

**UNDER SEAL**

**United States Court of Appeals**  
District of Columbia Circuit

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for the District of Columbia Circuit

**FILED SEP 3 2002**

Division for the Purpose of  
Appointing Independent Counsels  
Ethics in Government Act of 1978, As Amended

**Special Division**

Division No. 95-1  
IN RE: HENRY G. CISNEROS

Before: SENTELLE, *Presiding*, FAY and CUDAHY, *Senior Circuit Judges*

**UNDER SEAL**  
**ORDER**

Pursuant to the Independent Counsel Reauthorization Act of 1994, 28 U.S.C. § 591-99

1994), the Court, on its own motion and after due consideration of the response of the independent counsel to the order to show cause why the office should not be terminated, concludes that termination of the office of the independent counsel in the above-captioned matter is not currently appropriate under the standards set forth in 28 U.S.C. § 596 (b)(2) for reasons more fully set forth in the memorandum filed simultaneously herewith.\*

It is further ordered, that within six (6) months of the date of this order, the Independent Counsel again show cause why his office should not be terminated, and that his response to this show cause order include new developments since the date of this order.

Per Curiam

For the Court:

Mark J. Langer, Clerk

by

Marilyn R. Sargent, Chief Deputy Clerk

\*Separate concurring opinion filed by *Senior Circuit Judge Cudahy*.

## MEMORANDUM

In May of 1995 this Court appointed David Barrett independent counsel to conduct an investigation into possible federal criminal conduct on the part of HUD Secretary Henry Cisneros. Although the case against Cisneros was disposed of in September of 1999, and although the IC statute expired in June of 1999, IC Barrett's investigation has continued.

Section 596(b)(2) of the IC statute states:

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

This section also requires that the court determine on a yearly basis (beginning with the fifth anniversary of the IC's appointment), and on its own motion, whether termination of the IC's office is appropriate. In furtherance of this statutory mandate, on June 21, 2002, the court issued a show cause order directing that IC Barrett "show cause . . . why the Court should not order that any remaining investigations and prosecutions be transferred to the Department of Justice, and the Office of Independent Counsel terminated . . ."

On July 10, 2002, the IC filed his response. In this response, he asserts that his office "is presently investigating . . . possible obstruction of justice by employees of the Department of Justice and the Internal Revenue Service . . ." Apparently, during his initial investigation of Cisneros the IC discovered alleged improprieties with respect to Cisneros' tax returns. He subsequently sought an expansion of his jurisdiction to include investigation of possible tax offenses by Cisneros for the years 1989, 1991, 1992, and 1993. The Attorney General, however,

only expanded the IC's jurisdiction to include possible tax offenses for the year 1992. The IC claims that despite the IRS's internal determination that there was substantial evidence of Cisneros' tax offenses, "[t]here was an inexplicable disconnect between what the IRS uncovered in its investigation of Cisneros and the Attorney General's determination not to grant OIC jurisdiction over tax matters, except for one year." According to the IC, "[t]he evidence thus reveals the disturbing likelihood that the Attorney General was misinformed, directly by Public Integrity and indirectly by the IRS, when she was considering the scope of [the IC's] original and expansion jurisdiction."

Because of this continuing investigation, the IC contends that the special division does not have the authority to terminate his office. He argues that "[t]he determination of when to end criminal investigation or prosecution is a quintessential exercise of prosecutorial discretion," and that "[t]his Court is not authorized to use the termination power [under § 596(b)(2)] to intrude on an independent counsel's prosecutorial discretion to pursue an investigation as his judgment dictates." The IC cites *Morrison v. Olson*, 487 U.S. 654 (1988), in which the Court noted that "[t]he termination provisions of the Act do not give the Special Division anything approaching the power to *remove* the counsel while an investigation or court proceeding is still underway—this power is vested solely in the Attorney General." *Id.* at 682. (emphasis in original.)

The IC also points out that in its discussion of § 596(b)(2), the Court in *Morrison* adopted a very limited scope of the special division's termination power, stating that "the power to terminate, especially when exercised by the Division on its own motion, is 'administrative' to the extent that it requires the Special Division to monitor the progress of the independent counsel and come to a decision as to whether the counsel's job is 'completed.'" The IC states that his

investigation is far from being completed in that his office "is presently investigating substantial and credible evidence of obstruction of justice, false statements, and dereliction of duty by high-ranking government officials in, at a minimum, DOJ and the IRS, with the purpose and effect of obstructing this Office's investigation of Henry Cisneros." While we are not without misgivings, we ultimately agree that termination of the office is beyond the power of the Court on the present record.

It is true that section 596 (b)(2) gives the special division authority to "terminate an office of independent counsel at any time," under specified conditions. Furthermore, this section mandates that the court, at specified intervals, make a determination whether or not termination is appropriate. The Supreme Court, after expressing the above-quoted observations concerning the limitations on the special division's removal authority, went on in *Morrison* to note that termination pursuant to section 596(b)(2) "is basically a device for removing from the public payroll an independent counsel who has served his or her purpose, but is unwilling to acknowledge the fact." *Id.* at 683. One way to view our present task is that we are seeking to determine whether the independent counsel in this matter fits that description. His jurisdiction in this matter derives from the original appointment order and one expansion order. The core of the jurisdiction of the appointment order on May 24, 1995, gave the IC authority to investigate whether Cisneros "committed a violation of any federal criminal law . . . by making false statements with respect to his past payments to Linda Medlar to the Federal Bureau of Investigation during the course of his background investigation or conspiring with others to do so." And the order of March 18, 1997, expanded the IC's jurisdiction to the extent of granting him authority to investigate whether Cisneros "committed a violation of federal criminal law . . .

arising from or relating to the filing or preparation of his federal income tax returns for tax year 1992 or conspiring with others to do so.”

In late 1997 a grand jury indicted Cisneros on charges of conspiracy, making false statements, and obstruction of justice; the IC declined to pursue any charges relating to Cisneros' 1992 tax return. On September 7, 1999, Cisneros pled guilty to a single misdemeanor count of lying to the FBI. In return for Cisneros' guilty plea, the IC dismissed all 18 felony counts that had originally been lodged against him. Cisneros was subsequently sentenced to pay a fine of \$10,000 and a \$25 special assessment, but was not sentenced to any time in prison or on probation. (Charges were dismissed against all the other defendants except for Linda Medlar, who pled guilty to bank fraud, money laundering, obstruction of justice, falsifying material facts, and making false statements.) Therefore, the heart of the investigation in this matter is over, and has been over for three years.

The IC nevertheless claims that the activities he is currently pursuing are within his prosecutorial jurisdiction because they are related to the original subject matter he was authorized to investigate and they were developed during and arose out of that investigation. Even assuming, *arguendo*, that the IC is correct, those activities appear to be issues upon which the Attorney General made her determinations, and it may arguably be more appropriate for the DOJ to conduct its own investigation. Again, section 596(b)(2) states that termination by the special division is allowable if “the investigation . . . 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.” It could be argued that with the case against Cisneros resolved, the investigation has been “so substantially completed that it would be

appropriate for the Department of Justice to complete” the investigation because the remaining matter under investigation concerns DOJ internal policy decision-making appropriate for investigation by the DOJ itself.

Furthermore, the IC statute expired over three years ago. By allowing the statute to “sunset,” Congress expressed its intention that criminal investigations, even of government officials are within the province of the Executive and not of independent counsels appointed by the Court. However, the independent counsel retains jurisdiction of the matters under investigation under the grandfather provision of section 599 of the Act which states that “[t]his chapter shall cease to be effective [on June 30, 1999], *except* that this chapter shall continue in effect with respect to then pending matters before an independent counsel.”) (emphasis supplied).

herefore, the independent counsel and the Court remain subject to the provisions of the Ethics in Government Act as fully as if the sunset provision had not been allowed to have its effect. That said, we are bound by the constitutional rule interpreted and applied in *Morrison v. Olson*. As an Article III Court, we are not empowered to supervise the independent counsel, lest the Court find itself performing “executive or administrative duties of a nonjudicial nature.” *Morrison v. Olson*, 487 U.S. at 680. Given the “narrow construction” which the Supreme Court applied to “save [the statute] from constitutional infirmities,” *id.* at 682, we cannot order the office terminated on the present record. However, because of the unique status of this investigation, and especially because of the termination of the act, we expect that this matter will be brought to a close in the foreseeable future. We are, therefore, ordering an updated response to the show cause order including any new developments six months from the date of this order, including specifically what, if any, indictments have been returned.

CUDAHY, *Circuit Judge*, concurring:

The majority has accurately described the problem before us. IC Barrett has skillfully marshaled the constitutional arguments why in theory, and perhaps in practice, an independent counsel might pursue his investigation forever, if he were so inclined. At least, he need have little fear of being called to a halt by this panel of judges. Last year, at about this time, after this problem had received its annual round of consideration, I filed a separate opinion, which in tone and outcome reads much like today's panel memorandum. See *In re Cisneros*, 255 F.3d 832, 832 (D.C. Cir., Spec. Div., 2001) (Cudahy, J., concurring). I mention this, not out of pride of authorship, but to illustrate that there is nothing new about the problem with which we are trying to deal.

Mr. Barrett reports that he began to detect foul play by the higher-ups in Justice and in the IRS in 1997. That is five years ago, but apparently five years has not been long enough to determine whether there is something solid there or not. As the majority observes, the Supreme Court has suggested that termination pursuant to section 596(b)(2) is "basically a device for removing from the public payroll an independent counsel who has served his or her purpose but is unwilling to acknowledge the fact." *Morrison v. Olson*, 487 U.S. 654, 683 (1988). It might be convenient if that standard could be applied to the present circumstances, but, as the majority suggests, things are not that simple. There are, of course, the constitutional concerns, noted in *Morrison*, that caution us against undue aggressiveness. But it is certainly not too early to consider the possibility that the *Cisneros* investigation has fallen into the unfortunate category described in *Morrison*.

So, does this unfortunate category described above in *Morrison* now fit the *Cisneros*

investigation? It is noteworthy that the Court's rationale in *Morrison* essentially tracks the reasoning contained in the legislative history that accompanied the original version of the Act. See S.Rep. 95-170, at 75 (1977), reprinted in 1978 U.S.C.C.A.N. 4216, 4291 (stating that the termination provision "provides for the unlikely situation where a special prosecutor may try to remain as special prosecutor after his responsibilities under this chapter are completed"). Further, the 1994 amendments to the Act added explicit statutory language requiring that this court make an affirmative determination at specific intervals whether an investigation was substantially complete. See 28 U.S.C. § 596(b)(2). The legislative history accompanying the 1994 amendments quoted the same passage from *Morrison* and acknowledged "the constitutionally-defined limits of the special court's authority under section 596(b)(2)." S. Rep. 3-101, at 33-34 (1993), reprinted in 1994 U.S.C.C.A.N. 748, 778-79. The report then stated that the amendment "seeks to ensure that the court exercise that authority on a periodic basis." *Id.* While we might not relish the task of deciding when it is constitutionally permissible for this court to terminate an investigation, that is the role that has been assigned to us by Congress. As I have noted on an earlier occasion, an overly passive approach by our court "renders the termination provisions of the Independent Counsel Act, 28 U.S.C. § 596(b)(2), a dead letter." *In re Madison Guar.Sav. & Loan Ass'n*, 187 F.3d 7652, 653 (D.C. Cir., Spec. Div., 1999) (Cudahy, J., dissenting).

To my mind the key date in this matter seems to be June 30, 1999 – more than three years ago – which is the date when the sun definitively set on the Ethics in Government Act. See 28 U.S.C. § 599. Although this statute also included provisions extending jurisdiction over investigations pending at the time of its expiration, it seems to be implicit in this extension that

Such matters be brought to a reasonably prompt conclusion. That could be accomplished here if the Department of Justice took over the probe, conceivably by the Attorney General's naming Mr. Barrett himself as a special prosecutor. This might be the way to go if, as Mr. Barrett suggests, the Justice Department would have difficulty investigating itself.

The Attorney General has statutory authority to appoint special prosecutors. *See, e.g.*, 28 U.S.C. § 515 ("Any attorney specially appointed by the Attorney General . . . may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings . . . which United States attorneys are authorized by law to conduct . . ."); 28 U.S.C. § 533 ("The Attorney General may appoint officials . . . to detect and prosecute crimes against the United States . . . [and] to conduct such other investigations regarding official matters under the control of the Department of Justice . . . as may be directed by the Attorney General."); *see also United States v. Nixon*, 418 U.S. 683, 694 & n.8 (1974) (summarizing statutory and regulatory basis that permitted the Attorney General to delegate his authority to a "Special Prosecutor"); *In re Sealed Case*, 829 F.2d 50, 55 (D.C. Cir. 1987) (discussing statutory and regulatory authority "authoriz[ing] the Attorney General to create an Office of Independent Counsel virtually free of ongoing supervision"). Of course, this all assumes that there is something to investigate, and the Attorney General could make this call.

As a more promising alternative, we might move at this time to set a date for termination, which is an action specifically mentioned in the original legislative history of the Ethics in Government Act. *See* S. Rep. 95-170, at 75 (1977), *reprinted in* 1978 U.S.C.C.A.N. 4216, 4291 (noting that in order to facilitate an orderly termination decision under the Act, "it may be necessary for the division of the court to set a date certain for the termination of the office of

special prosecutor a reasonable time in the future so that the special prosecutor has an opportunity to complete this report while still serving as special prosecutor"). This approach seeks to find some middle ground between the constitutional strictures against supervision and the consequences of the expiration of the Act. Setting a termination date would also require this court to confront any doubts that may arise about whether Mr. Barrett is still within his prosecutorial jurisdiction.

Of course, we know that the matter most centrally within his jurisdiction, namely the plea bargain with Mr. Cisneros, was completed three years ago. We also know that his investigatory activities have been costing about \$1,000,000 every six months and thus have amounted to more than \$16,000,000 to date. I think the setting of a date for termination, perhaps in consultation with Mr. Barrett, offers the best prospect of carrying out the mandate of the statute without violating the injunctions of the Supreme Court.

I construe what the Special Division is doing here to be in important respects the functional equivalent of setting a date for termination. We appear to be saying that, at six-month intervals, we will reconsider the issue of termination. On that basis, I join in the Order and Memorandum of the court.

