

THE INDEPENDENT COUNSEL STATUTE: AN IDEA WHOSE TIME HAS PASSED

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I

INTRODUCTION

Recently, Michael Moore, the filmmaker best known for his movie *Roger & Me*, staked out the home of Whitewater Independent Counsel Kenneth Starr accompanied by a group of people dressed as eighteenth-century Puritans. Starr was appointed under the Ethics in Government Act to investigate allegations against the President of the United States. To help promote public confidence in the impartiality of the investigation and the ethics of government—the stated purpose of the Act—Starr was appointed not by the President himself, which would have detracted from the aura of impartiality, but by members of the branch of American government thought to be most above politics: the judiciary, or more specifically, the Special Division of the U.S. Court of Appeals for the District of Columbia Circuit. The Special Division had chosen Starr to replace Robert Fiske, an independent counsel appointed by the Attorney General, the better to ensure the appearance of impartiality. Starr, a respected former federal judge and Solicitor General who had frequently been mentioned as a possible nominee to the Supreme Court because of his distinguished record and judiciousness, initially had been praised for his integrity and impartiality.¹

So what was Moore's message for Starr? He wanted to show him "a cheaper way to conduct [his] witch-hunt."² Although Moore's means of expressing his opinion was unconventional, his belief in the unfairness of the investigation is shared by a surprising number of Americans. So much for restoring public confidence in the justice system.

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1. See Orrin G. Hatch, *Who Wants Justice?*, N.Y. TIMES, Mar. 29, 1998, § 4, at 15 (reporting comments of ACLU Legal Director Arthur Spitzer and former judge and White House Counsel Abner Mikva).

2. *Republicans and Democrats Prepare to Conduct Impeachment Hearings and Decide What Witnesses to Call* (CNBC television broadcast, Oct. 9, 1998), available in LEXIS, News Library, Script File.

The optimistically named “Ethics in Government Act” was passed in the wake of the Watergate scandal and, more specifically, President Nixon’s decision to fire Special Prosecutor Archibald Cox in what has come to be known as the “Saturday Night Massacre.” The scandal was seen as involving misconduct at the highest levels of the executive branch and, yet more frightening to the public, attempts to pervert the operation of the criminal justice system against the conspirators. “The rhetoric of the hour insisted that the Republic itself had ultimately been threatened by the conduct of the Nixon Administration—that, if not for a few hardy journalists and the President’s foolishness in taping his own conversations, the system might have collapsed.”³ The primary purpose of the Act was “to reassure the public that government scandals could be investigated impartially,”⁴ but its drafters also hoped to ensure they *were* investigated impartially: in other words, “[t]o promote the appearance and reality of even-handed justice.”⁵

But the wrong lesson had been “learned” from Watergate. Its lesson was not, as the Act’s drafters assumed, that officials high in the executive branch could violate the law and, by virtue of their position, escape prosecution. Rather, its lesson was that the system largely functioned as designed and brought the perpetrators to justice.⁶ Because of the inaccurate perception that executive branch officials could use their political connections to frustrate prosecution, Congress created a statute designed to ensure investigations would be conducted by someone outside the executive branch. To ensure that no wrongdoing would go undetected, the independent counsel mechanism was designed to be triggered easily and to apply to a broad range of officials; to ensure the appearance of impartiality, the Act required appointment by members of the least overtly political branch, the judiciary; to ensure that even the independent counsel could not sweep wrongdoing under the rug, he was required to report his findings to the court that had appointed him. In each instance, Congress departed from the normal American prosecutorial model, which vests decisions to investigate and prosecute within the executive branch. And, as set forth below, in each instance the departure was unnecessary and has had far-reaching negative implications both for the persons investigated and for the justice system as a whole. The overall result has been to politicize what had previously been a largely apolitical process of federal investigations and prosecutions. As a result, many are wondering today why the independent counsel should not be relegated to history. We believe that it should. Our conclusion is not based on any belief that individual independent counsels have intentionally

3. Stephen L. Carter, Comment, *The Independent Counsel Mess*, 102 HARV. L. REV. 105, 107 (1988).

4. Katy J. Harriger, *Damned If She Does and Damned If She Doesn't: The Attorney General and the Independent Counsel Statute*, 86 GEO. L.J. 2097, 2102 (1998); accord Joseph E. diGenova, *The Independent Counsel Act: A Good Time to End a Bad Idea*, 86 GEO. L.J. 2299, 2299 (1998).

5. Julie O'Sullivan, *The Independent Counsel Statute: Bad Law, Bad Policy*, 33 AM. CRIM. L. REV. 463, 463 (1996).

6. See, e.g., Carter, *supra* note 3, at 107; see also *infra* text accompanying note 14.

used the statute for improper purposes. Many independent counsels—including the current one, Kenneth Starr—have displayed honor, integrity, and great legal acumen in executing their duties. The problem is not the personnel, but the statute itself.

II

THE NECESSITY OF AN INDEPENDENT COUNSEL

The Ethics in Government Act (the “Act”) represents the ascendancy of politics over the normal processes of law enforcement. The Act was born of the belief that the Department of Justice (“DOJ”) could not be trusted to oversee the prosecution of high executive branch officials.⁷ In subsequent reauthorizations, necessary because of a sunset provision that would cause the statute to lapse if not reauthorized in five-year intervals,⁸ Congress has taken pains to distance itself from the view that the Justice Department actually *cannot* be trusted to oversee prosecutions of executive branch officials in favor of the position that the statute is necessary to preserve the *appearance* of justice and to “promote public confidence in the impartial investigation of alleged wrongdoing by government officials.”⁹

In a way, then, the Act panders to people’s worst instincts by indulging the belief that high officials will not be subject to the same brand of justice as everyone else unless someone outside the Justice Department oversees prosecutions against them. Indeed, the lack of trust is very pronounced; the Act disqualifies the Justice Department not just from prosecuting the Attorney General’s superiors, the President and Vice President. It also sweeps in employees of the Justice Department above a certain pay grade, certain members of the Executive Office of the President, the Director and Deputy Director of the CIA, the IRS Commissioner, the entire Cabinet, people who have formerly held those offices for up to one year after leaving their posts, as well as members of the President’s election committee exercising authority at the national level.¹⁰ The extensive list of covered individuals set forth in the Act stretches normal conflict of interest recusal practices well beyond their ordinary scope.¹¹ (A cynic might note that Congress exempted from the operation of the Act people just as likely to be in a position to exploit their political clout to put the kibosh on an investigation—those in leadership positions in Congress from the President’s party.) The Act thus seems to reflect a belief that the Justice Department cannot be trusted to investigate high executive branch officials.

7. O’Sullivan, *supra* note 5, at 468-69. For the sake of brevity, the “Justice Department” or “DOJ” includes U.S. Attorney’s Offices nationwide.

8. See 28 U.S.C. § 599 (1994).

9. S. REP. NO. 97-496, at 4 (1982), *reprinted in* 1982 U.S.C.C.A.N. 3537, 3540.

10. See 28 U.S.C. § 591(b) (1994).

11. Remarkably, the list has actually *shrunk* over the years. In the 1983 reauthorization, the list of covered persons was reduced to its present 70 from a whopping 120. See Harriger, *supra* note 4, at 2111.

Any such belief is utterly, irretrievably, irremediably wrong. The Justice Department and the U.S. Attorney's Offices have long been staffed with dedicated, intelligent, and experienced lawyers of great integrity. The Criminal Division, which would oversee the investigation and prosecution of high executive branch officials in the absence of the statute, is home to large numbers of career prosecutors with vast knowledge of criminal trial and appellate practice and an institutional interest as professionals in seeing that justice is done. They are drawn from all across America and are of all political stripes. They are supervised, for the most part, by other career prosecutors with even greater knowledge and experience. While a number of people are placed in supervisory roles by the incumbent administration, the vast majority are lawyers whose careers are not tied to political figures.

It is our experience that even if a political appointee intentionally tried to sweep evidence of official wrongdoing by an executive branch official under the rug, he would never succeed, because coworkers would detect it and refuse to tolerate it.¹² Even if the officials could not proceed with the investigation or prosecution, one or more attorneys would likely resign noisily or talk to the press or to Congress. One need not even rely on the integrity of prosecutors alone, because integrity will be buttressed by self-interest. As lawyers who have chosen careers outside politics, their best path to advancement lies in demonstrating their ability and judgment, not in performing favors for (often marginal) political figures. It makes little sense to presume that professional career prosecutors will be unable to fairly handle investigations involving sometimes mundane allegations against people who have so little direct power over them as, for example, the Secretary of Transportation, the Secretary of Veterans' Affairs, and the Secretary of Energy (most of whom the average line prosecutor, even in politics-obsessed Washington, would be hard-pressed to name). Prosecutors of the caliber to be assigned to such a case would realize that even the appearance of impropriety to curry political favor would be a black mark on their record.¹³

12. See Carter, *supra* note 3, at 136; O'Sullivan, *supra* note 5, at 476; Cass R. Sunstein, *Bad Incentives and Bad Institutions*, 86 GEO. L.J. 2267, 2281 (1998). Professor O'Sullivan has assembled an impressive history of high officials who were prosecuted by line attorneys in U.S. Attorney's Offices and at Main Justice:

Spiro Agnew was brought down by Assistant U.S. Attorneys in [his home state of] Maryland. John Mitchell and Maurice Stans were indicted by regular DOJ employees in New York. "It was one of [then-U.S. Attorney] Rudy Giuliani's assistants, not an 'independent' prosecutor, who called sitting Attorney General Ed Meese, his own boss, a 'sleaze' in a prosecution of one of Meese's closest friends." In Washington D.C., [then-U.S. Attorney] "Eric H. Holder Jr. had promised his political affiliation would make no difference, and anyone would find it hard to argue that the Democratic U.S. Attorney had gone easy in seeking and securing a 17-count indictment against House Ways and Means Committee Chairman Dan Rostenkowski," who was counted as critical to the legislative initiatives of the administration that appointed Holder.

O'Sullivan, *supra* note 5, at 476 n.57 (internal citations omitted).

13. See O'Sullivan, *supra* note 5, at 477.

In the days before the Act, the integrity and professionalism of Justice Department prosecutors, together with the oversight function of Congress and the press, ensured that justice was done. One latter-day example of this proposition is demonstrated by the fact that it is now well known that FBI Director Louis Freeh and Campaign Task Force head Charles LaBella advised Attorney General Janet Reno to appoint an independent counsel to investigate the Clinton-Gore campaign's fundraising practices during the 1996 presidential campaign. She, in turn, has been pressured heavily by the House Judiciary Committee and members of Congress to seek an independent counsel.

Perhaps an even better illustration is furnished by Watergate itself. The initial investigation of the Watergate break-in was conducted by prosecutors from the U.S. Attorney's Office for the District of Columbia, who before the appointment of a special prosecutor had issued a subpoena for White House documents and had begun researching the constitutionality of indicting a sitting President. According to then-Solicitor General Robert Bork, whose later firing of Archibald Cox did more than anything else to give impetus to the independent counsel movement, "[m]ore work remained to be done, but the essential outline of the case was there. Watergate would have played out about the way it did had the U.S. Attorney's Office been allowed to continue."¹⁴ The existing criminal justice system did an adequate job of handling even the "nightmare scenario" of allegations against officials at the very highest reaches of the executive branch. We are confident it could have handled, for example, allegations that former HUD Secretary Henry Cisneros lied to the FBI about payments to his former mistress.

Political pull goes only so far. It may delay an investigation, but in the end, the truth will out.

III

THE APPEARANCE OF JUSTICE

You cannot improve trust in institutions by telling people institutions are untrustworthy. Yet that is precisely what the independent counsel statute does—it telegraphs that the Justice Department cannot be trusted to investigate the President and his appointees. Several very respected lawyers and lawmakers have noted that the law has thereby had the unintended consequence of diminishing respect for DOJ. As former Attorney General Nicholas deB. Katzenbach stated during hearings on reauthorization of the Act, it "has served to destroy rather than preserve public confidence in the integrity of government in general and the Department of Justice in particular. The statute assumes conclusively that with respect to a broad range of senior government of-

14. Robert H. Bork, *Against the Independent Counsel*, COMMENTARY, Feb. 1993, at 22, reprinted in 139 CONG. REC. S15,868 (daily ed. Nov. 17, 1993). See generally O'Sullivan, *supra* note 5, at 476 n.55.

ficials the Attorney General cannot be trusted to enforce the law objectively.”¹⁵ Likewise, former Independent Counsel Joseph diGenova has written that “[t]his assumption is ingrained into the minds of the American people, reinforcing a negative assumption that eventually affects the public’s perception of impartiality of the DOJ as a whole in everyday matters.”¹⁶

For at least one other reason, the statute may have the unintended consequence of undermining the appearance of impartiality and undermining respect for prosecutors. Most criminal investigations are handled quietly by the prosecutor; few people know about them, not necessarily even the target. Independent counsel investigations, on the other hand, tend to be very public events. From the very outset of the appointment by the Special Division and the establishment of the new Independent Counsel Office, the press is on notice that someone important is being investigated.¹⁷ Because the results of such a public investigation have great potential political importance, politicians will have every incentive to impugn the integrity, independence, judgment, or competence of the independent counsel to suit their own political ends. The higher the official, in theory, the more justifiable the use of an independent counsel to promote impartiality, and the more likely the investigation will become a highly politicized event, thus undermining the very appearance of justice the Act was designed to promote.

15. S. REP. NO. 103-101, at 11 (1993), *reprinted in* 1994 U.S.C.C.A.N. 748, 755; *see also id.*, *reprinted in* 1994 U.S.C.C.A.N. at 756 (statement of Sen. Dole) (“We’re not enhancing ‘confidence in government’ when Congress presumes, as it presumes through the independent counsel statute, that the Attorney General lacks the integrity to conduct a fair and thorough investigation of another executive branch official.”).

16. diGenova, *supra* note 4, at 2302; *see also* Joseph diGenova, *Investigated to Death*, N.Y. TIMES, Dec. 5, 1995, at A25 (“When the public is told again and again that the Justice Department cannot be trusted to investigate a matter, the executive branch is hurt.”). Although we will not impugn the professionalism and integrity of DOJ, it is obvious that the Act provides the sort of incentives to make it a self-fulfilling prophesy. The immediate effect of the passage of the Act was to depress morale at DOJ. *See* Former Attorney General Griffin Bell, Role of the Independent Counsel, American College of Trial Lawyers Panel Presentation (Boca Raton, Fla., recorded Mar. 22, 1997) (on file with authors; C-SPAN television broadcast). Leaders since Julius Caesar have known that one way of getting groups to perform like elites is to tell them they are elite; telling a group of prosecutors that they cannot be trusted as an institution to enforce the law against certain people is likely to have a corresponding depressing effect. The Act, in a way, suggests that it is normal to expect that politics will creep into prosecutions that are not insulated by the independent counsel mechanisms. Thus, the move away from trust in institutions may make it more likely than not that the institutions become untrustworthy. Even if morale is again high at the Justice Department, the multiplication of actors responsible for law enforcement diminishes the feeling of responsibility that the members of any one institution will feel. If the prosecutors at the Justice Department were the sole persons responsible for enforcing federal criminal law, they would behave knowing that they alone were responsible for catching all violations. With the introduction of independent counsels to examine political figures, it becomes possible for prosecutors to believe that enforcement against particular persons is “someone else’s responsibility.” *See Reno Cover-up Continues*, WALL ST. J., Feb. 1, 1999, at A20.

17. *See, e.g.*, Sunstein, *supra* note 12, at 2278 (noting the number of front-page stories mentioning independent counsels between 1978 and 1997). Although the Act permits the Attorney General to keep the independent counsel’s identity and jurisdiction confidential, *see* 28 U.S.C. § 593(b)(4) (1994), in the ordinary course she does not do so. To our knowledge, only three independent counsel investigations have been kept confidential. *See* Sunstein, *supra* note 12, at 2284-85; Linda Greenhouse, *Blank Check; Ethics in Government: The Price of Good Intentions*, N.Y. TIMES, Feb. 1, 1998, § 4, at 1.

Most commonly, allies of the subject of the investigation are inclined to attack the independent counsel to soften the political impact if evidence of criminal behavior is found. Examples are legion. Thus, in recent years, we have seen figures such as Lawrence Walsh (Independent Counsel for the Iran-Contra investigation) and Kenneth Starr, both of whom had earned kudos as judges and public officials, portrayed by people sympathetic with the subjects of their investigations as dangerous extremists with political agendas.¹⁸ Even more inexcusably, by removing the power of appointing the independent counsel from the President and his political appointees, the Act has given political cover to the President—who as head of the executive branch is responsible for encouraging respect for law enforcement and for countering allegations of prosecutorial bias¹⁹—to argue that, in his case at least, the prosecution is biased.

Less commonly, political opponents of the subject of the investigation may impugn the integrity of the independent counsel if he decides not to bring charges or releases findings clearing the subject of criminal wrongdoing. Thus, Robert Fiske, initially lauded by members of both parties as an outstanding choice to serve as independent counsel, became the subject of attack by some Republican politicians once he issued a report concluding that White House Counsel Vincent Foster had committed suicide.²⁰ This widespread criticism of Fiske over a tangential area of inquiry draws into question the feature that proponents of the Act cite as its main advantage over special prosecutors appointed from within DOJ: their purported superior credibility, as outsiders, in pronouncing there are no grounds for bringing a prosecution.²¹

Even the judges who appoint independent counsels under the statute—the very people whose involvement in the scheme was supposed to remove the taint of partisanship from the process—have not been immune from attack. When the Special Division appointed Kenneth Starr to continue the Whitewater investigation under the newly reauthorized Act in 1994, rather than Robert Fiske, who had been appointed by the Attorney General under the DOJ regulations during a period in which the statute had been permitted to lapse, numerous Democrats immediately cried foul. They criticized David B. Sentelle (one of three judges on the Special Division) for his ties to the Republican party, and seized on a lunch meeting with fellow North Carolinians Jesse Helms

18. See, e.g., *A Tale of Two Counsels*, INVESTOR'S BUS. DAILY, Sept. 28, 1998, at A32 (discussing Walsh); Hatch, *supra* note 1 (discussing Walsh); Robert Scheer, *Setting Fire to Tobacco Legislation: Kenneth Starr Lives in a Glass House When It Comes to Conflicting Duties*, L.A. TIMES, July 28, 1998, at B7 (discussing Starr).

19. See, e.g., *United States v. Armstrong*, 48 F.3d 1508 (9th Cir. 1995) (en banc) (concerning claim of discriminatory prosecution in crack cocaine cases), *rev'd*, 517 U.S. 456 (1996).

20. Compare Michael Isikoff, *Whitewater Special Counsel Promises "Thorough" Probe*, WASH. POST, Jan. 21, 1994, at A1, A20 (reporting laudatory statements by, among others, Democrat Arthur Liman and Republican former Attorney General Dick Thornburgh), with David Johnston, *Appointment in Whitewater Turns into a Partisan Battle*, N.Y. TIMES, Aug. 13, 1994, at A1, A7 (reporting criticisms by various Republican politicians).

21. See, e.g., Remarks of Lawrence Walsh, American College of Trial Lawyers Panel Presentation, *supra* note 16.

and Lauch Faircloth, both outspoken critics of Mr. Fiske's investigation.²² Although the Starr appointment was not discussed at the lunch, and even though a panel of the D.C. Circuit later upheld the propriety of the meeting (in an opinion written by a Carter appointee),²³ allies of President Clinton—including even the First Lady—have continued to impugn the integrity of the Special Division and, in particular, Judge Sentelle.²⁴ Critics have also seen Sentelle's partisan machinations in the Special Division's decisions to approve expansions of Starr's jurisdiction.²⁵

The result, predictably, has been to undermine the perception of impartiality and fairness, rather than to promote it. As Professor Julie O'Sullivan—herself a former Associate Counsel to Robert Fiske's Whitewater investigation—has noted,

the perceived importance of the statute designed to remove politics from the criminal process may actually intensify the politicization of investigations involving high-ranking officials. That politicization, in turn, may serve to defeat the very purpose of the statute, promoting public confidence in the fairness and reliability of the results of such investigations.²⁶

Indeed, because the Act requires the involvement of the judicial branch in the appointment, and effectively encourages the involvement of members of the legislative branch (because the appointments typically become public events), the Act has spread the taint from the executive branch (where the popular mind had focused it during the Watergate era) to all three branches of government. Most damaging of all is the spread of the taint to the judicial branch, which until this point had largely been removed from the political fray. The end result is that the Act has failed in its stated goal of promoting confidence in the reliability of investigations of high government officials.

IV

THE REALITY OF JUSTICE

In order to promote the appearance of justice, Congress introduced several procedural innovations to the process of investigating and prosecuting federal crimes. Although the Act included numerous such innovations, this article focuses on just four of them. First, to ensure that the "salutary" mechanism of the independent counsel investigation is available whenever conceivably warranted, Congress set a low threshold for the appointment of a special prosecutor. Second, to ensure that the Attorney General's presumptive conflict of in-

22. See David Johnston, *Three Judges Spurn Protest on Whitewater Prosecutor*, N.Y. TIMES, Aug. 19, 1994, at A16.

23. See *In re A Charge of Judicial Misconduct or Disability*, 39 F.3d 374, 382 (D.C. Cir. 1994).

24. See Rad Sallee, "Equal Protection of Laws" Near, *Federal Judge Says*, HOUS. CHRON., Feb. 10, 1998, at A17 (reporting Hillary Clinton's observation that Judge Sentelle's nomination to the bench was promoted by North Carolina Senators Jesse Helms and Lauch Faircloth); see also Greg Goldin, *Bench Press: The Judge Who Gives Ken Starr Everything He Wants*, L.A. WKLY., Mar. 13, 1998, at 21.

25. See Goldin, *supra* note 24.

26. O'Sullivan, *supra* note 5, at 475.

terest does not taint the independent counsel, the Act grants the independent counsel formal independence from the Justice Department, does not require that the person appointed to be independent counsel be a career prosecutor (or, indeed, have any familiarity with criminal law), and de-emphasizes the role of the prosecutorial guidelines contained in the *DOJ Manual*. Third, to ensure that the independent counsel has resources adequate to perform the task, the Act exempts independent counsels from the budgetary and manpower limitations federal prosecutors normally face. Fourth, to ensure that any wrongdoing cannot be swept under the rug, the Act requires that the independent counsel file a formal report with the Special Division that appoints him. However, far from furthering the fair application of the criminal laws, each of these departures has guaranteed that each of the increasingly numerous people subject to the awesome machinery of the Act will suffer a far more grueling and searching inquiry into their lives than the average person suspected of wrongdoing.

Coupled with the overly broad scope of “covered persons” under the Act²⁷ is a virtual “hair trigger” controlling referrals under it. The statute requires the Attorney General to refer the matter to the Special Division for appointment of an independent counsel if a ninety-day preliminary investigation (itself triggered if a hasty review determines there is “specific[]” and “credib[le]” information that a covered person “*may* have” violated a federal criminal law²⁸) reveals that there are “reasonable grounds to believe that further investigation is warranted.”²⁹ The Act seems to contain a *presumption* of referral, because the Attorney General can notify the Special Division of an intent not to appoint a special prosecutor only if “there are *no reasonable grounds* to believe that further investigation is warranted.”³⁰ In an explicit effort to reduce the Attorney General’s authority, the Act prohibits the Attorney General from issuing subpoenas, convening a grand jury, granting immunity, or engaging in plea bargaining to determine whether the threshold standard for appointment of an independent counsel has been satisfied.³¹ (Evidently, the Act’s drafters feared the Attorney General might use those tools to scuttle cases by, say, immunizing critical witnesses before an unconflicted attorney could get his hands on them.³²) At the same time, because of lingering distrust of the Attorney General’s ability impartially to assess intent, the Act prohibits the Attorney General from declining to appoint an independent counsel on the grounds of lack of *mens rea* unless there is “clear and convincing evidence that the person lacked”

27. See *supra* text accompanying note 10.

28. 28 U.S.C. § 591(d)(1) (1994) (emphasis added); *id.* § 591(a), (c); see also *id.* § 592(c)(2).

29. *Id.* § 592(c)(1)(A). To ensure the Attorney General does not exercise a “pocket veto,” an independent counsel is also to be appointed if the 90-day period runs without the Attorney General reporting to the Special Division that there are no reasonable grounds to believe that further investigation is warranted. See *id.* § 592(c)(1)(B).

30. *Id.* § 592(b)(1) (emphasis added); see also *Morrison v. Olson*, 487 U.S. 654, 703, 713-14 (1988) (Scalia, J., dissenting).

31. See 28 U.S.C. § 592(a)(2)(A) (1994).

32. Comments of Nina Totenberg, American College of Trial Lawyers Panel Presentation, *supra* note 16.

the requisite state of mind.³³ Without the most effective investigatory tools available, that high evidentiary standard is in practice difficult to meet. Nonetheless, the Attorney General has declined to appoint independent counsels, citing lack of criminal intent, perhaps reflecting the capital's weariness of investigations.³⁴ In the past, the Attorney General has faced political pressures that may have caused her to err on the side of referral.³⁵ Once a case has been referred, there is a similar statutory bias in favor of expanding the jurisdiction of the independent counsel whenever it is requested.³⁶

The result of these incentives has been that the extraordinary mechanism of the Act has repeatedly and routinely been invoked in cases that even its proponents admit do not justify its application. Indeed, the very first appointments under the Act—to investigate quickly discredited charges that two White House employees used cocaine in a New York disco—were symptomatic of what was yet to come. In the twenty years since its enactment, no presidential administration has been free of investigation, and there is such a profusion of investigations today that it would be possible to establish an entire summer softball league using only the staffs of Independent Counsel Offices. If the Act was intended to be reserved for the sort of cataclysm some believed the nation faced in Watergate, its calibration is clearly far out of whack.

One of the most thoroughly discussed aspects of the Act is the lack of restrictions it places on the duration and expense of investigations. The Act provides Independent Counsel Offices with a virtually unlimited budget: The Justice Department is required to pay “all costs relating to the establishment and

33. 28 U.S.C. § 592(a)(2)(B)(ii) (1994). Similarly, Congress declared that the Attorney General should rarely close a matter under the independent counsel law based upon finding a lack of criminal intent, due to the subjective judgments required and the limited role accorded the Attorney General in the independent counsel process. Congress also believes that at least one Attorney General abused his authority in this area, that this abuse was the impetus for the statutory restriction in the expired law, and that a statutory restriction remains necessary to prevent future problems.

H.R. CONF. REP. NO. 103-511, at 11 (1994), *reprinted in* 1994 U.S.C.C.A.N. 792, 794.

34. *See, e.g.,* Chitra Ragavan, *In Other Scandal News . . .*, U.S. NEWS & WORLD REP., Feb. 8, 1999, at 22 (stating that, in deciding against appointing an independent counsel to investigate whether Harold Ickes lied before a Senate Committee, Reno stated that it was clear Ickes did not intend to lie); Cokie Roberts & Steven V. Roberts, *Just Like Clinton, Political Parties Aren't Above the Law*, DAILY NEWS (New York), Dec. 3, 1998, at 51 (predicting that Attorney General Janet Reno would probably decline to appoint an independent counsel to investigate President Clinton's fundraising tactics because Clinton did not intend to break any law); *NPR All Things Considered* (Nat'l Pub. Radio broadcast, Dec. 7, 1998) (transcript on file with authors) (quoting Attorney General Reno as stating that President Clinton did not act with “willful criminal intent” when she declined to appoint an independent counsel to investigate his 1996 campaign finances).

35. *See* O'Sullivan, *supra* note 5, at 479.

36. The Act vests the Attorney General with discretion to make the decision, but requires her to “accord[] great weight to the recommendations of the independent counsel” (who, if he is making the request, presumably wants his jurisdiction expanded), and permits her to decline only if “there are no reasonable grounds to believe that further investigation is warranted.” 28 U.S.C. § 593(c)(2)(B) (1994).

operation” of any Independent Counsel Office.³⁷ The independent counsel has no apparent limits on staffing: He “may appoint . . . such employees as [he] considers necessary (including investigators, attorneys, and part-time consultants).”³⁸ The statute itself imposes no limitation on the duration of an independent counsel investigation, although the Special Division retains the power—at least theoretically; it has never been exercised—to terminate an investigation when the matters within the independent counsel’s investigation are “completed or so substantially completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions.”³⁹ Accordingly, an independent counsel does not face the necessity of allocating scarce resources among competing demands for them, which usually focuses prosecutors’ attention on those crimes in which “the offense is the most flagrant, the public harm the greatest, and the proof most certain.”⁴⁰ The independent counsel can pour limitless resources into every detour of an investigation as though it were its main object, and pursue minor transgressions as if they were organized crime prosecutions under RICO.

Indeed, independent counsels have a number of strong incentives to conduct the most searching and extensive—and thus expensive—inquiries they can. First, in any high-profile investigation, they can expect to be criticized for any shortfalls; because chance favors the prepared, the independent counsel will be sure to be as thoroughly prepared as possible, chasing down every last lead and exhaustively examining every witness before acting. Second, “to ensure the accountability”⁴¹ of an independent counsel, the Act requires a report to the Special Division at the conclusion of the investigation, which typically is then made public.⁴² It is impossible to overestimate the importance of the final reporting requirement in driving up expenses. It gives independent counsels an incentive to leave no stone unturned in order to counter expected criticisms of being slipshod or making unsubstantiated allegations; as the D.C. Circuit observed in holding the Act unconstitutional, the structure creates a “reluctance to decide against indictment or to conclude the investigation absent near certainty that no indictment is possible or that no further leads remain.”⁴³ The independent counsel, who frequently is drawn from outside the ranks of professional prosecutors, may be acutely aware that this report will constitute the

37. *Id.* § 594(d)(2); *see also* S. REP. NO. 103-101, at 27-29 (1993), *reprinted in* 1994 U.S.C.C.A.N. 748, 771-74 (Although admonishing independent counsels to spend funds prudently, “[f]inal decision-making authority on expenditures . . . lies solely with independent counsels.”).

38. 28 U.S.C. § 594(c) (1994).

39. *Id.* § 596(b)(2).

40. *Morrison v. Olson*, 487 U.S. 654, 728 (1988) (Scalia, J., dissenting).

41. S. REP. NO. 95-170, at 70-71 (1977), *reprinted in* 1978 U.S.C.C.A.N. 4216, 4286-87 (discussing the Act’s original requirement that the final report be filed with Congress).

42. *See* 28 U.S.C. § 594(h) (1994).

43. *In re Sealed Case*, 838 F.2d 476, 509 (D.C. Cir. 1988), *rev’d sub nom.* *Morrison v. Olson*, 487 U.S. 654 (1988). President Reagan reportedly called Lawrence Walsh’s final report “an expensive, self-administered, taxpayer-funded pat on the back.” Comments of Theodore Olson, American College of Trial Lawyers Panel Presentation, *supra* note 16.

entire record of his prosecutorial experience; unlike a career prosecutor, the independent counsel will not be able to draw on the reservoir of his reputation for making tough but fair decisions in other prosecutions to help justify his actions in this prosecution.

The result of these incentives are investigations that are longer than some presidencies and that cost tens of millions of dollars. The total price tag for all independent counsel investigations by September 1996 had already reached \$128.80 million, and today doubtless stands tens of millions of dollars higher than that.⁴⁴ To put that figure into perspective, in 1988 (at the time the Supreme Court upheld the Act's constitutionality), the approximate annual expenditure on independent counsel investigations was equal to a tenth of the total budget for the entire Criminal Division.⁴⁵ The cost of the two largest investigations (Iran-Contra and Whitewater) each exceeded \$40 million, and lasted seven years and four years, respectively; according to one estimate, the same amount would easily fund the largest U.S. Attorney's Office in the country for a year.⁴⁶ The cost is actually far greater than these statistics reveal, because they measure only the direct public cost of the Act; no estimate has been made of the millions of dollars in legal fees spent by the subjects of (and witnesses to) these investigations.

But this is only one side of the picture; the other, more human side is that the targets of such investigations will in all likelihood be subject to far more searching inquiry than if they were private citizens. "Unlike a prosecutor in a traditional investigation, the Independent Counsel does not begin with an alleged crime and then search for a culprit; she begins with an alleged criminal and then searches for a crime."⁴⁷ The distinction is a subtle, but important one. If there is a unifying theme to federal criminal laws, it is that they are broadly (sometimes vaguely) worded, so that "a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone."⁴⁸ Such laws were designed under the assumption of the pre-independent counsel regime, here inoperative, that professional prosecutors faced with numerous competing demands would be restrained from bringing prosecutions in all cases involving a literal violation of a broadly worded proscription. The switch in emphasis from the alleged crime to the alleged criminal virtually guarantees a different brand of justice from that enforced against the average citizen. The ample resources of the Independent Counsel Offices "strip[] away" prosecutorial discretion, which is normally "a principal check on the op-

44. See Sunstein, *supra* note 12, at 2283. At that time, the cost of the Fiske/Starr investigation totaled only \$27.3 million, *see id.* at 2285; current estimates exceed \$44 million.

45. See *Morrison*, 487 U.S. at 714 (Scalia, J., dissenting).

46. See O'Sullivan, *supra* note 5, at 502 & n.148, 503.

47. Carter, *supra* note 3, at 138.

48. Robert H. Jackson, The Federal Prosecutor, Address Delivered to the Second Annual Conference of United States Attorneys (Apr. 1, 1940), *quoted in Morrison*, 487 U.S. at 728 (Scalia, J., dissenting). Professor Sunstein argues that politicians are yet more likely than private citizens to have run afoul of some statute "because of the complex network of statutes that regulate their behavior." Sunstein, *supra* note 12, at 2273.

pressive effect of an overly literal enforcement of the law.”⁴⁹ Because the independent counsel has all the time and resources necessary to prosecute his target’s every literal violation of the capacious federal laws, the target—and the public—must rely on his judgment to enforce the criminal laws only when appropriate. But the institution’s independence (in the sense of isolation) tends to cloud the very judgment that is necessary under such circumstances. It is hard to improve upon this statement of the problem by three former Attorneys General:

The problem is . . . that the institutional environment of the Independent Counsel—specifically, her isolation from the Executive Branch and the internal checks and balances it supplies—is designed to heighten, not to check, all of the occupational hazards of the dedicated prosecutor; the danger of too narrow a focus, of the loss of perspective, of preoccupation with the pursuit of one alleged suspect to the exclusion of other interests.⁵⁰

The reporting requirement perverts the process in one other way. Once the investigation is complete, it guarantees that, instead of remaining confidential as is ordinarily the case when an investigation does not culminate in indictment, the results of the investigation will be released to the Special Division, which (though not required to do so⁵¹) traditionally has published them. Although the reporting requirement only requires a “full[] and complete[] description of the work of the Independent Counsel, including the disposition of all cases brought,”⁵² a number of independent counsels have (whether because they read the statute broadly or for some other reason) included detailed analyses of the evidence uncovered, the credibility of witnesses, and (sometimes) even discussions of the legal or ethical propriety of the targets’ actions. Lawrence Walsh’s report on the Iran-Contra matter, for example, “repeatedly accuses named individuals of crimes, although in many instances the individual was never indicted, if indicted was never convicted, or if convicted the conviction was reversed.”⁵³ The report of Independent Counsel James McKay concerning Ed Meese has much the same character.⁵⁴ The reporting requirement is “unique to the independent counsel process”⁵⁵ and a striking departure from the ordinary practices of not commenting on decisions not to prosecute and of preserving the secrecy of evidence elicited before grand juries. It permits an official (or at

49. Carter, *supra* note 3, at 137.

50. *Morrison*, 487 U.S. at 731 (Scalia, J., dissenting) (quoting Brief for Edward H. Levi, Griffin B. Bell, and William French Smith as *Amici Curiae* at 11, *Morrison v. Olson*, 487 U.S. 654 (1988) (No. 87-1279)).

51. *See* 28 U.S.C. § 594(h)(2) (1994).

52. *Id.* § 594(h)(1)(B).

53. *In re North*, 16 F.3d 1234, 1237 (D.C. Cir. 1994); *see also* 1 LAWRENCE E. WALSH, FINAL REPORT OF THE INDEPENDENT COUNSEL FOR IRAN/CONTRA MATTERS 58-74 (1993).

54. *See* 1 JAMES MCKAY, REPORT OF INDEPENDENT COUNSEL IN RE EDWIN MEESE III 51 (1988) (Mr. Meese “probably committed two violations of that criminal statute [regarding conflict of interest] by personally participating in two . . . matters in which, to his knowledge, he had a conflict of interest.”); *id.* at 74 (“[A] trier of fact would probably conclude beyond a reasonable doubt that Mr. Meese violated” conflict of interest law.); *id.* at 99 (“Mr. Meese’s actions were a one-time failure to comply in full with his tax obligations”).

55. H.R. CONF. REP. NO. 103-511, at 19 (1994), *reprinted in* 1994 U.S.C.C.A.N. 792, 802.

least quasi-official) accusation of guilt without the benefit of a determination of probable cause by a grand jury or a determination of guilt by a petit jury.⁵⁶ Even aside from the disincentive such sweeping reports provide for candid testimony before grand juries and cooperation with prosecutors, such reports ensure the subjects of independent counsel investigations receive a materially different type of justice than the average citizen. As a result, “the target of the investigation will be subjected to scrutiny that is longer, more intensive, more invasive and more public than that which the average citizen would suffer.”⁵⁷

Largely because of the perceived abuses of the reports, Congress eliminated in its 1994 reauthorization the controversial requirement that the report explain “the reasons for not prosecuting any matter” within the independent counsel’s jurisdiction.⁵⁸ The legislative history of the 1994 reauthorization of the Act is larded with suggestions for preventing abuses (chief among them that independent counsels should “avoid” the use of conclusory statements regarding culpability in the absence of an indictment and should not extend investigations merely to write more complete reports),⁵⁹ but none has been reduced to a statutory command, let alone one enforceable against an independent counsel. It is too soon to tell whether these modest changes will have the desired effect of reducing the distorting effects of the final reporting requirement.

By design, independent counsels are given full independence from the Justice Department while being vested with virtually the “full power . . . to exercise all investigative and prosecutorial functions and powers of the Department of Justice, [and] the Attorney General.”⁶⁰ To put it casually, independent counsels are given virtually the full complement of rights, but not all the attendant responsibilities. While the Act establishes a parallel Justice Department, unlike the original one, it is not ultimately accountable to the President and thereby to the electorate. While the Act requires that the independent counsel follow prosecutorial guidelines in the *DOJ Manual* (and consult with DOJ on the interpretation of those guidelines) “except to the extent that to do so would be inconsistent with the purposes of” the Act,⁶¹ that does little to restore the accountability normally given by the President’s or Attorney General’s removal

56. See *In re North*, 16 F.3d at 1238 (reporting arguments of targets against release of report). More remarkably, the Watergate Special Prosecution Force itself argued in its report against such a document, on the grounds that “it would be irresponsible and unethical for a prosecutor to issue a report suggesting criminal conduct on the part of an individual who has no effective means of challenging the allegations against him or of requiring the prosecutor to establish such charges beyond a reasonable doubt.” WATERGATE SPECIAL PROSECUTION FORCE, FINAL REPORT 2 (1975).

57. O’Sullivan, *supra* note 5, at 493; accord Philip B. Heymann, *Four Unresolved Questions About the Responsibilities of an Independent Counsel*, 86 GEO. L.J. 2119, 2120 (1998).

58. Compare 28 U.S.C. § 594(h)(1)(B) (1987) (now you see it), with 28 U.S.C. § 594(h)(1)(B) (1994) (now you don’t); see also H.R. CONF. REP. NO. 103-511, at 19, *reprinted in* 1994 U.S.C.C.A.N. 792, 802 (discussing change).

59. 140 CONG. REC. H3697-02, H3701-02 (daily ed. May 19, 1994).

60. 28 U.S.C. § 594(a) (1994). The Act holds back authority “as to those matters that specifically require the Attorney General’s personal action” under 18 U.S.C. § 2516—namely, the authorization of wiretaps. *Id.*

61. *Id.* § 594(f)(1).

power. Even aside from the escape clause that the provision grants an independent counsel to disregard those guidelines, the guidelines are themselves largely a very loose set of standards that “involve the balancing of innumerable legal and practical considerations,” which thereby give an independent counsel great leeway to do as he pleases.⁶² Because the Act does not require that the independent counsel be appointed from the ranks of experienced prosecutors or that he staff his office with them, there is no guarantee that either he or his staff will have the critical experience necessary to make the sorts of judgments that the *DOJ Manual* requires. While the Act nominally requires consultation regarding the interpretation of the guidelines, there is obviously no way of enforcing that requirement; Congress has indicated that failure to follow policy would not “constitute grounds for removal of the special prosecutor by the Attorney General.”⁶³

The upshot is that a number of recent independent counsels have engaged in behavior that one would never expect to have occurred if the investigation had been done by Main Justice or one of the U.S. Attorney’s Offices. A prime example was Lawrence Walsh’s indictment of Secretary of Defense Caspar Weinberger just four days before the 1992 presidential election.⁶⁴ On another occasion, Independent Counsel Whitney North Seymour issued a subpoena for the Canadian ambassador during his investigation of White House Deputy Chief of Staff Michael Deaver, causing what another independent counsel called “an embarrassing international incident.”⁶⁵ Yet another example was

62. *Morrison v. Olson*, 487 U.S. 654, 708 (1988) (Scalia, J., dissenting). Indeed, this appears to have been Congress’s intent. See H.R. REP. NO. 103-224, at 20-22 (1993) (stating that the much of material in U.S. Attorney’s manual is “in the nature of ‘guidance,’ which provides desirable room for the exercise of discretion”). Some of the more important guidelines are themselves exceedingly broad. For example, in making a decision to prosecute, the guidelines counsel the prosecutor to consider such factors as the nature and seriousness of the offense, the deterrent effect of prosecution, the relative culpability of the offender, the offender’s criminal history, the offender’s willingness to cooperate, the offender’s personal circumstances, and the probable sentence on conviction. See UNITED STATES DEP’T OF JUSTICE, U.S. ATTORNEY’S MANUAL § 9-27.230(A) (1997). The prosecutor may consider declining prosecution if “no substantial Federal interest would be served,” even if “the person is believed to have committed a Federal offense and the admissible evidence is expected to be sufficient to obtain and sustain a conviction.” *Id.* § 9-27.230(B).

63. S. REP. NO. 97-496, at 16 (1982), *reprinted in* 1982 U.S.C.C.A.N. 3537, 3552; see also Julie R. O’Sullivan, *The Interaction Between Impeachment and the Independent Counsel Statute*, 86 GEO. L.J. 2193, 2233-34 & n.171 (1998) (collecting authorities).

64. See, e.g., Liam Plevin, *Arrest Raises Questions About Federal Inquiry*, NEWSDAY, Oct. 9, 1998, at A21; Bork, *supra* note 14, at 23, *reprinted in* 139 CONG. REC. S15,870 (daily ed. Nov. 17, 1993). Although the *DOJ Manual* does not explicitly tell prosecutors not to indict public figures shortly before elections (probably because the thought would never occur to the average line prosecutor), the *Manual* does seem to reflect a background principle of avoiding interference in electoral politics. See, e.g., UNITED STATES DEP’T OF JUSTICE, *supra* note 62, § 9-16.110 (discussing resignation as part of plea agreement, and requiring that Main Justice pre-clear plea bargains involving Members of Congress and congressional candidates). A Justice Department spokesman said there was an “unwritten rule” that such cases normally would be brought to the head of the Criminal Division in Washington, and former U.S. Attorney Otto Obermaier said “[n]ormally . . . the intent is . . . to defer it until after the election.” Plevin, *supra*.

65. diGenova, *supra* note 4, at 2301 n.11; see also N. Richard Janis, *Counsel Law a Threat to Justice; Prosecutors Without Restraint*, LEGAL TIMES, Feb. 1, 1988, at 18; Richard Lacayo, *Debate over Special Prosecutors; Have They Become Weapons in a Contest of Power?*, TIME, Dec. 28, 1987, at 73.

Lawrence Walsh's assertion to the Special Division that the grand jury secrecy rule (Federal Rule of Criminal Procedure 6(e)) did not apply to his office, and that therefore he could reveal information subject to the rule in his publicly released report.⁶⁶

V

SYSTEMIC DAMAGE WROUGHT BY THE INDEPENDENT COUNSEL LAW

Ordinarily, prosecutors are constrained by the threat of removal: Line prosecutors are accountable to their superiors, who can overrule their decisions and fire or reprimand them if they overstep or abuse their authority; the Attorney General can be overruled or fired by the President (and impeached by Congress); and the President himself is accountable to Congress (which can impeach him) and the electorate (who can vote him out of office, and whose approval may control his ability to further his agenda). An independent counsel, however, can be removed (aside from impeachment and conviction by Congress) only for "good cause, physical or mental disability . . . or any other condition that substantially impairs the performance of such Independent Counsel's duties."⁶⁷ Once ousted, he can seek judicial review of any such decision, which might entitle him to reinstatement.⁶⁸ Although "good cause" does not seem like an especially high standard in the abstract, in practice it is effectively insurmountable.

The result of this loss of accountability is predictable. The practical effect, of course, is that independent counsels may run amok with impunity, severely disrupting the lives of the targets and witnesses who come within the scope of the investigation and confronting the President with an ongoing embarrassment to his administration. But that is merely a symptom of a more important institutional problem: Without a clear chain of command, the voters are unable to determine who is responsible for the situation, and thus cannot hold them responsible at the polls. This is directly contrary to the intent of the Framers of the Constitution, who "conspicuously and very consciously" decided to concentrate executive power in a single person, instead of dividing it, as they had the legislative power.⁶⁹ This was done because the Founders realized that "[t]he ingredients which constitute safety in the republican sense are a due dependence on the people, and a due responsibility."⁷⁰ "[P]lurality in the executive," Alexander Hamilton wrote in the *Federalist Papers*, is dangerous precisely because "it tends to conceal faults and destroy responsibility."⁷¹

66. See *In re North*, 16 F.3d 1234, 1242-43 (D.C. Cir. 1994).

67. 28 U.S.C. § 596(a)(1) (1994). Regulatory independent counsels can also be removed for "good cause," but those regulations are subject to change by the Attorney General under ordinary notice and comment procedures. 28 C.F.R. § 600.3 (1998).

68. See 28 U.S.C. § 596(a)(3) (1994).

69. *Morrison v. Olson*, 487 U.S. 654, 698-99 (1988) (Scalia, J., dissenting).

70. THE FEDERALIST NO. 70, at 424 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

71. *Id.* at 427.

The Founders' fears have been realized in the independent counsel mechanism. Although many people are thoroughly tired of the investigation of President Clinton and wish it would end, they—for good reason—do not know to whom to address their concerns. One Washington State voter expressed the frustrations of many Americans in saying, "I can't really tell you who I blame the most for how out of control this thing has gotten."⁷² Further, the Act lends itself (whether by design or chance) to use by opponents of an incumbent administration to damage that administration, at low political cost to themselves.⁷³ It permits opponents of the administration to distract the President and other high officials in his administration from their political agenda by encouraging a "debilitating criminal investigation" without having to take direct action against the administration themselves, and thus without having to bear the political costs of a direct confrontation (such as "the political damage attendant to the commencement of impeachment proceedings against the President on trivial grounds"⁷⁴). Rather than immediately appearing as motivated solely by politics, the Act permits politicians to claim they are taking the "high road," conspicuously stating that they are not accusing a fellow politician of criminal activity, but just seeking the appointment of an independent counsel to "clear the air." Congress can then distance itself from investigations that have come to be viewed as excessive or meritless even if its members earlier encouraged them.⁷⁵ These blurred lines of accountability also encourage the administration to rail against the individual who is the independent counsel in a way it could not with a prosecutor the President or his Attorney General had appointed.

So was all the fuss worth it? It would be hard to term the Act an unqualified success at improving public confidence in government integrity. Americans in general believe that the ethics and honesty of their public officials have fallen over the past ten years, and (despite the belief of some experts that "politics is less corrupt today than at any time in modern memory"⁷⁶) polls reveal a growing level of cynicism about government.⁷⁷ While it is impossible to blame the increase in cynicism entirely, or even largely, on the Act, it has contributed to a lowering of public standards.⁷⁸ Even aside from encouraging people to think that "everybody does it" with a steady flow of independent counsel appointments and revelations, the Act encourages people to lower their expectations by focussing public attention on the wrong question. It encourages

72. Sam Howe Verhovek, *Angry Voters Aren't Sure Where to Place the Blame*, N.Y. TIMES, Oct. 11, 1998, at A1.

73. See *Morrison*, 487 U.S. at 713 (Scalia, J., dissenting) (noting that "the whole object of the law" is to "wound" the "President's ability to protect himself and his staff").

74. *Id.* at 713 (Scalia, J., dissenting).

75. See diGenova, *supra* note 4, at 2301-02.

76. Norman J. Ornstein, *Doing Congress's Dirty Work*, 86 GEO. L.J. 2179, 2181 (1998) (reporting "historians' viewpoint" that politics is less corrupt today).

77. See *id.* at 2179-80 (reporting results of ABC News/Washington Post and Gallup polls).

78. See SUZANNE GARMENT, *SCANDAL: THE CULTURE OF MISTRUST IN AMERICAN POLITICS* 98-99 (1991). Some of the other causes of growing public cynicism are discussed in Ornstein, *supra* note 76, at 2184-90.

people to form their judgments about public figures based not on whether they have behaved honorably or forthrightly, but on whether they have committed acts punishable under federal criminal law. Politicians encourage this belief by treating a decision not to prosecute as tantamount to vindication. Critics are right to complain that “mere absence of criminal wrongdoing is too low a threshold for judging the propriety of executive behavior.”⁷⁹ People are entitled to public officials of high moral and ethical stature, not just people whose conduct falls short of being criminal.

Moreover, the independent counsel statute can be used to obscure, rather than reveal, official misbehavior. The existence of an independent counsel investigation can be used as an excuse by allies of the President’s administration for not conducting oversight hearings on a scandal, although the focus of oversight hearings goes beyond narrow concerns of criminality to encompass the dignity and propriety of official action, and is thus more relevant to the electorate in making voting decisions. Furthermore, targets and sympathetic witnesses can use the pendency of the investigation as an excuse for refusing to make public statements describing or explaining their actions. Indeed, some have even cited grand jury secrecy rules—which are not binding on witnesses other than law enforcement personnel—for not discussing their testimony.⁸⁰ Thus, paradoxically, the Act gives the subject of an inquiry political cover for stonewalling publicly; the risk is that the target can use what remains of investigative secrecy to stonewall privately, relying on the independent counsel’s likely unwillingness to comment publicly about his subject’s actions.

VI

CONCLUSION

The Ethics in Government Act was designed to cure a lack of popular trust in public institutions. Congress’s error in passing it was its belief that it could cure that lack of trust in public institutions by itself vesting less trust in those institutions. In order to obtain the formal independence it desired, Congress tampered with the time-tested institutions of the criminal justice system, and in the process created a prosecutor effectively accountable to no one and with every incentive to conduct investigations far more intrusive than circumstances ordinarily would warrant. In order to remove the shroud of secrecy that surrounded executive branch decisions not to prosecute, Congress created a process that is substantially more public, introducing a political dynamic that has done nothing to improve the appearance of justice. Congress has traded a special prosecutor who might lend marginally less credibility to decisions not to prosecute for an independent counsel who (while a small improvement in that one regard) is signally worse in every other respect.

79. Carter, *supra* note 3, at 139.

80. See generally FED. R. CRIM. P. 6(e)(2).

The “original sin” that got us to this point was the decision to move away from trust in government. The cure is clear: a return to faith in the traditional institutions of law enforcement. When the Act expires this year, Congress should permit investigations of executive branch officials to return to the Department of Justice.