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## WHO SHOULD POLICE POLITICIZATION OF THE DOJ?

BRUCE A. GREEN\* & REBECCA ROIPHE\*\*

During the Trump administration, the public witnessed warring accusations about politicization of the Department of Justice (“DOJ”). Attorney General William Barr criticized what he perceived to be the politically motivated investigation into Russian interference in the 2016 election, labeling it “one of the greatest travesties in American history.”<sup>1</sup> Others, including independent watchdogs and former employees of the DOJ, maintained, to the contrary, that career officials, including those who launched the Russia probe, acted with integrity; they accused Barr of ushering improper partisan motivations into DOJ’s work.<sup>2</sup>

Allegations like these create two problems. First, although prosecutors should never allow partisan concerns to affect their decisions in individual cases, it is hard to determine if and when this corruption of federal prosecutorial decision-making has occurred. Second, leaving allegations of partisanship unresolved poses a danger to the rule of law, because the public may have faith in high-profile prosecutions only if the outcome corresponds with their ideological preferences, dismissing all others as the product of partisan bias. To address these problems, this Article argues that one body should take the lead in investigating politicization of the DOJ and analyzes which one is in the best position to do so.

At the moment, a number of different officials and agencies have authority to uncover corruption and political bias in the Department of Justice. At least

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1. Aaron Blake, ‘One of the Greatest Travesties in American History’: Barr Drops All Pretense About Ongoing Probe of Russia Investigation, WASH. POST (Apr. 9, 2020), <https://www.washingtonpost.com/politics/2020/04/09/one-greatest-travesties-american-history-barr-drops-all-pretense-about-ongoing-probe-russia-investigation/>; see Editorial, *Barr Claims Trump-Russia Investigation was FBI Attempt to ‘Sabotage’ the President*, GUARDIAN (Apr. 10, 2020), <https://www.theguardian.com/us-news/2020/apr/10/william-barr-donald-trump-russia-investigation-fbi-sabotage>.

2. See Nicholas Fandos, Katie Benner & Charlie Savage, *Justice Dept. Officials Outline Claims of Politicization Under Barr*, N.Y. TIMES (July 10, 2020), <https://www.nytimes.com/2020/06/24/us/politics/justice-department-politicization.html>; George Croner, *Ethics Groups Say Barr’s Use of DOJ is Shredding its Essential Independence*, JUST SEC. (Oct. 26, 2020), <https://www.justsecurity.org/73014/ethics-groups-say-barrs-use-of-doj-is-shredding-its-essential-independence/>.

in some situations, trial courts, federal and state disciplinary authorities, Congress, as well as several units within DOJ itself, can pursue a claim that a particular federal prosecutor was acting for impermissible partisan reasons. This Article analyzes these different actors' roles and responsibilities and concludes that the DOJ Inspector General ("IG") is in the best position to serve this function and ought to be given broader authority to do so. Of course, our system requires checks and balances, and an unlimited power to investigate and address politicization within DOJ would be problematic, but the Inspector General's office is not a rogue actor. It is overseen by Congress, as well as by the President, who has the power to remove the IG from office.

DOJ Inspectors General are in the best position to root out potential political partisanship and bias for two reasons: first, they are least likely to have a political bias themselves; second, they have the requisite experience to conduct a thorough investigation and the statutory mandate to make an investigation public. While it is true that almost everyone has some partisan allegiance or preference, some actors are more likely to allow these views to distort their independent judgment. Political appointees who have worked to strengthen their ties to politicians and may have political aspirations themselves are more likely to allow impermissible partisan consideration to affect their work. They are more likely to view facts through a political lens or skew the events in a way that favors the politicians with whom they have a personal relationship. This is, of course, not true of every political appointee but seems a fair generalization.<sup>3</sup> Even if it were not true, the public would be right to question the judgment of an individual who has political aspirations and political connections, and this alone is enough to destabilize our institutions.

In arguing that the Inspector General should have the principal responsibility for investigating the politicization of DOJ, this Article is divided into two parts. Part I discusses the alternatives to the DOJ Inspector General—trial courts, disciplinary authorities, Congress, and others in DOJ—and their limitations. It also notes that political accountability is an inadequate alternative. Part II gives an historical overview of the Inspector General's job and argues that the Inspector General role was conceived and designed for this sort of work. The Inspector General is both equipped to do the job and the least likely to be biased in the investigation.

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3. See Rebecca Ingber, *Bureaucratic Resistance and the National Security State*, 104 IOWA L. REV. 139, 155 (2018) (arguing that fear of bureaucracy may lead to an erosion of the important constraint on presidential power, but over-reliance is also dangerous in that it may lead to the abdication of responsibility from other branches).

## I. OTHER POSSIBLE REGULATORS: MANY OVERSEERS, LITTLE OVERSIGHT

Federal prosecutors have extraordinary power,<sup>4</sup> which they are supposed to wield in the public interest,<sup>5</sup> not in service of partisan politics. The principle applies to all prosecutors, not uniquely to federal ones. The American Bar Association's prosecution function standards, which reflect a professional consensus among members of the legal profession,<sup>6</sup> provide that "[a] prosecutor should not use . . . improper considerations, such as partisan or political or personal considerations, in exercising prosecutorial discretion."<sup>7</sup> The principle is uncontroversial and contemporary U.S. Attorneys General universally acknowledge it.<sup>8</sup> In the lead-up to the 2020 presidential election, for example, Attorney General William Barr reaffirmed that "partisan politics must play no role in the decisions of federal investigators or prosecutors regarding any investigations or criminal charges."<sup>9</sup>

DOJ has adopted procedures to deter its prosecutors from partisan abuses of power. For example, as a matter of self-regulation, it has internal restrictions on DOJ lawyers' political activities and a practice of restricting the timing of certain decisions,<sup>10</sup> and particularly of indictments, that may influence voters on

4. See Robert H. Jackson, *The Federal Prosecutor*, 31 J. AM. INST. CRIM. L. & CRIMINOLOGY 3, 3 (1940) ("The prosecutor has more control over life, liberty, and reputation than any other person in America."). Attorney General Jackson's observations remain relevant today—indeed, they are still considered to be highly significant. See, e.g., Charles R. Wilson, "That Justice Shall Be Done"—*Constitutional Requirements, Ethical Rules, and the Professional Ideal of Federal Prosecution*, 36 N. ILL. U. L. REV. 111, 112 (2015).

5. As the U.S. Supreme Court recognized 85 years ago, a prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). See generally MODEL RULES OF PROF'L CONDUCT, r. 3.8 cmt. 1 (AM. BAR ASS'N 2020) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."); see also Bruce A. Green & Rebecca Roiphe, *A Fiduciary Theory of Prosecution*, 69 AM. U. L. REV. 805, 814–23 (2020) (maintaining that the prosecutor's obligation to serve the public, which requires "independence from both political influence and popular control," derives both historically and theoretically from the prosecutor's fiduciary role as a public official).

6. See Rory K. Little, *The ABA's Project to Revise the Criminal Justice Standards for the Prosecution and Defense Functions*, 62 HASTINGS L.J. 1111, 1113 (2011).

7. CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION, Standard 3-1.6(a) (AM. BAR ASS'N 2017). To similar effect is STANDARDS ON PROSECUTORIAL INVESTIGATIONS, Standard 2.1(d)(1) (AM. BAR ASS'N 2014) ("When deciding whether to initiate or continue an investigation, the prosecutor should not be influenced by . . . partisan or other improper political or personal considerations . . .") (quoted by the court in *State v. Martinez*, 2019 N.J. Super. LEXIS 153, at \*59 (Oct. 29, 2019)).

8. See Bruce A. Green & Rebecca Roiphe, *Can the President Control the Department of Justice?*, 70 ALA. L. REV. 1, 22 n.107 (2018).

9. Memorandum from the Att'y Gen. to all U.S. Dep't of Just. Emps. (May 15, 2020), <https://assets.documentcloud.org/documents/7221422/Barr-memo-Election-Year-Sensitivities.pdf>.

10. See U.S. DEP'T OF JUST., *Political Activities*, <https://www.justice.gov/jmd/political-activities>.

the eve of an election.<sup>11</sup> Beginning after Watergate, and until Trump took office, DOJ also limited prosecutors' communications with White House personnel.<sup>12</sup> At one time, the federal Independent Counsel Act identified criminal cases where there was a particularly high risk of prosecutorial partisanship—namely, cases of alleged corruption by high-ranking federal executive-branch officials—and shifted investigative and prosecutorial authority from DOJ lawyers to independent court-appointed prosecutors.<sup>13</sup> That is the law that gave us Ken Starr's investigation of President Clinton.<sup>14</sup> Even such skeptics as Justice Scalia, who thought the law was unconstitutional,<sup>15</sup> acknowledged the risk of prosecutors' political partisanship but thought "the primary check against prosecutorial abuse is a political one."<sup>16</sup> When Congress allowed the law to sunset,<sup>17</sup> DOJ replaced it with the special counsel regulations that led to Robert Mueller's investigation of President Trump.<sup>18</sup>

Despite these sorts of prophylactic procedural measures, DOJ is sometimes suspected or accused of political partisanship,<sup>19</sup> and never more so than under Attorney General Barr's leadership in the latter part of the Trump Administration. Soon after taking office, Barr allegedly served Trump's political interests before the Mueller report was made public by misleadingly describing the report's findings.<sup>20</sup> Later, he appeared to be assisting various of the President's political cronies, including by countermanding the trial prosecutors' sentencing recommendation in Trump's 2016 campaign chairman

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11. See OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF JUST., OVERSIGHT & REV. DIV. 18–40, A REVIEW OF VARIOUS ACTIONS BY THE FEDERAL BUREAU OF INVESTIGATION AND DEPARTMENT OF JUSTICE IN ADVANCE OF THE 2016 ELECTION 16–18 (June 2018), <https://www.justice.gov/file/1071991/download>.

12. See *White House Communications with the DOJ and FBI*, PROTECT DEMOCRACY (Mar. 8, 2017), <https://protectdemocracy.org/agencycontacts/>.

13. Ethics in Government Act of 1978, 28 U.S.C. §§ 591–598 (sunset after reauthorizations in 1999).

14. For an account and critique of Starr's investigation of President Clinton, see Marjorie Cohn, *The Politics of the Clinton Impeachment and the Death of the Independent Counsel Statute: Toward Depoliticization*, 102 W. VA. L. REV. 59, 63–70 (1999).

15. See *Morrison v. Olson*, 487 U.S. 654, 697–734 (1988) (Scalia, J., dissenting).

16. *Id.* at 728.

17. See Ken Gormley, *Monica Lewinsky, Impeachment, and the Death of the Independent Counsel Law: What Congress Can Salvage from the Wreckage—A Minimalist View*, 60 MD. L. REV. 97 (2001) (discussing the Act's demise).

18. See ROBERT S. MUELLER, III, U.S. DEP'T OF JUST., REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION (Mar. 2019).

19. See, e.g., *infra* notes 107–09 and accompanying text (discussing Attorney General Alberto Gonzalez's firing of U.S. Attorneys during the George W. Bush administration).

20. See Letter from 27 Members of the Washington, D.C. Bar to the Off. of Disciplinary Couns. at 4–16 (July 22, 2020), <https://www.justsecurity.org/wp-content/uploads/2020/07/Professional-Responsibility-Investigation-of-William-P.-Barr-Complaint-DC-Bar-Association-July-22-2020.pdf> (asserting that Barr made multiple misleading statements regarding the Mueller report).

Roger Stone's case (before Stone was pardoned)<sup>21</sup> and moving to dismiss charges to which Michael Flynn, the President's first National Security advisor, had twice pled guilty.<sup>22</sup> And Barr was accused of initiating unfounded criminal investigations to promote the President's interests or to serve the President's whims.<sup>23</sup> Indeed, just one month before the 2020 election, federal prosecutors purportedly sought to influence voters by announcing election fraud investigations, exploiting Barr's exception to longstanding DOJ policy against announcing investigations with upcoming elections in mind.<sup>24</sup> After the Stone sentencing recommendation, more than one thousand former DOJ officials signed a letter denouncing Barr for flouting the fundamental principle "that political interference in the conduct of a criminal prosecution is anathema to the Department's core mission and to its sacred obligation to ensure equal justice under the law."<sup>25</sup> Then, in the weeks before the election, in an unprecedented step, two *current* federal prosecutors publicly accused the attorney general of

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21. See *DOJ Alumni Statement on the Events Surrounding the Sentencing of Roger Stone* (Feb. 16, 2020), <https://medium.com/@dojalumni/doj-alumni-statement-on-the-events-surrounding-the-sentencing-of-roger-stone-c2cb75ae4937> (statement of over 1,000 former DOJ officials condemning Barr's interference in the administration of justice in connection with Stone's sentencing).

22. See Brief for Court-Appointed *Amicus Curiae* at 2–3, *United States v. Flynn*, No. 17-cr-232 (EGS) (D.D.C. June 10, 2020) (asserting that: "courts [are empowered] to protect the integrity of their own proceedings from prosecutors who undertake corrupt, politically motivated dismissals. . . . That is what happened here. The Government has engaged in highly irregular conduct to benefit a political ally of the President.").

23. See, e.g., *John Durham's Politicized Investigation — And William Barr's Role in It*, AM. OVERSIGHT (Jan. 20, 2021), <https://www.americanoversight.org/investigation/john-durhams-politicized-investigation-and-william-barrs-role-in-it>.

24. See Robert Faturechi & Justin Elliott, *The Justice Department May Have Violated Attorney General Barr's Own Policy Memo*, PROPUBLICA (Oct. 6, 2020), <https://www.propublica.org/article/the-justice-department-may-have-violated-attorney-general-barrs-own-policy-memo>; Robert Faturechi & Justin Elliott, *DOJ Frees Federal Prosecutors to Take Steps That Could Interfere With Elections, Weakening Long-Standing Policy*, PROPUBLICA (Oct. 7, 2020), [https://www.huffpost.com/entry/doj-frees-federal-prosecutors-to-take-steps-that-could-interfere-with-elections-weakening-long-standing-policy\\_n\\_5f7df355c5b6fc1dec78ba0a](https://www.huffpost.com/entry/doj-frees-federal-prosecutors-to-take-steps-that-could-interfere-with-elections-weakening-long-standing-policy_n_5f7df355c5b6fc1dec78ba0a). Less than three weeks before the election, the Democratic chairs of four House of Representatives committees called on DOJ's Inspector General to conduct an emergency review to ascertain whether the publicly-announced investigation of election law violations was meant to influence the election. Letter from Rep. Jerrold Nadler et al. to Inspector Gen. Michael E. Horowitz (Oct. 19, 2020), <https://www.law360.com/articles/1321152/attachments/0>.

25. *DOJ Alumni Statement on the Events Surrounding the Sentencing of Roger Stone*, *supra* note 21. Members of the bar subsequently signed a similar indictment of Barr's conduct. *Open Letter Supporting the 100,000 Lawyers, Agents and Staff Members of the U.S. Department of Justice*, LAWS. DEFENDING AM. DEMOCRACY (Oct. 1, 2020), <https://lawyersdefendingdemocracy.org/open-letter-supporting-the-us-doj/> ("By word and deed, Attorney General Barr has demonstrated a willingness to politicize the DOJ by backing and helping to implement the President's most partisan and extreme views.").

playing politics,<sup>26</sup> and a third announced that he was resigning over the attorney general's meddling in criminal cases in "slavish obedience" to the President's will.<sup>27</sup>

Political accountability is not effective for this sort of transgression. The President can fire the attorney general when DOJ is mismanaged but will have no incentive to do so when DOJ acts to further the President's own political ambitions or allegiances. When a first-term President runs for reelection, the public might hold the President accountable for DOJ's abuses of prosecutorial power for partisan ends. But the possibility of such a reckoning is unrealistic. Even local prosecutors who themselves run for office are unlikely to pay a political price for partisan abuses, both because their abuses of prosecutorial power can be hidden,<sup>28</sup> and because voters probably tolerate abuses with which they sympathize. It is even less likely that voters would ever hold a President accountable for federal prosecutors' abuses. Even assuming voters might prioritize DOJ's work when choosing a President, they would rarely have enough information to make well-informed judgments. Prosecutors' discretionary decisions may seem to be politically motivated, but neither the public nor the press has access to DOJ's internal workings to confirm whether prosecutors abused their power or had legitimate motivations. Unless a court or other public body thoroughly investigates and credibly reveals that federal prosecutors used their power for political advantage, political accountability is not a meaningful possibility, even if members of the public voting for President were disposed to prioritize federal prosecutions.

To hold federal prosecutors accountable when they serve impermissible political ends, some institution must have authority, tools, and motivation both to investigate potential and apparent abuses and ultimately to resolve whether abuses occurred.<sup>29</sup> It would not be enough to uncover instances when White

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26. See Michael Dion, Letter to the Editor, SEATTLE TIMES (Oct. 6, 2020), <https://www.seattletimes.com/opinion/attorney-general-william-barr-america-deserves-better/> ("Prosecutors are supposed to do their jobs without regard to party or politics. Barr, however, is turning the Justice Department into a shield to protect the president and his henchmen."); James D. Herbert, Letter to the Editor, *Barr Dishonors Justice Department*, BOSTON GLOBE (Sept. 24, 2020), <https://www.bostonglobe.com/2020/09/24/opinion/barr-dishonors-justice-department/> ("The attorney general acts as though his job is to serve only the political interests of Donald J. Trump. This is a dangerous abuse of power.").

27. Phillip Halpern, Commentary, *I Won't Work in Attorney General William Barr's Justice Department Any Longer*, SAN DIEGO UNION-TRIBUNE (Oct. 14, 2020), <https://www.sandiegouniontribune.com/opinion/commentary/story/2020-10-14/william-barr-department-of-justice-doj>.

28. Cf. Bruce Green & Ellen Yaroshesky, *Prosecutorial Accountability 2.0*, 92 NOTRE DAME L. REV. 51, 66 (2016) ("[A]bsent effective media scrutiny of prosecutors' conduct, interested voters [cannot] make informed assessments of an office's professional practices."); Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 583 (2009) (concluding that prosecutor elections "do not often force an incumbent to give any public explanation at all for the priorities and practices of the office").

29. At the margins, the principle that prosecutors—even elected prosecutors—must exercise their authority without regard to partisan politics may raise definitional questions. The President

House officials privately pressured or importuned prosecutors. It is improper for prosecutors to use their power to further political ends even if no one in the White House expressly asks them to do so.<sup>30</sup> Prosecutors should not treat some individuals more favorably than others because they happen to be the President's cronies or members of the President's party or treat others more harshly because they are the current administration's opponents. To uncover such abuses, investigators must be able to question prosecutors about their decision-making processes and internal deliberations.

This Article examines several different institutions' competence to elicit the relevant facts and to make reliable determinations about prosecutors' political misuses of power. This question implicates practical concerns, such as whether particular institutions have adequate expertise and resources and are sufficiently objective and independent: the institution investigating accusations of DOJ politicization should itself be free from political pressures. And for investigative findings to have a meaningful role in responding to abuses of prosecutorial power, the institution must be able to act on them or disclose them publicly, so that others can act. This question also implicates jurisdictional considerations: does the particular institution have jurisdiction to look into political abuses by any DOJ lawyer in any criminal case, or is the institution's authority limited so that it can investigate only certain lawyers, certain political abuses, or certain cases? Finally, this question raises political and constitutional concerns, such as whether an institution's inquiry will interfere with prosecutors' legitimate work and whether its conclusions will win public confidence.

Before turning in Part II to the Inspector General, whom we deem to be the preferable investigator, this Part looks at other conceivable candidates: the courts in both the trial and disciplinary contexts, Congress, and other arms of the Department of Justice itself. We show that, although other institutions have legitimate responsibilities and opportunities to oversee federal prosecutors, each

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may establish criminal justice policy for the DOJ to implement, and while the policy may reflect the views or preferences of the President's political party, pursuing criminal-justice objectives is not illegitimately partisan. On the other hand, it would be illegitimately partisan for the DOJ to prosecute cases of voting fraud by individuals and organizations when they try to benefit the opposing party but not when they try to benefit the President's party. It may not always be easy to distinguish the legitimate (even if politically controversial) pursuit of policy priorities from the illegitimate use of power for partisan ends. Although the general principle of prosecutorial nonpartisanship has garnered near universal acceptance, whoever polices the politicization of DOJ may have to adopt, or be given, a more detailed standard or understanding.

30. William Barr attempted to defend his meddling in the Roger Stone case by claiming that he was acting on his own rather than responding to the President's tweet. He stated in an interview, the President is "mak[ing] it impossible for me to do my job." Anna Flaherty, *Barr Blasts Trump's Tweets on Stone Case: 'Impossible for Me to Do My Job'*, ABC NEWS (Feb. 13, 2020), <https://abcnews.go.com/Politics/barr-blasts-trumps-tweets-stone-case-impossible-job/story?id=68963276>. But if Barr second guessed the sentence in order to further a political agenda, it does not matter whether he was acting at his own initiative or following the President's order.

has significant limitations when it comes to policing political abuses of power in particular.

### A. Judicial Accountability

Federal prosecutors may be accountable to courts in two contexts: prosecutors' conduct in federal criminal cases is overseen by the courts before which they appear; and, as licensed practitioners, prosecutors are subject to disciplinary oversight by the judiciaries of the jurisdictions where they are licensed or practice. In some respects, federal courts might appear to be the ideal regulators when prosecutors abuse their power for political ends. Federal courts have expertise in applying legal and ethical norms to a given set of facts and can be expected to apply the relevant standards more objectively than members of other political branches. Federal courts have significant limitations, however, because their role in our system of separation of powers deprives them of the broad investigative powers needed to root out this particular impropriety. State courts exercising disciplinary authority are equally limited.

#### 1. Trial Court Review

Federal judges have supervisory authority over parties and lawyers, including prosecutors, who appear before them<sup>31</sup> and might conceivably exercise that power to police abuses of prosecutorial power for political ends. But judges' limited role in our system of separation of powers makes them less than ideal for this task, both because they can address only a fraction of the cases where this abuse may be present and because they have limited investigative powers.

Trial judges can decide legal issues only in cases that properly come before them. They cannot initiate inquiries into prosecutorial misconduct based on news accounts or any other extrajudicial allegation of misconduct. In many cases where federal prosecutors may have acted with improper political motivations, trial courts will have no opportunity to inquire. For example, if federal prosecutors decide *not* to initiate an investigation or prosecution of suspected criminal conduct because the suspect is the President's crony, the matter will never come before a court at all. Members of the public may be

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31. See Fred C. Zacharias & Bruce A. Green, *Federal Court Authority to Regulate Lawyers: A Practice in Search of Theory*, 56 VAND. L. REV. 1303 (2003). This authority is typically exercised with respect to federal prosecutors when the defense makes a motion alleging prosecutorial misconduct of some sort, at which point the parties may litigate whether the prosecutor misbehaved. Courts may also initiate inquiries into prosecutorial misconduct and investigate them independently of the defense. For example, in response to apparent discovery abuse, a judge might issue an order to show cause why the prosecutor should not be sanctioned. See Green & Yaroshefsky, *supra* note 28, at 74 (discussing district judges' issuance of such orders). Or a judge might appoint a special master to investigate as Judge Sullivan did following the revelation of discovery misconduct in the prosecution of Senator Ted Stevens. See *id.* at 73–74 (discussing appointment of special master). If the court concludes that the prosecutor misbehaved, it might sanction the offending prosecutor.

disappointed, but they could not persuade a court that it had power to countermand the federal prosecutors' decision.<sup>32</sup>

Even when alleged prosecutorial misconduct relates to a federal criminal case, federal judges will not necessarily adjudicate the allegations, because they generally view the regulation of lawyers as ancillary to their principal function of deciding cases. Seeking to conserve their resources, trial courts prefer to respond to allegations of prosecutorial misconduct only as necessary to decide a legal question raised in a case.<sup>33</sup> Otherwise, courts typically leave it to disciplinary authorities to resolve contested questions of professional conduct. Further, concerns about separation of powers counsel federal judges against probing the confidential decision-making processes of federal prosecutors, who are members of the executive branch. Therefore, if DOJ appears to be politically motivated in a case before the court, but no party complains, as when Attorney General Barr countermanded the trial prosecutors' sentencing recommendation for Roger Stone, trial judges will ordinarily ignore suspicions about prosecutorial misconduct because the prosecutors' conduct is not central to any question that the court must decide.

The district court's inquiry in the Flynn prosecution<sup>34</sup> is a rare counter-example, but one that ultimately underscores federal trial judges' limited authority. Before Flynn's sentencing, when the prosecution moved to dismiss the case purportedly because of insufficient evidence, Judge Sullivan took the initiative to appoint a lawyer, former federal district judge John Gleeson, as *amicus curiae* to argue against dismissal.<sup>35</sup> A presidential pardon of Flynn interrupted the proceedings, but even if they had continued, it is unclear whether the district court could have held the prosecutors accountable for a political abuse. Although the appeals court denied the government's request to shut down the district judge's inquiry, it was skeptical whether the district judge had authority to conduct a wide-ranging evidentiary hearing and ultimately could rule on the government's motion other than by granting it.<sup>36</sup> And it is nearly certain that the court's hands would have been tied if the government had made its motion before Flynn pled guilty rather than after.

Judicial oversight is more likely when the defense seeks a remedy for prosecutors' alleged abuse of power. For example, in moving to dismiss criminal charges based on selective or vindictive prosecution or based on a denial of the right to a disinterested prosecutor, the defense may allege that prosecutors were politically motivated to pursue the charges. These kinds of

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32. See Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 970, 970 n.41 (2009) ("The separation of powers, courts hold, forbids judicial interference with prosecutorial discretion to decline to file charges.") (citing authority).

33. See, e.g., *Cont'l Ins. Co. v. Superior Ct.*, 32 Cal. App. 4th 94, 111 n.5 (1995) ("[T]he 'business' of the court is to dispose of 'litigation' and not to oversee the ethics of those that practice before it unless the behavior 'taints' the trial.") (citing *Monsanto Co. v. Aetna Cas. & Sur. Co.*, 593 A.2d 1013, 1020 (Del. 1990)).

34. See *In re Flynn*, 973 F.3d 74 (D.C. Cir. 2020).

35. See *id.* at 76–77.

36. See *id.* at 80–82.

motions have no track record of success, however.<sup>37</sup> Reluctant to interfere with prosecutors' discretionary decisions about whom to investigate or charge, federal courts require substantial evidence to overcome the presumption that prosecutors are acting in good faith.<sup>38</sup> The legal standard for setting aside politically partisan prosecutions, though neither clear nor well-established, is demanding. The standard cannot be met simply by evidence that a particular prosecutor has a strong political identification,<sup>39</sup> or that the timing of events supports an inference that prosecutors were politically influenced.<sup>40</sup> While demanding more, courts do not allow defendants to conduct the discovery into prosecutors' decision-making processes needed to find it.<sup>41</sup> Nor do judges have authority and inclination to initiate their own inquiries except perhaps in the most exceptional cases.

## 2. Disciplinary review

State and federal courts oversee disciplinary processes which are a potential mechanism for policing prosecutors' misuse of power for political ends. As noted, district judges generally prefer to leave questions of lawyer misconduct to the disciplinary process. Likewise, when courts hold that prosecutors are immune from civil liability for politically-motivated charging decisions, as for other abuses in the context of criminal adjudications, courts point to professional discipline as an alternative.<sup>42</sup> Disciplinary authorities may be better positioned than trial courts because they can be proactive; they can conduct investigations on their own initiative as well as in response to complaints. They have investigative powers that are typically denied to defendants in criminal proceedings, and they have authority to mete out professional sanctions.

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37. See, e.g., *United States v. Scrusby*, 721 F.3d 1288 (11th Cir. 2013) (denying effort to overturn conviction, based on denial of a disinterested prosecutor, after investigations by Congress and DOJ's Office of Professional Responsibility into whether the prosecution was politically motivated).

38. See, e.g., *In re Grand Jury Subpoena Duces Tecum*, 782 F. Supp. 1518, 1521–23 (N.D. Ala. 1992) (rejecting claim that grand jury investigation is politically and racially motivated).

39. See *United States DOJ v. Mandanici (In re Starr)*, 152 F.3d 741, 752–55 (8th Cir. 1998) (Loken, J., concurring) (describing history of appointing politically-identified lawyers to investigate and prosecute public corruption).

40. See, e.g., *United States v. Pabian*, 704 F.2d 1533, 1537 (11th Cir. 1983) (finding that although the prosecutor represented the case to the grand jury after being criticized by members of Congress, it “would have been clearly erroneous” to find that the prosecutor’s decision was politically motivated).

41. See, e.g., *United States v. MacLeod*, 436 F.2d 947, 950 (8th Cir. 1971).

42. See, e.g., *Bernard v. Cnty. of Suffolk*, 356 F.3d 495, 504 (2d Cir. 2004) (“Certainly, racially invidious or partisan prosecutions, pursued without probable cause, are reprehensible, but such motives do not necessarily remove conduct from the protection of absolute immunity . . . . [P]rosecutorial misconduct may be subject to professional or even criminal sanctions at the same time that it fits within the scope of advocative functions entitled to absolute immunity from suit for money damages.”) (citing *Imbler v. Pachtman*, 424 U.S. 409 (1976)).

There are other limitations, however, on disciplinary authorities' ability to oversee prosecutors who have used their power politically. The disciplinary power arises out of courts' supervisory authority over members of the bar. In the disciplinary context, that power is ordinarily used to enforce rules of professional conduct adopted by the state judiciary to regulate lawyers. But the only rule specifically targeting prosecutors' charging decisions is the injunction against pursuing cases without probable cause.<sup>43</sup>

On rare occasion, courts invoke conflict of interest rules or other less-targeted disciplinary rules to sanction prosecutors who abuse their power toward political ends.<sup>44</sup> For example, the Indiana Supreme Court held that an elected chief prosecutor and his chief deputy engaged in "conduct that was prejudicial to the administration of justice" by exercising prosecutorial power against an opposing candidate for political gain: they threatened to investigate the candidate if he ran against the incumbent prosecutor, and when the candidate elected to run, they filed disciplinary charges and sought to initiate a prosecution against him.<sup>45</sup> The Arizona Supreme Court disbarred the elected chief prosecutor of Maricopa County, Arizona, and his deputy, in part, for misusing their power to advance the chief prosecutor's partisan political interests.<sup>46</sup> Some have argued that courts should amend the disciplinary rules to expand the disciplinary regulation of prosecutors' discretionary decision making.<sup>47</sup>

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43. See MODEL RULES OF PROF'L. CONDUCT, r. 3.8(a) (AM. BAR ASS'N 2020).

44. See generally Bruce A. Green & Samuel J. Levine, *Disciplinary Regulation of Prosecutors as a Remedy for Abuses of Prosecutorial Discretion: A Descriptive and Normative Analysis*, 14 OHIO ST. J. CRIM L. 143, 158–61, 169–80 (2016); see, e.g., Bruce A. Green & Rebecca Roiphe, *Rethinking Prosecutors' Conflicts of Interest*, 58 B.C. L. REV. 463, 486–87 (2017).

45. *In re Christoff*, 690 N.E.2d 1135, 1141 (Ind. 1997). The court explained:

The key element of culpability in the [prosecutors'] actions was their use of the prosecutorial powers to further their self-interests. [The chief prosecutor] used his prosecutorial discretion and authority to further his interest in retaining his elected position. [His deputy] actively assisted him in doing so. Use of prosecutorial authority becomes improper when the sole or overriding motivation for exercising it is the prosecutor's personal benefit or gain, and not to further the public interest of effective law application and enforcement.

*Id.*

46. *In re State Bar of Ariz. v. Thomas*, PDJ-2011-9002, at 233–46 (Ariz. Apr. 10, 2012), <http://archive.azcentral.com/ic/news/0410Thomas-Aubuchon.PDF>. The court agreed with the disciplinary authorities that the prosecutors' substantial purpose in initiating criminal charges against a member of the County Board of Supervisors "was to burden and embarrass a political foe" and to exact "politically-motivated-revenge." *Id.* at ¶¶ 89, 95, 97. The court found that, in acting in their own political self-interest, the prosecutors had an impermissible conflict of interest, because the chief prosecutor's "personal animosity towards [the Supervisor] should have precluded them from seeking his indictment and prosecution." *Id.* at ¶¶ 105, 109. Additionally, the court found, the prosecutors violated a professional conduct rule that forbids a lawyer from us[ing] means that have "no substantial purpose other than to embarrass . . . or burden" any other person. *Id.* at ¶ 98 (citing ARIZ. RULES OF PRO. CONDUCT, r. 4.4(a)).

47. See Samuel J. Levine, *The Potential Utility of Disciplinary Regulation as a Remedy for Abuses of Prosecutorial Discretion*, 12 DUKE J. CONST. L. & PUB. POL'Y no. 2, 1 (2016); Samuel

For several reasons, however, it would be a sharp break from traditional practice for federal courts to regulate federal prosecutors through the disciplinary process. First, the same separation-of-powers considerations that make federal courts deferential to federal prosecutors' charging and plea-bargaining decisions would apply here. Courts have no clear disciplinary standard to enforce against prosecutors who acted on political motivations, and federal courts would be reluctant to adopt and apply one. Setting standards governing prosecutors' charging and plea-bargaining decisions is primarily a job for Congress or for DOJ itself as an executive-branch agency, not for the judiciary. Further, federal courts have resource limitations. Most require lawyers appearing before them to abide by the state's professional conduct rules and defer to state court disciplinary processes to conduct investigations and initiate disciplinary proceedings. Although federal courts have ad hoc disciplinary processes, they rarely invoke them.

State courts have authority to regulate members of their state bars, including federal prosecutors, who violate professional conduct rules. But historically they have been reluctant to proceed against state prosecutors for what seem to be clear violations of clear rules.<sup>48</sup> State disciplinary authorities would be more hesitant to regulate federal prosecutors and less inclined to invoke vague rules to enforce standards against politically motivated federal prosecutions. The constitutional legitimacy of such inquiry would be highly questionable because of federalism concerns: It is doubtful whether state courts have constitutional authority to make and enforce rules of professional conduct that have the effect of dictating how federal executive agencies such as prosecutors' offices, acting through their lawyers, exercise their discretionary charging power. Moreover, DOJ could be expected to employ its considerable resources to defend its prosecutors, making a disciplinary investigation and proceeding expensive and time-consuming for state authorities.<sup>49</sup> Finally, state disciplinary authorities are decentralized, which means that a state court's disciplinary decision would not necessarily set a standard for federal prosecutors licensed in other states.

### *B. Legislative Accountability*

An alternative is for Congress to police DOJ by initiating inquiries when federal prosecutors appear to have acted for partisan political reasons. This is a legitimate function for Congress, which has a stake in protecting federal prosecutions from political influence including via law-making and, in the

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J. Levine, *Disciplinary Regulation of Prosecutorial Discretion: What Would a Rule Look Like?*, 16 OHIO ST. J. CRIM. L. 347 (2019).

48. See Green & Levine, *supra* note 44, at 155 (“[T]here is an overwhelming consensus of opinion that ethics rules are under-enforced against prosecutors.”) (citing authority).

49. See, e.g., *Stern v. U.S. Dist. Court*, 214 F.3d 4 (1st Cir. 2000) (U.S. Attorney's office brought constitutional challenge to ethics rule restricting prosecutors' issuance of subpoenas to lawyers); *In re Kline*, 113 A.3d 202 (D.C. Cir. 2015) (U.S. Attorney's office filed amicus brief in defense of federal prosecutor charged with discovery abuse).

Senate's case, when confirming the attorney general and U.S. attorneys.<sup>50</sup> Andrew Kent recently identified the potential importance of congressional oversight into allegations of improper political interference in criminal prosecutions and pointed to the example of congressional hearings in the 1970s in response to abuses in the Nixon administration.<sup>51</sup> Another notable example is the 2007 inquiry prompted by the firing of more than a half dozen U.S. Attorneys under the Bush Administration.<sup>52</sup> The conclusion that many were fired in order to bring partisan considerations to bear on politically-charged prosecutions led to new legislation meant to provide greater protection for federal prosecutors' independence.<sup>53</sup>

As important as occasional congressional inquiries may be, they are not a preferable regulatory mechanism for several reasons. First, Congress has important responsibilities aside from overseeing executive branch agencies, and it has many agencies in addition to DOJ to oversee, so it must be highly selective about what inquiries it undertakes. Second, as would also be true of inquiries by courts or other outsiders, congressional inquiries can interfere with investigations and prosecutions. DOJ has taken the position that legislative inquiries "inescapably create the risk that the public and the courts will perceive undue political and Congressional influence over law enforcement and litigation decisions" and "also often seek records and other information that our responsibilities for these matters preclude us from disclosing."<sup>54</sup> This is something of an overstatement, but inquiries into ongoing cases would be highly problematic and, in some cases, the President could assert the executive privilege to block access to information.<sup>55</sup> Third, Congress has no authority to provide a remedy in an individual criminal case or to impose personal or

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50. See, e.g., Preserving United States Attorney Independence Act of 2007, 153 CONG. REC. S3240, S3248 (daily ed. Mar. 19, 2007) (statement of Sen. Patrick Leahy) ("[W]hen it comes to the U.S. Department of Justice and to the U.S. attorneys in our home States, Senators have a say and a stake in ensuring fairness and independence to prevent the Federal law enforcement function from untoward political influence. That is why the law and the practice has always been these appointments require Senate confirmation.").

51. See Andrew Kent, *Congress and the Independence of Federal Law Enforcement*, 52 U.C. DAVIS L. REV. 1927, 1957–58 (2019).

52. For discussions of the so-called "U.S. Attorneys Scandal" and its implications, see Bruce A. Green & Fred C. Zacharias, "The U.S. Attorneys Scandal" and the Allocation of Prosecutorial Power, 69 OHIO ST. L.J. 187, 204–07 (2008); Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1202 (2013).

53. See Preserving United States Attorney Independence Act of 2007, 153 CONG. REC. H5553, 5553 (daily ed. May 22, 2007) (statement of Rep. John Conyers).

54. Letter from Rod J. Rosenstein, Deputy Att'y Gen., to Hon. Charles Grassley, Chairman, Sen. Comm. on the Judiciary (June 27, 2018) (quoting Letter from Robert Raben, Assistant Att'y Gen., to Hon. John Linder, Chairman, Subcomm. on Rules and Org. of the House, House Comm. on Rules (Jan. 27, 2000)). See 164 CONG. REC. H5827 (June 28, 2018).

55. The information might be more accessible once revealed to the Inspector General, but this fact might also affect the willingness of DOJ to cooperate with an ongoing IG investigation. See Andrew McCanse Wright, *Executive Privilege and Inspectors General*, 97 TEX. L. REV. 1295, 1299–1304 (2019).

professional sanctions on individual prosecutors whom it finds have abused their authority.

Perhaps most significantly, Congress's oversight of the executive branch can be highly partisan.<sup>56</sup> One cannot trust it to objectively identify the appropriate standards of prosecutorial independence, find the facts, and apply the standards to the facts. For example, legislators' partisanship was evident in 2014 when a House subcommittee examined whether improper political considerations were influencing career DOJ prosecutors who were investigating the IRS's targeting of conservative groups. The Republican chair of the subcommittee asserted that because the prosecutor had contributed close to \$7,000 to the Obama campaign and the Democratic National Committee, she could not be disinterested in investigating wrongdoing in the Obama administration. He declared: "[a] lady with a financial stake in a specific outcome is heading the investigation, a lady who has invested in the President's success is heading the investigation and the President could potentially be a target of that investigation, and we are supposed to believe this investigation is credible."<sup>57</sup> The Democrats on the committee, who disagreed, had the better side of the argument, since federal law, experience, and tradition undercut the premise that career prosecutors with manifest political preferences are unqualified to conduct politically-sensitive investigations and prosecutions.<sup>58</sup> But in any event, the fact that legislators break down on party lines on questions like this, as on so many others, suggests that they are unlikely to review prosecutors' conduct with the requisite objectivity. And even if they could, the public would likely discount their conclusion if it aligned with the interests of the legislators' political party.

### C. Internal Administrative Accountability

Like other entities, government agencies have an incentive to police their officers and employees to ensure that they are doing their jobs appropriately. To a significant extent, DOJ is entrusted to regulate its own prosecutors and can generally be trusted to do so effectively. Under DOJ's hierarchic structure, supervisors oversee line prosecutors, and high-ranking supervisors oversee lower-ranking ones. When alerted to possible wrongdoing, including inappropriate partisanship, DOJ has the necessary tools to investigate and, when political abuses are found, to remedy improprieties or sanction prosecutors, including by adverse job action. Assigning responsibility to an arm of DOJ

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56. See, e.g., Andrew McCause Wright, *Constitutional Conflict and Congressional Oversight*, 98 MARQ. L. REV. 881, 886–89 (2014) (noting the partisanship of congressional oversight when government is divided between the political parties).

57. *The IRS Targeting Investigation: What is the Administration Doing?: Hearing Before the H. Comm. on Oversight and Gov't Reform*, 113th Cong. (2014) (statement of Rep. Jordan, Chairman, H. Comm. on Oversight and Gov't Reform).

58. See *In re Starr v. Mandanici*, 152 F.3d 741, 752–55 (8th Cir. 1998) (Loken, J., concurring) (explaining that federal conflict-of-interest statutes and regulations do not require prosecutors to refrain from political engagement).

largely avoids the practical harms that an outside inquiry may cause, such as the disclosure of confidential information. Self-governance also avoids separation-of-powers and federalism problems. And DOJ has the necessary expertise to enunciate the relevant standard of conduct and to do so in a definitive way, as well as to apply that standard to the facts it adduces.

The question then becomes, which arm of DOJ should police federal prosecutors, with regard to improper partisanship in particular. Aside from the Inspector General, there are at least two other candidates. But the principal deficiency of both is a lack of independence from the very lawyers who have the greatest incentive and opportunity to exploit DOJ's power for partisan purposes, namely, the attorney general and other high-ranking presidential appointees. These are the DOJ lawyers who are most likely to interact with the President, who are most closely politically allied with the President (since they owe their positions to him) and, in some instances, to have political aspirations of their own, and who have the most authority and opportunity to bring partisan influence to bear on DOJ's work.

One possibility, when it is alleged that the federal criminal process was abused to serve political ends, is for the attorney general to assign a federal prosecutor who was not involved in the suspect proceedings to investigate. That is what happened in May 2019 when Attorney General Barr assigned U.S. Attorney John Durham to investigate law enforcement activities relating to the 2016 presidential election and in October 2020 when Barr appointed Durham as special counsel to continue the investigation.<sup>59</sup> Although the order directed Durham to focus on violations of law, in theory, the attorney general could have asked him to look into violations of internal DOJ policy concerning prosecutors' nonpartisanship.

Another possibility is to assign this responsibility to two DOJ offices—its Office of Professional Responsibility (“OPR”), which investigates federal prosecutors' alleged misconduct,<sup>60</sup> and its Professional Responsibility Review Unit (“PRRU”), which reviews OPR's misconduct findings and decides what discipline is appropriate.<sup>61</sup> These offices have two advantages over prosecutors who are assigned responsibility on an ad hoc basis. First, these offices are traditionally run by nonpartisan career prosecutors, while the attorney general's ad hoc appointees, as in Durham's case, may be political appointees and may be handpicked by the attorney general based on their sympathy toward the Administration. Second, prosecutors who are given individual assignments, as

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59. See OFF. OF THE ATT'Y GEN., ORDER NO. 4878-2020, APPOINTMENT OF SPECIAL COUNSEL TO INVESTIGATE MATTERS RELATED TO INTELLIGENCE ACTIVITIES AND INVESTIGATIONS ARISING OUT OF THE 2016 PRESIDENTIAL CAMPAIGNS (Oct. 19, 2020), <https://www.justice.gov/file/1370931/download>.

60. *Office of Professional Responsibility*, U.S. DEP'T OF JUST., <https://www.justice.gov/opr> (last visited Mar. 7, 2021).

61. See *id.*; Press Release, U.S. Dep't of Just., Attorney General Creates Professional Misconduct Review Unit, Appoints Kevin Ohlson Chief (Jan. 18, 2011), <https://www.justice.gov/opa/pr/attorney-general-creates-professional-misconduct-review-unit-appoints-kevin-ohlson-chief>.

in Durham's case, to look into whether a DOJ investigation was properly conducted, do not necessarily have institutional memory—*e.g.*, prior experience conducting such investigations, a way to benefit from other investigators' past experience, or a way to pass on their experience. In contrast, internal DOJ offices such as OPR and PRRU can draw on, and build, institutional memory. This is particularly important because the current expectations regarding prosecutors' duty to avoid improper partisan or political considerations are not well elaborated.

Both of these alternatives have deficiencies, however. Both a prosecutor assigned to investigate or a lawyer in OPR or PRRU is likely to have sympathies with federal prosecutors being investigated that will make their work less objective than that of an outsider.<sup>62</sup> More troublingly, these lawyers' determinations may be overruled by higher-ranking DOJ officials, some of whom are political appointees. For example, after OPR concluded that John Yoo, the principal drafter of the so-called "torture memos," breached his "duty to exercise independent legal judgment and render thorough, objective, and candid legal advice,"<sup>63</sup> the associate attorney general overruled its finding.<sup>64</sup>

Oversight is often untroubling, but in the case of politically-charged investigations, the risk is that the attorney general or other high-ranking DOJ official, not being disinterested, will have a political and personal motivation to overrule subordinate DOJ lawyers.<sup>65</sup> The allegations of political abuse directed at Attorney General Barr in the Stone and Flynn cases, among others, point up the problem. If OPR had investigated these allegations, its findings would ultimately be reviewable by the attorney general or his appointees, who are self-interested. Even if the attorney general were not personally implicated in an

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62. See Chris Opfer et al., *Epstein Investigation Revives Justice Department Turf Battle*, BLOOMBERG L. (Feb. 8, 2019), <https://news.bloomberglaw.com/daily-labor-report/epstein-investigation-revives-justice-department-turf-battle> (noting the argument that the Inspector General is better qualified than the OPR to investigate professional misconduct in the Epstein case because "the inspector general's office is independent and makes much of its findings public," and quoting Rep. Debbie Wasserman Schultz who characterized the OPR's work as "like the fox guarding the hen house").

63. OFF. OF PRO. RESP., U.S. DEP'T OF JUST., INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL'S MEMORANDA CONCERNING ISSUES RELATING TO THE CENTRAL INTELLIGENCE AGENCY'S USE OF "ENHANCED INTERROGATION TECHNIQUES" ON SUSPECTED TERRORISTS 11 (July 29, 2009).

64. Memorandum from David Margolis, Assoc. Deputy Att'y Gen., U.S. Dep't of Just., to the Att'y Gen. 2 (Jan. 5, 2010), <http://judiciary.house.gov/hearings/pdf/DAGMargolisMemo100105.pdf>. Margolis's conclusion that the memos' drafters did not engage in sanctionable wrongdoing met with criticism. See, *e.g.*, David D. Cole, *The Sacrificial Yoo: Accounting for Torture in the OPR Report*, 4 J. NAT'L SEC. L. & POL'Y 455 (2010); Milan Markovic, *Advising Clients After Critical Legal Studies and the Torture Memos*, 114 W. VA. L. REV. 109 (2011). But it was not assumed that Margolis, who was DOJ's highest ranking career official, was acting for partisan reasons.

65. Cf. Green & Zacharias, *supra* note 52, at 246–47 (observing that "to reduce concerns about partisanship, the Attorney General (who is closest to the White House and so most commonly identified as a partisan player) might adopt a policy to abstain altogether from involvement in individual corruption cases, delegating his authority to career prosecutors in DOJ").

investigation, any exercise of authority might be, or appear to be, politically motivated because the attorney general himself is a political appointee. This risk is compounded because internal findings by an appointed prosecutor or OPR are ordinarily kept confidential, with the result that senior DOJ officials who improperly derail an internal investigation may not be held publicly accountable for doing so.<sup>66</sup>

#### *D. The Bottom Line*

Various different government actors could investigate allegations that federal prosecutors misused their power for political purposes, but all have significant limitations.

Federal trial courts' jurisdiction is too limited. They have power to inquire into only a fraction of potential abuses, namely those that are the subject of an objection by the defense in a case before the court, and even then, the applicable law will often tie the court's hands. A disciplinary body under the auspices of the court may also investigate, but constitutional limitations would likely limit its power, the applicable rules would not afford much leeway, and prudential considerations would also counsel against taking on federal prosecutors.

Congress is another potential regulator, but congressional committees have resource limitations, have limited power to act on findings of prosecutorial misconduct, and most importantly, may be incapable of conducting inquiries free of partisan biases.

In various respects, internal investigations by lawyers within DOJ offer the most promising approach, avoiding the separation of powers problems (and, in the case of state courts, the federalism problems) implicated by external review. But potential DOJ investigators have limitations of their own, chief among them being the lack of independence from DOJ's political appointees. As we discussed above, those political appointees can be held accountable only by the electorate, and in this context that is, in reality, so unlikely to happen as to render this form of accountability practically useless. The question then is whether there is a more appropriate office within DOJ to undertake principal responsibility for investigating political abuses in DOJ. The obvious candidate, to which we turn attention in Part II, is DOJ's Inspector General.

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66. For a brief period under the Clinton administration, OPR selectively published its final reports, but afterwards DOJ returned to its former practice of keeping its reports confidential, except where Congress makes them public or there is a heightened public interest as in the case of OPR's report on the torture memos. See Bruce A. Green, *Regulating Federal Prosecutors: Let There Be Light*, 118 YALE L.J. POCKET PART 156, 160 (Mar. 4, 2009) (asserting that "DOJ's secrecy undermines public confidence in prosecutorial accountability. Furthermore, when kept secret, OPR's work fails to effectively deter future prosecutorial misconduct or to educate federal prosecutors about where the disciplinary lines are drawn."). Instead, OPR publishes short summaries of its investigations that do not identify their subjects by name. *OPR Reports Investigative Summaries*, U.S. DEP'T OF JUST., <https://www.justice.gov/opr/investigative-summaries>. OPR's website currently summarizes reports since 2013, none of which address prosecutors' misuse of power for political ends. *Id.*

## II. THE DOJ INSPECTOR GENERAL'S SUPERIORITY IN INVESTIGATING PROSECUTORS' PARTISANSHIP

### A. Overview of Inspector General Role

The Office of the Inspector General of DOJ was created in 1988 when Congress amended the 1978 Inspector General Act.<sup>67</sup> Like other IGs, the DOJ's IG is appointed by the President with the advice and consent of Congress. Inspectors General are to be chosen not because of political affiliation but "solely on the basis of integrity and demonstrated ability" to conduct investigations involving complex issues of fact and law.<sup>68</sup> The President can remove an Inspector General but must notify Congress of the reasons for doing so at least 30 days beforehand.<sup>69</sup> In 1977, the Office of Legal Counsel within DOJ concluded that the initial legislation was unconstitutional, but the obligation to report facts is seen as facilitating proper congressional oversight rather than impeding the executive function.<sup>70</sup>

The role of the Inspector General is rooted in early American history. After George Washington called for the review of organizational problems in the military, the Continental Congress created an Inspector General for the army.<sup>71</sup> In the 1950s, Congress created an Inspector General and Comptroller for the Department of State.<sup>72</sup> But it was not until the Nixon administration that Congress expanded the role of Inspectors General, initially creating an IG for the Department of Health, Education, and Welfare, which later became the Department of Health and Human Services. A year later, in 1977, Congress created another Inspector General for the Department of Energy. These served as models for the Inspector General Act of 1978.<sup>73</sup>

The purpose of the Act was to install nonpartisan officials whose job would be to detect waste, fraud, and abuse in the federal government. Months of testimony revealed how widespread the problem was.<sup>74</sup> While some agencies had internal inspectors, these watchdogs usually reported to individuals within the agency who were often the target of the investigation.<sup>75</sup> Similarly, the same

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67. See Inspector General Act Amendments of 1988, Pub. L. No. 100-504, title I, § 102(c), 102 Stat. 2515, 2516.

68. 5 U.S.C. app. § 3(a).

69. See *id.* § 3(b).

70. See John M. Harmon, *Inspector Gen. Legis.*, 1 Op. O.L.C. 16 (1977); Vicki Divoll, *The "Full Access Doctrine": Congress's Constitutional Entitlement to National Security Information from the Executive*, 34 HARV. J.L. & PUB. POL'Y 493, 513-18 (2011).

71. See DAVID A. CLARY & JOSEPH W. A. WHITEHORNE, *THE INSPECTORS GENERAL OF THE UNITED STATES ARMY 1777-1903* 23-27 (1987).

72. See Mutual Security Act of 1959, Pub. L. No. 86-108, 73 Stat. 246.

73. See BEN WILHELM, *CONG. RSCH. SERV.*, R45450, *STATUTORY INSPECTORS GENERAL IN THE FEDERAL GOVERNMENT: A PRIMER* 1 (2019).

74. See Kurt W. Muellenberg & Harvey J. Volzer, *Inspector General Act of 1978*, 53 TEMPLE L.Q. 1049, 1049-51 (1980).

75. See H.R. REP. NO. 95-584, at 5 (1977); S. REP. NO. 95-1071, at 6 (1978).

agency officials could determine when to initiate or terminate investigations into themselves or their programs.<sup>76</sup> Allegations of fraud or abuse were often held for years before they were referred to the DOJ.<sup>77</sup> Many agencies had no independent obligation to audit programs and relied only on complaints, which were rare, especially since regulations often did not require personnel to report potential wrongdoing.<sup>78</sup>

To ensure the requisite independence and remove the conflicts inherent in the previous model,<sup>79</sup> the Act gave IGs the authority to hire staff, conduct audits, access agency information, and report directly to Congress. IGs are placed within agencies so they develop the necessary expertise to review agency action without unduly interfering with agency work.<sup>80</sup> They report to both Congress and agency heads in order to both improve agency functioning and facilitate monitoring. But agency heads are not allowed to interfere with or control the work of the IG.<sup>81</sup> Thus, IGs were not created to substitute for Congressional oversight but rather to facilitate it.

Some agencies expressed concern that the IGs would have improper partisan motivations because they were appointed by the President.<sup>82</sup> These concerns were dismissed in part because of the long term of service and the requirement that the President explain the reasons for removing an IG.

A key aspect of the IG role is its independence from agency heads. This was considered critical to ensure proper oversight.<sup>83</sup> Similarly, IGs have no term of office, a deliberate attempt to make sure that IGs would survive a change in the presidential administration and remain independent of politically elected and appointed officials.<sup>84</sup> Congress amended the IG Act three times, adding more offices in 1988, including the Inspector General for the DOJ.<sup>85</sup> In 2008, Congress amended the act once again, creating a new Council on Inspectors General on Integrity and Efficiency ("CIGIE"), which coordinates Inspector General activity and investigates any alleged wrongdoing by an IG.<sup>86</sup> The guidelines for investigations set forth qualifications for IGs as well as standards. One of the central requirements is that the office is independent and impartial

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76. See H.R. REP. NO. 95-584, at 5 (1977).

77. See *id.* at 6.

78. See Muellenberg & Volzer, *supra* note 74, at 1051.

79. See S. REP. NO. 95-1071, at 7 (1978).

80. See H.R. REP. NO. 95-584, at 2 (1977).

81. See 5 U.S.C. app. § 3(a).

82. See H.R. REP. NO. 95-584, at 8 (1977).

83. See S. REP. NO. 95-1071, at 6-8 (1978).

84. See Michael R. Bromwich, *Running Special Investigations: The Inspector General Model*, 86 GEO. L.J. 2027, 2029 (1998).

85. See Inspector General Act of 1978, Pub. L. No. 95-452, § 102(c), 102 Stat. 2515 (codified as amended at 5 U.S.C. app. § 3 (11)(2) (1994)).

86. See Inspector General Reform Act of 2008, Pub. L. No. 110-409, 122 Stat. 4302.

and the guidelines specify some safeguards to ensure this remains so.<sup>87</sup> For example, the guidelines require officials to follow steps to safeguard independence, identify possible threats to independence, and address them.<sup>88</sup>

### *B. The DOJ Inspector General*

The DOJ Inspector General is in a better position to investigate politicization of DOJ than any of the institutions surveyed in Part I. The IG is unencumbered by separation-of-powers considerations that limit other branches of government, and has the expertise, tools, time, and resources to conduct thorough investigations and render reports that are detailed and credible. The IG has developed guidelines for its work to promote consistency and uniformity in its approach. The IG is also independent from political appointees, which helps ensure that its work will not be affected by partisan interest.

The DOJ Inspector General role is much like that of other IGs except for two significant limitations. First, the attorney general was given the authority to prohibit, limit, or control any investigation requiring access to certain categories of sensitive information.<sup>89</sup> Second, responding to DOJ's objection, Congress left the DOJ Office of Professional Responsibility, not the IG, responsible for any investigation into attorneys' discretionary decisions.<sup>90</sup> Unlike the IG, however, OPR reports directly to the attorney general and deputy attorney general.<sup>91</sup>

This limitation on the IG's jurisdiction was a compromise to appease the DOJ, which objected to the new position of IG, claiming that the DOJ was capable of reviewing the conduct of its own personnel.<sup>92</sup> Six years after the role

87. See COUNCIL OF THE INSPECTORS GEN. ON INTEGRITY AND EFFICIENCY, QUALITY STANDARDS FOR INVESTIGATIONS (2011), <https://www.ignet.gov/sites/default/files/files/invprg1211appi.pdf>.

88. See COUNCIL OF THE INSPECTORS GEN. ON INTEGRITY AND EFFICIENCY, QUALITY STANDARDS FOR FEDERAL OFFICES OF INSPECTOR GENERAL 10–14 (2012), <https://www.ignet.gov/sites/default/files/files/Silver%20Book%20Revision%20-%208-20-12r.pdf>.

89. See Inspector General Act Amendments of 1988, Pub. L. No. 100-504, title I, § 8D(a), 102 Stat. 2515.

90. See H.R. REP. NO. 100-1020, at 25 (1988) (Conf. Rep.); Inspector General Act Amendments of 1988 § 8D(b)(3) (requiring IG to refer any allegations of attorney misconduct to OPR). Both the House Report and the Conference Report on the 1988 amendments indicated that it would be preferable for the IG to have both the investigative and audit functions. See H.R. REP. NO. 100-771, at 9 (1988); H.R. REP. NO. 100-1020, at 24 (1988) (Conf. Rep.). See also *Jurisdiction and Relationship to the Office of the Inspector General*, OFF. OF PRO. RESP., U.S. DEP'T OF JUST., <https://www.justice.gov/opr/jurisdiction-and-relationship-office-inspector-general>.

91. See OFF. OF PRO. RESP., U.S. DEP'T OF JUST., ANNUAL REPORT 3 (2019), <https://www.justice.gov/opr/page/file/1259696/download>. See also Scott Shane, *Waterboarding Focus of Inquiry by Justice Department*, N.Y. TIMES (Feb. 23, 2008) (noting that the investigation into the DOJ's legal definition of torture was being conducted by OPR, which reports to the attorney general, not by the IG who enjoys a greater degree of independence).

92. See H.R. REP. NO. 100-771, at 8 (1988).

was created, there was a proposal to merge the office of the IG with OPR.<sup>93</sup> Attorney General Janet Reno opposed the plan. Her position was echoed by senior career officials who claimed that the attorney general should be able to control investigations into attorney misconduct so that she could be held accountable.<sup>94</sup> Senate Judiciary Republicans worried that the merger would undermine the independence of the head of OPR, Michael E. Sheehan, Jr.. Opposition to the merger was likely motivated by the conviction that department attorneys should review the conduct of their colleagues, but congressional leaders questioned whether this was a veiled effort to avoid accountability. Those who pushed to keep OPR separate from the Inspector General did so in part because of what they perceived as the traditional independence of OPR. Senator Orrin Hatch, for instance, was concerned that the Inspector General, as a political appointee, would be subject to greater partisan influence than the career official from OPR, who reported to the attorney general.

In the first two years of the IG's existence, OPR waged turf wars and consistently tried to restrict the power of the IG. The deputy attorney general put his thumb on the scale, defining OPR's authority broadly so as to increase its power relative to the IG.<sup>95</sup> A government report critical of OPR pointed out that Congress was initially concerned about the overlapping jurisdiction and intended to create an independent IG accountable to Congress.<sup>96</sup> The central goal of the Inspector General legislation to remove agency heads' ability to control and restrict investigations into their own conduct was undermined by this exception for OPR and attorney conduct.

This struggle between OPR and the IG highlights the question of whether independence is better achieved by career officials who answer to a political appointee or by an officer, such as an IG, who is appointed by the President but independent from the President's supervision. While the answer could depend on which individual holds each office, that obviously cannot comprise a principled response. Recent events make it clear that the AG's interest is often aligned with that of the President, and he can impose his will on those who report to him.<sup>97</sup> Therefore, it seems that independence in this context, as with

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93. See Bromwich, *supra* note 84, at 2030. The Inspector General's Act left it to the discretion of Agency heads to transfer functions to the Inspector General so Reno would not have needed additional congressional authority. See Inspector General Act § 9(a)(2).

94. See Jim McGee, *Reno Will Not Merge Two Internal Watchdog Units at Justice*, WASH. POST (Apr. 8, 1994), <https://www.washingtonpost.com/archive/politics/1994/04/08/reno-will-not-merge-two-internal-watchdog-units-at-justice/cf5b0f56-5093-4119-8a01-3c6f6ad21d71/>.

95. See U.S. GOV'T ACCOUNTABILITY OFF., GAO-94-24, LETTER TO HOUSE JUDICIARY COMMITTEE 3-4 (Apr. 27, 1994), <https://www.gao.gov/assets/400/390452.pdf>.

96. See *id.* at 3.

97. For a historical review of attorneys general and their partisan allegiances, see generally Jed Handelsman Shugerman, *Professionals, Politicos, and Crony Attorneys General: A Historical Sketch of the U.S. Attorney General as a Case for Structural Independence*, 87 FORDHAM L. REV. 1965 (2019) (arguing that there have been more politically connected attorneys general in the modern era).

other Inspectors General, is better served by separating the investigating function from the politically-appointed attorney general. If the President chooses to fire the IG, as President Trump did multiple times, at least the act would be public, allowing for some transparency and possible political repercussions.<sup>98</sup>

DOJ Inspector General investigations can begin in different ways. Congress or DOJ can refer investigations to the IG, but the IG's office can also initiate its own investigation based on reported information or information it discovers during the course of its work.<sup>99</sup> Unlike special counsels whose work is limited by the AG's definition of the scope of the investigation, the IG has freedom to pursue facts and evidence as it sees fit.<sup>100</sup> IGs have seen it as part of their role to filter Congressional referrals by refusing to pursue investigations that are designed merely to embarrass agency heads for political purposes.<sup>101</sup> They are well suited to investigate politicization of DOJ in part because their mission has always been to sift politically motivated allegations from real facts.

IGs have the authority to obtain any information from within their agencies without subpoenas<sup>102</sup> and can use administrative subpoenas to obtain documents and other physical evidence outside of their agencies.<sup>103</sup> While they cannot issue subpoenas for testimony of individuals outside DOJ, they can interview any employee.<sup>104</sup> So the IG already has the tools to investigate politicization within DOJ. In particular, the IG can obtain records and testimony regarding federal prosecutors' internal decision-making processes without other political branches intruding into those processes.

Like special counsel, but unlike prosecutors, the DOJ's IG must issue a report at the end of an investigation. This serves to create transparency in his methods. In a typical criminal case, prosecutors either charge or decline to charge. Professional ethics and grand jury secrecy usually prevent a prosecutor from issuing reports or narrative descriptions about the nature of the investigation.<sup>105</sup> This makes sense given the importance of protecting witnesses and uncharged individuals from danger, retaliation, and reputational harm. Like special counsel, however, the IG is bound to issue a report. The narrative will

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98. For a list of the IGs who have been fired by President Trump, see ANNE JOSEPH O'CONNELL, BROOKINGS INST., WATCHDOGS AT LARGE (Aug. 6, 2020), <https://www.brookings.edu/research/watchdogs-at-large/>.

99. See Bromwich, *supra* note 84, at 2032.

100. The attorney general determines the scope of a special counsel's investigation. 28 C.F.R. § 600.4(a) (2007). If the special counsel determines that the scope of the investigation ought to be different or broader, he must ask the AG for permission to expand or alter its parameters. *Id.* § 600.4(b).

101. See Bromwich, *supra* note 84, at 2033.

102. See 5 U.S.C. app. § 6(a)(1)(A).

103. See *id.* § 6(a)(3).

104. See *id.* § 6(a)(4).

105. See generally Jessica A. Roth, *Prosecutorial Declination Statements*, 110 J. CRIM. L. & CRIMINOLOGY 477 (2020) (discussing the rare situations in which prosecutors make public statements after declining to bring criminal charges).

allow the public to assess not only the conclusions but the nature and fairness of the investigation itself.

Some may worry that IGs themselves could be corrupted, motivated by their own political leanings. This is unlikely because the IG is not a political actor, has specific training and expertise, and has no direct ties to partisan interests. But even if these structural safeguards fail, there are sufficient oversight and checks on the IG. First, the President can fire IGs without cause but must notify Congress of the reasons for the decision. Congress also oversees the Office of Inspectors General. The House and Senate Judiciary committees, the House Government Reform, and the Senate Governmental committees all oversee the DOJ IG. The appropriations committee also exercises oversight by determining the resources available to the IG.<sup>106</sup> The IG must deliver a report at the end of an investigation and can be called to testify at any time. While this sort of oversight risks political pressure on IGs, it also provides a measure of transparency and political accountability, a check on their otherwise independent work.<sup>107</sup>

Not only is the DOJ IG capable of investigating politicization of DOJ, the office has done so before. In 2006, the IG joined with OPR to investigate the firing of nine U.S. Attorneys, concluding that the process was flawed and that Attorney General Alberto Gonzalez failed to ensure the proper oversight to prevent the improper firing of U.S. Attorneys.<sup>108</sup> Finding substantial evidence that the prosecutors were fired for partisan political reasons, the report recommended the appointment of special counsel to investigate whether criminal charges were warranted. The investigation was limited because key witnesses refused to testify, and while the IG has broad power to compel testimony within DOJ, former officials simply refused to cooperate.<sup>109</sup> At the same time, OIG and OPR investigated the hiring practices of DOJ, concluding that the office used inappropriate political criteria in hiring for certain career positions in the Department, in violation of federal law and department policy.<sup>110</sup> More recently, the IG also investigated the FBI's initiation of the Russia investigation, and a significant portion of the report addressed and rejected the allegation that the decision was affected by the political bias of the

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106. See Bromwich, *supra* note 84, at 2041.

107. See *id.* at 2042.

108. See *The Investigation into the Removal of Nine U.S. Attorneys in 2006: Hearing Before the H. Comm. on the Judiciary*, 110th Cong. (2008) (statement of Glenn A. Fine, Inspector General of The U.S. Dep't of Just.).

109. See *id.*

110. *Politicized Hiring at the Department of Justice: Hearing Before the Sen. Comm. on the Judiciary*, 110th Cong. (2008) (statement of Glenn A. Fine, Inspector Gen. of the U.S. Dep't of Just.).

agents involved.<sup>111</sup> At least some members of Congress agree that the IG is the best institution to investigate the politicization of DOJ.<sup>112</sup>

### *C. Proposed Amendments to Increase IG Independence*

The implication of our analysis is that DOJ's IG should have the leading role in investigating allegations that DOJ representatives have abused their criminal justice authority for political ends. This means that Congress should expand the IG's jurisdiction by giving it authority and primary responsibility within DOJ to investigate allegedly politically-motivated decision-making. This requires shifting at least part of OPR's authority to the IG. A proposal currently making its way through Congress would transfer investigative authority more significantly by empowering the DOJ Inspector General, instead of OPR, to investigate attorney misconduct.<sup>113</sup> We express no view on whether, as a general matter, the IG should have the job of investigating prosecutorial misconduct, but focus on the one type of troublesome prosecutorial conduct where we conclude the IG has a clear institutional advantage as investigator. When it comes to partisan abuses of power, the IG has greater institutional competence because it is more independent than OPR, which answers directly to the attorney general, who, as recent events show, may well exercise control over an investigation with political implications.

To be clear, our argument is not that the IG should have exclusive jurisdiction, but that Congress should assign it the leading role. Obviously, federal trial judges should still resolve motions that implicate prosecutorial abuses of a partisan nature, and disciplinary authorities should determine whether prosecutors violated disciplinary rules by acting for political advantage. Congress should continue its oversight role, both independently of the IG and in response to IG reports. And if OPR maintains authority over prosecutorial misconduct generally, there may be cases where the IG should invite OPR to team up with it or should defer to OPR to investigate broader allegations that include possible political partisanship. There may also be occasions when it would be appropriate for the AG, on an ad hoc basis, to appoint a DOJ lawyer to conduct an internal investigation that encompasses issues of political partisanship.

In addition to expanding the IG's jurisdiction, Congress should consider structural reform to enable the IG to conduct this work more effectively. Like

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111. See OFF. OF PRO. RESP., U.S. DEP'T OF JUST., REVIEW OF FOUR FISA APPLICATIONS AND OTHER ASPECTS OF THE FBI'S CROSSFIRE HURRICANE INVESTIGATION iii-iv (2019), <https://www.justice.gov/storage/120919-examination.pdf>.

112. See Letter from Members of the H. Comm. on the Judiciary, to Michael E. Horowitz, Inspector Gen., U.S. Dep't of Just. (May 8, 2020), [https://judiciary.house.gov/uploadedfiles/2020-05-08\\_letter\\_to\\_ig\\_horowitz\\_re\\_political\\_interference.pdf?utm\\_campaign=2735-519](https://judiciary.house.gov/uploadedfiles/2020-05-08_letter_to_ig_horowitz_re_political_interference.pdf?utm_campaign=2735-519); Letter from Rep. Jerrold Nadler et al. to Michael E. Horowitz, Inspector Gen., U.S. Dep't of Just. (Oct. 19, 2020), <https://www.law360.com/articles/1321152/attachments/0>.

113. Inspector General Access Act of 2021, S. 426, 117th Cong. (2021) (S.685, 116th Cong. (2019)).

the potential investigators surveyed in Part I, the IG has limitations. Our conclusion is not that the IG is perfect but that some institution should take the lead in policing DOJ politicization and that the IG is the best alternative. Therefore, besides adding to the IG's responsibilities, Congress should address some of the IG's limitations.

Some reforms have already been proposed, especially to protect the IG's independence.<sup>114</sup> We have not undertaken to enumerate and analyze proposed reforms, but we note that some may come at a cost to political accountability and might run into separation of powers concerns, especially as the increasingly conservative Supreme Court seems to embrace a version of the unitary executive theory, which maintains that the President has the power to control the entire executive branch.<sup>115</sup> For example, a bill has been introduced in Congress to further protect the IG's independence by providing a fixed term of service and limiting removal to situations in which the IG has demonstrated "permanent incapacity, inefficiency, neglect of duty, malfeasance, or conviction of a felony or conduct involving moral turpitude."<sup>116</sup> We support the bill's objective because, as we have emphasized, whatever institution has primary responsibility for addressing allegations of DOJ partisanship should ideally be independent of the President, DOJ's leadership, and other political actors. This proposal could face challenges, however, because recent Supreme Court precedent limits the ability of Congress to restrict the President's power to remove certain agency heads.<sup>117</sup>

#### *D. Checks on the DOJ Inspector General*

Assigning the job of policing politicization to the DOJ Inspector General will no doubt invite concerns from those who, fearing the "deep state," worry that unaccountable career officials will seize power from the people by thwarting an elected representative. The proposals to increase IG independence will only add to these concerns. Critics may argue that the IG, like other career

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114. See, e.g., Andrew C. Brunsten, *Inspectors General and the Law of Oversight Independence*, 29 WM. & MARY BILL RTS. J. (forthcoming 2021) (manuscript at 56–59), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3822429](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3822429) (proposing eligibility requirements for IGs and restricting the ability of the President to fill the position during temporary vacancies).

115. See Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1158 (1992).

116. Inspectors General Independence Act of 2020, S. 3664, 116th Cong. § 2(a-b) (as introduced in S. Comm. on Homeland Sec. & Governmental Affairs, May 7, 2020) (providing for a seven-year term of office and removal only "for permanent incapacity, inefficiency, neglect of duty, malfeasance, or conviction of a felony or conduct involving moral turpitude"); Inspectors General Independence Act of 2020, H.R. 6668, 116th Cong. § 2(a-b) (as introduced in H. Comm. on Oversight & Reform, May 1, 2020). See Letter from Rep. Jerrold Nadler et al. to Michael E. Horowitz, Inspector Gen., U.S. Dep't of Just. (May 8, 2020), [https://judiciary.house.gov/uploaded\\_files/2020-05-08\\_letter\\_to\\_ig\\_horowitz\\_re\\_political\\_interference.pdf?utm\\_campaign=2735-519](https://judiciary.house.gov/uploaded_files/2020-05-08_letter_to_ig_horowitz_re_political_interference.pdf?utm_campaign=2735-519); Letter from Rep. Jerrold Nadler et al. to Michael E. Horowitz, Inspector Gen., U.S. Dep't of Just. (Oct. 19, 2020), <https://www.law360.com/articles/1321152/attachments/0>.

117. See Brunsten, *supra* note 114, at 22–28.

officials, is not politically accountable for his acts.<sup>118</sup> Giving too much power to these officials threatens to hobble the presidency. The IG, however, is not as unaccountable to the voting public as critics suggest, nor is he in much of a position to seriously undermine presidential authority.<sup>119</sup> After all, the IG's role is limited to investigating and reporting; it is up to others to act on what the IG finds. And, perhaps more importantly, in this particular context, direct political accountability poses more of a danger than it solves because it inevitably comes with a risk of the very political bias and susceptibility to political influence that must be minimized to perform the task. Or, in the case of Congress, it comes with institutional incompetence and structural limits due to separation of powers. Critics of the deep state assume that political accountability is the only effective form of accountability, while in this context, political accountability is largely useless. Transparency and oversight, on the other hand, can be an effective tool.<sup>120</sup>

That said, the concern about unelected investigative officials is not unfounded. After all, in the recent past, starting in 1963, the FBI secretly gathered information on Martin Luther King, Jr. and later spied on opponents of the Vietnam War with the knowledge and blessing of President Johnson and the hopes of weakening the social movement.<sup>121</sup> The potential for abuse by career investigators is not the paranoid invention of those determined to dismantle the administration state. If, as this Article concludes, the Inspector General's office is the right regulator to uncover politicization within DOJ, then there must be adequate checks on its exercise of power.<sup>122</sup>

The current political moment is unusual in that those who are suspicious of bureaucracy and worry that career civil servants are silently working to undermine the President and the effectiveness of the executive branch have not traditionally feared federal law enforcement. Critics of career prosecutors have tended to fear too much executive power in the hands of the President, not too little.<sup>123</sup> In other words, they have feared that the President will commandeer

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118. See generally Calabresi & Rhodes, *supra* note 115 (arguing for limited Congressional ability to restructure the executive branch).

119. See Ingber, *supra* note 3, at 145. In the context of arguments about special counsels, some suggested that safeguards put in place to govern special counsels actually rendered them more, not less, accountable to the public. See Donald C. Smaltz, *The Independent Counsel: A View from Inside*, 86 GEO. L.J. 2307, 2363 (1998).

120. See Green & Roiphe, *supra* note 5, at 843–55; Ethan J. Leib, David L. Ponet & Michael Serota, *A Fiduciary Theory of Judging*, 101 CALIF. L. REV. 699, 728–29 (2013); Paul B. Miller & Andrew S. Gold, *Fiduciary Governance*, 57 WM. & MARY L. REV. 513, 553–56 (2015).

121. See David J. Garrow, *The FBI and Martin Luther King*, ATLANTIC (July–Aug. 2002), <https://www.theatlantic.com/magazine/archive/2002/07/the-fbi-and-martin-luther-king/302537/>.

122. See generally DAVID ROHDE, IN DEEP: THE FBI, THE CIA, AND THE TRUTH ABOUT AMERICA'S "DEEP STATE" (2020) (arguing that while Trump and others have turned the notion of a "deep state" into a toxic way to deflect criticism, the problem of unchecked permanent government institutions is real).

123. See Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1049 (2006) (alluding to the "almost unbridled discretion" of prosecutors to control criminal

law enforcement to his advantage, as happened with Johnson's FBI, not that a President will be thwarted by an overly independent prosecutorial agency.

The shifting concern about prosecutors shows the need for a more settled view of prosecutorial power and its limits that is not itself dependent on the political party of the President. There ought to be significant checks on career investigators and prosecutors, but the President should not be able to use investigators and prosecutors for his own ends either. Designating the IG to be the preferred official to uncover politicization within DOJ strikes the best balance in promoting an independent investigation that is still accountable to the public. To reiterate: we are not suggesting that the IG is perfect or that the IG should replace all others with oversight responsibility, but simply that the IG's office is the best institution to take the lead in investigating allegations of DOJ political abuse.

#### CONCLUSION

The DOJ IG should be given the primary responsibility to investigate politicization of the DOJ. The IG's offices have the requisite investigative tools and an ability to develop institutional memory. Like other DOJ entities, they can investigate without making the kinds of intrusions into DOJ's inner workings that pose constitutional problems. But the IG's office is more objective than other DOJ entities. The IG's offices are designed to be independent of the agencies they serve without undermining their proper function. The legislation structures the offices to ensure that IGs do not have direct political allegiance. They remain sufficiently insulated from agency heads and political actors to minimize chances that their own political inclinations will affect their work, and the proposals discussed above would further insulate the IG from political control.

There is no real threat that a DOJ IG investigation will interfere with DOJ's ability, or that of the President, to do legitimate work. The IG has primarily an information gathering role, and there is little chance that the IG who works within DOJ would intentionally interfere with a valid ongoing criminal investigation or prosecution. Further, if an IG were to overstep, there are remedies. The IG does not operate without oversight but answers to Congress, which has the power to compel testimony as well as the right to review reports. The President can fire the IG without cause and need only report on his reasons for doing so to Congress, once again helping to ensure transparency without unduly undermining executive power. In addition, reports that an IG has abused his power can be raised to the Council of Inspectors General on Integrity and Efficiency. It is therefore unlikely that rogue IGs will interfere in the executive branch's law enforcement function, much less that they will do so for long.

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cases); WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 87 (2011) (pointing to the "enormous discretionary power" of prosecutors in the United States).

Finally, the transparency ensured by the particular nature of IG investigations will help facilitate accountability rather than undermine it. While those who support a unitary executive may be concerned that these unelected officials are not directly accountable to the public, in this context, direct political accountability creates more problems than it solves. Criminal prosecutions are by nature opaque to public scrutiny. Without an independent recitation and assessment of prosecutorial decisions, the public will be unable to assess on its own whether DOJ has become politicized. Without the ability to uncover necessary information, the public cannot be expected to know which actors were improperly motivated by political considerations. The public can hardly be expected to hold anyone accountable at the ballot box without this information.