

*National Security Leaks and the Law*

Subcommittee on Crime, Terrorism, and Homeland Security  
Committee on the Judiciary  
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Chairman Sensenbrenner, Ranking Member Scott, and Members of the Subcommittee: Thank you for inviting me to testify today; it is a pleasure to appear before you again. My name is Nathan Sales, and I am a law professor at George Mason University School of Law, where I teach national security law, administrative law, and criminal law. Previously, I was Deputy Assistant Secretary in the Office of Policy at the U.S. Department of Homeland Security. I also served in the Office of Legal Policy at the U.S. Department of Justice, where my work focused on national security policy, among other matters. The views I will express in this hearing are mine alone, and should not be ascribed to any past or present employer or client.

Briefly stated, my testimony is as follows. The government has a number of legal tools available to combat unauthorized leaks of highly classified information. Federal courts have held that the rarely used Espionage Act of 1917 – the leading law on unauthorized access to classified information – applies to government employees who leak to the press, not just those who spy for foreign governments. In addition, intelligence officials routinely sign employment contracts pledging that they will not reveal any classified information, and that they will submit any writings to the government for pre-publication review. Federal courts, including the Supreme Court, agree that these arrangements are enforceable. At the same time, key terms in the Espionage Act are notoriously vague, and Congress should act to provide greater clarity, either by tweaking the existing statutory language or by enacting an entirely new law that is specifically crafted to deal with the problem of leaks. Finally, no statute requires the Justice Department to appoint a special prosecutor to investigate leaks by senior administration officials, but DOJ regulations provide for such a step and it has been done in the past.

## **I. Background and Overview**

Leaks seem to be ubiquitous these days. Just within the past several months, government employees have revealed highly classified operational details about a number of sensitive military and intelligence matters, including the following: A Pakistani doctor who is said to have helped the CIA track down Osama bin Laden in Abbottabad, Pakistan;<sup>1</sup> a plot by al Qaeda's Yemeni affiliate to bomb commercial airliners that reportedly was uncovered by an asset of the

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<sup>1</sup> Mark Mazzetti, *Vaccination Ruse Used in Pursuit of Bin Laden*, N.Y. TIMES, July 11, 2011; see also Richard Leiby & Peter Finn, *Pakistani Doctor Who Helped CIA Hunt for bin Laden Sentenced to Prison for Treason*, WASH. POST, May 23, 2012.

Saudi intelligence service;<sup>2</sup> the government's purported process for selecting targets for drone strikes, including President Obama's personal participation in the decisions;<sup>3</sup> and the alleged role of the United States and Israel in developing two pieces of malware, Stuxnet and Flame, that were designed to disable the Iranian regime's nuclear weapons program.<sup>4</sup> Previous years likewise saw officials leak classified information about the identity of Valerie Plame Wilson, a CIA employee;<sup>5</sup> the CIA's network of secret prisons for detaining and questioning senior al Qaeda figures, such as 9/11 mastermind Khalid Sheikh Mohammed;<sup>6</sup> the NSA's warrantless Terrorist Surveillance Program, which intercepted certain communications between al Qaeda suspects abroad and their contacts in the United States;<sup>7</sup> and the Treasury Department's efforts to track al Qaeda's finances by collecting and analyzing data about international money transfers.<sup>8</sup>

What are the government's options for preventing or sanctioning these sorts of leaks? There are two broad categories of possible responses. First, on the supply side, the government might seek to restrict officials from revealing secrets with which they have been entrusted. Specific techniques for doing so include prosecuting leaking employees for violating various criminal laws, as well as entering contractual arrangements in which officials promise, in exchange for employment with the government, not to disclose classified information. Second, on the demand side, the government might seek to restrict the press from publishing leaked classified information. Specific techniques for doing so include filing various criminal charges, this time against the media, or asking a court to issue an injunction that bars the press from publishing the material – i.e., a prior restraint. This approach, of course, raises profound constitutional questions,<sup>9</sup> and the bulk of my testimony today will focus on the supply side option – curtailing leaks through restrictions on government employees.

## II. Restrictions on Government Employees

The Espionage Act,<sup>10</sup> which was originally enacted in 1917 and has been amended several times since, is the principal source of legal restrictions on government employees who improperly reveal classified information. Section 793(d) of the statute makes it a crime for an official to “willfully communicate[], deliver[], [or] transmit[]” any “information relating to the

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<sup>2</sup> Scott Shane & Eric Schmitt, *Double Agent Disrupted Bombing Plot*, *U.S. Says*, N.Y. TIMES, May 8, 2012.

<sup>3</sup> Jo Becker & Scott Shane, *Secret “Kill List” Proves a Test of Obama’s Principles and Will*, N.Y. TIMES, May 29, 2012.

<sup>4</sup> David E. Sanger, *Obama Order Sped Up Wave of Cyberattacks Against Iran*, N.Y. TIMES, June 1, 2012; Ellen Nakashima et al., *U.S., Israel Developed Flame Computer Virus to Slow Iranian Nuclear Efforts*, *Officials Say*, WASH. POST, June 19, 2012.

<sup>5</sup> Robert D. Novak, *Mission To Niger*, WASH. POST, July 14, 2003; *see also* R. Jeffrey Smith, *Armitage Says He Was Source of CIA Leak*, WASH. POST, Sept. 8, 2006.

<sup>6</sup> Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005.

<sup>7</sup> James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005.

<sup>8</sup> Eric Lichtblau & James Risen, *Bank Data Is Sifted by U.S. in Secret to Block Terror*, N.Y. TIMES, June 23, 2006.

<sup>9</sup> *See, e.g.*, Harold Edgar & Benno C. Schmidt, Jr., *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV. 929 (1973).

<sup>10</sup> 18 U.S.C. § 792 et seq.

national defense” to “any person not entitled to receive it,” if the official “has reason to believe” that the information “could be used to the injury of the United States or to the advantage of any foreign nation.”<sup>11</sup> Violations are punishable by jail terms of up to ten years.<sup>12</sup> The Espionage Act quite plainly applies to spies who share secrets with hostile foreign governments. Courts have held that it also applies to employees who leak secrets to the press (though it is seldom used in this way).

The leading case on this issue is *United States v. Morison*.<sup>13</sup> Samuel Loring Morison was a Navy intelligence officer who provided *Jane’s Defence Weekly*, a British magazine, with classified satellite imagery of a new Soviet aircraft carrier in 1984.<sup>14</sup> (Morison later claimed that the reason he leaked the photographs was to alert the public about alarming Soviet military capabilities, and thereby inspire Congress to increase the Navy’s budget, but it’s more likely he was angling for a full time job at *Jane’s*.<sup>15</sup>) He soon found himself charged with violating section 793(d) as well as several other laws.<sup>16</sup> Morison’s primary defense was that the Espionage Act “was intended to punish only ‘espionage’ in the classic sense of divulging information to agents of a hostile foreign government and not to punish the ‘leaking’ of classified information to the press.”<sup>17</sup> The district court emphatically rejected this argument, and the Fourth Circuit affirmed its ruling – and Morison’s conviction – on appeal.

According to the appellate court, the notion that leakers can be held liable follows from the plain language of the Espionage Act. “[T]he statutes themselves, in their literal phrasing, are not ambiguous on their face and provide no warrant for [Morison’s] contention.” To the contrary, they “plainly apply” to leaks. The statutory language “includes no limitation to spies or to an agent of a foreign government,” and it “declare[s] no exemption in favor of one who leaks to the press. It covers ‘anyone.’” “It is difficult,” the court concluded, “to conceive of any language more definite and clear.”<sup>18</sup>

The Fourth Circuit also emphasized that the structure of the Espionage Act supports liability for leakers. Unlike section 794 – a related provision that narrowly and specifically prohibits disclosures “to any foreign government”<sup>19</sup> – section 793(d) more broadly prohibits disclosing information “to *any person* not entitled to receive it.”<sup>20</sup> The statutes differ in another

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<sup>11</sup> *Id.* § 793(d).

<sup>12</sup> *Id.* § 793.

<sup>13</sup> 604 F. Supp. 655 (D. Md. 1985), *aff’d*, 844 F.2d 1057 (4th Cir. 1988).

<sup>14</sup> *Morison*, 844 F.2d at 1061.

<sup>15</sup> *Id.* at 1062.

<sup>16</sup> Morison also was charged with violating 18 U.S.C. § 793(e), a section of the Espionage Act that makes it a crime to possess classified information without authorization, as well as 18 U.S.C. § 641, which makes it a crime to embezzle or steal any “thing of value” belonging to the government.

<sup>17</sup> *Morison*, 604 F. Supp. at 657.

<sup>18</sup> *Morison*, 844 F.2d at 1063 (some internal quotation marks omitted).

<sup>19</sup> 18 U.S.C. § 794(a).

<sup>20</sup> *Id.* § 793(d) (emphasis added).

important way: The maximum penalty for violating section 793(d) is ten years incarceration, while violations of section 794, a more serious offense, are punishable by life imprisonment or by death. The implication is that Congress meant for sections 793(d) and 794 to cover two “separate and distinct” crimes. “[S]ection 793(d) was not intended to apply narrowly to ‘spying’ but was intended to apply to disclosure of the secret defense material to *anyone* ‘not entitled to receive’ it, whereas section 794 was to apply narrowly to classic spying.”<sup>21</sup>

Finally, leakers can be held liable under the Espionage Act because of Congress’s purpose in enacting the statute. According to the district court, Congress’s goal was to prevent the nation’s most sensitive secrets from falling into the hands of hostile foreign powers.<sup>22</sup> That is precisely what happens when classified information is leaked to the media and then published.<sup>23</sup> In other words, the harm about which Congress was concerned will materialize regardless of the means by which a foreign power learns of a secret – whether directly from a spy or indirectly by reading about it in the newspaper. “[T]he danger to the United States is just as great when this information is released to the press as when it is released to an agent of a foreign government.”<sup>24</sup>

What about the Constitution? The Fourth Circuit made short work of Morison’s claim that it would violate the First Amendment to apply the Espionage Act to leakers. It is “beyond controversy” that a government employee who reveals classified information “is not entitled to invoke the First Amendment as a shield to immunize his act of thievery.” To hold otherwise “would be to prostitute the salutary purposes of the First Amendment.”<sup>25</sup> The court also denied that the Espionage Act was unconstitutionally vague or overbroad. Some of the terms in the statute were less than crystal clear, the panel acknowledged, but jury instructions could cure those deficiencies. In particular, the district judge properly instructed the jury that the phrase “relating to the national defense” must be limited to information that “would be potentially damaging to the United States or might be useful to an enemy of the United States” and that is “not available to the general public.”<sup>26</sup> Likewise, the jury was told to interpret “not entitled to receive” in light of the government’s classification system – one is “not entitled to receive” classified information if one lacks the requisite security clearances.<sup>27</sup>

*Morison* is such an important precedent because there are relatively few judicial interpretations of how the Espionage Act applies to leakers. To this day, Samuel Morison remains the only person the government has successfully tried under the statute for leaking classified information to the press, though several other government employees have pled guilty

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<sup>21</sup> *Morison*, 844 F.2d at 1065.

<sup>22</sup> *Morison*, 604 F. Supp. at 660.

<sup>23</sup> *Id.* at 659.

<sup>24</sup> *Id.* at 660.

<sup>25</sup> *Morison*, 844 F.2d at 1069-70. Two of the panel’s judges wrote separately to express the view that, while prosecuting leakers can sometimes implicate serious First Amendment interests, those interests were overcome here by the government’s need to protect sensitive national security secrets. *Id.* at 1081, 1083 (Wilkinson, J., concurring); *id.* at 1085 (Phillips, J., concurring).

<sup>26</sup> *Id.* at 1071-72.

<sup>27</sup> *Id.* at 1074.

to comparable charges.<sup>28</sup> (President Clinton later pardoned Morison on his last day in office.<sup>29</sup>) Indeed, over the century long lifespan of the Espionage Act, the government has only brought charges against leakers nine times, with six of those prosecutions coming since President Obama took office in 2009.<sup>30</sup> Nevertheless, in the wake of *Morison*, it seems fairly well established that some leaks of highly classified information are crimes – in other words, the press counts as persons “not entitled to receive” the information under the Espionage Act – and that the First Amendment generally is no obstacle to holding leakers accountable.

The Espionage Act is perhaps the government’s best known legal tool for combating leaks, but it is not the only one. In addition to the sanctions of the criminal law, the government can use civil law to prevent disclosure of classified information – in particular, the law of contract. The standard practice is for intelligence community officials to sign secrecy agreements when they begin employment with the government; when they leave, they also sign oaths reiterating their commitment to confidentiality. These agreements typically forbid officials from disclosing any classified information to people who lack the requisite clearances. They also require officials to submit their writings for prepublication review, allowing the government to verify that they do not contain any classified information. The government can ask a court to enforce these obligations if it learns that a current or former employee may reveal secrets. In particular, a court might issue an injunction forbidding an official from disclosing any classified information, or it might impose a constructive trust on the proceeds from the sale of any books or other writings.

The Supreme Court (in *Snepp v. United States*<sup>31</sup>) and the Fourth Circuit (in *United States v. Marchetti*<sup>32</sup>) both squarely held that these sorts of secrecy agreements are enforceable. Each case involved a former CIA official who sought to publish a book about his time at the agency. The Supreme Court stressed that Snepp “voluntarily signed the agreement that expressly obligated him to submit any proposed publication for prior review,” and there was no reason to think he “executed this agreement under duress.”<sup>33</sup> The Fourth Circuit likewise explained that Marchetti acquired “secret information touching upon the national defense and the conduct of foreign affairs” “while in a position of trust and confidence,” and that he was “contractually bound to respect it.”<sup>34</sup> The courts further held that, even though secrecy agreements operate as prior restraints on speech, the First Amendment generally does not forbid them. “[S]uch

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<sup>28</sup> Charlie Savage, *For U.S. Inquiries on Leaks, a Difficult Road to Prosecution*, N.Y. TIMES, June 9, 2012; Charlie Savage, *Nine Leak-Related Cases*, N.Y. TIMES, June 20, 2012.

<sup>29</sup> Vernon Loeb, *Clinton Ignored CIA in Pardoning Intelligence Analyst*, WASH. POST, Feb. 17, 2001.

<sup>30</sup> Scott Shane & Charlie Savage, *Administration Took Accidental Path to Setting Record for Leak Cases*, N.Y. TIMES, June 19, 2012. Those prosecuted by the Obama administration include a former FBI linguist who pled guilty after leaking classified information to a blogger, a former CIA official who allegedly revealed the identities of officers involved in the agency’s interrogation and rendition programs, and an Army intelligence analyst who allegedly disclosed military and diplomatic documents to WikiLeaks. Savage, *Nine Leak-Related Cases*, *supra* note 28.

<sup>31</sup> 444 U.S. 507 (1980).

<sup>32</sup> 466 F.2d 1309 (4th Cir. 1972).

<sup>33</sup> *Snepp*, 444 U.S. at 509 n.3.

<sup>34</sup> *Marchetti*, 466 F.2d at 1313.

agreements are entirely appropriate,” the Fourth Circuit explained. “Marchetti, of course, could have refused to sign” the contract, in which case “he would not have been employed” and thus “would not have been given access to the classified information he may now want to broadcast.”<sup>35</sup> In fact, both courts suggested that the government’s interest in protecting classified information is so great that the First Amendment permits it to restrict its employees’ speech even in the absence of an express contractual requirement.<sup>36</sup> (The Fourth Circuit emphasized that the government may only bind its employees to secrecy with respect to classified information. A contract would violate the First Amendment, and would be unenforceable, “to the extent that it purports to prevent disclosure of unclassified information.”<sup>37</sup>)

This is not to say that the current legal architecture for restricting leaks is perfect. As one of the judges in *Morison* opined, “the Espionage Act statutes as now broadly drawn are unwieldy and imprecise instruments for prosecuting government ‘leakers’ to the press as opposed to government ‘moles’ in the service of other countries.”<sup>38</sup> Several of the statute’s critically important terms suffer from varying degrees of ambiguity – “information relating to the national defense,” “any person not entitled to receive it,” and so on. These phrases may not be so opaque that they are void for vagueness under the Constitution, as the Fourth Circuit explained in *Morison*, but they still would benefit from greater clarity. Right now, the principal mechanism for obtaining this needed clarity is for trial judges to provide limiting instructions to juries on a case by case basis. (Once again, *Morison* is the preeminent example.) Jury instructions are better than nothing, but Congress should consider a more durable and sustainable solution – enacting more precise statutory language.

Congressional action is preferable for at least two reasons. First, jury instructions do not provide government employees or members of the general public with advance notice of what conduct will result in criminal sanction.<sup>39</sup> Ex post jury instructions can assist defendants who could not have reasonably known that their disclosures were unlawful at the time they made

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<sup>35</sup> *Id.* at 1316. This transaction can be understood in economic terms. See generally Frank H. Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges and the Production of Information*, 1981 SUP. CT. REV. 309. In exchange for a job that entails access to classified information, an official effectively “sells” the government his right to reveal that information (which, of course, he would not acquire at all but for his government employment). *Snepp* and *Marchetti* – and any other officials who took government jobs subject to secrecy agreements – calculated that they were better off with this arrangement than without it. They regarded the benefit of government employment as greater than the cost of the foregone speech. If courts declined to enforce these secrecy agreements, that would create a windfall for the officials. *Snepp* and *Marchetti* were already compensated for their agreement to refrain from revealing secrets, and they now would be exercising a right that they previously assigned to the government.

<sup>36</sup> *Snepp*, 444 U.S. at 509 n.3 (“[T]his Court’s cases make clear that – even in the absence of an express agreement – the CIA could have acted to protect substantial government interests by imposing reasonable restrictions on employee activities that in other contexts might be protected by the First Amendment.”); *Marchetti*, 466 F.2d at 1316 (reasoning that “the law would probably imply a secrecy agreement had there been no formally expressed agreement”).

<sup>37</sup> *Marchetti*, 466 F.2d at 1317.

<sup>38</sup> *United States v. Morison*, 844 F.2d 1057, 1085 (4th Cir. 1988) (Phillips, J., concurring).

<sup>39</sup> *Cf. id.* at 1086 (“[J]ury instructions on a case-by-case basis are a slender reed upon which to rely for constitutional application of these critical statutes.”).

them. But, unlike clear statutory standards announced *ex ante*, they do not provide fair warning of what one must not do if one wishes to avoid being charged in the first place. Second, relying on ad hoc jury instructions to tailor the scope of the Espionage Act effectively delegates a vital national security function to the courts. Ultimately it is the responsibility of Congress and the President – the two politically accountable branches, and the ones charged by the Constitution with preserving the nation’s security – to determine the circumstances in which government employees who reveal sensitive secrets should be eligible for criminal liability.

Another difficulty with the Espionage Act as it currently stands is that, because the statute makes it a crime to leak “information relating to the national defense,” as opposed to classified information *per se*, it threatens to produce both false positives and false negatives. First, consider the problem of false positives, or overinclusion. Certain types of unclassified but private “information relating to the national defense” could be released to the public without harming the national security in any meaningful way. Suppose an official reveals that the Secretary of Defense received a failing grade in an undergraduate military history class. Read literally, the Espionage Act might prohibit such a trivial disclosure, if the resulting embarrassment is deemed to somehow harm the United States or help a foreign country. The problem of false negatives, or underinclusion, is probably even more acute. Certain types of highly classified information may not “relat[e] to the national defense,” yet leaking it could cause exceptionally grave harm. Imagine the diplomatic fallout that would result from the disclosure of a memo detailing the United States Trade Representative’s negotiating strategy for a round of talks over a free trade agreement. In its present form, the Espionage Act does not address either problem effectively.

Commentators, including two of the judges in *Morison*,<sup>40</sup> have been calling on Congress to remedy the perceived shortcomings of the Espionage Act for decades. Congress has a number of options if it wishes to do so. The most modest solution would be to enact legislation that provides greater clarity on the meaning of key statutory terms. For instance, what particular types of information count as “information relating to the national defense,” the disclosure of which is a crime? Who, specifically, is a “person not entitled to receive it”? How certain must an official be that the revealed information “could be used to the injury of the United States or to the advantage of any foreign nation,” and what sorts of injuries and advantages are sufficient to trigger liability? A somewhat more ambitious legislative fix would be to eliminate the phrase “information relating to the national defense,” and replace it with a prohibition on disclosing “classified information” *per se* (or perhaps “properly classified information,” to make clear that the judiciary has a role in deciding whether the information is justifiably kept secret). The most ambitious reform of all would be to enact an entirely new statute that is specifically crafted to deal with the problem of leakers. Such a law might straightforwardly make it a crime for a government employee to reveal any classified information (not just “information relating to the national defense”) to a person who is not authorized to access it (as opposed to one not “entitled” to “receive” it). (Legislation along these lines passed both houses of Congress in 2000, but President Clinton vetoed it.<sup>41</sup>) To be clear, the purpose of this testimony is not to endorse any particular legislative reform; before doing so it would be necessary to consider the constitutional

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<sup>40</sup> *Id.* at 1085 (Wilkinson, J., concurring); *id.* at 1086 (Phillips, J., concurring).

<sup>41</sup> Intelligence Authorization Act for Fiscal Year 2001, H.R. 4392, 106th Cong. § 303 (2000).

issues raised by these and other proposals far more thoroughly than is possible here. My more modest ambition is simply to lay out a menu of policy options from which Congress may wish to choose.

### III. Independent Prosecutors

Finally, let me briefly address the rules and procedures that govern the Justice Department's appointment of independent prosecutors in leak investigations.

After the 1999 expiration of the independent counsel statute, there is no longer any legal requirement that the Attorney General appoint a special prosecutor to investigate alleged misconduct by senior executive branch officials. Congress originally enacted the independent counsel law as part of the Ethics in Government Act of 1978.<sup>42</sup> The goal of this post-Watergate reform was to prevent the actual or apparent conflicts of interest that can arise when Justice Department officials in the presidential chain of command are responsible for investigating and prosecuting high ranking figures elsewhere in the executive branch.

Toward that end, the statute established an elaborate process for appointing independent counsels. The Attorney General was required to conduct a preliminary investigation upon receiving information "sufficient to constitute grounds to investigate whether any [covered senior official] may have violated any Federal criminal law."<sup>43</sup> If he concluded that there were "reasonable grounds to believe that further investigation is warranted," the law required him to ask a special federal court known as the Special Division to appoint an independent counsel.<sup>44</sup> Once appointed by the court, an independent counsel had "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice."<sup>45</sup> In addition, he enjoyed a great deal of autonomy. Because an independent counsel was appointed by the Special Division, his authority and legitimacy derived from the court rather than the Attorney General. An independent counsel was supposed to "comply with the written or other established policies of the Department of Justice respecting enforcement of the criminal laws," but there was an exception where doing so "would be inconsistent with the purposes of" the statute.<sup>46</sup> Perhaps the most significant safeguard of independence had to do with removal. Other than by the court, an independent counsel could be removed from office "only by the personal action of the Attorney General and only for good cause, physical or mental disability . . . or any other condition that substantially impairs the performance of such independent counsel's duties."<sup>47</sup>

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<sup>42</sup> 28 U.S.C. §§ 49, 591 et seq. (1994). *See generally* Morrison v. Olson, 487 U.S. 654 (1988).

<sup>43</sup> 28 U.S.C. § 591(a).

<sup>44</sup> *Id.* § 592(c)(1).

<sup>45</sup> *Id.* § 594(a).

<sup>46</sup> *Id.* § 594(f).

<sup>47</sup> *Id.* § 596(a)(1).

While the independent counsel statute is a now dead letter, the Justice Department adopted regulations in 1999 that allow for a “special counsel” to be appointed in certain circumstances.<sup>48</sup> Under these rules, the Attorney General “will appoint” a special counsel if he determines that “criminal investigation of a person or matter is warranted,” that investigation by normal DOJ personnel “would present a conflict of interest,” and that a special counsel “would be in the public interest.”<sup>49</sup> Once appointed, a special counsel has “the full power and independent authority to exercise all investigative and prosecutorial functions of any United States Attorney.”<sup>50</sup> He also is fairly autonomous. A special counsel must be appointed from outside the U.S. government.<sup>51</sup> As a general matter, he is required to comply with DOJ’s rules and policies,<sup>52</sup> but he “shall not be subject to the day-to-day supervision of any official of the Department.”<sup>53</sup> He may be “removed from office only by the personal action of the Attorney General,”<sup>54</sup> and then only for reasons of “misconduct, dereliction of duty, incapacity, conflict of interest, or for other good cause, including violation of Departmental policies.”<sup>55</sup> Even if the Attorney General does not appoint a special counsel in a particular case, he might nevertheless decide to recuse himself from the matter. Recusal helps eliminate any appearance of impropriety that could result if the Attorney General had direct supervisory authority over investigators who are looking into allegations of wrongdoing by other high ranking officials.

These rules and practices apply to all investigations, not just investigations of allegedly unlawful leaks. But prosecutorial independence may be especially appropriate in leak cases. Leak cases almost always involve the news media, and Justice Department rules normally require prosecutors to obtain the Attorney General’s approval before asking a grand jury to subpoena a reporter to learn the source of a given leak.<sup>56</sup> As a result, the Attorney General would be required to personally participate in an investigation into whether any of his fellow senior officials in the executive branch unlawfully disclosed classified information to the press. Needless to say, this situation that has the potential to raise the very conflict of interest problems that inspired Congress to enact the independent counsel statute and, more recently, the Justice Department to enact its special counsel regulations.

The previous decade offers an example of what steps the Justice Department might take to minimize conflict issues in a leak investigation. In 2003, the Department appointed a special counsel to investigate whether senior administration officials had unlawfully revealed the identity of a CIA employee. The special counsel’s independence went even further, in an important respect, than what was required under DOJ’s regulations: He was expressly delegated

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<sup>48</sup> 28 C.F.R. pt. 600.

<sup>49</sup> *Id.* § 600.1.

<sup>50</sup> *Id.* § 600.6.

<sup>51</sup> *Id.* § 600.3(a).

<sup>52</sup> *Id.* § 600.7(a).

<sup>53</sup> *Id.* § 600.7(b).

<sup>54</sup> *Id.* § 600.7(d).

<sup>55</sup> *Id.*

<sup>56</sup> United States Attorneys’ Manual § 9-13.400.

all investigative powers of the Attorney General (as under the old independent counsel statute) rather than the lesser powers of a U.S. Attorney (as under the regulations).<sup>57</sup> As a result, it wasn't necessary for the special counsel to receive approval from DOJ leadership before asking a grand jury to subpoena the press, granting immunity to a witness, taking an appeal, and so on.<sup>58</sup> Moreover, to avoid even the appearance of impropriety, the Attorney General recused himself from the investigation, handing all supervisory authority over the case to the Deputy Attorney General.<sup>59</sup>

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Mr. Chairman, thank you again for the opportunity to testify this morning. I would be happy to answer any questions you or other Members of the Subcommittee might have.

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<sup>57</sup> Letter from James B. Comey, Acting Attorney General, to Patrick J. Fitzgerald, United States Attorney, Dec. 30, 2003, *available at* [http://www.justice.gov/usao/iln/osc/documents/ag\\_letter\\_december\\_30\\_2003.pdf](http://www.justice.gov/usao/iln/osc/documents/ag_letter_december_30_2003.pdf); *see also* Department of Justice Press Conference, Appointment of Special Prosecutor to Oversee Investigation into Alleged Leak of CIA Agent Identity and Recusal of Attorney General John Ashcroft from the Investigation, Dec. 30, 2003, *available at* <http://www.fas.org/irp/news/2003/12/doj123003.html>.

<sup>58</sup> Department of Justice Press Conference, *supra* note 57.

<sup>59</sup> *Id.*