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THE INDEPENDENT COUNSEL STATUTE: BAD LAW, BAD POLICY

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INTRODUCTION

The Watergate scandal—and the crisis in public confidence in government it spawned—left us many legacies, one of which is the Independent Counsel ("IC") statute.[1] Over twenty years after the fact, the "lessons" of the scandal itself continue to be the dominant reference. It is time to evaluate the "lessons" of Watergate's legacies and, in particular, the IC mechanism.

Watergate involved allegations not only of misconduct by officials at the highest reaches of the Executive Branch, but also of the attempted perversion of the criminal justice process. This attempt clearly was not successful,[2] but the threat posed—highlighted in perhaps the most dramatic chapter in the Watergate saga, the "Saturday Night Massacre"[3]—was perceived as sufficiently serious to provoke a crisis in public confidence in the impartial administration of criminal justice. The IC statute was designed to reassure the public that persons of political importance to the President will not receive more favored consideration in criminal investigations and prosecutions than would the average citizen. To promote the appearance and reality of evenhanded justice, it was felt that such investigations and prosecutions must be removed from their traditional home in the Department of Justice (the "DOJ") and entrusted to someone not chosen by, or subject to the control of, the administration. The requisite independence is sought to be achieved in the statute through the judicial appointment of an IC who may be removed by the Attorney General only upon a showing, satisfactory to a reviewing court, of good cause or disability.

This essay suggests that although the IC statute was intended to address a perceived problem in the criminal process, it appears over time to have been

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1. The Independent Counsel Reauthorization Act of 1994, 28 U.S.C. §§ 591-599 (1994). The statute was first enacted as the Ethics in Government Act of 1978, Pub. L. 95-521, 92 Stat. 1867, and has been reenacted three times. *See* Pub. L. 97-409, 96 Stat. 2039 (1982); Pub. L. 100-191, 101 Stat. 1293 (1987); Pub. L. 103-270, 108 Stat. 732 (1994).

2. *See infra* notes 55, 161-64 and accompanying text.

3. *See infra* notes 161-64 and accompanying text.

adopted as *the* mechanism by which any questions about the criminal or ethical conduct of senior public officials can credibly be investigated and addressed. The consequences are twofold. First, the IC mechanism is overused; it is invoked to displace the DOJ in cases where the likelihood that political pressure will derail the appearance or reality of prosecutorial fairness is low. Second, in cases where the political stakes are high—where, for example, the allegations of misconduct concern the President or Attorney General—the growth of the perceived function and importance of the IC mechanism has heightened the political consequence of IC investigations. Given the public and press attention devoted to such investigations, partisans cannot afford to let the IC process simply unfold and the political chips fall where they may. Recent experience demonstrates that the favored means by which to blunt the political damage posed by an IC investigation is to attack as biased the IC, or the judges that appointed him. One of the "lessons" of the operation of the IC statute, then, is that in cases of potentially great political import it creates partisan incentives to generate the very "appearance" problems that the statute sought to erase. As a consequence, although the IC mechanism in general may enjoy public support, the political dynamics of the statute mean that in the high-profile cases at the heart of the statute partisans will seek to destroy that which the statute is designed to further: public confidence in the integrity of the results of the independent investigation.

The IC mechanism, then, seems to guard against "appearance" problems in lower profile cases where no such problems truly exist, for example in the Theodore Olson and Timothy Kraft affairs, but does not, in today's political climate, operate to guarantee the "appearance" of justice is the high-profile cases where its intervention may be justified, such as in Iran-Contra and Whitewater. Even if it does not operate to cure serious "appearance" problems, however, can the IC mechanism be justified as necessary to the "reality" of the equitable administration of the criminal laws? I would submit that the statute, and the political dynamic the statute generates, encourage ICs to employ their vast, unchecked powers to impose a harsher and potentially inferior brand of justice upon those subject to IC investigation. On balance, it seems to me that the IC statute is not worth its high cost in human, financial and systemic terms.

The power to enforce the laws applicable to all citizens should be returned to the Executive Branch. Abandoning the IC mechanism may not only correct some of the inequities and potential abuses in its operation, it will also reorient the relevant inquiry. When allegations of wrongdoing by senior public officials arise, the primary focus should not be whether those officials are subject to criminal penalty but rather whether they are qualified to serve in high public office. Ensuring the equitable imposition of criminal penalties, while a significant goal, is less important than informing the public of the relevant facts, letting the political processes work to address the problem and thus promoting public confidence that this democracy functions as it should. The IC statute in effect says—contrary to the

lessons of history—that these processes cannot work. Further, the statute entrusts this function to the IC, who, as a criminal prosecutor, is qualified only to assure fairness in the criminal process, not to explore public officials' fitness to serve the public. He cannot, and given the traditions and rules governing our criminal process, in fairness should not be asked to perform this larger function. Ultimately, it may be Congress or its delegees, not the IC, who should take the leading role in identifying for the public what happened and what should be done to remedy the problem, for now and in the future.

STATUTORY SUMMARY

The statute operates generally as follows. It sets forth a list of "covered persons" as to whom, Congress has determined, the DOJ is conclusively deemed to have a conflict of interest in criminal investigations because of the covered persons' political power or importance to the success of an administration. These "covered persons" include the President, the Vice President, cabinet level officials (including the Attorney General), certain high-ranking officials in the Executive Office of the President and the DOJ, the Director and Deputy Director of the Central Intelligence Agency, the Commissioner of the Internal Revenue Service, and certain officials involved in the President's national political campaign.[4]

When the Attorney General receives specific and credible[5] information "sufficient to constitute grounds to investigate"[6] whether these covered persons may have violated federal criminal law,[7] she is required to commence a "preliminary investigation."[8] After the Attorney General has completed the preliminary investigation, or 90 days have elapsed,[9] she must then report to the U.S. Court of Appeals for the District of Columbia Circuit, Special Division for Appointing Independent Counsels ("Special Division"), which was created "for the purpose of appointing

4. 28 U.S.C. § 591(b) (1994).

5. 28 U.S.C. § 591(d)(1)(A), (B).

6. 28 U.S.C. § 591(a).

7. *Id.* (excepting from the violations covered by the Act those classified as Class B or C misdemeanors and infractions). The triggering information may come from anyone, including Congress. The Act gives certain committees and Members of Congress the power "to request in writing that the Attorney General apply for the appointment of an independent counsel." § 592(g)(1). The Attorney General is required to respond to this request within a specified time but is not required to accede to it. § 592(g)(2).

8. 28 U.S.C. § 591(a). In certain circumstances, the Attorney General may, in her discretion, conduct preliminary investigations and refer matters to the Special Division for appointment of an IC where persons not expressly covered by the statute are implicated. Thus, when an Attorney General receives specific and credible information sufficient to constitute grounds to investigate a person *not* covered by the Act and she determines that an investigation or prosecution of the non-covered person by the DOJ may result in a "personal, financial or political conflict of interest," the Attorney General may conduct a preliminary investigation. § 591(c)(1). Further, when the Attorney General receives specific and credible information sufficient to constitute grounds to investigate whether a Member of Congress violated any federal law and she determines that it would be "in the public interest," she may conduct a preliminary investigation. § 591(c)(2).

9. 28 U.S.C. § 592(a)(1), (c)(1)(B) (1994).

independent counsels."[10]

If the Attorney General determines at the conclusion of the preliminary investigation that "there are no reasonable grounds to believe that further investigation is warranted," she will notify the Special Division and that Court "shall have no power to appoint an independent counsel with respect to the matters involved."[11] If, however, the preliminary investigation reveals that there are "reasonable grounds to believe that further investigation is warranted," then she "shall apply to the [Special Division] for the appointment of an independent counsel."[12] Under the statute, the Attorney General's decision to apply to the Special Division for the appointment of an IC is not reviewable "in any court";[13] the Attorney General's refusal to refer a case to the Special Division is also unreviewable.[14]

The Special Division has the sole discretion to select the IC to be appointed, and it is the court's responsibility to define that IC's prosecutorial jurisdiction.[15] In defining the IC's jurisdiction, the court is directed to "assure that the independent counsel has adequate authority to fully investigate and prosecute the subject matter with respect to which the Attorney General has requested the appointment of independent counsel, and all matters related to that subject matter."[16] This jurisdiction must "also include the authority to investigate and prosecute Federal crimes . . . that may arise out of the investigation or prosecution of the matter . . . including perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses."[17]

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10. 28 U.S.C. § 49 (1994); *see also* § 593(b)(1). The court consists of three circuit court judges or justices appointed by the Chief Justice of the United States.

11. 28 U.S.C. § 592(b)(1); *see also* Morrison v. Olson, 487 U.S. 654, 695 (1988) ("under the Act the Special Division has no power to appoint an independent counsel sua sponte; it may only do so upon the specific request of the Attorney General").

12. 28 U.S.C. § 592(c)(1) (1994).

13. 28 U.S.C. § 592(f).

14. *See, e.g., Morrison*, 487 U.S. at 695 ("the courts are specifically prevented from reviewing the Attorney General's decision not to seek appointment"); *In re* Olson, 818 F.2d 34 (D.C. Cir. Indep. Couns. Div. 1987) (Attorney General's decision not to seek appointment of an IC under section 592(b) was final and Special Division had no authority to override this determination through referral of a "related" matter under section 594(e)); H.R. CONF. REP. No. 452, 100th Cong., 1st Sess. 22 (1987) ("The conferees agree that an Attorney General's determinations under the independent counsel law are not subject to judicial review. This includes such determinations as whether . . . to request appointment of an independent counsel. . . . An exception is the Attorney General's decision to remove an independent counsel from office."); United States v. Tucker, No. 95-3268, 1996 WL 112414, at *4 (8th Cir. March 15, 1996) (in holding that Attorney General referrals of matters to an IC under section 594(e) are not subject to judicial review, noting congressional intent "that unreviewability of the Attorney General's decisions is the rule when the independent counsel law does not expressly provide otherwise"); *cf.* Dellums v. Smith, 797 F.2d 817, 823 (9th Cir. 1986) (no judicial review is available of decisions by the Attorney General not to conduct preliminary investigations); Banzhaf v. Smith, 737 F.2d 1167 (D.C. Cir. 1984) (en banc) (per curiam) (same).

15. 28 U.S.C. § 593(b)(1) (1994).

16. 28 U.S.C. § 593(b)(3).

17. *Id.* Under section 593(c), the jurisdiction of an independent counsel may be expanded to include matters unrelated to his original jurisdiction as defined by the Special Division. First, upon referral of a matter to the

With respect to all matters within the IC's jurisdiction, the statute grants the IC "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice."[18] These functions include: conducting grand jury proceedings; engaging in civil and criminal litigation, including court proceedings and appeals; making applications for witness immunity, warrants, subpoenas or other orders; framing and signing indictments; and initiating and conducting prosecutions.[19]

As to the means for carrying out an IC mandate, the IC has the power to "appoint, fix the compensation, and assign the duties of such employees as such independent counsel considers necessary (including investigators, attorneys and part-time consultants)."[20] He also has a virtually unlimited budget; the DOJ is required to pay "all costs relating to the establishment and operation" of any IC office.[21] Further, the statute imposes no limitation on the duration of an IC's

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Special Division by the Attorney General, the Special Division may expand the prosecutorial jurisdiction of an existing IC in lieu of the appointment of another IC. § 593(c)(1). Second, if an IC discovers possible criminal violations that are not related to his jurisdictional mandate, he may submit the information to the Attorney General. If, after conducting a preliminary investigation and giving "great weight to any recommendations of the independent counsel," § 593(c)(2)(B), the Attorney General determines that there are reasonable grounds to believe that further investigation is warranted, the Special Division "shall expand the jurisdiction of the appropriate independent counsel to include the matters involved or shall appoint another independent counsel to investigate such matters." § 593(c)(2)(C).

In section 594(e), the statute also includes a "procedure for an Independent Counsel to confirm whether his jurisdiction, as conferred by the Special Division upon the Attorney General's application, extends to a particular matter. If an Independent Counsel believes that a matter is related to (and therefore encompassed within) the jurisdiction defined by the Special Division, he may request that the Attorney General or the Special Division refer that matter to the Independent Counsel." Brief of Appellant at 21, United States v. Tucker, No. 95-3268, 1996 WL 112414 (8th Cir. March 15, 1996). If the Attorney General or the Special Division, as the case may be, determines that the matter is "related," and as such that it falls within the Independent Counsel's existing jurisdiction, she may formally refer investigation and prosecution of the matter to the Independent Counsel. 28 U.S.C. § 594(e) (1994). When the Special Division makes such a referral under section 594(e), it can reinterpret or clarify the original grant of jurisdiction to the IC, but cannot expand that jurisdiction; expansion of jurisdiction to include matters not related to the original matter referred may only be made by the Special Division, under section 593(c)(2), at the request of the Attorney General. *See* Morrison v. Olson, 487 U.S. 654, 680 n.18, 685 n.22 (1988).

18. 28 U.S.C. § 594(a) (1994). The Attorney General, however, retains "direction or control as to those matters that specifically require the Attorney General's personal action" under the wiretapping statute, 18 U.S.C. § 2516 (1994). 28 U.S.C. § 594(a) (1994).

19. 28 U.S.C. § 594(a)(1)-(10).

20. 28 U.S.C. § 594(c) (1994).

21. *Id.* § 594(d)(2) (1994); *see also* DAVID L. CLARKE, GAO FINANCIAL AUDIT—EXPENDITURES BY SIX INDEPENDENT COUNSELS FOR THE SIX MONTHS ENDED MARCH 31, 1995, GAO/AIMD-95-233 1 (September 29, 1995) ("In 1987, Public Law 100-202 established a permanent, indefinite appropriation within Justice to fund expenditures by independent counsels."); S. REP. NO. 101, 103d Cong., 1st Sess 27-29 (1994) (aim of the 1994 statutory cost "controls" amendment "is to codify the responsibility of independent counsels to spend federal funds prudently and, as much as possible, in the same manner as other federal prosecutors" but those limits are not enforceable against the IC by those under investigation, the DOJ, or the Administrative Office charged with administering them; "[f]inal decisionmaking authority on expenditures . . . thus lies solely with independent counsels who are accountable for them"); H.R. REP. NO. 224, 103d Cong., 1st Sess. 43 (1993) (additional views of Rep. Fish) ("Despite the use of misleading subtitles like 'Added Cost Controls', [the 1994 Reauthorization

investigation; the only temporal limitation is the statute of limitations generally applicable to the alleged violation at issue.[22]

The IC "may be removed from office, other than by impeachment and conviction, only by the personal action of the Attorney General and only for good cause, physical or mental disability . . . , or any other condition that substantially impairs the performance of such independent counsel's duties."[23] In the event the Attorney General removes an IC under this standard, she must file a report justifying her action to the Special Division and Congress,[24] and the Attorney General's action is subject to judicial review in federal court.[25]

The IC is required to cooperate with Congress in the exercise of its oversight jurisdiction over the conduct of the IC investigation[26] and is subject to certain reporting requirements.[27] Most notably, when the IC believes that he has completed his task and is ready to terminate his office, he must file a final report with the Special Division "setting forth fully and completely a description of the work of the independent counsel, including the disposition of all cases brought."[28] Although the decision whether to release publicly the final report is up to the Special Division,[29] these reports have regularly been made public at the conclusion of IC investigations.

THE APPEARANCE OF EQUAL JUSTICE

The primary political impetus behind the Independent Counsel legislation was "public opinion polls and the elections of 1974 and 1976 [indicating] that some action should be taken to help restore public confidence in government after Watergate."[30] Bolstering public credibility in the entire government being beyond

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Act] actually allows independent counsels to continue to enjoy virtually unlimited budgets. The expenses of all independent counsel would remain under a permanent indefinite appropriation and, thus, totally outside the scrutiny of the annual appropriations process.").

22. *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 672 (1988) ("[t]here is concededly no time limit on the appointment of a particular counsel").

23. 28 U.S.C. § 596(a) (1994); *see also* § 596(b)(2) (1994) (the Special Division may terminate an investigation only where the matters within the IC's jurisdiction are "completed or so substantially completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions").

24. 28 U.S.C. § 596(a)(2).

25. 28 U.S.C. § 596(a)(3).

26. 28 U.S.C. § 595(a)(1) (1994).

27. An independent counsel must file an expenditure report with the Special Division every six months. 28 U.S.C. § 594(h)(1)(A) (1994); S. REP. No. 101, 103d Cong., 1st Sess. 15 (1993). Further, an IC must submit annual reports on his activities to Congress to justify his expenditures. 28 U.S.C. §§ 595(a)(2) (1994). He must also advise the House of Representatives of any substantial, credible evidence that may constitute grounds for impeachment. § 595(c) (1994).

28. 28 U.S.C. § 594(h)(1)(B) (1994).

29. 28 U.S.C. § 594(h)(2).

30. KATY J. HARRIGER, INDEPENDENT JUSTICE: THE FEDERAL SPECIAL PROSECUTOR IN AMERICAN POLITICS 72 (1992); *see also id.* at 44-45, 50-54 (discussing public opinion polls in the seventies indicating an increasing lack of faith in the government and congressional reaction).

the power of legislation, Congress addressed the particular problem Watergate presented by drafting legislation whose "basic purpose . . . is to promote public confidence in the impartial [criminal] investigation of alleged wrongdoings by government officials."[31] The statutory mechanism does not necessarily reflect a congressional judgment that DOJ attorneys are incapable of conducting a fair and impartial criminal investigation of any matter involving any covered person.[32] Rather, it reflects the view that "[t]he appearance of justice is just as important as justice itself, in terms of maintaining public confidence in our judicial system."[33]

It is important to understand as an initial matter what Congress' evolving notion of the appearance of equal justice and of "independence" demands. In examining the working of the statute over time, Congress became concerned that, in removing the potential for favored treatment of administration officials, the IC statute actually operated to subject public officials to a harsher, or at least different, brand of justice than the average citizen.[34] Congress has responded to this perceived unequal treatment by amending the statute to encourage ICs to make their investigations look as much like DOJ investigations as possible—absent, of course, the oversight of the Attorney General. For example, the modern incarnation of the statute encourages the IC to borrow his prosecutorial staff from the DOJ because "Justice detailees provide a ready source of the cost-effective, up-to-date and experienced personnel that independent counsels need for a quick and solid performance."[35] The statute further directs the IC to adhere to the policies of the

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31. S. REP. 496, 97th Cong., 2d Sess. 4 (1982).

32. *See, e.g.*, S. REP. 496, 97th Cong., 2d Sess. 6 (1982) ("The intent of the special prosecutor provisions is not to impugn the integrity of the Attorney General or the Department of Justice. Throughout our system of justice, safeguards exist against actual or perceived conflicts of interest without reflecting adversely on the parties who are subject to conflicts."); 139 CONG. REC. S15,846-48 (daily ed. Nov. 17, 1993) (remarks of Sen. Cohen) (emphasizing "appearance issue"); 128 CONG. REC. S20,819 (daily ed. Aug. 12, 1982) (remarks of Sen. Rudman) ("I must point out that the act is not intended to imply any mistrust or doubt in the veracity or impartiality of our U.S. Attorney General. Indeed, I do not doubt that they would properly investigate allegations of malfeasance by high ranking officials in the executive branch. Instead, the act is intended to prevent potential conflicts of interest that would give rise to an appearance that the Attorney General would be incapable of impartially investigating allegations. Essentially, it prevents a problem before it arises.").

33. 139 CONG. REC. S15,847 (daily ed. Nov. 17, 1993) (remarks of Sen. Cohen).

34. *See* 128 CONG. REC. S20,820 (daily ed. Aug. 12, 1982) (remarks of Sen. Levin) ("[T]he special prosecutor provisions must reflect our best effort to balance two competing interests: to insure that persons in high office are prosecuted for their crimes without political favoritism, and to insure that these same persons are not unfairly prosecuted solely because of their positions. . . . Our goal should be that high public officials be treated no better and no worse than other citizens."); *see also* S. REP. NO. 101, 103d Cong., 1st Sess. 25-28, 31, 32 (1993) (discussing need to avoid potential abuse by IC); H.R. REP. NO. 224, 103d Cong., 1st Sess. 20 (1993) (same); S. REP. NO. 496, 97th Cong., 2d Sess. 4, 12, 16-17, 19, 22 (1982) (same).

35. S. REP. NO. 101, 103d Cong., 1st Sess. 25-26 (1993) ("[An] amendment was adopted which would clarify the ability of Justice Department employees to be detailed to an independent counsel's staff if requested by that independent counsel. This provision was added, again, to ensure that independent counsel cases are handled as much like other federal prosecutions as possible and to make it clear that independent counsels should avail themselves of the legal, investigatory and administrative expertise at the Department."); *see also* 28 U.S.C. § 594(d)(1) (1994) (authorizing IC to request assistance from DOJ).

DOJ[36] and counsels him to confer with the DOJ[37] and local United States Attorneys[38] for guidance as to the content of DOJ policies. Congress has also made the judgment that "it is not only permissible under current law, but appropriate for the Attorney General to include [the DOJ's views of the potential prosecutorial merit of the referred case] in filing[s] requesting appointment of an independent counsel, since they will assist independent counsel in complying with Justice Department law enforcement policies and operating in a manner similar to other federal prosecutions."[39]

This obviously reveals just how thin the "appearance" of independence from the DOJ need be (as well as underscoring the apparent congressional belief that DOJ investigations are problematic only in appearance, not in reality). Congress would essentially like—but does not require—that IC investigations proceed as a DOJ investigation, staffed by experienced and professional DOJ personnel, supported by DOJ resources, and run according to DOJ policies, except for the man or woman at the top—who, for appearances sake, must be "independent." The achievement of the purposes of the statute depends upon the public perception that this one individual—the IC—is truly independent of political forces; only then will the public accept as just the resolution of a politically charged case. Does the statutory mechanism in fact ensure that the IC is viewed as independent? Perhaps in theory but, I submit, not necessarily in practice in those cases at the heart of the statute: the greater the political sensitivity of a case and thus the perceived political importance of the results of the IC investigation, the greater are the incentives to impugn the independence and ability of the IC.

Although the IC mechanism was born of and responsive to a perceived crisis of confidence in the administration of criminal justice, its notoriety has purchased it a broader function. The public perception seems to be that when an allegation of wrongdoing of any kind is made against a high-ranking political figure and is pressed by his or her political foes, someone impartial must sort it out. The view appears to be—the Watergate Committee's success notwithstanding—that congressional investigations are too political to be entirely trustworthy. Accordingly, demands for an IC arise virtually whenever allegations of misconduct by senior administration officials surface, whether those allegations concern conduct that is simply ethically suspect or is potentially proscribed by criminal law. In short, the IC mechanism appears to have been transformed from a means to ensure the appearance of impartiality in criminal investigations to *the* means by which to expose and root out wrongdoing by politically important officials.

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36. 28 U.S.C. § 594(f)(1) (1994).

37. *Id.*

38. 28 U.S.C. § 594(a)(10) (1994); *see also* S. REP. 496, 97th Cong., 2d Sess. 16-17, 22 (1982) (amendment to require compliance with DOJ policies and to authorize consultation with U.S. Attorney in order to ensure that officials receive the same treatment as ordinary citizens).

39. S. REP. NO. 101, 103d Cong., 1st Sess. 22 (1993).

The very importance of the IC statute itself ironically may prove the statute's downfall. Quite simply, given the visibility of the statute, and press and public interest in its workings, the political consequences of a referral and either an indictment or a declination in a high-profile case are too serious for political actors to leave the process unattended. Politics today demand that doubt be cast on the independence, judgment or ability of an IC where the actions of that IC may interfere with partisan interests. The object—and predictable consequence—is to undermine what the statute seeks to promote: public confidence in the integrity of the results of an IC's investigation in politically sensitive cases.

Take first the appointment process. The appointment of the IC by a panel of unelected and politically unaccountable (and thus, presumably, apolitical) judges is the primary means by which the statute seeks to remove any suggestion of administration influence and to thus enhance public confidence in the results of politically charged investigations. The apparent assumption—one that in other contexts has increasingly come under public attack by influential persons such as Senator Dole and New York Governor Pataki—is that federal judges, once their political appointment and confirmation process is behind them, are purged of any suspect political affiliation. I have no doubt that the three-judge panel responsible for selecting ICs, the Special Division, does in fact exercise its prerogatives with an impartial eye to obtaining a truly independent counsel. The central inquiry here, however, is not about realities, it is about appearances. Recent events demonstrate that, once a case has become heavily politicized, the judiciary will not be exempted from charges of "appearance" problems.

In January 1994, Attorney General Janet Reno was faced with daily demands—led by a chorus of Republicans—to appoint an IC to investigate Whitewater and the Vincent Foster suicide. The IC statute had lapsed due to opposition by Republican critics of Judge Lawrence Walsh's Iran-Contra investigation. Attorney General Reno, who is a supporter of the IC statute and wanted to await its reauthorization, finally acceded to Republican demands and appointed an IC pursuant to DOJ regulations.[40] Attorney General Reno's choice, Robert B. Fiske, Jr. was widely lauded—he had a record while serving as the U.S. Attorney in New York as a "tough-minded but judicious prosecutor,"[41] and is an "establishment lawyer with Republican credentials and a reputation for unimpeachable integrity."[42] Those bipartisan accolades largely evaporated when Mr. Fiske issued a

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40. 28 C.F.R. § 600.1 (1995) (regulatory authority for appointment of independent counsel); 28 C.F.R. § 603.1 (1994) (Attorney General's definition of Mr. Fiske's authority by final rule).

41. Michael Isikoff, *Whitewater Special Counsel Promises 'Thorough' Probe*, WASH. POST, Jan. 21, 1994, at A1 (" 'If you were creating the ideal special counsel from a test tube, you would come up with somebody who looked exactly like Bob Fiske in experience, reputation and abilities,' said Arthur Liman"; "Republican former attorney general Dick Thornburgh called Fiske a 'first-rate lawyer' who was a 'solid performer' as a U.S. Attorney.").

42. Gerard Lynch & Philip Howard, *Special Prosecutors: What's the Point?*, WASH. POST, May 28, 1995, at C7.

report concluding that Vincent Foster had committed suicide. Political opponents of the administration immediately went on the attack.[43] Suddenly, the regulatory counsel mechanism—which the Republicans had demanded be invoked—was faulty; suddenly, Republican prosecutor Robert Fiske was suspect.

On June 30, 1994, the IC statute, which had by now, not surprisingly, gained Republican converts, was reauthorized. Attorney General Reno referred the Whitewater matter to the Special Division. The Special Division was faced with a choice. Clearly, as even members of Congress had noted when passing the 1994 IC statute, the most time- and cost-efficient choice would have been to reappoint Mr. Fiske, who had been working full-time on the matter for months and who was well along in his investigation.[44] Precedent also supported the move; while the constitutional challenge to the IC statute was pending before the courts, statutory ICs in the Iran-Contra and Nofzinger matters accepted dual appointments by the Attorney General as regulatory ICs.[45] Thus, one could certainly argue that by reappointing Mr. Fiske and thus affixing its "independent" imprimatur on him, the Special Division could have removed any "taint" caused by his initial appointment by the Attorney General. Instead, the Special Division concluded that the appearance of impartiality demanded the appointment of a new counsel.[46] It selected as the statutory IC Kenneth Starr, who reportedly also had been on Attorney General Reno's short list for the appointment of a regulatory Whitewater IC.[47] Judge Starr is a respected lawyer with a distinguished record whose strong Republican credentials would presumably insulate the choice—and the ensuing investigation—from any politically motivated attack. Did it?

Given the political dynamics involved, it could not and did not. "Democrats . . . complained first about Mr. Starr's conservative Republican background, then about his public opposition to President Clinton's claim of immunity in a sexual harassment suit."[48] As the press reported, "[p]ast appointments of independent counsels have sometimes caused grumbling but rarely has an appointment pro-

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43. In July 1994, Senator Lauch Faircloth, "who was highly critical of Mr. Fiske's report on the initial phases of his investigation, wrote to Ms. Reno, . . . rais[ing] questions of possible conflict"; subsequently ten other conservative Republican lawmakers wrote directly to the Special Division's head, Judge David B. Sentelle, asking the panel to replace Mr. Fiske. David Johnston, *Appointment in Whitewater Turns Into a Partisan Battle*, N.Y. TIMES, Aug. 12, 1994, at A1

44. 140 CONG. REC. S6,376 (daily ed. May 25, 1994) (remarks of Sen. Levin).

45. *See* Brief on Behalf of Amicus Curiae United States at 2, 31, *In re* Sealed Case, 838 F.2d 476 (D.C. Cir. 1988) (Nos. 87-5261, 5264, 5265), *rev'd*, Morrison v. Olson, 487 U.S. 654 (1988).

46. *See In re*: Madison Guaranty Sav. & Loan Ass'n, No. 94-1, Order at 3 (D.C. Cir. Indep. Couns. Div. Aug. 4, 1994) (The Court "has determined that [appointment of Mr. Fiske as IC] would *not* be consistent with the purposes of the Act. This reflects no conclusion on the part of the Court that Fiske lacks either the actual independence or any other attribute necessary to the conclusion of the investigation. Rather, the Court reaches this conclusion because the Act contemplates an apparent as well as an actual independence on the part of the Counsel.").

47. *See* Michael Isikoff, *N.Y. Lawyer Fiske Is In Line To Head Whitewater Inquiry*, WASH. POST, Jan. 20, 1994, at A3.

48. Johnston, *supra* note 43, at A1.

duced so much protest about the partisan loyalties of the prosecutor."[49] The politicization of the appointment process itself reached new heights, however, when questions were raised about the very persons intended to guarantee the independence and impartiality of IC choices: the Special Division judges.

The press broke the story of a luncheon between the head of the Special Division panel, Judge David B. Sentelle, and Senator Lauch Faircloth, a conservative Republican of North Carolina and "a leader of efforts to oust Robert B. Fiske, Jr. as the Whitewater prosecutor," while the panel was still considering its choice of IC.[50] Not unexpectedly, it was now the Democrats who took the offensive. Senator Carl Levin, chairman of the subcommittee with jurisdiction over the IC law, urged the Special Division to ask Judge Starr for an accounting of his recent partisan activities and to issue an opinion stating whether he could fairly investigate a Democratic President.[51] Thirty-nine House Democrats then sent a letter to Judge Sentelle urging him to reconsider his panel's selection and expressing doubt about the impartiality of the Special Division as well as about Judge Starr's independence.[52]

This drama has yielded many casualties, not least of which is the IC mechanism. Certainly Robert Fiske was treated shabbily. Judge Starr, who was never alleged to have been present at the suspect luncheon or to be actually involved in any political machinations, may be the continuing victim. Most fundamentally, however, a precedent has been set: examination of the composition and political orientation of the Special Division is now fair game for political pundits. The Special Division, presumably keenly aware of its vital role in ensuring the appearance of impartiality, will have a tough row to hoe. For fear of the appearance of favoring the subject, it may well feel obliged to select someone who is not a member of the party in power in the White House. But to avoid appearing part of a witchhunt, it must not select someone from the opposing party who is perceived to be too political or too hostile to the President (while also avoiding luncheon meetings). That the Special Division will even have to consider the political implications of its choice is perhaps evidence that the game is lost before it begins.

Recent experiences with IC investigations demonstrate further that even if the initial appointment of an IC to investigate a politically sensitive case receives bipartisan support, the actual conduct of the investigation will inevitably be caught in the partisan cross-fire. The impossibility of creating the appearance of a truly apolitical investigation in politically charged cases may find its genesis in the IC statute itself. The statute, by its very existence, endorses in the public mind whatever questions it held about professional government prosecutors' ability to

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49. *Id.*

50. *Id.*

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

52. *Id.*

achieve a just and unbiased result where politics overshadow a particular case.[53] The statutory presumption that political considerations are sufficiently powerful to override professional and ethical obligations in high-profile cases is not, however, logically confined to DOJ personnel. The high visibility and political importance of IC investigations has encouraged politicians to apply it publicly to ICs when it is in their partisan interest to do so.

The administration and its allies obviously have every interest in appearing cooperative while attacking as biased or incompetent any IC who actually uncovers criminal conduct worthy of indictment. Conversely, the opposing political party has every incentive to keep the case in the news, to press for a result discrediting the person under investigation and the administration with which that person is affiliated, and to create grave questions about the impartiality or judgment of an IC who exonerates the subject. As a practical matter, once a case has been officially stamped too politically charged for a professional DOJ prosecutor to handle, the case has been rendered too politically charged for partisans to allow the judgment of any prosecutor to be accepted without question.

Perhaps the best case in point is the Iran-Contra investigation. The claim that the appointment of a nonpartisan figure of great repute will ensure that the investigation appears to be "above politics" is refuted by two words: "Lawrence Walsh."

> The Iran-contra investigation proved the impossibility of taking a politically sensitive case 'above politics.' Here we had a special prosecutor of the president's own party, with a long history of moderation and professionalism, a respected and independent figure with a lifetime of achievement in law practice and public service. Surely, his conclusions would be respected by all.
>
> Hardly. When Judge Walsh began to conclude the president's men were crooks, he was vilified by the president's allies (spearheaded by the *Wall Street Journal*) as politically motivated and biased. Judge Walsh was predictably defended as impartial by Democrats, but he was no more able to escape imputations of bias than regular prosecutors would have been. Indeed, Judge Walsh became a political symbol.[54]

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53. As Former Attorney General Katzenbach stated, the law,

> contrary to its purpose, 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 officials the Attorney General cannot be trusted to enforce the law objectively . . . and that in all such instances judges should appoint Independent Counsel to replace the Attorney General.

S. REP. No. 101, 103d Cong., 1st Sess. 11 (1993); *see also id.* (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."); Joseph diGenova, *Investigated to Death*, N.Y. TIMES, Dec. 5, 1995, at A25 (former Independent Counsel) ("When the public is told again and again that the Justice Department cannot be trusted to investigate a matter, the executive branch is hurt.").

54. Lynch & Howard, *supra* note 42, at C7; *see also, e.g.*, Robert H. Bork, *Against the Independent Counsel*, COMMENTARY, Feb. 1993, at 22 (discussing Judge Walsh's indictment of Secretary of Defense Caspar Weinberger

The irony is inescapable that 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.

THE FAIR, EQUITABLE AND IMPARTIAL ADMINISTRATION OF JUSTICE

Even if the statute may, in actual practice, encourage the creation of as many "appearance" problems as it eliminates in politically sensitive cases, perhaps the IC statute can actually be justified in that it will likely, in the average case, provide "better justice" than is available through other means.

It is my belief that it does not. As the following discussion illustrates, the statute gives an IC an excess of time, means and incentive to pursue a far greater number of people, over a wider investigatory landscape, with less justification, and at greater human, financial and institutional cost than is reasonably necessary to promote the reality, or appearance, of evenhanded justice. In most cases, DOJ prosecutors, who have a necessarily broader focus and are privy to a store of institutional knowledge and experience, are better positioned to exercise their discretion in a professional and equitable manner, and are accountable if they do not.

"Covered Persons"

As explored above, in cases where considerations of politics may be perceived to compromise the Executive Branch investigation of high-ranking officials, the invocation of the IC mechanism may be justified but may also ultimately be counterproductive. I would argue further that where the political consequence of a particular case is not serious, the application of the IC statute is not needed. In presumptively covering persons by reference to their office and not distinguishing among cases by reference to their actual political importance to the President or the success of an administration, however, the heavy artillery of the IC statute is often brought to bear upon persons and cases that do not warrant it in terms of any realistic likelihood of the actual or perceived subversion of justice.

While acknowledging that even during Watergate DOJ employees acted professionally, proponents of broad presumptive coverage argue that not in every case

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four days before the 1982 presidential election on a count that was later dismissed, and asserting that "[a]ny regular prosecutor, accountable to a superior, would undoubtedly be called on the carpet, and probably discharged, for what looks remarkably like a partisan attempt to influence the outcome of a presidential election"), *reprinted in* 139 CONG. REC. S15,870 (daily ed. Nov. 17, 1993); *Dole Urges Inquiry About Prosecutor*, N.Y. TIMES, Nov. 9, 1992, at A13 ("Speaking on the CBS program 'Face the Nation,' Mr. Dole, the Senate minority leader, called the special prosecutor's office 'a Democratic hotbed of Democratic activist lawyers.' He argued that a special prosecutor from the Justice Department should be designated to determine 'whether or not politics played any part' in a new indictment of Caspar W. Weinberger.").

can one count upon having persons of integrity making the hard choices faced by the justice department officials and special prosecutors in Watergate. Their apparent belief is that an ounce of prevention is worth a pound of cure. This is an issue that empirical study is unlikely to resolve; whether the Attorney General can be counted upon to refer politically sensitive matters involving "covered persons" on an ad hoc basis and whether the average DOJ prosecutor will in future generally act responsibly in such investigations cannot be demonstrated, nor can public confidence in hypothetical case results be tested. Where one stands on the question of presumptive coverage, then, depends to a certain extent upon one's perspective and experience. My own conclusion (which I freely concede is colored by my experiences in the Southern District of New York, where Assistants' political affiliations were unremarked and completely irrelevant to the assignment or conduct of cases) is that it is far more reasonable to assume that Executive Branch prosecutors will be fair and professional than not. Further, as is argued at greater length within, the ounce of prevention bought by over-use of the statute may well be more costly than should be acceptable and the cure—letting the political processes work to correct any problems—may have its own value.

Watergate demonstrated both that it is reasonable to trust "regular" DOJ prosecutors to act professionally even in the most politically sensitive case,[55] and that the system (Congress, the Attorney General, the public and the press) can in general be counted upon to ensure that the criminal system works as it should.[56] Examples of indifference to political considerations in the U.S. Attorneys' Offices also are not hard to come by.[57] While one cannot discount entirely the possibility

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55. Ironically, had Special Counsel not been appointed in Watergate, the scandal may have proved the best example of why such counsel is unnecessary. According to those involved, the initial investigation of the Watergate break-in was conducted by Earl Silbert and his colleagues in the U.S. Attorney's Office for the District of Columbia. Bork, *supra* note 54, at S15,868. These Executive Branch prosecutors had issued a wide-ranging subpoena for White House documents and were researching the constitutionality of indicting a President before impeachment. *Id.* However, when Elliott Richardson was nominated as the new Attorney General, Congress urged him to appoint what was then called a special prosecutor to get to the truth. He agreed and appointed Archibald Cox under DOJ regulatory authority. *Id.* Mr. Silbert gave Mr. Cox about 90 type-written pages outlining the conspiracy and the evidence. *Id.* According to then Solicitor General Bork, "[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." *Id.*

56. See *infra notes* 161-64 and accompanying text.

57. Spiro Agnew was brought down by Assistant U.S. Attorneys in Maryland. John Mitchell and Maurice Stans were indicted by regular DOJ employees in New York. "It was one of 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., "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," Kenneth J. Cooper, *U.S. Attorney, A Democrat, Brings Judicial Experience to the Prosecutor's Task*, WASH. POST, June 1, 1994, at A15, who was counted as critical to the legislative initiatives of the administration that appointed Holder. *See id.* (Pres. Clinton was counting on Rep. Rostenkowski to guide health care legislation through Congress); Kenneth J. Cooper, *A High Profile and High Stakes for Prosecutor*, WASH. POST, April 29, 1994, at A25 (same).

of an Executive Branch prosecutor responding improperly to political incentives or pressures, experience demonstrates that it is more reasonable to assume that she will not do so than that she will. Further, when one examines the incentives of professional prosecutors and federal investigators, it does not make sense to presume that the political credentials of such persons as the Commissioner of the IRS, the Deputy Director of the CIA and the entire cabinet mean that investigations into allegations of wrongdoing by those persons—particularly allegations that may concern conduct unrelated to their official duties—cannot be handled fairly by the DOJ and the U.S. Attorneys' Offices.

Regardless of the scope or target of a prosecutor's ambitions, if she is reasonably bright she will know that there is no surer way of blighting a promising legal career than being implicated in any activity smacking of the perversion of justice for political ends. It is exceedingly unlikely that a prosecutor would undertake career suicide in consideration for the possible future benevolence of Henry Cisneros, Theodore Olson, Hamilton Jordon, or Michael Espy, or the questionable gratitude of their superiors. Indeed, if ambition plays a role, it probably would be better served by indicting a big name official than by exonerating him.

Even if one assumes the worst about the prosecutors assigned to the investigation of a "covered person," it is important to recognize that federal prosecutors cannot act in complete isolation and secrecy. Those prosecutors with a political axe to grind will be surrounded by those who do not. Further, the FBI or other governmental investigators will be involved. The likelihood of a successful coverup grows exceedingly dim when one considers that federal investigators are hired and promoted for their investigatory achievements, not their political views, and that their self-interest most decidedly counsels against being party to a betrayal of their office.

One could, of course, argue that unethical prosecutors and agents may decide that the risks of discovery and exposure are small and that the rewards to be garnered from grateful politicians are worth the risk. Assuming that such rewards would be politically feasible and not in and of themselves evidence of a whitewash, it would seem that the conspiratorial cabal could only reasonably believe that their actions would go unexamined in the least visible and least politically important cases—that is, cases in which the conspiracy is least likely to be worthwhile. It is difficult to credit, at least in today's environment, that political foes of the subject of the investigation, the witnesses who raised the allegations in the first instance, the press, and Congress will simply turn a blind eye to the prosecutor's progress or lack thereof in a high-profile case involving politically sensitive charges.

Finally, one may argue that the concern is not that the line prosecutors or investigating agents are willing to "throw" a case for personal gain but rather that

the President or other high-ranking officials may be sufficiently corrupt to attempt to quash a meritorious investigation for personal or political reasons. If the Saturday Night Massacre taught us anything, it demonstrates the political impossibility of a President or Attorney General taking such action overtly. It also seems to me that for all the reasons stated above, covert efforts would meet with little success. In addition to professional and ethical considerations, the self-interest of the many people participating in or aware of the investigation will likely lie in exposing rather than acquiescing in any coverup. Further, while one cannot say that a covert "fix" is impossible, it would seem likely to succeed only in cases not extensively monitored by the press or administration foes—that is, cases in which the conduct or target under investigation lack strong ties to the President or Attorney General. Yet these are the cases least likely to invite high-level obstruction of justice, given that administration officials are unlikely to risk the enormous political damage that would ensue if the whitewash were exposed if such strong political or personal ties are absent.

Nor can it be argued that the "appearance" of evenhanded justice requires presumptive coverage even if the "reality" does not. Although I would posit that the lessons of history are ultimately to the contrary, I am willing to assume that the public perception (fed by partisan politics) may be that the President or Attorney General have too much power and influence over the DOJ for even a well-meaning DOJ Attorney to handle investigations regarding those persons fairly and impartially. However, I do not believe this assumption valid with respect to the balance of persons presumptively covered under the statute. While a particular "covered person" may have sufficient personal or political connections to a President or Attorney General to create (or generate political incentives to create) questions about the DOJ's impartial administration of a criminal investigation targeting that person, this is the exceptional case that should be the subject of ad hoc IC appointments rather than the rule warranting presumptive coverage. Again, this is a matter not easily verified but I, for one, doubt that the public perceives the DOJ to be incapable of fairly investigating whether Carter campaign aid official Timothy Kraft engaged in recreational drug use or, if the general public was even aware of the controversy, whether DOJ official Theodore Olson made misleading statements to Congress. Moreover, in these cases it seems that the "public confidence" sought is formed largely by press coverage, which in turn is shaped by the political dynamic. Where a case does not involve politically sensitive allegations involving persons close to the President or Attorney General and is dealt with in the normal manner by DOJ, it is unlikely to warrant the extended attention of politicians and the press or to create partisan incentives to undermine publicly the ultimate judgment of DOJ investigators. Indeed, the availability of the IC mechanism may actually create incentives to politicize these cases. It appears that such investigations as "Passportgate" attain more public credibility and political importance

because of the appointment of an IC and the publicity that surrounds the IC process than because of their intrinsic interest to the public.

Referral Mechanism

Not only is the list of "covered persons" as to whom DOJ is presumptively deemed conflicted too broad,[58] but the statutory trigger is designed so that the Attorney General has little choice but to over-refer cases for appointment of an IC. The words of the standard provide little real guidance: the Attorney General must refer a matter to the Special Division for appointment of an IC if the preliminary investigation reveals that there are "reasonable grounds to believe that further investigation or prosecution is warranted."[59] The politicization of the referral process creates an incentive for the Attorney General to interpret and apply this vague standard to include cases in which an IC appointment is unnecessary to further the fair administration of justice.

Demands for an IC have become political weapons because they not only ensure that allegations of wrongdoing by political allies of the President receive maximum and continuing press coverage, they also put the administration in a political bind. A refusal to refer the allegations to the Special Division will be good for yet more adverse publicity, and may actually result in a greater political black eye than would a referral and subsequent investigation. One could argue that an Attorney General may, particularly in light of the Whitewater experience, determine that taking a short-term political penalty in very high-profile cases may be better than inviting a continuing political hemorrhage. In the more ordinary case, however, it seems likely that an Attorney General faced with allegations of wrongdoing by administration officials such as those raised in the Espy or Cisneros cases may feel pressured to over-refer in order to counter any perception that she is obstructing justice.[60]

Further, Congress has made it difficult for the DOJ to probe whether or not an allegation has any real legs. The statute prohibits the Attorney General from issuing subpoenas or using the grand jury or other investigative methods in establishing whether the threshold standard is met,[61] and requires a decision within

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58. If one accepts the congressional presumption that DOJ prosecutors cannot be counted upon to act fairly with respect to those politically important to the administration, the list of presumptively conflicted persons must also be deemed underinclusive for not including the President's leading congressional supporters. The issue of including Congress within the presumptive coverage of the Act has been raised and rejected, principally because, it was asserted, Congress is not part of the Executive Branch and is therefore not subject to the intra-executive "institutional" conflict of interest targeted in the statute. *See* S. REP. No. 101, 103d Cong., 1st Sess. 18-19 (1993). However, the structure of the Act, which includes as covered persons campaign officials not working within the Executive Branch while omitting lower rank and file employees of the Executive, tells us that it is the political connections of the covered persons, not the source of their paycheck, that is the genesis of the perceived conflict.

59. 28 U.S.C. § 592(c)(1)(A) (1994).

60. *See* Morrison v. Olson, 487 U.S. 654, 701-703 (Scalia, J., dissenting).

61. 28 U.S.C. § 592(a)(2)(A) (1994).

90 days.[62] Perhaps most important, the principal question in many of these cases, involving as they do such alleged violations as false statements, obstruction, or the transgression of one of a raft of federal regulations governing the conduct of public officials, will be whether the conduct at issue was inadvertent or negligent as opposed to knowing and intentional. The Attorney General, however, must refer each and every such violation as to which further investigation may be warranted unless she has "clear and convincing evidence" that the subject lacked the requisite criminal state of mind.[63] The Attorney General, barred from the most effective means of gathering evidence, will rarely if ever be able to reach such a conclusion. A conscientious application of the statutory standard, then, will require the referral of many cases involving unintentional or inadvertent violations that ultimately should not warrant criminal prosecution.

These constraints reflect a congressional unease with the statute's requirement, adopted in response to constitutional imperatives, that no IC can be appointed absent the specific request of the Attorney General.[64] The Attorney General must comply with the statutory referral standard, but her decision as to the application of that standard in a given case is final and unreviewable by the courts.[65] In response to the failure of an Attorney General to refer matters to the Special Division in instances where Congress felt such referrals were warranted, Congress has constrained the scope of the Attorney General's statutory referral discretion.[66] What is ironic is that Congress' efforts do not change the fact that an Attorney General still has the unreviewable power to refuse to make a referral for illegitimate reasons—for example, because an IC investigation would be politically injurious to the administration. All that Congress has succeeded in doing, then, is forcing an Attorney General who is committed to the principled application of the statute to refer a great many more cases than the purposes of the statute require.[67]

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62. 28 U.S.C. § 592(a)(1).

63. 28 U.S.C. § 592(a)(2)(B)(ii).

64. *See supra* note 11 and accompanying text.

65. *See supra* notes 13-14 and accompanying text.

66. *See, e.g.*, H.R. CONF. REP. 511, 103d Cong., 2d Sess. 11 (1994) ("Congress believes 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."); S. REP. NO. 123, 100th Cong., 1st Sess. 9-12 (1987) (restrictions designed to limit DOJ discretion); H.R. REP. NO. 316, 100th Cong., 1st Sess. 25-27 (1987) (same); 133 CONG. REC. S30,497 (daily ed. Nov. 3, 1987) (remarks of Sen. Metzenbaum) (describing Attorney General Meese's failure to request an independent counsel to investigate charges against persons with whom he had personally associated); Harriger, *supra* note 30, at 84-85, 88.

67. It may be worth noting that, as of the time of the 1994 reenactment of the statute, Congress reported upon the results of thirteen IC appointments. S. REP. NO. 101, 103d Cong., 1st Sess. 13-14 (1993). Fully nine of the thirteen resulted in no indictments (IC investigations regarding Hamilton Jordan, Timothy Kraft, Raymond Donovan, Edwin Meese III, Theodore Olson, three subjects whose identities are confidential, and the "Passportgate" affair). *Id.*

Selection of the IC

Once the Attorney General refers a matter to the Special Division, that Division has complete discretion to choose the IC.[68] The Special Division's choice is obviously important to the statutory end of promoting the appearance of impartiality. The identity of the IC is also critical to ensuring a fair, professional and expeditious resolution of the matter referred. It is this person who, as is discussed at greater length below, will wield the enormous and virtually unchecked powers of the IC office. Further, it is important to note that the statute simply provides for the judicial appointment of an IC, not his team.[69] The statute provides no guidance regarding the composition of, or qualifications for, members of an IC's staff. The IC can choose to work on a part-time basis and delegate important decisions to persons whose selection is solely within his discretion and who are apparently accountable only to him. The identity of the IC is important, then, not only because his own reputation and performance will affect the success of the investigation, but also because his staff selections, delegation decisions, and supervision of the staff will be both critical to the responsible conduct of the investigation and within his sole discretion.

The sum total of qualifications provided by Congress for a position whose power equals that of the Attorney General within its sphere[70] is the directive that the Special Division "appoint as independent counsel an individual who has the appropriate experience and who will conduct the investigation and any prosecution in a prompt, responsible, and cost-effective manner."[71] How the Special Division chooses to read this vague mandate is not subject to challenge; its appointment decision is not reviewable by the courts, nor is this appointment, like a presidential nomination of an Attorney General, subject to Senate investigation and approval. I submit that the congressional mandate is deficient in at least two critical respects.

First, given the importance in high-profile IC cases of bringing the investigation to a speedy conclusion, the statute should require that an IC devote his full time and energies to the IC office. Although in the normal case the duration of an investigation may only affect the subjects of the investigation, in the IC context timing considerations may have far more wide-reaching consequences. Especially in cases involving the President and those close to him, the effective conduct of the business of the Executive Branch may be impaired until the case is resolved. The investigation will not only distract and burden those individuals subject to its scrutiny, it may also divert the public debate from matters of important public policy to matters of as yet unproven public scandal. IC timing decisions also may actually skew the political process; decisions regarding such matters as the timing

68. *See supra* note 15 and accompanying text.
69. 28 U.S.C. § 593 (1994).
70. *See supra* notes 18-19 and accompanying text.
71. 28 U.S.C. § 593(b)(2) (1994).

of grand jury appearances, indictments and the issuance of IC reports can affect the outcome of elections. Finally, given the unique public spotlight trained upon subjects of IC investigations, basic fairness dictates that allegations of wrongdoing be resolved with dispatch.

It is true that investigations proceed in fits and starts, and that an IC matter may not require the undivided attention of the IC throughout its course. However, appearances, which are deemed so important in this context, require appointment of a full-time IC in politically charged cases at the heart of the statute even if the reality is that the investigation may proceed expeditiously with a part-time IC. The statutory object is, of course, to ensure public confidence in the results of politically sensitive IC investigations. To achieve this, confidence in the IC himself must remain untarnished throughout the process. An IC who appears to place a lesser priority on a high-profile investigation than on his own law practice will inevitably open himself up to partisan attacks; even if he is in actual fact conscientiously doing all that is necessary to further the IC investigation, no one will know that but the IC and his team. The concurrent private practice of law also provides fertile ground for allegations of conflicts of interest. Again, the reality may be that no such conflicts exist, but the perception, once planted, can be mined by those with an interest in discrediting the eventual results of an investigation.

Congress, in rejecting a proposal to require full-time IC appointments, expressed fear that this requirement would deter many qualified lawyers from undertaking IC service.[72] This concern only arises because of the overbroad coverage of the statute; were the statute invoked more sparingly, fewer ICs would be needed and the allure of the appointment would be significantly greater. Many lawyers may be unwilling to dedicate themselves full-time to determining whether Hamilton Jordan engaged in recreational drug use, partly because the investigation likely would not absorb their full energies and partly because the matter may not be of sufficient public import to draw them from their practices. Were the statute's coverage confined to cases in which the DOJ genuinely may appear to be conflicted—for example, where the subject is the President or the Attorney General—it is difficult to believe that the Special Division could not find outstanding candidates willing to undertake a full-time appointment.

Second, Congress does not deem it necessary that the "appropriate experience" qualification required by the statute include a stint in a prosecutor's office. It would seem, however, that just as one seeking to hire an attorney to defend one in a high-profile criminal case would not turn to, for example, a trusts and estates attorney,[73] neither should the government entrust an important and time-sensitive investigation to a criminal-law novice. It must be conceded that it is difficult to enforce a requirement that the candidate's prosecutorial experience be meaningful,

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72. H.R. CONF. REP. No. 452, 100th Cong., 2d Sess. 26-27 (1987).

73. No offense intended to my colleagues practicing in this area of the bar.

and that many a talented novice may in time outshine the most experienced professional prosecutor. The key considerations here, however, seem to me to be credibility and timing. A former prosecutor with a distinguished record of being both fair and aggressive may not only have more initial credibility with the public, he may also depend to some extent upon that reputation to shield his credibility when he makes tough and politically objectionable decisions. More important, an IC may not have the time to learn on the job. He will be called upon promptly after appointment to make important and delicate prosecutorial strategy calls, such as how to order the conduct of the investigation; when and to whom to offer cooperation and immunity deals; whether critical evidence is likely to be admitted and, if so, whether it is sufficient to support a conviction; and whether indictments are consistent with not only the evidence and the law but also the public interest and DOJ policies and practices applied to the average citizen. These strategy calls require the exercise of judgment based upon experience. While the criminal law is not high science unknowable by any but practitioners of long standing, one with little acquaintance with the criminal processes, no matter how bright, well-meaning or industrious, will face a steep learning curve and may well make mistakes in these matters of no small consequence to the successful conclusion of the investigation.

Investigation

In the conduct of the investigation, the IC holds a blank check.[74] Especially significant is the amount of personnel that an IC can employ to investigate and prosecute the sole matter entrusted to him, which is often vastly disproportionate to that which the DOJ would normally allocate to the same case in the normal course.[75] An IC may employ as many prosecutors, investigators, and support personnel, and use as many other resources, as he or she wishes. An IC is the only prosecutor in the country who is by statute entitled to call upon all the vast resources of the federal government without providing any justification, without assuming responsibility for funding shortfalls, and without worrying about competing demands upon available resources.

The unlimited resources available to an IC not only result in perceived inequities

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74. *See supra* note 21 and accompanying text.

75. *See Hearing on H.R. 811 Independent Counsel Reauthorization Act Before the Subcommittee on Administrative Law and Governmental Relations of the Comm. on the Judiciary of the House of Representatives*, 103d Cong., 1st Sess. 68 (March 3, 1993) (statement of Terrence O'Donnell, Esq., Williams & Connolly) ("By our count 70 lawyers have served in the Walsh office since he began six long years ago. In the North case alone, 40 IC lawyers appeared on the pleadings. More than 50 FBI, IRS and Customs agents were dispatched around the globe to gather evidence. While the average assistant U.S. Attorney (one lawyer) handles more than 100 cases per year, the entire Walsh staff produced 14 pleas or indictments in six years. And when the Walsh army was deemed inadequate, they brought in the reserves—former federal judges and law professor consultants from Harvard, Virginia and Columbia. These numbers give one the sense of the enormous and disproportionate fire power focused on a handful of individuals.").

in treatment between public officials and average citizens, they also may well skew the exercise of an IC's prosecutorial discretion in significant ways. Many statutes applicable to the white collar offenses that are generally the subject of IC investigation, such as the wire and mail fraud statutes, are capable of very creative and novel interpretation by a prosecutor who seeks to make a case. The thicket of regulations applicable to federal officials is also such that de minimus violations often may be unearthed with sufficient time, manpower and incentive. The constraints upon resources generally available to "normal" federal prosecutors ensure that the criminal process will be effectively reserved for egregious violations in which criminal rather than civil prosecution is clearly appropriate. Where resource allocation is not an issue, such as in an IC investigation, no such constraints exist to separate the truly criminal transgression from the case more reasonably and equitably treated through civil sanctions.

The IC enjoys not only virtually unlimited means, he also enjoys virtually unlimited time (absent statute of limitations problems) in which to exploit those means. To be sure, DOJ investigators also may take whatever time they need to investigate and prosecute a case, subject only to statute of limitations concerns. The IC's temporal license is of greater concern, however, both because of the compelling reasons, explored above, for the prompt disposition of IC matters and because the IC statute creates an unique incentive for ICs to exploit their license unnecessarily. The IC must file a final report at the conclusion of his investigation, while DOJ policy forbids similar comment in the normal case.[76] As a practical matter, the existence of a final reporting requirement virtually ensures that the IC will tax his blank check to the utmost and that the investigation will be unnecessarily prolonged.

The final report was conceived by Congress as the means to " 'ensure the accountability' of the IC to the government of the United States and to the public by providing 'a detailed and official record of the activities of the [independent counsel] which may be reviewed and analyzed at the appropriate time.' "[77] Given that the report is designed to serve as the means by which the IC's results are publicly graded, any rational IC will recognize its importance in forming the judgment of history on his or her performance. Further, given the political

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76. "Requiring a prosecutor to file a final report that may become a public document is unique to the independent counsel process." H.R. CONF. REP. NO. 511, 103d Cong., 2d Sess. 19 (1994). "Details of non-independent counsel investigations within the Department that do not result in an indictment or plea, are confidential. There are no reports filed with a court or any other outside body. . . . In some cases, where there has been a substantial amount of media attention, the Department will send a letter or call the subject's counsel stating that the investigation has ended without any charges being filed. The Department will then either make no public statement or limit its public statement to the fact that the investigation is over without charges being filed." A.B.A., SEC. OF CRIM. JUST. REP. TO THE HOUSE OF DELEGATES—RECOMMENDATION 12 (Aug. 1993).

77. *In re* North, 16 F.3d 1234, 1238 (D.C. Cir. Indep. Couns. Div. 1994) (quoting S. REP. NO. 170, 95th Cong., 2d Sess. 70-71 (1978)).

consequences of his conclusions, an IC must expect that those partisans likely to be unhappy with his results will be lining up to attack publicly the investigation as incomplete and the report's conclusions as biased or unsubstantiated. An IC, then, has an incentive to conduct his investigation in part with the final report in mind and to use the final report to justify his actions and counter any potential criticisms. The report, in short, gives an IC every reason to first overinvestigate and then overexplain, both of which will needlessly burden the public fisc and prolong the investigation.

The Whitewater investigation once again provides a worthy case in point. Judge Starr has recently been taken to task by some commentators for the length and apparent depth of his investigation.[78] One cannot blame Judge Starr, however, for responding to the pressures created by the statute, by politicians, and, of course, by the press itself. Judge Starr can hardly ignore the criticism levelled at his predecessor's reports—criticism that, not unexpectedly, seemed to follow strict party lines. He knows that he will be treated to even more of the same politically motivated fire unless he is able to demonstrate that he looked at every scrap of paper, relevant or not; talked to every conceivable witness, and then some; and in short pursued each and every crackpot avenue that any conspiracy theorist could imaginably posit. He is, in essence, damned if he does (for taking his time) and damned if he doesn't (for not finding a smoking gun that does not exist) because it is good politics to abuse him either way, and good press to follow it. A "normal" DOJ prosecutor or U.S. Attorney does not have similar means nor, given the policy against reporting on declined cases, similar incentives; she simply could not be effective in dealing with the many cases for which she is responsible if she squanders scarce resources on pursuing improbable theories or looking for crimes that likely did not happen and that may not be worth prosecuting if they did.

Jurisdiction

The fact that the IC may only employ these resources within the jurisdiction granted him by the Special Division does not contain the problem. The Special Division is required by statute to confer jurisdiction sufficient to "assure that the independent counsel has adequate authority to fully investigate the subject matter . . . *and all matters related to that subject matter.*"[79] Not surprisingly, the Special Division has provided ICs with very broadly worded jurisdictional mandates,[80] and the courts have been willing to accept a very permissive reading of what

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78. Stuart Taylor, Jr., *Time of Testing for Kenneth Starr*, LEGAL TIMES, Feb. 12, 1996, at 25.

79. 28 U.S.C. § 593(b)(3) (1994) (Emphasis added).

80. *See, e.g., In re:* Alphonso Michael (Mike) Espy, No. 94-2, Order at 1-2 (D.C. Cir. Indep. Couns. Div. Sept. 9, 1994); *In re* Madison Guar. Sav. & Loan Ass'n, Div. No. 94-1, Order at 1-2 (D.C. Cir. Indep. Couns. Div. Aug. 5, 1994); *In re:* Oliver L. North, et al., Div. No. 86-6, Order at 1-2 (D.C. Cir. Indep. Couns. Div. Dec. 19, 1986).

"related" matters ICs may legitimately pursue within those mandates.[81]

Indeed, the Special Division recently referred what it concluded was a "related" case[82] to Independent Counsel Donald C. Smaltz over the objection of the Attorney General that the matter was not in fact related to, and thus encompassed within, Mr. Smaltz's original jurisdictional grant.[83] The Special Division concluded that, to meet constitutional requirements, a matter referred by the Special Division to an IC pursuant to that IC's request under section 594(e) of the statute must be "demonstrably related" to the original jurisdictional grant, and that such relatedness " 'depends upon the procedural and factual link between the OIC's original prosecutorial jurisdiction and the matter sought to be referred.' "[84] It is difficult to determine from the Special Division's discussion the precise procedural or factual connection between the matters originally conferred upon Mr. Smaltz and the matters sought to be investigated. It appears from the discussion, however, that neither the "precise factual matters" at issue nor the persons whose conduct is sought to be investigated were named in the original order.[85]

The implication this reader drew from the order is that the additional allegations concerned persons who worked closely with Secretary Espy at Agriculture and may have engaged in similar patterns of alleged misbehavior.[86] Notably, however, there is no statement in the order that these persons are alleged to have conspired or acted in concert with Secretary Espy.[87] There is also no explicit response to the DOJ's apparent argument that this referral is not necessary to advance the investigation of the principal matter referred.[88] Nor does the order suggest that the persons at issue are "covered persons" within the meaning of the statute. Perhaps I am drawing too much from what is unstated in the order but it appears that the Special Division considers a matter to be "related" simply when it comes to the IC's attention during the course of his investigation and involves similar witnesses, alleged patterns of conduct and applicable law.

Concerned as we are with the practical operation of the statute, the questions whether the Special Division's application of the relatedness standard is consistent

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81. *See In re:* Alphonso Michael (Mike) Espy, No. 94-2, slip op. at 10-14 (D.C. Cir. Indep. Couns. Div. Apr. 1, 1996) (approving IC's determination that matter is related); United States v. Tucker, No. 95-3268, 1996 WL 112414, at *6-8 (8th Cir. Mar. 15, 1996) (relatedness is "exceedingly broad"); *see also In re* Grand Jury Subpoenas Duces Tecum, Nos. 95-3279, 3282, 1996 WL 112411, at *4 (8th Cir. Mar. 15, 1996) (new allegations "unquestionably related" to original jurisdiction); *In re* Olson, 818 F.2d 34, 47-48 (D.C. Cir. Indep. Couns. Div. 1987) (investigation of other persons is related).

82. *See supra* note 17 (discussing power of Special Division to make referral).

83. *In re:* Alphonso Michael (Mike) Espy, No. 94-2, slip op. at 10-14 (D.C. Cir. Indep. Couns. Div. Apr. 1, 1996).

84. *Id.* at 11 (quoting *Tucker*, 1996 WL 112414, at *7).

85. *In re Espy*, No. 94-2, slip op. at 12-13; *see also id.* at 2 (text of the order).

86. *Id.* at 12-13.

87. *Cf. In re* Olson, 818 F.2d 34, 48 (D.C. Cir. Indep. Couns. Div. 1987) (IC's jurisdiction to investigate conspiracy encompasses authority to investigate others involved in alleged conspiracy).

88. *See In Re Espy*, No. 94-2, slip op. at 13.

with Article III, separation of powers principles,[89] and the Division's own precedents[90] are beyond the scope of this essay. There are valid practical arguments for reading the "related" jurisdiction of an IC fairly broadly where such "related" matters have been referred by the Attorney General and thus are unlikely to compromise any ongoing DOJ investigations and where the related jurisdiction, although not central to the original case, is necessary to further the resolution of that case, for example by allowing the IC to pressure the "related" persons to cooperate in the investigation of the principal case. What is troubling is that, in practical effect, the Smaltz referral seems to have exceeded even these expansive bounds and thus established a precedent that stretches the concept of "relatedness" to its breaking point. Attorney General Reno has not proved grudging either in her referrals of cases to the Special Division as an initial matter or in her subsequent willingness to refer additional "related" matters to existing ICs.[91] Nonetheless, the Special Division overruled this Attorney General's "relatedness" determination apparently where (1) there was no allegation of a conspiracy tying the pattern of conduct in the referred matter to the principal matter; (2) the referred matter was not demonstrably justified as necessary to further the primary investigation; and (3) the referred matter brought within the IC's mandate persons who apparently are not "covered persons" and thus whose investigation by an IC is not, even under the statutory conflict presumptions applied to "covered persons," required by the purposes of the statute. The DOJ may not be far off when it objected that referrals of such matters give an "independent counsel unlimited jurisdiction and power to prosecute anyone whose path may have crossed that of the named subject of the investigation."[92]

A final note is in order regarding the difficulty of enforcement of whatever jurisdictional constraints may be in place. If the Attorney General determines that a

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89. *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 679-81, 695-96 (1988).

90. *See In re Olson*, 818 F.2d at 47-48 (holding that where an Attorney General had determined that there were no reasonable grounds to believe that further investigation was warranted with respect to a matter under section 592(b)(1), and later rejected an IC's request that the Attorney General refer the matter as "related" to the IC's primary jurisdiction under section 594(e), the Special Division has no authority to refer the matter to the IC under 594(e); further ruling that while the IC's original jurisdictional grant was broad enough to permit inquiry into whether the persons sought to be referred conspired with the person under IC investigation to obstruct the investigation, it did not give the IC authority to prosecute those persons); *see also Morrison*, 487 U.S. at 685 n.22 ("We express no view on the merits of the Division's interpretation of the original grant or of its ruling in regard to its power to refer matters that the Attorney General has previously refused to refer.").

91. In addition to the Whitewater referral, Attorney General Reno has referred to the Special Division for appointment of ICs allegations regarding former Agriculture Secretary Michael Espy, Commerce Secretary Ronald Brown, and Housing and Urban Development Secretary Henry Cisneros. She has also referred two "related" matters to Independent Counsel Kenneth Starr. *See In re* Grand Jury Subpoenas Duces Tecum, Nos. 95-3279, 95-3282, 1996 WL 112411, at *3-4 (8th Cir. Mar. 15, 1996) (referral of campaign contribution issues); United States v. Tucker, No. 95-3268, 1996 WL 112414, at *2 (8th Cir. Mar. 15, 1996) (referral of bankruptcy issue); *see also* 139 CONG. REC. S15,846 (daily ed. Nov. 17, 1993) (remarks of Sen. Cohen) ("Attorney General Reno is one of the first confirmed Attorneys General who has come out in favor of [the IC statute]").

92. *In Re Espy*, No. 94-2, slip op. at 13.

matter is "related" and refers it to an IC, that referral is not subject to judicial review.[93] If, over the objection of the Attorney General and at the behest of the IC, the Special Division expands (by way of an inappropriate referral) the jurisdiction of the IC, there may be no timely remedy. The subjects of the allegedly "related" matter may not even know that they are subjects. If they do, it is very unlikely that they will be given access to the investigative information upon which the IC will argue his "relatedness" case. Without such access, the subjects cannot rebut IC assertions regarding commonality of witnesses or "patterns" of wrongdoing, and they therefore cannot meaningfully contest the merits of the jurisdictional dispute. Further, assuming that the subjects are equipped to argue the case on the merits, they may not have standing to do so.[94] Finally, the statute contains no provision for how or where an appeal as of right may be taken by such subjects. Similarly, in a case where the Special Division overrides an Attorney General's objection to referral of a matter to an IC, there is some question as to how, and where, the DOJ may appeal this determination.[95]

In sum, the scope of an IC's jurisdiction can be " 'both wide in perimeter and fuzzy at the borders,' "[96] and constraints upon it may be difficult to enforce. As a consequence, subjects of IC investigations can count upon the IC having the mandate, as well as the means and the incentive, to delve into private areas far afield from the original inquiry. The likelihood is that with a malleable jurisdiction mandate and so much firepower, *some* information of an unflattering if not criminal nature will surface—however tangentially related to the original subject-matter of the investigation. To compound this invasion, the IC may, unlike normal DOJ prosecutors, record such matters in his final report and the report may be, and generally is, made public by the Special Division.

Exercise of Prosecutorial Discretion

The most obvious objection to providing an IC with so much power, so many resources, and so broad a mandate is that it may, and given the an IC's incentives probably will, subject the targets of IC investigations to far greater scrutiny and violate their privacy much more than would be the case if the targets were private citizens. Certainly this is troubling where no criminal prosecution is ultimately brought but the final report sets forth information that is sure to harm the target's

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93. *Tucker*, 1996 WL 112414, at *2-6.

94. *See In re Olson*, 818 F.2d at 48 (denying motions to intervene submitted by persons sought to be referred to IC for investigation under 594(e) because "a person challenging the authority or propriety of a criminal investigation can do so only after an indictment (if any) is returned by the grand jury").

95. The constitutionality of the IC statute was heard on direct appeal to the D.C. Circuit from a contempt order entered by the District Court under 28 U.S.C. § 1826(a) when the subjects of the investigation refused to appear pursuant to grand jury subpoenas. *In re* Sealed Case, 838 F.2d 476, 480 (D.C. Cir. 1988), *rev'd*, Morrison v. Olson, 487 U.S. 654 (1988).

96. *Tucker*, 1996 WL 112414, at *6 (quoting United States v. Wilson, 26 F.3d 142, 148 (D.C. Cir. 1994), *cert. denied*, 115 S.Ct. 1430 (1995)).

reputation or professional standing. However, one may ask whether we should care that the process to which a public official was subjected was more harsh and invasive than that which a ordinary citizen would suffer if a violation is proved and the public official is guilty. Should it bother us that the conceded misconduct would only have been discovered through application of the extraordinary powers of the IC? The answer is "yes" in these circumstances.

We may accept the argument that all prosecutions are to some degree selective and that a prosecution is not illegitimate simply because the government discovered this one offense but did not detect, or chose not to pursue, others. It is quite another thing to "selectively" target a *person*, set out to see if he or she ever did anything criminal in relation to a vaguely worded mandate, and then publish any results of this inquiry. This not only institutionalizes unequal treatment, it also creates grave dangers to the integrity of the process. In Justice Jackson's words:

> "If the prosecutor is obliged to choose his case, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him. It is in this realm—in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself."[97]

The dangers of inequity, then, lie not only in the perceived unfairness of treating public officials more harshly than the average citizen, but in the potential for the subversion of the proper exercise of prosecutorial discretion resulting from the IC's singular focus. This singular focus "heighten[s] . . . 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."[98] Just as the extraordinary resources available to an IC may distort the exercise of his discretion,[99] an IC's single mandate makes his

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97. *Morrison*, 478 U.S. at 728 (Scalia, J., dissenting) (quoting Robert H. Jackson, *The Federal Prosecutor*, 24 JUDICATURE 18, 19 (1940) (address delivered at the Second Annual Conference of the United States Attorneys, April 1, 1940)).

98. Amici Curiae Brief of Edward H. Levi, Griffin B. Bell, and William French Smith at 11, Morrison v. Olson, 487 U.S. 654 (1988) (No. 87-1279).

99. *See supra* notes 75-77 and accompanying text.

actual indictment or declination decisions subject to a very different dynamic than that applicable to "regular" prosecutors, with a likelihood that politicians will be treated differently, and probably more harshly, under an IC regime than would be the case in a DOJ investigation.

To be sure, politically charged cases inherently change the dynamics of prosecutorial decisionmaking, even by the DOJ. The conventional wisdom is that Executive Branch prosecutors are subject to pressure to make cases against administration officials go away. It may be more likely, however, that DOJ attorneys will be subject to a fair amount of pressure to indict. They may bring marginal cases, or cases that would normally be declined or diverted, because "the understandable effort by Attorneys General to prove they can handle these tough cases with scrupulous fairness may produce a tendency to 'bend over backwards' to avoid favoring the person under investigation."[100] Ambition may also fuel this incentive; a line prosecutor may well see the case as one in which to make a name for himself. On balance, however, it seems to me that the danger that prosecutorial discretion will be skewed in high-profile cases is greater in an IC investigation than in DOJ investigations. Professional Executive Branch prosecutors have the luxury of compiling a record over time, involving myriad different matters, with which to lend credibility to their choices in hard cases and to justify their performance to professional peers, Congress, the press, and the public. By contrast, an IC's performance will be assessed on the basis of the one matter referred to him, which will certainly alter his perspective and may well alter his substantive decisions.

An IC will want to be viewed as successfully resolving the sole matter entrusted to him, whether by indictment followed by conviction or by declination amply justified in his final report. The IC may, as a result, decline meritorious but hard-to-win cases that a "regular" DOJ prosecutor would (and should) bring. For example, a responsible U.S. Attorney may well conclude that it is worthwhile to bring a tough case involving bribery of a public official. Win or lose, he will be able to point to his record to protect himself from a popular politician's cries of political vendetta. An IC looking at the same case but having no record to rely upon to shield him from the inevitable political fallout may be tempted to decline the close case and write a report explaining why, even though the target was probably dirty, the evidence was not strong enough to submit to a jury. The converse is also true; a case that a U.S. Attorney may, despite plenty of evidence, normally decline for reasons of equity or resource allocation, an IC would likely to feel pressure to bring so as to generate a statistic to be used to justify his existence (and expenditures) to Congress and the public.

The primary check upon these distorting forces is the same check that ensures the responsible exercise of prosecutorial power in the normal case: the IC will not

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100. S. REP. No. 496, 97th Cong., 2d Sess. 34-35 (1982) (supplemental remarks of Sen. Eagleton); *see also* 128 CONG. REC. S20,815 (daily ed. Aug. 12, 1982) (remarks of Sen. Cohen).

want to lose a high-profile case, either by suffering a no true bill at the grand jury stage (an exceedingly unlikely event with a captive special grand jury) or, as is more likely, suffering an acquittal after trial. Assuming that the IC has sufficient knowledge and experience to weigh accurately the evidence available to him, this check provides some counterweight to the incentives to over-indict flowing from his singular focus. Indeed, as noted above, the IC will likely feel a great deal of pressure not to indict unless he is sure that he has the evidence to win. However, the fear of suffering a no true bill or acquittal cannot deter the unwarranted declination of worthwhile cases. Nor is it likely to prevent the distortion of the normal exercise of prosecutorial discretion in favor of indictment in the many cases where the issue is not the quantum of evidence available, but rather whether the public interest warrants prosecution.

U.S. Attorneys consider a number of factors in deciding whether to bring a case that have little to do with the weight of the evidence. "Decisions on whether to prosecute a violation of a federal criminal law on a given set of facts depend on a variety of factors including the availability of non-criminal alternatives to prosecution, the federal interest served by prosecution, the deterrent effect of the prosecution, the nature and seriousness of the offense, and the subject's culpability and past record. This reasonable discretion is regularly practiced by the Department of Justice, U.S. Attorneys, and prosecutors throughout the federal system."[101]

These considerations are largely irrelevant to an IC. As discussed, allocation of resources is not an issue; he has unlimited time, money and personnel to pursue one matter. The high-profile nature of the case will mean that a prosecution will always send a message. And it has become increasingly difficult, given the intense politicization of recent investigations, for an IC to decline to prosecute or divert a technical or de minimis violation on the ground that the case, although supported by the evidence, is one that probably would not have been pursued if the target of the investigation were not a political figure.

Gerard Lynch, former Associate Counsel in two IC investigations and former Chief of the Criminal Division in the U.S. Attorney's Office for the Southern District of New York, and author Philip Howard state the case best:

> Deciding to prosecute is not a simple matter of finding that a law has been violated. It is a far more subtle decision, made against the reliable backdrop of hundreds of other cases. Judgment and discretion are at the heart of a prosecutor's job. In a world in which regulations are piled so high that many well-meaning people trip over them, prosecutors must decide every day whether a particular violation is merely technical or is one that requires the awesome step of criminal prosecution. Decisions to prosecute are inextricably bound up in priorities—prosecutors regularly allocate scarce resources to

101. S. REP. No. 496, 97th Cong., 2d Sess. 14 (1982).

> violent and drug crimes at the expense of nonviolent white-collar cases—and necessarily draw on society's norms and values. . . . In the ordinary case, the U.S. attorney has to ask himself: Is it fair to treat this case as a felony, as compared to how we treat other, similar cases where the defendant was not politically prominent? The special prosecutor has no such concerns. He has only one investigation to pursue, and the unnatural intensity skews the decision. The smallest infraction can take on a life of its own.[102]

In sum, the combination of the unlimited resources available to the IC and his singular focus may well skew IC discretionary prosecution decisions, resulting in disparate, and probably harsher, treatment of IC targets than would be the case were their cases entrusted to the DOJ.

Knowledge and Experience

Even if an IC succeeds in overcoming these distorting influences, broadening his frame of reference beyond the narrow confines of the matter entrusted to him, and considering the myriad factors that normally shape a federal prosecutor's indictment decisions, he may not have the knowledge or experience to apply his discretion equitably.

A high-profile investigation conducted by a U.S. Attorneys Office or out of main Justice is likely to be staffed by prosecutors experienced in criminal trial practice and knowledgeable about the type of case at issue. Those attorneys will be supervised by persons with even greater knowledge and experience who have spent years making decisions on cases of the same criminal character. Knowing the facts of prior cases, and the considerations driving previous indictment decisions, they will at least have a basis for comparing the high-profile case with less notorious prosecutions. This fund of knowledge and experience is not necessarily something shared by ICs.

The congressional exhortation that ICs follow DOJ policies, and confer with DOJ and local U.S. Attorneys to determine the content of those policies, does not fill the vacuum. "[O]ne would be hard put to come up with many investigative or prosecutorial 'policies' (other than those imposed by the Constitution or by Congress through law) that are absolute. Almost all investigative and prosecutorial decisions including the ultimate decision whether, after a technical violation of the law has been found, prosecution is warranted—involve the balancing of innumerable legal and practical considerations."[103] Reference to the United States Attorneys' Manual underscores this point. Rarely does it set forth categorical imperatives; rather, it provides factors and considerations to guide the exercise of discretion in a particular instance.[104] It is, in short, not the words of relevant

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102. Lynch & Howard, *supra* note 42, at C7.

103. *Morrison*, 487 U.S. at 707-08 (Scalia, J., dissenting).

104. *See* H.R. REP. No. 224, 103d Cong., 1st Sess. 20-22 (1993) (discussing fact that most material in the U.S.

policies but the experience of applying those policies in similar cases that ensures that the policies are enforced uniformly.

Accountability

The IC, like all prosecutors, " 'has more control over life, liberty, and reputation than any other person in America.' "[105] Given the IC's vast powers and potentially wide-ranging jurisdiction, as well as the incentives for him to employ both to the fullest, there obviously exists the potential for abuses of the IC mechanism. For example, the unlimited budget accorded ICs can be exploited far beyond the limits of reasonableness. ICs can abuse their grand jury and other investigatory powers and ignore with impunity DOJ policies and federal rules that protect all other citizens (Judge Walsh's position that the grand jury secrecy rules embodied in Federal Rule of Criminal Procedure 6(e) did not apply to him springs immediately to mind). "[T]here is a danger that a special prosecutor could prolong an investigation needlessly for any number of reasons, including publicity, political leverage, or political reprisal."[106] An independent counsel may use the reporting requirement to score political points, to settle personal scores, or purely for professional aggrandizement. Most important, the IC may bring or decline cases for reasons that have nothing to do with the merits.

The potential for abuse of power is exceeded only by the near certainty of unequal treatment. Even if the IC does not abuse his powers in the sense of employing them for improper purposes, it is likely that 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.

Is there any effective means of containing the potential abuses and inequities in the operation of the statute? In the debates surrounding the IC statute, the term "accountability" is often used but seldom defined. As is evidenced by Congress' reliance upon the final reporting requirement as a means of imposing "accountability" upon ICs, Congress appears to define "accountability" to mean that after the conclusion of the investigation the IC will be judged according to the results achieved and his or her reputation will fare accordingly. The judgment of history reached after the termination of the investigation, however, obviously does nothing to prevent, redress or correct abuses. Accountability should be defined by reference to the danger attributed to its absence: a runaway IC who abuses his "awesome" powers of investigation or prosecution in the various ways described

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Attorney's Manual is "in the nature of 'guidance,' which provides desirable room for the exercise of discretion," and amending section 594(f) in part because the pre-1994 language of the act "suggests that the Department's policies themselves are mandatory in nature, when that is not always the case").

105. *In re* North, 16 F.3d 1234, 1238 (D.C. 1994) (quoting Robert H. Jackson, *The Federal Prosecutor*, 24 JUDICATURE 18, 18 (1940) (address delivered at the Second Annual Conference of United States Attorneys, April 1, 1940)).

106. S. REP. No. 496, 97th Cong., 2d Sess. 16 (1982).

above.[107] If "accountability" is to mean anything, it seems to me to require some degree of ongoing control to address such problems at the earliest possible moment.

The most effective constraints upon the power of the IC lie in the traditional checks that apply to all prosecutors: the trial court and the petit jury. These checks act upon the most egregious potential abuse of the IC process—the case the IC brings for illegitimate reasons. Belated as the remedies of judicial dismissal of an indictment or jury acquittal may seem to the target, these devices work to blunt the threat of vindictive or baseless prosecutions. This check does not, however, prevent unwarranted declinations of cases or address the other potential abuses we have explored. Nothing in the statute does.

While the Attorney General may be dismissed at will by the President or impeached by Congress, a regulatory IC can be removed,[108] and line DOJ prosecutors can be fired, sanctioned or overruled if they abuse the powers of their office, the IC, once appointed, is practically untouchable. A number of statutory provisions are cited as reserving some measure of "accountability" to the Executive, to the Special Division, and to Congress. The problem is that none of these provisions provide effective real-time control, and indeed were not intended to do so.

Executive: The entire purpose of the IC statute was to divest the Executive Branch of control over politically sensitive investigations to the extent constitutionally possible. Not surprisingly, then, the asserted "controls" reserved to the Executive over the conduct of IC investigations—the power of referral and the power of removal for good cause—are intentionally anemic.

As noted above, the trigger for referral of matters to the Special Division is a slight one. Further, "the limited power over referral is irrelevant to the question whether, once appointed, the independent counsel exercises executive power free from the President's control."[109] After the referral is made, the identity of the IC and the scope of his or her investigation is up to the Special Division.[110] The

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107. S. REP. NO. 496, 97th Cong., 2d Sess. 16 (1982) (remarks of Arthur Christy, special prosecutor in the Hamilton Jordan investigation) (" 'I think in the hands of an irresponsible person who is special prosecutor, you might have a great many problems. . . . (C)ertainly during the course of the investigation, had I decided that I wanted to use it for personal aggrandizement, I could have.' ").

108. Under the existing DOJ regulations, a regulatory IC can be removed for "good cause." 28 C.F.R. § 600.3 (1995). "So long as this regulation remains in force the Executive Branch is bound by it, and indeed the United States as sovereign composed of the three branches is bound to respect and enforce it." United States v. Nixon, 418 U.S. 683, 696 (1974). It is also "theoretically possible for the Attorney General to amend or revoke the regulation defining the Special Prosecutor's authority." *Id.*

109. Morrison v. Olson, 487 U.S. 654, 707 (1988) (Scalia, J., dissenting).

110. 28 U.S.C. § 593(b) (1993); *see also Morrison*, 487 U.S. at 678-679 (Special Division has the power "to choose who will serve as independent counsel and the power to define his or her jurisdiction"); *id.* at 695-96 ("It is undeniable that the Act reduces the amount of control or supervision that the Attorney General and, through him, the President exercises over the investigation and prosecution of a certain class of alleged criminal activity. The Attorney General is not allowed to appoint the individual of his choice; he does not determine the counsel's jurisdiction; and his power to remove a counsel is limited.").

trigger, once pulled, divests the Executive of all power over the IC except removal for "good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties."[111]

Categorizing the "good cause" removal provision as a viable means of executive control is "somewhat like referring to shackles as an effective means of locomotion."[112] Both legally and practically, this provision is more aptly viewed as a restriction on executive discretion than as an effective mechanism for accountability. The President's power to remove is qualified, and his exercise of that power is subject to judicial review. It is unclear just what "cause" would withstand judicial scrutiny although it appears that such fundamental problems as an IC's refusal to follow DOJ policies would not qualify.[113] In 1992, the Justice Department "admitted it had never developed any standards or procedures for using this authority and expressed little interest in doing so."[114] Why not? Because, given the strength of public reaction to the "Saturday Night Massacre" and its political repercussions, it is difficult to conceive of any administration exercising this power absent patent physical disability or madness on the IC's part.

Proponents of the IC statute also point to the fact that it requires an IC to comply with the DOJ's law enforcement policies "except to the extent that to do so would be inconsistent with the purposes of [the IC statute]."[115] This provision provides for no ongoing control as Congress provided no mechanism for the enforcement of these norms. While Congress "urged" that ICs follow DOJ policies and opined that if the IC does deviate from established practices, he "should thoroughly explain his reasons for doing so in his report to the court at the conclusion of his investigation," it also made clear that a failure to follow policy would not "constitute grounds for removal of the special prosecutor by the Attorney General."[116]

Special Division: Those sections of the statute that vest powers in the Court are similarly toothless. An IC must comply with a court-defined area of inquiry, which, as discussed above, is not a terribly meaningful restriction. In any case, "once the court has appointed a counsel and defined his or her jurisdiction, it has no power to supervise or control the activities of the counsel."[117] "The Act simply does not give the Division the power to 'supervise' the independent counsel in the exercise

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111. 28 U.S.C. § 596(a)(1) (1994).

112. *Morrison*, 487 U.S. at 706 (Scalia, J., dissenting).

113. S. REP. NO. 496, 97th Cong., 2d Sess. 16 (1982).

114. S. REP. NO. 101, 103d Cong., 1st Sess. 15 (1993).

115. 28 U.S.C. § 594(f)(1) (1994). In 1982, Congress amended the original statute, which provided that ICs were required to follow DOJ policies only "to the extent the special prosecutor deems appropriate," to require that ICs follow the written or other established DOJ policies "except where not possible." S. REP. NO. 496, 97th Cong., 2d Sess. 16 (1982). The current language was added in 1994. *See* H.R. REP. NO. 224, 103d Cong., 1st Sess. 20-22 (1993) (discussing amendments to the language).

116. S. REP. NO. 496, 97th Cong., 2d Sess. 16 (1982).

117. *Morrison*, 487 U.S. at 695.

of his or her investigative or prosecutorial authority."[118] As the Special Division itself has said, "[t]he Independent Counsel does not operate under our supervision and his acts . . . do not bear our aegis."[119]

Congress: As the Supreme Court explained in *Morrison*:

> [W]ith the exception of the power of impeachment—which applies to all officers of the United States—Congress retained for itself no powers of control or supervision over an independent counsel. The Act does empower certain Members of Congress to request the Attorney General to apply for the appointment of an independent counsel, but the Attorney General has no duty to comply with the request, although he must respond within a certain time limit. § 592 (g). Other than that, Congress' role under the Act is limited to receiving reports or other information and oversight of the independent counsel's activities, § 595 (a), functions that we have recognized generally as being incidental to the legislative function of Congress.[120]

Notably, Congress has refused to use its greatest power—the power of the purse—to control the conduct or length of IC investigations, instead providing ICs with a virtually unlimited charter.[121]

Reporting: Congress seems to have envisioned that a primary means of ensuring IC "accountability" would be the final report requirement.[122] As an after-the-fact accounting, however, it is by definition incapable of controlling on-going abuses. As the American Bar Association's Section of Criminal Justice concluded in August 1993:

> [T]he reporting requirement fails to fulfill [the accountability goal] since the independent counsel's decision not to prosecute cannot be challenged by the court or anyone else. Moreover, the fact that the report is filed only at the conclusion of the independent counsel's work, as the last act before leaving office, further belies the perception that the reporting requirement provides some accountability. Any feared damage resulting from the work of an independent counsel will have occurred well before the report is filed. Once the report is filed, the independent counsel ceases to exist and there would be no recourse for wrongful acts.[123]

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118. *Id.* at 681.

119. *In re* North, 16 F.3d 1234, 1239 (D.C. Cir. 1994).

120. *Morrison*, 487 U.S. at 694. I am unaware of any congressional oversight hearings that have actually been held on the "conduct" of IC investigations. *See also* 139 CONG. REC. S15,876 (daily ed. Nov. 17, 1993) (Congress has never actually convened oversight hearing to address work of a sitting IC); 133 CONG. REC. H28,587 (daily ed. Oct. 21, 1987) (remarks of Sen. Rodino) (noting "chilling effect" that would be caused by oversight of ongoing investigations). As a constitutional matter, it would raise serious executive privilege and separation of powers issues were Congress to compel a federal prosecutor to discuss the substance of his investigation or to explain his prosecution decisions in a particular case. Whether such issues would also be raised in the IC context is an open question.

121. *See supra* note 21 and accompanying text (discussing IC's unlimited budget).

122. S. REP. No. 170, 95th Cong., 2d Sess. 69, 70-71 (1978).

123. A.B.A., SEC. OF CRIM. JUST. REP. TO THE HOUSE OF DELEGATES—RECOMMENDATION 12-13 (Aug. 1993).

The reporting requirement is not only ineffectual, it is also uncertain in scope, inequitable in theory, and potentially grossly unfair in application. In short, far from providing accountability, the reporting requirement actually poses one of the greatest dangers for abuse of the IC process.

First, the scope of the reporting requirement is unclear, inviting abuse of its license. Does the "the work of the independent counsel" within the meaning of the statute include (1) simply a sketch of the investigation (that is, the number, and perhaps, identity of witnesses questioned; the numbers of subpoenas issued; the types of tests applied to physical evidence; and the like); (2) a further summary of the evidence yielded by these sources; (3) a statement assessing the credibility of the sources and resolving disputed factual issues; and/or (4) a conclusion regarding the legal or ethical propriety of the subject's actions? One could certainly argue that, as a matter of statutory interpretation, "the work of the independent counsel" should be limited to (1), above, because if Congress intended to require a more detailed summary of evidence or factual or legal conclusions, it knows how to say so and it did not.[124] However, rather than exercising restraint in reading the statutory mandate, a number of ICs, most notably Judge Walsh, have read it quite broadly to include (1) through (4) above; indeed, Judge Walsh's Iran-Contra report "is rife with accusations of guilt of criminal conduct against persons never indicted or convicted."[125]

ICs' apparent tendency to read the reporting mandate broadly exacerbates the inequity of the requirement itself:

> Consistent with the power and responsibility of their office, prosecutors do not issue reports, and they do not pronounce persons guilty of crimes who have not been indicted, tried, and convicted. The filing of reports by Independent Counsels is 'a complete departure from the authority of a United States Attorney' and is 'contrary to the practice in federal grand jury investigations.'[126]

The longstanding federal prosecutorial tradition of not commenting where a case has been declined is grounded in both practical policy and fundamental fairness.

A fair and complete summary of an investigation will be difficult to achieve given the legal constraints upon federal prosecutors, and may actually impair future investigative efforts. For example, as the Iran-Contra report illustrates, it may be impossible for an IC to set forth a full summary of the factual circumstances of the matter referred without violating Federal Rule of Criminal Procedure 6(e)'s bar on disclosing matters occurring before a grand jury or without

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124. *See, e.g.*, 10 U.S.C. § 1034 (1994) (Inspector General report of inspection shall contain thorough review of facts relating to allegations); 18 U.S.C. § 3333(b) (1994) (report from special grand jury shall contain facts and evidence supporting its conclusions).

125. *In re* North, 16 F.3d 1234, 1238 (D.C. Cir. 1994).

126. *In re North*, 16 F.3d at 1238 (quoting *In re* Sealed Motion, 880 F.2d 1367, 1369-70 (D.C. Cir. 1989)).

compromising confidential sources.[127] Disclosure of witness statements may also create disincentives to cooperation, and may threaten witnesses with embarrassment or harassment from which normal DOJ practices would shield them.[128]

More important, this tradition is required by basic principles of fairness unique to the criminal process. If a prosecutor declines to prosecute but publicly describes, or worse, assesses, the evidence against a subject, he in effect unilaterally imposes a criminal stigma that will wreak havoc on the subject's reputation and career. The potential unfairness of the final report takes its most extreme form in cases in which an IC concludes that persons, not indicted or tried, violated the law or ethical requirements. One prime example is the Iran-Contra report, which, as the Special Division noted,

> 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. These accusations include charges that named individuals were guilty of a conspiracy charged in a count that was dismissed before trial, that various named public officials engaged in efforts to obstruct justice, where such individuals were never indicted, let alone convicted, and instances in which the Report charges that individuals were 'factually guilty' even though the United States Court of Appeals for the District of Columbia Circuit had reversed the only conviction relevant to the charge under discussion.[129]

Although clearly unhappy with this commentary in the report, the Special Division approved its public release, complete with its discussion of matters occurring before the grand jury which would normally be protected from disclosure by Federal Rule of Criminal Procedure 6(e).[130] In so doing, the Special Division noted that the factor weighing most strongly in favor of full release of the report was the fact that the filing contained information already publicly known, or publicly known in misleading part.[131] The information, including secret grand jury material, had been previously disseminated in IC statements, leaks and four interim reports filed with Congress by the IC, who took the position that he was not bound by the secrecy standards of Rule 6(e) applicable to all other federal prosecutors.[132] The Court recognized that its decision might set a dangerous precedent in that a future IC, wishing to ensure the release of his report, may "go on television and make comments accusing subjects of his report of crimes so that

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127. The Special Division noted with respect to the Iran-Contra report that "[t]he intermingling of grand jury materials with the rest of the Report is more like leaven in a loaf of bread. It cannot be separated out. Release is an up-or-down vote; redaction is simply not possible." *In re North*, 1234 F.3d at 1242.

128. *Cf.* Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 218-19 (1979) (discussing reasons for preserving grand jury secrecy).

129. *In re North*, 16 F.3d at 1237-38.

130. *Id.* at 1244.

131. *Id.* at 1240-41, 1244.

132. *Id.* at 1240-41, 1442-45.

the Court could later find that the contents of the report were already public."[133] However, the Court concluded, "[a]s this Court has no supervisory power, there would be little we could do about it. As the Independent Counsel is virtually without supervision, there would be little anyone could do about it. This danger may be inherent in the nature of the Independent Counsel."[134]

In discussing criminal wrongdoing not charged or proved, Judge Walsh relied upon a provision in the statute requiring that the IC include in his report the " 'reasons for not prosecuting any matter within the prosecutorial jurisdiction of such independent counsel.' "[135] In the 1994 reauthorization statute, the final reporting provision was amended to delete this requirement.[136] Thus, under the present statute, the "work of the independent counsel" no longer includes "the reasons for not prosecuting" nor, by implication, the factual and legal reasons why an IC believes someone culpable despite a decision not to prosecute.

The legislative history of this amendment is muddled, but contains some indication of a congressional intent to relieve ICs of the obligation to report the reasons for failing to bring a case but to permit an IC to include those reasons if he believes that the public interest requires it, for example where the report completely vindicates the subject.[137] Assuming that this murky legislative history can override the implications of the plain language of the statute—a questionable proposition—the public interest should never require the filing of a report by a prosecutor summarizing evidence, resolving factual disputes and concluding that persons, not indicted or tried, committed wrongdoing.

This type of discussion is obviously contrary to the normal presumption in criminal felony cases that the government must prove its case to an impartial tribunal before going public with accusations of criminal wrongdoing. It robs public officials of that which the grand jury is designed to provide all citizens: " 'the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or dictated by an intimidating power or by malice and personal ill will.' "[138] This function is all the more important in the IC context because of the skewing effect that the IC's unlimited resources and singular focus may exert upon his exercise of prosecutorial discretion; it is in this context, where a practically unaccountable IC is making decisions, that the grand

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133. *Id.* at 1241.

134. *Id.*

135. *Id.* at 1238 (quoting 28 U.S.C. § 595(b)(2) (1982)).

136. *See* 28 U.S.C. § 594(h)(1)(B) (1994); *see also* 140 CONG. REC. S6,374 (daily ed. May 25, 1994) (remarks of Sen. Levin).

137. *See* H.R. CONF. REP. No. 511, 103d Cong., 2d Sess. 19-20 (1994); 140 CONG. REC. S6,374 (daily ed. May 25, 1994) (remarks of Sen. Levin) (the amendments do not prohibit such explanation, but give the IC discretion to include it when he "determines it would be in the public interest").

138. United States v. Mechanik, 475 U.S. 66, 74 (1986) (O'Connor, J., concurring) (quoting Wood v. Georgia, 370 U.S. 375, 390 (1962)).

jury is needed most urgently to ensure that the IC's power does not result in grossly inequitable or, worse, baseless prosecutions.

Further, this type of commentary is fundamentally inconsistent with every citizen's "right, with a plethora of attendant constitutional protections, to stand innocent until proven guilty beyond a reasonable doubt before a jury of his peers. U.S. Const. amends. V, VI."[139] Fundamental to our criminal process is the belief that prior to the imposition of criminal stigma, a defendant is entitled all the constitutional protections necessary to achieve a fair result and to a jury determination, made after hearing both sides, of the relevant facts. It is the criminal jury, not an IC or any other prosecutor, who is charged with finding the facts and determining whether the government has sufficient proof to rebut the presumption of innocence to which every citizen is entitled.

At the very least, fundamental considerations of due process require that a subject essentially indicted and tried by IC report be given a meaningful opportunity vindicate him- or herself. Although the statute permits subjects an opportunity to respond to such an IC report,[140] this rebuttal provision is fairly meaningless. Subjects of IC investigations, absent indictment, do not have access to the IC's files, cannot call upon equivalent investigative resources, and do not have the ability to compel sworn testimony from witnesses or the production of other critical discovery that may assist them in rebutting the charges.

The injustice suffered where a prosecutor comments in any way upon cases that he has declined to bring is particularly acute given the high-profile and official nature of the IC final report. The Special Division has attempted to erase any misconception that its public release of an IC's report means that the report is issued "under the Court's aegis" and bears its official "imprimatur."[141] However, even without the Court's stamp of approval, the public is still more likely to accept as credible the IC's report to the Court than whatever defense the subjects are able to put forth under these constraints, not least of all because the subjects, by virtue of the report's allegations, will obviously be viewed as anything but disinterested. As the Independent Counsel Subcommittee of the American Bar Association has concluded, then, "[i]n Independent Counsel investigations in which no prosecution is brought, covered persons should not have their reputations damaged and their privacy invaded by disclosure of information that does not suffice to give rise to a criminal charge."[142]

The final reporting requirement, in sum, creates incentives for ICs to investigate too long and report too fulsomely[143]; its contours are so vague as to invite abuses

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139. *In re* North, 16 F.3d 1234, 1238 (1994).

140. 28 U.S.C. § 594(h)(2) (1994).

141. *In re North*, 16 F.3d at 1239.

142. INDEPENDENT COUNSEL SUBCOMM. OF THE CRIMINAL JUSTICE SECTION OF THE ABA WHITE COLLAR CRIME COMM., SUMMARY REPORT AND RECOMMENDATIONS 7-8 (Aug. 19, 1989).

143. *See supra* notes 76-78 and accompanying text.

that the Special Division is in no position to remedy; it constitutes a signal departure from the rules applied to all other citizens; it is incompatible with the grand jury tradition; it contravenes fundamental notions of fairness in the criminal process; *and* it is ineffective to further its stated purpose of ensuring IC accountability.

The final reporting requirement also seems to have contributed to the public perception that it is an IC who should be charged with investigating any politically charged allegations—whether or not facially criminal—and providing the public with a full, definitive and impartial report. The above demonstrates that the IC, as a prosecutor, faces obstacles peculiar to the criminal process that make such a function unworkable and unfair.

COSTS OF THE STATUTE

The IC process clearly carries with it a grave potential for abuse and inequity. It is important to recognize the scope of the human, financial and systemic costs incurred when these dangers are realized.

Allegations of wrongdoing by public officials referred to an IC immediately raise the specter of criminal punishment, not just political exile. Further, a criminal investigation under the IC statute is unique in its highly public nature. As former Attorney General Griffin Bell explained, an IC investigation is normally

> "announced under great notoriety, and any conclusion reached is likewise notorious. Other citizens are investigated without announcement—indeed usually under great confidentiality given the secrecy of the grand jury rule, Federal Rules of Criminal Procedure 6(e), and the practice of the Department of Justice in not commenting on ongoing investigations. Usually the fact of an investigation is never known if there is no indictment. This is completely contrary to the practice in the Independent Counsel cases to date."[144]

Judging from public opinion polls, the sound and fury surrounding the appointment of an IC creates a public sense that there is something to an allegation—even though the referral itself means nothing of the sort given the low statutory trigger. Press reports on the continuing work of the IC over time—such as the issuance of subpoenas, grand jury appearances of important persons, and subsidiary indictments—keep the pressure up and lend an additional air of credibility to the charges initially referred. As discussed above, the reporting requirement simply adds insult to injury. In operation, then, "[r]eputations are savaged, effectiveness in office is crippled, and there is lingering suspicion even though an investigatory target is exonerated."[145] "Careers are held captive, families torn apart and the mental and

144. 133 CONG. REC. H28,566 (daily ed. Oct. 21, 1987) (remarks of Rep. Swindell quoting Judge Bell).

145. 128 CONG. REC. S30,274 (daily ed. Dec. 13, 1982) (remarks of Sen. Kindness).

physical health of those under investigation are put under strain. It is not unusual for people involved to lose their jobs, just when they need money to cover legal expenses."[146]

IC investigators, armed with a limitless checkbook, a flexible jurisdictional mandate, no competing case demands, and all the time they need, can investigate their case far beyond that which would seem reasonable in the normal case and have the incentive to pursue avenues that would not survive the competition for scarce resources were the matter under DOJ scrutiny. The consequences of such diligence may be quite onerous not only for the subjects or targets of the investigation, but also for a wide array of witnesses caught up by, but not implicated in, the investigation. As former "Passportgate" IC Joseph E. diGenova recently commented:

> [W]hat about the emotional and financial cost to people caught up in the maelstrom? At great expense, lawyers must be hired, even by the most insignificant witnesses. The dire consequences of merely misspeaking, which could result in a false-statement charge, are high, given the prosecutor's vast powers.[147]

On a purely economic level, it is we, the taxpayers, who are paying for all of this, and paying dearly. What are we buying and at what cost to other law enforcement priorities? Judge Walsh's investigation cost nearly $40 million and the ancillary bills, including the cost to various government agencies of complying with the document requests and subpoenas issued by his office, brought the total tab up to about $100 million.[148] These funds yielded, over the course of seven

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146. diGenova, *supra* note 53, at A25. Congress would argue that it has alleviated the financial burdens imposed by the IC statute through its attorneys fees provision. The statute contains a "narrow exception" to the general rule that most non-indigent persons who participate in criminal proceedings, whether as subjects, targets or witnesses, cannot obtain publicly-funded reimbursement of attorneys fees. S. REP. NO. 101, 103d Cong., 1st Sess. 20 (1993). This exception, however, is very narrow. It provides reimbursement only for "subjects" of IC proceedings who are not indicted and would not have incurred the fees but for the requirements of the IC law. 28 U.S.C. § 593(f) (1994); *see* S. REP. NO. 101, 103d Cong., 1st Sess. 20-21 (1993). Witnesses' and immunized subjects' fees are not covered, nor are the fees of persons ultimately indicted but acquitted or otherwise exonerated. *Id.* Further, even a covered subject who is ultimately not indicted is unlikely to be made whole. For example, Congress has discouraged government payment of prevailing white-collar legal rates. *See* H.R. CONF. REP. NO. 511, 103d Cong., 2d Sess. 13-15 (1994) (Hourly rates of $40 to $75 per hour are reasonable while market rates of $300 to $400 per hour should not be fully recoverable because "Congress did not intend that properly recoverable attorney fees under this statute be construed to be what the market will bear in the private sector. Rather, Congress intends that the reasonableness of attorney fee requests under the independent counsel law be judged, not solely with reference to the rates commanded by expensive legal counsel, but also with reference to what cost is reasonable for the taxpayers to bear."). Perhaps more importantly, it will be nearly impossible for a subject to prove that he was subjected to a far more exhaustive and lengthy investigation by the IC than he would have been by the DOJ. *See* H.R. CONF. REP. NO. 511, 103d Cong., 2d Sess. 13-14 (1994) (criticizing "overly generous" interpretation of attorneys fees awards and reaffirming original congressional intent that "the special court construe the but-for requirement of the attorney fee provision narrowly").

147. diGenova, *supra* note 53, at A25.

148. H.R. REP. NO. 224, 103d Cong., 1st Sess. 37 (1993) (dissenting views of Rep. Hyde, et al.); *see also id.* at 43 (additional views of Rep. Fish) ("Independent Counsel Lawrence Walsh, now well into the seventh year of his

years, the indictment of fourteen persons.[149] In terms of the opportunity cost of these monies, it may be illuminating to compare the Iran-Contra results with the statistics achieved by U.S. Attorneys Offices with comparable budgets. According to the Department of Justice, the operating budgets for two of the largest U.S. Attorneys Offices—the Southern District of Florida and the Central District of California—for fiscal year 1995 were $39.0 million and $39.8 million, respectively.[150] These budgets funded the filing of a total of approximately 8,000 criminal and civil cases and other unquantified investigative activity.[151]

The statute also takes a heavy toll in more intangible, but equally important ways. First, "[j]ustifying the smallest details of a past transaction or decision has become part of the job description for high executive office, always with the suggestion of public scandal and personal ruin."[152] Who could blame persons in the Executive Branch for retreating from principled claims of, say, executive privilege in the face of congressional hostility backed by the prospect of an IC investigation? Theodore B. Olson's fate provides a sobering example of how big a stick Congress has when it threatens to call for an IC to investigate a source of conflict with the administration. In that matter, Congress and the Executive were engaged in a dispute over documents that Congress had subpoenaed from the Environmental Protection Agency ("EPA") and that the President, acting on the advice of the DOJ, ordered the EPA to withhold on grounds of executive privilege.[153] Although the document dispute was ultimately settled, Congress determined to investigate the DOJ's role in the controversy and called Assistant Attorney General Olson to testify before a House Subcommittee.[154] The House Judiciary Committee subsequently claimed that Mr. Olson's testimony was misleading and called for and got an IC investigation. The investigation began in May 1986 and concluded in January 1989 with IC Alexia Morrison's decision not to bring criminal charges.[155] Mr. Olson reportedly spent $1.3 million in legal fees[156] and took to "jogging by flashlight in the middle of the night" to relieve the

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investigation of the Iran-Contra affair, has spent approximately $40 million. The average cost for prosecutions per criminal defendant in a U.S. Attorney's Office is approximately $10,000; Independent Counsel Walsh is currently averaging over $2.5 million per defendant."); Toni Locy, *Independent Counsels Have Spent $17 Million in Probing Clinton Aides*, WASH. POST, April 2, 1996, at A4.

149. *In re* North, 16 F.3d 1234, 1240 (1994).

150. Fax from Financial Management Staff, Executive Office for United States Attorneys, U.S. Department of Justice, to Julie O'Sullivan, Associate Professor, Georgetown Univ. Law Center 2 (Mar. 25, 1996) (on file with author).

151. Fax from Data Analysis Group, Executive Office for United States Attorneys, U.S. Department of Justice, to Julie O'Sullivan, Associate Professor, Georgetown Univ. Law Center 2 (Mar. 23, 1996) (on file with author).

152. Lynch & Howard, *supra* note 42, at C7.

153. Morrison v. Olson, 487 U.S. 654, 665 (1988).

154. *Id.* at 665-66.

155. Ruth Marcus, *Ex-Official's Testimony Not 'Designed to Conceal'; Decision Against Prosecuting Olson Explained*, WASH. POST, Mar. 21, 1989, at A4.

156. Mes H. Andrews, *Impartial Prosecutor or Loose Cannon?*, CHRISTIAN SCI. MONITOR, Oct. 25, 1993, at 13.

pressures of the process.[157] Given Mr. Olson's experience, others in the Executive Branch may well weigh more heavily the personal risks attendant upon making politically difficult choices. In such situations, the harshness of the enforcement mechanism may actually deter aggressive executive action and have a dampening effect on the substantive conduct of executive functions.[158]

Second, we recognize and are willing to accept the disincentives for public service created when we impose upon public officials a higher standard of conduct. However, the disincentive for public service may well become unacceptable when one factors in the operation of the IC mechanism. That mechanism ensures that the investigation of allegations of misconduct will be blindingly public and may well exceed anything that an average citizen would be forced to bear in terms of length, scope and personal, professional, and reputational cost. Moreover, public office does not pay exorbitant wages, yet subjects of IC investigations have reportedly racked up legal bills in the millions of dollars. Most important, these consequences may well be visited upon those who trip over political landmines (as apparently was the case for Theodore Olson) or inadvertently violate regulatory requirements because, as discussed above, the statute essentially bars an Attorney General from declining to refer a matter to the Special Division on the ground that the alleged transgression was likely the result of negligence or ignorance rather than criminal intent. Those who willingly undertake to conform to higher standards of conduct for the privilege of serving in government may find the privilege significantly less alluring when a misstep, even an entirely inadvertent one, may have such ruinous consequences.

Finally, even were these costs deemed worthwhile in the exceptional case, over-use of the statute has created its own problems. The excessive invocation of the statute trivializes the IC mechanism. When the Whitewater investigation began, witness cooperation was the order of the day, perhaps because it was the only game in town and one of its subjects was the President. It appears that the increasing number of recent IC appointments involving lower-ranking officials and the less than earthshaking nature of the wrongdoing alleged has devalued the currency of the IC mechanism, invited claims of political persecution, encouraged non-cooperation and ultimately perhaps harmed the efficacy of IC investigations.

Most important, this overuse needlessly undermines public confidence in the integrity of the DOJ. It is one thing to say that the DOJ cannot, or should not for appearances sake, be entrusted with an investigation of the President. But what message are we sending when we suggest that the DOJ or local U.S. Attorneys cannot be trusted to investigate whether former Housing and Urban Development Secretary Henry Cisneros misled federal investigators during his pre-nomination interviews about payments he made to his former mistress? Further, undermining

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157. Ronald J. Ostrow & Robert L. Jackson, *Efficiency, Ethics of 1978 Independent Counsel Law Questioned*, L.A. TIMES, Sept. 20, 1992, at A4.

158. *See* Morrison v. Olson, 487 U.S. 654, 712-13 (1988) (Scalia, J., dissenting).

the public standing of the DOJ in political cases of less than startling import may well encourage the public to believe, in non-political cases, that DOJ has other suspect agendas equally irrelevant to the impartial administration of the criminal laws.

CONCLUSION

It is possible to address some of the problems discussed above by tinkering with the statute. At the very least, the statute should be amended so as to drastically reduce the number of "covered persons," possibly to include only the President and very senior DOJ appointees; raise the threshold showing for referral to the Special Division for appointment of an IC; provide some means of qualifying a panel of IC candidates from which the Special Division may choose particular ICs; and extend the attorneys' fees provisions. Other problems would be much more difficult to address by statutory amendment without interfering with the effective conduct of IC investigations, such as imposing arbitrary limitations on duration or cost. Some cannot be remedied at all without undermining the fundamental premise of the statute (or violating constitutional strictures), such as requiring real-time accountability of the IC to the Executive, Congress or the Special Division.

Abandoning the statute entirely seems to me to be the better alternative. The power to investigate and prosecute should be returned to its constitutional home for close to two centuries, the Executive Branch. As in the past, in extraordinary cases where the appearance or reality of a genuine conflict of interest requires that a matter be referred to someone outside the DOJ, that referral should be made to a regulatory IC.[159] History demonstrates that, properly chosen, regulatory ICs stand as good a chance as the modern day statutory IC to achieve a result that will satisfy the demands of justice and the public.[160]

For example, when President Nixon ordered the DOJ to remove Watergate (regulatory) Special Counsel Archibald Cox from office when Mr. Cox pressed his investigation by issuing a subpoena for White House tape recordings and other records,[161] Attorney General Richardson and his deputy William Ruckelshaus resigned rather than carry out that order; finally, Solicitor General Robert Bork complied and fired Mr. Cox.[162] According to congressional wisdom, it was this

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159. *See* HARRIGER, *supra* note 30 at 13-39 (analyzing "three official corruption cases in which allegations of wrongdoing by members of the executive branch led to the ad hoc appointment of special prosecutors: the Teapot Dome scandal of the 1920s, the tax scandals of the 1950s, and the Watergate scandal of the 1970s").

160. *See, e.g., id.* at 38 ("The study of ad hoc uses of special prosecutors suggests that there are some advantages to presidential appointment of special prosecutors that would exist to a lesser extent under a statutory independent appointment mechanism"; the findings also suggest that "the case against executive appointment has been overstated and is based more on appearances than on reality").

161. S. REP. NO. 101, 103d Cong., 1st Sess. 5-6 (1993).

162. *Id.* at 6.

"Saturday Night Massacre" that "shattered public confidence in our system of justice," necessitating the enactment of the IC statute.[163] What is overlooked is the fact that the system subsequently worked as it should, despite the "Massacre": a second Watergate regulatory special prosecutor, Leon Jaworski, was named, the investigation continued, and it eventually led to successful criminal prosecutions, impeachment proceedings, and President Nixon's resignation.[164] Further, even if a second special prosecutor had not been named to replace Mr. Cox, President Nixon's actions in the Saturday Night Massacre might well have done him in anyway. In other words, the political costs of interference created its own checks and balances.

Another modern example of successful use of a regulatory IC is Attorney General Griffin Bell's appointment of Paul J. Curran as "special counsel" to investigate the "Carter Peanut Warehouse Case." Congress itself acknowledged that "[o]nce Attorney General Bell granted Mr. Curran total independence and Mr. Curran issued a detailed report clearing President Carter and his brother Bill of all criminal wrongdoing, public confidence in the thoroughness of the investigation was restored."[165]

Of a certainty, the fact that a regulatory IC is selected by the Attorney General will provide politicians with additional ammunition with which to attempt to impeach the eventual results of the investigation. If the Whitewater case is any precedent, however, it makes little difference; due to the circumstances of his appointment and the reigning political dynamic, Judge Starr has suffered a great deal more questioning about his impartiality than Robert Fiske ever did.

It is also true that the conduct of a regulatory IC investigation will be subject to many of the same objections as can presently be levelled at statutory IC investigations. In particular, the more "independence" a regulatory IC is granted under DOJ regulations to promote public confidence in the integrity of the investigation, the less effective control or accountability exists, with some of the attendant problems discussed above. On balance, a sparingly invoked regulatory IC mechanism still appears preferable because this tradeoff is not as extreme as it is in the case of the statutory IC. If a statutory IC proves judgment-impaired, politically motivated or just plain inept, what can be done? As demonstrated above, in practical reality, nothing. The political unaccountability of the Special Division judges is intended to ensure that they will choose a truly "independent" and competent IC; it also means that if the Division does not, there is no accountability as well as no politically feasible remedy. If the Attorney General were to select a regulatory IC of suspect partiality or inadequate ability, however, she and the administration would pay a price. The Attorney General and the administration generally are accountable through the political process and, in extreme cases, the impeachment

163. *Id.*
164. *Id.*
165. S. REP. No. 496, 97th Cong., 2d Sess. 5 (1982).

mechanism. The fact that an IC who clearly abuses the powers of his office was her choice may also make it more feasible for the Attorney General to remove the offending IC and replace him with a more responsible alternative. However indirect these controls may be, they provide more accountability than is available under the statutory alternative.

Ridding ourselves of the statutory IC mechanism may have the ultimate value, moreover, of reorienting the process—a process fundamentally distorted by the "lessons" of Watergate and the statute itself. As discussed above, judging from the clamor for appointment of an IC that arises whenever allegations of misconduct by senior administration officials are made, the public seems to have embraced the view that the IC is the only credible means of sorting out such allegations. Final reports such as that issued in the Iran-Contra case fuel the public's perception. This view in turn ensures that the appointment process and the conduct of these investigations will become political battlegrounds. The politicization of the process means that partisans will have incentives to tarnish the credibility of individual ICs in politically charged cases with the object of promoting public distrust of the investigation. Thus, although the existence of the statutory IC mechanism itself is a comfort to the public, the statute may not actually work in the cases in which it is most needed—where the investigations are likely of the greatest political consequence--to promote public confidence in the criminal justice process.

Perhaps more troubling, however, the perceived importance of the IC mechanism has resulted in a regrettable shift in focus: the issue is no longer whether an official engaged in misconduct that should disqualify him from serving the public, but rather whether the official committed a criminal offense. This "criminalization" obviously has serious implications for covered persons, and may create unfortunate disincentives for public office. But it also seems to have problematic consequences beyond the individual case.

When accusations of wrongdoing by high-ranking public officials arise, the public interest lies primarily in answering those accusations so that the citizens may exercise their franchise to clean house. Exacting criminal penalties for such wrongdoing is obviously important for the usual reasons underlying the imposition of criminal punishment (*e.g.*, deterrence) and, in political cases, for reinforcing the public's belief in the evenhanded administration of justice. Ultimately, however, it seems to me—as Watergate demonstrates—that imposing criminal punishment should be secondary to the more important goal of exposing wrongdoers, letting the political processes work to rid the government of those persons, and thereby restoring confidence in honest and effective government. The statutory IC mechanism itself constitutes a concession—unwarranted by history or, I submit, general experience—that the normal processes of government cannot be counted upon to work; the appointment of an IC, then, necessarily compromises this goal.

Moreover, this function is not one that a prosecutor is qualified or equipped to

fulfill. What the public appears to expect from the IC is not just a determination as to whether sufficient evidence exists to believe something criminal has been done, which is the limit of an IC's prosecutorial competence. Rather, the expectation seems to be that the IC will publish all the evidence gathered and reach a determination as to the ethical as well as criminal implications of the conduct found—implicitly, a conclusion as to the subject's fitness for office. This task is alien to the prosecutorial function as properly defined, and is fundamentally inconsistent with traditional notions of fair process in the imposition of criminal stigma and punishment. First, the criminal process will not yield meaningful answers regarding the broader question of competency for office. The criminal standard is too narrow; a determination by a prosecutor that there is insufficient proof to demonstrate that a person is a crook beyond a reasonable doubt does not answer the question whether that person is qualified to be President. Nor, given the evidentiary constraints applicable in criminal trials and the narrow legal challenges available on appeal, will an acquittal or an appellate reversal after conviction answer this latter, critical question. Second, using the criminal process to test fitness for public service distorts that process, leading to prosecution of those who should not be charged as well as to "vindication" of people who need to be turned out of office, even if they are not prosecuted, are acquitted, or have their convictions overturned on appeal. Finally, the prosecutor has an obligation to use the awesome powers of his office to determine whether criminal conduct has been committed and if so by whom. His job is to decline—in fairness without comment—if no case is warranted, and to indict and try criminal cases where the evidence and other considerations dictate. It is fundamentally inconsistent with the traditions of his office and the grand jury and criminal trial process for a prosecutor to be charged with finding out whether an official engaged in ethically questionable conduct, reporting the particulars to the public and defending that report in the public realm.

The result of the apparent disjunction between the public perception of the prosecutorial function in the IC context and the reality of prosecutorial competence is unfortunate both from the public's and the IC's point of view. The fact that a responsible prosecutor is bound by grand jury secrecy and other ethical and legal constraints which prevent him from disclosing much of what he discovers means that the public cannot (or should, in fairness, not) receive a full accounting from him. Because these are, by definition, political cases or cases with which political hay can be made, those with a partisan interest in impugning a prosecutor's choices will never be satisfied, and a prosecutor will never be able to respond fully to the inevitable criticism. The public, in short, does not get what it demands, needs and is paying dearly for—a full and final determination of what happened that it can rely upon when making leadership choices. The IC does not get what he has a right to expect—public acceptance of and respect for his work product and credit for his public service.

Perhaps it is, in the final analysis, Congress, or a delegee of Congress, that should be the central actor here, not a criminal prosecutor. Congress has the powers necessary to investigate allegations of wrongdoing by high-ranking public officials, and has proved itself capable on prior occasions, most notably in Watergate. Indeed, it is arguable that witnesses, particularly politicians, called to account before the public spotlight may well be more forthcoming and provide greater cooperation than they will when attempting to fend off criminal charges in the secret confines of the grand jury. Ceding primary responsibility to Congress obviously is not without its problems, including the possible compromise of subsequent criminal prosecutions. More important given our primary aim, the inevitable partisanship involved in a congressional committee investigation is at best distracting and at worst saps the inquiry of its credibility and effectiveness. It may be that Congress should consider delegating its investigative function to a strictly bipartisan panel of lawyers and investigators, which would have a circumscribed mandate (in terms of subject matter as well as available time and resources). Such a congressional delegee would have a greater chance of using its dual partisanship in a constructive way—that is, to ensure that both sides of the story are fully aired and available for public digestion. If fairly run, a congressional inquiry of this kind may permit the effective discovery and adversarial testing of evidence through which the public will learn what it needs to know and perhaps what it needs to fix.