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INDEPENDENT COUNSEL

whether a Member of Congress may have violated any Federal criminal law other than a violation classified as a Class B or C misdemeanor or an infraction.

(d) Examination of information to determine need for preliminary investigation.-

(1) Factors to be considered.-In determining under subsection (a) or (c) (or section 592(c)(2)) whether grounds to investigate exist, the Attorney General shall consider only-

(A) the specificity of the information received; and

(B) the credibility of the source of the information.

(2) Time period for making determination.-The Attorney General shall determine whether grounds to investigate exist not later than 30 days after the information is first received. If within that 30-day period the Attorney General determines that the information is not specific or is not from a credible source, then the Attorney General shall close the matter. If within that 30-day period the Attorney General determines that the information is specific and from a credible source, the Attorney General shall, upon making that determination, commence a preliminary investigation with respect to that information. If the Attorney General is unable to determine, within that 30-day period, whether the information is specific and from a credible source, the Attorney General shall, at the end of that 30-day period, commence a preliminary investigation with respect to that information.

(e) Recusal of Attorney General.-

(1) When recusal is required.-

(A) If information received under this chapter involves the Attorney General, the next most senior official in the Department of Justice who is not also recused shall perform the duties assigned under this chapter to the Attorney General.

(B) If information received under this chapter involves a person with whom the Attorney General has a personal or financial relationship, the Attorney General shall recuse himself or herself by designating the next most senior official in the Department of Justice who is not also recused to perform the duties assigned under this chapter to the Attorney General.

(2) Requirements for recusal determination.-Before personally making any other determination under this chapter with respect to information received under this chapter, the Attorney General shall determine under paragraph (1)(B) whether recusal is necessary. The Attorney General shall set forth this determination in writing, identify the facts considered by the Attorney General, and set forth the reasons for the recusal. The Attorney General shall file this determination with any notification or application submitted to the division of the court under this chapter with respect to such information.

§ 591. Applicability of provisions of this chapter

(a) Preliminary investigation with respect to certain covered persons.-The Attorney General shall conduct a preliminary investigation in accordance with section 592 whenever the Attorney General receives information sufficient to constitute grounds to investigate whether any person described in subsection (b) may have violated any Federal criminal law other than a violation classified as a Class B or C misdemeanor or an infraction.

(b) Persons to whom subsection (a) applies.-The persons referred to in subsection (a) are--

- (1) the President and Vice President;
- (2) any individual serving in a position listed in section 5312 of title 5;
- (3) any individual working in the Executive Office of the President who is compensated at a rate of pay at or above level II of the Executive Schedule under section 5313 of title 5;
- (4) any Assistant Attorney General and any individual working in the Department of Justice who is compensated at a rate of pay at or above level III of the Executive Schedule under section 5314 of title 5;
- (5) the Director of Central Intelligence, the Deputy Director of Central Intelligence, and the Commissioner of Internal Revenue;
- (6) the chairman and treasurer of the principal national campaign committee seeking the election or reelection of the President, and any officer of that committee exercising authority at the national level, during the incumbency of the President; and
- (7) any individual who held an office or position described in paragraph (1), (2), (3), (4), or (5) for 1 year after leaving the office or position.

(c) Preliminary investigation with respect to other persons.-

(1) In general.- When the Attorney General determines that an investigation or prosecution of a person by the Department of Justice may result in a personal, financial, or political conflict of interest, the Attorney General may conduct a preliminary investigation of such person in accordance with section 592 if the Attorney General receives information sufficient to constitute grounds to investigate whether that person may have violated Federal criminal law other than a violation classified as a Class B or C misdemeanor or an infraction.

(2) Members of Congress.-When the Attorney General determines that it would be in the public interest, the Attorney General may conduct a preliminary investigation in accordance with section 592 if the Attorney General receives information sufficient to constitute grounds to investigate

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§ 592. Preliminary investigation and application for appointment of an independent counsel

(a) Conduct of preliminary investigation.—

(1) **In general.**—A preliminary investigation conducted under this chapter shall be of such matters as the Attorney General considers appropriate in order to make a determination, under subsection (b) or (c), on whether further investigation is warranted, with respect to each potential violation, or allegation of a violation, of criminal law. The Attorney General shall make such determination not later than 90 days after the preliminary investigation is commenced, except that, in the case of a preliminary investigation commenced after a congressional request under subsection (g), the Attorney General shall make such determination not later than 90 days after the request is received. The Attorney General shall promptly notify the division of the court specified in section 593(a) of the commencement of such preliminary investigation and the date of such commencement.

(2) Limited authority of Attorney General.—

(A) In conducting preliminary investigations under this chapter, the Attorney General shall have no authority to convene grand juries, plea bargain, grant immunity, or issue subpoenas.

(B)(i) The Attorney General shall not base a determination under this chapter that information with respect to a violation of criminal law by a person is not specific and from a credible source upon a determination that such person lacked the state of mind required for the violation of criminal law.

(ii) The Attorney General shall not base a determination under this chapter that there are no reasonable grounds to believe that further investigation is warranted, upon a determination that such person lacked the state of mind required for the violation of criminal law involved, unless there is clear and convincing evidence that the person lacked such state of mind.

(3) **Extension of time for preliminary investigation.**—The Attorney General may apply to the division of the court for a single extension, for a period of not more than 60 days, of the 90-day period referred to in paragraph (1). The division of the court may, upon a showing of good cause, grant such extension.

(b) Determination that further investigation not warranted.—

(1) **Notification of division of the court.**—If the Attorney General, upon completion of a preliminary investigation under this chapter, determines that there are no reasonable grounds to believe that further investigation is warranted, the Attorney General shall promptly so notify the division of the court, and the division of the court shall have no power to appoint an independent counsel with respect to the matters involved.

(2) **Form of notification.**—Such notification shall contain a summary of the information received and a summary of the results of the preliminary investigation.

(c) Determination that further investigation is warranted.—

(1) **Application for appointment of independent counsel.**—The Attorney General shall apply to the division of the court for the appointment of an independent counsel if—

(A) the Attorney General, upon completion of a preliminary investigation under this chapter, determines that there are reasonable grounds to believe that further investigation is warranted; or

(B) the 90-day period referred to in subsection (a)(1), and any extension granted under subsection (a)(3), have elapsed and the Attorney General has not filed a notification with the division of the court under subsection (b)(1).

In determining under this chapter whether reasonable grounds exist to warrant further investigation, the Attorney General shall comply with the written or other established policies of the Department of Justice with respect to the conduct of criminal investigations.

(2) **Receipt of additional information.**—If, after submitting a notification under subsection (b)(1), the Attorney General receives additional information sufficient to constitute grounds to investigate the matters to which such notification related, the Attorney General shall—

(A) conduct such additional preliminary investigation as the Attorney General considers appropriate for a period of not more than 90 days after the date on which such additional information is received; and

(B) otherwise comply with the provisions of this section with respect to such additional preliminary investigation to the same extent as any other preliminary investigation under this section.

(d) **Contents of application.**—Any application for the appointment of an independent counsel under this chapter shall contain sufficient information to assist the division of the court in selecting an independent counsel and in defining that independent counsel's prosecutorial jurisdiction so that the independent counsel has adequate authority to fully investigate and prosecute the subject matter and all matters related to that subject matter.

(e) **Disclosure of information.**—Except as otherwise provided in this chapter or as is deemed necessary for law enforcement purposes, no officer or employee of the Department of Justice or an office of independent counsel may, without leave of the division of the court, disclose to any individual outside the Department of Justice or such office any notification, application, or any other documents, materials, or memorandum supplied to the division of the court under this chapter. Nothing in this chapter shall be

construed as authorizing the withholding of information from the Congress.

(f) **Limitation on judicial review.**—The Attorney General's determination under this chapter to apply to the division of the court for the appointment of an independent counsel shall not be reviewable in any court.

(g) **Congressional request.**—

(1) **By Judiciary Committee or members thereof.**—The Committee on the Judiciary of either House of the Congress, or a majority of majority party members or a majority of all nonmajority party members of either such committee, may request in writing that the Attorney General apply for the appointment of an independent counsel.

(2) **Report by Attorney General pursuant to request.**—Not later than 30 days after the receipt of a request under paragraph (1), the Attorney General shall submit, to the committee making the request, or to the committee on which the persons making the request serve, a report on whether the Attorney General has begun or will begin a preliminary investigation under this chapter of the matters with respect to which the request is made, in accordance with subsection (a) or (c) of section 591, as the case may be. The report shall set forth the reasons for the Attorney General's decision regarding such preliminary investigation as it relates to each of the matters with respect to which the congressional request is made. If there is such a preliminary investigation, the report shall include the date on which the preliminary investigation began or will begin.

(3) **Submission of information in response to congressional request.**—At the same time as any notification, application, or any other document, material, or memorandum is supplied to the division of the court pursuant to this section with respect to a preliminary investigation of any matter with respect to which a request is made under paragraph (1), such notification, application, or other document, material, or memorandum shall be supplied to the committee making the request, or to the committee on which the persons making the request serve. If no application for the appointment of an independent counsel is made to the division of the court under this section pursuant to such a preliminary investigation, the Attorney General shall submit a report to that committee stating the reasons why such application was not made, addressing each matter with respect to which the congressional request was made.

(4) **Disclosure of information.**—Any report, notification, application, or other document, material, or memorandum supplied to a committee under this subsection shall not be revealed to any third party, except that the committee may, either on its own initiative or upon the request of the Attorney General, make public such portion or portions of such report, notification, application, document, material, or memorandum as will not in the committee's judgment prejudice the rights of any individual.

§ 593. Duties of the division of the court

(a) **Reference to division of the court.**—The division of the court to which this chapter refers is the division established under section 49 of this title.

(b) **Appointment and jurisdiction of independent counsel.**—

(1) **Authority.**—Upon receipt of an application under section 592(c), the division of the court shall appoint an appropriate independent counsel and shall define that independent counsel's prosecutorial jurisdiction.

(2) **Qualifications of independent counsel.**—The division of the court shall appoint as independent counsel an individual who has appropriate experience and who will conduct the investigation and any prosecution in a prompt, responsible, and cost-effective manner. The division of the court shall seek to appoint as independent counsel an individual who will serve to the extent necessary to complete the investigation and any prosecution without undue delay. The division of the court may not appoint as an independent counsel any person who holds any office of profit or trust under the United States.

(3) **Scope of prosecutorial jurisdiction.**—In defining the independent counsel's prosecutorial jurisdiction, the division of the court shall assure that the independent counsel has adequate authority to fully investigate and prosecute the subject matter with respect to which the Attorney General has requested the appointment of the independent counsel, and all matters related to that subject matter. Such jurisdiction shall also include the authority to investigate and prosecute Federal crimes, other than those classified as Class B or C misdemeanors or infractions, that may arise out of the investigation or prosecution of the matter with respect to which the Attorney General's request was made, including perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses.

(4) **Disclosure of identity and prosecutorial jurisdiction.**—An independent counsel's identity and prosecutorial jurisdiction (including any expansion under subsection (c)) may not be made public except upon the request of the Attorney General or upon a determination of the division of the court that disclosure of the identity and prosecutorial jurisdiction of such independent counsel would be in the best interests of justice. In any event, the identity and prosecutorial jurisdiction of such independent counsel shall be made public when any indictment is returned, or any criminal information is filed, pursuant to the independent counsel's investigation.

(c) **Expansion of jurisdiction.**—

(1) **In general.**—The division of the court, upon the request of the Attorney General, may expand the prosecutorial jurisdiction of an independent counsel, and such expansion may be in lieu of the appointment of another independent counsel.

(2) **Procedure for request by independent counsel.**—

(A) If the independent counsel discovers or receives information about possible violations of criminal law by persons as provided in section 591, which are not covered by the prosecutorial jurisdiction of the independent counsel, the independent counsel may submit such information to the Attorney General. The Attorney General shall then conduct a preliminary investigation of the information in accordance with the provisions of section 592, except that such preliminary investigation shall not exceed 30 days from the date such information is received. In making the determinations required by section 592, the Attorney General shall give great weight to any recommendations of the independent counsel.

(B) If the Attorney General determines, after according great weight to the recommendations of the independent counsel, that there are no reasonable grounds to believe that further investigation is warranted, the Attorney General shall promptly so notify the division of the court and the division of the court shall have no power to expand the jurisdiction of the independent counsel or to appoint another independent counsel with respect to the matters involved.

(C) If—

(i) the Attorney General determines that there are reasonable grounds to believe that further investigation is warranted; or

(ii) the 30-day period referred to in subparagraph (A) elapses without a notification to the division of the court that no further investigation is warranted,

the division of the court shall expand the jurisdiction of the appropriate independent counsel to include the matters involved or shall appoint another independent counsel to investigate such matters.

(d) **Return for further explanation.**—Upon receipt of a notification under section 592 or subsection (c)(2)(B) of this section from the Attorney General that there are no reasonable grounds to believe that further investigation is warranted with respect to information received under this chapter, the division of the court shall have no authority to overrule this determination but may return the matter to the Attorney General for further explanation of the reasons for such determination.

(e) **Vacancies.**—If a vacancy in office arises by reason of the resignation, death, or removal of an independent counsel, the division of the court shall appoint an independent counsel to complete the work of the independent counsel whose resignation, death, or removal caused the vacancy, except that in the case of a vacancy arising by reason of the removal of an independent counsel, the division of the court may appoint an acting independent counsel to serve until any judicial review of such removal is completed.

(f) **Attorneys' fees.**—

(1) **Award of fees.**—Upon the request of an individual who is the subject of an investigation conducted by an independent counsel pursuant to this chapter, the division of the court may, if no indictment is brought against such individual pursuant to that investigation, award reimbursement for those reasonable attorneys' fees incurred by that individual during that investigation which would not have been incurred but for the requirements of this chapter. The division of the court shall notify the independent counsel who conducted the investigation and the Attorney General of any request for attorneys' fees under this subsection.

(2) **Evaluation of fees.**—The division of the court shall direct such independent counsel and the Attorney General to file a written evaluation of any request for attorney's fees under this subsection, addressing—

- (A) the sufficiency of the documentation;
- (B) the need or justification for the underlying item;
- (C) whether the underlying item would have been incurred but for the requirements of this chapter; and
- (D) the reasonableness of the amount of money requested.

(g) **Disclosure of information.**—The division of the court may, subject to section 594(h)(2), allow the disclosure of any notification, application, or any other document, material, or memorandum supplied to the division of the court under this chapter.

(h) **Amicus curiae briefs.**—When presented with significant legal issues, the division of the court may disclose sufficient information about the issues to permit the filing of timely amicus curiae briefs.

§ 594. **Authority and duties of an independent counsel**

(a) **Authorities.**—Notwithstanding any other provision of law, an independent counsel appointed under this chapter shall have, with respect to all matters in such independent counsel's prosecutorial jurisdiction established under this chapter, 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 office or employee of the Department of Justice, except that the Attorney General shall exercise direction or control as to those matters that specifically require the Attorney General's personal action under section 2516 of title 18. Such investigative and prosecutorial functions and powers shall include—

- (1) conducting proceedings before grand juries and other investigations;
- (2) participating in court proceedings and engaging in any litigation, including civil and criminal matters, that such independent counsel considers necessary;

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(3) appealing any decision of a court in any case or proceeding in which such independent counsel participates in an official capacity;

(4) reviewing all documentary evidence available from any source;

(5) determining whether to contest the assertion of any testimonial privilege;

(6) receiving appropriate national security clearances and, if necessary, contesting in court (including, where appropriate, participating in in camera proceedings) any claim of privilege or attempt to withhold evidence on grounds of national security;

(7) making applications to any Federal court for a grant of immunity to any witness, consistent with applicable statutory requirements, or for warrants, subpoenas, or other court orders, and, for purposes of sections 6003, 6004, and 6005 of title 18, exercising the authority vested in a United States attorney or the Attorney General;

(8) inspecting, obtaining, or using the original or a copy of any tax return, in accordance with the applicable statutes and regulations, and, for purposes of section 6103 of the Internal Revenue Code of 1986 and the regulations issued thereunder, exercising the powers vested in a United States attorney or the Attorney General;

(9) initiating and conducting prosecutions in any court of competent jurisdiction, framing and signing indictments, filing informations, and handling all aspects of any case, in the name of the United States; and

(10) consulting with the United States attorney for the district in which any violation of law with respect to which the independent counsel is appointed was alleged to have occurred.

(b) Compensation.—

(1) **In General.**—An independent counsel appointed under this chapter shall receive compensation at the per diem rate equal to the annual rate of basic pay payable for level IV of the Executive Schedule under section 5315 of title 5.

(2) **Travel expenses.**—Except as provided in paragraph (3), an independent counsel and persons appointed under subsection (c) shall be entitled to the payment of travel expenses as provided by subchapter I of chapter 57 of title 5, United States Code, including travel, per diem, and subsistence expenses in accordance with section 5703 of title 5.

(3) Travel to primary office.—

(A) **In general.**—After 1 year of service under this chapter, an independent counsel and persons appointed under subsection (c) shall not be entitled to the payment of travel, per diem, or subsistence expenses under subchapter I of chapter 57 of title 5, United States Code, for the purpose of

commuting to or from the city in which the primary office of the independent counsel or person is located. The 1-year period may be extended by 6 months if the employee assigned duties under subsection (1)(1)(A)(iii) certifies that the payment is in the public interest to carry out the purposes of this chapter.

(B) **Relevant factors.**—In making any certification under this paragraph with respect to travel and subsistence expenses of an independent counsel or person appointed under subsection (c), such employee shall consider, among other relevant factors—

(i) the cost to the Government of reimbursing such travel and subsistence expenses;

(ii) the period of time for which the independent counsel anticipates that the activities of the independent counsel or person, as the case may be, will continue;

(iii) the personal and financial burdens on the independent counsel or person, as the case may be, of relocating so that such travel and subsistence expenses would not be incurred; and

(iv) the burdens associated with appointing a new independent counsel, or appointing another person under subsection (c), to replace the individual involved who is unable or unwilling to so relocate.

(c) **Additional personnel.**—For the purposes of carrying out the duties of an office of independent counsel, such independent counsel may appoint, fix the compensation, and assign the duties of such employees as such independent counsel considers necessary (including investigators, attorneys, and part-time consultants). The positions of all such employees are exempted from the competitive service. Such employees shall be compensated at levels not to exceed those payable for comparable positions in the Office of United States Attorney for the District of Columbia under sections 548 and 550, but in no event shall any such employee be compensated at a rate greater than the rate of basic pay payable for level ES-4 of the Senior Executive Service Schedule under section 5382 of title 5, as adjusted for the District of Columbia under section 5304 of that title regardless of the locality in which an employee is employed.

(d) Assistance of Department of Justice.—

(1) **In carrying out functions.**—An independent counsel may request assistance from the Department of Justice in carrying out the functions of the independent counsel, and the Department of Justice shall provide that assistance, which may include access to any records, files, or other materials relevant to matters within such independent counsel's prosecutorial jurisdiction, and the use of the resources and personnel necessary to perform such independent counsel's duties. At the request of an independent counsel, prosecutors, administrative personnel, and other employees of the Department of Justice may be detailed to the staff of the independent counsel.

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(2) **Payment of and reports on expenditures of independent counsel.**—The Department of Justice shall pay all costs relating to the establishment and operation of any office of independent counsel. The Attorney General shall submit to the Congress, not later than 30 days after the end of each fiscal year, a report on amounts paid during that fiscal year for expenses of investigations and prosecutions by independent counsel. Each such report shall include a statement of all payments made for activities of independent counsel but may not reveal the identity or prosecutorial jurisdiction of any independent counsel which has not been disclosed under section 593(b)(4).

(e) **Referral of other matters to an independent counsel.**—An independent counsel may ask the Attorney General or the division of the court to refer to the independent counsel matters related to the independent counsel's prosecutorial jurisdiction, and the Attorney General or the division of the court, as the case may be, may refer such matters. If the Attorney General refers a matter to an independent counsel on the Attorney General's own initiative, the independent counsel may accept such referral if the matter relates to the independent counsel's prosecutorial jurisdiction. If the Attorney General refers any matter to the independent counsel pursuant to the independent counsel's request, or if the independent counsel accepts a referral made by the Attorney General on the Attorney General's own initiative, the independent counsel shall so notify the division of the court.

(f) **Compliance with policies of the Department of Justice.**—

(1) **In general.**—An independent counsel shall, except to the extent that to do so would be inconsistent with the purposes of this chapter, comply with the written or other established policies of the Department of Justice respecting enforcement of the criminal laws. To determine these policies and policies under subsection (1)(1)(B), the independent counsel shall, except to the extent that doing so would be inconsistent with the purposes of this chapter, consult with the Department of Justice.

(2) **National Security.**—An independent counsel shall comply with guidelines and procedures used by the Department in the handling and use of classified material.

(g) **Dismissal of matters.**—The independent counsel shall have full authority to dismiss matters within the independent counsel's prosecutorial jurisdiction without conducting an investigation or at any subsequent time before prosecution, if to do so would be consistent with the written or other established policies of the Department of Justice with respect to the enforcement of criminal laws.

(h) **Reports by independent counsel.**—

(1) **Required reports.**—An independent counsel shall—

(A) file with the division of the court, with respect to the 6-month period beginning on the date of his or her appointment, and with respect to each 6-month period

there-after until the office of that independent counsel terminates, a report which identifies and explains major expenses, and summarizes all other expenses, incurred by that office during the 6-month period with respect to which the report is filed, and estimates future expenses of that office; and

(B) before the termination of the independent counsel's office under section 596(b), file a final report with the division of the court, setting forth fully and completely a description of the work of the independent counsel, including the disposition of all cases brought.

(2) **Disclosure of information in reports.**—The division of the court may release to the Congress, the public, or any appropriate person, such portions of a report made under this subsection as the division of the court considers appropriate. The division of the court shall make such orders as are appropriate to protect the rights of any individual named in such report and to prevent undue interference with any pending prosecution. The division of the court may make any portion of a final report filed under paragraph (1)(B) available to any individual named in such report for the purposes of receiving within a time limit set by the division of the court any comments or factual information that such individual may submit. Such comments and factual information, in whole or in part, may, in the discretion of the division of the court, be included as an appendix to such final report.

(3) **Publication of Reports.**—At the request of an independent counsel, the Public Printer shall cause to be printed any report previously released to the public under paragraph (2). The independent counsel shall certify the number of copies necessary for the public, and the Public Printer shall place the cost of the required number to the debit of such independent counsel. Additional copies shall be made available to the public through the depository library program and Superintendent of Documents sales program pursuant to sections 1702 and 1903 of title 44.

(i) **Independence from Department of Justice.**—Each independent counsel appointed under this chapter, and the persons appointed by that independent counsel under subsection (c), are separate from and independent of the Department of Justice for purposes of sections 202 through 209 of title 18.

(j) **Standards of conduct applicable to independent counsel, persons serving in the office of an independent counsel, and their law firms.**—

(1) **Restrictions on employment while independent counsel and appointees are serving.**—

(A) During the period in which an independent counsel is serving under this chapter—

(i) such independent counsel, and

(ii) any person associated with a firm with which such independent counsel is associated,

may not represent in any matter any person involved in any investigation or prosecution under this chapter.

(B) During the period in which any person appointed by an independent counsel under subsection (c) is serving in the office of independent counsel, such person may not represent in any matter any person involved in any investigation or prosecution under this chapter.

(2) Post employment restrictions on independent counsel and appointees.—

(A) Each independent counsel and each person appointed by that independent counsel under subsection (c) may not, for 3 years following the termination of the service under this chapter of that independent counsel or appointed person, as the case may be, represent any person in any matter if that individual was the subject of an investigation or prosecution under this chapter that was conducted by that independent counsel.

(B) Each independent counsel and each person appointed by that independent counsel under subsection (c) may not, for 1 year following the termination of the service under this chapter of that independent counsel or appointed person, as the case may be, represent any person in any matter involving any investigation or prosecution under this chapter.

(3) **One-year ban on representation by members of firms of independent counsel.**—Any person who is associated with a firm with which an independent counsel is associated or becomes associated after termination of the service of that independent counsel under this chapter may not, for 1 year following such termination, represent any person in any matter involving any investigation or prosecution under this chapter.

(4) Definitions.—For purposes of this subsection—

(A) the term "firm" means a law firm whether organized as a partnership or corporation; and

(B) a person is "associated" with a firm if that person is an officer, director, partner, or other member or employee of that firm.

(5) **Enforcement.**—The Attorney General and the Director of the Office of Government Ethics have authority to enforce compliance with this subsection.

(k) Custody of records of an independent counsel.—

(1) **Transfer of records.**—Upon termination of the office of an independent counsel, that independent counsel shall transfer to the Archivist of the United States all records which have been created or received by that office. Before this transfer, the independent counsel shall clearly identify which of these records are subject to rule 6(e) of the Federal Rules of Criminal Procedure as grand jury materials and which of these records have been classified as national security information. Any records which were compiled by an

independent counsel and, upon termination of the independent counsel's office, were stored with the division of the court or elsewhere before the enactment of the Independent Counsel Reauthorization Act of 1987, shall also be transferred to the Archivist of the United States by the division of the court or the person in possession of such records.

(2) **Maintenance, use, and disposal of records.**—Records transferred to the Archivist under this chapter shall be maintained, used, and disposed of in accordance with chapters 21, 29, and 33 of title 44.

(3) Access to records.—

(A) **In general.**—Subject to paragraph (4), access to the records transferred to the Archivist under this chapter shall be governed by section 552 of title 5.

(B) **Access by Department of Justice.**—The Archivist shall, upon written application by the Attorney General, disclose any such records to the Department of Justice for purposes of an ongoing law enforcement investigation or court proceeding, except that, in the case of grand jury materials, such records shall be so disclosed only by order of the court of jurisdiction under rule 6(e) of the Federal Rules of Criminal Procedure.

(C) **Exception.**—Notwithstanding any restriction on access imposed by law, the Archivist and persons employed by the National Archives and Records Administration who are engaged in the performance of normal archival work shall be permitted access to the records transferred to the Archivist under this chapter.

(4) **Records provided by Congress.**—Records of an investigation conducted by a committee of the House of Representatives or the Senate which are provided to an independent counsel to assist in an investigation or prosecution conducted by that independent counsel—

(A) shall be maintained as a separate body of records within the records of the independent counsel; and

(B) shall, after the records have been transferred to the Archivist under this chapter, be made available, except as provided in paragraph (3)(B) and (C), in accordance with the rules governing release of the records of the House of Congress that provided the records to the independent counsel.

Subparagraph (B) shall not apply to those records which have been surrendered pursuant to grand jury or court proceedings.

(l) Cost Controls and Administrative Support.—

(1) Cost Controls.—

(A) **In general.**—An independent counsel shall—

(i) conduct all activities with due regard for expense;

(ii) authorize only reasonable and lawful expenditures; and

(iii) promptly, upon taking office, assign to a specific employee the duty of certifying that expenditures of the independent counsel are reasonable and made in accordance with law.

(B) **Liability for Invalid Certification.**—An employee making a certification under subparagraph (A)(iii) shall be liable for an invalid certification to the same extent as a certifying official certifying a voucher is liable under section 3528 of title 31.

(C) **Department of Justice Policies.**—An independent counsel shall comply with the established policies of the Department of Justice respecting expenditures of funds, except to the extent that compliance would be inconsistent with the purposes of this chapter.

(2) **Administrative Support.**—The Director of the Administrative Office of the United States Courts shall provide administrative support and guidance to each independent counsel. No officer or employee of the Administrative Office of the United States Courts shall disclose information related to an independent counsel's expenditures, personnel, or administrative acts or arrangements without the authorization of the independent counsel.

(3) **Office Space.**—The Administrator of General Services, in consultation with the Director of the Administrative Office of the United States Courts, shall promptly provide appropriate office space for each independent counsel. Such office space shall be within a Federal building unless the Administrator of General Services determines that other arrangements would cost less. Until such office space is provided, the Administrative Office of the United States Courts shall provide newly appointed independent counsels immediately upon appointment with appropriate, temporary office space, equipment, and supplies.

§ 595. Congressional oversight

(a) Oversight of conduct of independent counsel.—

(1) **Congressional oversight.**—The appropriate committees of the Congress shall have oversight jurisdiction with respect to the official conduct of any independent counsel appointed under this chapter, and such independent counsel shall have the duty to cooperate with the exercise of such oversight jurisdiction.

(2) **Reports to Congress.**—An independent counsel appointed under this chapter shall submit to the Congress annually a report on the activities of the independent counsel, including a description of the progress of any investigation or prosecution conducted by the independent counsel. Such report may omit any matter that in the judgment of the

independent counsel should be kept confidential, but shall provide information adequate to justify the expenditures that the office of the independent counsel has made.

(b) **Oversight of conduct of Attorney General.**—Within 15 days after receiving an inquiry about a particular case under this chapter, which is a matter of public knowledge, from a committee of the Congress with jurisdiction over this chapter, the Attorney General shall provide the following information to that committee with respect to that case:

(1) When the information about the case was received.

(2) Whether a preliminary investigation is being conducted, and if so, the date it began.

(3) Whether an application for the appointment of an independent counsel or a notification that further investigation is not warranted has been filed with the division of the court, and if so, the date of such filing.

(c) **Information relating to impeachment.**—An independent counsel shall advise the House of Representatives of any substantial and credible information which such independent counsel receives, in carrying out the independent counsel's responsibilities under this chapter, that may constitute grounds for an impeachment. Nothing in this chapter or section 49 of this title shall prevent the Congress or either House thereof from obtaining information in the course of an impeachment proceeding.

§ 596. Removal of an independent counsel; termination of office

(a) Removal; report on removal.—

(1) **Grounds for removal.**—An independent counsel appointed under this chapter may be removed from office, other than by impeachment and conviction, only by the personal action of the Attorney General and only for good cause, physical or mental disability (if not prohibited by law protecting persons from discrimination on the basis of such a disability), or any other condition that substantially impairs the performance of such independent counsel's duties.

(2) **Report to division of the court and Congress.**—If an independent counsel is removed from office, the Attorney General shall promptly submit to the division of the court and the Committees on the Judiciary of the Senate and the House of Representatives a report specifying the facts found and the ultimate grounds for such removal. The committees shall make available to the public such report, except that each committee may, if necessary to protect the rights of any individual named in the report or to prevent undue interference with any pending prosecution, postpone or refrain from publishing any or all of the report. The division of the court may release any or all of such report in accordance with section 594(h)(2).

(3) **Judicial review of removal.**—An independent counsel removed from office may obtain judicial review of the

removal in a civil action commenced in the United States District Court for the District of Columbia. A member of the division of the court may not hear or determine any such civil action or any appeal of a decision in any such civil action. The independent counsel may be reinstated or granted other appropriate relief by order of the court.

(b) Termination of office.--

(1) Termination by action of independent counsel.--

An office of independent counsel shall terminate when--

(A) the independent counsel notifies the Attorney General that the investigation of all matters within the prosecutorial jurisdiction of such independent counsel or accepted by such independent counsel under section 594(e), and any resulting prosecutions, have been completed or so substantially completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions; and

(B) the independent counsel files a final report in compliance with section 594(h)(1)(B).

(2) Termination by division of the court.--

The division of the court, either on its own motion or upon the request of the Attorney General, may terminate an office of independent counsel at any time, on the ground that the investigation of all matters within the prosecutorial jurisdiction of such independent counsel or accepted by such independent counsel under section 594(e), and any resulting prosecutions, have been completed or so substantially completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions. At the time of such termination, the independent counsel shall file the final report required by section 594(h)(1)(B). If the Attorney General has not made a request under this paragraph, the division of the court shall determine on its own motion whether termination is appropriate under this paragraph no later than 2 years after the appointment of an independent counsel, at the end of the succeeding 2-year period, and thereafter at the end of each succeeding 1-year period.

(c) Audits.--

(1) On or before June 30 of each year, an independent counsel shall prepare a statement of expenditures for the 6 months that ended on the immediately preceding March 31. On or before December 31 of each year, an independent counsel shall prepare a statement of expenditures for the fiscal year that ended on the immediately preceding September 30. An independent counsel whose office is terminated prior to the end of the fiscal year shall prepare a statement of expenditures on or before the date that is 90 days after the date on which the office is terminated.

(2) The Comptroller General shall--

(A) conduct a financial review of a mid-year statement and a financial audit of a year-end statement and statement on termination; and

(B) report the results to the Committee on the Judiciary and the Committee on Governmental Affairs of the Senate and the Committee on the Judiciary and the Committee on Government Operations of the House of Representatives not later than 90 days following the submission of each such statement.

§ 597. Relationship with Department of Justice

(a) Suspension of other investigations and proceedings.-- Whenever a matter is in the prosecutorial jurisdiction of an independent counsel or has been accepted by an independent counsel under section 594(e), the Department of Justice, the Attorney General, and all other officers and employees of the Department of Justice shall suspend all investigations and proceedings regarding such matter, except to the extent required by section 594(d)(1), and except insofar as such independent counsel agrees in writing that such investigation or proceedings may be continued by the Department of Justice.

(b) Presentation as amicus curiae permitted.-- Nothing in this chapter shall prevent the Attorney General or the Solicitor General from making a presentation as amicus curiae to any court as to issues of law raised by any case or proceeding in which an independent counsel participates in an official capacity or any appeal of such a case or proceeding.

§ 598. Severability

If any provision of this chapter or the application thereof to any person or circumstance is held invalid, the remainder of this chapter and the application of such provision to other persons not similarly situated or to other circumstances shall not be affected by such invalidation.

§ 599. Termination of effect of chapter

This chapter shall cease to be effective five years after the date of the enactment of the Independent Counsel Reauthorization Act of 1994, except that this chapter shall continue in effect with respect to then pending matters before an independent counsel that in the judgment of such counsel require such continuation until that independent counsel determines such matters have been completed.

§ 6. Report on White House Office Personnel

(a) Submission of Report.-- On July 1 of each year, the President shall submit a report described in subsection (b) to the Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House of Representatives.

(b) Contents.-- A report under subsection (a) shall, except as provided in subsection (c), include--

(1) a list of each individual--

10

- (A) employed by the White House Office; or
- (B) detailed to the White House Office; and

(2) with regard to each individual described in paragraph (1), the individual's-

- (A) name;
- (B) position and title; and
- (C) annual rate of pay.

(c) **Exclusion from Report.**-If the President determines that disclosure of any item of information described in subsection (b) with respect to any particular individual would not be in the interest of the national defense or foreign policy of the United States-

(1) a report under subsection (a) shall-

(A) exclude such information with respect to that individual; and

(B) include a statement of the number of individuals with respect to whom such information has been excluded; and

(2) at the request of the Committee on Governmental Affairs of the Senate or the Committee on Government Operations of the House of Representatives, the information that was excluded from the report shall be made available for inspection by such committee.

§ 7. Transition Provisions.-

(a) **In general.**-Except as provided in this section, the amendments made by this Act shall apply with respect to independent counsels appointed before, on, or after the date of enactment of this Act.

(b) **Assignment of employee to certify expenditures.**-An independent counsel appointed prior to the date of enactment of this Act shall assign to an employee the duty of certifying expenditures, as required by section 594(l) of title 28, United States Code, as added by section 3(a), by the date that is 30 days after the date of enactment of this Act.

(c) **Office space.**-The Administrator of General Services, in applying section 594(l)(3) of title 28, United States Code, as added by section 3(a), to determine whether the office of an independent counsel appointed prior to the date of enactment of this Act should be moved to a Federal building, shall take into account the moving, legal, and other expenses that might arise if the office were moved.

(d) **Travel and subsistence expenses.**-For purposes of the restrictions on reimbursement of travel and subsistence expenses of an independent counsel and employees of an office of independent counsel contained in paragraph (3) of section 594(b) of title 28, United States Code, as amended by section 3(b), as applied to the office of an independent counsel appointed before the date of enactment of this Act,

the 1-year service period shall begin on the date of enactment of this Act.

(e) **Rates of compensation.**-The limitation on rates of compensation of employees of an office of independent counsel contained in the last sentence of section 594(c) of title 28, United States Code, as amended by section 3(c), shall not be applied to cause a reduction in the rate of compensation of an employee appointed before the date of enactment of this Act.

(f) **Periodic Reappointment.**-The determinations by the division of the court contained in the last sentence of section 596(b)(2) of title 28, United States Code, as amended by section 3(h), shall, for the office of an independent counsel appointed before the date of enactment of this Act, be required no later than 1 year after the date of enactment of this Act and at the end of each succeeding 1-year period.

(g) **Reporting requirements.**-No amendment made by this Act that establishes or modifies a requirement that any person submit a report to any other person with respect to an activity occurring during any time period shall be construed to require that a report submitted prior to the date of enactment of this Act, with respect to that time period be supplemented to include information with respect to such activity.

(h) **Regulatory Independent Counsel.**-Notwithstanding the restriction in section 593(b)(2) of title 28, United States Code, the division of the court described in section 49 of that title may appoint as an independent counsel any individual who, on the date of enactment of this Act, is serving as a regulatory independent counsel under parts 600 and 603 of title 28, Code of Federal Regulations. If such an individual is so appointed, such an independent counsel shall comply with chapter 40 of title 28, United States Code, as amended by this Act, in the same manner and to the same extent as an independent counsel appointed before the date of enactment of this Act is required to comply with that chapter, except that subsection (f) of this section shall not apply to such an independent counsel.

(i) **White House personnel report.**-Section 6 shall take effect on January 1, 1995.

MEMORANDUM

TO: Merrick B. Garland
Principal Associate Deputy
Attorney General

FROM: Janis A. Sposato
Deputy Assistant Attorney General
Law and Policy
Justice Management Division

SUBJECT: Ethics Provisions of Independent Counsel Act

As you may recall from our prior discussions, I have received on behalf of the Department a legal opinion from Kirkland & Ellis, the law firm of Whitewater Independent Counsel Kenneth Starr.¹ The same memorandum was sent to the Office of Government Ethics. Kirkland & Ellis sent the memorandum to us as the agencies with enforcement responsibility for Section 594(j)(1) of the Independent Counsel Act to advise us of the interpretation that they have given to that section as applied to the law firm of an Independent Counsel (IC).² Kirkland & Ellis is not seeking any reply to their memorandum.

¹ I accepted this assignment at your direction because the Office of Legal Counsel did not want to accept work relating to the Whitewater Independent Counsel.

² The Attorney General and the Director, Office of Government Ethics have "authority to enforce compliance" with this provision. 28 USC § 594 (j)(5). On the other hand, the intended enforcement mechanism is somewhat obscure. There are no criminal or civil penalties mentioned in the statute, and the removal provision of § 596 is presumably of limited significance in matters involving an IC's law firm.

Statutory Construction

? - substance?

Section 594(j)(1) provides that neither the IC nor his firm may represent "in any matter any person involved in any investigation or prosecution" under the Act. The text of the section has a very broad sweep, covering not only matters relating to any IC investigation, but also matters unrelated to any IC investigation where the client is a "person involved" in an IC investigation. The latter application at an extreme would mean that a firm of an IC cannot continue to represent a longstanding client in matters completely unrelated to any IC investigation if that client is involved as even a minor witness in a matter before a different IC from the one employed by the law firm.

The Kirkland & Ellis interpretation would apply the provision with full force to an IC personally, and it would apply it with limited force to the law firm. The Kirkland & Ellis interpretation would not apply the provision to the firm's representations on non-IC matters of clients who are involved in investigations conducted by IC's other than the one employed by the firm.

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However appealing as a matter of policy, the text of the statute does not support the Kirkland & Ellis interpretation. The text is clear on its face, and it applies identically to the IC's and their law firms. While I personally agree that the impact on law firms may be broader than Congress realized, the Kirkland & Ellis

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interpretation essentially rewrites the provision without any legislative sanction or guidance.

The legislative history of the provision shows that the House and Senate bills each had different provisions on this subject, and that the final version combined elements of each. There is virtually no discussion in the Conference Report or floor debate of the intended impact of the final version, which has a considerably broader impact on law firms than either the House or Senate bill.

- The original House bill would have prohibited an IC's law firm from representing "any person in any matter involving any investigation or prosecution under this chapter." H. Rep. No. 316, 100th Cong., 1st Sess. (1987) (emphasis added) This version did not prohibit representation in matters unrelated to an IC investigation.
- The Senate version would have barred the IC but not his law firm from serving as "counsel or cocounsel to a person who is subject to any proceedings under this chapter." S. 1293, § 594(1)(2)(A). The Senate version, like the final enactment, would have prohibited representations in matters unrelated to any IC investigation, but unlike the final enactment it only applied to ICs themselves.

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The final version seems to have taken the broad approach of the Senate and applied it to the law firms as well as the ICs. It did so by making a slight change in the order of the phrases in the House bill.

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- The final enactment prohibits ICs and their law firms from representing "in any matter any person involved in any investigation or prosecution" under the Act. Section 594(j)(1) (emphasis added)

Given the final text and procedural history, I see no alternative but to give the language its plain meaning.

Enforcement Policy

The absence of any obvious enforcement mechanism for this provision makes development of an enforcement policy something of an empty exercise. On the other hand, we are in the difficult position of having a shared, but clear, enforcement responsibility for this provision, and being on notice that law firms have not necessarily conformed their activities to the literal text of the provision. I think that it is unwise to allow this situation to continue indefinitely, and I recommend that we work with the Office of Government Ethics to clarify with the Congress [1) our enforcement responsibilities and] 2) the desired scope of disqualification for law firms. This opens a

what is
the
view?

variety of issues about the best way and time to approach Congress about this, and the nature of any policy recommendations that we should make on these issues. While I have some thoughts that I am willing to contribute to such discussions, I know that there will be others who will approach this from a variety of different vantage points, and I do not want to preclude a full discussion of the issues by setting forth my own preliminary thoughts at this early stage.

Let me know how you would like to proceed.

KIRKLAND & ELLIS
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

655 Fifteenth Street, N.W.
Washington, D.C. 20005

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(202) 879-5000

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September 30, 1994

Janis A. Sposato
Deputy Assistant Attorney General
Law and Policy
Department of Justice, Room 1111
10th and Constitution Avenue, N.W.
Washington D.C. 20530

Re: Interpretation of Subsection 594 (j)(1) of the Independent Counsel Act

Dear Ms. Sposato:

Per our conversation earlier this week, this letter duplicates the submission which we made on September 23, 1994 to Stephen Potts, Director, Office of Government Ethics (OGE). Our partner, Edward W. Warren, met on that day with Mr. Potts and other OGE officials to explain the position taken in this letter and to respond to any questions it might raise. We respectfully request a similar opportunity for him to meet with you and others at the Department.

Our partner, former Judge Kenneth W. Starr, was appointed by the Special Division of the United States Court of Appeals as Independent Counsel in the Whitewater investigation. Since that time, we have familiarized ourselves with the provisions of the Independent Counsel Act (ICA) and how they might apply to our firm.

This letter sets out the interpretation that Kirkland & Ellis plans to give to subsection 594(j)(1) of the Act. That subsection provides that neither the Independent Counsel (IC) nor his firm may represent "in any matter any person involved in any investigation or prosecution" under the Act.

In light of this language, Kirkland & Ellis sought the advice of outside counsel, former United States Solicitor General and Harvard Law Professor Charles Fried, regarding the potential applicability of subsection 594(j)(1) to our firm's representation in entirely unrelated matters of persons who may happen to be involved in IC investigations conducted by persons other than Judge Starr.

Professor Fried advised us that subsection 594(j)(1) should not be read to preclude Kirkland & Ellis from representing such persons except in connection with other pending IC

KIRKLAND & ELLIS

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September 30, 1994
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investigations. As he explains, this opinion is consistent with the practice of all other ICs and their law firms since the ICA was amended in 1987 to add subsection 594(j)(1). Having sought and provided the attached opinion to you, we plan to follow Professor Fried's advice as more fully summarized below.

1. The issue for the IC's law firm posed by the text of subsection 594(j)(1).

Subsection 594(j)(1), added in the 1987 amendments to the ICA, contains provisions that relate to private client representations that can be undertaken, inter alia, by the IC's law firm.

- The original House bill would have prohibited the IC's law firm from representing "any person in any matter involving any investigation or prosecution under this chapter." H. Rep. No. 316, 100th Cong., 1st Sess. (1987) (emphasis added).
- The Senate version would have barred the IC but not his law firm from serving as "counsel or cocounsel to a person who is subject to any proceedings under this chapter." S. 1293, § 594(l)(2)(A).
- Both versions thus applied to representations in IC investigations, and neither prohibited a firm from continuing to serve its clients in matters unrelated to such investigations.

Without any indication that it was changing this rule, the House-Senate Conference "combine[d] elements of the House bill and the Senate amendment," to produce a final version which prohibits the IC, his law firm and the IC staff from representing "in any matter any person involved in any investigation under this chapter." H.R. Conf. Rep. No. 452, 100th Cong., 1st Sess. 35 (1987) (emphasis added).

While it does not seem to have been Congress' intent, the final language could be read more broadly than either the House or Senate versions. Thus, by reversing the order of the expressions "any person" and "in any matter" found in the House bill and by changing "involving" to "involved in," subsection 594(j)(1) as enacted could be read to prohibit firms such as ours from representing clients -- even in unrelated matters -- if the client is "involved in" any IC investigation, whether conducted by our partner or another IC. When coupled with the fact that the very existence of an IC investigation may be entirely secret, no IC who remains in private practice (or his law firm) could possibly be assured of being in compliance with subsection 594(j)(1) read so broadly.

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Nothing in the legislative history indicates that Congress intended to make such a sweeping change from the House and Senate versions. To the contrary, the changes made by Congress in 1987 appear to have been prompted by two concerns.

- First, the Department of Justice (DOJ) in March, 1987 had reversed a prior interpretation and decided to treat ICs and their staffs as DOJ employees, thereby subjecting them to much more stringent earnings and post-employment restrictions -- a position which the Senate Report characterized as "unnecessarily harsh and detrimental to the quality of persons that will agree to serve in the offices of independent counsels." S. Rep. No. 123, 100th Cong., 1st Sess. 13 (1987).
- Second, Congress wanted to stop the "troubling practice" of "at least one independent counsel and one independent counsel staff member" who served during their tenure as "defense counsel in other, ongoing independent counsel proceedings." *Ibid.*

These concerns are addressed: (1) by subsection 594(i) (which declares the IC and his staff to be "separate from and independent of" DOJ); (2) by subsection 594(j)(1) (as read to preclude the IC and his firm from representing persons "involved in" another IC investigation in that investigation); and (3) by subsections 594(j)(2)&(3) (which contain special post-employment restrictions on the IC, his law firm, and the IC's staff that are less stringent than those that would otherwise apply to regular government employees returning to private practice).

NOT AN
IMPAUSIBLE
READING

Despite these considerations, the text of subsection 594(j)(1) could be interpreted differently. We accordingly sought and obtained an independent opinion as to its requirements from Professor Fried. The steps we and Judge Starr plan to take in light of Professor Fried's opinion, and the substance of Professor Fried's opinion as it relates to representation in unrelated matters of persons involved in another IC investigation, are set out below.

2. Our interpretation of subsection 594(j)(1) as guided by Professor Fried.

In light of Professor Fried's opinion, we have taken the following steps to comply with the letter and the spirit of subsection 594(j)(1). First, we have provided Judge Starr with a full list of active Kirkland & Ellis clients. While this list is confidential and hence may not be shared with persons outside of the firm, Judge Starr, as our partner, can use it appropriately to determine the firm's compliance with subsection 594(j)(1) in his own investigation. In addition, Kirkland & Ellis does not now, and will not during Judge Starr's appointment, represent any client in any of the other pending IC investigations. Finally, Judge Starr has indicated that he will not represent any client who, so far as he can ascertain, is "involved in" any other IC investigation.

KIRKLAND & ELLIS

Ms. Janis A. Sposato
September 30, 1994
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There remains, however, the question of whether Kirkland & Ellis is prevented by subsection 594(j)(1) from representing, in unrelated matters, a client who may now, or in the future, be "involved in" an IC investigation conducted by someone other than our partner. Professor Fried concludes regarding that question that, "[t]hough the text may be read to require such disqualifications," that was not Congress' intention in subsection 594(j)(1). See p.2. First, it would be extremely difficult "to administer or comply with" such a rule since "Independent Counsel investigations are not always public, and even for those that are it may be difficult or impossible for persons not conducting them to know who are their subjects and who is involved in them." Id. Moreover, the "possibility of any conflict of interest" in such situations is simply too "remote and too inconsequential." Id. at 10.

Equally important, if the Act were interpreted to require such disqualifications, it would become "impossible for a member of a national firm to serve as an Independent Counsel without resigning from the firm." Id. This would contradict the "legislative history and structure of the Act" both of which envision that "Independent Counsels will be drawn from among the leading members of the bar who may remain members of their firm." Id. at 2 (emphasis added). Indeed, as Professor Fried notes, subsection 594(j) "was passed as part of an effort to remove an analogous impediment that had been imposed by a change in policy by the Department of Justice." Id. Moreover, "[w]ith one exception, all Independent Counsels have remained members of their firms," and "it appears that" no firms remaining associated with Independent Counsels have adopted" the "extreme interpretation" permitted by the text of subsection 594(j)(1). Id. Accordingly, Professor Fried concludes that: "I do not believe that you should interpret the statute to extend to these unrelated representations." Id.

Based on Professor Fried's advice and for the reasons detailed in his attached opinion letter, Kirkland & Ellis intends to interpret subsection 594(j)(1) of the ICA as permitting it to represent in unrelated matters persons who may now or in the future be involved in an IC investigation being conducted by someone other than our partner, Judge Starr. If you have any questions about our interpretation or the enclosed opinion from Professor Fried, please do not hesitate to contact Edward W. Warren, a partner in our Washington office at (202) 879-5018.

KIRKLAND & ELLIS

CHARLES FRIED

Holmes Field Building 302
1575 Massachusetts Avenue
Cambridge, MA 02138

telephone (617) 495-4636
fax (617) 495-9964

September 20, 1994

To the firm of Kirkland and Ellis:

You have asked my opinion about your obligations under 28 U.S.C. § 594(j) as they bear on situations arising out of your partner Kenneth Starr's service as an Independent Counsel under 28 U.S.C. chapter 40 (§§591-599, as amended, 1994). I shall not review the history and purposes of the Ethics in Government Act and of its provisions relating to Independent Counsels generally, but move directly to the issues that are of concern to the firm.¹ You are particularly concerned to understand your obligations under §594(j)(1)(A), which states that a firm "with which . . . [an] independent counsel is associated may not represent in any matter any person involved in any investigation under this chapter." I summarize my conclusions briefly below and then set out the analysis by which I have reached these conclusions.

SUMMARY

Section 594(j), in respect to a serving Independent Counsel, prohibits both the Independent Counsel and his firm from representing "in any matter any person involved in any [Independent Counsel] investigation or prosecution" I take this to mean most clearly that you may not represent any person in any Independent Counsel matter. As to your

Handwritten note:] * Starr

1. For a detailed account of the Act, see Beth Nolan, Removing Conflicts from the Administration of Justice: Conflicts of Interest and Independent Counsels Under the Ethics in Government Act, 79 Geo.L.J. 1 (1990). Ms. Nolan's article deserves attention because she served for many years as a respected career official in the Office of Legal Counsel and specialized in advising on ethical matters. She joined the faculty of George Washington University Law School, and now serves in the Office of White House Counsel, where she once again advises on ethical issues. It is of particular interest that, though Ms. Nolan argues for increased rigor in the enforcement of conflicts of interest standards on Independent Counsels and their law firms, in the course of her comprehensive and exhaustive study she does not even mention the cases which are so troubling to your firm. See pages 8 - 13 below.

representation of clients in matters unrelated to any Independent Counsel investigation, I believe you and any client of yours, who may become involved in your partner Judge Starr's own investigation, would show appropriate prudence if you terminated such a representation.

*
prudence

The difficulty arises in respect to the firm's representation of subjects of, or persons involved in, another Independent Counsel's investigation, when your representation relates to a matter unrelated to the investigation. Though the text may be read to require such disqualifications, such requirements would be difficult to administer or to comply with: Independent Counsel investigations are not always public, and even for those that are it may be difficult or impossible for persons not conducting them to know who are their subjects and who is involved in them. In the face of such difficulties and uncertainties, any large firm would almost inevitably be driven to sever its relationship to a partner who chose to become an Independent Counsel. The legislative history and structure of the Act are clear, however, that Congress envisaged that Independent Counsels will be drawn from among the leading members of the bar who may remain members of their firm. Indeed, § 594(j) was passed as part of an effort to remove an analogous impediment that had been imposed by a change in policy by the Department of Justice. With one exception all Independent Counsels have remained members of their firms. Such an extreme interpretation would be a very great impediment to service by members of large national firms, and it appears that no firms remaining associated with Independent Counsels have adopted that interpretation. Accordingly, I do not believe that you should interpret the statute to extend to these unrelated representations.

The Act provides no criminal penalties for violations of § 594(j), although it does make provision for criminal penalties in other cases. The only enforcement mechanism regarding this provision adverted to in the Act or the legislative history is removal of the Independent Counsel by the Attorney General for "good cause." The Act gives the Attorney General and Office of Government Ethics the authority to enforce compliance with this provision. Accordingly, because the interpretation I recommend to you may be thought to be inconsistent with a possible reading of the text, I urge you to put before the Attorney General (Office of Legal Counsel) and the Office of Government Ethics a statement of the interpretation you are giving to this provision and of the steps you have taken to implement that interpretation.

DISCUSSION

Section 594(j) imposes restrictions both during a person's service as Independent Counsel (subsection 1) and after that service is completed (subsection 2). The post-service restrictions are relatively straightforward and familiar to those accustomed to the restrictions on former high federal officials. I shall not discuss these except as they help in the interpretation of the restrictions in subsection 1. The restrictions in subsections 1(A)(i) and (ii), which apply without stated distinction both to the Independent Counsel himself and to his law firm, are necessarily more difficult, as they contemplate an unusual, though not unique, arrangement:² a person continuing as a partner in a private law practice while exercising an important, highly visible and delicate federal law enforcement function.³ (For ease of reference I have displayed these restrictions in the attached tables and numbered the restrictions relating to each type of circumstance (1) - (8).)

Restrictions on a Serving Independent Counsel

In respect to his own investigation. The statute requires the obvious: that the Independent Counsel not represent a subject of his investigation⁴ in respect to that investigation. (cell 1) Such a representation would constitute a palpable conflict of interest, violating the principal duties behind the conflict notion: confidentiality and loyalty.⁵

Nothing more need be said about this restriction, except that it helps to understand the further restriction imposed by the statute: the Independent Counsel also may not represent a subject of his investigation "in any matter,"

*where?
in statute?*

2. There has long been provision for persons serving in government temporarily. They are denominated special government employees, and are exempt from certain provisions of 18 U.S.C. chapter 11 addressing criminal conflict of interests and related matters. The most prominent recent example of a person serving as a special government employee is White House Counsel Lloyd Cutler, who because of this designation was not required to resign from his firm. The Act has classified Independent Counsels and their appointees as special government employees, though without the time limitations applicable to such service. See note 19 below and accompanying text, and Nolan, *supra* note 1, at 60 - 70.

3. Paragraph B of subsection (1) addresses restrictions on the Independent Counsel's subordinates.

4. The statute refers throughout to "investigation or prosecution." For ease of presentation I shall use only the more inclusive term investigation.

5. American Bar Ass'n, Model Rules of Professional Conduct, Rules 1.6 and 1.7.

that is, the Independent Counsel may not represent a subject of his own investigation in matters wholly unrelated to that investigation. (cell 2)

Illustration 1. The Independent Counsel is investigating allegations that Mr. A conspired with a high government official to make an illegal campaign contribution. Both are subjects of his investigation. The Independent Counsel may not also represent Mr. A in a child custody dispute.

In many such cases there is little risk that confidential information coming to the Independent Counsel in his official capacity would allow him to benefit his client in his representation in the unrelated matter. There is slightly more risk that confidential information about the subject learned in the course of the unrelated representation might be useful to the Independent Counsel in his official investigation. But there are likely to be severe strains on the Independent Counsel's duty of loyalty to his two clients. He may be tempted, or be seen to be tempted, to show favoritism in pressing his investigation against his client.

The statute further prohibits the Independent Counsel from representing in respect to his own investigation any person "involved" in that investigation. (cell 3) The term "person involved" is not defined either by the statute or in the legislative history.⁶ The conflict in loyalties in such a case are again palpable: if a "person involved" needs the assistance of counsel in respect to an Independent Counsel investigation, that counsel may not be the very same counsel who is conducting the investigation.

This obvious fact needs only be mentioned here in so far as it assists in understanding the further restriction on the Independent Counsel's representation of a "person involved" in the counsel's investigation, when the representation relates to a matter wholly distinct from the investigation. This disqualification is effected by the prohibition on representing "in any matter any person involved in any investigation under this chapter." (cell 4) (emphasis supplied).

Illustration 2. The illegal campaign contribution in illustration 1 was made out of the proceeds and in the exact amount of a loan to Mr. A by Acme Bank. The Inde-

6. There is some discussion in the legislative history of the word "involved," as it occurs in another section and different context. See discussion at pages 11 - 12 below.

pendent Counsel is not permitted to represent Acme in a wholly unrelated mortgage foreclosure proceeding.

Although there may be no problems of confidentiality troubling such a dual representation, the Independent Counsel may be tempted, or appear to be tempted, to be less aggressive in pursuing his private client to divulge information in his investigation and prosecution under the statute, particularly where divulging such information might be embarrassing or burdensome. And certainly the Independent Counsel would be inhibited from aggressive pursuit of his prosecutorial function in the circumstance where his private client's involvement might be promoted to that of a subject.

In respect to another Independent Counsel's investigation. One of the circumstances that led Congress to enact § 594(j) was the perceived unseemliness of Independent Counsel Alexia Morrison's representation of a person who was the subject of another Independent Counsel's unrelated investigation.⁷ The conflict, once again, relates primarily to the duty of loyalty rather than to any danger to confidentiality. The concern was expressed that the Independent Counsel might on behalf of her private client attack the constitutionality of the statute or take other legal positions contrary to those that supported the interests of the United States as they appear in her work as Independent Counsel.⁸ The statute accomplishes the disqualification in such cases by reference to "any investigation or prosecution under this chapter." (cell 5)

The same policies, though in an attenuated form, apply to the representation, in another Independent Counsel's investigation, of a person not the subject of, but only "involved in," that other investigation. (cell 7) Such a "person involved" may also have reason to resist yielding up information and may also move from the position of "person involved" to that of "subject," and accordingly the person representing him may have reason to adopt legal positions adverse to the authority of Independent Counsels generally.

I shall not here address the two remaining cases to which the language of the statute might be thought to apply:

7. The Senate Report states that the provision in issue sets up "a prohibition against simultaneously representing another person subject to proceedings under this Act . . ." S. Rep. 100-123 (1987) at p. 27. This is the most specific statement in the legislative history regarding this provision. For an account of the controversies surrounding Alexia Morrison, which led to the provision, see Nolan, *supra* note 1, at 20 and 28 n. 125.

8. Nolan, *supra* note 1, at 71 n. 289.

where the Independent Counsel represents the subject of, or a person involved in, another Independent Counsel's investigation, but in respect to a matter unrelated to an Independent Counsel investigation. (cells 6 and 8) These cases are of special concern in respect to representations by the firm, and I discuss them at length in that connection below. But as to Judge Starr, you have indicated to me that during his service as Independent Counsel he will have very little time to devote to his private practice and has decided that he will not represent any person, if he learns that that person is the subject of, or involved in any other Independent Counsel's investigation.⁹

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Restrictions on The Firm of a Serving Independent Counsel

The statute in clause (ii) of (j)(1)(A) applies to "any person associated with a firm with which such independent counsel is associated" the same prohibitions on representation that it applies to the Independent Counsel himself. The reference to the Independent Counsel's law firm reflects the twofold congressional purpose of avoiding conflicts of interest, or their appearance, while allowing Independent Counsels to remain as members of their law firms.

It is a premise of the statute that an Independent Counsel may remain a member of his firm.¹⁰ It matters less whether the Independent Counsel himself continues in his private practice of the law -- often there will be little time for that -- than whether he must resign from his partnership. Partnership in a law firm is an all-or-nothing matter, so that halfway measures like a leave of absence or inactive status, which seek to preserve the departing partner's options on return, are unavailable in this context. Accordingly, it was well understood that if persons of standing and experience at the bar are to be recruited to this service, such a large sacrifice cannot be demanded of them. Of the Independent Counsels whose service was subject to § 594(j), Alexia Morrison, James McKay, Whitney North Seymour, Jr., Arlen Adams, and Joseph DiGenova all

9. For the difficulties that Judge Starr or anyone not privy to an Independent Counsel investigation will have in determining who is involved in it, see the discussion below at page 11.

10. Independent Counsel Whitney North Seymour, Jr, for instance, was most emphatic in his insistence that he was "not a full-time public employee." See Nolan, supra note 1, at 20 - 21.

retained their associations with their law firms. Lawrence Walsh resigned from his firm.¹¹

In 1987 the Department of Justice ruled that Independent Counsels and their staffs were henceforward to be considered as Department of Justice employees and subject to postemployment restrictions on such employees. This ruling would effectively have barred all such persons from any representation involving the Department, which meant they would for a period of time have been barred from most litigation involving the United States. This ruling prompted a spate of resignations -- including one Independent Counsel and his entire staff. The Senate Report clearly states as a principal purpose of the 1987 revisions to reverse this decision, and to make Independent Counsels and their staffs special government employees under 18 U.S.C. § 202 in order to avoid such disqualifications as would deter recruiting competent members of the bar.¹²

In respect to his own investigation. It would obviously be unseemly for an Independent Counsel's partner to represent in that investigation the subject of that counsel's investigation. (cell 1) In a private setting such an extreme conflict of interest could not be cured even by consent and "Chinese wall" barriers to protect client confidences. Members of the same firm simply may not represent both sides of a controversy. In this public setting the possibility that a subject might obtain favored treatment by hiring the Independent Counsel's partners would be intolerable. But the dangers of favoritism are also far too great if "a person involved in the investigation" hires the Independent Counsel's firm to represent him in relation to that investigation (cell 3); or if the subject of an Independent Counsel's investigation engages the Independent Counsel's firm to represent him in an entirely unrelated matter (cell 2).

A more tenuous case for disqualification is one where the law firm would represent a "person involved" in Judge Starr's investigation, though in a matter unrelated to that investigation. (cell 4) Although the policies of the

11. Robert Fiske resigned from his law firm, but his appointment was not made under this statute. He served as a Department of Justice employee appointed by the Attorney General and so was bound by other laws and regulations.

12. S. Rep. 100 - 123, p. 13; Katy J. Harriger, *Independent Justice: The Federal Special Prosecutor in American Politics* 145 - 146 (Lawrence, Kansas 1992); Nolan, *supra* note 1, at 25 - 33.

statute extend only remotely to this case, the language of the statute may be taken to include such a disqualification: the firm may not represent "in any matter . . . any person involved in any investigation under this chapter." Accordingly, out of an abundance of caution you and any client of yours, who may become involved in Judge Starr's own investigation, may choose to terminate that relationship.

In respect to another Independent Counsel's investigation. Just as Congress was moved by its disapproval of Independent Counsel Alexia Morrison's representation of subjects of other Independent Counsel investigations to enact § 594(j), so the legislative history indicates that Congress did not wish the partners of a person in Morrison's position to undertake such representation.¹³ Though less acute, the same considerations mentioned above obtain in this situation (cell 5): the conflicting loyalties when inconsistent positions regarding the criminal laws and this statute are taken by members of the same firm. This same concern is present, though in a more attenuated form, when the Independent Counsel's partners represent a person involved in another Independent Counsel's investigation in respect to that other Independent Counsel's investigation. (cell 7) Congress intended that an Independent Counsel's law firm, no less than the Independent Counsel himself, simply stay out of Independent Counsel matters during the period of his service.

The two difficult cases.

The two categories of case that concern you the most and that have potentially the most disruptive effect on your practice are those where the firm might, in a matter wholly unrelated to any Independent Counsel investigation or prosecution, represent a person, who is either a subject of or is merely "involved in" another Independent Counsel's investigation. (cells 6 and 8) Your firm has over 450 partners and associates, who represent hundreds of clients (many of whom have complex networks of affiliated entities) in a wide variety of matters. Accordingly, a potentially vast range of disqualifications might spring into existence with the initiation of a major, complex Independent Counsel investigation, if the statute is interpreted to disqualify your firm as a whole from representing any person who is the subject of, or involved in, any Independent Counsel investigation

13. See, e.g., H. Rep. 100-316 (1987) at section V.D. (unnumbered page): "The [House Judiciary] Committee determined that while the office of an independent counsel is operating, the independent counsel, staffs, and their law firms may not represent any person in any other independent counsel investigation/prosecution. . . ."; Nolan, supra note 1, at 20.

other than that conducted by your partner, Kenneth Starr, even in a matter wholly unrelated to that other investigation.

The concern has been expressed that the text of the statute may be read to effect these two further disqualifications. The argument from the text is as follows:

Subsection 594 (j)(1)(A) extends the disqualification to the representation

- in "any matter," NOT just in "any matter involving any [Independent Counsel] investigation" (as in § 594(j)(2)(B) and (3) relating to certain post-service disqualifications),

- of "any person involved," NOT just of a person who was "the subject of an [Independent Counsel] investigation" (as in § 594(j)(2)(A)), and

- in respect to that person's involvement in "any investigation or prosecution under this chapter," NOT just "an [Independent Counsel] investigation . . . conducted by that independent counsel" (as in § 594(j)(2)(A)).

Thus distinctions effecting less extensive disqualifications are made elsewhere in the section, but not in this provision.

The House and Senate materials offer little direct help on this point. The House Bill prohibited only any representation of "any person in any matter involving any investigation or prosecution under this chapter," H.R. 2939, §594(i)(1)(A), thus tracking the post-service disqualification of the Independent Counsel's firm in the present statute.¹⁴ The Senate version used the phrasing "in any matter any person involved in any investigation," but unlike the House bill did not refer to the Independent Counsel's firm. The Senate phrasing was adopted in the final text, but along with the House's coverage of the Independent Counsel's firm. Nothing in the legislative history indicates that the change from the House language was intended to accomplish any specific result. Indeed, the Senate Report uses only the general phrase: "a prohibition against simultaneously representing another person subject to proceedings under this Act . . ." S. Rep. 100-123 (1987) at p. 27.

Notwithstanding a textual argument for interpreting the statute to forbid a serving Independent Counsel's firm from representing, in wholly unrelated matters, a subject or an involved person (cells 6 and 8), I think the balance of

14. See the House Judiciary Committee report, supra note 13.

reason supports the conclusion that it is not the intention of the statute to reach those extreme results. The possibility of any conflict of interest is, in the words of 18 U.S.C. § 208(b)(2), "remote or too inconsequential." (See note 19, below.)

My conclusion is based principally on the consideration that such an extreme interpretation would, as a practical matter, make it impossible for a member of a national firm to serve as an Independent Counsel without resigning from the firm. Yet it is a premise of the legislation that such disassociation will not be necessary. That Congress did not intend to put such obstacles in the way of recruiting Independent Counsels and their staff from the most distinguished ranks of the bar is confirmed by the Congressional reaction, referred to above, when the Department of Justice instituted a post-service disqualification that provoked several abrupt departures from Independent Counsel staffs. And, so far as is publicly known, all but one Independent Counsel serving under the strictures of the statute have remained as partners of their law firms, and two (James McKay and Arlen Adams) continued (and Judge Adams continues now) as partners of large law firms with varied national practices and clientele. James McKay stated to me that his firm did not disqualify itself from representations in unrelated matters. Joseph DiGenova has given a similar indication in conversation with you. Judge Adams indicated to me that, in respect to other Independent Counsel's investigations, his firm would disqualify itself from representations in matters relating to that other Independent Counsel's investigation, but had no policy beyond that. (cells 5 and 7)

The policy gain in extending the disqualification to representations in unrelated matters is exceedingly remote and speculative. When the firm's representation of a subject of, or the "person involved" in, another Independent Counsel's investigation is limited to matters unrelated to the statute, there is no occasion for the firm to take legal positions that conflict with those that its Independent Counsel partner might want to take in his own investigation. Nor is it realistic to fear that the other Independent Counsel may deal more gently with the subject or involved person out of deference to the fact that this person is a client, in an unrelated matter, of a fellow Independent Counsel's law firm partners.

Finally and particularly importantly, the practical difficulties set out below in putting such a drastic disqualification policy into effect are so great that large national firms such as yours would find it virtually impossible to comply and so would be moved to require a part-

ner named as an Independent Counsel to resign. But this would have the same effect in deterring distinguished members of the bar from accepting appointment as the Department of Justice's 1987 policy change, which led in part to the enactment of § 594(j) and other 1987 amendments. These practical difficulties are far less in the other categories, and this corresponds to the greatly more attenuated policy grounds for these extreme disqualifications in respect to unrelated representations before another Independent Counsel.

First, the Act specifically contemplates that fairness and the public interest may require that an investigation remain undisclosed, and there have been several such undisclosed investigations.¹⁵ Thus a structural feature of the statute itself points away from the most extreme interpretation of § 594(j)(1)(A) (cells 6 and 8), since in the case of such undisclosed investigations a law firm would have no way of complying unless its client, who is the subject of such an investigation, has first himself been informed that he is a subject and then goes on to inform the firm. And even if the client had any incentive to take this initiative to destroy his existing or contemplated relation to the firm, the client may have little reason to be aware of the existence of such a disqualification rule or of its application to his law firm in an unrelated matter.¹⁶

Second, these difficulties are compounded in respect to a person who is only "involved in" the other investigation -- even assuming the investigation has been made public under § 593(b)(4). The term "person involved" is undefined and vague. The only help in interpreting it comes from the Senate Report to the 1987 Act, at pp. 16-17, which discusses a different provision, § 591(e), regarding the Attorney General's recusal from the preliminary investigation leading to a request of the Special Division to appoint an Independent Counsel. The Report explains that the statutory term "in-

15. Section 593(b)(4) provides that:

An independent counsel's identity and prosecutorial jurisdiction (including any expansion under subsection (c)) may not be made public except upon the request of the Attorney General or upon a determination of the division of the court that disclosure of the identity and prosecutorial jurisdiction of such Independent counsel would be in the best interests of justice. . .

16. To see how far fetched such a scheme might become, consider the destructive effect on a firm's practice of a rule requiring it to warn all existing and prospective clients that they must inform the firm if they become the subjects of, or are involved in, an Independent Counsel investigation, so that the firm could terminate the representation in an unrelated matter.

volving" the Attorney General or other high Justice department official, means that:

that official has in some respect participated in the underlying events which gave rise to the case. Examples include cases where the official has performed a material role in the conduct being questioned, has participated in the decisionmaking process to approve or plan such conduct, has provided legal advice on such conduct, or is otherwise a material witness in the case. . . .

If this discussion may properly be brought forward to give meaning to the similar term, "any person involved in any investigation" in § 594(j), it would help narrow it somewhat, but still leave a great degree of indefiniteness. Moreover, it is virtually impossible to overcome this vagueness in respect to another Independent Counsel's investigation, without asking that other Independent Counsel to make that judgment. But that other Independent Counsel may be unwilling or unready to make such a judgment.

These structural reasons for not interpreting the statute to cover the Independent Counsel's firm's representation in unrelated matters of subjects and others involved in another Independent Counsel's investigation are confirmed by the fact that such structural difficulties do not obtain in the other cases that have been discussed. The Independent Counsel himself will know who are the subjects of, and who is involved in his own investigation, and so he can both disqualify himself from representing any such persons in unrelated matters and assist his firm in doing so as well.¹⁷ (cells 1-4) And as to representing either subjects or involved persons in respect to the other Independent Counsel's investigation itself, of course the firm will know that it is being asked to undertake such a representation and can decline to do so. So it becomes practicable to comply scrupulously with the statute if it is interpreted as I propose, while the more extreme interpretation leads to problems of administration so intractable that no large firm could allow an Independent Counsel to remain as a partner. And that is a result that contradicts the purpose of the statute, as revealed both in its legislative history and in

17. This is not to say that there are not serious issues about implementing a proper disqualification policy even about the Independent Counsel's own investigation. Only a person who is both a member of the Independent Counsel's firm and of his staff (including the Independent Counsel himself, of course) is in a position to receive and check client lists, which are privileged to the firm, against the investigative records, which must be confidential to the investigation.

its text, which addresses, and so assumes the existence of, such a continuing relationship.¹⁸

This conclusion requires interpreting the words "represent in any matter" in light of their context, and the structure, policy and history of the statute. In recommending this conclusion to you, I note that your own research has discovered no provision for civil or criminal penalties for violations of § 594(j) by the Independent Counsel or his firm. I would add to your conclusion in this regard indications that Congress intended that certain specific criminal penalties apply to the office and functions of the Independent Counsel,¹⁹ but these are -- with modifications and exceptions appropriate to his status as a special government employee²⁰ -- the familiar penalties for "bribery, graft and conflict of interest" which are defined in Chapter 11 of 18 U.S.C. and do not include the restrictions of §594(j). The 1987 House Conference Report (100-452) states that "an independent counsel's failure to abide by the standards of conduct set forth in Section 594(j) could constitute good cause for removal [by the Attorney General under § 596] of such independent counsel." (p.35) That no civil or criminal penalties were intended is further confirmed by the 1994 reenactment of the statute, which added a paragraph (5)

18. I recall here that the most exhaustive and knowledgeable scholarly evaluation of these issues does not even mention these two extreme cases. See Nolan, *supra* note 1.

19. Section 3 of Public Law 100-191 (the 1987 reauthorization of the Act) is a technical amendment of Chapter 11 of the federal criminal code, 18 U.S.C. section 202 relating to "bribery, graft and corruption," clarifying the status of the Independent Counsel and his staff as special government employees under that chapter of the criminal code. The provisions of chapter 11 that apply have to do with bribery (section 201), receipt of outside compensation for performance of official duties and salary supplementation (section 203), inappropriate prosecution of claims against the United States (section 205), participation in matters in which the employee had substantially participated in his official capacity (section 207), and participation in a decision in which he has a financial interest (section 208), unless there has been a prior determination that the interest is "too remote or too inconsequential."

I agree with your conclusion that section 594(j) cannot serve as a predicate for liability under 18 U.S.C. sections 371 (conspiracy to defraud the United States), 1341 (mail fraud), and 1343 (wire fraud). Even if I should be wrong in my interpretation of section 594(j), the conduct of the firm in representing a target or an involved person in an unrelated matter lacks any element of seeking by fraud or concealment to obtain an advantage at the expense of the United States or of any other person. This is particularly so if the firm accepts my recommendation to lay before the Department of Justice and the Office of Government Ethics a full account of how it intends to proceed in this regard. In any event, it would be unconscionable for a prosecutor to seek to stretch these general provisions to cover section 594(j), when the Act specifically provides what criminal penalties shall apply to which violations, without criminalizing section 594(j), and specifically provides what the enforcement mechanism for section 594(j) shall be, and the firm has made a good faith and open effort to comply with the Act.

20. See Nolan, *supra* note 1, at 32 - 33.

(entitled "Ethics Enforcement" Pub. L. 103-270 § 3(d) (June 30, 1994)) to § 594(j):

(5) Enforcement -- The Attorney General and the Director of the Office of Government Ethics have authority to enforce compliance with this subsection.

The absence of penalties does not, of course, absolve you from diligent compliance with the ethical requirements of the statute. But the considerations I have set out argue that it is reasonable to interpret the statute as not requiring the disqualification of your firm from representing persons who are the subjects of, or involved in, other Independent Counsel's investigations, when the subject matter of the representation does not relate to that investigation. A contrary interpretation undermines the purpose of the statute to allow Independent Counsels to remain as members of their law firms. Nevertheless, both prudence and a commitment to compliance with the law and with the highest standards of professional ethics require that, at such time that there appears to be a material possibility that an issue on these points may arise, you lodge with both the Attorney General and Director of the Office of Government Ethics (the designated enforcement officers) a statement setting out the procedures you intend to follow in respect to the statute, your interpretation of its provisions, and the reasoning behind that interpretation.



Charles Fried

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