

# THE INDEPENDENT COUNSEL STATUTE AND QUESTIONS ABOUT ITS FUTURE

ORRIN G. HATCH\*

## I

### INTRODUCTION

James Madison explained in the *Federalist Papers* the necessity of providing legal mechanisms to guard against the abuse of governmental power:

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.<sup>1</sup>

More than two hundred years after Madison's admonition, the independent counsel statute<sup>2</sup> is a prominent example of a statutory "auxiliary precaution" designed to curb abuses of power by a President. The statute attempts to accommodate two related interests: (1) avoiding the inherent conflict of interest that arises when a prosecutor investigating the President is controlled by the President, and (2) deterring the use of presidential power to commit crimes. As Madison would understand, an assessment of the independent counsel statute and its future ultimately must reconcile the related questions of conflict of interest and the balance of power.

The primary impetus for our nation's first independent counsel statute was the firing of then-Watergate Special Prosecutor Archibald Cox in 1973 by President Nixon. Mr. Cox had been appointed to investigate a potential abuse of presidential power—the Watergate scandal—by President Nixon's Attorney General, Elliott Richardson. Mr. Cox pressed his investigation and issued a subpoena for White House tape recordings and other records. President Nixon took advantage of the inherent conflict of interest that then existed in the law by ordering Attorney General Richardson to remove Mr. Cox from office. Rather than carry out the order, both Attorney General Richardson and his deputy, William Ruckelshaus, resigned. Their resignations and the eventual

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\* United States Senator (R.-Utah); Chairman, United States Senate Committee on the Judiciary; B.A. 1952, Brigham Young University; J.D. 1962, University of Pittsburgh.

1. THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

2. Ethics in Government Act, Pub. L. No. 95-521, tit. VI, 92 Stat. 1824, 1867-73 (1978) (codified as amended at 28 U.S.C. §§ 591-599 (1994)).

firing of Mr. Cox by Solicitor General Robert Bork later came to be known as the “Saturday Night Massacre.” Although legally permissible at the time, the decision by President Nixon to fire Mr. Cox was seen by many as a threat to our system of justice. Cox’s termination led to congressional hearings and the consequent political pressure on President Nixon that forced him to appoint another special prosecutor, Leon Jaworski, whose investigation ultimately led to impeachment proceedings against President Nixon.<sup>3</sup>

The serious disruption to the country and the breach of public trust caused by the Watergate scandal led Congress to conclude that the federal government ought to establish a new process for investigating and prosecuting high-level government officials. In 1978, Congress established an “auxiliary precaution,” or legal mechanism, for the appointment of a special outside prosecutor who would be selected by a special court and who could be fired only for good cause or disability.<sup>4</sup> The goal of the statute was to improve public trust in government by ensuring fair and impartial criminal proceedings when an administration investigates its own senior officials.<sup>5</sup>

The 1978 law—the foundation for today’s independent counsel statute—was enacted notwithstanding constitutional concerns expressed by many Republicans in Congress, including me,<sup>6</sup> and was given a life of five years.<sup>7</sup> In 1983 and 1987, it was reenacted,<sup>8</sup> each time for another five years, each time with several amendments,<sup>9</sup> and each time notwithstanding the concerns of many conservative Members of Congress.<sup>10</sup> In 1992, the statute lapsed<sup>11</sup> but, at the in-

3. See generally *The Independent Counsel Reauthorization Act of 1993: Hearing Before the Senate Comm. on Gov’t Affairs on S. 24, to Reauthorize the Independent Counsel Law for an Additional 5 Years, and for Other Purposes*, 103d Cong. 1-4 (1993) (statement of Sen. Levin); Dave Boyer, *Congress Calls on Lessons Learned from Watergate Days*, WASH. TIMES, Dec. 7, 1998, at A12 (detailing the chronology of the Watergate scandal from the June 1972 burglary of Democratic National Committee headquarters to President Nixon’s August 1974 resignation).

4. See Ethics in Government Act, Pub. L. No. 95-521, § 601(a), 92 Stat. 1824, 1867-73 (1978) (codified as amended at 28 U.S.C. §§ 591-599 (1994)).

5. See H.R. CONF. REP. NO. 95-1756, at 78-79 (1978), reprinted in 1978 U.S.C.C.A.N. 4381, 4394-95 (explaining that because a special prosecutor’s tenure of office extends “only until completion of the investigation or prosecution he was appointed to handle,” this will ensure “independence of judgment”); S. REP. NO. 95-170, at 73 (1978), reprinted in 1978 U.S.C.C.A.N. 4217, 4289 (noting that “this chapter has identified certain positions, the holders of which have such a relationship to the Attorney General and the President that there is a conflict of interest or the appearance thereof if the Department of Justice conducts a criminal investigation of an individual [holding one of these positions]”).

6. See, e.g., 123 CONG. REC. 20,969-72 (1977) (statement of Sen. Hatch); *id.* at 20,970 (statement of Sen. Scott); *id.* at 20,996, 21,004 (statement of Sen. Baker). Note that despite my constitutional reservations, I did vote in favor of the Senate bill. See *id.* at 21,007.

7. See Ethics in Government Act, Pub. L. No. 95-521, § 601(a), 92 Stat. 1824, 1873 (1978) (§ 598 of 1978 Act).

8. See Ethics in Government Act Amendments of 1982, Pub. L. No. 97-409, 96 Stat. 2039; Independent Counsel Reauthorization Act of 1987, Pub. L. No. 100-191, 101 Stat. 1293.

9. See S. REP. NO. 97-496, at 4-19 (1982), reprinted in 1982 U.S.C.C.A.N. 3537, 3540-3555; H.R. CONF. REP. NO. 100-452, at 19-39 (1987), reprinted in 1987 U.S.C.C.A.N. 2185, 2185-2205.

10. See, e.g., 128 CONG. REC. 30,274 (1982) (statement of Rep. Kindness); 133 CONG. REC. 28,559-60 (1987) (statement of Rep. Lott); *id.* at 28,560-61, 28,577-78 (statements of Rep. Hyde); *id.* at 28,561, 28,610-11 (statements of Rep. Shaw); *id.* at 28,564-65 (statement of Rep. Lungren); *id.* at 28,566-67 (statement of Rep. Swindall); *id.* at 30,498-500 (statement of Sen. Hatch); *id.* at 30,514 (statement of Sen. Stevens). The 1982 reauthorization passed the Senate by voice vote, so my vote was

sistence of President Clinton,<sup>12</sup> was reenacted for another five years,<sup>13</sup> again with many amendments<sup>14</sup> and, yet again, notwithstanding the concerns of many Republican Members.<sup>15</sup> The current statute is due to expire on June 30, 1999, but its expiration will not affect any independent counsel investigations that are ongoing on that date.<sup>16</sup>

The current statute, the Independent Counsel Reauthorization Act of 1994 (the "Act"), as in pre-1978 law, allows the Attorney General to conduct a preliminary investigation into alleged criminal acts by the President and other high-level administration officials.<sup>17</sup> Because the President, who appoints (and may remove) the Attorney General, may still have some influence over the start of the investigation, some conflict of interest still exists. Furthermore, the Act follows pre-1978 law by permitting Congress to exert political pressure to combat the effects of a conflict of interest. The House and Senate Judiciary Committees may ask the Attorney General to initiate a preliminary investigation, and, if the Attorney General removes an independent counsel, he must report to these committees the reasons for such removal.<sup>18</sup>

The Act, however, shifts the focus of the political pressure that Congress may exert from the President, who is more vulnerable to political pressure, to the Attorney General, who is less vulnerable to political pressure. In addition, the Act differs substantially from pre-1978 law by requiring that a panel of

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not recorded. See JOURNAL OF THE SENATE OF THE UNITED STATES OF AMERICA, 97th Cong. 462, 714 (1982). In 1987, as in 1978, despite my constitutional concerns, I voted in favor of the independent counsel reauthorization. See JOURNAL OF THE SENATE OF THE UNITED STATES OF AMERICA, 100th Cong. 856-57 (1987). In addition, 87 members of the House (20% of the body) voted against the 1987 reauthorization. See 133 CONG. REC. 28,612-13 (1987).

11. See Independent Counsel Reauthorization Act of 1987, Pub. L. No. 100-191, § 2, 101 Stat. 1293, 1306 (amending 28 U.S.C. § 599 so that the statute would expire on December 15, 1992, five years after its date of enactment).

12. See Statement by President William J. Clinton upon Signing S. 24, 30 WEEKLY COMP. PRES. DOC. 1383 (July 4, 1994), reprinted in 1994 U.S.C.C.A.N. 809-1 (stating that "[r]egrettably, this statute was permitted to lapse when its reauthorization became mired in a partisan dispute in the Congress. Opponents called it a tool of partisan attack . . . and a waste of taxpayer funds. It was neither. In fact, the independent counsel statute has been in the past and is today a force for Government integrity and public confidence.").

13. See Independent Counsel Reauthorization Act of 1994, Pub. L. No. 103-270, § 2, 108 Stat. 732, 732 (amending 28 U.S.C. § 599 to extend the Act five additional years).

14. See H.R. CONF. REP. NO. 103-511, at 9-26 (1994), reprinted in 1994 U.S.C.C.A.N. 792, 792-809.

15. See, e.g., 140 CONG. REC. H4735, H4739 (daily ed. June 21, 1994) (statements of Rep. Goss); *id.* at H4736, H4744-45 (statements of Rep. Hyde); *id.* at H4738 (statement of Rep. Armey); *id.* at H4742-44 (statement of Rep. Fish). As in 1978 and 1987, despite my constitutional concerns, I voted in favor of the Senate bill. See JOURNAL OF THE SENATE OF THE UNITED STATES OF AMERICA, 103d Cong. 695 (1993). The conference committee version of the bill passed the Senate the following year by voice vote. See JOURNAL OF THE SENATE OF THE UNITED STATES OF AMERICA, 103d Cong. 364 (1994).

16. See 28 U.S.C. § 599 (1994) (providing that "[t]his chapter shall cease to be effective five years after the date of the enactment of the . . . Act . . . except that this chapter shall continue in effect with respect to then pending matters before an independent counsel that in the judgment of such counsel require such continuation until that independent counsel determines such matters have been completed").

17. See *id.* § 592(a).

18. See *id.* §§ 592(g)(1), 596(a)(2).

three life-tenured federal judges, instead of the President, select an independent counsel.<sup>19</sup> Thus, the Act significantly reduces the conflict of interest inherent when the President, or his Attorney General, selects the prosecutor of the President or other high-level executive officials. Finally, the Act protects the independent counsel, once appointed, from influence by the President by providing that an independent counsel is removable only for cause or disability and by providing that the Attorney General does not control the independent counsel's budget.<sup>20</sup> This was an attempt to avoid the conflict of interest that President Nixon exploited when firing Archibald Cox by making the independent counsel unaccountable to the President. These protections also shifted the balance of power by decreasing the ability of the President to control an investigation and by transferring some of that power to a new independent counsel. Thus, the Act made substantial changes in the potential for conflict of interest and in the balance of power that existed prior to 1978.

Notwithstanding these changes, one can certainly argue that the independent counsel statute has done little to improve public trust in our system of justice. Indeed, some would argue that the law has weakened our trust in government. Critics fault the law for its alleged distortion of the prosecutorial decisionmaking process: Independent counsels have unlimited budgets, do not have to account for competing resource demands of general prosecutorial jurisdiction, and cannot be removed except under limited circumstances. Other critics argue that the statute is unenforceable if an Attorney General chooses not to comply with it, because the Attorney General's decision not to request an independent counsel is not subject to judicial review.

Despite the divergence of opinion regarding the Act, it appears there is a growing public consensus that the Act is genuinely and seriously flawed.<sup>21</sup> Whether these flaws can be corrected, much less whether the law will be reauthorized when it expires, is in serious doubt. At this point, even some of the law's historic champions have questioned whether it is possible to muster a coalition to reenact the statute.<sup>22</sup> The *Washington Post* recently captured this

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19. See *id.* § 593(b).

20. See *id.* §§ 594(b)-(c), 596(a); Act of Dec. 22, 1987, Pub. L. No. 100-202, § 101(a), 101 Stat. 1329, 1329-8 to -9.

21. See *Independent Counsel Law May Not Get ABA Backing*, CHI. TRIB., Feb. 7, 1999, § 1, at 8 (quoting the President of the American Bar Association's opinion that "there is general agreement in the legal profession and in Congress and in the American public that it has not achieved its laudable original purpose").

22. See 144 CONG. REC. S11,957 (daily ed. Oct. 8, 1998) (statement of Sen. Levin that "[i]t will be difficult in this environment [where members of both parties have been reluctant to speak out against Kenneth Starr's alleged abuses of authority under the independent counsel statute] to salvage the legitimate goal of the independent counsel law when it expires next year"); see also George Lardner, Jr., *ABA Advocates End to Independent Counsels*, WASH. POST, Feb. 9, 1999, at A3 (noting the American Bar Association's recommendation that Congress allow the independent counsel statute to expire and that "even the law's defenders agree it needs 'radical surgery' to survive").

I note that the American Bar Association has reversed its position on the independent counsel statute. Compare American Bar Ass'n, *Report No. 4 of the Criminal Justice Section*, 112 REPORTS OF THE AMERICAN BAR ASSOCIATION 379, 380 (1987) (stating that "[t]he last five years' experience under the independent counsel [statute] demonstrates conclusively that the forces which compelled the

sentiment when it commented, “[A]t this stage, the law has almost no constituency.”<sup>23</sup>

## II

### PRACTICAL EXPERIENCE WITH THE OPERATION OF THE STATUTE: THE 1996 CAMPAIGN FINANCE SCANDAL

Two major conclusions emerge from an assessment of the independent counsel statute's controversial twenty-year life span: First, an inherent conflict of interest still exists in the conduct of the preliminary investigation and the decision whether to request the appointment of an independent counsel. Second, this inherent conflict negates the ultimate effectiveness of any investigation of the President or other high-level officials.

Under the Act, the Attorney General, who serves at the pleasure of the President, conducts the preliminary investigation and has the sole, unreviewable power to request, or not to request, the appointment of an independent counsel.<sup>24</sup> Thus, while the President has no direct influence over an independent counsel that has been appointed, he still has indirect influence over whether the appointment is made in the first place. Furthermore, under pre-1978 law, Congress could offset the effects of a conflict of interest by focusing its political power on an appointing authority (the President) who was directly accountable to the people and thus vulnerable to political pressure from Congress. Under current law, Congress has a less effective mechanism to offset a conflict of interest because it must focus its political pressure on an appointing authority (the Attorney General) who is not directly accountable to the people and thus is far less vulnerable to political pressure from Congress.<sup>25</sup>

This shift in the focus of political pressure from the President to the Attorney General subjects the process to a new and more sophisticated type of abuse. The Attorney General, who is not directly accountable to the people, controls the preliminary stage of the investigation and the decision to request an independent counsel. If the Attorney General delays or decides not to request an independent counsel, he also could deflect unintentionally any public

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ABA's original endorsement of the provisions have not abated, and that the provisions are essential both for the reality of a fair administration of justice and for its appearance. Thus, in our view, it is imperative that Congress reauthorize the independent counsel [act] . . . [without] a sunset provision . . .”), with AMERICAN BAR ASS'N, REPORT NO. 116A, at 3 (Feb. 1999) (stating that “on balance, the operation of public and political forces are sufficient, along with the current statutes and regulations which allow the Attorney General to appoint a Special Counsel in appropriate circumstances, to ensure the public confidence in federal law enforcement efforts directed at high ranking government officials. We conclude, therefore, that the Act should be permitted to expire and should not be renewed.”).

23. Editorial, *Independent Counsel Reform*, WASH. POST, June 12, 1998, at A26.

24. See 28 U.S.C. § 592(f) (1994) (“The Attorney General’s determination under this chapter to apply . . . for the appointment of an independent counsel shall not be reviewable in any court.”); *Morrison v. Olson*, 487 U.S. 654, 695 (1988) (explaining that “the courts are specifically prevented from reviewing the Attorney General’s decision not to seek appointment [of an independent counsel]”) (citing 28 U.S.C. § 592(f)).

25. See 28 U.S.C. §§ 592(g)(2)-(3), 595(b), 596(a) (1994).

criticism for such delay or decision from the President, who does not make the appointment decision.

In no case are the Act's shortcomings more clearly illustrated than by the current campaign finance scandal. For nearly two years, the Attorney General has refused to do what the law compels: to appoint an independent counsel to investigate allegations of campaign finance abuses by the 1996 Clinton-Gore reelection campaign, the Administration, and the Democratic National Committee.<sup>26</sup> Attorney General Janet Reno has followed this course despite the conclusions of both the FBI Director Louis Freeh and her handpicked special investigator, Charles LaBella,<sup>27</sup> that any criminal investigation by the Attorney General would be plagued by either a potential or an actual political conflict of interest.<sup>28</sup>

Under the Act, the Attorney General must apply to the Special Division of the United States Court of Appeals for the District of Columbia Circuit for the appointment of an independent counsel whenever (1) after completion of a preliminary investigation, the Attorney General "determines that there are reasonable grounds to believe that further investigation is warranted" regarding whether certain high-ranking executive branch officials<sup>29</sup> may have violated federal criminal law<sup>30</sup> or (2) after the expiration of the ninety-day preliminary investigation period (or any judicially granted extension thereof), the Attorney General has not notified the Special Division that "there are no reasonable

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26. See, e.g., David Johnston, *Reno Rejects Call to Name a Counsel over Fund-Raising*, N.Y. TIMES, Apr. 15, 1997, at A1; Roberto Suro, *Outside Probe of Ickes Rejected*, WASH. POST, Jan. 30, 1999, at A1; Roberto Suro, *Reno Formally Rejects Independent Counsel*, WASH. POST, Apr. 15, 1997, at A1; Roberto Suro, *Reno Rejects Probe of Gore on Lying*, WASH. POST, Nov. 25, 1998, at A1; Roberto Suro, *Reno Won't Seek Probe by Counsel on '96 Ads*, WASH. POST, Dec. 8, 1998, at A1.

27. LaBella resigned as head of the Justice Department's campaign finance task force in the spring of 1998 to become interim United States Attorney for the Southern District of California. See David Johnston, *New Leader for Finance Inquiry*, N.Y. TIMES, June 6, 1998, at A9 (reporting Attorney General Reno's announcement of LaBella's replacement as head of task force and his imminent departure). LaBella also resigned from the position of Interim U.S. Attorney after the Attorney General stated she was planning to have him replaced with another prosecutor as U.S. Attorney. See Tony Perry, *LaBella to Resign as Interim U.S. Attorney*, L.A. TIMES, Feb. 3, 1999, at A3.

28. See, e.g., Brian Duffy & Susan Schmidt, *Freeh Advised Reno to Seek Special Counsel*, WASH. POST, May 7, 1997, at A1; Roberto Suro & Michael Grunwald, *Independent Probe of '96 Funds Urged: Reno Noncommittal on Campaign Report*, WASH. POST, July 24, 1998, at A21; Don Van Natta Jr., *F.B.I. Chief Still Sees Need for Campaign Finance Prosecutor*, N.Y. TIMES, May 2, 1998, at A10.

29. The Act states that it applies to

(1) the President and Vice President; (2) any individual serving in [level III of the Executive Schedule]; (3) any individual working in the Executive Office of the President who is compensated . . . at or above [the pay rate of] level II of the Executive Schedule . . . ; (4) any Assistant Attorney General and any individual working in the Department of Justice who is compensated . . . at or above [the pay rate of] level III of the Executive Schedule . . . ; (5) the Director of Central Intelligence, the Deputy Director of Central Intelligence, and the Commissioner of Internal Revenue; (6) the chairman and treasurer of the principal national campaign committee seeking the election or reelection of the President, and any officer of that committee exercising authority at the national level, during the incumbency of the President; and (7) any individual who held an office or position described [above] . . . for 1 year after leaving the office or position.

28 U.S.C. § 591(b) (1994).

30. See *id.* §§ 592(c)(1)(A), (a)(1).

grounds to believe that further investigation is warranted.”<sup>31</sup> If an independent counsel subsequently determines that a crime actually has been committed, he will prosecute that crime in court.<sup>32</sup> The Attorney General also must determine, with respect to lower-ranking executive officials, whether a conflict of interest would result from her investigation.<sup>33</sup> If so, she may seek the appointment of an independent counsel.<sup>34</sup>

Attorney General Reno, however, has interpreted the Act in a manner inconsistent with its text and intent. First, she has interpreted the Act to require evidence not that a high-level official “may have” committed a crime, but that the official actually did commit a crime.<sup>35</sup> Thus, a large portion of the investigation that was intended to be conducted by the independent counsel was instead conducted by the Attorney General. Second, the Attorney General, who before the campaign finance scandal acknowledged that an “apparent” conflict of interest would be sufficient to seek an independent counsel for lower-level officials, now takes the position that an “actual” conflict of interest is required.<sup>36</sup> These subtle and unreviewable changes in applying the standards set forth in the Act have expanded dramatically the scope of the preliminary investigation controlled by the Attorney General. Attorney General Reno’s interpretation of the Act, therefore, has greatly expanded precisely the type of conflict of interest the Act was designed to prevent.

Numerous individual investigations are being handled by a campaign finance task force created by the Attorney General. Yet the task force reportedly has never conducted an investigation or inquiry into the campaign finance matter as a whole to determine if there exists specific and credible information

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31. *See id.* § 592(c)(1)(B).

32. *See id.* § 594.

33. *See id.* § 591(c)(1).

34. *See id.*

35. *See, e.g.,* Micah Morrison, *The Reno Brain Trust*, WALL ST. J., Oct. 8, 1997, at A22 (describing Attorney General Reno’s justification for not seeking appointment of an independent counsel to investigate possible campaign finance law violations as meaning “[i]n short, no smoking gun, no independent counsel”); Susan Schmidt & Roberto Suro, *Troubled from the Start: Basic Conflict Impeded Justice Probe of Fund-Raising*, WASH. POST, Oct. 3, 1997, at A1; Roberto Suro, *How Reno Has Set Focus of Probe*, WASH. POST, Oct. 6, 1997, at A7 (reporting that Attorney General Reno justified closing avenues of inquiry if investigators “had no evidence of criminal wrongdoing”).

36. Attorney General Reno’s interpretation of the independent counsel statute has undergone a remarkable transformation between her first year in office and the beginning of President Clinton’s second term. *Compare Hearing Before the Senate Comm. on Gov’t Affairs, on S. 24, to Reauthorize the Independent Counsel Law for an Additional 5 Years, and for Other Purposes*, 103d Cong. 27 (1993) (statement of Attorney General Reno that “[t]he Independent Counsel Act was designed to avoid even the *appearance* of impropriety in the consideration of allegations of misconduct by high-level Executive Branch officials, and to prevent either actual or perceived conflicts of interests”), with Letter from Janet Reno, Attorney General of the United States, to Orrin G. Hatch, Chairman, United States Senate, Committee on the Judiciary 3 (Apr. 14, 1997) (on file with the Senate Committee on the Judiciary) (“The Congress has made it very clear that [the discretionary] provision [of the independent counsel statute] should be invoked only in certain narrow circumstances. Under the Act, I must conclude that there is a potential for an *actual* conflict of interest, rather than merely an *appearance* of a conflict of interest.”).

that would require the Attorney General to request an independent counsel.<sup>37</sup> Indeed, as has been reported, the task force utilizes a higher threshold of evidence when evaluating allegations that may implicate the Act or White House personnel.<sup>38</sup> Repeated inquiries and heightened political pressure by Congress on the Attorney General have proven futile in combating the inherent conflict of interest that exists.

Experience with the Act has shown that Congress's most effective pre-1978 weapon to combat the conflict of interest—political pressure—has little effect on the Attorney General who, unlike the President, is not directly accountable to the people. Of what value is the independent counsel statute if the Attorney General, either through misapplication or disregard, fails to comply with it? And how can Congress address the flaw without making the statute unconstitutional? These are just a few of the important questions being asked in the 106th Congress.

### III

#### POSSIBLE REFORMS TO THE CURRENT INDEPENDENT COUNSEL MECHANISM

If Congress decides to reform the independent counsel statute, Congress should consider carefully the impact of any suggested reform on the inherent conflict of interest in a President controlling an investigation of himself and on the balance of power between the independent counsel and the President.

##### A. Conflict of Interest

Whenever the Justice Department investigates executive branch misconduct, reformers argue that there must be “statutory guidelines that strictly channel the discretion of the Attorney General in the triggering process.”<sup>39</sup> Congress should examine whether the Attorney General's role in making the decision to request an independent counsel should be narrowed or expanded and what impact this would have on the conflict of interest. The Act currently requires the Attorney General to request the appointment of an independent

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37. See Schmidt & Suro, *supra* note 35 (reporting that Justice Department task force members “operated under a ‘bottom up’ strategy”); Suro, *supra* note 35 (quoting Attorney General Reno as saying “I think it is important, when there is an investigation underway, to do it not in terms of some big blob but in terms of the evidence and the law”). Unlike the Justice Department's disjointed investigation, Congress has conducted several wide-ranging inquiries, examining many elements of the scandal as parts of a larger pattern of wrongdoing. See INVESTIGATION OF ILLEGAL OR IMPROPER ACTIVITIES IN CONNECTION WITH 1996 FEDERAL ELECTION CAMPAIGNS: FINAL REPORT OF THE SENATE COMM. ON GOV'TL AFFAIRS, S. REP. NO. 105-167 (1998) (6 volumes); INVESTIGATION OF THE CONVERSION OF THE \$1.7 MILLION CENTRALIZED WHITE HOUSE COMPUTER SYSTEM, KNOWN AS THE WHITE HOUSE DATABASE, AND RELATED MATTERS: FIFTH REPORT BY THE COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT, H.R. REP. NO. 105-828 (1998); INVESTIGATION OF POLITICAL FUNDRAISING IMPROPRIETIES AND POSSIBLE VIOLATIONS OF LAW: INTERIM REPORT; SIXTH REPORT BY THE COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT, H.R. REP. NO. 105-829 (1998) (4 volumes).

38. See Schmidt & Suro, *supra* note 35.

39. 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, 2111 (1998).



counsel unless she concludes that there are no reasonable grounds to warrant further investigation.<sup>40</sup> Under this standard, it is difficult to avoid triggering the Act (unless the Attorney General patently refuses to follow it), not only because of the exacting demands in proving a negative, but also because in her preliminary investigation the Attorney General lacks subpoena power, which could provide evidence that no reasonable grounds warranting further investigation exist.<sup>41</sup>

On the one hand, Congress could decrease the Attorney General's discretion in deciding whether to seek the appointment of an independent counsel, thus decreasing both the scope of the investigatory process over which the President would have influence and the inherent conflict of interest. The Act could be amended to include an automatic trigger that would require the Attorney General to request appointment of an independent counsel if the statutory standards are met (for example, requiring that the Attorney General request an independent counsel each time allegations of criminal misconduct against particular officials are received). Alternatively, the Director of the FBI or another law enforcement official could be authorized to make the request if the Attorney General refuses to comply with the statutory standards. However, if the Act is amended to make the trigger truly "automatic," the political partisanship that already infects the process "could only multiply the investigations and the expense."<sup>42</sup>

On the other hand, Congress could increase the Attorney General's discretion in requesting the appointment of an independent counsel, thus increasing both the scope of the investigatory process over which the President would have influence and the inherent conflict of interest. For example, if Congress effectively incorporated into the Act some of the fictitious criteria the Attorney General has established, the Attorney General less frequently would be bound to request the appointment of an independent counsel. The Attorney General then could consider legitimately subjective factors such as (1) the accused's state of mind;<sup>43</sup> (2) the prospect of conviction;<sup>44</sup> (3) fairness to the accused;<sup>45</sup> and (4) the interests of justice.<sup>46</sup> For example, it has been argued that the independent counsel statute should require the Attorney General to request the appointment of an independent counsel only if she identifies an actual conflict of interest rather than merely an apparent conflict of interest.<sup>47</sup> (This is effectively the standard the Attorney General is now applying.) Some reformers advocate raising this threshold for triggering the request for an independent

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40. See 28 U.S.C. § 592(b) (1994).

41. See Neil A. Lewis, *How to Build a Better Independent Counsel; Tripping over the Ghosts of Watergate*, N.Y. TIMES, May 17, 1998, § 4, at 1.

42. Katy J. Harriger, *The History of the Independent Counsel Provisions: How the Past Informs the Current Debate*, 49 MERCER L. REV. 489, 516 (1998).

43. See, e.g., TERRY EASTLAND, ETHICS, POLITICS AND THE INDEPENDENT COUNSEL 122 (1989).

44. See Harriger, *supra* note 39, at 2116.

45. See *id.*

46. See *id.*

47. See *id.*

counsel from “information sufficient to constitute grounds to investigate whether any [covered officer] *may have* violated any federal criminal law” to an actual violation of the federal criminal law<sup>48</sup> or as high as clear and convincing evidence.<sup>49</sup> (Attorney General Reno also appears to have applied the actual violation standard to justify her decision not to seek appointment of a campaign finance independent counsel.) While it might be appropriate for Congress to consider these modifications to the Act, the Attorney General’s current unilateral creation and imposition of such modifications exacerbates the very conflict of interest that the Act was designed to prevent.

Some reformers also have proposed repealing the provision that allows a majority of the House or Senate Judiciary Committee to file a written request that the Attorney General seek the appointment of an independent counsel and that mandates a written explanation for a decision not to do so. It is argued that eliminating this provision would remove the temptation to politicize the process.<sup>50</sup> This proposal, however, would deprive Congress of its very limited power to combat the conflict of interest that exists when the President can influence a portion of the investigatory process.

## B. Balance of Power

Intimately related to the conflict of interest issue and the reforms that affect it is the balance of power between the independent counsel and the President. The Act shifted the pre-1978 balance of power by decreasing the power of the President over investigations and by increasing the power of the former special prosecutor. Unlike other executive branch officials, who are removable by the President<sup>51</sup> at will, an independent counsel may be removed only for cause.<sup>52</sup> On the one hand, this may be a good thing: After all, the whole point of having an independent counsel is to have an investigator of high-level public corruption whom the President cannot control. On the other hand, it runs contrary to

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48. See, e.g., H.R. 3239, 104th Cong. § 2 (1996) (Rep. Dickey).

49. For approval of a higher threshold, see Julie O’Sullivan, *The Independent Counsel Statute: Bad Law, Bad Policy*, 33 AM. CRIM. L. REV. 463, 505 (1996), and Abner J. Mikva, *The Damage Starr Does: Now the Independent Counsel Process Itself Threatens the Integrity of Government*, LEGAL TIMES, Feb. 2, 1998, at 25.

50. See Harriger, *supra* note 39, at 2115-16.

51. The unitary nature of the executive power makes the President ultimately responsible to the people for all activities of the executive branch; one of his principal means of control over the executive branch is his power to remove its officers. See *Bowsher v. Synar*, 478 U.S. 714, 722 (1986) (explaining that “[t]he Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts”); *Humphrey’s Executor v. United States*, 295 U.S. 602, 627-28 (1935) (“The actual decision in the *Myers* case finds support in the theory that such an officer is merely one of the units in the executive department and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aid he is. . . . [T]he necessary reach of the decision goes far enough to include all purely executive officers.”); *Myers v. United States*, 272 U.S. 52, 132 (1926) (arguing that because he is “[m]ade responsible under the Constitution for the effective enforcement of the law, the President needs as an indispensable aid to meet [this responsibility] the disciplinary influence upon those who act under him of a reserve power of removal”).

52. See 28 U.S.C. § 596(a)(1) (1994).

the American system of a unitary executive, as well as to the separation of powers doctrine, to have an executive branch official who is not accountable to the President.<sup>53</sup>

Recently, a commentator astutely summarized the effect that a powerful and unaccountable independent counsel has on the powers of the President. Citing President Clinton's practice of litigating matters likely to create precedents unfavorable for the institution of the presidency, this writer argued, "A weakened president has become . . . a cost of having the law."<sup>54</sup> Indeed, Justice Scalia, in his thoughtful and prescient dissent in *Morrison v. Olson*, noted that some threats to our constitutional government—like the independent counsel statute—come "clad, so to speak, in sheep's clothing . . . [b]ut this wolf [the powerful and unaccountable independent counsel] comes as a wolf."<sup>55</sup>

Accordingly, a fundamental question policymakers must ask before attempting to fix the Act is whether having a truly independent prosecutor is worth the perceived dilution of the President's powers. In short, does society prefer a weakened President, with all the attendant threats to our constitutional government, or a President who cannot be easily investigated?

If Congress wants to strengthen the power of the presidency while maintaining the Act, it could revise how independent counsels are selected or simply narrow the power of the independent counsel. One suggested reform would have the Special Division of the court select the independent counsel from a list of candidates submitted by the Attorney General. Conversely, the Attorney General could be required to select an independent counsel from a list submitted by the Special Division of the court. The Attorney General and the Justice Department may be less inclined to view an independent counsel as an institutional or political threat if they have notice of the lawyers likely to be appointed.

Congress could limit the independent counsel's powers by restricting the number of officers or crimes covered by the Act, the number of investigations, the time periods subject to investigation, the budget of the independent counsel, or the independent counsel's power to report investigative material. For example, the Act could be amended to cover only the President, Vice President, and perhaps the Secretary of State, Secretary of Defense, Secretary of the Treasury, and the Attorney General.<sup>56</sup> Another proposal would define the cov-

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53. See *Morrison v. Olson*, 487 U.S. 654, 708-709 (1988) (Scalia, J., dissenting) (arguing that the majority's rationale supporting the independent counsel statute is "utter[ly] incompatib[le] . . . with our constitutional traditions").

54. Benjamin Wittes, *A Kiss of Death for Independent Counsels*, WASH. POST, Aug. 11, 1998, at A21.

55. 487 U.S. at 699 (Scalia, J., dissenting).

56. A recommendation with broad support, including that of Archibald Cox, is to require that an independent counsel withdraw from private law practice. In essence, the Office of the Independent Counsel would be a full-time job, thus giving the independent counsel an incentive to wrap up an investigation. See, e.g., Beth Nolan, *Removing Conflicts from the Administration of Justice: Conflicts of Interest and Independent Counsels Under the Ethics in Government Act*, 79 GEO. L.J. 1, 35-36 (1990) (arguing that "if independent counsels are to fulfill their mission of serving the public interest, of main-

ered officers more generally.<sup>57</sup> One of President Clinton's personal attorneys once suggested that a revised independent counsel statute should apply to certain high-level White House officials and certain Members of Congress.<sup>58</sup> The Act could be amended to cover only conduct occurring during the subject's tenure of office or during the political campaign that led to the tenure of office.<sup>59</sup>

The Act also could be amended to cover only allegations involving a substantial or felonious violation of the public trust while in office, such as bribery or conspiracy.<sup>60</sup> Thus, pre-election conduct—for example, much of the Whitewater scandal—would not be subject to investigation by the independent counsel.

Another possibility would be to prohibit an investigation from expanding to cover matters unrelated, or not demonstrably related, to the subject matter for which the Attorney General originally requested the appointment of an independent counsel.<sup>61</sup> For example, this would have prevented Attorney General Reno from requesting that Independent Counsel Kenneth W. Starr, who was appointed originally to investigate the Whitewater affair, be granted jurisdiction over the White House Travel Office and FBI-files controversies, which were arguably not demonstrably related to the original subject of jurisdiction.

In addition, Congress could restrict the virtually unlimited budgets and timeframes under which an independent counsel now operates.<sup>62</sup> Representative Jay Dickey (R.-Ark.) has proposed that an independent counsel be obliged to request an extension of investigatory authority and a supplemental appropriation for investigations that extend beyond two years. While this provision might ameliorate public impatience that accompanied both the Iran-Contra and Whitewater investigations, it could create simultaneously an incentive for delaying and obstructionist tactics by the subjects of the investigation.<sup>63</sup>

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taining confidence in government investigations and prosecutions, and of meeting the ordinary obligations of federal prosecutors, their conflict-of-interest obligations . . . [should be] more rigorous than those applied to ordinary government employees”).

57. See KATY J. HARRIGER, *INDEPENDENT JUSTICE: THE FEDERAL SPECIAL PROSECUTOR IN AMERICAN POLITICS* 208-10 (1992) (defining two groups of persons subject to independent counsel investigations: (1) “those who bear ultimate responsibility for law enforcement and to whom [Justice Department] investigators must ultimately answer”; and (2) “individuals . . . who have close personal relationships” with members of the first group).

58. See Robert S. Bennett, *How to Avoid Another Lawrence Walsh*, WALL ST. J., Apr. 28, 1993, at A21.

59. Senator Carl Levin (D-Mich.), a long-time advocate of the Act, supports this proposal. See Lewis, *supra* note 41.

60. See Harriger, *supra* note 39, at 2115-16.

61. See EASTLAND, *supra* note 43, at 121.

62. A criticism of the current Act is that independent counsel operations are funded through what is called a “permanent indefinite appropriation.” Act of Dec. 22, 1987, Pub. L. No. 100-202, § 101(a), 101 Stat. 1329, 1329-9 (establishing as part of Fiscal Year 1988 continuing appropriations “a *permanent indefinite appropriation* . . . within the Department of Justice to pay *all necessary expenses* of investigations and prosecutions by independent counsel appointed pursuant to [28 U.S.C. §§ 591-599]) (emphasis added).

63. See Lewis, *supra* note 41, at 1.

Finally, Congress could restrict the power of an independent counsel to publicly harm the targets of his investigation. The current process ensures that the public is aware from the beginning that a covered person is being investigated, a result that is practically inevitable when the Department of Justice must go to court to have a new independent counsel appointed for each investigation. The current statute puts the independent counsel and his target in the spotlight from the outset. But many of these investigations ultimately turn up nothing. In the meantime, the reputation of the investigated party can be frequently and indelibly harmed. Few who followed the investigations of Raymond Donovan, Secretary of Labor under President Reagan, will forget what he said after a federal independent counsel investigation determined that allegations of organized-crime connections were not prosecutable and after a New York state jury acquitted him on similar charges of corruption: "Which office do I go to to get my reputation back?"<sup>64</sup> Arguably, the continual imposition of such costs for allegations of misconduct will deprive the nation of many fine public servants. Some commentators argue that an independent counsel should have no greater power to "speak" than ordinary prosecutors. As a result, they urge that an independent counsel should either indict or not indict but should not have either the power or duty to issue a report.<sup>65</sup>

#### IV

##### ALTERNATIVES TO THE INDEPENDENT COUNSEL MECHANISM

###### A. Create Within the Federal Government a Permanent Office of the Independent Counsel, Office of Public Prosecutor, or Office of Special Counsel

Both former Senator Howard Baker (R.-Tenn.) and former President Gerald Ford had, at one point, supported the concept of a permanent independent counsel.<sup>66</sup> A permanent independent counsel patterned on the Baker-Ford model, like any other principal officer of the United States, would be appointed by the President by and with the advice and consent of the Senate and be subject to removal by the President at will. The advantages of a permanent inde-

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64. Selwyn Raab, *Donovan Cleared of Fraud Charges by Jury in Bronx*, N.Y. TIMES, May 26, 1987, at A1; *Jury Acquits Donovan of Larceny, Fraud*, CHI. TRIB., May 26, 1987, § 1, at 1. Donovan's statement has been widely quoted as illustrating the irrevocable effects of an independent counsel investigation on a target's reputation, even if no charges are eventually brought.

65. See Alexia Morrison, *The Law Has Independence and Accountability as Well*, WASH. POST, Feb. 22, 1998, at C3.

66. SENATE SELECT COMM. ON PRESIDENTIAL CAMPAIGN ACTIVITIES, FINAL REPORT, S. REP. NO. 93-981, at 1105-06 (1974) (mentioning Sen. Baker's proposal for a permanent Office of Public Prosecutor); WATERGATE REFORMS: COMMUNICATION FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING PROPOSED SUBSTITUTE LANGUAGE TO CORRECT CONSTITUTIONAL AND PRACTICAL PROBLEMS CONTAINED IN S. 495, THE WATERGATE REORGANIZATION AND REFORM ACT OF 1976, CURRENTLY PENDING BEFORE THE SENATE, H.R. DOC. No. 94-550, at 1-3 (1976) (advocating that a permanent Office of Special Prosecutor be created in lieu of the proposed case-by-case appointment of Justice Department special prosecutors).

pendent counsel office would, its proponents claim, include (1) broader prosecutorial perspective, thus eliminating the disproportionate focus that jurisdiction over only one matter produces; (2) institutional memory and history, which would presumably provide a source of precedent and guidance; (3) a careerist mentality that would reduce the tendency toward overzealous investigations; and (4) the power to control the initiation of any investigation—preliminary or otherwise.<sup>67</sup>

On the one hand, this proposal would increase the conflict of interest by giving the President the power to remove the independent counsel. However, Congress could offset much of the President's power to remove with political pressure, as it did in the Watergate scandal. On the other hand, the proposal would decrease the conflict of interest by allowing the independent counsel, instead of the Attorney General, to control the investigation from the beginning.

#### B. Make the Independent Counsel Temporary, but Answerable Directly to the President

Another proposal would allow, “[w]hen the public interest requires, the President [to] appoint, by and with the advice and consent of the Senate, a Special Counsel to investigate and prosecute matters within the jurisdiction assigned by the President.”<sup>68</sup> Thus, unlike a permanent office, the *ad hoc* nature of the office would be retained, but would be subject to standard presidential appointment procedures for superior constitutional officers. Essentially, the independent counsel would become a temporary distinct executive department, answerable directly to the President through its head. In one advocate's view,

[c]larifying the role of the President in [this] manner . . . would expedite, depoliticize, and enhance the credibility and effectiveness of special counsel investigations; and ensure that the Congress alone is directly responsible for overseeing the conduct of the President of the United States and determining, in the first instance, whether his conduct warrants a public sanction.<sup>69</sup>

A decision to deny the appointment would rest completely with the President. This proposal could be applied retroactively to allow President Clinton to appoint an independent counsel to investigate the campaign finance matter. After all, if the Attorney General's interpretation of the current independent counsel statute—in her reasoning—precluded appointment of an independent counsel, there is no reason why President Clinton, were this option made available to him, should not avail himself, the Justice Department, and the public of

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67. See Niles L. Godes & Ty E. Howard, *Independent Counsel Investigations*, 35 AM. CRIM. L. REV. 875, 896-897 (1998); Cass R. Sunstein, *Bad Incentives and Bad Institutions*, 86 GEO. L. J. 2267, 2281 (1998) (proposing that the “simplest approach would be to establish an office within the Department of Justice, perhaps modelled [*sic*] on the FBI, and entrusted with several sensitive jobs, including that of investigating reports of illegality involving a small band of officials: the President, the Vice President, and the Attorney General”); see also EASTLAND, *supra* note 43, at 131; Abbe David Lowell, *A Permanent Special Prosecutor*, LEGAL TIMES, Feb. 23, 1998, at 30 (discussing the advantages of a permanent special prosecutor).

68. Brett M. Kavanaugh, *The President and the Independent Counsel*, 86 GEO. L.J. 2133, 2146 (1998).

69. *Id.* at 2178.

the Act's benefits. This proposal also would clearly pass constitutional muster because the President would have the power to appoint and remove the independent counsel and the Senate would have the power to confirm the nominee.

On the one hand, this proposal would increase the conflict of interest by increasing the President's control over the investigatory process. On the other hand, the proposal would increase substantially Congress's ability to combat the effects of that conflict of interest by shifting the focus of political pressure from the Attorney General to the President, an official directly accountable to the people.

### C. Allow the Independent Counsel Statute to Expire

The proposal with growing support would allow the independent counsel statute to expire, thus restoring the pre-1978 conflict of interest and balance of power. The reasoning underlying this proposal is that the Act's problems outweigh its benefits and that regular Justice Department prosecutors can impartially investigate and prosecute high-level executive branch misconduct. If a genuine conflict of interest prevents such action, the Attorney General still could appoint a special prosecutor to work within the Justice Department or Congress could effectively wield its oversight, appropriations, and impeachment powers.<sup>70</sup> Ironically, in the campaign finance matter, Attorney General Reno effectively has argued that the Act, as she interprets it, *prevents* her from seeking the appointment of an independent counsel.<sup>71</sup> Arguably, the existence of the independent counsel statute and Attorney General Reno's curious interpretation of it have combined to thwart a truly independent investigation. If, by contrast, there were no independent counsel statute, the President and the Attorney General would have the legal authority to appoint a special prosecutor to investigate the campaign finance matter, and a special prosecutor likely would have been appointed long ago due to congressional pressure.

On the one hand, this proposal would create a greater conflict of interest, because the President would have more influence over the investigatory process. On the other hand, Congress could, as it did in the Watergate scandal,

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70. See EASTLAND, *supra* note 43, at vi-x; Gordon Crovitz, *The Criminalization of Politics*, in THE IMPERIAL CONGRESS: CRISIS IN THE SEPARATION OF POWERS 239-67 (Gordon S. Jones & John A. Marini eds., 1988); Harriger, *supra* note 42, at 515-16; Ronald J. Krotoszynski, Jr., *On the Danger of Wearing Two Hats: Mistretta and Morrison Revisited*, 38 WM. & MARY L. REV. 417, 472-74 (1997) (arguing that alternative means of achieving the objective of the independent counsel statute exist, such as "the appointment of a special prosecutor by the Justice Department, coupled with Congress's power of impeachment"); O'Sullivan, *supra* note 49, at 464-65; Russell M. Soloway, *The Tale of the Omnipotent Prosecutor: How Recent Events Expose Flaws in the Supreme Court's Analysis of the Independent Counsel Clause of the Ethics in Government Act*, 17 REV. LITIG. 611, 639-41 (1998) (noting that "[r]egulatory [independent counsels], who are appointed by the Attorney General and remain under the Executive Branch, have been the past solution. Their past successes provide an excellent record of proper prosecution as well as public faith in the investigation and final outcome.").

71. See Schmidt & Suro, *supra* note 35 (reporting that "[f]ar from investigating Clinton, Gore or other senior officials specifically covered by the act, Justice Department prosecutors determined at the start that the law prohibited them from looking at the activities of such 'covered persons' unless presented with 'specific' and 'credible' allegations that they had committed a crime").

place substantial pressure on the President, who is far more vulnerable to such pressure than is the Attorney General. There would be an increased conflict of interest, but a more powerful weapon to combat its effects.

#### D. Allow the President to Appoint the Independent Counsel

One attractive alternative that has been discussed in the Senate would seek to increase the pressure on the President to appoint an independent counsel in appropriate cases. This alternative would authorize the President to appoint, by and with the advice and consent of the Senate, an outside independent counsel. Moreover, it would authorize the President, in consultation with the outside counsel, to determine the jurisdiction of the counsel.

This is not a new and untested idea. There is a century-old tradition in the United States of presidential appointment of prosecutors from outside the Justice Department to investigate and prosecute high-ranking executive branch officials and close associates of the President. In 1924, for example, President Coolidge appointed, by and with the advice and consent of the Senate, two special prosecutors from outside the Justice Department to investigate the Teapot Dome scandal.<sup>72</sup> These special prosecutors successfully investigated the Secretary of the Interior and obtained a conviction for bribery.<sup>73</sup>

On the one hand, this alternative would include a greater conflict of interest, because the President would have more influence over the investigation and any prosecution. On the other hand, Congress could directly pressure the President, who would be solely responsible for the appointment decision. There would be an increased conflict of interest but a very powerful weapon to combat its effects.

## V

### CONCLUSION

At the core of the debate is a conundrum. To the extent that any prosecutor is accountable to the executive branch, there inevitably will be pressure not to investigate and prosecute aggressively scandals at the highest levels of government—an inherent conflict of interest. At the same time, the creation of a powerful and unaccountable prosecutor invites the specter of excessive investigation of dedicated public servants and weakens the presidency—a shift in the balance of power.

In crafting any legislative improvement over the current system, Congress should be mindful of Madison's instruction:

Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human

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72. See Ken Gormley, *An Original Model of the Independent Counsel Statute*, 97 MICH. L. REV. 601, 627-28 (1998).

73. See *id.*



nature that such devices should be necessary to control the abuses of government.  
But what is government but the greatest of all reflections on human nature?<sup>74</sup>

Because experience has shown too clearly that men are not “angels,” we must seek a solution that both inhibits the deleterious effects of a presidential conflict of interest and maintains a workable and effective balance of power.

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74. THE FEDERALIST NO. 51, *supra* note 1, at 322 (James Madison).