

Time for an Independent Counsel

Alberto Gonzales's testimony before Congress: a criminal investigation is warranted

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Congressional leaders are calling for the appointment of a special counsel to investigate possible perjury charges against Alberto Gonzales. As we saw during the Watergate scandal, the executive branch cannot be counted on to investigate itself.

Watergate led to the enactment of the Ethics in Government Act. Three years after Richard Nixon resigned rather than face impeachment, President Jimmy Carter asked Congress to pass a law authorizing the appointment of a special prosecutor to investigate and prosecute unlawful acts by high government officials. The bill empowered the attorney general to conduct a preliminary 90-day investigation when serious allegations arose involving a high government official. President Carter, who signed the bill in 1978, declared, "I believe that this act will help to restore confidence in the integrity of our government."

Under the act, the attorney general could drop the investigation if he determined it was unsupported by the evidence. But if he found some merit to the charges, he was required to apply to a three-judge panel of federal court judges who would appoint a special prosecutor to investigate, prosecute, and issue a report.

The referral clause of the independent counsel statute provided, "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." But Congress, reacting to Kenneth Starr's witch hunt which led to Bill Clinton's impeachment, allowed the independent counsel statute to expire by its own terms in 1999.

With the death of the independent counsel statute, the pendulum had swung back. By failing to renew the act, Congress returned the investigation of high government officials to pre-Watergate policies. Once again, the power to appoint an independent counsel would rest with the executive branch, that is, the attorney general. The Department of Justice drafted a set of regulations to guide future investigations.

Now the attorney general, not a three-judge panel, has the authority to appoint and remove special counsel to investigate top government officials. He exercises power over indictments and other prosecutorial actions, and the special counsel remains accountable to the attorney general. He can block "any investigative or prosecutorial step" he deems "inappropriate or unwarranted."

Justice Department regulations call for the appointment of an outside special counsel when

(1) a criminal investigation of a person or matter is warranted, (2) the investigation or prosecution of that person or matter by a United States Attorney's Office or litigating division of the Department of Justice would present a conflict of interest for the Department, and (3) under the circumstances it would be in the public interest to appoint an outside Special Counsel to assume responsibility for the matter. When these three conditions are satisfied, the attorney general must select a special counsel from outside the government. (28 C.F.R. 600.1, 600.3 (2007).)

In light of material inconsistencies in Alberto Gonzales's testimony before Congress, a criminal investigation is warranted. Gonzales, who is suspected of committing perjury, has a conflict of interest. The public interest requires that the highest prosecutor in the land be brought to justice.

Congress should appoint a permanent special counsel to investigate and advise Congress about misconduct by high government officials, beginning with Alberto Gonzales. That procedure should lead the House Judiciary Committee to initiate impeachment proceedings against Gonzales.

Marjorie Cohn is a professor at Thomas Jefferson School of Law and President of the National Lawyers Guild. Her new book, Cowboy Republic: Six Ways the Bush Gang Has Defied the Law, was just published by PoliPointPress. Her articles are archived at <http://www.marjoriecohn.com>.

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