

Let Justice Take Its Course
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The case is not yet a week old, but to some senators it is already compromised. They say the Justice Department should appoint a special counsel to investigate accusations that senior administration officials broke the law by revealing the identity of a covert C.I.A. officer. One senator has said he intends to reintroduce a version of the Independent Counsel Act, which expired in 1999.

That would be a mistake. The career prosecutors at the Justice Department have experience investigating politically charged cases (campaign finance improprieties, for example). By contrast, the independent counsel statute, under which a panel of judges appoints a lawyer accountable essentially to no one, creates terrible incentives for the prosecutor and distorts the priorities of the legal system. A special counsel, who would work under the attorney general, would suffer from some of the same problems.

The Independent Counsel Act, which created the office that allowed Lawrence Walsh to investigate the Iran-contra affair and Kenneth Starr to investigate Whitewater, did little to instill confidence in the rule of law. Everyone -- Republicans and Democrats, prosecutors and defense lawyers -- can agree on that, just as we agree that Mr. Starr and Mr. Walsh were talented lawyers.

The problem was with the law itself. The independent counsel was a constitutional orphan, with no base in any branch of government. The person in the job had nothing to do but investigate a single entity for some kind of wrongdoing. Independent counsels were almost entirely insulated from budget constraints, investigation deadlines and Justice Department policy and practice. And because they were judged by the indictments and convictions they obtained, they had an incentive to investigate, accuse and pursue relentlessly. To paraphrase a saying made famous by Mark Twain: to a man with a hammer, a lot of things look like nails.

Such incentives are particularly problematic in a case involving leaks. Leak investigations often drag on endlessly and rarely culminate in indictments. They can demoralize government staff members, who often must take several polygraph tests. They also have a chilling effect on reporters and columnists, who face tremendous pressure from the government to reveal their sources.

In a case like this one, where national security concerns may be pitted against the First Amendment freedom of the press, it is important that the investigation proceed carefully and methodically and with accountability. So far, there is absolutely no reason to think

that the Justice Department is incapable of handling it.

Of course, as with any criminal investigation, a reason may yet emerge. And to the extent a greater degree of independence from the attorney general is necessary, the Justice Department already has a system for the appointment of a special counsel.

This system gives the attorney general the power to name someone outside the traditional channels to investigate and bring indictments. The rules give the special counsel freedom from day-to-day supervision by the attorney general and other political appointees, but they also require the counsel to adhere to Justice Department policies. What's more, if the attorney general overrules a special counsel as to any investigative or prosecutorial step, he must inform Congress of his decision.

Nevertheless, the special counsel shares some of the problems of an independent counsel, especially his single-minded focus. As such, the calls for a special counsel are premature. This is not a circumstance of a direct personal conflict, nor is it one where the Justice Department is investigating itself. Some degree of conflict of interest is inevitable when the Justice Department investigates the White House, of course. But the conflict should be weighed against the disadvantages of outside prosecutors.

Independence from political influences sounds good in theory. In reality, however, such independence often does great harm to civil liberties, personal reputations and the public fisc. Before reviving a dubious constitutional experiment or tinkering with the machinery of justice, Congress should give the Justice Department's prosecutors a chance.