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OF PROSECUTORS AND SPECIAL PROSECUTORS: AN ORGANIZATIONAL PERSPECTIVE

H. GEOFFREY MOULTON, JR.* AND DANIEL C. RICHMAN*

The Independent Counsel (IC) statute,¹ designed to restore public trust in the impartial administration of criminal justice after Watergate, ultimately fueled rather than quieted the perception that partisan politics drives the investigation of high-ranking government officials. Congress, in an inspiring display of bipartisanship, bid it a muted farewell. The statute's fate was sealed by the enormous controversy surrounding the investigation conducted by Independent Counsel Kenneth Starr.

Although Starr did not bring criminal charges against President Clinton, his office went pretty far in that direction, committing considerable enforcement resources to that end,² bringing criminal charges against people believed to have information that would implicate Clinton, and deploying arguments of prosecutorial prerogative that have significantly changed the legal landscape.³ Like many others, we have found this exercise of prosecutorial power terribly troubling. Also troubling, however, is the difficulty we (and others) have had in identifying "neutral principles"⁴ of prosecutorial discretion that Starr violated. The standard criticisms of Starr's investigation do not meet that measure. The standard criticisms of the IC mechanism generally, though possessing greater force, are similarly unsatisfying. This essay, written from the perspective of two former federal prosecutors,⁵ springs from our effort to identify the fundamental

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1. The Independent Counsel Reauthorization Act of 1994, 28 U.S.C. §§ 591-599 (1994). The provision was first enacted as part of the Ethics in Government Act of 1978, Pub. L. 95-521, 92 Stat. 1867 (1978), and was thereafter reenacted three times. *See* Pub. L. 97-409, 96 Stat. 2039 (1983); Pub. L. 100-191, 101 Stat. 1293 (1987); Pub. L. 103-270, 108 Stat. 732 (1994).

2. *See, e.g.*, Pete Yost, *Starr's Probe Soon to Become Most Expensive: Investigation to Top \$48.5 Million Inquiry into Reagan Deals in Iran, Nicaragua*, ATLANTA J. & CONST., Apr. 1, 1999, at A3; Connie Cass, *Starr's Outsourcing Costs: \$4.2 Million*, WASH. POST, Aug. 28, 1999, at A10; Stephen Hedges & Vanessa Blum, *GAO Puts Clinton Probe at \$39.6 Million*, CHI. TRIB., Oct. 1, 1998, at 6.

3. *See, e.g.*, *Swidler & Berlin v. United States*, 524 U.S. 399 (1998) (rejecting Independent Counsel's argument that attorney-client privilege does not survive client's death); *In re Sealed Case*, 148 F.3d 1073 (D.C. Cir. 1998) (upholding Independent Counsel's argument that Secret Service officers cannot claim a protective function privilege), *cert. denied*, 119 S.Ct 461 (1998); *In re Lindsey*, 148 F.3d 1100 (D.C. Cir. 1998) (upholding Independent Counsel's argument that Deputy White House Counsel could not claim attorney-client privilege to protect communications between the President and government lawyers when questioned during grand jury investigation), *cert. denied*, 119 S. Ct. 466 (1998).

4. *Cf.* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

5. Professor Richman was an assistant United States Attorney for the Southern District of

shortcomings of the IC concept, particularly as manifested in the Starr investigation, and to decide whether efforts to cure those shortcomings with a new and improved version of the IC approach are warranted.

EVALUATING STARR (AND THE INDEPENDENT COUNSEL APPROACH)

For some, what made Starr's pursuit of the President particularly inappropriate (after the Whitewater investigation failed to pan out), and evinced the partisan nature of the project, is the fact that perjury is virtually never prosecuted.⁶ And this much is true: Given how much perjury occurs in the judicial system (yes, even in the grand jury), the frequency with which such cases are brought is extraordinarily low. Perjury cases *have* been brought, however, as House Republicans demonstrated when they paraded a number of convicted perjurers before the Judiciary Committee.⁷ While each of these cases had its own unique facts, no grand principle of prosecutorial discretion separated them from the crimes that Starr believed Clinton to have committed.

New York from 1987 through 1992, serving as chief of the Appellate Unit from 1991 to 1992. Professor Moulton was an assistant United States Attorney for the Eastern District of Pennsylvania from 1986 through 1990, serving (on a temporary detail) as special counsel to the Assistant Attorney General, Criminal Division, in 1988.

6. See, e.g., David E. Rovella, *Will He Escape This Time? Perjury Charge a Stretch, Say Nation's DAs*, NAT'L L.J., Feb. 9, 1998, at A1. For example, "Many say that prosecuting the president for perjury in a civil case is unfair since such a charge against an ordinary citizen is . . . almost unheard of." *Id.* "[L]egal experts agree that in ordinary civil suits, lying is rampant and prosecution for lying is rare. There have been at most a few dozen published court decisions over the last decade that concern perjury and civil cases, though the total number of prosecutions could be considerably higher." Laura Mansnerus, *Testing of a President: The Law; Lying Rampant in Civil Suits But Prison for Lying is Rare*, N.Y. TIMES, Feb. 22, 1998, at 22, col. 5. Lawrence Walsh was quoted saying that "In 60 years of practice, I have never known this [perjury investigation before conclusion of civil suit] to happen. Most civil lawsuits begin with exaggerated allegations by the parties, which are narrowed and corrected as discovery and depositions proceed." *Id.* This lack of investigation may occur because "[i]f prosecutors sprang into action every time a lawyer in a civil case complained of perjury by an opposing witness, they'd be doing little else." Gerard E. Lynch, Letter to the Editor, *A Search for Truth, or a Partisan Inquisition?; Prosecuting Frenzy*, N.Y. TIMES, Feb. 22, 1998, § 4, at 16.

7. Francis X. Clines, *Penitents Called by GOP Speak on Perils of Perjury*, N.Y. TIMES, Dec. 2, 1998, at A1. Federal perjury prosecutions are indeed relatively rare. Less than one percent of criminal matters received by U.S. Attorneys in 1996 involved perjury or contempt, see BUREAU OF JUSTICE STATISTICS, COMPENDIUM OF JUSTICE STATISTICS, 1996 Table 1.1 (1999), and less than one-half of one percent (283 out of 56,938) of defendants were charged with those offenses, *id.* Table 1.2. Such cases are more frequently brought in state systems, however. See Peter Hartlaub, *Rogan Cites Statistics on Perjury*, L.A. DAILY NEWS, Dec. 19, 1998, at N4 ("In my home state of California, since Bill Clinton became president, there have been some 16,000 prosecutions for perjury.") (quoting Republican Congressman James E. Rogan); see also Ruth Marcus, *Paying the Price for Civil Perjury; Prosecution May Be Unusual, But It Can Mean Prison*, WASH. POST, Mar. 3, 1998, at A4.

Part of Starr's justification for pursuing Clinton's conduct in connection with the Paula Jones lawsuit rested on Clinton's position as Chief Executive. "In view of the enormous trust and responsibility attendant to his high Office," his report declared, "the President has a manifest duty to insure that his conduct at all times complies with the law of the land."⁸ Some people found evidence of inappropriate partisanship in this explanation as well, arguing that, at least in highly personal matters unconnected with official duties, a public official, however high, ought not to be held to a higher standard of conduct.⁹ Reasonable people can differ here too.

Starr has also been attacked for his investigative tactics. Critics point particularly to his office's interviews of Monica Lewinsky, which seemed to include advice not to contact counsel, to the treatment of Lewinsky's mother, designed to put pressure on the daughter, and to the leaks of grand jury information, which are plainly unlawful, as beyond the prosecutorial pale.¹⁰ Apart from the leaks, however, which themselves are not unprecedented, Starr's tactics seem largely within the mainstream (at least for cases that prosecutors deem important to bring). The claim that the tactics, in and of themselves, demonstrate partisanship (rather than aggressiveness) itself has a distinctly partisan flavor.

As we step back and consider the broader implications of Starr's inquiry, what is most striking is not how one comes out on these questions of prosecutorial discretion, but rather how ill-equipped we all are at coming up with clear (and thus demonstrably non-partisan) answers to them. Our difficulty here is not just that any claim to a normative theory of prosecution requires some articulation of a more general theory of criminal justice. Even without such a theory, one might significantly advance the discussion with a mere description of how "regular" prosecutors normally act and, by extension, how a prosecutor untainted by Starr's alleged partisanship would have acted. But we can't even do that.

Just flip through the United States Attorneys' Manual—a tome that the two of us tried not to disturb when we were federal prosecutors but one that could provide a starting place for such positivist policy discussions. Although every so

8. COMMUNICATION FROM KENNETH W. STARR, INDEPENDENT COUNSEL, TRANSMITTING A REFERRAL TO THE UNITED STATES HOUSE OF REPRESENTATIVES FILED IN CONFORMITY WITH THE REQUIREMENTS OF TITLE 28, UNITED STATES CODE, SECTION 595(C), H.R. DOC. NO. 105-310, at 7 (1998). *See also id.* ("The Presidency is more than an executive responsibility. It is the inspiring symbol of all that is highest in American purpose and ideals.") (quoting Herbert Hoover) (citation omitted).

9. *See, e.g.*, Geraldo Rivera, Letter to the Editor, *A Search For Truth, or a Partisan Inquisition: Sex, Lies and Tapes*, N.Y. TIMES, Feb. 22, 1998, § 4, at 16 (arguing that the President is neither above nor below the law, and noting: "Bill Clinton may have much to answer for, but the only person with an absolute right to ask the questions is his wife.").

10. *See, e.g.*, Michael Grunwald, *Hardball at the Ritz Puts Starr on the Spot*, WASH. POST, Sept. 23, 1998, at A1; Richard Willing, *Starr's team: Tough people, tough tactics prosecution, not politics, strong suit*, USA TODAY, Feb. 16, 1998, at 6A.

often a clear pronouncement emerges, the most marked characteristic of this putatively authoritative guide is its mushiness (or, if you will, flexibility).¹¹ The point is not merely one of manual-drafting, which will be affected by a reluctance to limit the deterrent effects of criminal legislation or to demonstrably undercut legislative choices (however ill-considered). Even in the privacy of their own offices, prosecutors find it hard to make, and generally resist making, categorical judgments about what kinds of cases should be brought. Perhaps they could do better. And efforts in this direction would, as David Sklansky has recently argued, be quite salutary.¹² But we have never seriously demanded that they do so, and we have allowed the whole process to be cloaked in mystery and blessed by vague allusions to prosecutors' broad discretion.¹³ The positivist analysis thus stops with a tautology: The only reliable way to see if a case would be brought by a federal prosecutor is to present it to a "real" federal prosecutor and see if she would bring it. And here, of course, the answer may well depend on which prosecutor you ask.¹⁴

Evidence of our uncertainty in this regard comes from Starr's inquiry itself. When pressed to defend his investigation or a particular move therein, Starr and his deputies often invoked the participation of "career" prosecutors on his staff

11. See Jed S. Rakoff, *The Exercise of Prosecutorial Discretion in Federal Business Fraud Prosecutions*, in *CORRIGIBLE CORPORATIONS AND UNRULY LAW* 179 (Brent Fisse & Peter A. French eds., 1985) (describing U.S. Attorneys' Manual as "an unwieldy, multi-volume melange of policies, guidelines, legal analyses and helpful hints" marked by "lax and sometimes idiosyncratic" internal enforcement); cf. David A. Sklansky, *Starr, Singleton, and the Prosecutor's Role*, 26 *FORDHAM. URB. L.J.* 509, 536 (1999) (noting extent to which discretionary questions raised by Starr's investigation are not answered by the Justice Department's formal policies).

12. See Sklansky, *supra* note 11.

13. Here, "we" refers to the general public, and to those governmental actors, including legislators, who could press the Justice Department in this regard. The academic literature contains many cogent, and substantially unheeded, calls for clear prosecutorial guidelines. See Daniel C. Richman, *Old Chief v. United States: Stipulating Away Prosecutorial Accountability?*, 83 *VA. L. REV.* 939, 959 & n.69 (1997) (citing sources).

14. Compare *Hearing to Consider Articles of Impeachment Before the House Judiciary Comm.*, 105 *Cong.* (Dec. 9, 1998) (statement of former assistant U.S. Attorney Ronald K. Noble) ("a career federal prosecutor, asked to investigate allegations like those in the Clinton-Lewinsky matter, would not pursue federal criminal prosecution to the indictment or trial stage."), and *id.* (statement of former U.S. Attorney and former head of DOJ criminal division Edward S.G. Dennis) ("I think that it is fairly clear, and that if a poll were taken of former U.S. Attorneys from any administration, you would probably find the overwhelming number of them would agree with the assessment that this case is a loser and just would not be sustained in court."), with *id.* (statement of former U.S. Attorney and current Republican Congressman Ed Bryant) (arguing that perjury prosecution would be supported by "compelling evidence"), and *id.* (statement of former U.S. Attorney and current Republican Congressman Robert L. Barr) (accusing Noble, Dennis, and others of ignoring obvious criminal violation and trying to find "technicalities and legalities" to excuse the President's behavior).

in the decisionmaking process¹⁵—people like Michael Emmick, former head of the public corruption unit of the Los Angeles U.S. Attorney’s Office; Hickman Ewing, former U.S. Attorney in Memphis; Jackie Bennett, Jr., former assistant U.S. Attorney in Indianapolis and prosecutor in the Justice Department’s Public Integrity Section, and Ray Jahn, an experienced assistant U.S. Attorney from San Antonio. The claim then is that the judgments of line prosecutors can be duplicated *in vitro* by capturing some of them and placing them in the IC’s office. This claim is not outlandish, for it was the very one that lay behind Congress’s decision to allow IC’s offices to be staffed by regular Department of Justice (DOJ) personnel. The idea, according to the Senate Report, was “to ensure that independent counsel cases are handled as much like other federal prosecutions as possible.”¹⁶

In the end, though, the presence of “regular” prosecutors on Starr’s staff afforded him little insulation from partisan and not-so-partisan attacks. That this is so should not be surprising. Perhaps most obviously, the presence of former or current prosecutors does not alter the most salient feature of an IC’s office—the singularity of its focus. While regular prosecutors, and regular prosecutors’ offices, have a wide range of investigations to attend to and prioritize, the IC has but one case, or more accurately, one principal target. This singular focus is the central structural feature of IC offices that both distinguishes them from regular

15. When interviewed by ABC’s Diane Sawyer, for example, Starr defended the graphic sexual detail in his report to Congress by explaining that his staff had made a “professional judgment” that such detail was necessary. “When Sawyer questioned the report’s tone, he shot back: ‘Diane, don’t fault career prosecutors for telling the truth.’” Howard Kurtz, *Kenneth Starr Opens Up in TV Interview*, WASH. POST, Nov. 25, 1998, at D1. See also Louis Freeburg, *Starr Stands His Ground As Demos Blast Inquiry; He Restates His Case for Impeachment*, SAN FRAN. CHRON., Nov. 20, 1998 at A1 (quoting Starr as defending report as the “product of career prosecutors and investigators”); Ruth Marcus, *The Prosecutor: Following Leads Or Digging Dirt?*, WASH. POST, Jan. 30, 1998, at A1 (quoting former Starr deputy John D. Bates that “The independent counsel’s office has been staffed over the last several years by professional prosecutors with enormous experience who have diligently and properly followed relevant leads in an attempt to discover the truth”).

16. See S. REP. NO. 103-101, at 25-26 (1993):

[An] amendment was adopted which would clarify the ability of Justice Department employees to be detailed to an independent counsel’s staff if requested by that independent counsel. This provision was added, again, to ensure that independent counsel cases are handled as much like other federal prosecutions as possible and to make it clear that independent counsels should avail themselves of the legal, investigatory and administrative expertise at the Department.

Id.; see also 28 U.S.C. § 594(d)(1) (1994) (authorizing IC to request assistance from DOJ); Julie O’Sullivan, *The Independent Counsel Statute: Bad Law, Bad Policy*, 33 AM. CRIM. L. REV. 463, 469, 470 (1996); (explaining that “Congress would essentially like—but does not require—that IC investigations proceed as a DOJ investigation, staffed by experienced and professional DOJ personnel, supported by DOJ resources, and run according to DOJ policies, except for the man or woman at the top—who, for appearances sake, must be ‘independent’”).

prosecutors' offices and maximizes the risk of overaggressive investigation and prosecution.

To say that, in their everyday work, regular prosecutors lack the "luxury" of having but one case is to have it backwards. Rather, the need to consider the opportunity costs of every case brought is a great solace to prosecutors, particularly federal prosecutors, for whom the gap between jurisdiction and resources is the greatest.¹⁷ This constraint not only frees them from any obligation to make absolute judgments of desert, but provides a reality check to their judgment calls, bringing home the consequences of every decision. Independent Counsel offices, of course, lack any such constraint, a point that Justice Scalia made in his *Morrison v. Olson* dissent when he observed that the IC mechanism "is designed to heighten, not to check, all of the occupational hazards of the dedicated prosecutor; the danger of too narrow a focus, of the loss of perspective, of preoccupation with the pursuit of one alleged suspect to the exclusion of other interests."¹⁸

Other structural features of the IC's office combine with its singular focus to create a level of scrutiny largely unknown in the investigation of ordinary citizens. The IC's relatively unlimited time and budget (compared to the ordinary prosecutor's need to move cases quickly and efficiently), and the pressure to justify his decisions in a final report (compared to the ordinary prosecutor's ability to rest on a longer and broader record, and to leave most decisions unexplained) are two features frequently mentioned.¹⁹ Another notable feature of IC offices that sets them apart from most federal prosecutors' offices is the absence of outside, detached review of significant investigative and charging decisions. High-level investigations run out of U.S. Attorneys' offices typically require not only internal hierarchical review but also some measure of review by "Main Justice."²⁰ That review, by individuals not otherwise invested in the investigation, can serve as an important check on line prosecutors (or even entire offices) fixated on nabbing a particular target.²¹ Here, the broader focus and

17. See Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 765-66 (1999).

18. 487 U.S. 654, 731 (1988) (Scalia, J., dissenting) (quoting Brief for Edward H. Levi, Griffin B. Bell, and William French Smith as Amici Curiae). See also O'Sullivan, *supra* note 16, at 484 ("Where resource allocation is not an issue, such as in an IC investigation, no such constraints exist to separate the truly criminal transgression from the case more reasonably and equitably treated through civil sanctions.").

19. See, e.g., O'Sullivan, *supra* note 16, at 483-85. Bob Woodward quotes Starr as demanding an exhaustive narrative in his report to Congress as follows: "[W]e need to have an encyclopedia. It will show all the information. It will show how much work we did." BOB WOODWARD, *SHADOW: FIVE PRESIDENTS AND THE LEGACY OF WATERGATE* 453 (1999).

20. See U.S. DEPT OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-2.400 (1997) [hereinafter USAM] (listing, on 36-page "Prior Approvals Chart," situations in which U.S. Attorneys' Offices must notify, consult with, or seek prior approval of other components of DOJ).

21. Additional layers of review can, on occasion, influence an investigation in the other

institutional knowledge of detached DOJ prosecutors can be particularly salutary. The absence of outside review is not unique to IC offices, of course. Most local district attorney's offices face the same situation, and some of the larger U.S. Attorney's offices treat Main Justice review as a mere formality.²² Nonetheless, both the prospect and the fact of review can affect the conduct of investigations and prosecutions. Here, as elsewhere, multiple layers of decisionmakers are less likely to reach extreme results.

Even if IC offices were staffed with Justice Department prosecutors randomly selected for such a detail, the narrow focus of such units, the freedom from cost internalization, and the absence of detached review would thus undermine any claim that the prosecutors were making the same judgments in their new milieu as they would in their old one. But IC staffs are not randomly selected. For his part, the IC has complete discretion as to whom he imports from the Department. Although striving for the appearance of nonpartisanship, a partisan IC would presumably hire similarly minded assistants. There is likely to be a selection bias on the other side as well, since anyone agreeing to come from the Department will be fully aware both of the IC's potential target and the singular nature of the IC's focus. Perhaps a high-minded assistant U.S. Attorney or Department prosecutor would sign on simply to see that justice is done, but recruits are more likely to come from the ranks of those hoping to take down someone in the named subject's office, or the named subject in particular. Indeed, critics suggested that the members of Starr's staff (regular prosecutors and new recruits alike) suffered from just this syndrome.²³ This point is part of the larger and often ignored fact that the quality of justice depends to a significant degree on the quality of the individuals administering it, not simply on institutional arrangements. For any investigation of conduct that is close to a relatively blurred criminal line, as many investigations of high-ranking officials are likely to be, the outcome of the investigation may well depend on the relative

direction as well, when reviewers press for a more aggressive approach than that taken by the line prosecutors.

22. See JAMES EISENSTEIN, COUNSEL FOR THE UNITED STATES: U.S. ATTORNEYS IN THE POLITICAL AND LEGAL SYSTEMS 116 (1978) ("The size of the office provides the best single indication of the relationship between a U.S. attorney and the department. The larger the office, the more likely it is to be . . . ('semiautonomous').")

23. See, e.g., T.R. Goldman, *Proposal to Make DOJ Home to Permanent Special Prosecutor Gathers Force*, LEGAL TIMES, Mar. 1, 1999, at 2 (describing the "missionary zeal that many IC staffers bring to their jobs" and quoting David Vladeck of the Public Citizen Litigation Group: "The people who joined Starr at the senior level wanted to fight the jihad. . . . [T]hese are not disinterested, neutral career prosecutors."); Daryl Linsey, *Cast of Characters*, SALON, (Sept. 10, 1998) <<http://www.salon.com/news/1998/09/10/sidebar.html>> (describing connections between Starr's office and "[t]he tentacles of billionaire conservative Richard Mellon Scaife and the American Spectator . . ."); Greg Gordon, *Starr's Leading Lawyers, Known for Toughness, Have Taken Some Heat*, SACRAMENTO BEE, May 3, 1998, at A24 (describing criticisms of Starr deputies).

aggressiveness, diligence, creativity, morality and partisanship of the critical decision-maker(s).

A final reason why the importation of line prosecutors offers no assurance of “normality” in the operation of an IC’s office is that a partisan IC remains free to bend them to his will, or to simply overrule them. Although a book in which all too many footnotes blithely rely on “interviews with knowledgeable source” may not provide the gold-standard for accuracy, Bob Woodward’s recent account of Starr’s operation relates a number of occasions on which Starr overruled line prosecutors on his staff when they argued for restraint in some aspect of the Whitewater/Lewinsky investigation.²⁴ While lacking any prior prosecutorial experience himself, Starr apparently was willing to reject the advice of his staff on a broad range of matters, including the appropriate scope of his investigation, charging decisions, and the assessment of evidentiary strength.²⁵

Where does this leave us? We want ICs and their staffs to act as much like regular DOJ prosecutors as possible, but the *in vitro* solution offers no guarantee of providing a continuity of professional judgment, or even the appearance of such continuity. If DOJ prosecutors are to provide the standard for judging the performance of ICs, it makes sense to return to square one and ask why DOJ prosecutors can’t do the work of ICs without leaving the Department, under the aegis of the Attorney General and her minions. At the outset, we have to concede the rough empiricism of our analysis. But this is an area where, as usual, the resolution of the issue largely turns on where one places the burden. Given that the IC statute has expired, leaving the field to DOJ prosecutors, it seems fair, at least provisionally, to start by questioning why those prosecutors ought to be presumptively superseded in certain classes of cases.

WHY NOT DOJ?

If we leave DOJ prosecutors responsible for investigating and prosecuting misconduct by high administration officials, what should we be worrying about? The appropriate course of analysis seems to be pretty straightforward—though that doesn’t mean it has always been used. First, one must identify the risks that DOJ prosecutors will handle these cases inappropriately and the likelihood of each troubling scenario actually occurring. Second, one must compare these potential costs with those arising out of the alternative institutional arrangements we have experimented with since Watergate. James Fleissner describes the choice here as a “discretion dilemma”—risking either underzealous investigation by

24. See, e.g., WOODWARD, *supra* note 19, at 503-04 (describing Starr’s rejection of staff advice concerning the indictment of Julie Hiatt Steele, the Vince Foster documents investigation, the Travelgate investigation, and the FBI files investigation).

25. *Id.* For example, “Starr found the evidence [of perjury] more conclusive than anyone else in the office.” *Id.* at 419.

regular prosecutors or overzealous investigation by ICs.²⁶ While this neat dichotomy may reflect the thinking that spawned the IC statute—that the risk of inappropriate inaction by DOJ outweighs the risk of inappropriate action by ICs—it misses the complex range of prosecutorial motivations and thus overstates the risk of DOJ underzealousness.

One critical point must be made at the outset: We are very much dealing with a second-best world, not just because our starting premise is that a high administration official must be investigated but because the decisions of *any* attorney involved in that kind of investigation may be inappropriately skewed by the desire to “take down” such an official. For prosecutors, this is the pathology that Tom Wolfe so colorfully described in *The Bonfire of the Vanities* as the “Great White Defendant” problem.²⁷ Having long pursued a steady stream of fungible defendants, a prosecutor may well jump all too quickly at the opportunity to advance his career within the profession—even if not within the government—by aiming at a high-profile target.²⁸ The prospect may be gratifying for non-economic reasons as well, promising the sheer thrill of attacking the high castle.²⁹ What makes this risk of overzealousness so insidious is that we lack a

26. James P. Fleissner, *The Future of the Independent Counsel Statute: Confronting the Dilemma of Allocating the Power of Prosecutorial Discretion*, 49 MERCER L. REV. 427, 428 (1998). Professor Fleissner explains that:

If the power is vested in the Attorney General, there is a risk that the power will be abused when the administration investigates allegations against the President or other high ranking [government] officials. This risk involves the administration’s receiving favorable treatment from a prosecutor laboring under a conflict of interest. On the other hand, if the power is vested in an independent prosecutor, there is a risk that the power will be abused by an overly aggressive, unchecked, and perhaps politically motivated prosecutor. This risk involves inappropriate use of the power to investigate and indict by an unaccountable prosecutor.

Id.

27. TOM WOLFE, *THE BONFIRE OF THE VANITIES* 380 (1987).

28. See Gerard E. Lynch & Philip K. Howard, *Special Prosecutors: What’s the Point?*, WASH. POST, May 28, 1995, at C7 (explaining that “[t]he real pressures distorting prosecutors’ judgment are the opposite of what reporters and good government editorialists perceive. High officials are the most tempting targets for young prosecutors. Fame and glory (and ultimately a lucrative private law practice) come from handling cases in the headlines.”); O’Sullivan, *supra* note 16, at 477. Professor O’Sullivan further explains that:

Regardless of the scope or target of a prosecutor’s ambitions, if she is reasonably bright she will know that there is no surer way of blighting a promising legal career than being implicated in any activity smacking of the perversion of justice for political ends. . . . Indeed, if ambition plays a role, it probably would be better served by indicting a big name official than by exonerating him.

Id.

29. See also PHILIP B. HEYMANN, *THE POLITICS OF PUBLIC MANAGEMENT* 102 (1987) (“Law

metric for determining the influence of such motivation. After all, high government officials ought to be held to a higher standard of conduct, and general deterrence is enhanced when conspicuous public figures are targeted. The fact that lesser folks are not prosecuted for the same conduct does not prove anything.

We are not chiefly concerned with this problem here, however, not because it isn't real, but because our focus is comparative, and there is no reason to believe that this troubling motivation is more prevalent within DOJ than without. Perhaps line prosecutors who would like to enter private practice with a splash are somewhat more likely to fall victim to this pathology than are lawyers already in private practice. But this is like suggesting that poor people are more likely to steal; it just doesn't get one very far. In a profession that all too easily converts public exposure to profit, the risks of improper motivations in this regard, however troubling, seem sufficiently alike to ignore for our purposes.

Other difficulties with the investigation of high-level executive branch officials likewise apply, to varying degrees, in both the IC and the DOJ contexts. While a DOJ investigation will occur against the backdrop of other current, former and future investigations, it will tend to be all-consuming for the individual prosecutor handling the matter in somewhat the same way as it is for an IC. Similarly, such investigations will have particular allure for those prosecutors attracted to landing the big fish, and supervisory personnel will not assign such cases randomly. Here again, however, because the problems of singular focus and self-selection are not peculiar to DOJ investigations (and indeed are likely greater in the IC context), they don't weigh against leaving responsibility with DOJ.

Let us examine two troubling scenarios more specific to the handling of cases by DOJ prosecutors. One is the Watergate scenario, which figured most prominently in the origin of the IC statute: Law enforcement officers accidentally stumble on a case, hand it over to prosecutors, and the ensuing investigation implicates high government officials, including some, like the Attorney General and President, with hierarchical power over the enforcement bureaucracy. A second scenario, presenting the same potential conflicts, follows the Iran-Contra model: Allegations of misconduct arise not out of an ordinary criminal investigation, but are uncovered by either the media or legislative investigation. In this scenario, which may represent the majority of IC matters to date,³⁰ the

enforcement officials take pride in a willingness to go after powerful officials, since it forcefully confirms a highly valued aspect of their self-image and refutes hated charges of bias, favoritism or corruptibility.”).

30. Cf. Colloquy, *The Independent Counsel Process: Is It Broken and How Should It Be Fixed?*, 54 WASH. & LEE L. REV 1515, 1529 (1997) [hereinafter Colloquy, *Is It Broken?*] (remarks of former Attorney General William P. Barr) (estimating that “90 percent of [potential independent counsel matters] come from the newspapers” and explaining that “congressmen then push it to get an independent counsel named”).

political implications are manifest from the start, both to prosecutors and to the public. In both scenarios, of course, the fear is not of overzealousness but of insufficient zeal on the part of prosecutors who have some loyalty to the administration or who fear some sort of retribution from above if they pursue the case. Alternatively, even if the prosecutors are not so deterred, their efforts can be derailed by superiors who deny them necessary support, or take an even more active role in shutting down the inquiry.

These are the fears, but what is the likelihood of their realization? Although gross generalities are inescapable when making these empirical predictions, there are degrees of grossness. One way to limit the generality is to distinguish among prosecutorial types in this regard. First, there is the lawyer whom the two of us are most familiar with from our time in big city U.S. attorneys' offices—the prosecutor who considers public service to be one phase of a long legal career, and who is as much concerned with how his conduct is judged by professional peers outside the government as by those within (if not more so).³¹ If anything, his loyalties and economic incentives will cut toward overzealousness, for the reasons already discussed. Should he perceive any effort by others within the government to derail his work, there is no reason to believe that he won't protest, and, if necessary, whistleblow.

This lawyer's sense of removal from political pressures will be particularly strong if he serves in one of those U.S. Attorneys' offices whose size and status limits the extent to which it can be controlled by Washington. One need not rely on hypotheticals here. It is no coincidence that U.S. Attorneys' offices of this sort vigorously prosecuted Vice President Agnew, former Attorney General Mitchell, and, until superseded by special counsel, doggedly pursued the Watergate probe.³² Even as it has vastly increased federal prosecutorial authority and discretion, Congress has taken care to ensure that most of this power stays decentralized, in the hands of U.S. Attorneys, who are selected with considerable

31. See ANTHONY DOWNS, *INSIDE BUREAUCRACY* 95-96 (1967) (“[S]ome analysts of bureaus consider professionals as a separate bureaucratic type because each is more strongly influenced by his occupation than his organization.”) (footnote omitted); FRANCIS E. ROURKE, *BUREAUCRACY, POLITICS, AND PUBLIC POLICY* 18 (3d ed. 1984) (“[P]rofessional organizations’ [] dominated by individuals whose primary commitment is to the skill they practice rather than to the institution by which they are employed.”); JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* 60 (1989) (“In a bureaucracy, professionals are those employees who receive some significant portion of their incentives from organized groups of fellow practitioners located outside the agency.”).

32. See EISENSTEIN, *supra* note 22, at 209-10 (“The fact that Republican U.S. attorneys indicted former Attorney General John Mitchell, Vice-President Spiro Agnew, and the Republican chairman in New Jersey illustrates that the current decentralization of the department insulates its branch offices from potential political pressures . . .”); O’Sullivan, *supra* note 16, at 476 (noting that “[e]xamples of indifference to political considerations in the U.S. Attorneys’ Offices [] are not hard to come by.”) (footnote omitted).

legislative input, and whose responsiveness to presidential authority has traditionally been quite tempered.³³

Further protection against political influences will come from the partnership that line prosecutors must establish with the agents, most often from the Federal Bureau of Investigation, who will be conducting the investigation with him. At first blush, this may seem curious; if decentralization plays such a role in insulating assistant U.S. attorneys, why is insulation enhanced by the participation of agents from one of the most centralized organizations in the government? The best answer lies in recent history, which has shown strenuous efforts by Congress and the Bureau itself to put the agency beyond an Administration's control. Woodward's book tells of President Bush's bitterness at the FBI sting launched against his Texas organization during the 1992 presidential campaign,³⁴ and of President Clinton's annoyance at the distance that FBI Director Louis Freeh has kept from the White House.³⁵ Freeh, in fact, has proved a politically painful source of pressure on the Attorney General to appoint an IC in the campaign finance investigation.³⁶ The Bureau thus serves a bonding function, acting as a relatively apolitical watchdog over line prosecutors, even as its agents provide investigative assistance.³⁷

O.K., this story of Bureau incorruptibility sounds a little Panglossian,³⁸ but that may not matter for our comparative purposes, where the focus is on alternative prosecutorial structures, not alternative investigative structures. Perhaps this focus is mistaken. If the Bureau succumbs to political pressures and endeavors to derail a case, the nature of the prosecutorial structure probably will not make any difference. If politically compromised agents control the information flow, it is hardly likely that an investigation will get off the ground.³⁹ Perhaps, given the proliferation of top drawer private investigative firms,⁴⁰ we ought to consider staffing IC offices not with FBI agents (or other federal agents) but with a pick-up team of hired snoopers. But while Starr has employed several

33. See Richman, *supra* note 17, at 812-13.

34. WOODWARD, *supra* note 19, at 219-20.

35. *Id.* at 450.

36. See Neil A. Lewis, *Freeh Says Reno Clearly Misread Prosecutor Law*, N.Y. TIMES, July 16, 1998, at A1; see also Richman, *supra* note 17, at 813.

37. See HEYMANN, *supra* note 29, at 100 (concluding that "involvement of professional, career agents makes less credible charges of political bias in Justice").

38. We don't mean to suggest that the FBI's vigilance in pursuing investigations against administration officials necessarily extends to investigating its own transgressions. See, e.g., Henry Ruth, *The FBI Investigates Itself—Again*, WALL ST. J., Monday, Aug. 30, 1999, at A26 col. 3 (criticizing FBI's internal investigation of FBI conduct in connection with fire at Branch Davidian Compound near Waco, Texas).

39. Neither agents nor prosecutors, however politically compromised, will easily bury an investigation that is born full-blown, like Iran-Contra or Travelgate.

40. See Daniel C. Richman, *Grand Jury Secrecy: Plugging the Leaks in an Empty Bucket*, 36 AM. CRIM. L. REV. 339, 347 (1999) (footnote omitted).

private investigators,⁴¹ FBI agents have played a significant role both in his investigation and in virtually every other IC probe. So long as the participation of the Bureau is a given, our comparative analysis has to presume that the agency will zealously pursue any investigation of high administration officials and will help steel all prosecutors, including line DOJ prosecutors, against improper political influences.

In short, at least when line prosecutors fit the mold here described, there is very little reason to fear that they will be underzealous in their pursuit of administration officials. Perhaps this is the real lesson of the Watergate investigation, which was diligently pursued from the beginning despite the prospect of administration disfavor.

Not all federal prosecutors fit the mold described above, of course. Both in U.S. Attorney's offices and at Main Justice, one finds a second type of prosecutor—the lawyer who intends, at least for the foreseeable future, to stay in the government. This lawyer's ambitions, if they go beyond performance of his present duties, may extend only to bureaucratic advancement. As a result, this lawyer arguably has less incentive to be aggressive, and more incentive to be circumspect, particularly if he envisions that the reigning administration will have a long run. These are more problems of caution than corruption, however. Moreover, caving to political pressure is hardly a sure course to bureaucratic advancement or peer respect, where others are likely to be aware of the investigation and political winds are certain to shift eventually. Indeed, part of the culture of career prosecutors, particularly at Main Justice but in U.S. Attorney's offices as well, is the comfort of knowing that this administration, too, shall pass. In our experience, career prosecutors run the gamut from aggressive to meek, as do short timers. As a general structural matter, there is no significant reason to fear that a case involving serious criminal allegations against an executive branch official, assigned to a career prosecutor, will be tanked out of fear of partisan retribution.

Line prosecutors (career or otherwise) do not have the final say, however, and in some cases more politically sensitive superiors might try to derail an investigation for political reasons. As suggested above, however, the prosecutor seeking peer approval (and fearing peer condemnation) both inside and outside the government is hardly likely to roll over meekly in such a scenario. It is difficult (though not impossible) to imagine serious allegations of serious misconduct being kept from public exposure in this manner. Moreover, the bulk of IC-level investigations to date have begun in the public spotlight, as a result of media or congressional investigation. If responsibility for such matters were to remain at DOJ, even the most partisan Attorney General (or subordinate) would be loathe to terminate them for fear of significant and inevitable political

41. See Cass, *supra* note 2 (noting that Starr's offices had ten contracts for outside investigative services); Alison Mitchell, *Starr Has Hired Ex-Federal Agents in Investigation of Clinton*, N.Y. TIMES, Oct. 29, 1998, at A25.

cost. A central cause of Nixon's downfall, of course, was his effort to use his position of authority over DOJ to end the already public Watergate investigation.

There obviously are situations in which particular DOJ prosecutors, from foot soldiers to Attorney General, should be disqualified for a conflict of interest.⁴² We certainly do not want a lawyer prosecuting a case, for example, in which a close friend or relative is a target, in which the lawyer has a financial interest, or which involves a former client.⁴³ These sorts of problems, however, are quite different from the much broader, generalized concern that DOJ lawyers cannot be trusted to investigate executive branch officials. And, as a general matter, the Department appears to handle such matters regularly and appropriately.

But what if the Attorney General herself is the one with the conflict? Suppose an investigation's target is the President, to whom the AG owes her appointment. Shouldn't she, and the department that reports to her, step aside? As to the Attorney General personally, the answer is yes. That situation, much like one in which the AG's family member (or sworn personal enemy) is involved, raises too starkly the possibility that her judgment will be affected by inappropriate considerations.⁴⁴ The rest of the Department is a different matter, however. We already have argued that Department lawyers can be trusted to investigate high-level executive branch officials. The mere fact that their boss has a conflict does not undermine the foundation of that trust. The premise of DOJ's recusal approach is that others, often career subordinates with nonpolitical appointments, can step in and handle the duties of the recused on a temporary basis. Nothing in DOJ's record suggests that it doesn't work that way. Although the prosecution of administration officials raises conflicts, our point is that the mere fact that the target is such an official, however high, is not enough by itself to warrant disqualification of the entire Department of Justice.

Our analysis so far has assumed that cases against high administration officials would be handled within the Department like any other case. And very often they should be, or at least could be. But the fact is that Attorneys General (and sometimes Presidents), without any statutory obligation, have regularly appointed special prosecutors to investigate matters that they felt ill-equipped to handle,

42. The United States Attorneys' Manual addresses, in general terms, both the circumstances requiring recusal of U.S. Attorneys and their subordinates and the procedures to be followed in accomplishing such recusal. See USAM, *supra* note 20, §§ 3-2.170, 3-2.171, 3-2.220.

43. See USAM, *supra* note 20, § 3-2.170 ("If a conflict exists because a United States Attorney has a personal interest in the outcome of the matter or because he/she has or had a professional relationship with parties or counsel, or for other good cause, he/she should recuse himself/herself."); *id.* § 3-2.220 ("The same circumstances which require that a United States Attorney recuse himself/herself . . . apply to an Assistant United States Attorney.").

44. Cf. *id.* § 3-2.170; MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (1999) (with limited exceptions, "[a] lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests . . .").

including Teapot Dome, the Truman Administration tax scandals, loans to Jimmy Carter's peanut warehouse, Watergate and Whitewater.⁴⁵ While some of these appointments undoubtedly were made out of felt political necessity rather than genuine concern about avoiding conflicts, they do demonstrate that a mechanism for taking matters outside the Department not only has always been available but also will often be used.

Following the demise of the Independent Counsel provisions of the Ethics in Government Act, Attorney General Reno promulgated regulations designed to regularize the appointment and operation of "special counsel."⁴⁶ According to the Department, these regulations are designed to "strike a balance between independence and accountability in certain sensitive investigations, recognizing that there is no perfect solution to the problem."⁴⁷ These regulations indeed may not be perfect—they appear, for example, to grant "special counsel" considerably less independence from DOJ oversight than that granted ad hoc special prosecutors in the past.⁴⁸ Nevertheless, they reflect the institutionalizing of a time-honored departmental practice of bringing in outside investigators where appropriate. Moreover, the notion that an Attorney General will be able to cover up serious criminal activity of high-level officials by strong-arming special counsel simply blinks political reality⁴⁹ (not to mention Watergate).

Critics of the new regulations, and proponents of an independent counsel mechanism, might ask why, if there are matters that warrant recusal of the entire Department, we shouldn't protect against an Attorney General's failure to properly identify such matters by replacing her discretion with a statute or regulation that mandates appointment of an outsider. We offer two related reasons. First, identifying *ex ante* a meaningful class of cases that deserves outside handling is extraordinarily difficult, and is prone to the dramatic overinclusiveness of The Ethics in Government Act's "covered persons"

45. See KATY J. HARRIGER, *INDEPENDENT JUSTICE: THE FEDERAL SPECIAL PROSECUTOR IN AMERICAN POLITICS* 13-39, 124-26 (1992); cf. Colloquy, *Is It Broken?*, *supra* note 30, at 1532-33 (remarks of former Attorney General William P. Barr) (describing ad hoc use of "inherent authority as Attorney General" to bring in outsiders to conduct or oversee sensitive investigations).

46. See Appointment of Special Counsel Regulations for Department of Justice, Office of the Attorney General, 64 FED. REG. 37,038 (1999) (to be codified as 28 C.F.R. § 600.1 *et seq.*)

47. *Id.*

48. See, e.g., 28 C.F.R. § 600.7(b) (1999) (requiring special counsel to provide, upon request by Attorney General, "explanation for any investigative or prosecutorial step," and authorizing Attorney General "after review to conclude that the action is so inappropriate or unwarranted under established Departmental practices that it should not be pursued."). For a critical analysis of the new regulations, see John P. MacKenzie, *Life After Sunset*, 5 WIDENER L. SYMP. J. 99 (2000).

49. See Dick Polman, *Independent Counsel Law is Dying Friendless*, PHILA. INQ., June 27, 1999, at E1 (quoting former Independent Counsel and U.S. Attorney Joseph diGenova: "If charges of wrongdoing are serious enough, if the Geiger counter starts to click, the public will demand a full and independent investigation, the press and Congress will scream—and it will be impossible for any attorney general to control it for political reasons.").

approach. Second, because special prosecutors are threatened by the same singularity of focus problems as ICs, their use ought to be presumptively disfavored, not encouraged.

We are not so naïve as to suppose that leaving discretion in the Attorney General is without risk—her ability to ignore conflicts is largely unreviewable except at the level of politics. Of course, the same appears to be true of the decision not to refer a matter to an independent counsel.⁵⁰ Rather our claim (speculative, as always) is that the risk of AG abuses in this regard is low, and that the disruption caused by trying to carve out those cases in advance (as with the IC statute) is far too costly. And, in the end, maybe even a modicum of trust is appropriate here. As Madison suggested:

As there is a degree of depravity in mankind which requires a certain degree of circumspection and distrust, so there are other qualities in human nature which justify a certain portion of esteem and confidence. Republican government presupposes the existence of these qualities in a higher degree than any other form. Were the pictures which have been drawn by the political jealousy of some among us faithful likenesses of the human character, the inference would be that there is not sufficient virtue among men for self-government; and that nothing less than the chains of despotism can restrain them from destroying and devouring one another.⁵¹

THE APPEARANCE FACTOR

One response to the foregoing defense of DOJ rectitude is that the real problem is one of apparent, not actual, conflict of interest.⁵² Even if the

50. See, e.g., Lewis, *supra* note 36, and Richman, *supra* note 17, at 813 (discussing Attorney General's decision not to refer campaign finance investigation to an IC).

51. THE FEDERALIST NO. 55, at 346 (James Madison) (Clinton Rossiter ed., 1961). Not surprisingly, there is a Madison quote employed by the pro-IC forces as well:

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

Id. NO. 51, at 322 (James Madison), quoted in Colloquy, *A Roundtable Discussion on the Independent Counsel Statute*, 49 MERCER L. REV. 457, 463 (1998) [hereinafter Colloquy, *A Roundtable Discussion*] (statement of Lloyd Cutler). For what it's worth, the framers did not include an independent counsel mechanism in the Constitution's arsenal of "auxiliary precautions."

52. "The intent of the special prosecutor provisions is not to impugn the integrity of the Attorney General or the Department of Justice. Throughout our system of justice, safeguards exist against actual or perceived conflicts of interest without reflecting adversely on the parties who are

Attorney General and line prosecutors can in fact be trusted to investigate executive-branch officials with vigor, the argument runs, the public inevitably will suspect that any result favorable to such officials was tainted by partisan influence. That means we must mandate an investigation run from outside DOJ. Lloyd Cutler put the point starkly: "The Attorney General's appearance of impartiality and independence is simply gone for our generation."⁵³ This position, at the very least, has some rhetorical appeal: What could be wrong with playing it safe and avoiding, in the words of the old ethics rules, even "the appearance of impropriety?" The central (and by now obvious) difficulty with this position is that the IC mechanism has generated its own, perhaps greater, appearance-of-partiality problem. Whether or not the appointment process is politicized,⁵⁴ the political motivations of any and every Independent Counsel are now fully in play, so that even a truly nonpartisan IC will be subject to partisan attacks of partiality once an investigation heats up.⁵⁵ Far from promoting the appearance of neutrality in criminal investigations, the IC mechanism has simply fueled the now-accurate perception that the investigation of high-ranking political figures has become as much politics as anything else.

A second and more speculative response to the appearance argument is that by regularly resorting to ICs, we undermine rather than promote trust in our public institutions. While local district attorneys prosecute the vast majority of this country's crimes, the Department of Justice is and will remain our nation's primary criminal justice organization. The existence of the IC mechanism tells the citizenry that there is a class of cases in which the Department of Justice,

subject to conflicts."S. REP. NO. 97-496, at 6 (1982). *But see, e.g.*, 139 CONG. REC. S425-26 (daily ed. Jan. 21, 1993) (statement of Sen. Cohen) ("I believe that an institutional mechanism, such as the independent counsel law, will always be necessary to guard against inherent conflicts of interest that [will] occur whenever the executive branch is called upon to investigate itself."); Colloquy, *Is It Broken?*, *supra* note 30, at 1598 (statement of Congressman Hyde) (explaining that IC mechanism is necessary to avoid an "inherent conflict of interest with a prosecutor who is a political appointee trying to prosecute or investigate her patron or his patron").

53. Colloquy, *A Roundtable Discussion*, *supra* note 51, at 464.

54. *Cf.* John Q. Barrett, *Special Division Agonistes*, 5 WIDENER L. SYMP. J. 17 (2000) (examining, *inter alia*, actual and perceived roles of Special Division in appointing ICs); William Michael Treanor, *Independent Counsel and Vigorous Investigation and Prosecution*, 61 LAW & CONTEMP. PROBS. 149, 153-57 (1998) (examining process of selecting ICs and special prosecutors).

55. *Cf.* Lynch & Howard, *supra* note 28, at C7 (drawing lesson from Walsh and Starr investigations that "[p]artisan arguments intrude into all decisions involving the political arena"). The appointment of Starr's successor, Robert Ray, has brought yet another round of partisan wrangling. *See* Don Van Natta, Jr., *Starr's Successor Sworn In To Oversee Clinton Inquiry*, N.Y. TIMES, Oct. 19, 1999, at A20 ("Even before Mr. Ray was sworn in, White House aides had begun calling reporters to contend that Mr. Ray had a conflict of interest because he had once been hired as a Federal prosecutor by Rudolph W. Giuliani, who may face Mrs. Clinton in the New York Senate race."); Neil A. Lewis, *Aide to Starr Successor Rejects Conflict Claim Involving Giuliani*, N.Y. TIMES, Oct. 20, 1999, at A23.

because of corrupting political influence, cannot be trusted to be vigilant, and further that the Department cannot be trusted to identify those cases on its own.⁵⁶ The harm from this bleak, debilitating, and, we believe, mistaken message has been immeasurably compounded by the frequency of calls for and actual referrals to ICs.⁵⁷ What lesson does this teach with respect to DOJ (and other prosecutors' offices) generally? Political favor can operate on a much smaller scale than presidents intimidating (or cajoling) attorneys general, and there is no shortage of nonpolitical potentially corrupting influences. The pro-IC appearance argument, while seductive, should be resisted. If we want the public to trust critical government institutions, then we should begin by trusting those institutions to act appropriately in situations of possible conflicts of interest, not by assuming their incapacity.

WHAT NOW?

When Congress again takes up the question of how best to govern the governors, it will not want for alternatives. While the IC statute died with few visible public supporters (perhaps as much a testament to dissatisfaction with the Walsh and/or Starr investigations as with the statute itself), adherents to the concept have suggested a wide range of largely salutary modifications.⁵⁸ Dramatically reducing the list of "covered persons," raising the showing needed before the appointment of an IC will be required, limiting coverage to misconduct in office, and increasing IC accountability, taken together, would ameliorate many of the problems associated with IC investigations. Indeed, had the IC statute been born with those components in place, it would certainly still be alive today. That being the case, why shouldn't we just revamp the statute?

56. See, e.g., S.REP.NO. 103-101, at 11 (1993) (statement of Sen. Dole) ("We're not enhancing 'confidence in government' when Congress presumes, as it presumes through the independent counsel statute, that the Attorney General lacks the integrity to conduct a fair and thorough investigation of another executive branch official."); *id.* (statement of former Attorney General Katzenbach) (concluding that IC statute, "contrary to its purpose, has served to destroy rather than preserve public confidence in the integrity of the government in general and the Department of Justice in particular. The statute assumes conclusively that with respect to a broad range of senior government officials the Attorney General cannot be trusted to enforce the law objectively . . ."); Colloquy, *A Roundtable Discussion*, *supra* note 51, at 465 (statement of former Attorney General Griffin Bell) ("I think you just cause the people to distrust the Department of Justice. The more special counsels we have, the less people think of the Department.").

57. See O'Sullivan, *supra* note 16, at 470. "The public perception seems to be that when an allegation of wrongdoing of any kind is made against a high-ranking political figure and is pressed by his or her political foes, someone impartial must sort it out." *Id.*

58. See, e.g., Erwin Chemerinsky, *Learning the Wrong Lessons From History: Why There Must be an Independent Counsel Law*, 5 WIDENER L. SYMP. J. 1 (2000); Michael Stokes Paulsen, *A Constitutional Independent Counsel Statute*, 5 WIDENER L. SYMP. J. 111 (2000); Ken Gormley, *An Original Model of the Independent Counsel Statute*, 97 MICH. L. REV. 601 (1998).

Our answer here (given, we hope, with the right number of qualifications) is, first, that proponents of an IC statute have failed to demonstrate a need for that mechanism. Neither fear of underzealous efforts by DOJ prosecutors nor an unexamined appeal to appearance does the trick. As a result, we would prefer to leave prosecutorial responsibility with DOJ, an approach that seemed to work remarkably well before passage of the Ethics in Government Act.

Second, it is far too late to go back to the beginning, to get partisan politics out of the criminal investigation of high administration officials. No matter who's doing the investigating, and no matter what direction such an investigation takes, its exploitation for partisan political ends seems certain. A target feeling pressure will attack the investigation as partisan; political opponents of a target being treated favorably will do the same. What we face is not a choice between underzealous regular prosecutors and overzealous ICs,⁵⁹ but rather the inevitability of *charges* (fair and unfair) of partisan underzealousness or overzealousness, depending on whose ox is being gored at the moment. To be sure, many IC investigations have avoided this politicization, but largely because of their lack of political significance. As Julie O'Sullivan perceptively observed, IC handling of low-profile matters tends to work well but is unnecessary, while IC handling of high-profile matters tends to "intensify the politicization of [such] investigations."⁶⁰ Reducing the list of covered persons to the President and Vice President, therefore, will not fix the problem. Moreover, we are inclined to follow trends rather than averages here. We simply cannot put the genie of partisan attacks on the prosecutor back in the bottle. The Department of Justice, an institution dominated by professional prosecutors and investigators with a relatively thin overlay of political appointees and with a lengthy track record of nonpartisan work, is far better equipped to withstand such attacks than is a one-shot independent counsel.

One final thought: As an effort to counter the politicization of criminal justice, the IC statute failed miserably. Indeed, it fostered an ever graver problem—the criminalization of politics. By giving the opposition party an apparently apolitical home for its political complaints, any IC mechanism threatens to color ordinary political disputes with an unwarranted criminal hue. Let's keep the distinction between politics and crime as distinct as possible by letting the Department of Justice decide what and whom to prosecute. If the Department stumbles, it (and the entire executive branch, including the President and the Attorney General) remains subject to political checks. There may also be a margin for error here: If the absence of an IC statute means that a democratically elected President will be able to avoid, during his term in office, facing charges meager enough that, when aired by opponents and/or the media, they generate insufficient pressure to force the Department's hand, we are not quite sure that real damage has been done.

59. See Fleissner, *supra* note 26 and accompanying text.

60. O'Sullivan, *supra* note 16, at 475.