1981, hearing record, pp. 58–69; Giuliani testimony, supra fn. 44.
[116] Supra fn. 33, hearing record at 157.

Similarly, Attorney General Civiletti testified that neither the Jordan nor the Kraft case, "under the ordinary principles and standards of the Department of Justice, under the past administration and this administration, or any administration, merited extensive investigation or prosecutions.[117]

In finding that the present law can require the appointment of a special prosecutor to investigate alleged violations which would not be otherwise pursued, the Subcommittee shares the concerns of these critics that this process often results in an uneven administration of justice: one standard is applied to the citizenry at large, while another is applied to our public officials. At the hearing, Senator Cohen questioned Attorney General Civiletti on the wisdom of this result:

> Senator COHEN. One of the difficulties is that in the past there has been a belief that high level officials by virtue of their position, enjoy a certain different treatment as far as the application of the law is concerned—an unequal application—and that they are insulated from the types of prosecutorial endeavors that are applied to non-officials. Now we seem to be saying that we are engaging in another form of the unequal application of the law, and we are prosecuting cases that ordinarily would not be prosecuted. This raises the question of what you think is the relationship of high level officials to the people of their country. Is it in the nature of fiduciary or trustee?
>
> Mr. CIVILETTI. I think it is, clearly. And I think that is the only justification, the level of position, the only justification for a special prosecutor provision at all.
>
> Senator COHEN. What if we say that a high-level official is a trustee and we remember Justice Cardozo's words that a "trustee is held as something stricter than the morals of the marketplace, not honesty alone, but the punctillio in honor of the most sensitive?" Do you apply that standard?
>
> Mr. CIVILETTI. I think we apply that in the privilege of holding the office, I don't think we can apply that standard when we are applying the criminal law and due process and the deprivation of freedom, but certainly in terms of continuing in a position in holding the public trust and confidence I would agree with Justice Cardozo's statement.[118]

The Subcommittee recognizes that there are instances in which a clear policy and clear Department of Justice precedent not to prosecute exist for a given violation, for all citizens. In these instances, it is unfair to subject a public official to the substantial costs of a special prosecutor investigation when all parties involved know that no prosecution will result.[119] Such a policy is inconsistent with the Act's

[117] Supra fn. 35, hearing record at 9.
[118] Id., hearing record at 13–4.
[119] The subcommittee recognizes that even in following prosecutorial guidelines, the subject's personal circumstances are considered in the decision of whether to prosecute. For example, the "Principles of Federal Prosecution" includes the person's personal circumstances as a factor in determining if prosecution serves a substantial interest. The report states that "circumstances such as the fact that the accused occupied a position of trust or responsibility which he violated in committing the offense, might weight in favor of prosecution." Supra, fn. 128 at 10.
The subcommittee believes that this is a permissible consideration for a prosecutor to make. Unfairness arises, however, when all other factors are ignored and prosecution is automatically required because the subject is a public official.

goal of establishing a standard administration of justice for officials and non-officials.

To lessen the inequities created by the present low standard and to prevent needless special prosecutor investigations, the Subcommittee recommends that the appointment standard be raised.

The Subcommittee believes that the Attorney General should be required to apply for the appointment of a special prosecutor only if he has *reasonable grounds to believe that further investigation or prosecution is warranted.* This standard, which was proposed by Mr. Cutler, would clearly require a higher level of evidence supporting the allegations than is the case under the current law. As Mr. Cutler stated in his written statement:

> The current special prosecutor provisions require the Attorney General to investigate in order to develop facts to disprove an allegation and sets the standards so low that it is very difficult for the Attorney General to find sufficient facts to conclude that no further investigation is warranted.[120]

The "reasonable grounds" language would, in the Subcommittee's judgment, strike an appropriate balance between the need to permit the Attorney General to exercise limited discretion in evaluating the results of the preliminary investigation and the need to establish a standard that is not so high that the Attorney General would be making decisions best left to the special prosecutor.

The Subcommittee's proposed standard should not be interpreted as allowing the Attorney General to definitely establish whether or not prosecution is warranted. Rather, the Attorney General should determine only whether there are reasonable grounds based on the evidence uncovered during the preliminary investigation to justify further examination by an independent special prosecutor. Only the special prosecutor should make the ultimate determination of whether to proceed to the indictment stage.

In addition to evaluating the evidence supporting the allegations, the Attorney General should consider the written prosecutorial guidelines of the Department of Justice in determining whether a reasonable ground for further investigation or prosecution exists.[121] The Subcommittee recomends that the Attorney General be permitted to justify his decision that a special prosecutor should not be appointed upon a showing to the court that the Department of Justice does not, as a matter of established practice, prosecute the alleged violation of federal criminal law. Alternatively, he may state to the court that it is the practice of U.S. Attorneys for the district in which the violation was alleged to have occurred not to prosecute this violation. The Subcommittee encourages the Attorney General to consult with the U.S. Attorney for the district involved in making his finding to the court, when such consultation could be made without jeopardizing confidentiality of the case. In proposing this amendment, the Subcommittee strongly stresses that the Attorney General must make this determination only in those clear cases in which there is an established, demonstrable policy not to prosecute. This caveat reflects the view of the

[120] See supra fn. 83, hearing record at 48.
[121] See e.g., "Principles of Federal Prosecution," supra fn. 119.

Subcommittee that the Attorney General performs a screening function only. Any case in which there is no clear policy against prosecution or any arguably exceptional circumstances present [122] should be sent to a special prosecutor.

The Jordan case may be used as an example to distinguish between the current standard and the Subcommittee's proposed trigger for appointing a special prosecutor. Attorney General Civiletti testified before the Subcommittee that the present law required him to apply for the appointment of a special prosecutor even though he specifically concluded that the matter was so unsubstantiated that prosecution was not warranted.[123] Because, however, he was unable to state to the court that no further investigation was warranted, he could not avoid the appointment of a special prosecutor.

The Subcommittee's proposed trigger would have allowed Attorney General Civiletti to report to the court, after completing the preliminary investigation, that the allegations did not reasonably warrant further investigation or prosecution based on the Department of Justice prosecutorial guidelines. The allegations against Mr. Jordan could thus have been resolved without resorting to a full-blown special prosecutor investigation.

The Subcommittee believes that the requirement that the Attorney General report to the court his reasons for determining that no special prosecutor is needed provides the necessary check on any abuse of his discretion.

If the Attorney General concludes that no special prosecutor should be appointed because of the absence of sufficient evidence of wrongdoing, he would have to fully substantiate this decision. Under the Subcommittee's proposal, his report to the court would be required to describe the preliminary investigation and his reasons for concluding that the reasonable grounds standard was not met. The Attorney General should also fully discuss any options which he chose not to pursue during the investigation.

Similarly, if the Attorney General determines that a special prosecutor is not needed because the written prosecutorial guidelines of the Department do not call for prosecution of the alleged violation, he must fully document that decision. In his report to the court, the Attorney General must substantiate this practice with case law, opinions of the U.S. Attorney for the district in which the violation was alleged to have occurred, written prosecutorial guidelines, or other clear, factual support that no prosecution would be brought.

I. THE POWERS OF THE SPECIAL PROSECUTOR ARE EXTENSIVE

The current law gives the special prosecutor extensive powers. Pursuant to Title VI, a special prosecutor has all the powers of the Attorney General and the Department of Justice to investigate and prose-

[122] In his testimony, Mr. Rosenfeld provided a good illustration of one such "exceptional circumstance": the Watergate breaking and entry of the Democratic National Committee Headquarters. Although breaking and entry in the night may not be ordinarily prosecuted, the additional circumstances of who was involved, where the activity occurred are factors which the Attorney General should consider in making his determination to the court. See testimony of Steven Rosenfeld, Bar Association of the City of New York, before the Subcommittee on Oversight of Government Management, May 22, 1981, hearing record, pp. 166–68.

[123] Supra fn. 35, hearing record at 8–9.

cute matters within his jurisdiction. These powers include, but are not limited to: conducting investigations and convening grand juries, granting immunity, compelling testimony, inspecting tax returns, contesting claims of national security and appealing cases.[124] He is removable only by the Attorney General on the grounds of "extraordinary impropriety" or mental or physical incapacity, and the special prosecutor can obtain judicial review of such removal.[125]

Such broad powers could be easily subject to abuse in the hands of an irresponsible prosecutor. Of particular concern to the Subcommittee is the danger that a special prosecutor could prolong an investigation needlessly for any number of reasons, including extensive compensation, publicity, political leverage, or political reprisal. For example, Gerald Gallinghouse, special prosecutor in the Kraft case, informed the Subcommittee that he decided to postpone the Kraft investigation until after the 1980 President election.[126] This illustrates the latitude he enjoyed in the timing of his investigation. This same latitude could, however, be used for a variety of less admirable motives.

In reaching its finding, the Subcommittee found the views of Arthur Christy particularly persuasive. As a former special prosecutor, Mr. Christy is most familiar with the extensive breadth of the position. He characterized the powers he held as special prosecutor as truly "awesome." Reflecting on his own experience in the job, Mr. Christy discussed a prime area of potential abuse—political aggrandizement:

> I would have to say to the Senators that certainly during the course of the investigation, had I decided that I wanted to use it for personal aggrandizement, I could have. I decided very early on that I would conduct the investigation in as low-keyed a way and in as confidential a way as possible, without any contact with the press in any way.[127]

Mr. Christy also informed the Subcommittee that there were many opportunities in which he could have easily sought media attention for his investigation. For example, he could have "tipped off" the press when Hamilton Jordan came to New York to be interviewed by Christy concerning the Studio 54 allegations.

While the Subcommittee finds that the special prosecutor's powers are indeed extensive, it also believes that true independence is crucial to assure an impartial investigation and public confidence in the prosecutor's findings and decisions. Again, historical experiences with special prosecutors provide evidence for the finding.

In the Carter Peanut Warehouse Case, Attorney General Bell appointed Paul Curran, "special counsel," to investigate allegations of improper financial dealings by the Carter Peanut Warehouse business, yet required that Curran clear all prosecutorial decisions with the Assistant Attorney General, Head of the Criminal Division. This control on the independent counsel brought extensive objections in Congress as nullifying the independence of the investigation. Ultimately, Attorney General Bell withdrew these restrictions.[128]

[124] 28 U.S.C. § 594.
[125] 28 U.S.C. § 596.
[126] Supra, fn. 38, hearing record at 288.
[127] Testimony of Arthur H. Christy before the Subcommittee on Oversight of Government Management, May 22, 1981, hearing record, pp. 132–45.
[128] See supra fn. 48.

Moreover, full investigative tools are necessary to completely dispose of allegations of criminal wrongdoing. Mr. Christy testified that his years of experience as a prosecutor taught him that the powers to grant immunity, issue subpoenas and convene a grand jury are crucial to fully investigate and make sound prosecutorial decisions.[129] Thus, to complete his assigned task, the special prosecutor must have these investigative instruments at his disposal, and they must not be subject to review by the Department of Justice or by the Attorney General. To do so would render the independence of the special prosecutor nominal at best. Once appointed, he should have all investigative tools available to him in order to perform his function.

The Subcommittee recommends three methods of checking the potential abuses by a special prosecutor without compromising his or her independence. First, this goal can be achieved through limiting the number of cases which are referred to a special prosecutor so that the mechanism will not be used for frivolous or minor allegations. The Subcommittee's recommendations to raise the standard which triggers the appointment of a special prosecutor to "reasonable grounds to believe that further investigation or prosecution is warranted" and to allow the Attorney General to consider the credibility of the accuser in conducting a preliminary investigation and follow prosecutorial guidelines in referring cases to a special prosecutor will achieve this result.

Second, the Subcommittee believes that the danger of a needlessly prolonged investigation by the special prosecutor can be minimized by clarifying his authority to dismiss a case referred to him immediately, without further investigation. Although the Act states that the special prosecutor has "full power and independent authority to exercise all investigative and prosecutorial functions,"[130] and the legislative history of the Act recognizes that the special prosecutor has discretion to dismiss allegations,[131] the Act itself does not clearly state that the special prosecutor may dismiss a case with no further investigation, if warranted. Some special prosecutors may interpret the absence of such language as a requirement—or invitation—for the special prosecutor to conduct a new, full-blown investigation. This could lead to unnecessary harrassment of officials covered by the Act. At the hearing, Mr. Rosenfeld discussed his Association's proposal to clarify the present law in this area:

> We therefore believe that it is appropriate for future special prosecutors to understand that they are not required or even expected to necessarily subject officials to exhaustive investigations in circumstances where the Justice Department would quickly dismiss the same charges against private citizens. Rather, the Act itself should be amended to make it clear that a special prosecutor, once appointed, is free to exercise "prosecutorial discretion" as the interests of justice may dictate and consistent with the written guidelines of the Justice Department, including, for example, a decision to conduct only a cursory investigation or indeed to terminate

[129] Supra fn. 33, hearing record at 181.
[130] 28 U.S.C. § 594(a).
[131] Supra fn. 12 at 58.

> the whole matter based only on his review of the file which he gets from the Justice Department, and which led to his appointment.
>
> It's the decision that ought to be independent, and not necessarily a requirement that there must be a full-scale investigation that costs the government $160,000 and the target $100,000 in every case.
>
> Senator COHEN. As a practical matter you have a special prosecutor who's appointed under the provisions of the Act. He takes a quick look at the file, says there's no merit to the allegations. He looks at the DOJ guidelines, and therefore he recommends the case be dismissed. How do you think that would sit with the public, if you're talking about restoring credibility and trust with the American people? How practical is that particular suggestion?
>
> Mr. ROSENFELD. Mr. Chairman, I think as we get into experience with this Act and every appointment of a special prosecutor isn't a cause celebre, I mean the first two got a lot of attention because they were the first two, and because there was a Presidential campaign going on. And I think as we get into more experience with the Act, that's exactly the kind of decision the public is going to accept and it is going to, in Senator Levin's language, institutionalize trust.[132]

To achieve this objective, the Subcommittee recommends that the following language should be added to section 594(f) of the Act;

> The special prosecutor shall have full authority to refrain from prosecution upon such preliminary investigation of the matter as the special prosecutor deems appropriate or to dismiss the allegations without conducting an investigation if to do so would be consistent with the written policies of the Department of Justice.[133]

The Subcommittee further recommends that language of section 594(f) which states that the special prosecutor shall comply with the written policies of the Department of Justice respecting enforcement of criminal laws "to the extent that the special prosecutor deems appropriate"[134] should be amended to require such compliance "whenever possible." This change reflects the Subcommittee's belief that the special prosecutor should comply to the Department of Justice guidelines in most situations in order to assure the fair administration of the law. It also allows the special prosecutor flexibility to deviate from those written guidelines when extenuating circumstances exist. The intent of this charge is to create a presumption that the special prosecutor will follow prosecutorial guidelines. The Subcommittee stresses that the special prosecutor's deviation from established guidelines is the exception rather than the rule, and the special prosecutor should thoroughly explain his reasons for not following Department of Justice policies in his report to the court at the conclusion of his investigation.

[132] Supra fn. 91, hearing record at 169–70.
[133] The subcommittee adopts the language proposed by the Association of the Bar of the City of New York. See hearing record at 193.
[134] 28 U.S.C. § 594(f).

In addition, the Subcommittee recommends that language be added to the Act to specifically allow the special prosecutor to consult with the U.S. Attorney for the district in which the violation was alleged to have occurred. Although this is permissible under present law, the language of the Act should clearly indicate that this is desirable, and consistent with the purpose of the Act. This proposal stemmed from discussions at the hearing regarding the integrity and expertise which U.S. Attorneys throughout the country have. Senator Rudman stated that:

> I believe—and I have had some experience—that the U.S. attorneys around this country, generally speaking, enjoy good reputations and are very much involved in are knowledgeable in procedures of criminal investigation, that they are removed from the Attorney General, even though they work for him, that they are certainly remote from the President.[135]

The Subcommittee believes that the U.S. Attorney can provide valuable assistance to the special prosecutor in determining the policy of the Department and of the particular jurisdiction regarding prosecution for the alleged violation.

This recommendation will help assure that a public official is afforded the same application of law as would be a private citizen, whenever this is possible. Once again, the Subcommittee stresses that the special prosecutor can, under exceptional circumstances, deviate from this policy, provided that he explain his reasons for doing so in the report to the court.

Third, the standard for removal of a special prosecutor should be an effective element in checking potential abuses of his power. The Subcommittee stresses, however, that the special prosecutor must not be easily removable by the President or the Attorney General, for this would substantially undermine the independence of the investigation. The "Saturday Night Massacre" of Watergate in which Archibald Cox was fired by Attorney General Bork because President Nixon believed the special prosecutor to be exceeding the scope of his investigation provides clear historical evidence of the dangers of allowing the President or Attorney General to have extensive removal powers over the special prosecutor.

Testimony received at the hearing leads the Subcommittee to find, however, that the present standard of "extraordinary inpropriety" is undefinable and may present too many opportunities for the special prosecutor to abuse his authority.[136] The Subcommittee recommends that the standard should be amended to allow the Attorney General to remove the special prosecutor "for good cause"—a standard which is used for removal of the heads of independent agencies. This change will allow the Attorney General, and the court which has judicial review of such removals under 28 U.S.C. section 596, to have a developed body of law to govern the standards of removal. In making this recommendation, the Subcommittee stresses that the Attorney General must use this removal power in only extreme, necessary cases, as removal of a special prosecutor severely undermines the public confidence in investigations of wrongdoing by public officials.

[135] Hearing record at 109.
[136] 28 U.S.C. § 596(a); see supra fn. 44.

Under present law, when the special prosecutor is removed, the Attorney General must file a report outlining the grounds for removal with the Senate and House Judicial Committees and the court. The Act provides that the Committees shall make this report available to the public.[137] The Subcommittee views these reporting and disclosure provisions as strong, effective safeguards against dangers that the Attorney General will interfere with the independence of the special prosecutor. Once again, the Subcommittee urges both the courts and Congress to exercise their authority as this check is crucial to public confidence in the investigation of senior officials and the integrity of the special prosecutor process.

As a final note, the Subcommittee wishes to commend the two special prosecutors who have served under the Ethics in Government Act. Both Mr. Christy and Mr. Gallinghouse conducted their investigations with probity, and displayed a high regard for ethics and the fair administration of justice. In making our recommendations, in no way do we assail their integrity. Instead, just as the Act establishes safeguards against abuses by the Attorney General, so too must we guard against abuses by this new officer of the government, the special prosecutor. Indeed, the oft-quoted statement of James Madison justifies why we need to control the powers of the special prosecutor:

> If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls in government would be necessary. In training a government which is to be administered by men over men the great difficulty lies in this, you must first enable the government to control the governed, and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government, but experience has taught mankind the necessity for auxiliary precautions.[138]

The Subcommittee believes that its recommendations will provide such auxiliary precautions without jeopardizing the independence of the special prosecutor.

[137] 28 U.S.C. § 596(a)(2).
[138] 151 Madison, James, The Federalist Papers No. 51.

V. Conclusion

The Subcommittee believes that the findings discussed in this report will be useful to the Congress in ensuring the fair investigation of alleged wrongdoing by government officials and others who are close to Presidential decisionmaking. The recommendations seek to achieve the even administration of justice while preserving both the fact and appearance of impartiality in these investigations.

The Subcommittee hopes that these recommendations will be carried out to the fullest extent possible.

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