The institute of independent prosecutor in the USA

As a rule, independent prosecutors are professional legal advisors, who were previously appointed by the US Congress to investigate and prosecute criminal violations by officials while in office. The main reason for the emergence of the institute of independent prosecutor is that representatives of state investigative bodies may be linked to the persons under investigation, which might lead to a conflict of interest.

In the United States, different branches of power can appoint or engage independent prosecutors. For example, the US judicial branch can still appoint one to conduct investigations, prosecutions and bring charges in legal cases. Such prosecutors are called special prosecutors. In cases when executive agencies or separate government ministries, departments or agencies conducted internal investigations into misconduct by certain officials, while also appointing an independent prosecutor, this independent prosecutor was called an independent counsel. If such a counsel is hired by the authorities of a separate state or by local authorities, he/she is called a special counsel. The United States Office of the Special Counsel monitors signals and complaints by civil servants over unfair treatment at work, providing protection against employers. This is an independent government agency unrelated to the institute of independent prosecutor.

On 3 January 1983, certain changes were made to this terminology. The US federal government replaced the term “independent counsel” with “special prosecutor”. Legislation on independent counsels, appointed by a special panel of the United States Court of Appeals for the District of Columbia Circuit (Washington, D.C.), expired in 1999. Currently, the only federal regulatory document allowing the US Attorney General to appoint independent prosecutors is 28 Code of Federal Regulations (CFR), Part 600. Such prosecutors are called special counsels and they are associated with the US Department of Justice.

Thus, appointment of a special counsel is today the prerogative of the executive authorities, the US President and, in the narrow sense, the Attorney General. According to the 28 CFR, the ground for such an appointment may be the Attorney General’s inner conviction based on information on criminally liable behaviour of a federal level official detected during preliminary investigation, as well as the fact that

such аn appointment is in the public interest and helps preclude a conflict of interest.

Earlier, the law provided more detailed regulations for the timeframe and procedure for selecting and appointing independent counsels. The Attorney General had 30 days after receiving information about misconduct by a given official to decide whether or not there were sufficient grounds for conducting a preliminary investigation. The Attorney General had to initiate a preliminary investigation even if he failed to make a determination on the sufficiency of such information within the 30-day period. The Attorney General had to terminate the investigation if the information proved insufficient or came from an unreliable source. The Attorney General had 90 days after commencement of a preliminary investigation to decide on appointment of an independent counsel. This period could be extended by court by 60 days but only if proper arguments were presented to the court. In conducting preliminary investigations, the Attorney General had no authority to convene grand juries, plea bargain, grant immunity, or issue subpoenas. The Attorney General asked the court to appoint an independent counsel irrespective of whether or not he was able to decide on the fault of the official within the allocated time frame. The Attorney General had, therefore, to interpret his doubts in favour of the investigation.

This law, which no longer applies, allowed the Attorney General and his subordinates to carry out such preliminary investigations into misconduct by top US officials, including the President and Vice President, CIA Director, Commissioner of Internal Revenue, and members of Congress representing the legislative branch in the United States. If the Attorney General decided that such an investigation would lead to a conflict of interest, he was entitled to nominate an independent counsel for further investigation. The Congress members selected for the committees on courts of the Senate and the House of Representatives could apply to the Attorney General to nominate an independent counsel only if the number of members supporting such an appeal exceeded half the majority or minority of the representatives of the Republican and Democratic parties in such committees.

These timeframes, procedures and the range of persons who can be investigated are not determined by the 28 CFR, Part 600. As a result, the powers of a special counsel are limited to investigations into representatives of the executive branch.

An individual named as special counsel should be a lawyer with a reputation for integrity and impartial decision-making, having appropriate experience, in order to ensure both that the investigation would be conducted competently, expeditiously and thoroughly, and that the investigative and prosecutorial decisions would be supported by an informed understanding of criminal law and Department of Justice policies. The special counsel should be selected from outside the United States Government. Special counsels should agree to devote their full time to fulfilling their official duties. The Attorney General should consult with the Assistant Attorney General for Administration to ensure an appropriate appointment method and that a special counsel undergoes an appropriate background investigation and a detailed review of ethics and conflicts of interest issues. According to the Code of Federal Regulations, the special counsel should be appointed as a “confidential employee”.

The special counsel is vested with full power and independent authority to exercise all investigative and prosecutorial functions of any United States Attorney. The special counsel should determine whether and to what extent to inform or consult with the Attorney General or others within the Department about the conduct of his/her duties and responsibilities. At the same time, the Attorney General may request that the special counsel provide an explanation of any investigative or prosecutorial step and may, after review, conclude that the action should not be pursued, to which effect the Attorney General should notify the Congress.

The jurisdiction of a special counsel is established by the Attorney General and is limited to specific criminal cases, including the authority to investigate and prosecute crimes committed in the course of and with intent to interfere with the special counsel’s investigation and to conduct appeals arising out of the matter under investigation and/or prosecution. If, in the course of his/her investigation, new matters come to light that require additional jurisdiction, the special counsel should consult with the Attorney General, who will determine whether to include the additional matters within the special counsel’s jurisdiction or resolves the issue in another way. If, in the course of his/her investigation, the special counsel determines that administrative remedies, civil sanctions or other government action outside the scope of the criminal justice system might be appropriate, he/she should consult with the Attorney General with respect to the appropriate component to take any requisite action and the Attorney General grants such civil and administrative jurisdiction to the special counsel at his/her request.

The special counsel should submit a proposed budget for the Attorney General’s review and approval. The special counsel should be provided with all appropriate resources both within and outside the Department of Justice, including assignment of personnel. The Attorney General can apply any disciplinary measure against the special counsel, including by removing him/her. The Attorney General should notify Congress of appointment and removal of a special counsel and of the inappropriateness of his/her actions.

The special counsel should notify the Attorney General of all significant events in the course of his/her investigation. At the conclusion of the special counsel’s work, he/she should provide the Attorney General with a report, and the Attorney General should decide whether to publish or archive the report. The Attorney General should determine to what extent the report may be published.

28 CFR, Part 600 contains a proviso that these regulations do not establish any rights.