UNIVERSITY OF BALTIMORE SCHOOL OF LAW

Charles Tiefer
Professor of Law

3904 Woodbine Street
Chevy Chase, MD
20815

CTIEFER@ubalt.edu

TESTIMONY BEFORE THE HOUSE COMMITTEE ON THE JUDICIARY

by Professor Charles Tiefer

The Attorney General, not the House, "Determines" If There is a Conflict of Interest, And When to Appoint Special Counsels

Thank you for the opportunity to testify as a live witness. I served in the House General Counsel's office in 1984-1995, becoming General Counsel (Acting).. (Since 1995, I have been Professor at the University of Baltimore School of Law,) So, I have lengthy full-time experience, including many, many experiences working with Congressional committees on special (including independent) counsels. This work takes in whether the House may seriously ask the Attorney General to initiate one. I have had more years of experience than anyone else in House history focused on this subject.

In 1987 I was Special Deputy Chief Counsel of the House Iran-Contra Committee and worked extensively with that Independent Counsel. Since becoming Professor I have written extensively on special counsel issues. Charles Tiefer, *The Specially Investigated President*," 5 Univ. of Chicago Roundtable 143-204 (1998). I also wrote a leading article defending the constitutionality of independent counsels and my office filed on behalf of the House one of the winning briefs on independent counsel constitutionality.[1]

I might note that I have kept my hand in, in a bipartisan way, in hearings involving matters like those here. Chairman Sensenbrenner's (R-Wis.) called me as lead witness at his hearing on the FBI raid on a Member's office.[2] I was Chairman Issa's (R-

[1] The article was Charles Tiefer, The Constitutionality of Independent Officers as Checks on Abuses of Executive Power, 69 B.U.L. Rev. 59 (1983); the case was *Morrison v. Olson*, 487 US. 654 (1988).

[2] "The Search Warrant Raid Was an Unnecessary and Radical Step ," in Reckless Justice: Did the Saturday Night Raid of Congress Trample the Constitution?, Hearing Before the House Committee on the Judiciary (May 30, 2006)

Cal.) lead witness at his hearing on the demand for Justice Department materials that became the House's contempt case against Attorney General Holder.[3]

I testified vigorously in support of the House's right to obtain *closed* case materials from Attorney General Holder -- while carefully noting that there was no right to get *open* investigation materials, as is sought now. Let me say that again in the plainest terms: when you sought closed case materials, I was vigorously on your side, and you were glad to rely on me; when you seek open investigation materials, your position is absurd and purported support for it is bogus.

It is Absurd to Dispute That Attorney General Holder -- Not the House -- Has Discretion to Decide For or Against a Special Counsel on the (House's) "Justice Department Conspiracy"

Since the expiration of the prior statute fifteen years ago, appointment of a special counsel is governed by regulations. These regulations provide for Attorney General Holder -- not the House -- to have full discretion to decide for or against a Special Counsel. 28 C.F.R. § 600.1. That section says, in full:

§ 600.1 Grounds for Appointing a Special Counsel

> The Attorney General, or in cases in which the Attorney General is recused, the Acting Attorney General, will appoint a Special Counsel **when he or she determines** that criminal investigation of a person or matter is warranted and --
>
> (a) That 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 or extraordinary circumstances; and
>
> (b) That under the circumstances, it would be in the public interest to appoint an outside Special Counsel to assume responsibiilty for the matter.
>
> Source: Order No. 2232-99, 64 FR 37042, July 9, 1999, unless otherwise noted.

It is pure fantasy for the House to deny the Attorney General's having discretion under a regulation saying the Attorney General makes the appointment "when he or she **determines**" the factors as to the need for one. (Bold type added.) The Supreme Court has held many times that the wording that someone or something -- and specifically the

[3] "Congressional Committee Conducting Oversight of ATF Program to Sell Weapons to Smugglers, Notwithstanding Pending Cases," in Hearing on Justice Department Response to Congressional Subpoenas: Hearing Before the House Committee on Government Oversight. June 13, 2011.

Attorney General -- "determines" something means that they have discretion, and that the discretion is theirs, not someone else's. *See, e.g., School Committee v. Department of Education*, 471 U.S. 359 (1985)("the meaning of the words 'grant such relief as the court determines is appropriate' confers broad discretion on the court"); *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987)("Section 208(a) provides that the Attorney General has discretion to grant asylum 'if the Attorney General determines that such alien is a refugee.'").

Note the careful parallelism of the regulation's wording. It does not say the Attorney General "determines" something and then go on to say that somebody else "determines" something else. On the contrary, it does not mention somebody else. Rather, the section is worded with the single verb "determines" followed by three parallel follow on clauses, each beginning with "that." This means the section reads that the "he or she determines that [abc], and --(a) That [def]; and (b) That [xyz]. These are all determinations for the Attorney General. And since "determines" connotes discretion, the Attorney General has discretion to determine each of them.

Within that careful parallelism of the regulation's wording, note how the regulation's wording treats the determination of "a conflict of interest." Namely, the regulation does not say that someone else comes along to decide about "a conflict of interest." Rather, the regulation says "he or she" -- meaning the Attorney General -- "determines . . . That 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 or extraordinary circumstances;" . . . It does not say that someone other than the Attorney General comes along to decide about "a conflict of interest." Rather, this is something the Attorney General "determines" and since "determines" connotes discretion, the Attorney General has "discretion" to decide about a conflict of interest.

This regulation goes back fifteen years, through three Presidents and half a dozen Attorneys General. In all that time, I m unaware of a single writing in which someone disputes that the Attorney General has discretion. This is not some kind of serious argument for which the House finds existing support. It is a convenient unheralded concoction of fanciful imagination.

The regulation's source further confirms the Attorney General's discretion and knocks down any chimerical notions to the contrary. As the regulation notes, its source is is the publication on July 9, 1999, as a regulation about the "Office of Special Counsel" in 64 Fed. Reg. 37038 (July 9, 1999). In the explanatory section, it says:

> The Attorney General is promulgating these regulations to replace the procedures set out in the Independent Counsel Reauthorization Act of 1994. These regulations seek to strike a balance between independence and accountability in certain sensitive investigations, recognizing that there is no perfect solution to the problem. The balance struck is one of day-to-day independence, with a Special Counsel appointed to investigate and if appropriate, prosecute matters **when the Attorney General concludes** that extraordinary circumstances exist such that the public interest would be served by removing a large degree of responsibility for the matter from the Department of Justice.

Thus the regulation's own background source says the action occurs when, and only "when the Attorney General concludes." Thus regulation's source further confirms the Attorney General's discretion. Again, the Supreme Court confirms that "concludes" and "discretion" go together. The Attorney General "shall" deports certain aliens "unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States. *INS v.Doherty*, 502 U.S. 314 (1992).

I suppose the House wishes that its resolution took away the Attorney General's discretion. A moment of reviewing this special counsel regulation shows the unreality of such a House interpretation. These regulations were devised by the Department of Justice itself. When it says the Attorney General has discretion, why would it simultaneously deny the Attorney General his discretion? 1999 was a perfect moment for the Department of Justice to codify the Attorney General's discretion. The independent counsel statute had expired. The (Republican) Congress showed no interest in renewing it, both because the country was extremely sick and tired of Ken Starr, and, because the Republican Congress (correctly) hoped the next president would be a Republican like George W. Bush and did not want to cramp him. So there was not going to be a statute, not the slightest chance. The Department of Justice had a clear field to shape its regulations in a way that gave the Attorney General discretion.

Moreover, how could the Department of Justice, in its regulations, set up a system in which the House of Representatives, a political body, could get special counsels? The entire classic stance of the Department of Justice before, during, and after the 1999 regulations has been firmly against, passionately opposed to, and intensely resistant to, dictation on law enforcement matters by the House of Representatives, a political body. So how could one possibly interpret a regulation based on which the Attorney General "determines," as meaning what kind of law enforcement the House, a political body, dictates?

Perhaps it will be urged, when the committee sees some chance of it, that the regulation says "the Attorney General [ ] will appoint a Special Counsel when he or she determines [etc].." That is, perhaps it will be urged, when the committee sees some chance of it, that the word "will" takes out the discretion of the Attorney General to "determine," and replaces discretion with mandatoriness. But look at the first two sentences in this paragraph, on the lines above, both of which begin with a phrase around "will" (it "will" be urged) and go on to "when the committee sees some chance of it." Each of those two sentences is contingent on "when the committee sees some chance of it." The word "when" is a synonym for "if" in this context.

Having the word "will" does not take out the contingency in those sentences on "when the committee sees some chance of it. Rather, the word "will" just describes what "will" ensue from that contingent, discretionary choice by the committee. Similarly, it remains discretionary with the Attorney General as to whether he determines that the Justice Department has a conflict of interest. It is his determination, not the House's. The word "will" does not take out the contingency. It just describes what "will" ensue from his determination -- a determination that is contingent and in his discretion, not the House's.

No doubt the House majority party thinks its own judgment about whether to have a special counsel is better than his. No doubt the House majority party would prefer that the phrase that "the Attorney General [] will appoint a Special Counsel when he or she determines [etc.]" meant that when it sees things its way, then, he has no discretion -- he "will" do what the House wants. Members and witnesses can always opine about what they would like the Attorney General to determine. But, the regulation does not bind him to what they would like. The regulation puts it up to his own determination -- his, the Attorney General's not the House's or its witnesses.

I may add that I became acquainted with the Attorney General's process during an investigation by the House Committee on the Judiciary itself, in the mid-1980s. This Committee asked Attorney General' Ed Meese to have a special prosecutor about the scandal involving the Justice Department blatantly covering up Superfund non-enforcement.[4] In the end, he did, although with narrow jurisdiction.

Why? The Justice Department had a process for the Attorney General's determination. Memos recommending what to do came up from the long-term, objective Justice Department civil service, particularly memos from the Criminal Division, up through layers of analysis, to the Attorney General. That kind of process underlies the Justice Department regulation on the Attorney General's discretionary determination. That kind of process, suited to the Attorney General's own determination, is quintessentially what a Justice Department regulation intends. Nothing could be further than to have the House, a political body, with its witnesses, who may be hand-picked to share its politics, to mandate what shall occur.

The Bush Administration Precedents Show Neither Support Nor Need for a Special Counsel on the House's "Justice Department Conspiracy"

Between the 1999 special counsel regulations, and the current administration, we have had the two-term Bush Administration. It provides, for comparison, a number of examples showing the hollowness of the claim for a special counsel on the House's "Justice Department Conspiracy."

In 2007, Senate Democrats sought, in a formal letter, a special counsel on Attorney General Alberto Gonzales lying to Congress about the NSA wiretapping program. Attorney General Gonzales testified in February 2006 that there "has not been any serious disagreement" about the "terrorist surveillance program."[5] It later emerged that Gonzales went to Ashcroft's hospital room for a pitched argument about renewing the program, leading (Acting) Attorney General James Comey to threaten to resign. Unlike today's Justice Department conspiracy, this was a potential very specific perjury charge against the Attorney General personally, making the conflict of interest patent and strong.

Yet there was no special counsel. Moreover, the lack of one did not preclude Congress from doing its job. Congress has held many hearings on NSA programs, and has dealt with them through the annual intelligence authorization and other vehicles.

---

[4] There are two articles in Wikipedia with the basic historic facts:
http://en.wikipedia.org/wiki/Reagan_administration_scandals#EPA_scandals
http://en.wikipedia.org/wiki/Morrison_v._Olson

[5] This account is from John Bresnahan, *Dems Seek Gonzales Special Counsel*, Politico (July 26, 2007).

Annually, Congress appropriates for the IRS, and it may put whatever riders it chooses on that vehicle. Indeed, it has slashed IRS appropriations that way. Whether that is a well-thought-out step may be debated, but in any event, no one doubts Congress may do it, and has no need for a special counsel in order to do it.

In 2006, Jan Schakowsky, along with Judiciary Committee and subcommittee chairs and a total of 53 House members, urged Attorney General Michael Mukasey to appoint a special counsel on whether the interrogation of detainees (using "enhanced interrogation techniques," i.e., torture) violated criminal laws. Unlike today's Justice Department conspiracy, then the Justice Department conflict of interest was patent and strong. The infamous "torture memo" blessing the practices had been written for Alberto Gonzales, then head of the Office of Legal Counsel in the Justice Department, notably by John Yoo.

Yet there was no special counsel. Moreover, the lack of one did not preclude Congress from doing its job. In the McCain Amendment and other measures, Congress moved against the torture policy. Conversely, Congress has found many vehicles for riders about the related subject of keeping detainees at Guantanamo. Whether those provisions are all wise may be debated, but, in any event, no one doubts Congress may do it, and, has no need for a s special counsel in order to do it.

From the 2002 to the end of the Bush Administration, its war in Iraq was dogged by scandal. From Vice President Dick Cheney on down, the Administration misled Congress about the war being needed to deal with Iraq's nuclear and other "weapons of mass destruction." The Justice Department conspiracy is an unreal chimera; the government-wide conspiracy about WMD was real and very well documented.

Similarly, the contractors KBR and Blackwater had the highest-level connections, and faced criminal cases, from KBR's criminal kickbacks with its Kuwaiti subcontractor, to Blackwater's massacre in Nisur Square in 2007. There was serious questions as to whether the Justice Department undercharged in these matters; for example, it treated KBR fraud as civil rather than criminal. The Defense Contract Audit Agency had unmasked much KBR fraud that did not get charged as criminal.

I have some experience with these Iraq war contracting scandals. I was Commissioner, on the statutorily-chartered Commission on Wartime Contracting in Iraq and Afghanistan in 2008-201. We held twenty-five televised hearings and I took three missions to Iraq and Afghanistan.

There was no special counsel in relation to the Iraq War. And, the lack of one did not preclude Congress from doing its job. Congress enacted many provisions about the war. One of them set up my Commission. Some of my Commission's recommendations were enacted into law. Iraq War provisions went on the annual defense authorization. Congress did try to deal with the Iraq War by the 2007 war supplemental appropriation. This drew a veto, but it did show, Congress doing its job, and without a need for a special counsel to do it.

Another example was the scandal of Jack Abramoff's lobbying, leading to his plea in 2006.[6] This involved extensive connections, primarily Republican during a Republican administration. Unlike the purely fabulous Justice Department conspiracy, this really did involve widespread political matters. John Ashcroft himself was on the lobbying practice "Team Abramoff," raising Justice

[6] http://en.wikipedia.org/wiki/Jack_Abramoff_scandals

Department questions. Yet there was no special counsel, and, Congress did its job without one, enacting ssome matters as earmarking prohibitions.

In the House's "Justice Department Conspiracy," the Assertions That Purport to Bear on the Justice Department's Supposed "Conflict of Interest" Are Without Merit

H. Res 565 is the resolution that calls for a special counsel. It passed with a vote of 250 to 168. The vote was largely partisan.

In its quest for a special counselt , the key part of the House case, in H. Res. 565, are assertions purporting to show conflict of interest in the Justice Department. But, these are few and do not stand up to scrutiny.

H. Res. 565 says "on May 8, 2013, Richard Pilger, Director of the Election Crimes Branch of the Department of Justice's Public Integrity Section, spoke to Lois G. Lerner about potential prosecution for false statements about political campaign intervention made by tax-exempt applicants."

But, the Justice Department made Pilger available for questioning by House staff, an extraordinary accommodation of the House-- I hardly remember that being done when I was House Counsel And, he completely deflated the allegation. They were looking at an outside suggestion. She said there was no chance it would work. The suggestion was dismissed. The press has had no interest in thisH. Res. 565 said "on May 15, 2013, Attorney General Holder testified before the Judiciary Committee that the Department f Justice would conduct a 'dispassionate' investigation into the IRS matter, and '[t]his will not be about parties * * * this will not be about ideological persuasions * * * anybody who has broken the law will be held accountable."

But, that is exactly what he should, rightly and correctly, say. This sends a powerful message within the department, against any partisan or ideological leanings. And as House committees have found by their own questioning, that is exactly the way the Public Integrity Section operates.

I had dealings with the Public Integrity Section from 1980 to the present, especially when I was House counsel. The personnel there have typically served through several administrations -- if they are senior it can add up to quite a number. They are absolutely career-oriented, and they do their same job through the succession of Democratic and Republican administrations alike. I never saw them show any favor when my dealings involved Democratic Members or Republican Members. Pilger explained this in a House interview on May 6, 2014:

> "Since I joined the Public Integrity Section in 1992, I have never encountered politically motivated decisions. To the contrary, it has been my consistent experienced this section has acted, without exception, on a strictly nonpartisan basis in all of its decisions and actions. In my experience politics plays no role in our work as prosecutors, period."

H. Res 565 says "the Civil Rights Division of the Department of Justice has a history of politicization, as evident in the report by the Department of Justice Office Inspector General entitled, "A Review of the Operations of the Voting Rights Section of the Civil Rights Division."

But, a problem in one section of the Civil Rights Division does not taint the whole Division. (Parenthetically, the DOJ IG review is mainly about events during the Bush Administration, not the current one.) The Division has nine sections plus working groups, special offices, etc. And, the Lois Lerner investigation is primarily under the Public Integrity Section of the Criminal Division, which is not the Voting Rights Section of the Civil Rights Division. I am before the House Judiciary Committee; you do know these things; you know, for example, that these two sections are so far apart that you have different subcommittees of the Judiciary Committee to oversee those two sectionsH Res. 565 says "Barbara Bosserman, a trial attorney in the Civil Rights Division who in the past several years has contributed nearly $7,000 to the Democratic National Committee and President Barack Obama's political campaigns, is playing a leading role in the Department of Justice's investigation."

But, again, this investigation is primarily under the Public Integrity Section of the Criminal Division. The main allegations against Lois Lerner are those which the Public Integrity Section investigates. The Department has reviewed the matter and determined that it is not a violation of the ethics rules for her to make campaign contributions. Recall that every U.S. Attorney is a Presidential appointee, many of them of some prominence and assets. If every time a U.S. Attorney made a contribution, he was set up for the cry of conflict of interest, you would need a new Main Justice building to hold the overflowing of the special counsel offices. Federal regulations prohibit career employees from participating in a criminal investigation if they have a "political relationship" with an organization that has a substantial interest in the outcome of the innvestigation . (28 C.F.R. § 45.2.) That does not mean some campaign contributions, that means "service as a principal adviser" with the organization, which she never had.

H. Res. 565 says "on April 9, 2014, the House Committee on Ways and Means referred Lois G. Lerner to the Department of Justice for criminal prosecution.

But, the Justice Department says they are working on it. As House Counsel, I saw committee referrals. They were not in the least binding on the Justice Department. All you can ask is that they do what they are doing -- working on it. I may say, I always advised committees their referrals would be more worthy of respect if they were bipartisan.

H. Res. 565 says "former Department of Justice officials have testified before a subcommittee of the House Committee on Oversight and Government Reform that the circumstances of the Administration's investigation of the IRS's targeting of conservative tax-exempt applicants warrant the appointment of a special counsel"

But, there are a large, large number of former officials. What one or two think, is something that hardly matters apart from whatever specifics they discuss, which, presumably are somewhere in H. Res. 565. The resolution apparently refers to Hans von Spakovsky. He served as a Republican Party chairman, worked on the Bush team during the 2000 Florida recount, had a much-criticized time when appointed by Bush to head the Civil Rights Division, was nominated to the FEC (the nomination was withdrawn under criticism for partisanship), and is now at the Heritage Foundation. He has every right to his opinions, but it would be a stretch for H. Res. 565 to put him forth as a typical former Justice Department witness.

A better choice would be an official definitely in the loop of this Justice Department investigation, namely, the Director of the FBI, James Comey. Comey

testified before this committee that the investigation was proceeding properly. It may be noted that Comey was appointed as Deputy Attorney General in 2003-3005 during the Bush Administration, the second-highest post in the Justice Department, after being appointed as U.S. Attorney for the Southern District of New York in 2002-2003 during Bush Administration, one of the most responsible U.S. Attorney posts in the country. It is a shame that H. Res. 565 does not acknowledge him.

H. Res. 565 says "Department of Justice regulations counsel attorneys to avoid the 'appearance of a conflict of interest likely to affect the public perception of the integrity of the investigation or prosecution."

But, as previously discussed, the regulations on having a special counsel use the high standard of an actual conflict of interest, not a mere "appearance" of one. There has not been any showing of even an "appearance" of one, but even if there were, that would fall far, far short, of the "actual" one for the Attorney General to determine, in order to take the case away from the Department of Justice.

H. Res. 565 says "since May 15, 2013, the Department of Justice and the Federal Bureau of Investigation have refused to cooperate with congressional oversight of the Administration's investigation of the IRS's targeting of conservative tax-exempt applicants."

But, this is an open criminal investigation. The history of Congressional committees has been that they cannot piggy-back on open criminal investigations. I have been explaining this to Congressional committees for thirty years. H. Res. 565 says "on January 13, 2014 , unnamed officials at the Department of Justice leaked to the media that no criminal charges would be appropriate for IRS officials who engaged in the targeting activity, which undermined the integrity of the Department of Justice's investigation."

But, that kind of statement is common and means nothing. Since then the Department of Justice has made very clear it is conducting a serious investigation.

H. Res. 565 says 'on April 16, 2014, electronic mail communications between the Department of Justice and the IRS were released showing that the Department of Justice considered prosecuting conservative nonprofit groups for engaging in political activity\

But, the question was whether the IRS wanted to refer cases Lois Lerner said, flatly, "no." So nothing ensued.

In conclusion: the House's quest for a special counsel is unrealistic. I think highly of the House of Representatives. Its committee investigations are wonders to behold, especially when conducted in a bipartisan fashion. But, it cannot replace the Attorney General's judgment, about special counsels, with its own.