
HOUSE BILL 2918

State of Washington

54th Legislature

1996 Regular Session

By Representative Appelwick

Read first time 01/26/96. Referred to Committee on Law & Justice.

1 AN ACT Relating to the appointment of independent counsel; and
2 adding a new chapter to Title 10 RCW.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

4 NEW SECTION. **Sec. 1.** There is created a supervisory committee
5 within the court of appeals, consisting of three judges, for the
6 purpose of selecting an independent counsel for the investigation and
7 prosecution of persons specified in section 2 of this act. The chief
8 justice of the Washington supreme court shall designate and assign the
9 three judges, one from each division of the court of appeals, to the
10 committee for two-year terms. Any vacancy in the supervisory committee
11 shall be filled only for the remainder of the two-year term in which
12 the vacancy occurs.

13 NEW SECTION. **Sec. 2.** (1) The attorney general shall conduct a
14 preliminary investigation in accordance with this chapter whenever the
15 attorney general receives information sufficient to constitute grounds
16 to investigate whether a person specified in subsection (2) of this
17 section might have violated a criminal law other than a violation
18 classified as a misdemeanor or gross misdemeanor.

1 (2) An elected official of the executive branch, and a director or
2 deputy director of a state agency, are subject to preliminary
3 investigation by the attorney general and appointment of an independent
4 counsel by the supervisory committee of the court of appeals for the
5 investigation and prosecution of violations of criminal law.

6 (3)(a) In determining whether grounds to investigate exist, the
7 attorney general shall only consider the specificity of the information
8 received and the credibility of the source of the information.

9 (b) The attorney general shall determine whether grounds to
10 investigate exist not later than thirty days after the information is
11 received. If within that thirty-day period the attorney general
12 determines that the information is not specific or not from a credible
13 source, the attorney general shall close the matter. If within that
14 thirty-day period the attorney general determines that the information
15 is specific and from a credible source, the attorney general shall
16 commence a preliminary investigation with respect to that information.
17 If the attorney general is unable to determine within that thirty-day
18 period whether the information is specific and from a credible source,
19 the attorney general shall commence a preliminary investigation with
20 respect to that information at the end of the thirty-day period.

21 (c) If information received under this chapter involves the
22 attorney general, the next most senior official in the office of the
23 attorney general who is not also recused shall perform the duties
24 assigned to the attorney general under this chapter. If information
25 received under this chapter involves a person with whom the attorney
26 general has a personal or financial relationship, the attorney general
27 shall recuse himself or herself by designating the next most senior
28 official in the office of the attorney general who is not also recused
29 to perform the duties assigned to the attorney general under this
30 chapter. A determination to recuse must be in writing, must identify
31 the facts considered by the attorney general, and must set forth the
32 reasons for the recusal. The attorney general shall file this
33 determination with any notification or application submitted to the
34 supervisory committee under this chapter with respect to the
35 information.

36 NEW SECTION. **Sec. 3.** (1) A preliminary investigation under this
37 chapter must be of such matters as the attorney general considers
38 appropriate in order to make a determination on whether further

1 investigation is warranted, with respect to each potential violation,
2 or allegation of a violation, of criminal law. The attorney general
3 shall make the determination not later than ninety days after the
4 preliminary investigation is commenced, except that, for a preliminary
5 investigation commenced after a legislative request under section 4 of
6 this act, the attorney general shall make the determination not later
7 than ninety days after the request is received. The attorney general
8 shall promptly notify the supervisory committee of the commencement of
9 the preliminary investigation and the date of the commencement. The
10 attorney general may apply to the supervisory committee for a single
11 extension for a period of not more than sixty days. The supervisory
12 committee may grant the extension upon a showing of good cause.

13 (2)(a) In conducting a preliminary investigation under this
14 chapter, the attorney general may not convene grand juries, plea
15 bargain, grant immunity, or issue subpoenas.

16 (b) The attorney general may not base a determination that
17 information with respect to a violation of criminal law by a person is
18 not specific and from a credible source upon a determination that the
19 person lacked the state of mind required for the criminal law
20 violation. The attorney general may not base a determination that
21 there are no reasonable grounds to believe that further investigation
22 is warranted upon a determination that the person lacked the state of
23 mind required for the violation of criminal law involved, unless there
24 is clear and convincing evidence that the person lacked the required
25 state of mind.

26 NEW SECTION. **Sec. 4.** (1)(a) The attorney general shall apply to
27 the supervisory committee for the appointment of an independent counsel
28 if:

29 (i) The attorney general determines after completion of the
30 preliminary investigation that there are reasonable grounds to believe
31 that further investigation is warranted; or

32 (ii) The ninety-day time period for conducting the preliminary
33 investigation and any time extension granted have elapsed and the
34 attorney general has not filed a notification with the supervisory
35 committee.

36 (b) In determining whether reasonable grounds exist to warrant
37 further investigation, the attorney general shall comply with the

1 written or other established policies of the office of the attorney
2 general with respect to the conduct of criminal investigations.

3 (2) If the attorney general determines after the completion of a
4 preliminary investigation that there are no reasonable grounds to
5 believe that further investigation is warranted, the attorney general
6 shall promptly notify the supervisory committee of this determination,
7 and the supervisory committee may not appoint an independent counsel
8 with respect to the matters involved. The notification must contain a
9 summary of the information received and a summary of the results of the
10 preliminary investigation.

11 (3) Upon receipt of a notification from the attorney general that
12 there are no reasonable grounds to believe that further investigation
13 is warranted, the supervisory committee may not overrule this
14 determination but may return the matter to the attorney general for
15 further explanation of the reasons for the determination.

16 (4) If, after submitting a notification to the supervisory
17 committee that no further investigation is warranted, the attorney
18 general receives additional information sufficient to constitute
19 grounds to investigate, the attorney general shall conduct an
20 additional preliminary investigation the attorney general considers
21 appropriate for a period of not more than ninety days following receipt
22 of the additional information.

23 (5) An application for the appointment of an independent counsel
24 under this chapter must contain sufficient information to assist the
25 supervisory committee in selecting an independent counsel and in
26 defining that independent counsel's prosecutorial jurisdiction so that
27 the independent counsel has adequate authority to fully investigate and
28 prosecute the subject matter of the investigation and all related
29 matters.

30 (6) Except as otherwise provided in this chapter or as is deemed
31 necessary for law enforcement purposes, an officer or employee of the
32 office of the attorney general or an office of an independent counsel
33 may not, without leave of the supervisory committee, disclose to an
34 individual outside the office of the attorney general or office of the
35 independent counsel a notification, application, or other document,
36 materials, or memorandum supplied to the supervisory committee under
37 this chapter. This chapter may not be construed as authorizing the
38 withholding of information from the legislature.

1 (7) The attorney general's determination to apply to the
2 supervisory committee for the appointment of an independent counsel is
3 not reviewable by a court.

4 (8)(a) The committee on law and justice of either the house of
5 representatives or the senate, by a majority vote of the committee's
6 members and with the concurrence of the house executive rules committee
7 or the senate facilities and operations committee, respectively, may
8 request in writing that the attorney general apply for the appointment
9 of an independent counsel.

10 (b) Not later than thirty days after receipt of a request under (a)
11 of this subsection, the attorney general shall submit to the
12 legislative committee making the request, or to the committee on which
13 the persons making the request serve, a report on whether the attorney
14 general has begun or will begin a preliminary investigation. The
15 report must set forth the reasons for the attorney general's decision
16 regarding the preliminary investigation as it relates to each of the
17 matters with respect to which the congressional request is made. If
18 the attorney general determines that a preliminary investigation is
19 warranted, the report must include the date on which the preliminary
20 investigation began or will begin.

21 (c) At the same time as a notification, application, or other
22 document, material, or memorandum is supplied to the supervisory
23 committee for a preliminary investigation of any matter with respect to
24 which a legislative request is made under (a) of this subsection, the
25 notification, application, or other document, material, or memorandum
26 must be supplied to the legislative committee making the request, or to
27 the legislative committee on which the persons making the request
28 serve. If an application for the appointment of an independent counsel
29 is not made to the supervisory committee after completion of the
30 preliminary investigation, the attorney general shall submit a report
31 to the legislative committee stating the reasons why the application
32 was not made, addressing each matter with respect to which the
33 legislative request was made.

34 (d) A person may not reveal a report, notification, application, or
35 other document, material, or memorandum supplied to a legislative
36 committee under this section to a third party, except that the
37 legislative committee may, either on its own initiative or upon the
38 request of the attorney general, make public a portion or portions of
39 a report, notification, application, document, material, or memorandum

1 that will not in the legislative committee's judgment prejudice the
2 rights of any individual.

3 NEW SECTION. **Sec. 5.** (1)(a) Upon receipt of an application for
4 the appointment of an independent counsel, the supervisory committee
5 shall appoint an appropriate independent counsel and shall define that
6 independent counsel's prosecutorial jurisdiction.

7 (b) The supervisory committee shall appoint as independent counsel
8 an individual who has appropriate experience and who will conduct the
9 investigation and any resulting prosecution in a prompt, responsible,
10 and cost-effective manner. The supervisory committee shall seek to
11 appoint as independent counsel an individual who will serve to the
12 extent necessary to complete the investigation and any resulting
13 prosecution without undue delay. The supervisory committee may not
14 appoint as an independent counsel any person who holds an office of
15 profit or trust under the state of Washington.

16 (c) In defining the independent counsel's prosecutorial
17 jurisdiction, the supervisory committee shall assure that the
18 independent counsel has adequate authority to fully investigate and
19 prosecute the subject matter and all related matters with respect to
20 which the attorney general has requested the appointment of an
21 independent counsel. The jurisdiction of the independent counsel must
22 also include the authority to investigate and prosecute crimes, other
23 than misdemeanors and gross misdemeanors, that might arise out of the
24 investigation or prosecution of the matter being investigated,
25 including perjury, obstruction of justice, destruction of evidence, and
26 intimidation of witnesses.

27 (d) An independent counsel's identity and prosecutorial
28 jurisdiction may not be made public except upon the request of the
29 attorney general or upon a determination by the supervisory committee
30 that disclosure would be in the best interests of justice. The
31 identity and prosecutorial jurisdiction of the independent counsel must
32 be made public when an indictment is returned or any criminal
33 information is filed as a result of the independent counsel's
34 investigation.

35 (2) If the independent counsel discovers or receives information
36 about a possible violation of criminal law by a person specified in
37 section 2 of this act that is not covered by the independent counsel's
38 prosecutorial jurisdiction, the independent counsel may submit the

1 information to the attorney general. The attorney general shall
2 conduct a preliminary investigation of the information not to exceed
3 thirty days from the date the information is received. If the attorney
4 general determines that there are no reasonable grounds to believe that
5 further investigation is warranted, the attorney general shall promptly
6 notify the supervisory committee of this finding and the supervisory
7 committee may not expand the jurisdiction of the independent counsel or
8 appoint another independent counsel with respect to the new matter. If
9 the attorney general determines that there are reasonable grounds to
10 believe that further investigation is warranted, or if the thirty-day
11 period elapses without a notification to the supervisory committee that
12 no further investigation is warranted, the supervisory committee shall
13 expand the jurisdiction of the independent counsel to include the new
14 matters or shall appoint another independent counsel to investigate the
15 new matter.

16 (3) Upon receipt of a notification from the attorney general that
17 there are no reasonable grounds to believe that further investigation
18 is warranted, the supervisory committee may not overrule this
19 determination but may return the matter to the attorney general for
20 further explanation of the reasons for the determination.

21 NEW SECTION. **Sec. 6.** (1) If a vacancy in the office of
22 independent counsel arises by reason of the resignation, removal, or
23 death of an independent counsel, the supervisory committee shall
24 appoint a new independent counsel to complete the work of the
25 independent counsel whose resignation, removal, or death caused the
26 vacancy. For a vacancy arising by reason of the removal of an
27 independent counsel, the supervisory committee may appoint an acting
28 independent counsel to serve until any judicial review of the removal
29 is completed.

30 (2) Upon the request of an individual who is the subject of an
31 investigation conducted by an independent counsel under this chapter,
32 the supervisory committee may, if no indictment is brought against the
33 individual as a result of that investigation, award reimbursement for
34 those reasonable attorneys' fees incurred by that individual during the
35 investigation that would not have been incurred but for this chapter.

36 NEW SECTION. **Sec. 7.** (1) An independent counsel appointed under
37 this chapter has full power and independent authority to exercise all

1 investigative and prosecutorial functions and powers of the office of
2 the attorney general. The investigative and prosecutorial functions
3 and powers of the independent counsel include:

4 (a) Conducting proceedings before grand juries and other
5 investigation;

6 (b) Participating in court proceedings and engaging in litigation,
7 including civil and criminal matters, that the independent counsel
8 considers necessary;

9 (c) Appealing a decision of a court in a case or proceeding in
10 which the independent counsel participates in an official capacity;

11 (d) Reviewing all documentary evidence available from any source;

12 (e) Determining whether to contest the assertion of a testimonial
13 privilege;

14 (f) Initiating and conducting prosecutions in a court of competent
15 jurisdiction, framing and signing indictments, filing informations, and
16 handling all aspects of a case; and

17 (g) Consulting a prosecuting attorney for the county in which a
18 violation of law with respect to which the independent counsel is
19 appointed was alleged to have occurred.

20 (2) An independent counsel may request assistance of the office of
21 the attorney general in carrying out the functions of the independent
22 counsel. The assistance may include access to records, files, or other
23 materials relevant to matters within the independent counsel's
24 prosecutorial jurisdiction, and the use of resources and personnel
25 necessary to perform the independent counsel's duties.

26 (3)(a) An independent counsel appointed under this chapter must
27 receive compensation pro rated based on the rate for a senior deputy
28 attorney general. For the purposes of carrying out the duties of an
29 office of independent counsel, the independent counsel may appoint, fix
30 the compensation, and assign the duties of any employees the
31 independent counsel considers necessary. The employees of the office
32 of independent counsel must be compensated at levels not to exceed
33 those paid for comparable positions in the office of the attorney
34 general.

35 (b) The office of the attorney general shall pay all costs relating
36 to the establishment and operation of an office of independent counsel.
37 The attorney general shall submit to the legislature, not later than
38 thirty days after the end of each fiscal year, a report on amounts paid

1 during that year for expenses of investigations and prosecutions by
2 independent counsels.

3 (4) An independent counsel shall comply with the written or other
4 established policies of the office of the attorney general respecting
5 enforcement of the criminal laws, except to the extent that to do so
6 would be inconsistent with the purposes of this chapter. The
7 independent counsel may dismiss matters within the independent
8 counsel's prosecutorial jurisdiction without conducting an
9 investigation or at a subsequent time before prosecution if to do so
10 would be consistent with the written or other established policies of
11 the office of the attorney general with respect to the enforcement of
12 criminal laws.

13 (5) If a matter is in the prosecutorial jurisdiction of an
14 independent counsel, the office of the attorney general shall suspend
15 all investigations and proceedings regarding the matter unless the
16 independent counsel agrees in writing that the investigation or
17 proceedings may be continued by the office of the attorney general.

18 (6)(a) An independent counsel shall file with the supervisory
19 committee every six months after the independent counsel's appointment
20 a written report that identifies and explains major expenses and
21 summarizes all other expenses incurred by the office of independent
22 counsel during that six-month period. Before the termination of the
23 office of independent counsel, the independent counsel shall file a
24 final report with the supervisory committee, setting forth fully and
25 completely a description of the work of the independent counsel,
26 including the disposition of all cases brought.

27 (b) The supervisory committee may release to the legislature, the
28 public, or an appropriate person, portions of a report made under this
29 subsection that the supervisory committee considers appropriate. The
30 supervisory committee shall make such orders as are appropriate to
31 protect the rights of an individual named in the report and to prevent
32 undue interference with pending prosecution. The supervisory committee
33 may make a portion of a final report available to an individual named
34 in the report for the purposes of receiving any comments or factual
35 information the individual may submit.

36 NEW SECTION. **Sec. 8.** (1) During the period in which an
37 independent counsel is serving under this chapter, the independent
38 counsel, and a person associated with a firm with which the independent

1 counsel is associated, may not represent in any matter a person
2 involved in an investigation or prosecution under this chapter.

3 (2) An independent counsel and a person appointed by that
4 independent counsel may not, for a period of three years following the
5 termination of the independent counsel's or appointed person's service,
6 represent a person in a matter if that individual was the subject of an
7 investigation or prosecution under this chapter conducted by that
8 independent counsel. An independent counsel and a person appointed by
9 that independent counsel may not, for a period of one year following
10 the termination of the independent counsel's or appointed person's
11 service, represent a person in a matter involving an investigation or
12 prosecution under this chapter.

13 (3) A person associated with a firm with which an independent
14 counsel is associated or becomes associated may not, for one year after
15 the termination of the service of the independent counsel, represent a
16 person in a matter involving an investigation or prosecution under this
17 chapter.

18 (4) For the purposes of this section, "firm" means an organization
19 providing legal services, whether organized as a partnership,
20 corporation, professional limited liability company, or limited
21 liability partnership.

22 NEW SECTION. **Sec. 9.** (1) The appropriate committees of the
23 legislature have oversight jurisdiction with respect to the official
24 conduct of an independent counsel appointed under this chapter, and the
25 independent counsel shall cooperate with the exercise of the oversight
26 jurisdiction. An independent counsel appointed under this chapter
27 shall submit to the legislature annually a report on the activities of
28 the independent counsel, including a description of the progress of any
29 investigation or prosecution conducted by the independent counsel. The
30 independent counsel may omit from the report a matter that in the
31 judgment of the independent counsel should be kept confidential, but
32 shall provide information adequate to justify the expenditures of the
33 office of the independent counsel.

34 (2) Within fifteen days after receiving an inquiry about a
35 particular case under this chapter from a committee of the legislature
36 with jurisdiction over this chapter, the attorney general shall provide
37 the following information to that committee with respect to the case:

38 (a) When the information about the case was received;

1 (b) Whether a preliminary investigation is being conducted and, if
2 so, the date it began; and

3 (c) Whether an application for the appointment of an independent
4 counsel or a notification that further investigation is not warranted
5 has been filed with the supervisory committee and, if so, the date of
6 the filing.

7 (3) An independent counsel shall advise the house of
8 representatives of substantial and credible information that the
9 independent counsel receives that might constitute grounds for an
10 impeachment.

11 NEW SECTION. **Sec. 10.** (1)(a) An independent counsel appointed
12 under this chapter may be removed from office, other than by
13 impeachment and conviction, only by the personal action of the attorney
14 general and only for good cause, physical or mental disability, or
15 other condition that substantially impairs the performance of the
16 independent counsel's duties.

17 (b) If an independent counsel is removed from office, the attorney
18 general shall promptly submit to the supervisory committee and the
19 committees on law and justice of the house of representatives and the
20 senate a report specifying the facts found and the ultimate grounds for
21 the removal. The legislative committees shall make this report
22 available to the public, except that a legislative committee may, if
23 necessary to protect the rights of an individual named in the report or
24 to prevent undue interference with a pending prosecution, postpone or
25 refrain from publishing any of the report. The supervisory committee
26 may release any of the report in accordance with section 7(6)(b) of
27 this act.

28 (c) An independent counsel removed from office may obtain judicial
29 review of the removal in a civil action commenced in the Thurston
30 county district court. A member of the supervisory committee may not
31 hear or determine the suit or an appeal of the suit. The independent
32 counsel may be reinstated or granted other appropriate relief by order
33 of the court.

34 (2)(a) An office of independent counsel terminates when:

35 (i) The independent counsel notifies the attorney general that the
36 investigation of all matters within the prosecutorial jurisdiction of
37 the independent counsel and any resulting prosecutions have been
38 completed or so substantially completed that it would be appropriate

1 for the office of the attorney general to complete the investigation or
2 prosecution; and

3 (ii) The independent counsel files a final report with the
4 supervisory committee in compliance with section 7(6)(b) of this act.

5 (b) The supervisory committee, either on its own motion or upon the
6 request of the attorney general, may terminate an office of independent
7 counsel at any time, on the grounds that the investigation of all
8 matters within the prosecutorial jurisdiction of the independent
9 counsel and any resulting prosecutions have been completed or so
10 substantially completed that it would be appropriate for the office of
11 the attorney general to complete the investigations and prosecutions.
12 At the time of termination, the independent counsel shall file the
13 final report required by section 7(6)(b) of this act. If the attorney
14 general has not made a request under this subsection, the supervisory
15 committee shall determine on its own motion whether termination is
16 appropriate no later than two years after the appointment of the
17 independent counsel, at the end of the succeeding two-year period, and
18 thereafter at the end of each succeeding one-year period.

19 (3) Upon the termination of the office of an independent counsel,
20 the independent counsel shall transfer to the division of archives and
21 records management all records that have been created or received by
22 that office. A record transferred to the division of archives and
23 records management must be maintained, used, and disposed of in
24 accordance with chapter 40.14 RCW.

25 NEW SECTION. **Sec. 11.** If any provision of this act or its
26 application to any person or circumstance is held invalid, the
27 remainder of the act or the application of the provision to other
28 persons or circumstances is not affected.

29 NEW SECTION. **Sec. 12.** Sections 1 through 11 of this act
30 constitute a new chapter in Title 10 RCW.

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