Defenses Commensurate with the Danger of Attack: The Special Counsel Regulations, Separation of Powers and A Call for Reform in the Department of Justice

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ABSTRACT

This paper examines constitutional and practical issues surrounding criminal investigations of a sitting or former president and related matters. Part I examines the source and nature of the executive power to prosecute and discusses the Supreme Court's seminal decision in *Morrison v. Olson*, 487 U.S. 654 (1988) in that context. Part II recounts how the executive power to investigate the president was first exercised administratively within the Department of Justice and under the post-Watergate Independent Counsel Act ("ICA") and why the ICA, although determined to be constitutional in *Morrison*, was allowed to expire. Part III discusses the Department of Justice's ("DOJ") current Special Counsel regulations, which replaced the ICA, and certain legislative proposals which would have re-involved the third branch in protecting the independence of special counsel. This part also contends the Special Counsel regulations are either unconstitutional *per se*, unconstitutional as applied, or represent on overt effort to mislead the American public about the exercise of executive power. Part IV describes certain *ad hoc* procedures and policies, largely driven by the well-deserved respect given to one senior official, which have guided DOJ through various crises but, as recent events have demonstrated, are now inadequate. Finally, Part V offers, as an alternative to first and third branch involvement, certain structural reforms within DOJ designed to ensure the executive branch exercises its core prosecutorial power with integrity and independence.

Table of Contents

I. The Power to Prosecute: A Core Executive Branch Function 6
A. A Core Constitutional Function 6

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B. The Ethics in Government Act of 1978 13
II. The Independent Counsel Act: Its Lofty Goals and Tales of Unintended Consequences ... 15
A. The ICA in Design and Concept 15
B. Morrison v. Olson *and Justice Scalia's "Great Dissent"* 18
C. Monica Lewinsky and the ICA in Practice 25
D. Chinagate, Janet Reno and the Campaign Finance Task Force 32
III. A Third Way - The Special Counsel Regulations and the Third Branch.......... 35
A. The Special Counsel Regulations: An Imperfect Regime 35
B. Congressional Meddling and the Ghost of Ken Starr.......... 39
C. DOJ's attempt to have it both ways ……………………………………….40
IV. David: Where For Art Thou?: Institutionalizing the Role of the Career ADAG 47
A. David Margolis and Conflict of Interest Enforcement 47
B. James Comey and the Physics of a Vacuum 52
C. Rod Rosenstein, Andrew McCabe and the Dueling Ethicists 61
V. A Call for Structural Reforms Within the Department of Justice.......... 62
A. A DOJ "Integrity Division".......... 62
B. Key Components of the Integrity Division.......... 63
i) Returning the Public Integrity Section to its Original Role.......... 63
ii) Expansion of PIN's Election Crimes Branch.......... 65
iii) OEO and FCPA Enforcement.......... 67
iv) OPR, PRAO and an Office of Justice Ethics.......... 68
v) Foreign Intelligence Surveillance Act Oversight.......... 69
C. The Role of the ODAG in Insuring Department-Wide Integrity.......... 72
VI. Conclusion 73

"[T]he great security, against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack."

The Federalist No. 51, pp. 321-322 (Madison, J.)

Introduction

At least since the existential trauma of Watergate, if not from the founding,[1] we as a nation have struggled with a fundamental question of constitutional dimension: Who may investigate the President for conduct which may be a crime and when?[2] The first post-Watergate attempt by the Legislative Branch to address this problem, the independent counsel provisions of the Ethics in Government Act of 1978 ("EGA"),[3] survived constitutional muster in the Supreme Court[4] only to collapse under their own weight amidst bipartisan angst and even contempt.

As recent events demonstrate, the Special Counsel regulations of the Department of Justice ("DOJ"),[5] a singular creature of the Executive Branch, are an imperfect substitute antithetical to the separation of powers. While certain features of the regulations seek to serve commendable ends, they have not insulated the DOJ from political and popular attacks. On a fundamental level, they fail to strike the proper balance between the executive power to investigate and prosecute and the congressional power to impeach. More worrisome is that they have inspired proposals representing real and imminent encroachment on the separation of powers by Congress and, albeit unwittingly, the courts. In the end, the current Special Counsel regulations are either unconstitutional on their face, unconstitutional as applied, or susceptible to political manipulation to the extent they may be used to mislead the American public about who ultimately wields and should be politically accountable for the exercise of prosecutorial power.

This latent ambiguity has had collateral consequences. In reaction to Robert Mueller's Russian Election Interference investigation, Congress toyed with proposals from both political

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[1] Both James Madison and Alexander Hamilton understood the risk of, and advocated for structural protections against, a corrupt executive. *See* THE FEDERALIST NO. 69, at 416 (Alexander Hamilton) (emphasis added) ("The President of the United States would be liable to be impeached, tried, and upon conviction . . . removed from office, and would *afterwards* be liable to prosecution and punishment in the *ordinary course of law*."). *Cf.* U.S. CONST., art. 1, § 3, cl. 7 ("Judgment in Cases of Impeachment" limited to removal from office and disqualification from future office "but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law."). Article 1, Section 3, cl. 7 tracks The Federalist No. 69 with fidelity.

[2] Whether the President enjoys immunity from criminal prosecution during office is an unsettled question. The Department of Justice's Office of Legal Counsel (OLC), which provides constitutional law advice for the Office of the President, has twice opined that the President is immune from criminal prosecution while in office. *See A Sitting President's Amenability to Indictment and Criminal Prosecution*, 24 *Opinions of the Attorneys General (Op. Atty's Gen.)* 222 (October 16, 2000) (Randolph D. Moss, Assistant Attorney General) (affirming Sept. 24, 1973 OLC opinion). Others have expressed differing views. *See generally*, *Impeachment or Indictment: Is a Sitting President Subject to the Compulsory Criminal Process*, HEARING BEFORE THE SUBCOMM. ON THE CONST., FEDERALISM, AND PROP. RTS. OF THE S. COMM. ON THE JUDICIARY, 105TH CONG. (Comm. Print 1998). While OLC's opinion is of substantial persuasive weight and appears consistent with the text and purpose of Article 1, the word of OLC is not the final word. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (declaring it the "province and duty of the Judicial Department" to determine the constitutionality of governmental action). DOJ admits as much. *See* Mike Scarcella, *Justice Dept. OLC Memos Have No 'Force of Law' Feds Tell Appeals Court*, NAT'L L. J. (2019). Consistent with the author's views of the expansive reach of the executive branch's prosecutorial power, this article assumes that constitutional tolling applies only to the prosecutorial and not the investigative function. Beyond the scope of this article is whether temporary immunity tolls an otherwise applicable statute of limitations and the substantial federalism issues that would arise from a state criminal prosecution of a sitting president. *See* Trump v. Vance, 941 F.3d 631 (2d Cir. 2019) (presidential immunity does not apply to state prosecutor's investigative steps). In contrast, a sitting President is not immune constitutionally from civil suit and process during his or her term of office. *See* Clinton v. Jones, 520 U.S. 681 (1997) (doctrine of separation of powers does not require federal courts to stay all private actions against President during term of office).

[3] Pub. L. No. 95-521, 92 Stat. 1824 (Oct. 26, 1978).

[4] *See* Morrison v. Olson, 487 U.S. 654 (1988).

[5] *See* 28 C.F.R. § 600.1–600.10.

parties intended to ensure the independence of special counsel. These legislative proposals sought to reinstate judicial oversight of a core executive function as a check against the abuse of power. A cynic might dismiss them as acts of political grandstanding from the firm and seemingly unassailable grounds of anti-corruption. More benignly, one might view them as understandable *ad hoc* responses to perceived threats to the politically charged Mueller investigation.[6] Whatever the motivation, these bills were not only ill-advised but constitutionally suspect.

This article argues that respect for, and adherence to, fundamental principles of the separation of powers mandate that Congress actually take the opposite, and perhaps counterintuitive, tack. The answer is not entanglement with the least dangerous branch nor the use of the Executive Branch as the investigative arm of Congress. The proper response is not a diminution of executive power but rather its reaffirmation. What is required is a return to the original intent of the EGA to create a robust and powerful standalone anti-corruption unit within DOJ coupled with a fortification of internal structural protections within the agency so that the Executive Branch, acting alone and without interference from the Congress or the courts, may exercise its core prosecutorial power with integrity, independence, and fidelity to the law. To that end, the Department should eliminate the Special Counsel regulations altogether, even assuming they are constitutional *ab initio* or as applied, because they function as a self-inflicted infringement of core executive power.

Part I begins with an explication of the foundational premise that investigations and prosecutions generally are inherently and historically a non-delegable Executive Branch function. Open questions of immunity notwithstanding,[7] this includes the power to investigate the president even if active prosecution during the term of office is tolled to ensure that any investigation of criminal conduct, even in the highest office in the land, is timely and full. This section will then briefly recount historical events leading to the passage of the EGA and the original and renewed Independent Counsel Act ("ICA") with special focus on the original intent to create an apolitical independent prosecutorial unit with statutorily mandated annual reporting obligations to Congress. Lastly, Part I will discuss the seminal decision in *Morrison v. Olson*, 487 U.S. 654 (1988), not so much for what it held, but how much Justice Scalia's powerful and influential dissent sheds light on the efficacy and wisdom of the current special counsel regulations.

Part II describes that although blessed by the Supreme Court in *Morrison* how the troubled history of the various independent counsels culminated in the controversial Campaign Finance Task Force, the last major effort to combat foreign influence in a U.S. election cycle, and ultimately in the sunset of the ICA. This history is important and should not be forgotten in the debate over the Mueller Russian investigation and more recently the Special Counsel appointments. To the extent the Campaign Finance Task Force was successful, it presents an investigatory and prosecutorial model acting without inter-branch influence or interference. On the other hand, to the extent it succumbed to internal political pressure, it may prove that something may be constitutional but not a wise, efficient, and effective exercise of governmental power absent a robust DOJ self-governance process not yet in place.

Part III sets out the structure and unique features of the current Special Counsel regulations and how they functioned as a practical matter during the Mueller Russian investigation—the first

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6 *See* U.S. DEP'T OF JUST., OFF. OF SPECIAL COUNS., REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION, VOLS. I AND II, (2019) ("MUELLER REPORT").

7 *See supra* note 2.

real test of the regulations since their passage—through the more recent indictments of Donald Trump, Hunter Biden, and other matters.[8] Part III continues with an analysis of certain bills by Senators Lindsay Graham (R-S.C.), Cory Booker (D-N.J.), Sheldon Whitehouse (D-R.I.) and Richard Blumenthal (D-Conn.)[9] as well as Thom Tillis (R-N.C.) and Chris Coons (D-Del.)[10] that sought to return the prosecutorial landscape to the discredited days of the ICA and opines on how Justice Scalia's dissent in *Morrison*, in light of its force and a changed Supreme Court, might have doomed those proposals to failure. Although these attempts at reform failed, reform is still sorely needed as the Department of Justice has either applied the Special Counsel regulations in a manner that offends the Constitution or in the alternative has misled the body politic about whether a proper constitutional officer—a superior officer—exercises the core power to indict, convict, and seek punishment for a federal offense.

Part IV recounts how certain *ad hoc* procedures and policies, largely driven by the well-deserved respect given to one senior DOJ official,[11] have guided DOJ through moments of crises such as the investigation of the death of Vince Foster, the prosecution of I. Lewis ("Scooter") Libby, the investigation of the destruction of CIA tapes chronicling the use of so-called enhanced interrogation techniques, and the Department's self-examination of the Office of Legal Counsel memoranda approving of those techniques. However, as then-FBI Director James Comey's misguided usurpation of the prosecutorial function in the Midyear/Clinton email investigation[12] and reported DOJ infighting during the Mueller Russian investigation both reveal,[13] those informal policies have proven to be inadequate amidst increased scrutiny of governmental functions in these more complicated times, a reality that now includes active prosecutions of the leading candidate of the party that opposes the incumbent administration, the sitting president

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[8] Except where noted, the author intends a critique of administrative agency processes and procedure rather than substantive prosecutorial decisions. Accordingly, this article offers no opinion on the conclusions of the Mueller Report regarding allegations of a campaign finance or other conspiracy involving the Trump presidential campaign and Russian persons and entities or attempts to obstruct and impede the investigation of such a conspiracy. *See I* MUELLER REPORT, *supra* note 6, (Investigation of Alleged Conspiracy to Influence 2016 Election) and *II* MUELLER REPORT, (Obstruction Investigation). Nor does the author offer any comment on the substantive merits of the investigations and prosecutions undertaken by any of the recent or current Offices of Special Counsel.

[9] *See* ALB17686, Special Counsel Independence Protection Act, 115th Cong., 1st Session, S. __ ("a BILL To limit the removal of a special counsel, and for other purposes"), available at https://www.scribd.com/document/355454481/Special-Counsel-Independence-Protection-Act [https://perma.cc/RU7Q-V99R].

[10] *See* SIL17618, Special Counsel Integrity Act, 115th Cong., 1st Session, S. __ ("a BILL To ensure independent investigations by allowing judicial review of the removal of a special counsel and for other purposes"), available at https://www.justsecurity.org/wp-content/uploads/2017/08/tillis-coons-special-counsel-integrity-act.pdf [https://perma.cc/U8GD-56LK].

[11] *See* Eric Lichtblau, *David Margolis, a Justice Department Institution, Dies at 76*, N.Y. TIMES (July 15, 2016) available at https://www.nytimes.com/2016/07/16/us/david-margolis-a-justice-department-institution-dies-at-76.html [https://perma.cc/V3HT-KZ3J]. David Margolis's unique and influential role in DOJ history and the model that history suggests for institution reform is discussed *infra*, Part IV, pp. 48–63.

[12] *See* U.S. DEP'T OF JUST., OFF. OF THE INSPECTOR GEN., A REV. OF VARIOUS ACTIONS BY THE FED. BUREAU OF INVESTIGATION AND DEP'T OF JUST. IN ADVANCE OF THE 2016 ELECTION, Oversight and Rev. Div., No. 18-04 (June 2018) (review of criminal investigation denominated by the FBI as "Midyear Exam") (hereinafter "DOJ-OIG MIDYEAR REPORT"), available at https://www.justice.gov/file/1071991/download [https://perma.cc/42LQ-TMLH].

[13] *See* Laura Jarrett, *McCabe and Rosenstein quarreled over recusals in front of Mueller,* CNN (Oct. 11, 2018) (reporting alleged confrontation between the Deputy Attorney General and Acting Director of FBI over mutual refusals to recuse in the Mueller Russian investigation) available at https://www.cnn.com/2018/10/11/politics/andrew-mccabe-rod-rosenstein-recusal-russia-investigation-mueller/index.html [https://perma.cc/AQ4R-QH8F].

himself, and his son. Part IV will conclude that the Department is sorely in need of an overhaul and modernization of its procedures for defining ethical boundaries and guiding the exercise of the prosecutorial function to avoid what has now become its routine entanglement with political forces.

First, the Department should promulgate clearly articulated conflict of interest rules; second, establish a mechanism to enforce such rules and resolve disputes concerning them when they arise. Lastly, the Department should jettison the Special Counsel regulations and start anew. In their place, the Department must promulgate internal but transparent regulations governing the appointment of lead prosecutors in matters of unusual sensitivity and high public interest that place the ultimate authority and prosecutorial decision-making in a person of proper constitutional rank—therefore assuming the corresponding political risk—in order for the regulations to be constitutional.

Necessarily, these officers must be "superior officers' as defined by the Constitution and Appointments Clause. Nothing less will instill and ensure public confidence that DOJ's investigative and prosecutorial decisions are made by the un-conflicted and unbiased and that the decisions themselves are untainted by political influence, motive or gain or other improper considerations. And if those senior officials of the Executive Branch fail to meet their ethical and moral obligations, it is to the people they will answer through the exercise of the power given to Congress in the Constitution and ultimately at the ballot box.

Finally, Part V urges Congress and DOJ, in light of all the above, to create a new standalone division in the Department—an Integrity Division. This new division, patterned in part after the post-9/11 creation of the National Security Division ("NSD"), would consolidate under one Assistant Attorney General all DOJ anti-corruption and governmental ethics efforts and decision-making. Matters of governmental integrity, transparency and ethical enforcement of the criminal law are no less deserving of clear policy directives and procedures. Just as we should be protected from outside threats, our democracy should be protected from inside threats to our nation of laws and not men.

A DOJ Integrity Division would be headed by a superior officer, as that term is constitutionally defined and as other DOJ Divisions are, and serve an extended term of office that mirrors that of the FBI Director. As with other divisions, this AAG would report directly to the Office of the Deputy Attorney General ("ODAG"), have "dotted line" reporting responsibility to the Department's Office of Inspector General ("OIG"), and be governed by formal regulations promulgated after notice and comment under the Administrative Procedure Act.[14]

In sum, the history recited below compels the conclusion that what DOJ needs now, what our nation has always needed, and what our constitution requires, is a strong, independent, comprehensive, and permanent division within DOJ, insulated from political influence from without and within, and charged with enforcing the criminal law fairly, faithfully and without fear or favor.

I. The Power to Prosecute: A Core Executive Branch Function

A. A Core Constitutional Function

[14] 5 U.S.C. § 551 *et seq*.

As a matter of American law, the power to investigate and prosecute is an inherently Article II[15] executive function. Every American high school student should know[16] that the Legislative Branch makes the law, the Judicial Branch interprets the law, and the Executive Branch enforces the law. Of course, the lines are not always sharply defined[17] but this tripartite demarcation[18] and division of power is a fundamental principle of American democracy and distinguishes it from other forms of representative government around the world.

In that way, it is a key component of American Exceptionalism if one believes in such a thing[19] and, at least in theory, marks a key distinction between common law traditions as molded by the American experience and the continental law of civil codes.[20] Each branch must stay in its

[15] U.S. CONST., art. II, § 1, cl. 1 ("The executive Power shall be vested in a President….").

[16] A survey conducted by the University of Pennsylvania found on the eve of the 2016 presidential election that only 26 percent of American adults could name all three branches of government—down from 38 percent five years earlier. *See* Americans' Knowledge of the Branches of Government Is Declining (Sept. 13, 2016), https://www.annenbergpublicpolicycenter.org/americans-knowledge-of-the-branches-of-government-is-declining [https://perma.cc/7G88-PX93].

[17] BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (Yale Univ. Press 1921) (arguing judges apply law in easy cases and make law in hard cases).

[18] *See* MONTESQUIEU, DE L'ESPRIT DES LOIX (1748). More specifically, "[i]n every government there are three sorts of power: the legislative; the executive in respect to things dependent on the law of nations; and the judiciary in regard to matters that depend on the civil law." MONTESQUIEU, THE SPIRIT OF LAWS, BOOK XI (The Colonial Press 1899, Thomas Nugent trans.).

[19] *See* JOHN W. KINGDON, AMERICA THE UNUSUAL (Worth 1999).

[20] In many European countries, and some South American systems whose legal systems derive from continental law, the prosecutorial power is exercised by an investigating magistrate with a mix of judicial and prosecutorial powers. *See generally*, Erik Luna, et al., *Prosecutors as Judges,* 67 WASH. & LEE L. REV. 1413, 1429–1500 (2010) (describing European model). Some have argued the breadth and depth of power currently wielded by federal prosecutors approaches the European model and is even beneficial. *See id*. at 1424–26 (citing Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2141, 2147 (1998) and noting Lynch's use of the term "prosecutorial adjudication"); *see also* Gerard E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 LAW & CONTEMP. PROBS. 23, 58 (1997). But even critics of allegedly unchecked American prosecutorial power view this as less a conflation of governmental powers otherwise separate and more an example of executive branch excess. *See e.g.,* Ronald Wright, et al., *Honesty and Opacity in Charge Bargaining*, 55 STAN. L. REV. 1409, 1410 (2003) (arguing that lack of prosecutorial transparency denies defendants reasonable access to judicial oversight); Maximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223, 225–26 (2006) (criticizing coercive plea-bargaining tactics).

proper constitutional lane.[21] The Legislature may not exercise judicial[22] or executive power.[23] judges may not legislate[24] or enforce the criminal law.[25] The executive may not legislate[26] or perform the judicial function of declaring a law unconstitutional.[27]

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[21] According to Montesquieu, the muse of the founding fathers:

> When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.
>
> Again, there is no liberty if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.
>
> There would be an end of every thing, were the same man, or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.

MONTESQUIEU, THE SPIRIT OF LAWS, BOOK XI (The Colonial Press 1899, Thomas Nugent trans.).

[22] *But see* Mistretta v. United States, 488 U.S. 361 (1989) (rejecting separation of powers challenge to the mandatory sentencing guidelines promulgating by quasi-legislative U.S. Sentencing Commission). To the extent *Mistretta* was wrongly decided in the same way *Morrison* arguably was, its reach is cabined by United States v. Booker, 543 U.S. 220 (2005), which held the sentencing guidelines are merely advisory albeit more clearly on Sixth Amendment grounds than the separation of powers. Nonetheless, *Booker* righted a certain listing of the constitutional ship by restoring the core judicial function of judicial discretion in sentencing.

[23] Congress may hold someone in contempt for failure to answer a subpoena subjecting them to public shame (or fame) and public approbation (or martyrdom), and may even arrest and detain them presumably until they comply, *see* McGrain v. Daugherty, 273 U.S. 135 (1927), but only the executive may prosecute that individual for violating the statute criminalizing contempt of Congress. *See* 2 U.S.C. § 192 (misdemeanor to refuse valid congressional subpoena); 2 U.S.C. § 194 (setting forth procedure to certify contempt to the "appropriate United States Attorney" for grand jury presentation). Section 194 is written to command presentation to the grand jury "for its action." *Id.* Congress has largely avoided testing the constitutionality of a mandatory presentment. *See generally* CONG. RSCH. SERV., CONG. SUBPOENAS: ENFORCING EXEC. BRANCH COMPLIANCE (Mar. 27, 2019) (describing alternatives to criminal prosecution in enforcing congressional subpoenas); *see also* Wilson v. United States, 369 F.2d 198 (D.C. Cir. 1966) (finding the Speaker of the House in error in interpreting 2 U.S.C. § 194 as conferring no discretion).

[24] *See* United States v. Stevens, 559 U.S. 460, 481 (2010) (declining to "rewrite a . . . law to conform it to constitutional requirements . . . for doing so would constitute a 'serious invasion of the legislative domain[]'") (quoting Reno v. American Civil Liberties Union, 521 U.S. 844, 884 (1997); United States v. Treasury Employees, 513 U.S. 454, 479, n.26 (1995)). The Supreme Court's historical treatment of the legal theory of "honest services fraud" illustrates the difficulties courts confront when they attempt to interpret statutory language to save a poorly written statute. Such "gap-filling" often inspires allegations of judicial incursion into the legislative function. *Compare* McNally v. United States, 483 U.S. 350, 360 (1987) (declining to read concept of honest services fraud into mail and wire fraud statute stating "[i]f Congress desires to go further, it must speak more clearly than it has[]") *with* Skilling v. United States, 561 U.S. 358, 408–09 (2010) (limiting definition of honest services fraud to bribes and kickbacks over vigorous Justice Scalia dissent accusing the majority of impermissibly legislating to save vague statute). *See also* Sara Sun Beale, *An Honest Services Debate*, 8 OHIO ST. J. CRIM. L. 251, 269–270 (2010) (using a fictional expert debate to highlight the tension between judicial gap-filling to save a statute or, in the alternative, striking it down to spur further legislative action).

[25] Federal courts may not compel federal prosecution. *See* United States v. Cox, 342 F.2d 167, 171 (5th Cir. 1965) ("courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions[]"); *see also* United States v. Friedland, 83 F.3d 1531, 1539 (3d Cir. 1996) ("The United States Attorney is responsible for the prosecution of all criminal cases within his or her district.").

Within these generally accepted parameters, there seems little controversy that the power to enforce the criminal law through investigation and prosecution belongs within the exclusive power of the executive. Derived from the power—indeed obligation—of the king to ensure public order, in modern terms we think of this common law domain as the police power.

In this regard form—and the modern administrative state—follows function. Federal agencies, creatures of the Executive Branch, employ vast armies of federal law enforcement officers with the statutory authority to carry firearms, execute search and arrest warrants, and conduct electronic surveillance. The Department of Justice itself has five separate components with domestic criminal investigative power, the Federal Bureau of Investigation;[28] the Drug Enforcement Agency; the Bureau of Alcohol, Tobacco, Firearms and Explosives; the U.S. Marshals Service and an Office of Inspector General. Even the Department's Office of Professional Responsibility ("OPR"), manned by lawyers, not special agents, asserts criminal investigative powers.

The DOJ investigative and prosecutorial behemoth is matched only by the Department of Homeland Security ("DHS"). Patched together after the September 11, 2001 terrorist attacks to create a force dedicated to external threats, DHS combines law enforcement agencies from several legacy components including the Secret Service from Treasury, the Coast Guard and the Transportation Security Agency from the Department of Transportation, and the Federal Protective Service from the General Services Administration.

In a new component called Customs and Border Protection, the border control functions of the former DOJ component, Immigration and Naturalization Service, and Treasury's Custom Inspectors were combined to designate border officers with both customs and immigration enforcement responsibilities.[29] Extended border or interior investigations of immigration offenses and transnational crime fell under another new bureau, Immigration and Customs Enforcement, which also combined those functions from DOJ and Treasury legacy components.[30]

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[26] *See* Clinton v. City of New York, 524 U.S. 417 (1998) (granting president line-item veto power intrudes on the legislative function).

[27] Although they may try. *See generally* CONG. RSCH. SERV., PRESIDENTIAL SIGNING STATEMENTS: CONSTITUTIONAL AND INSTITUTIONAL IMPLICATIONS (Jan. 4, 2012), https://sgp.fas.org/crs/natsec/RL33667.pdf [https://perma.cc/BQN2-7JY6]. *Cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952) ("the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad[].").

[28] The FBI serves two related but separate domestic functions. The Criminal, Cyber, Response, and Services Branch ("CCRSB") investigates financial crime, white-collar crime, violent crime, organized crime, public corruption, civil rights violations, and, starting in the 1980's, drug-related crimes. The mission of CCRSB's counterpart, the National Security Division, is domestic counterintelligence, territory off-limits to the intelligence community which is limited by the National Security Act and other laws to foreign operations.

[29] *See* Reorganization Plan for the Department of Homeland Security, H.R. Doc. No. 108-16 (2002) *reprinted in* 6 U.S.C.A. § 542 (2007) (renaming the Customs Service as the Bureau of Customs and Border Protection and combining the "resources and missions relating to borders and ports of entry of the Customs Service, the INS, including the Border Patrol and the inspections program, and the agricultural inspections function of the Agricultural Quarantine Inspection program[]").

[30] *Id*. (renaming the Bureau of Border Security the Bureau of Immigration and Customs Enforcement and combining INS and legacy Customs Service "interior enforcement functions, including the detention and removal program, the intelligence program, and the investigations program[]" in order to "enforce the full range of immigration and customs laws within the interior of the United States").

DOJ and DHS, cabinet-level agencies both, while the largest, are far from alone. Treasury retains the formidable Internal Revenue Service which supplements its revenue agents who maximize tax collection with special agents in its Criminal Investigations Division who target criminal tax evasion and fraud. Virtually every other federal agency also has special agents, or the equivalent, with law enforcement authority, either as standalone bureaus under the authority of the agency head or as the investigative arm of the agency's inspector general.[31] The Department of Defense;[32] the State Department;[33] other cabinet-level departments such as Agriculture, Education, Energy, Health and Human Services, and Labor; the Environmental Protection Agency; and even the quasi-federal United States Postal Service[34] investigate not only potential violations of federal criminal statutes specific to their agency but often operate in *ad hoc* and semi-permanent task forces with DOJ and DHS.

While the Judicial Branch employs law enforcement officers to enforce orders of release on bail[35] and criminal judgments,[36] it is the Executive Branch—not the Judicial Branch—that

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[31] Federal inspectors general ("IGs") are governed by the Inspector General Act of 1978, Pub. L. 95–452, 5 U.S.C. App. ("IGA"). The initial contingent of twelve IGs has expanded to seventy-two. There are two types of inspectors general under the IGA: "Establishment IGs" ("EIGs") who are presidentially appointed and Senate-confirmed and Designated Federal Entities inspectors general who are appointed by the agency head ("DFE IGs"). There are subtle differences between EIGs and DFE IGs. Those differences, as well as a large number of similarities, are beyond the scope of this article.

[32] The Department of Defense ("DOD") has five separate agencies with civilian law enforcement powers. The most well-known, of course, is the Naval Criminal Investigative Service ("NCIS"). Army's Criminal Investigation Division Command, Air Force's Office of Special Investigations, the Marine Corps' Criminal Investigation Division and the DOD Inspector General's Defense Criminal Investigative Service are no doubt wondering when they will get their own popular television show.

[33] The Bureau of Diplomatic Security is State's federal law enforcement component. *See Our Mission and Vision*, STATE.GOV, https://www.state.gov/bureaus-offices/under-secretary-for-management/bureau-of-diplomatic-security/ [https://perma.cc/K2XB-TY2T].

[34] Seasoned federal prosecutors often rely on the Postal Inspection Service to supplement or supplant sensitive corruption investigations ordinarily handled by the FBI. *See* Jim Geraghty, *The Last Trusted Prosecutor in Washington*, NAT'L REV. (Nov. 4, 2019), https://www.nationalreview.com/2019/11/john-durham-last-trusted-prosecutor-in-washington [https://perma.cc/T6UG-HQE6] (discussing veteran DOJ prosecutor John Durham's use of postal inspectors where FBI agents subject to conflict of interest). Federal criminal law reaches fraud schemes which have a nexus to the postal service including bribe and kickback schemes. *See* 18 U.S.C. §§ 1341 (criminalizing use of Postal Service to devise any scheme of artifice to defraud) and 1346 (defining "scheme or artifice to defraud" to include "a scheme or artifice to deprive another of the intangible right to honest services.").

[35] Pretrial Services Officers make bail recommendations to federal trial judges and supervise those released on bail and other conditions pending trial. They first became part of the federal judiciary pursuant to the Speedy Trial Act of 1974, 88 Stat. 2086, on a "demonstration" basis in ten judicial districts. The Pretrial Services Act of 1982, 96 Stat. 1136, expanded the program nationwide. *See* Court Officers and Staff: Probation and Pretrial Services Officers, FED. JUD. CTR. https://www.fjc.gov/history/administration/court-officers-and-staff-probation-and-pretrial-services-officers [https://perma.cc/YMF5-HBPB].

[36] The judiciary first hired probation officers in 1927 under the authority of the Federal Probation Act of 1925, 43 Stat. 1259, to supervise defendants sentenced to a term of probation. Over the years their duties have expanded to the preparation of presentence investigation reports and post-incarceration supervision. *See supra* note 35; *see also* 18 U.S.C. § 3583 (providing for "[i]nclusion of a term of supervised release after incarceration").

transports[37] and houses federal prisoners both pre-trial and post-conviction.[38] Indeed, the Judicial Branch, and for the most part Congress,[39] are completely dependent on the Executive for the exercise of police powers.[40] Add in Executive Branch uniformed police forces and the broader inspector general community, whose mandate to investigate agency fraud, waste, and abuse extends their investigative reach far beyond employees and agency walls, there are few aspects of society and commerce hidden from the searching eye of the investigative agencies of the Executive Branch.[41] There is even an inspector general of sorts for the inspector general community.[42]

All this investigative muscle is matched by the Attorney General's prosecutorial firepower. Six separate divisions at DOJ headquarters in Washington, D.C., colloquially referred to as "Main Justice"—Tax, Antitrust, Environmental and Natural Resources, Civil Rights, National Security, and, of course, the Criminal Division—have litigation units that prosecute federal crimes nationwide with or without the assistance of United States Attorney's Offices. Main Justice prosecutors, designated as "Trial Attorneys" and their supervisors gather evidence, present matters to grand juries, arrange extraditions, coordinate trans-border investigations

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[37] Federal prisoners are processed upon arrest and, if detained or serving a federal custodial sentence, are transported to and from court proceedings from federal prisons and detention centers by deputies of the United States Marshals Service ("USMS"), a DOJ component. *See generally* MISSION, USMARSHALS.GOV, https://www.usmarshals.gov/who-we-are/about-us [https://perma.cc/K5CG-RFC2] (describing law enforcement duties of the USMS).

[38] Federal pretrial detainees are held in federal detention facilities maintained by the Department of Justice's Federal Bureau of Prisons ("BOP") or local facilities under contract with the United States Marshals Service. If convicted and sentenced to prison, federal defendants are incarcerated by the executive branch (DOJ) not the judiciary. *See generally About Us*, BOP.GOV, https://www.bop.gov/about/ [https://perma.cc/XKS8-PRKC] (setting forth responsibilities of BOP).

[39] Congress' exercise of direct police powers is limited to the Senate and House Sergeants at Arms, who may enforce orders of the relevant chamber including orders of contempt, and the United States Capitol Police, who may partner with the FBI nationwide to investigate threats to Members of Congress but largely act as a uniformed service to secure the Capitol grounds. *See Sergeant at Arms,* HOUSE.GOV., https://www.house.gov/the-house-explained/officers-and-organizations/sergeant-at-arms [https://perma.cc/AV3W-L468] (House Sergeant at Arms); *About the Sergeant at Arms*, SENATE.GOV, https://www.senate.gov/about/officers-staff/sergeant-at-arms.htm [https://perma.cc/867M-QAH7] (Senate Sergeant at Arms); *The Department*, USCP.GOV, https://www.uscp.gov/the-department [https://perma.cc/2UKZ-UWQE] (Capitol Police).

[40] Consistent with its constitutional status as the least dangerous branch, the judiciary relies on the executive branch for its most basic operations. Executive branch employees serve process, execute final judgments, and provide personal security (United States Marshals Service ("USMS")), secure federal courthouses (USMS and Homeland Security's Federal Protective Service), and provide physical space for its daily operations (General Services Administration). The only exception is a small police force which protects the United States Supreme Court.

[41] Federal law enforcement is big business. The General Accounting Office reported in December 2018 that the 20 largest federal law enforcement agencies spent at least $1.5 billion from 2010 through 2017 on firearms, ammunition and tactical gear alone. *See* GOV. ACCOUNTABILITY OFFICE, FEDERAL LAW ENFORCEMENT - PURCHASES AND INVENTORY CONTROLS OF FIREARMS, AMMUNITION, AND TACTICAL EQUIPMENT (Dec. 2018) https://www.gao.gov/assets/700/695985.pdf [https://perma.cc/MN38-BM5D].

[42] The Council of the Inspectors General on Integrity and Efficiency ("CIGIE"), established by the Inspector General Reform Act of 2008, Pub. L. 110-409, acts as an umbrella organization for the inspector general community. The CIGIE is made up of 72 inspectors general, the Office of Management and Budget, and other interested law enforcement partners. *See generally CIGIE Governing Documents*, IGNET.GOV, https://ignet.gov/content/cigie-governing-documents [https://perma.cc/NR7L-9T8W].

through permanent foreign outposts,[43] and try criminal cases to petit juries in federal court. Like the DOJ investigative components they work with, each of these divisions report to, and are supervised by the Deputy Attorney General, DOJ's presidentially appointed, Senate-confirmed, second-in-command.

The United States Attorney community, with its own DOJ headquarters presence,[44] deploys over a thousand federal prosecutors in 93 offices across all 94 judicial districts.[45] In some larger offices, United States Attorney's Offices hire their own investigators and assemble and supervise teams of local police officers deputized and acting under federal authority. This basic organizational structure for federal prosecutors is as old as the Republic. The appointment by the President of a chief federal prosecutor in each judicial district was a key feature of the Judiciary Act of 1789.[46]

After some early ambiguity, by 1861 the authority of the Attorney General, and perforce the President, to supervise United States Attorneys was firmly established.[47] From the establishment

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[43] One of the lasting contributions of former FBI Director Louis Freeh, himself a former federal prosecutor, was the substantial expansion of the FBI's foreign presence. FBI legal attaches, commonly referred to as "Legats," serve in 63 embassies worldwide. LOUIS J. FREEH, MY FBI, BRINGING DOWN THE MAFIA, INVESTIGATING BILL CLINTON, AND FIGHTING THE WAR ON TERROR 50–51 (St. Martins 2005) (describing enlisting support from Clinton to expand FBI operations overseas). DOJ runs a parallel program centered in the Criminal Division at Main Justice which stations federal prosecutors strategically around the globe for purposes of training and law enforcement coordination. Known as Resident Legal Advisors ("RLAs"), RLAs work with FBI Legats and other executive branch employees stationed internationally to advance executive branch policy, treaty, law enforcement and intelligence community goals. *See generally*, https://www.justice.gov/criminal-opdat [https://perma.cc/86QH-9H9A] (describing role of RLAs).

[44] United States Attorneys ("USAs") are for the most part presidentially appointed and Senate-confirmed. *See* 28 U.S.C. § 541. However, vacancies can be filled in the absence of Senate confirmation by separate statute through presidential appointment and judicial confirmation. *See* 28 U.S.C. § 546. Since 1953, USAs are represented at DOJ headquarters through the Executive Office of United States Attorneys ("EOUSA"). *See generally*, U.S. Dep't of Just., Exec. Off. of U.S. Att'ys, available at https://www.justice.gov/usao/eousa [https://perma.cc/2S32-JWPE]. In addition, by regulation the Attorney General's Advisory Committee ("AGAC") provides a platform for a rolling committee of leading USAs to provide policy guidance to the Attorney General and the Deputy Attorney General to whom the USAs report. *See* 28 C.F.R. § 0.10, Att'y Gen.'s Advisory Comm. of U.S. Att'ys (2020). For a thoughtful and comprehensive review of the vital role USAs play in enforcing federal criminal law and their tradition of independence as superior officers, see Sara Sun Beale, *Rethinking the Identity and Role of United States Attorneys*, 6 OHIO ST. J. CRIM. LAW 369 (2009). Whether Title 28, U.S.C. § 546 remains constitutional in light of recent appointments clause jurisprudence is a fair question beyond the scope of this article.

[45] Ninety federal judicial districts encompass the 50 states and the District of Columbia. There are four additional districts, one each for the Commonwealth of Puerto Rico, and the territories of the Virgin Islands, Guam and the Northern Mariana Islands. A single United States Attorney serves both Guam and the Northern Mariana Islands. Therefore, there are 93 U.S. Attorneys for the 94 judicial districts. U.S. Dep't of Just.*, Offices of the United States Attorneys,* available at https://www.justice.gov/usao/about-offices-united-states-attorneys [https://perma.cc/SHJ8-WZA2].

[46] The Senate version of the bill placed the appointment power with the judicial branch. The bill as passed vested the authority in the president. *See generally*, Admin. Off. of the Courts, Fed. Jud. Center, *History of the Federal Judiciary, Judicial Branch, Court Officers and Staff: U.S. Attorneys,* https://www.fjc.gov/history/administration/court-officers-and-staff-u.s.-attorneys [https://perma.cc/93UB-R9XT] (discussing history of the Judiciary Act of 1789).

[47] *See generally* Stephanie A.J. Dangel, *Is Prosecution a Core Executive Function? Morrison v. Olson and the Framers' Intent*, 99 YALE L. J. 1069 (1990); Scott Ingram, *Representing the United States Government: Reconceiving the Federal Prosecutor's Role Through a Historical Lens*, 31 NOTRE DAME J. L. ETHICS & PUB. POL'Y 293 (2017).

of the Justice Department in 1870 through today's comprehensive *Justice Manual*[48] the centralization and uniformity of Main Justice supervision has only increased. As with the Assistant Attorneys General who oversee the litigating components of Main Justice, each of them presidentially appointed and Senate-confirmed principal officers ("PASCs"), United States Attorneys, themselves PASCs, report to another PASC, the Deputy Attorney General. While it may make for a somewhat complicated organizational chart (and plenty of egos in the room),[49] the Executive Branch's investigative and prosecutorial prowess works perfectly well in the mine-run, even complex, criminal case.

But what to do when the subject of the investigation is the President of the United States, the Vice-President, a member of the Cabinet or other high-ranking official? So far, we are on version 3.0. Although often conflated, historically there are three different versions of the *ad hoc* prosecutor operating alongside or outside the regular DOJ chain of command for such circumstances: the special prosecutor, the independent counsel, and the special counsel. In some measure, they differ only in the organic law from which they sprung.

The first historical iteration, the "special prosecutor," was not borne of statute or regulation but was understood to flow from the inherent power of the President—perhaps no better testament to the notion that the power to prosecute is inherently Executive. Although the concept predates Watergate,[50] that scandal was the historical apex of the special prosecutor if for no other reason than it precipitated the denouement of a sitting president.

In contrast, independent counsel—the second paradigm—is in theory a creature of all three branches: established by statute with an express reporting requirement to Congress, yet supervised by the judiciary and operating with the power, tools and resources and resources of the Executive. Two such statutory independent counsel regimes have been in effect; the first from 1978 through 1992[51] and the second iteration from 1994 to 1999,[52] when the statute reached a pre-ordained sunset date. After Congress declined to renew the last independent counsel statute, DOJ adopted separate administrative regulations to formally create the Office of Special Counsel, the third and latest attempt to address these thorny issues.

B. The Ethics in Government Act of 1978

The second iteration—the concept of an independent counsel—was intended to address the inherent conflicts in a system that relied solely on Article II power to investigate the President.

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[48] Prior to 2018, the *Justice Manual* was known as the United States Attorneys' Manual. According to DOJ, it was "comprehensively revised and renamed" that year. See U.S. Just. Manual, available at https://www.justice.gov/jm/justice-manual [https://perma.cc/LR2E-YS2T].

[49] *See Agencies, Organization Chart*, JUSTICE.GOV, https://www.justice.gov/agencies/chart [https://perma.cc/XBD7-3LH2] (DOJ organizational chart).

[50] *See* Leslie E. Bennett, *One Lesson From History: Appointment of Special Counsel and the Investigation of the Teapot Dome Scandal*, BROOKINGS INSTITUTION (1999), http://academic.brooklyn.cuny.edu/history/johnson/teapotdome.htm [https://perma.cc/XC8X-LTR6].

[51] The Office of Independent Counsel was first created by the Ethics in Government Act of 1978 and renewed twice, first by the Ethics in Government Act Amendments of 1982, 96 Stat. 2039, and, second, by the Independent Counsel Reauthorization Act of 1987, 101 Stat. 1293. Like the second iteration, the 1978 Act contained a sunset provision and elapsed on the fifth anniversary of its 1987 reauthorization—December 15, 1992—one month after the election of President Clinton to his first term.

[52] The Independent Counsel Reauthorization Act of 1994, Pub. L. 103-270, was effective June 30, 1994 and like its predecessor statutes required reauthorization after a term of years. The statute was not renewed at the end of its five-year term.

Watergate was, and continues to be, a defining moment in modern American political history. Our "long national nightmare"[53] was not completely for naught as the perceived threat to the rule of law ultimately moved a reportedly reluctant Congress to pass the thoughtful and comprehensive Ethics in Government Act of 1978 ("EGA"). As a legislative act it sought to address myriad good government issues applicable to appointed and elected federal officials which continue to resonate: financial disclosure,[54] restrictions on outside income, conflicts of interest, and limits on lobbying activities.[55] The EGA also dictated two important structural reforms; first, the creation of the Office of Government Ethics ("OGE"), a somewhat benign and beneficial creature of the Executive Branch;[56] and second, the establishment of the Office of Independent Counsel ("OIC"), an office that over time some—not all of them targets of its work—argued was a hybrid beast of broad and ill-defined power.

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[53] Gerald Ford, in accepting the office of President after Richard Nixon's resignation, sought to assure the American people: "My fellow Americans, our long national nightmare is over. Our Constitution works; our great Republic is a Government of laws and not of men." *Inauguration of Gerald Ford*, https://en.wikipedia.org/wiki/Inauguration_of_Gerald_Ford [https://perma.cc/56KB-RJ5E].

[54] The financial disclosure obligations pertaining to elected officials was of particular sensitivity as Congress feared that incomplete or inaccurate forms might result in criminal prosecutions from a DOJ politicized at any given time. Congress received off-the-record assurances from senior officials at DOJ during the legislative process that it would adopt an internal policy not to prosecute members of Congress solely for false statements on financial disclosure forms. The policy was never formally adopted but was well known to senior officials and honored. The ill-fated prosecution of Alaskan Senator Ted Stevens may have been the first departure from that unwritten policy. *See* Press Release, U.S. Dep't of Justice, Criminal Division, U.S. Senator Indicted on False Statement Charges (July 29, 2008), https://www.justice.gov/archive/opa/pr/2008/July/08-crm-668.html [https://perma.cc/P3MX-38EV]. DOJ's informal and unwritten policy not to indict members of Congress for intentionally false financial disclosure forms in the absence of other charges is too important a policy, if true, not to recognize openly and transparently.

[55] Watergate abuses spurred reforms in many areas. One was campaign finance. *See* Federal Election Campaign Act of 1971, Pub. L. 92–225, 86 Stat. 3 (Feb. 7, 1972); FECA Amendments of 1974, Pub. L. 93–443, 88 Stat. 1263 (Oct. 15, 1974); and FECA Amendments of 1976, Pub. L. 94–283, 90 Stat. 475 (May 11, 1976). Another was a statute criminalizing the disclosure of tax returns and taxpayer information unless authorized by judicial order, a response to Nixon's penchant for using the Internal Revenue Service to target his political enemies. *See* 26 U.S.C. § 6103; Joan Stafford, *Follow That Lead! Obtaining and Using Tax Information in a Non-Tax Case*, 46 U.S. ATTY'S BULL., 3, 28 (April 1998) (tracing Section 6103 to Watergate abuses). DOJ's treatment of tax cases demonstrates the Department's ability to insulate criminal prosecutions from political interference. DOJ regulations mandate that the Tax Division, apart from any U.S. Attorney or DOJ litigating unit, must separately approve all criminal prosecutions under Title 26, the Internal Revenue Code. *See* Justice Manual § 6-4.200 - Tax Division Jurisdiction and Procedures (Assistant Attorney General, Tax Division, "has responsibility for all criminal proceedings arising under the internal revenue laws" and "must approve any and all criminal charges that a United States Attorney's Office intends to bring against a defendant for conduct arising under the internal revenue laws, regardless of which criminal statute(s) the United States Attorney's Office proposes to use in charging the defendant."). This is intended to prevent political interference in tax prosecutions. *See* Mark Matthews, *Through the Looking Glass: Reconciling the Mission of the Tax Division with the Goals of the United States Attorneys' Offices in Tax Prosecutions*, 46 U.S. ATTY'S BULL., 7, 10 (April 1998) (arguing "[t]he structure of the entire [Tax Division] review system, including career professionals at the IRS Chief Counsel's office, ensures both the reality and the public perception that individuals charged with criminal tax violations are selected for the crimes they commit not because of who they are"). For a comprehensive summary of Watergate-inspired legislative reforms, see Mark Stencel, *Watergate 25, the Reforms*, WASH. POST (June 13, 1997) https://www.washingtonpost.com/wp-srv/national/longterm/watergate/legacy.htm [https://perma.cc/366C-B6EX].

[56] OGE has oversight authority and sets ethics policy for the executive branch. Each agency with the executive branch is tasked with selecting a Designated Agency Ethics Official (DAEO) who will have "primary responsibility for directing the daily activities of an agency's ethics program and coordinating with OGE." *See* UNITED STATES OFFICE OF GOVERNMENT ETHICS, MISSION AND RESPONSIBILITIES, https://www.oge.gov/web/OGE.nsf/0/0DCB095C47EB209D85258610005CA2D3/$FILE/2020%20OGE%20Profile%20Book%20(Final).pdf [https://perma.cc/JTU7-Q5D7] (explaining functions of OGE).

Before it became a pariah, the OIC was intended to be a savior. Like many examples of bad law motivated by good intentions, it arose in the context of the worst facts. Then-President Richard Nixon's decision to fire the presidentially-appointed Watergate special prosecutor, Archibald Cox, had caused a cascading series of resignations down the DOJ chain of command as officials chose loyalty to the Department over loyalty to the President. On October 20, 1973, Nixon ordered Attorney General Elliot Richardson to fire Cox. Richardson, and his Deputy Attorney General William Ruckelshaus, refused and resigned instead. Under the then extant order of succession, the task fell to Solicitor General Robert Bork who dismissed Cox, reportedly with reticence.[57] The wounds to morale and damage to the Department's reputation would take a considerable effort and extraordinary leadership to mend.[58]

II. The Independent Counsel Act: Its Lofty Goals and Tales of Unintended Consequences

A. The ICA in Design and Concept

The Independent Counsel Act was an ambitious legislative act that reimagined core principles of separation of powers in a remarkable way. As noted above, Nixon would eventually resign rather than face a Senate trial—some evidence the separation of powers doctrine actually works as intended without the need for changes in the careful balance struck by the Framers effected by the ICA. Nonetheless, the drama and trauma of the Saturday Night Massacre—centering on the seeming ease in which the President reached down into the Department of Justice and eventually dictated the removal of his tormentor—spurred legislative reform.

As the Supreme Court would later note in *Morrison v. Olson*[59] in upholding the constitutionality of ICA, the Supreme Court had never viewed the separation of powers as requiring "that the three Branches of Government 'operate with absolute independence.'"[60] Quoting Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*,[61] the conscious design of "dispersed powers"[62] did not compel an "unworkable government."[63] Rather, the Framers intended "separateness but interdependence, autonomy but reciprocity."[64]

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[57] Bork testified before Congress that he had no legal basis to refuse Nixon's order. Under the theory of a unitary executive, since the position of special prosecutor was created by the president, the president retained the legal right to summarily dismiss the office holder at will or dismantle the office in its entirety or both. According to Bork, he stayed on with the Department after firing Cox at the urging of Richardson and Ruckelshaus to ensure the special prosecutor's investigation would continue unabated. *See Bork Defends His '73 Firing of Cox: Tells Senate Panel He Preserved Watergate Investigation*, L.A. TIMES (Sept. 16, 1987) available at https://www.latimes.com/archives/la-xpm-1987-09-16-mn-5454-story.html [https://perma.cc/Q9VW-E4PY].

[58] President Ford appointed Edward H. Levi, the Dean of the University of Chicago Law School, as his Attorney General. Levi is widely credited for leading the Department out of the darkness of Watergate. *See* Edward H. Levi, *Restoring Justice: The Speeches of Attorney General Edward H. Levi*, Forward by Jack Fuller (Univ. of Chicago Press 2013). General Levi spearheaded many needed FBI reforms designed to prevent political influence on Department decision-making. Several of his initiatives to improve integrity and restore morale in the Department, such as the creation of the Criminal Division's Public Integrity Section and the Office or Professional Responsibility, are noted *infra* Section V. B. i., ii., and iv., pp. 64-67. These reforms continue to serve a vital role in the uniform application of federal criminal law.

[59] 487 U.S. 654 (1988).

[60] *Id.* at 693–94 (quoting United States v. Nixon, 418 U.S. 683, 707 (1974)).

[61] 343 U.S. 579 (1952).

[62] *Id*. at 635.

[63] *Id*.

[64] *Id*.

And it was on that model and arguably muddled standard that the ICA was built. Congress could, and did, select species of governmental powers, like delicacies from a smorgasbord, to construct a statute to act as a check on executive branch corruption by supplanting the inherent power of the president to appoint, and fire at will, a special prosecutor. In this new post-Watergate iteration of special purpose prosecutorial power, each branch was given some limited but clearly defined role.

First, the statute only covered certain high-ranking officials where the risk of a conflict of interest or bias would be greatest.[65] Whether allegations of criminal behavior implicated the conduct of such "covered persons" and adequate prediction existed for a full investigation rested first with the executive branch, a nod, if not to the separation of powers, at least to second branch expertise in sorting the wheat from the chaff in criminal investigations. This function of a preliminary investigation and review to determine if the statutory triggers had been met was assigned to the Public Integrity Section ("PIN"), a new unit established in DOJ's Criminal Division as a result of the EGA.

Next, the matter would be brought to the attention of a special court, the aptly named Special Division of the United States Court of Appeals for the District of Columbia Circuit. If the Attorney General found after preliminary review that "no reasonable grounds to believe that further investigation [was] warranted" the Department reported that determination to the Special Division and the matter, at least as it related to invocation of the ICA, ended there.[66] If, however, PIN's preliminary review concluded that a full field investigation of a covered person was recommended, and the Attorney General agreed, the field of play would shift to the judicial branch. In such circumstances, a three-judge panel would appoint an "independent counsel" ("IC") for the matter.[67]

While the IC could be dismissed for cause, the IC would have the full authority of the Attorney General for the particular matter assigned and any subsequently approved extensions. The IC acted autonomously.[68] There would be no other role for the Department which was obligated by statute to stand down.[69] The authority of the Special Division was also cabined. Other than approving any extension of investigative scope when requested, the Special Division would have no oversight role of the work of the IC except to approve the plan to turn out the lights and lock the doors at the end. The term of any given IC would end either when the IC informed the Attorney General that the investigation had concluded or the Special Division determined on its own or after a report from the Attorney General that all matters within the jurisdiction of the IC had been completed or substantially so.[70]

So too did Congress exercise a significant role both in the operation of an IC investigation and its oversight. Congress itself could trigger a preliminary investigation,[71] which required a DOJ response.[72] IC's were mandated by the statute to cooperate with oversight committees[73] and from time to time send statements and reports on their activities.[74] Significantly as it would turn

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[65] *See* 28 U.S.C. § 591(b) (Supp. V 1982).
[66] *See* 28 U.S.C. § 592(b)(1) (Supp. V 1982).
[67] *See* 28 U.S.C. § 593(b) (Supp. V 1982).
[68] *See* 28 U.S.C. § 594 (Supp. V 1982).
[69] *See* 28 U.S.C. § 597(a) (Supp. V 1982).
[70] *See* 28 U.S.C. § 596(b)(2) (Supp. V 1982).
[71] *See* 28 U.S.C. § 592(g)(1) (Supp. V 1982).
[72] *See* 28 U.S.C. § 592(g)(2) (Supp. V 1982).
[73] *See* 28 U.S.C. § 595(a)(1) (Supp. V 1982).
[74] *See* 28 U.S.C. § 595(a)(2) (Supp. V 1982).

out, the ICA obligated an IC to inform the House of Representatives of "substantial and credible information [the IC] receives . . . that may constitute grounds for impeachment."[75]

Neither Congress's ambition in the ICA to combine elements of all three branches of government nor the controversy over its structure are unique. The endless war over separation of powers has been waged on many fronts. It can arise as a flashpoint and news headline when one branch's attempt to encroach upon another spurs vigorous pushback, as we see in the tension between claims of executive privilege and congressional oversight or, most recently, between claims of executive privilege and the impeachment power.[76] It may be a more protracted battle over policy and institutional structure such as defining the proper role of the many hybrid forms of governmental bodies that have arisen in the modern era,[77] or it may concern an intellectual, historical, and, perhaps even revisionist, perspective on the unchecked power of the administrative state, especially after the New Deal.[78]

Although these battles are noteworthy, they are almost predictable given the intentional ambiguities of the Constitution's structure and broad enumerated powers. As with all law, the boundaries ebb and flow incrementally over time. Sometimes the presidency is in ascendancy, sometimes Congress. And on a rare occasion, the courts remind us all of their role.[79] The pendulum will swing back and forth from time to time, but everyone seems to know the outlines of the arguments even if the potential for harm is unclear.[80] This rebalancing, and even conflation of, constitutional powers may get a judicial tweak now and again, but we long ago accepted, perhaps blindly, the existence and legitimacy of a "fourth branch" administrative state as a permanent and necessary evil in a complex world.[81]

But there is something profoundly different about the genesis and structure of the ICA, separate and apart from concerns over the administrative state. Justice Scalia, at least early in his

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[75] *See* 28 U.S.C. § 595(c) (Supp. V 1982).

[76] *See* Comm. on Judiciary, U.S. House of Representatives v. McGahn, 968 F.3d 755, 764, 778 (D.C. Cir. 2020) (upholding Article III power of district court to hear action brought by a congressional committee to enforce subpoena duly issued "in the performance of constitutional responsibilities" such as legislating, oversight and impeachment); *see also* Comm. on Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53, 55 (D.D.C. 2008) (Bates, J.) (same).

[77] *See infra* note 347 for a discussion of the litigation concerning the structure of the Consumer Financial Protection Bureau.

[78] *See* Cass Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421 (1987) (arguing that "agency capture" and other administrative failures may be "traced to the New Deal's failure to incorporate the original constitutional commitment to checks and balances into regulatory administration[]").

[79] *See* Baez-Sanchez v. Barr, 947 F.3d 1033 (7th Cir. 2020) (expressing dismay and scolding executive branch for failing to abide by court mandate).

[80] *See Morrison*, 487 U.S. at 699 ("Frequently a [separation of powers issue] will come before the Court . . . [and] the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis.") (Scalia, J. dissenting).

[81] *But see*, Jonathan Turley, *The rise of the fourth branch of government*, WASHINGTON POST (May 24, 2013) (arguing the growing administrative state is "dangerously off kilter) https://www.washingtonpost.com/opinions/ the-rise-of-the-fourth-branch-of-government/2013/05/24/c7faaad0-c2ed-11e2-9fe2-6ee52d0eb7c1_story.html [https://perma.cc/LMX9-J8DR]; *see generally*, Philip Hamburger, *Is Administrative Law Unlawful?*, p. 355 (Univ. of Chicago Press 2015, paperback ed.) (contending as the title suggests that the modern administrative state is inconsistent with a proper balancing of the separate of powers). The continuing efficacy of the so-called Chevron Doctrine appears to be firmly in play in the Supreme Court. *See e.g.*, Kaelan Deese, *Fishermen head to Supreme Court to cast Chevron overboard*, WASHINGTON EXAMINER, (January 17, 2024) https://www.washingtonexaminer.com/news/2800320/fishermen-head-to-supreme-court-to-cast-chevron-overboard/ [https://perma.cc/6FR6-YYPY].

career less suspicious of the administrative state than one might presume,[82] openly feared the ICA. To him it came not merely as a wolf in sheep's clothing but rather uncloaked and teeth-bared, his analogy intending to convey the overt and unusual threat it posed to the unitary executive and the separation of powers.[83] That may be a kind assessment. In some ways, the ICA is like the mythical Chimera[84] in the form of a killer robot. Lacking the checks and balance of advice and consent, any proscribed term of office, or financial limits, an IC derived his or her authority from all three branches but was responsible to none. Selected in obscurity and lacking mortality and natural enemies, an IC promised to be an omnipotent, lethal, and unrelenting foe. With Nixon in mind and by design, it was a machine that would go of itself.

So for some, including Ted Olson, himself a constitutional scholar, the vaunted independence of the IC begat unaccountability and the excesses that often follow from unchecked power. And while it took about a decade after Watergate for the issue to be fully joined, the Supreme Court would finally have occasion to examine the constitutionality of this hybrid beast in *Morrison*.

B. Morrison v. Olson *and Justice Scalia's "Great Dissent"*

Morrison arose in the now commonplace turf war of congressional oversight of the Executive Branch.[85] Equally predictable are the skirmishes and compromises that often follow such inter-branch squabbles—if not the specter of vague and uncertain legal jeopardy for the individual participants. The controversy arose when subpoenas issued out of two House subcommittees to the Environmental Protection Agency ("EPA") to produce certain documents regarding EPA and DOJ enforcement of the "Superfund Law." President Reagan, acting on the advice of the Department's Office of Legal Counsel ("OLC"), invoked executive privilege over the documents contending that disclosure could impede ongoing investigations.

When the EPA Administrator complied with the presidential directive and withheld the documents the House voted to hold her in contempt.[86] The lawsuit contesting the citation and subpoenas was eventually settled with a limited disclosure. During this process, Ted Olson, the

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[82] See Richard J. Pierce, *Justice Scalia's Unparalleled Contributions to Administrative Law*, MINNESOTA L. REV. (2016) (tracing Scalia's evolution from trusting the executive as a check against judicial activism to a later stage concern over administrative power).

[83] *See Morrison,* 487 U.S. at 699 ("But this wolf comes as a wolf.') (Scalia, J. dissenting).

[84] A chimera is a fire-breathing she-monster of Greek mythology having a lion's head, a goat's body, and a serpent's tail. *See* Merriam-Webster Dictionary, online ed., https://www.merriam-webster.com/dictionary/chimera [https://perma.cc/F9PB-BKZ6].

[85] Except as noted *infra*, the narrative facts recited in Section II. B. are derived from the majority and dissenting opinions in *Morrison* itself, *see* Morrison v. Olson *supra* note 4, and the Report on Investigation of the Role of the Department of Justice in the Withholding of Environmental Protection Agency Documents from Congress in 1982-83, H.R. Rep. No. 99-435 (1985) (hereinafter "House Report 99-435").

[86] Washington, D.C. seems at times like the center of the universe, at least for those who practice law and live there. At other times, it is more like a small town. One blogger has noted that it was Justice Neil Gorsuch's mother, Anne Gorsuch, who, when she resigned as EPA Commissioner, was replaced by William D. Ruckelshaus, who had resigned from DOJ rather than remove Archibald Cox. Ruckelshaus's resignation inspired the ICA, which led to the investigation of Ted Olson, which gave rise to Justice Scalia's dissent in *Morrison*. Add in that Anne Gorsuch signed the regulation at issue in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) now under assault, and the commentator concludes with only mild facetiousness that "[e]verything is connected." Josh Blackman, *The Connection Between Judge Gorsuch, Justice Scalia's Dissent in Morrison v. Olson, and Chevron Deference*, JOSHBLACKMAN.COM, (Feb 2, 2017) http://joshblackman.com/blog/2017/02/02/judge-gorsuch-and-justice-scalias-dissent-in-morrison-v-olson/ [https://perma.cc/RR77-XS2Z].

Assistant Attorney General in charge of OLC, and by virtue of that position intimately involved in the battle over the scope of executive privilege, testified before one of the House subcommittees on March 10, 1983.

The conflict over the scope of executive privilege spurred a separate oversight investigation by the House Judiciary Committee which two years later, in 1985, issued a majority report suggesting, among other things, that Olson had committed perjury in his 1983 testimony.[87] Invoking the ICA, Congress issued to the Attorney General a referral for criminal prosecution. As contemplated by the ICA,[88] the Public Integrity Section of the Criminal Division reviewed the matter and recommended the appointment of an independent counsel (Ms. Morrison) to investigate and, if warranted, prosecute Olson. The Special Division approved an expansion of the referral from DOJ—which had only named Olson—to also cover anyone who might have conspired with him to obstruct the congressional investigation.[89] Morrison issued grand jury subpoenas to Olson, and two other DOJ officials, setting the stage for a constitutional challenge to the structure and function of the ICA.

Olson's arguments in the Supreme Court were three-fold. First, that vesting authority in a court—the Special Division—to appoint an independent counsel violated the Constitution's Appointments Clause.[90] Second, that the Special Division's exercise of executive and administrative duties violated Article III of the Constitution[91] because such tasks were not inherently judicial. And lastly, that the ICA both in structure and application impermissibly interfered with the Executive Branch in violation of the separation of powers doctrine. Chief Justice Rehnquist, writing for a seven Justice majority,[92] and over the sole and passionate dissent of Justice Scalia, rejected all three arguments upholding the constitutionality of the ICA.

In addressing the Appointments Clause argument,[93] the Court first concluded that Morrison was not a "superior" officer requiring nomination by the President and Senate confirmation. While recognizing that the very point of the ICA was to create a prosecutor with some autonomy, the position was nonetheless still inferior to the Attorney General in at least three ways. First, as a matter of hierarchy, the ICA made explicit that the Attorney General retained the right to remove her from office, albeit for cause. Second, while the independent counsel acted, when she did act, with the full authority and power of a federal prosecutor, this power was limited to certain denominated investigative targets and enumerated federal crimes as defined by the Special Division's appointment in a particular case. Lastly, the appointment was limited in time—after the matters within the limited grant of jurisdiction were resolved, the appointment was terminated either by the Special Division or the counsel herself.

Finally, the Court rejected the notion that even if properly defined as an inferior officer, the Appointments Clause banned so-called "inter-branch" appointments. Nothing in the text of the Clause itself barred such appointments and in the case of independent counsel a mandatory

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[87] *See* House Report 99-435 *supra* note 85.

[88] *See* 28 U.S.C. § 592(c).

[89] PIN recommended an independent prosecutor for two other Department officials. Ultimately, the Department petitioned the Special Division for an appointment of an independent counsel only for Olson. *See Morrison*, 487 U.S. at 666-67.

[90] U.S. CONST. art. II, § 2, cl. 2.

[91] *Id.*, art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish.").

[92] The Chief Justice was joined by Justices Brennan, White, Marshall, Blackmun, Stevens and O'Connor. Justice Kennedy, recently confirmed, took no part in the Court's decision.

[93] *See Morrison,* 487 U.S. at 669-70.

recusal of the appointing judges in any matter arising from the appointment prevented those "incongruous" appointments violative of the Clause. Lastly, perhaps delving into purposivism constitutional theory, the Court noted that Congress passed the ICA mindful of the inherent conflicts when the Executive Branch investigates itself and rationally chose the courts for the appointment power as the "most logical place."

The majority was also unpersuaded that the ICA's role for the Special Division ran afoul of Article III.[94] First, as the Court had held, the power to appoint counsel had a separate foundation in the Constitution—the Appointments Clause. So long as the appointment was within the narrow confines allowed under the Clause, Article III was not implicated. While acknowledging, as precedent dictated, that Article III bars courts from exercising executive power and performing administrative functions not related to the courts themselves, the ICA placed no such burdens on the Special Division. The Special Division "received" but could not act on the final reports of counsel, did not supervise counsel, and terminated the office much as a court would close a case when the controversy had ended.

True supervision came not from the court but from the Attorney General who alone had the power to discharge counsel for conduct related to the investigation and prosecution. In light of these attenuated powers and nonexistent role in the day-to-day operations of the independent counsel's office, there was no risk the Special Division would be dragged into a partisan battle inconsistent with Article III neutrality.

Lastly, the Court refused to strike down the ICA on principles of separation of powers.[95] First, nothing in the ICA granted to any branch other than the President the power to dismiss independent counsel. In the view of the majority, neither the Special Division nor Congress gained the power under the ICA to intrude upon this core executive function. The Court acknowledged that dismissal of independent counsel had to be "for cause" pursuant to the statute but eschewed any rigid test for defining when Congress could or could not place this restriction on executive authority through legislation.

The majority rejected Olson's attempt to distinguish the Court's seminal decision in *Humphrey's Executor v. United States*,[96] upon which the Court relied as precedent, as addressing only for-cause dismissal protections for quasi-judicial and quasi-legislative officers. In Olson's view, unlike Humphrey who had been appointed to the quasi-legislative Federal Trade Commission, the IC was a prosecutor and therefore exercised a core executive function. The Court rejected the difference as immaterial arguably by mere *ipse dixit.*[97]

In another nod to the prophylactic intent of the ICA, what seemed to matter most to the majority decision was the Court's deference to the congressional view that the "for cause" limitation on the power of the executive was a necessary component of a truly independent counsel. Stated differently, the Court seemed to rest its conclusion that Congress had not violated

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[94] *See id*. at 677-85.

[95] *See id*. at 685-96.

[96] 295 U.S. 602 (1935). *In Humphrey's Executor,* the Supreme Court held that while the president had full power to dismiss an executive branch official for political reasons, Congress could provide by statute that a quasi-judicial or quasi-legislative appointee may only be terminated for cause. *Id*. Franklin Delano Roosevelt dismissed Coolidge appointee William Humphrey as a Commissioner of the quasi-legislative Federal Trade Commission because of his lukewarm support of the New Deal.

[97] Justice Scalia's dissent accuses the majority of just that. *See Morrison,* 487 U.S. at 711–12 (Scalia, J. dissenting) (declaring lack of a "justiciable standard" to determine whether diminution of Article II power is constitutional and accusing majority of declaring ICA constitutional "because we say it is so[]") (Scalia, J. dissenting) (citing Baker v. Carr, 369 U.S. 186, 201 (1962)).

separation of powers on the shaky ground that its motives in the post-Watergate era were laudable.

It is hard to say what is more remarkable about the Chief Justice's majority opinion: the holding as a matter of constitutional law,[98] what it says about Rehnquist's place in the firmament of conservative legal stars,[99] or as an exemplar of the somewhat ironic manner in which the Supreme Court maintains its power and constitutional integrity. Rehnquist's majority opinion in *Morrison* is not the brute force exercise of Marshallian power to declare what the law is, but rather an exercise in the humble declination to use it when the political winds urge caution and restraint. In the area of defining executive power, *Morrison* fits the bill of prudent judicial restraint in the face of some other acceptable political hegemony.[100]

But more than anything, the majority decision in *Morrison* is best understood by examining the impetus behind it, through the lens of the milieu in which it was issued, and the principles of honest government it sought to uphold. Watergate, while no longer an open wound by 1988, was not a distant memory to the body politic. Except for the occasional nod to the historic diplomatic and economic détente with China, the Nixon presidency and Nixon personally would never be rehabilitated. Without exaggeration, Watergate was an existential constitutional crisis without parallel.

By the mid-80's, with President Carter (the anti-Nixon) gone from office after a single term, the ascending "silent majority" had returned the Republicans, including a few Nixonians, back to the White House. The ICA was an important component of a comprehensive reform and remedial statute intended by Congress to rein in an out-of-control Executive Branch and prevent, through independent oversight, another political trauma akin to the Saturday Night Massacre.

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[98] *See* Adrian Vermeule, *Morrison v. Olson is Bad Law*, LAWFARE (June 9, 2017), https://www.lawfareblog.com/morrison-v-olson-bad-law [https://perma.cc/R8PV-UUNM].

[99] *See* Jay S. Bybee & Tuan N. Samahon, *William Rehnquist, the Separation of Powers, and the Riddle of the Sphinx*, 58 STAN. L. REV. 1735, 1757–59 (2005-2006) (discussing the *Morrison* decision's departure from core separation of powers doctrine).

[100] Perhaps the most recent example of this phenomenon is National Federation of Independent Business v. Sebelius, 567 U.S. 519 (2012) upholding the Affordable Care Act ("ACA"). Some have suggested that the current Chief Justice's shift to the political middle in upholding ACA stemmed from a concern of the perceived legitimacy of the Court if the popular legislation were struck down. To critics, starting with sharp dissents from Justices Scalia, Thomas and Alito, the majority decision in *Sebelius* and a companion case were based on policy and politics and not law: "[T]his court's two decisions on the [ACA] will surely be remembered through the years . . . .[a]nd the cases will publish forever the discouraging truth that the Supreme Court of the United States favors some laws over others, and is prepared to do whatever it takes to uphold and assist its favorites." King v. Burwell, 576 U.S. 473, 518 (2015) (Scalia, J. dissenting). For some on the political right the sense of betrayal was palpable. *See* David Savage, *Obamacare ruling again shows Chief Justice John Roberts' independent streak*, L.A. TIMES (June 25, 2015) ("'We might as well call the law … RobertsCare,' said Ilya Shapiro, a lawyer at the Cato Institute, a libertarian think tank in Washington"), https://www.latimes.com/nation/la-na-court-roberts-20150626-story.html [https://perma.cc/7FSC-ZUKB]. Others reached the opposite conclusion, suggesting the decision was proof of a lack of a political calculus. *See id*. (quoting Duke law professor Neil Siegel who called the majority opinion "a masterpiece of legal craft, good sense and fidelity to the law at a time when political polarization threatens to spill over into the judiciary[]" and former acting U.S. Solicitor General Neal Katyal, who said "[*Sebelius*] shows [Roberts] really meant . . . [judges just call ball and strikes]. . . . [*Sebelius* is] a profound statement about the difference between law and politics."); *see also* Tonja Jacobi, *A Strategy of Increasing Judicial Power in* NFBI v. Sebelius*,* p. 89 *in* THE AFFORDABLE CARE ACT DECISION: PHILOSOPHICAL AND LEGAL IMPLICATIONS*,* Routledge (Fritz Allhoff & Mark Hall eds., 2014) ("Scholars have long recognized that the Court is most capable of accruing power while appearing to limit itself") (citing ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 200-01 (1986)); *see also* Bybee, *supra* note 99, at 1759–60 (describing willingness of Rehnquist to abandon purest views of separation of powers as a "Lone Ranger" justice of the Court in order to build consensus as Chief Justice).

Olson's challenge, even if correct as a matter of constitutional law, was doomed to failure in an era of sweeping good government reforms and public cynicism toward government. It was not a time to appear to protect the corrupt.

Whatever its laudable motivations might have been, the majority opinion in *Morrison* has been a source of frustration for conservative constitutional purists and Justice Scalia's dissent a form of sacred text. Where the Chief Justice failed, Scalia shined. Notably, it was his first oral dissent.[101] Scalia would have none of the majority's attempt at a high-altitude tightrope walk teetering amongst the first three Articles of the Constitution. For him, the boundaries between the branches were rigid, immutable, and sacrosanct; and intended to be so. As an originalist, he begins with a reminder of the historical antecedents. The notion of a government of laws not men was not merely a platitude. It was a quote from the Massachusetts Constitution of 1780, a model predecessor to the Constitution. He gave the quote in full[102] and emphasized the important principle of American democracy that the means to achieve that laudable and even preeminent goal was strict adherence to the separation of powers.

Turning to the text, he set out how the separation of powers provided the backbone and structural framework for the Constitution as a whole.[103] Each branch was assigned its enumerated powers, of course, but simply saying so was not nearly enough. While expressly set out in clear and unmistakable language, these powers also required protection and to be shielded from encroachment. Conceptually, this meant splitting the legislature to protect against majoritarian tyranny, an idea the Framers had considered for the executive and flatly rejected. Accordingly, the executive had to be insulated from any similar fate. The power of the executive was not to be diminished, but as demonstrated by the veto power, "fortified" against assault. The executive was intentionally and unassailably "unitary," its power indivisible and monolithic by design.

Not surprisingly, in Scalia's view with this test applied the ICA failed on multiple grounds. The first failure was a statutory distortion of the application of prosecutorial discretion[104] an important theme he returned to later in his dissent. In deciding to take a case, a prosecutor weighs the availability of limited resources, the likelihood of finding sufficient evidence of a provable crime, potential disclosure of sensitive governmental operations, and the danger of entanglement in political dustups, among other prudential factors. None of that applies to a statute that compels investigation by what will turn out to be a task force unless the Attorney General finds "no reasonable grounds to believe that further investigation is warranted." That is not a very daunting threshold.

The second failure was an illusion of Executive Branch influence or control conjured up by the majority.[105] The statute did not preserve or promote such power. It hobbled it on purpose. The provision for dismissal was not salve; it was proof of the disease. In the opinion's best one-

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[101] For a comprehensive history and evaluation of this practice see Christopher W. Schmidt & Carolyn Shapiro, *Oral Dissenting on the Supreme Court*, 19 WM. & MARY BILL RTS. J. 75 (2010).

[102] MASS. CONST. Part the First, art. XXX reads in full:

> In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them. The executive shall never exercise the legislative and judicial powers, or either of them. The judicial shall never exercise the legislative and executive powers, or either of them. To the end it may be a government of laws and not of men.

[103] *See Morrison,* 487 U.S. at 697–700.

[104] *See id*. at 703–04.

[105] *Id*. at 706–12.

liner, Scalia quips that calling the provision of "for cause" dismissal a form of presidential control "somewhat like referring to shackles as an effective means of locomotion."[106] For Scalia, there was no mistaking a seminal truth and a cardinal sin. Article II of the Constitution grants *all* of the executive power to the president—not some—all. The ICA provisions of EGA took some of that power and gave it away to the other branches, shifting impermissibly the careful balance of powers erected by the Framers.[107]

With such a clear reliance on the text and structure of Constitution and an unyielding doctrinal approach to the separation of powers, much of the rest of the dissent seems almost superfluous or redundant. Scalia spilled some ink rebutting the contention that the IC is an inferior officer. While acknowledging that the IC's grant of jurisdiction is limited to a particular matter, as it relates to that particular matter that power, by Congressional command, is complete, fulsome, and unchecked.[108] By definition, one free of the President's direction is not an inferior officer.[109] And Scalia quibbled with the majority's application of *Humphrey's Executor*, siding with Olson's argument that the case starts with the proposition, found inapplicable to Humphrey but applicable to IC Morrison, that the president has the constitutional power to dismiss someone exercising Article II power.

The rest of the opinion reflects a remarkable analytical discordance for the preeminent strict constructionist as it focuses on both process and the practical effect of the majority decision. This paradigmatic shift begins with a real-world assessment of the process inherent in most prosecutions and juxtaposes it with the IC's presumed objectives. Federal prosecutors writ large do not make their decisions in a vacuum nor do they prosecute every act of misconduct they find. As Scalia noted in assessing the standard triggering the application of the ICA, there should be, and often is, proportionality to the exercise of this enormous power.[110] Quoting then-Attorney General, later Justice, Robert Jackson, he observed:

> One of the greatest difficulties of the position of prosecutor is that he must pick his cases, because no prosecutor can even investigate all of the cases in which he receives complaints. If the Department of Justice were to make even a pretense of reaching every probable violation of federal law, ten times its present staff would be inadequate. We know that no local police force can strictly enforce the traffic laws, or it would arrest half the driving population on any given morning. What every prosecutor is practically required to do is to select the cases for prosecution and to select those in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain.
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> If the prosecutor is obliged to choose his cases, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will

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[106] *Id*. at 706.

[107] *Id*. at 714–15.

[108] *See* 28 U.S.C. § 594(a) (the ICA grants the IC "full power and independent authority to exercise all investigative and prosecutorial functions of the Department of Justice[]").

[109] *See Morrison,* 487 U.S. at 723.

[110] *See id.* at 727–29.

> pick people that he thinks he should get, rather than pick cases that need to be prosecuted.[111]

In Scalia's view, the proper exercise of the prosecutorial power is that expressed in the first paragraph. But the ICA, both in intent and by design, created the potential monster described in the second paragraph. The prosecutor under the first paragraph had to answer for any excess or poor judgment to the Attorney General and ultimately to the President. And the President who failed to undertake the appropriate oversight was answerable to the people.[112] Moreover, the ordinary prosecutor is part of a larger institution which helps to shape a uniform application of law.

The IC, in contrast, had none of these restraints. Morrison answered to no one and would be judged on the success or failure of a narrow subset of matters guided by no discernable standards. In language oddly predictive of events that would follow in some cases decades later, Scalia wrote:

> But even if it were entirely evident that unfairness was in fact the result—the judges hostile to the administration, the independent counsel an old foe of the President, the staff refugees from the recently defeated administration—*there would be no one accountable to the public to whom the blame could be assigned.*[113]

The alarm sounded was more than a theoretical rift in the constitutional infrastructure—it was the existential threat to individual freedom a government of diffuse power was supposed to prevent in the first place.

Like the Constitution itself, there is an elegant simplicity to Scalia's dissent. To him the analysis and result were clear, and so, as was his style, his language was blunt. The ICA had accomplished exactly what the framers had chosen not to do. By countenancing and protecting independent counsel, Congress had not only split the unitary executive but turned the lesser half against the whole. The very fabric of a sacred text had been torn and shredded along with the social contract that went with it. The majority had fashioned out of whole cloth nothing less than a standard-less and amorphous, "revolution in our constitutional jurisprudence."[114]

On one level, it might be fair to characterize the stark difference between the majority opinion and Scalia' dissent as examples of contrasting modalities of constitutional theory.[115] On one side, the majority was willing to sacrifice a structural and textualist approach to the separation of powers on the altar of post-Watergate anti-corruption pragmatism. If Congress

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[111] *See id.* at 727–28 (quoting Robert Jackson, The Federal Prosecutor, Address Delivered at the Second Annual Conference of United States Attorneys (April 1, 1940), https://www.roberthjackson.org/speech-and-writing/the-federal-prosecutor/ [https://perma.cc/K69Z-N76K]).

[112] *See Morrison,* 487 U.S. at 729 ("The President is directly dependent on the people, and, since there is only *one* President, *he* is responsible.") (emphasis in original). Scalia noted that Alexander Hamilton had argued against a plurality in the executive because it "conceal[ed] faults and destroy[ed] responsibility." THE FEDERALIST NO. 70, 427 (ALEXANDER HAMILTON).

[113] *Morrison*, 487 U.S. at 731 (emphasis in original).

[114] *Id.* at 708.

[115] *See generally* HARVIE J. WILKINSON III, COSMIC CONSTITUTIONAL THEORY, WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE (2012) *passim* (describing the four main modalities of constitutional interpretation as Justice Brennan's "Living Constitutionalism, " Justice Scalia's "Originalism," Prof. John Hart Ely's "Political Process Theory, " and former Judge Richard Posner's "Pragmatism").

thought the ICA was not only the best way but the only way to protect the people from a corrupt president it was not the duty of the Court to stand in the way.

For Scalia, fidelity to the original intent of the Framers and adherence to the text and structure of the Constitution should not have been undermined by even the imminent threat of corruption much less a potential or theoretical one. There was no need for deference to pragmatic gap-filling however admirable the goal. The Framers anticipated the risk of corruption and provided a cure called impeachment. But for all of its originalist purity, Scalia's excursion into process theory and pragmatism was remarkably prescient. Much of what he predicted about the ICA would come true and be proved true under the Special Counsel regulations. And it would not take too many years for the check and balance of impeachment itself to be influenced by the ICA and its structural flaws.

A. Monica Lewinsky and the ICA in Practice

The irony of *Morrison* is that in the end it was Scalia, the originalist and textualist, who had the clearest view of the practical impact of the Court's decision. Mindful that the ICA had already spawned numerous independent counsel investigations, Scalia painted a dire picture for the future. It followed from Rehnquist's blessing of the ICA that if neither DOJ, nor the Special Division, nor Congress had any meaningful oversight role in the structure of the ICA this left the ICs untethered to any reasonable check on their power. As the majority points out, they were "independent."[116]

One cost of independence is institutional harm to the presidency. Scalia both noted that this phenomenon had already occurred and would likely occur in the future:

> Besides weakening the Presidency by reducing the zeal of his staff, it must also be obvious that the institution of the independent counsel enfeebles him more directly in his constant confrontations with Congress, by eroding his public support. Nothing is so politically effective as the ability to charge that one's opponent and his associates are not merely wrongheaded, naive, ineffective, but, in all probability, "crooks." And nothing so effectively gives an appearance of validity to such charges as a Justice Department investigation and, even better, prosecution. The present statute provides ample means for that sort of attack, assuring that massive and lengthy investigations will occur, not merely when the Justice Department in the application of its usual standards believes they are called for, but whenever it cannot be said that there are "no reasonable grounds to believe" they are called for. The statute's highly visible procedures assure, moreover, that unlike most investigations these will be widely known and prominently displayed. Thus, in the 10 years since the institution of the independent counsel was established by law, there have been nine highly publicized investigations, a source of constant political damage to two administrations.[117]

One measure was the sheer volume of resources devoted and dollars spent. For its 1989 budget request, the Department had sought a total of $52 million for the entire Criminal

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[116] *Morrison*, 487 U.S. at 696 ("counsel is to some degree 'independent' and free from executive supervision").
[117] *Id.* at 713–14.

Division, one of the main litigating units at Main Justice. Then, as now, scores of trial attorneys and their supervisors in designated sections in the Criminal Division prosecuted major crimes, coordinated international efforts, and oversaw nationwide enforcement programs such as organized crime, public integrity, fraud, narcotics and dangerous drugs, and internal security.[118] The Department had earmarked $7 million of that figure just for the four active IC investigations, almost one-tenth of the entire budget.[119] This telling statistic confirmed two of Scalia's main contentions regarding the ICA's impact on the nexus between presidential power and prosecutorial discretion. As Attorney General Jackson had noted in his now-famous speech,[120] authority over scarce prosecutorial resources means picking your battles. And as one of the two political branches, it may mean picking those enforcement efforts most meaningful to the general public.

In 1989, although waning in influence now, La Cosa Nostra was still a force to be reckoned with. The United States economy had suffered a stock market crash[121] which reverberated in financial markets from Wall Street to Main Street. The perception of unchecked corruption in the financial markets was so negative that it emboldened then-United States Attorney for the Southern District of New York Rudy Giuliani to authorize the arrest of securities traders on the trading floor in the middle of the day as if they had just robbed a bank at gunpoint.[122] This enforcement period, centered in the Southern District of New York, saw both the largest securities fraud prosecution ever brought and the largest tax prosecution.[123] In part because of

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[118] The Criminal Division operates today largely as it did in 1989. For an overview of the Division's operations and responsibilities, see https://www.justice.gov/criminal/sectionsoffices [https://perma.cc/TVG2-54E7]. One notable difference is the 2006 transfer of what was then known as the Internal Security Section and the Counter-Terrorism Section to the newly formed National Security Division. Internal Security, which enforced the espionage, international embargo, and export control statutes, was eventually rebranded, first as the Counter-Espionage Section, and most recently as the Counterintelligence and Export Control Section. Its portfolio includes the Foreign Agents Registration Act of 1938 and related disclosure statutes which have been largely under-enforced and are now the subject of increased focus as a result, in part, of the Mueller Investigation. An overview of the National Security Division may be found here: https://www.justice.gov/nsd/national-security-division-organization-chart [https://perma.cc/622B-VKV7].

[119] *See Morrison*, 487 U.S. at 714.

[120] *See* Robert Jackson, The Federal Prosecutor, Address Delivered at the Second Annual Conference of United States Attorneys (April 1, 1940), https://www.roberthjackson.org/speech-and-writing/the-federal-prosecutor/ [https://perma.cc/K69Z-N76K].

[121] Regulators referred to it more clinically as a "market break." *See* U.S. SEC. & EXCH. COMM'N, THE OCTOBER 1987 MARKET BREAK, A REPORT BY THE DIVISION OF MARKET REGULATION (Feb. 1988), https://www.sechistorical.org/collection/papers/1980/1988_0201_MarketBreak_01.pdf [https://perma.cc/EC7M-4E2R].

[122] *See* William Glaberson, *3 Leading Brokers Seized On Charges of Insider Trading; U.S. Inquiry Widens*, N.Y. TIMES, February 13, 1987, at A1 (describing arrest of three Wall Street executives on insider trading charges in theirs offices during trading hours).

[123] *See* United States v. Michael Milken, 3 Fed. Sent. R. (1990), https://www.jstor.org/stable/20639317?seq=3#metadata_info_tab_contents [https://perma.cc/Y7FU-U3Q2] (defendant sentenced to incarceration upon six counts of unlawful gratuities under the Investment Act of 1940); In Re Grand Jury Subpoenas, 179 F. Supp. 2d 270 (S.D.N.Y. 2001) (setting out history of the indictment of oil traders Marc Rich and Pincus Green, their fugitivity and subsequent pardons by President Bill Clinton). James Comey served as lead prosecutor both in the original Rich/Pincus indictment and the investigation of the political donations associated with the Clinton pardons during stints in the United States Attorney's Office for the Southern District of New York, the latter as U.S. Attorney. Like Marc Rich, Michael Milken was also pardoned, this time by President Trump. On the same day as the Milken pardon, President Trump commuted the sentence of former Illinois Governor Rod Blagojevich convicted on corruption charges in 2009 in an investigation led by U.S. Attorney for the Northern

Wall Street excesses and partly because of relaxed regulatory controls, dozens of savings and loan associations across the U.S. found themselves in financial distress which later required a major government bailout to protect depositors.[124] Every major city in the U.S. was flooded with cheap crack cocaine and terrorized by turf-protecting gun violence.[125] Hindsight is 20/20, but it seems unlikely that DOJ management, unfettered, would have devoted one-tenth of the Criminal Division's budget to just four cases given the substantial urban and white-collar crime problems facing the country in 1989. Yet that is what happened. And from the perspective of many, it would get worse before it got better.

Although it would not conclude until the submission of the IC's final report in 2001 and that report's release in 2002, *In re: Madison Guaranty Savings & Loan Association*[126] or "Whitewater" as it became known colloquially,[127] arose from the Savings & Loan crises many years before.[128] In 1986, the responsible regulator, the Federal Home Loan Bank Board ("FHLBB"), began an audit of an Arkansas bank, Madison Guaranty, and found the insured bank undercapitalized and rife with "overextended liabilities[] and unlawful banking and loan practices."[129] Like many S&L's of the time, Madison Guaranty was deeply in debt because of failed real estate loans and insider deals catering to the local elite. The FHLBB moved swiftly ousting Madison Guaranty's principals Jim McDougal and his wife Susan, and other bank officers. A criminal referral resulted in the guilty plea of the bank president and the indictment of Jim McDougal and others associated with the bank. Both Madison Guaranty and the Resolution Trust Corporation ("RTC") which succeeded to the operations of the bank as statutory receiver, were represented by the Rose Law Firm, whose partners included Vince Foster, Web Hubbell, and Hillary Clinton.

However, when Jim McDougal and others were acquitted at trial, the matter seemed over until a March 1992 article in the *New York Times* re-ignited the controversy in the context of the 1992 presidential election.[130] The McDougals personal investments included a failed real estate

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District of Illinois Patrick Fitzgerald. Trump took the opportunity to express his distaste for both Comey and Fitzgerald. *See* Caitlin Oprysko, *Trump announces a blitz of pardons and commutations*, POLITICO (Feb. 18, 2020), https://www.politico.com/news/2020/02/18/trump-commutes-sentence-of-rod-blagojevich-115807 [https://perma.cc/QG2A-GWYR] (quoting Trump that "[i]t was a prosecution by the same people, Comey, Fitzpatrick — the same group[]").

[124] A short history of the S&L crisis and the relationship between deregulation and a chase for yield and deposits is explained in this publication from the Federal Reserve. Kenneth J. Robinson, *Savings and Loan Crisis 1980–1989,* FEDERAL RESERVE HISTORY (November 22, 2013), https://www.federalreservehistory.org/essays/savings-and-loan-crisis [https://perma.cc/CKX3-VCVB].

[125] A history, from the perspective of DOJ, describing the crack cocaine epidemic of the late 1980's may be found here: *The Crack Epidemic 1985-1990*, U.S. DEPARTMENT OF DRUG ENFORCEMENT ADMINISTRATION, https://web.archive.org/web/20060823024931/http://www.usdoj.gov/dea/pubs/history/1985-1990.html [https://perma.cc/JD3R-J8NX].

[126] *See* FINAL REPORT OF THE INDEPENDENT COUNSEL IN RE: MADISON GUARANTY SAVINGS & LOAN ASSOCIATION*,* D.C. Cir., Div. for the Purpose of Appointing Indep. Couns., Ethics in Gov't Act of 1978, As Amended, Div. No. 94-1 (hereinafter "*Whitewater Final Report*") (Received by the Special Division Jan. 5, 2001; Filed March 2, 2002; Released March 20, 2002).

[127] Historians, or linguists, can debate why Whitewater avoided the ubiquitous "-gate" suffix. Perhaps three syllables are one too many or "Whitewatergate" is just too cute.

[128] Except where noted, the factual narrative in Section II. C. is derived from the *Whitewater Final Report. See supra* note 126.

[129] WHITEWATER FINAL REPORT*, supra* note 126, at Vol. I, Overview, at 8.

[130] Jeff Gerth, *The 1992 Campaign: Personal Finances; Clintons Joined S&L Operator In an Ozark Real Estate Venture,* N.Y. TIMES (Mar. 8, 1992), https://www.nytimes.com/1992/03/08/us/1992-campaign-personal-finances-clintons-joined-s-l-operator-ozark-real-estate.html [https://perma.cc/B8ML-JYN4].

company owned in equal parts by the McDougals and Bill and Hillary Clinton called Whitewater Development Corporation, Inc. The RTC submitted a criminal referral to the United States Attorney for the Eastern District of Arkansas on September 1, 1992 where it sat dormant, with the approval of the local field office of the FBI, until after the election.[131]

In July 1993, the FBI obtained a search warrant for the Little Rock, Arkansas offices of Capital Management Services, Inc. ("CMS"), a special small business investment corporation ("SSBIC') funded by the Small Business Administration ("SBA"). CMS was operated by David Hale, a politically connected Little Rock municipal court judge and it was deeply entangled with both Madison Guaranty and Whitewater Development Corp. It took just two months to indict Hale and others on SBA fraud charges in Little Rock.

Hale, who would eventually plead guilty and cooperate with government investigators, publicly alleged that he had been pressured by Bill Clinton to make an SBA-backed $300,000 CMS loan to an entity controlled by Susan McDougal. The loan was never repaid and at least some of the proceeds ended up in the McDougal/Clinton real estate partnership itself doomed to failure. SSBICs existed to provide small loans to the economically disadvantaged, not to bail out the failed investments of the well-healed and politically connected.[132]

The procedural morass triggered by Hale's indictment and public accusations is a case study in the Department's largely opaque process of addressing and attempting to resolve conflicts of interest in politically sensitive matters.[133] One of Bill Clinton's first acts as President was to fire all 93 U.S. Attorneys including the United States Attorney for the Eastern District of Arkansas Charles A. Banks who, as noted, had suspended one of the RTC criminal referrals pending the election.[134] His replacement, Paula Casey, took office in August of 1993, the month before the Hale indictment.

According to FBI agents, Casey had made the decision to recuse herself from all Madison Guaranty matters in September 1993 but did not do so until after concurring in a Main Justice declination of one RTC referral and after scores of grand jury subpoenas were issued under her authority. Her eventual recusal came in November 1993 reportedly at the urging of unnamed senior officials at Main Justice. The matter was assigned to an attorney in the Fraud Section in the Criminal Division of Main Justice who would pursue the matter with some vigor for three months from November 1993 through January 1994. The RTC had already begun shifting a series of additional Madison Guaranty criminal referrals to Main Justice apparently out of concern for the uncertain prosecutorial climate in Little Rock. It would later come out that the White House was following the RTC referrals intensely since at least September 29, 1993 including a personal briefing of the President in early October 1993.

From January 11 through 13, 1994, the Fraud Section trial attorney assigned to the matter, Donald Mackay, issued a series of thirty grand jury subpoenas to prominent institutions and individuals in Arkansas. Whether by coincidence or not, on January 12, 1994, Clinton directed Attorney General Janet Reno to appoint an Archibald Cox-like special counsel for the Madison Guaranty matter shutting down Mackay's grand jury inquiry. Reno did so, appointing prominent

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[131] WHITEWATER FINAL REPORT, *supra* note 126, at Vol. I, Overview, at 11.

[132] *See id*. at 12.

[133] *See infra* Section IV, pp. 48-63.

[134] *See* David Boyer, *White House says firing of U.S. attorneys is standard practice,* WASH. TIMES (March 17, 2017) https://www.washingtontimes.com/news/2017/mar/13/white-house-firing-us-attorneys-standard-practice/ [https://perma.cc/DX6V-RZPF] (recounting Clinton firing and noting practice as common in both Democratic and Republican administrations).

New York litigator Robert B. Fiske, Jr. to take over the probe.[135] Fiske and his assembled team worked vigorously through the winter, spring and into the early summer of 1994 on a dizzying array of allegations encompassing money laundering, bank fraud, attorney billing fraud, obstruction of justice, tax evasion and campaign finance violations, including securing a guilty plea and cooperation from David Hale.[136]

But Fiske would only partly finish his work. In June 1994, Congress passed and, in an act he would no doubt live to regret, Bill Clinton signed a renewed ICA on June 30, 1994. The next day, Reno, knowing that Fiske had only finished part of his investigation, sought appointment of an independent counsel to take up the matters left undone. A little over a month later, on August 5, 1994, a three-judge panel of the newly reconstituted Special Division of the D.C. Circuit promptly appointed their former colleague and the first Bush Administration's Solicitor General, Kenneth W. Starr, to replace Fiske. The Special Division's appointment Order took pains to note, somewhat cryptically, that the switch from Fiske, perceived as a "moderate" Republican, to Starr, more aligned with conservative elements in the party, was not intended to "impugn the integrity of the Attorney General's appointee [Fiske] but rather to reflect the intent of the [ICA] that the actor be protected against perceptions of conflict."[137]

Whitewater was defined, of course, less by where it began than where it went and where it ended. Over the next five years, Starr, at times maintaining an active private law practice, oversaw a sprawling investigation that went both backwards and forwards. Matters resolved by Fiske, such as the mysterious death of Associate White House Counsel Vince Foster were re-examined and re-investigated. New matters were taken up. In addition to Madison Guaranty, Starr received Special Division permission to expand his investigation into post-election allegations of presidential misconduct including White House review of the FBI background files of political adversaries ('Filegate") and the firings of employees of the White House Travel office in favor a new vendor favored by the Clintons ("Travelgate"). By that point, Judge Hale's $300,000 CMS check to Whitewater Development Corporation had almost become an afterthought.

If the public has forgotten about David Hale, or never knew who he was, they almost certainly remember Monica Lewinsky. Lewinsky was a witness in a civil suit alleging sexual harassment brought by an Arkansas public employee, Paula Jones, in Arkansas federal court for alleged conduct while Clinton was governor of Arkansas. Jones sought to prove that Clinton had a habit and practice of harassing or seducing subordinate employees. Learning of Clinton's affair with Lewinsky in the White House, Jones sought her testimony.

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[135] In his final report, Ray describes Fiske as "regulatory independent counsel" presumably to distinguish him from Ray's role as a statutory independent counsel. Ray cites to no authority for this description. It appears that Fiske was appointed, like Archibald Cox before him, based solely on the inherent power of the President under Article II to exercise the prosecutorial function. *See* WHITEWATER FINAL REPORT*, supra* note 126, at Vol. I, Overview at 16-17.

[136] In addition to the federal prosecution initiated by Robert Fiske, David Hale was a target and eventually an unindicted co-conspirator in a criminal prosecution brought in the District of New Jersey. Hale had been caught up in an FBI undercover operation operated from the Bureau's Linwood, New Jersey resident agency. Hale, and two others, a Texas financial advisor and a New Orleans-based president of a Utah insurance company, had agreed to use Hale's CMS, the same SSBIC at the center of Whitewater, to launder what they believed were off-the-books gambling proceeds from high-roller junkets on private jets to Atlantic City. The defendants in the New Jersey matter pled guilty to related charges and the Hale's involvement was referred to Fiske's office. See United States v. Michael Clark, Doc. No. 1, 94-cr-00197 (D.N.J.)(JEI).

[137] Order, In re: Madison Guar. Sav. & Loan Ass'n, Div. No. 94-1, 1994 U.S. App. LEXIS 43730 (D.C. Cir. Aug. 5, 1994).

After losing a battle over presidential immunity,[138] Clinton gave testimony in a deposition overseen by the U.S. District Judge Susan Webber Wright on January 17, 1998 in her courtroom, almost five years after his first day in office as President. As he would later admit in state bar disciplinary proceedings, his denial under oath of a sexual relationship with Lewinsky, while she served as an intern in the White House, was patently, and even brazenly, false given the setting. Starr's Office of Independent Counsel had already sought and obtained an expansion of its investigation the day before the deposition after having developed other evidence that Clinton had sought to suborn perjury through the false testimony of other witnesses in the Jones lawsuit including Lewinsky and Clinton's personal secretary.

Having concluded that Clinton's deposition was knowingly and intentionally false, Starr's office, invoking a provision in the ICA,[139] referred the matter to the House of Representatives as possible grounds for impeachment. After impeachment on two Articles arising from Clinton's conduct in the Jones lawsuit (perjury and obstruction of justice), Clinton was acquitted by the Senate on February 12, 1999. Starr resigned his appointment as Independent Counsel seven months later, on October 18, 1999, as much of the work of the office had been resolved. The investigation, over five years old under Starr's watch, and over fourteen years old if dated back to the first indictment of Jim McDougal, would span the entire Clinton presidency. As a source of expanding jurisdiction, endless investigations, incursions into private misconduct, and overheated political rancor, the ICA had demonstrated, if not in general, certainly through the Whitewater investigation alone, its capacity for all the ugliness, political name-calling and hobbled presidential leadership that Scalia's *Morrison* dissent had predicted would be the inevitable result of an unaccountable government juggernaut.

Also evident was the outsized diversion of scare executive branch resources. By the 1998 fiscal year, the $7 million Justice Scalia noted in his *Morrison* dissent had been reallocated for independent counsel investigations had ballooned to over $166 million spread across 21 separate independent counsel investigations. Almost $60 million had been spent on Whitewater alone.[140] And by going one step further and becoming the vehicle for a failed impeachment of a sitting President, the ICA had, by 1999, become a bipartisan pariah.[141] With little or no political will to act otherwise, Congress allowed the ICA to sunset, as it was designed to do, that year.

There would be some pushback on the alleged excesses of Whitewater. The final report of Robert W. Ray, the Independent Counsel appointed to complete the investigation, offers a spirited defense of the investigation as a whole and, by extension, the concept of an independent counsel.[142] His report first emphasized that Whitewater had begun through normal channels and had been investigated and supervised by several career agents and prosecutors. He highlighted

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[138] *See supra* note 2.

[139] *See* 28 U.S.C. § 595(c).

[140] See From Watergate to Whitewater: History of the independent counsel, CNN (June 30, 1999), https://www.cnn.com/ALLPOLITICS/stories/1999/06/30/ic.history/ [https://perma.cc/Q5G5-8Y2R]. The GAO would ultimately conclude that the final price tag for Whitewater exceeded $70 million. See GAO: Clinton Probes Cost $70 Million, Fox News (March 29, 2002), https://www.foxnews.com/story/gao-clinton-probes-cost-70-million [https://perma.cc/MW5C-T7PW].

[141] Ironically, Clinton had supported the 1994 renewal of the ICA despite advice by George H. W. Bush that the law be allowed to lapse. Bush himself had been caught up in the seven-year long Iran-Contra IC investigation which returned its final report three days before Bush's defeat to Clinton in the 1992 presidential election. *See From Watergate to Whitewater: History of the independent counsel*, CNN (June 30, 1999), https://www.cnn.com/ALLPOLITICS/stories/1999/06/30/ic.history/ [https://perma.cc/Q5G5-8Y2R] (noting the "statute has long been a source of dissatisfaction for both Republicans and Democrats.").

[142] WHITEWATER FINAL REPORT, *supra* note 126, at Vol. 1, Overview, Preface at i-iv.

the fifteen individual Whitewater convictions encompassing more than forty felony counts. Among those found guilty included the Governor of Arkansas, Jim Guy Tucker, who resigned from public office, both Jim and Susan McDougal,[143] and Webster Hubbell,[144] who served the Clinton Administration as Associate Attorney General, the third-highest ranking position in DOJ.

Ray was particularly incensed by Bill Clinton's relentless attacks on the motives and integrity of the investigators, and Ray's rebuttal quotes the serial barbs verbatim.[145] He acknowledged that "[t]o many, this eight-year investigation has gone on too long[],"[146] and that some had characterized it as "wasteful partisan extravagance."[147] Ray argued, nonetheless, that the nation was better for it. The fact that no charges were recommended against the Clintons "was comfort, not condemnation,"[148] because the public could rest assured that such a conclusion was borne of a thorough, objective, and professional investigation.[149]

Ray's closing argument was most passionate in its defense of his predecessor, Ken Starr, who oversaw the investigation for five years and spearheaded its expansion into the death of Vince Foster, Travelgate, the FBI files matter, and the sad saga of Monica Lewinsky. Starr, Ray opined, would "one day be recognized and fully appreciated[]" for his decency and professionalism. What Ray failed to note, however, was that Starr had joined the crescendo of bipartisan voices celebrating the statutory sunset of the ICA in 1999 and the resistance against its

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[143] Clinton would later pardon Susan McDougal on his last day of office as part of several last-minute pardons, including three other Whitewater defendants. The pardons bypassed Department of Justice protocols. For a list of those pardoned on January 20, 2001, *see* U.S. DEPARTMENT OF JUSTICE, OFFICE OF THE PARDON ATTORNEY, PARDONS GRANTED BY PRESIDENT WILLIAM J. CLINTON, *Jan. 20, 2001*, https://www.justice.gov/pardon/pardons-granted-president-william-j-clinton-1993-2001#january202001 [https://perma.cc/TWE3-S8K3]. The Senate would later hold hearings regarding procedural failures in forty-seven of Clinton's last-minute pardons. *See President Clinton's Eleventh Hour Pardons: Senate Hearing 107-194 before the Committee on the Judiciary*, 107th Cong. (Feb. 14, 2001), https://www.govinfo.gov/content/pkg/CHRG-107shrg76344/html/CHRG-107shrg76344.htm [https://perma.cc/DH5R-PU3V].

[144] A tax conviction obtained against Hubbell was reversed. *See* United States v. Hubbell, 530 U.S. 27 (2000) (reversing conviction based on documents produced under grant of immunity).

[145] *Whitewater Final Report*, *supra* note 126, at Preface at i. Clinton called the Whitewater probe, among other things, "bogus," "just garbage," and "a fraud" motivated by politics and responsible for the prosecution of "totally innocent people." *Id*. A later president, also impeached, would attack the inquiry regarding him and his associates in similar fashion. Donald Trump's contention that the Mueller investigation was "The Greatest Witch Hunt in U.S. history, by far!" was met with a defense similar to Ray's defense of Whitewater. Donald J. Trump @realDonaldTrump, TWITTER (Jul. 24, 2019, 7:03 AM), https://twitter.com/realDonaldTrump/status/1153984090712018950 [https://perma.cc/F42D-BHKH]. *See* Brett Samuels, *Mueller says his probe was not a 'witch hunt' in first-ever public refute of Trump claim*, THE HILL (July 24, 2019), https://thehill.com/homenews/house/454550-mueller-says-his-probe-was-not-a-witch- hunt-in-first-ever-public-refute-of [https://perma.cc/P86X-9K7G](citing convictions and indictments obtained in the Mueller Russian Special Counsel investigation).

[146] WHITEWATER FINAL REPORT, *supra* note126, at Preface at iv.

[147] *Id*.

[148] *Id*.

[149] This sentiment is not without supporters. *See infra* note 331.

renewal. And that Starr,[150] like Attorney General Reno,[151] would come to publicly question the ICA's constitutionality.

As the Whitewater independent counsel investigation progressed and ultimately wound down, at roughly the same time, a different model appeared that oddly foreshadowed the Mueller Russian election interference investigation. The existence of a late 1990s DOJ task force, the Campaign Finance Task Force (CFTF), demonstrates that foreign influence operations benefitting one presidential candidate over another are not new. The CFTF also provides a potential model for how an investigation that might implicate the President could be handled—and was handled—wholly within DOJ, and hence the Executive Branch, without resort to an independent counsel.

D. China-gate, Janet Reno and the Campaign Finance Task Force

Foreign governmental influence over the course of U.S. government affairs—or at least the attempt to do so—is as old as the Republic.[152] Much more recently, a DOJ task force as well as Congressional committees probed an alleged attempt by Chinese intelligence to exchange campaign contributions to the 1992 and 1996 Clinton-Gore presidential campaigns for a relaxation of export controls over missile technology.[153] The CFTF, set up by then-Attorney General Janet Reno using existing DOJ personnel, resulted in numerous successful prosecutions and represents an interesting contrast to the special counsel or special prosecutor models.

Even prior to the 1996 election, news reports began to surface that the Democratic Party and specific Democratic candidates had received large campaign donations in the 1992 and 1996 election cycles from foreign entities and foreign persons.[154] By June 1997,[155] reports tied the donations to Chinese intelligence as part of an alleged *quid pro quo*. An individual sympathetic

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[150] *See Starr opposes Independent Counsel Act*, CNN (Apr. 14, 1999), https://www.cnn.com/ALLPOLITICS/stories/1999/04/14/test.top/index.html [https://perma.cc/WW6P-YR6G] (noting Starr's testimony before the Senate Governmental Affairs Committee that "[t]he statute tries to cram a fourth branch of government into our three-branch system.").

[151] *See Reno backs scrapping 'structurally flawed' counsel law*, CNN (Mar. 17, 1999), https://www.cnn.com/ALLPOLITICS/stories/1999/03/17/reno.ic/ [https://perma.cc/5NUU-ADCD]. Reno testified in the Senate against renewal of the ICA observing: "I have come to believe, after much reflection and with great reluctance, that the independent counsel act is structurally flawed and that those flaws cannot be corrected within our constitutional framework." *Id.*

[152] Historians continue to speculate, ponder, and probe whether Alexander Hamilton was an agent of the British Crown and Thomas Jefferson a spy for the French revolutionists. *See* RON CHERNOW, ALEXANDER HAMILTON (2004). Of course, meddling in sovereign elections is a two-way street. U.S. intelligence operations have long sought to influence, and even reverse, foreign elections results. *See generally* JONATHAN KWITNY, ENDLESS ENEMIES, THE MAKING OF AN UNFRIENDLY WORLD (1984). For an interesting discussion of the potential source of Vladimir Putin's animosity toward Hillary Clinton and support for Donald Trump, *see* Michael Crowley et al., *Why Putin hates Hillary,* POLITICO (Jul. 27, 2016), https://www.politico.com/story/2016/07/clinton-putin-226153 [https://perma.cc/EKB5-MYPS] (discussing Putin's complaint that U.S. State Department funding of Russians protesters challenging Russian election results impugned Russian sovereignty). For Clinton's broader role in promoting internet freedom as a platform for foreign regime change, *see* Jack Goldsmith, *The Failure of Internet Freedom,* KNIGHT FIRST AMEND. INST., COLUM. UNIV., ESSAYS AND SCHOLARSHIP (Jun. 13, 2018), https://knightcolumbia.org/content/failure-internet-freedom [https://perma.cc/JQ53-5ELJ].

[153] *See generally* EDWARD TIMPERLAKE ET AL., YEAR OF THE RAT: HOW BILL CLINTON COMPROMISED U.S. SECURITY FOR CHINESE CASH (1998).

[154] *Id.*; *see also* HOUSE GOVERNMENT REFORM CHINA-GATE AND SENATE GOVERNMENTAL AFFAIRS CHINA-GATE REPORTS, *infra* note 162.

[155] *See* TIMPERLAKE, *supra* note 153, at 33.

to the Chinese regime would be embedded in at least one U.S. government agency and given top security clearance and access to sensitive trade information concerning the export to China of so-called dual-use and military-grade equipment. Much of the technology centered on ballistic missiles and satellite-based navigation essential to U.S. dominance in space and nuclear deterrence.[156] "China-gate," as it was dubbed, was by then the scandal *du jour*. Suspicions of treason filled the Washington air, perhaps a timely reminder that there is little in the nation's capital that is truly unprecedented.

When the allegations first arose, and with the ICA in effect, DOJ undertook its usual review to determine if sufficient predication[157] existed against a covered person to trigger a recommendation from the Public Integrity Section for the appointment of an independent counsel. Press reports suggested that at least an inquiry involving then-Vice President Gore might be justified in light of allegations arising from a fundraiser held at a Buddhist temple in California.[158] Additional allegations concerned fundraising by President Clinton on federal property and the Democratic National Committee rewarding large donors with presidential perks like an overnight visit to the White House in the Lincoln Bedroom and an intimate dinner with the President.

The timing was at best awkward. By early 1997, there had been more than a dozen independent counsels investigating either President Clinton or senior members of his Cabinet. Some had been wrapped up quickly. Others lingered, racking up convictions sporadically, but testing the limits of federal criminal law to address the grayer forms of public corruption.[159] A certain fatigue beset the body politic—even malaise. Despite being in effect a Full Employment

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[156] *See id*. at 159–85.

[157] The word "predication" is deeply embedded, without precise definition, in the lexicon of the FBI and serves to prevent political or other improper manipulation of its investigative power even if one may be hard pressed to find the word in a standard dictionary. It is generally understood as the minimum quantum of evidence sufficient to trigger a preliminary investigation. By way of example, if the agent on duty at an FBI field office receives an anonymous telephone call alleging that the local mayor is protecting drug traffickers associated with a Mexican cartel the call alone would be insufficient to justify the taking of any overt or covert investigative steps even if the proffered information is detailed. The risk is too high that the call could have come from the mayor's rival in the next election, who after making the false allegation and triggering an investigation, would use the investigation itself to make political hay. If, on the other hand, a check of indices of recent FBI investigative reports reveals that a FBI surveillance team observed a car registered to the mayor parked at a warehouse where tractor trailers with Texas license plates were believed to have offloading bulk drugs, these leads taken together may be sufficient to trigger a preliminary investigation and some additional covert investigation steps. In this way, predication could be defined as information suggesting the commission of a federal crime with some corroborating evidence from a reliable source. *See* The Attorney General's Guidelines For Domestic FBI Operations *infra* note 260, at 20–23 (describing protocol for "predicated" preliminary and full field investigations). For a recent in-depth discussion of the central role of predication in preventing the misuse of investigative resources for political gain, see JOHN DURHAM, SPECIAL COUNSEL, REPORT ON MATTERS RELATED TO INTELLIGENCE ACTIVITIES AND INVESTIGATIONS ARISING OUT OF THE 2016 PRESIDENTIAL CAMPAIGNS, *infra* note 200.

[158] Several prominent Democratic Party fundraisers were indicted on money laundering, campaign finance and conspiracy charges arising for the fundraising activities at the Hsi Lai Temple in Hacienda Heights, California and were later convicted. *See* Robert L. Jackson, *Buddhist Nuns Charged in Donation Case*, L.A. TIMES (Apr. 6, 2000), https://www.latimes.com/archives/la-xpm-2000-apr-06-mn-16605-story.html [https://perma.cc/TC9Q-LLHG]; *see also Al Gore and the Temple of Cash*, N.Y. TIMES (Feb. 22, 1998), https://www.nytimes.com/1998/02/22/opinion/al-gore-and-the-temple-of-cash.html [https://perma.cc/3Z5L-RUU5]. Two nuns associated with the temple were later indicted for criminal contempt when they refused to provide testimony at trial and left the country. *Id*.

[159] *See* United States v. Sun-Diamond Growers of California, 526 U.S. 398 (1999) (in case brought by independent counsel Donald Smaltz in case arising from investigation of Secretary Michael Espy holding that the crime of illegal gratuity, like bribery, requires a *quid pro quo* relationship to an official act substantially limiting reach of federal bribery and gratuity statute).

Act for the white-collar defense bar, questions arose about the efficacy of the ICA. And with Al Gore both the presumptive Democratic nominee in the 2000 presidential election and the focus of one of the more serious China-gate allegations,[160] whether to recommend an independent counsel to investigate Democratic Party fundraising in the 1992 and 1996 election cycles carried enormous potential to influence the election at the end of Clinton's second term.

A story would later circulate alleging that, and Congress would later investigate whether, political pressure from the White House skewed the ICA evaluation process. According to this report, Attorney General Janet Reno, who would go on to be the second-longest serving Attorney General in U.S. history, was told bluntly, if not in so many words: "One more independent counsel and you are gone."[161] For her part, General Reno denied receiving, much less succumbing to, such pressure, and the evidence to support the allegation is at best circumstantial. History does show that General Reno chose a different path than the ICA.

Early on in the unfolding scandal, on November 8, 1996, General Reno announced the formation of the CFTF, a special DOJ headquarters-based unit to investigate the China-gate allegations. A U.S. Attorney was appointed to head the endeavor which would be centered in the Criminal Division and then-FBI Director Louis Freeh assigned substantial Bureau resources to the effort. After roughly five months, on April 14, 1997, in the face of harsh political criticism and despite mounting evidence of at least attempted influence by the Chinese government on U.S. elections, Reno announced that she had determined that the factors required to trigger the ICA had not been met. There would never be an independent counsel for China-gate despite recommendations from two CFTF section chiefs, Robert Conrad and Charles LaBella, and from Director Freeh himself.[162]

The CFTF continued its work under the direction of the Assistant Attorney General for the Criminal Division, obtaining convictions in several substantial matters. It disbanded in 2000, its remaining matters transferred to the Criminal Division's Public Integrity Section ("PIN") and in one notable instance, to the outgoing U.S. Attorney for the Southern District of New York, Mary Jo White.[163] A subsequent report from the Republican-controlled House Committee on

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[160] *See* TIMBERLAKE, *supra* note 153, at 71–76 (detailing long-standing relationship between Al Gore and DNC with the Hsi Lai Temple, named as unindicted co-conspirator with Chinese government agent Maria Hsia in scheme to funnel foreign contributions to Democratic candidates from at least 1993 through 1996).

[161] *See* Byron York, *How Congress Can Break Through the Reno Stonewall*, WALL ST. J. (Dec. 16, 1997), https://www.wsj.com/articles/SB882226961380855000.

[162] *See* UNITED STATES HOUSE OF REPRESENTATIVES, COMMITTEE ON GOVERNMENT REFORM, JANET RENO'S STEWARDSHIP OF THE JUSTICE DEPARTMENT: A FAILURE TO SERVE THE ENDS OF JUSTICE, H.R. Rep. No. 106–1027, at 12 (2000) [hereinafter House Government Reform China-gate Report]; *see also* UNITED STATES SENATE, COMMITTEE ON GOVERNMENTAL AFFAIRS, INVESTIGATION OF ILLEGAL OR IMPROPER ACTIVITIES IN CONNECTION WITH 1996 FEDERAL ELECTION CAMPAIGNS, FINAL REPORT, S. Rep. No. 105–167 (1998) [hereinafter Senate Governmental Affairs China-gate Report].

[163] White, the outgoing United States Attorney for the Southern District of New York, assumed jurisdiction over the prosecution of Democratic Party donor David Chang who was awaiting sentencing in the District of New Jersey and the related investigation of then-Senator Robert Torricelli to whose campaigns Chang had donated generously. Chang had sought Torricelli's assistance in pressuring the State Department to link future aid to North Korea to an agreement to pay a large debt owed to Chang for previous shipments of wheat and sugar. Chang also sought to influence a State Department official by directly making improper payments to the senior diplomat for North Korean affairs, Ken Quinones. *See* Tim Golden, *Ex-State Dept. Aide Guilty In Conflict-of-Interest Case*, N.Y. TIMES (Aug. 31, 2001), https://www.nytimes.com/2001/08/31/world/ex-state-dept-aide-guilty-in-conflict-of-interest-case.html?auth=login-email&login=email [https://perma.cc/JJE9-L86H]. After the election of George W. Bush, those matters were transferred to SDNY and White by then-Acting Assistant Attorney General for the Criminal

Government Reform sharply criticized Reno's determination, largely based on recommendations from the leadership of PIN, which, unlike the contrary view of the CFTF section chiefs, never wavered in its view that the ICA had not been triggered. Press reports suggested that the House report precipitated management changes at PIN.[164]

III. A Third Way - The Special Counsel Regulations and the Third Branch

A. The Special Counsel Regulations: An Imperfect Regime

The vulnerabilities to wanton abuse of power inherent in the pre-Watergate special prosecutor model inspired the flawed ICA. Conversely, it can be said that the harsh criticism of Reno's tenure over the CFTF spurred, at least in part, a return to a model that would allow the Attorney General some measure of separation from the Department's most sensitive investigations—as had the ICA—but also leave room for some ultimate responsibility and control in the Executive Branch.[165] Could there be a third way that balanced appropriately the competing interests?

The need to replace the ICA with something that would instill confidence in DOJ decision-making became a bipartisan concern, and as the pendulum swings made clear, the issues were complex. An *ad hoc* commission to develop proposals for Congress and the Executive Branch was chaired by former Senators Bob Dole and George Mitchell with assistance from the American Enterprise Institute and The Brookings Institution. The commission released a public report in May of 1999 followed by testimony before the House Judiciary Committee including remarks by former Attorney General Richard Thornburg. Congress ultimately deferred to the Department, which, after notice and comment, promulgated the Special Counsel regulations.

The Special Counsel regulations are in ten parts.[166] The core provisions—the ones that proponents would cite as its strengths and the ones critics would cite as its Achilles' heels—are: 1) § 600.1 Grounds for appointing a Special Counsel; 2) § 600.3 Qualifications of the Special Counsel; 3) § 600.7 Conduct and accountability; 4) § 600.8 Notification and reports by the Special Counsel; and 5) § 600.9 Notification and reports by the Attorney General.[167]

Division Robert Mueller in 2001 to avoid any allegation that prosecutorial decision-making would be tainted by partisan motives. Ms. White's office declined to file charges against Torricelli who later resigned after a Department of Justice referral of the results of the Chang investigation to the Senate Ethics Committee. David Margolis had previously directed that the Chang prosecution and related investigative matters be assigned to the Campaign Finance Task Force because, in part, the acting United States Attorney for the District of New Jersey would have required the approval of Senator Torricelli for nomination to a permanent appointment. *See generally*, James V. Grimaldi, *For Defense Teams, Bad News Means Billable Hours and Good Profits*, WASH. POST. (Aug. 13, 2001), https://www.washingtonpost.com/archive/ business/2001/08/13/for-defense-teams-bad-news-means-billable-hours-and-good-profits/b2dae7ff-3499-4147-a8a5-63340c01efec/ [https://perma.cc/SZX8-A8QH] (detailing in part procedural history of the Chang/Torricelli matter). For a fuller description of Margolis' role in assigning sensitive matters within the Department see *infra* Section IV. A., pp. 48–53.

[164] *See* Grimaldi, *supra* note 163.

[165] *See* ATTORNEY GENERAL'S SPECIAL COUNSEL REGULATIONS, HEARING ON H.R. 2083 BEFORE THE H. COMM. ON THE JUDICIARY, 106TH CONG. 1–32 (1999) (statements of Dick Thornburg, Kirkpatrick & Lockhart, Mark H. Tuohey III, Vinson & Elkins, and Michael Davidson, Washington, D.C.).

[166] 28 C.F.R. § 600.1-.10.

[167] Although not unimportant, the remaining sections deal largely with administrative matters and procedure: § 600.2 Alternatives available to the Attorney General, § 600.4 Jurisdiction, § 600.5 Staff, § 600.6 Powers and Authority, § 600.10 No creation of rights. *See id.*

The threshold question, and the first major flaw in the regulations, is what circumstances trigger the regulations. Section 600.1 sets forth the criteria the Attorney General uses in deciding whether to appoint a Special Counsel. More specifically, the Attorney General will appoint a Special Counsel if:

> [a] [An] investigation or prosecution . . . [by] the Department of Justice would present a conflict of interest for the Department or other extraordinary circumstances; and
>
> [b] That under the circumstances, it would be in the public interest to appoint an outside Special Counsel to assume responsibility for the matter.[168]

The test is therefore two-pronged with the first prong disjunctive. A Special Counsel will be appointed: a) if the Department has an agency-wide conflict and it would otherwise be in the "public interest" *or* b) in the case of "extraordinary circumstances" and it would otherwise be in the "public interest."

The articulated standard for appointment begs a host of important questions. What is the measure of "extraordinary circumstances"? Or, for that matter, how does one gauge the notion of the "public interest"? And how does one determine when a department official has a conflict of interest? As noted elsewhere in this Article, there is no central authority to adjudicate conflicts of interest or compel recusal within DOJ.

Moreover, the regulation seems to assume that there will be cases in which no prosecutor anywhere in the Department is conflict-free, a finding that flies in the face of both tradition and reality within the Department.[169] And at what stage in an investigation would the regulation be triggered? On this score the regulation is completely silent despite long-established procedures within DOJ regarding sequential investigative steps designed to propel investigations by evidence not politics.[170]

One thing is clear, however. Given the broad standard, it is virtually inconceivable that an investigation of the President, or his campaign, or his close associates, would not trigger the Special Counsel regulations. Yet the Special Counsel regulations intentionally omitted the enumerated persons section set out in the ICA. This seems to have been intended to avoid automatically triggering the regulation in any case involving someone with a connection to the President. Attorney General Janet Reno struggled mightily in trying to draw that line in the CFTF and her reputation and the Department's arguably suffered as a result. Of course, there are advantages to a broadly-written and flexible test, and it seems the drafters of the regulation sought that result for any number of good reasons. Not every case involves an investigation of individuals associated with a newly-elected President. But that really is the point—what if it does?

Here, breadth and a lack of specificity result in a regulation with no meaningful standard. If a Special Counsel "will" be appointed when extraordinary circumstances exist and the public

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[168] 28 C.F.R. § 600.1(a), (b)(emphasis added).

[169] As Patrick Fitzgerald's prosecution of Scooter Libby in Plamegate, John Durham's investigation of the CIA's destruction of interrogation tapes, and the many successes of the Campaign Finance Task Force all demonstrate, the Department has a rich history and formidable record in the proper handling of sensitive matters without resort to special counsel even in matters that touch on the presidency. *See infra* Section II. D. and note 242.

[170] *See infra* note 260 (discussing Attorney General Guidelines for sensitive investigations). The ICA required a certain quantum of predication before the Act was triggered. *See supra* Section II. A. at 15–18.

interest requires it—even at the earliest stages of an investigation before any meaningful chance to test the allegations—are there any circumstances where an investigation of a sitting president, or his advisors and confidants, would not trigger the appointment of a Special Counsel? Add in an active Fourth Estate and a loyal opposition in charge of at least one house of Congress, and the answer is most assuredly "no." At least the ICA had some preliminary review by the Public Integrity Section. Now, with the Special Counsel regulations, that is gone. For better or worse, with the ICA in place, the CFTF was able to prosecute numerous major contributors to the same party that controlled the White House. But in 2017, with the Special Counsel regulations in place, apparently there was no one in the Department of Justice able to prosecute Paul Manafort for his fraud and tax crimes—conduct unrelated to the President.

The second and third major flaws in the Special Counsel regulations concern the wholesale adoption of the ICA provisions regarding the appointment process and standards governing the Special Counsel's conduct. Pursuant to § 600.3, the regulations mandate that a Special Counsel be appointed from outside the government,[171] and while Department employees may be detailed to the office,[172] a Special Counsel may also supplement the office with outsiders.[173] As Justice Scalia had predicted and bemoaned, Special Counsels, like ICs, could easily be an "an old foe of the President, the [the Office] staff[ed with] refugees from the recently defeated administration[.]"[174] Add in a for-cause dismissal standard,[175] the attendant risk of overzealousness, and the loss of Robert Jackson's proportionality and perspective,[176] and the ICA and Special Counsel regulations, at least for these provisions, function identically.

While the parallelism between the ICA and the Special Counsel regulations is clear, there was some effort to make the Special Counsel regulations different from the ICA in two major aspects. The first was to make the release of a Special Counsel's final report discretionary. While § 600.8 of the regulations require the Special Counsel to prepare a formal written report for the Attorney General,[177] § 600.9 grants to the Attorney General the option to maintain its confidentiality.[178] This is consistent with longstanding traditions in the Department to encourage robust debate in the deliberative process, to protect the confidentiality of sources and methods, and to avoid reputational harm to the uncharged, not to mention avoiding running afoul of grand

[171] *See* 28 C.F.R. § 600.3(a) ("The Special Counsel shall be selected from outside the United States Government."). In an apparent effort to avoid a repeat of Judge Starr's efforts to run the Whitewater investigation while maintaining his practice at a major law firm, the regulation requires Special Counsel to treat the role as having 'precedence in the professional lives." *Id.* Robert Mueller resigned his law firm partnership during his tenure as Special Counsel. *See* Matt Zapotosky, *Mueller, several team members gave up million-dollar jobs to work on special counsel investigation*, WASH. POST. (Aug. 8, 2017), https://www.washingtonpost.com/world/ national-security/mueller-several-team-members-gave-up-million-dollar-jobs-to-work-on-special-counsel-investigation/2017/08/08/e11169da-7b78-11e7-83c7-5bd5460f0d7e_story.html [https://perma.cc/79CC-KES2]. It is not at all clear, however, that the Department has been in full self-compliance with this provision. *See infra* note 203.

[172] *See* 28 C.F.R. § 600.5.

[173] *Id*.

[174] Morrison v. Olson*,* 487 U.S. 654, 731 (1988).

[175] *See* 28 C.F.R. § 600.7(d).

[176] *See supra* note 111. *See also* Brief of Edward H. Levi, Griffin B. Bell, and William French Smith as Amici Curiae, Morrison v. Olson*,* 487, U.S. 654 (1988) (No. 87–1279) (noting the risk of institutional bias toward indictment in offices of independent counsel).

[177] *See* 28 C.F.R. § 600.7(d).

[178] *See* 28 C.F.R. § 600.9(c) ("The Attorney General may determine that public release of these reports would be in the public interest, to the extent that release would comply with applicable legal restrictions.").

jury secrecy rules that may vary from district court to district court and circuit to circuit.[179] For these substantial reasons alone, the Department has long resisted releasing declination memoranda to third parties.[180]

The second modification was the removal of a mandate that Department employees act as the investigative agents for impeachment proceedings. The ICA obligated an IC to inform the House of Representatives of "substantial and credible information [the IC] receives . . . that may constitute grounds for impeachment."[181] Monica Lewinsky and the Whitewater investigation's two-volume report on that affair were fresh memories for drafters of the Special Counsel regulations in 1999. They consciously drafted the regulations to maintain a clear separation between the executive power to prosecute and the congressional power to impeach.[182]

However, as the winding down of the Mueller investigation and the political scuffle that ensued proves, these two reforms failed to function as intended. They have done nothing to prevent disclosure of presumptively confidential information, embroiled the Department in unnecessary litigation that threatens to upend deep traditions of grand jury secrecy,[183] turned the Department against itself,[184] and set up the Department and the Attorney General for unfair criticism. It is unrealistic to mandate the writing of a formal report that raises questions about the President of the United States, even if the Special Counsel determines that no provable crime occurred, and expect it to remain secret when the loyal opposition clamors for it as a roadmap to impeachment. In practical effect, the illusion of opaqueness and concern for the rights created by the Special Counsel of those not charged regulations provides just enough ammunition for the opposing party to cry "coverup!"[185]

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[179] *See infra* note 339.

[180] *See* Thornburg, Tuohey, and Davidson, *supra* note 165 (citing 64 Fed. Reg. 37041):

> At the end of a special counsel's investigation, section 600.8(c) of the regulation provides that a special counsel "shall provide the Attorney General with a confidential report explaining the prosecution or declination decisions reached by the Special Counsel." The special counsel's obligation to file "a summary final report" is "limited." The counsel's report is to be "handled as a confidential document as are internal documents relating to any federal criminal investigation.

[181] *See* 28 U.S.C. § 595(c) (1982 ed., Supp. V).

[182] *See* Thornburg, Tuohey, and Davidson, *supra* note 165. According to former Attorney General Thornburg:

> The Attorney General's regulations are silent about reporting on impeachment matters. The project report specifically recommended that the provision in the Independent Counsel Act on impeachment reports to the House not be carried forward. At the same time, we made clear that "nothing in [the project's proposed regulation] prevents Congress from obtaining information during an impeachment proceeding.

[183] *See infra* note 339.

[184] *See* U.S. Department of Justice, Office of Special Counsel, Letter from Special Counsel Robert S. Mueller, III to Attorney General William P. Barr (March 27, 2019), https://www.chicagotribune.com/nation-world/ct-mueller-report-russia-investigation-20190328-story.html [https://perma.cc/9NJQ-KXNA] (complaining of "public confusion" regarding the Special Counsel's Report) (republishing Washington Post report).

[185] *See* Karoun Demirjuan et al., *Democrats say they will accuse Barr of a 'cover up' if he delivers incomplete Mueller report,* WASH. POST (Mar. 28, 2019), https://www.washingtonpost.com/powerpost/house-intelligence-committee-republicans-formally-call-on-schiff-to-resign-as-chairman/2019/03/28/669f431c-515e-11e9-88a1-ed346f0ec94f_story.html [https://perma.cc/P4SP-F4YF]. The most recent example of the illusion that the Attorney General has any real discretion, other than on paper, to decline to release a report by a Special Counsel is Robert Hur's final report in his investigation of President Biden's handling of classified materials. *See infra* note 204. Hur's report lays out across 345 pages plus appendices in comprehensive detail both the full nature of the investigation and his justification for why no charges were recommended. See https://www.justice.gov/storage/report-from-special-counsel-robert-k-hur-february-2024.pdf [https://perma.cc/6RM7-CN3P]. The report is in essence then what is known in the common parlance of the

In sum, the Special Counsel regulations are a failed experiment. Nothing has really changed since Justice Scalia's 1988 dissent in *Morrison* and the Department has failed to learn lessons from the ICA. Whether constitutional or not,[186] the Special Counsel regulations repeat every major structural error found in the ICA and set up the Department for the same unwarranted political attacks that plagued it under the ICA. Simply put, the Special Counsel regulations, as actually used, are a locked, loaded, and hair-triggered gun aimed straight at the President—any president.

B. Congressional Meddling and the Ghost of Ken Starr

The Special Counsel regulations had their first real test in the investigation led by Special Counsel Robert Mueller. After the recusal of then-Attorney General Jeff Sessions because of contacts he had with a Russian diplomat, Deputy Attorney General Rod Rosenstein invoked the Special Counsel regulations to appoint Mueller, then in private practice, to investigate allegations of Russian meddling in the 2016 presidential election and collusion between the Russian government and the Trump presidential campaign.[187]

As the investigation made rapid progress against Trump campaign officials and confidants and indictments and convictions began to pile up, speculation in the press that President Trump

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Department as a "declination memo." But rarely, if ever, are declination memos made public in the mine-run case. There are a host of reasons, all valid—concerns about grand jury secrecy, witness protection, damage to reputation, among others—that render such memos the confidential work product of prosecutors not to see the light of day. Yet Hur's report was made public by the Attorney General within days of its submission, no doubt a necessary default to transparency in light of Jack Smith's decision to indict Donald Trump for arguably similar conduct. *See Letter from Attorney General Garland to the House and Senate Judiciary Committees*, https://www.justice.gov/storage/20240208aggarlandletter.pdf. However, transparency came at a political cost as the press focused on Hur's characterization of Biden's mental acuity in an election year spurring at least one congressional hearing in the opposition-led House of Representatives. Once again, the Special Counsel regulations are ineffective in protecting the Department in its exercise of prosecutorial power and unfailingly effective in dragging the Department into political quagmires. *See Congressional hearing on Biden classified documents probe turns into a proxy campaign battle*, ASSOCIATED PRESS (Mar. 13, 2024), https://apnews.com/article/classified-documents-biden-hur-special-counsel-122526da6d89d7bf4d6ccfc54590312b [https://perma.cc/ZH2E-WQYW]. Nor has the controversy subsided as the Republican-led House now seeks Hur's underlying investigative materials, including an audio recording of a sitting president, a further conflation of executive and legislative power caused by the Special Counsel regulations. See https://www.cbsnews.com/news/house-gop-special-counsel-hur-biden-interviews/ (last visited June 15, 2024).

[186] *See In re* Grand Jury Investigation, 315 F. Supp. 3d 602 (D.D.C. 2018) (Howell, J.) (special counsel duly appointed as inferior officer), *aff'd*, 916 F.3d 1047 (D.C. Cir. 2019); United States v. Manafort, 312 F. Supp. 3d 60 (D.D.C. 2018) (Jackson, J.) (upholding authority of special counsel); United States v. Manafort, Crim. No. 18–83 (E.D.Va.) (Ellis, J.) (in *dicta*, noting argument that Special Counsel regulations are unconstitutional would likely fail); and United States v. Concord Management and Consulting, 317 F. Supp. 3d 598 (D.D.C. 2018) (Friedrich, J.) (upholding constitutionality of Special Counsel regulations).

[187] *See supra* note 6. Mueller's report refers to the concept of "collusion." There is no crime of collusion. There is a federal crime of conspiracy, including conspiracies against the United States. *See* 18 U.S.C. § 371. Moreover, foreign nationals are prohibited from making contributions to, or expending funds on behalf of, candidates in U.S. elections (whether such expenditures are coordinated or not). *See infra* notes 290, 291. Separately, but relatedly, a coordinated expenditure is a "contribution" which implicates monetary limits on individual contributions and bans on contributions from prohibited sources such as foreigners. *See* Buckley v. Valeo, 424 U.S. 1, 47 (1976) ("prearrange[ed] and coordinat[ed] expenditure[s] with the candidate or his agent" from prohibited source or exceeding contribution limits carry the risk of *quid pro quo* corruption and are unlawful). Mueller's use of the word collusion appears to be less of a technical term and more of an umbrella term encompassing each and all of these potential federal crimes.

intended to fire Robert Mueller as Special Counsel spurred calls for congressional action to protect him from retaliation.[188] The specter of a repeat of President Richard Nixon's "Saturday Night Massacre," which triggered, or at least hastened, the march toward Nixon's impeachment and eventual resignation, seemed to cast a pall over Republicans and Democrats alike. That the proposed legislation could have the effect, when combined with the existing Special Counsel regulations, of reinstituting the long-lapsed ICA and all its potential for abuse, did not seem to damper the hue and cry.

Whether motivated to save his party or the President from himself,[189] one effort to protect Mueller was led by Senator Lindsay Graham (R-SC), an otherwise loyal and staunch supporter of President Trump. His bill was bipartisan. Senator Graham was joined by Senators Cory Booker (D-NJ), Sheldon Whitehouse (D-RI), and Richard Blumenthal (D-CT) in introducing in the Senate the "Special Counsel Independence Protection Act" ("Graham bill").[190] A similar bill, the "Special Counsel Integrity Act" ("Tillis bill") was introduced in the Senate by Senators Thom Tillis (R-NC) and Chris Coons (D-DE).[191]

A form of special legislation, the Graham and the Tillis bills were intended to be prophylactic. They eschewed any role in choosing a Special Counsel, a process spelled out in detail in the existing regulations,[192] but they were clearly designed to protect Mueller.[193] Each bill provided that, once appointed, a Special Counsel could only be removed for cause and only if the for-cause dismissal was justified after review by a three-judge panel of the United States District Court for the District of Columbia,[194] with notice to Congress and the ability to appeal directly to the U.S. Supreme Court.

The for-cause standard was not new, of course. A similar provision in the ICA had been countenanced by the majority in *Morrison*.[195] And the current Special Counsel also required that dismissal of a Special Counsel be for-cause[196] but codifying that standard and putting the weight of both Congress and the Courts behind it through judicial review would present a significant change. The bills differed only in who had the burden to strike the first blow. The Tillis bill required the Special Counsel to contest the dismissal in court by creating a chose-in-action post-dismissal.[197] The Graham bill would have required the Department to seek prior court approval of any dismissal of a Special Counsel.[198] In both bills, the substantive standard to be met was whether the Department was justified in "finding misconduct, dereliction of duty, incapacity,

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188 *See* Elana Schor, *McConnell: Mueller 'seems to need no protection'*, POLITICO (Jan. 30, 2018), https://www.politico.com/story/2018/01/30/mitch-mcconnell-robert-mueller-congress-special-counsel-protection-378658 [https://perma.cc/4ZGL-F43X].

189 *See* Greg Sargent, *This new report on Trump's state of mind should alarm you,* WASH. POST: THE PLUM LINE (Mar. 19, 2018) https://www.washingtonpost.com/ blogs/plum-line/wp/2018/03/19/this-new-report-on-trumps-state-of-mind-should-alarm-you/ [https://perma.cc/GFK9-MACS].

190 *See* Special Counsel Independence Protection Act, *supra* note 9.

191 *See* Special Counsel Integrity Act, *supra* note 10.

192 *See* Qualifications of the Special Counsel, 28 C.F.R. § 600.3 (2024).

193 Special Counsel Integrity Act, *supra* note 10. The Tillis bill specified a *nunc pro tunc* effective date of May 17, 2017, the day of Mueller's appointment.

194 *See* 28 U.S.C. § 2284 (allowing for a three-judge district court panel when specifically authorized by Congress).

195 *Morrison,* 487 U.S. at 670–77, 685–96. The Court found that the ICA's for-cause dismissal provision violated neither the Appointments Clause nor the separation of powers doctrine.

196 *See* Conduct and accountability, 28 C.F.R. § 600.7 (2024).

197 *See supra* note 10 at Sec. 2(d)(1).

198 *See supra* note 9 at Sec. 2(a).

conflict of interest, or other good cause, including violations of policies of the Department of Justice."[199]

The Graham and Tillis bills would surely have caused Justice Scalia some agita. First, they would have codified a for-cause standard for terminating the Special Counsel, thereby shifting a standard which currently exists only as an internal agency regulation to the Legislative Branch. Second, the standard for dismissal was narrow, bolstering the Special Counsel's independence in a way reminiscent of the ICA. But the most obvious defect, and the one most offensive to the separation of powers, was the direct involvement of the judiciary in determining the appropriateness and legality of the actions of Special Counsel. The majority in *Morrison* had hinged much of its conclusion that the ICA did not impinge on the authority of the president on the absence of such judgments and control. While the Special Division chose the Independent Counsel, their operational and supervisory role ended there. After appointment, ICs were free to do as they chose, and they did. Justice Scalia's dissent made clear that he viewed even that role to be enough to violate the separation of powers. Surely, involving the Courts directly in judging the conduct of the Special Counsel would cross even the thin line set by the *Morrison* majority.

In the end, President Trump did not fire Mueller. Some Starr-like expansions of his jurisdiction notwithstanding, his investigation avoided many of the pitfalls of Whitewater. Crimes uncovered, but not directly related to Russian interference in the 2016 election cycle, such as the Michael Cohen campaign finance matter, were spun off to the appropriate U.S. Attorney's Office. And the core investigation of the president and his campaign for alleged conspiracy with foreign operatives in election activities as well as allegations of an obstruction of that investigation were both thoroughly and efficiently resolved.

Yet controversy still dogged the process as it unfolded, bringing renewed scrutiny of how the Department handles its most sensitive matters. History suggests the rules are not as fixed or clear as one might hope and have right to expect. And for some, the invocation of the Special Counsel regulations to address the Russian interference allegations, predicated as it was in large measure on dubious research paid for by the loyal opposition, came perilously close to what Scalia feared would happen when the executive branch power was diluted—the corrupt use of the investigative and prosecutorial power not to vindicate the law but to weaponize it by lending credibility to campaign dirty tricks despite long standing protocols designed to ensure the FBI and other agencies would not be manipulated into agents of political retribution and subterfuge.[200]

C. DOJ's Attempt To Have It Both Ways

[199] *See supra* note 9 at Sec. 2(c); *supra* note 10 at Sec. 2(b).

[200] On October 19, 2020, Trump Attorney General William Barr appointed John Durham as Special Counsel to investigate allegations that the FBI improperly predicated the Crossfire Hurricane investigation, ignored established procedures to ensure political neutrality, and was motivated by political animus. *See* Appointment of John Durham as Special Counsel, Office of the Attorney General, Order No. 4878-2020 (Oct.19, 2020) (laying out scope of jurisdiction), https://www.justice.gov/sco-durham [https://perma.cc/JU8D-U8M9]. Durham's final report, issued May 12, 2023, found those suspicions and concerns were well-founded. *See* Letter from John Durham, Special Counsel, to Merrick B. Garland, Attorney General at 9 (finding in part that inspired by political bias "[t]he speed and manner in which the FBI opened and investigated Crossfire Hurricane during the presidential election season based on raw, unanalyzed, and uncorroborated intelligence also reflected a noticeable departure from how it approached prior matters involving possible attempted foreign election interference plans aimed at the Clinton campaign."), https://www.justice.gov/storage/durhamreport.pdf [https://perma.cc/6B4X-5DRV].

While the Department could be said to have dodged a bigger bullet in the way the Mueller investigation wound down, and even benefitted from the vigorous, independent, and thoughtful review of Department procedures conducted by DOJ Inspector General Michael Horowitz[201] and Special Counsel John Durham[202] in its aftermath, the future of the Special Counsel regulations is once again mired in controversy and doubt as to their legal and constitutional foundation. While the various legislative proposals inspired by the Mueller Russian investigation described above never gained traction, precluding a rejoining of the issue first addressed in *Morrison,* the current Attorney General's aggressive use of the Special Counsel regulations may now set the stage for the Supreme Court to vindicate Scalia's *Morrison* dissent in the most extraordinary of circumstances.

As of the writing of this Article, the Biden Administration's Attorney General, Merrick Garland, has appointed three Special Counsel: Jack Smith, who oversees several investigations and prosecutions of former President Donald Trump;[203] Robert Hur, who conducted an investigation of President Biden's alleged mishandling of classified materials while a senator and vice president;[204] and David Weiss, whose initial investigation of President Biden's son Hunter as U.S. Attorney for the District of Delaware was expanded to address allegations beyond Weiss's initial jurisdictional reach.[205] While each of these investigations raise various concerns about the implementation of the constitutionality of the Special Counsel regulations,[206] it is the prosecutions by Jack Smith of former President Trump that present the clearest opportunity for the judiciary to assess the constitutionality of the current DOJ regulations.

Jack Smith was appointed by Attorney General Merrick Garland on November 18, 2022, first, to investigate allegations that Trump had mishandled classified materials as he transitioned to private life after his defeat in the presidential election of 2020, and second, that he had, at a minimum, aided and abetted the January 6, 2021 assault on the Capitol by a mob intent on disrupting the Vice President's constitutional duty as President of the Senate to certify the

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[201] *See* DOJ-OIG MIDYEAR REPORT, *supra* note 12.

[202] *See supra* note 200.

[203] *See* Appointment of John L. Smith as Special Counsel, Office of the Attorney General, Order No. 5559–2022 (Nov. 18, 2022) (laying out scope of jurisdiction), https://www.justice.gov/sco-smith [https://perma.cc/9R6K-2RYG].

[204] *See* Appointment of Robert K. Hur, Office of the Attorney General, Order No. 5588-2023 (Jan. 12, 2023) (laying out scope of jurisdiction), https://www.justice.gov/sco-hur [https://perma.cc/7AJ7-DQQU].

[205] *See* Appointment of David C. Weiss, Office of the Attorney General, Order No. 5730-2023 (Aug.11, 2023) (laying out scope of jurisdiction), https://www.justice.gov/sco-weiss [https://perma.cc/6WST-GHKK].

[206] According to the plain language of the Special Counsel regulations, Special Counsel must be appointed from outside the government. *See* 28 C.F.R. § 600.3(a) ("The Special Counsel shall be selected from outside the United States Government."). Hur, who was appointed as Special Counsel from private practice, and Jack Smith, who returned to the Department from a position as a prosecutor with Kosovo Specialist Chambers in The Hague, meet this qualification. *See Specialist Prosecutor*, KOSOVO SPECIALIST CHAMBERS & SPECIALIST PROSECUTOR'S OFFICE, https://web.archive.org/web/20221118193247/https://www.scp-ks.org/en/spo/specialist-prosecutor [https://perma.cc/XR63-XERC]. However, it is unclear how Weiss, who is the holdover, Senate-confirmed, U.S. Attorney for the District of Delaware from the Trump Administration and Durham, who was at the time of his appointment as Special Counsel the Senate-confirmed U.S. Attorney for the District of Connecticut, qualified for their appointments. The Weiss and Durham appointment orders are silent on the issue, which raises the specter that the Department feels that it can waive any provision of the Special Counsel regulations without notice. One could argue that because they hold, or held during their appointment, a presidentially appointed and senate-confirmed position they are in that sense superior officers, even if their geographical jurisdiction is expanded beyond their original appointment, and are on more solid constitutional ground. This may serve as a contrast between Weiss's indictment of Hunter Biden outside his home District in the Central District of California, United States v. Biden, No. 2:23-cr-00599 (Dist. Ct. C.D. Cal., Dec. 7, 2023), and Smith's two indictments of Trump.

Electoral College and the election of Joseph Biden as the new president. Smith is no stranger to the Department of Justice and a seasoned prosecutor having served with distinction in the Manhattan District Attorney's Office, as an Assistant U.S. Attorney in the Eastern District of New York, as interim U.S. Attorney in the Middle District of Tennessee, and in the Criminal Division at Main Justice as the Chief of the Public Integrity Section, a career position and ground zero for the Department's anti-corruption, campaign finance and election crime programs.[207] His office has already been productive, obtaining two indictments of the former president, one in the Southern District of Florida in the classified documents investigation[208] and one in the District of Columbia for Trump's alleged role in helping to incite the January 6, 2021 mob attack on the U.S. Capitol.[209] Quite apart from arguments of presidential immunity for acts committed while in office which might apply only to the January 6 prosecution, both of Smith's Trump indictments may suffer from a different and fatal Achilles' heel.

Following the unsuccessful constitutional challenge to the ICA in *Morrison*, the enactment of the Special Counsel regulations was largely uncontroversial, at least as a matter of constitutional law. If the convoluted structure of the ICA and the entanglement of the various branches it allowed was not enough to offend the separation of powers, then surely an internal regulation promulgated in the modern administrative state designed admirably to address conflicts of interest would survive in a similar safe harbor if challenged. However, since the enactment of the Special Counsel regulations there has been a sea change in the composition of the Supreme Court, a re-examination of long-established precedents interpreting the Appointments Clause,[210] and a possible redefinition of the scope of the power to delegate enumerated powers. Moreover, the tide appears to be rising.[211]

Whether couched in terms of the illegality of modern administrative law,[212] the concept of a unitary executive, or in the more nuanced definitions of "principal," "superior" or "inferior" officers of the United States, the core theme is the same: the central balance of a representative government in which the people cede their power only to those they elect, or to those duly appointed by the Executive with the advice and consent of the legislature, may exercise the enumerated and limited powers set forth in the first three Articles of the Constitution. As one prominent scholar has put it:

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[207] *See* Glenn Thrush, *Who is Jack Smith, the Special Counsel Who Indicted Trump?*, N.Y. TIMES, June 8, 2023 (describing Smith as a "hard-driving, flinty veteran Justice Department prosecutor chosen for his experience in bringing high-stakes cases against politicians in the United States and abroad."), https://www.nytimes.com/2023/06/08/us/politics/jack-smith-special-counsel-trump-indictment.html [https://perma.cc/JZ8A-LZJ3].

[208] United States v. Trump, No. 23-CR-80101-CANNON(s) (S.D. Fla., Jul. 27, 2023), https://www.justice.gov/storage/US-v-Trump-Nauta-De-Oliveira-23-80101.pdf.

[209] United States v. Trump, No. 1:23-cr-00257-TSC (Dist. Ct. D.C., Aug. 1, 2023), https://www.justice.gov/storage/US_v_Trump_23_cr_257.pdf.

[210] *See* Lucia v. Sec. and Exch. Comm'n, 138 S. Ct. 2044 (2018) (applying Freytag v. Comm'r, 501 U.S. 868 (1991) to curb power of Securities and Exchange Commission administrative law judges).

[211] *Id.* at 2057 (Thomas, J., concurring) ("With exceptions not relevant here, Congress required all federal officials with ongoing statutory duties to be appointed in compliance with the Appointments Clause."); *see generally*, Lucas T. Vebber, *Unconstitutional Federalism: A Call to Reinvigorate the Appointments Clause*, 21 GEO. J. OF L. & PUB. POL'Y, 337, 374 (2023) (cautioning against reading too much into *Lucia* outside the quasi-judicial functions of executive branch administrative law judges but describing the Appointments Clause as "one of the Constitution's vital structural limits" designed to prevent the federal government from "grow[ing] its power in an unchecked and unaccountable manner.").

[212] *See generally*, Philip Hamburger, IS ADMINISTRATIVE LAW UNLAWFUL?, 355 (2015).

> The problem can be understood in terms of self-government. Whereas the people traditionally ruled themselves through the laws made by their representatives, the government now tends to rule the people through administrative commands. Administrative law thus inverts the relationship between the people and their government, reducing the people to servants and elevating government as their master.[213]

Through this lens, the Special Counsel regulations, which are purely administrative regulations promulgated by the Executive Branch, appear to have significant constitutional vulnerabilities as an *ultra vires* exercise of Second Branch power. The first difficulty is clear cut and does not require any interpretation. By the plain language of the regulations, the Special Counsel, with the stated intention of avoiding a conflict of interest, "shall be selected from outside the United States Government." 28 C.F.R. § 600.3(b). By definition then, the Special Counsel is an "inferior officer" of the United States because he or she is not appointed under the Appointments Clause of the Constitution[214] but rather by fiat by the Attorney General. There is no appointment by the President, the highest elected official in the land, and no advice and consent of the Senate precluding any determination that the Special Counsel is a "principal officer" of the United States.[215] His professional *bona fides* notwithstanding, Jack Smith, appointed to the role of Special Counsel from employment with the Hague, does not hold, and never has held,[216] such a position in the constitutional firmament. This is more than a colorable claim and the issue that the Special Counsel regulations are unconstitutional per se, the precedent of Morrison v. Olson notwithstanding, has now been joined in both of the Special Counsel's prosecutions of Donald Trump.[217]

Why this matters, or at a minimum requires heightened judicial scrutiny in our constitutional democracy, should be manifest. Special Counsel Jack Smith, an inferior officer of the United States acting extra-constitutionally, has in the summer of 2023 indicted the leading Republican candidate for President of the party opposing the incumbent Democratic President's bid for reelection in 2024. And on a time frame that seems to ensure that the former President's criminal trials will coincide with both the nomination process of his party and the general election. One does not have to be a constitutional scholar to wonder whether the person who wields such

[213] *Id.*

[214] U.S. CONST. art. II. § 2, cl. 2.

[215] *Buckley*, 424 U.S. at 132 (per curiam) ("Principal officers are selected by the President with the advice and consent of the Senate.").

[216] Although it may not be significant as a matter of constitutional law, it is fair to note that at the time of his appointment as Special Counsel for the investigation of Russian interference in the 2016 election cycle Robert Mueller, while appointed to the position from the private practice of law, had previously been appointed by the President and confirmed by the Senate on three prior occasions, twice as a U.S. Attorney and once as Director of the FBI.

[217] *See* Brief of Former Attorney General Edwin Meese III & Law Professors Steven G. Calabresi & Gary S. Lawson As Amici Curiae Supporting Neither Party, United States v. Trump, No. 23–624 (arguing the Special Counsel prosecutions of Donald Trump are unconstitutional), https://www.supremecourt.gov/DocketPDF/23/23-624/293864/20231220140217967_US%20v.%20Trump%20amicus%20final.pdf [https://perma.cc/84S8-XQXK]; United States v. Trump, No. 23-CR-80101-CANNON(s) (S.D. Fla.), Motion to Dismiss Indictment, Based on the Unlawful Appointment and Funding of Special Counsel Jack Smith by Donald J. Trump, Docket No. 326 (same) (filed February 22, 2024). In the Southern District of Florida case, Judge Cannon has allowed an impressive cadre of amici to offer support or opposition to the motion. *Id.* at Docket Nos. 364 and 410 (in support) and 429 (in opposition).

momentous and consequential power should be accountable, directly or indirectly, to the people in a constitutional democracy.

Of course, Jack Smith does not himself have to be a superior officer if he is supervised and held accountable by one.[218] But is he? Here, the Special Counsel regulations indulge in a teetering but ultimately unconvincing attempt at a balancing act, taking away with one hand what is given with the other, in a transparent attempt to save the Special Counsel from the structural problems that gave Justice Scalia such fits when he scrutinized the ICA.[219] The critical language is found in Title 28, C.F.R. § 600.7(b), Conduct and accountability:

> (b) The Special Counsel shall not be subject to the day-to-day supervision of any official of the Department. However, the Attorney General may request that the Special Counsel provide an explanation for any investigative or prosecutorial step, and may after review conclude that the action is so inappropriate or unwarranted under established Departmental practices that it should not be pursued. In conducting that review, the Attorney General will give great weight to the views of the Special Counsel.

Id.

On its face, § 600.7(b) takes a stab at a kind of "independent Counsel–lite." On the one hand, the Department eschews active supervision but retains a form of veto power, when, despite an explicit presumption of correctness, the Special Counsel deviates in some undefined way from "established practices." But how that veto power is exercised, and when, is left unsaid. Can a defendant seek review by the Attorney General only after indictment, or, as is the case with virtually any other DOJ target, pre-indictment?[220] One is left to guess, hardly a shining example of procedural due process. Beyond articulating a standard of review arguably as clear as mud, what also remains opaque is how this standard differs in any meaningful way from the deference given to U.S. Attorneys by the Department in their day to day prosecutions. But maybe that's the point—to treat Special Counsel as if they were actually principal officers—which of course they are not.

This is all angels dancing on a pin, however, as it relates to Jack Smith as the Attorney General has publicly disavowed any desire to second guess his decisions under the § 600.7(b)

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[218] *See* Edmond v. United States, 520 U.S. 651, 663 (1997) ("'inferior officers' are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the Senate's advice and consent"). In literally all 93 United States Attorney's Offices nationwide and in the territories, Assistant U.S. Attorneys present matters to the grand jury and indict defendants with the approval of a supervisor exercising authority delegated from the U.S. Attorney. Invariably, the indictments bear the signature of the U.S. Attorney, a presidentially appointed and Senate-confirmed superior officer who by statute is the only authorized representative of the United States in District Court absent special appointments. 28 U.S.C. § 547 (each United States attorney, within his district, shall "prosecute for all offenses against the United States" and "prosecute or defend, for the Government, all civil actions, suits or proceedings in which the United States is concerned").

[219] See *supra* pp. 21-24.

[220] This is some reason to believe that a pre-indictment review will occur if requested. *See* letter from John P. Rowley III to Merrick Garland, Attorney General, (May 23, 2023), https://truthsocial.com/@realDonaldTrump/posts/110420928827917285. What is not clear is whether such an audience is with the Special Counsel and his lieutenants only or with the Deputy Attorney General and staff or higher. *See* Eric Tucker, *Trump lawyers meet with Justice Dept. officials as charging decision nears in Mar-a-Lago case*, ASSOCIATED PRESS (June 5, 2023), https://apnews.com/article/trump-justice-department-classified-documents-maralago-455e06ae11fecd5fc6aa565bee6b3878 [https://perma.cc/D68Y-NA6B]. Donald Trump was indicted less than two months after the reported meeting at Main Justice. *See* United States v. Trump, *supra* note 208.

standard,[221] raising a substantial question as to whether the Special Counsel regulations—even if constitutional as written—are unconstitutional as applied.[222] If the Department wants to act as if Jack Smith is truly independent, as it seems to desire at any cost, it must do so at its constitutional peril. Most importantly, it must face the prospect of a revisiting of *Morrison v. Olson* in a new and risky political and legal environment. It is hard not to imagine Justice Scalia voicing from the grave something akin to "I warned you."

Beyond the constitutional legitimacy of the Special Counsel regulations, either facially or as applied, there is a legitimate question about the Department's level of candor, or worse, the willingness to engage in political manipulation that the Department has displayed in implementing the Special Counsel regulations in the Trump prosecutions. The question is less of one of constitutional legitimacy and more of public relations and spin. It cannot be gainsaid that there is a strong political incentive for the Department's political leadership (and the President) to distance itself from the prosecutorial decisions of the Special Counsel. It is easier, one can argue, for the Attorney General and the President to say the Special Counsel acts "independently" than candidly admitting the Constitution may require something else. While the Department may trumpet "the Department's commitment to both independence and accountability in particularly sensitive matters,"[223] it is the former and not the latter that has taken center stage when it comes to framing public perception of the Trump prosecutions. In a political context, "independence" and "accountability" are not co-equal values, they are antagonists. In colloquial terms, the Department has erred on the side of independence seemingly comfortable with, if not enthusiastic about, the notion that if Jack Smith makes a mistake, it is on him, not the incumbent and appointing administration.

It is commonplace whenever it announces an important indictment or policy change for the Department of Justice to hold a press conference in its modern and well-equipped media facilities at Main Justice in Washington, DC. At such events, the stage is often crowded with senior Department officials, heads of investigative agencies, and a small platoon of prosecutors, each jockeying for position in the television camera's field of vision. Contrast this with Jack Smith's spartan announcements of the two Trump indictments[224] in which, in classic Marshal McLuhan fashion, the medium is the message.[225] In each of the announcements, Smith stands alone — that is to say visually "independent"— devoid of the small army of his no doubt substantial supporting cast. The Trump indictment press announcements stand in sharp contrast

[221] In announcing Jack Smith's appointment, Attorney General Garland stated: "As special counsel, [Smith] will exercise *independent* prosecutorial judgment to decide whether charges should be brought." (emphasis added). *See* Savannah Kuchar, *Garland transcript: Jack Smith named special counsel in Trump investigation*, USA TODAY (Nov.18, 2022), https://www.usatoday.com/story/news/politics/ 2022/11/18/transcript-merrick-garland-jack-smith-special-prosecutor/10728962002/ [https://perma.cc/P8J7-QHBC]. It is hard to see how such a statement squares with even the minimal accountability standard inserted into § 600.7(b) by its drafters presumably to preserve its constitutionality.

[222] For a thoughtful, albeit now dated, discussion of the distinction between facial and as-applied constitutional challenges *see* Roger Pilon, *Foreword Facial v. As-Applied Challenges: Does It Matter?*, CATO S. CT. REV. (2009), https://www.cato.org/sites/cato.org/files/serials/files/supreme-court-review/2009/9/foreword-pilon.pdf [https://perma.cc/9U3Z-HLFF].

[223] *See* Kuchar, *supra* note 221.

[224] *See* MSNBC, *Jack Smith speaks on charges in Trump classified documents indictment*, YOUTUBE (June 6, 2023), https://www.youtube.com/watch?v=Q1VI0f8vnfE; C-SPAN, Complete statement of Special Counsel Jack Smith on Trump Indictment, YOUTUBE (Aug. 1, 2023), https://www.youtube.com/watch?v=TDpdlw0kmBw [https://perma.cc/9Z9S-5H6D].

[225] *See* Marshall McLuhan, UNDERSTANDING MEDIA: THE EXPRESSIONS OF MAN (McGraw-Hill 1964) (explaining the notion that the manner in which you convey a message may also be the message itself).

to the Attorney General's announcement of Smith's appointment which made special mention that Smith was in some sense merely a continuation of an already well established team effort.[226]

Equally telling are the form of the indictments themselves. Unlike an indictment brought by a presidentially appointed, Senate-confirmed U.S. Attorney, Smith's indictments bear only his signature as the charging official, seemingly joining in stark and graphic terms, front and center and in black and white, the issue of his constitutional authority to act.[227] In sum, the Department may not have it both ways. Either the Special Counsel regulations as drafted survive constitutional scrutiny because the Attorney General exercises his obligation of accountability as the appointing principal officer or they violate the separation of powers and must fall of their own insufficient weight. Both cannot hold.

So how should the Department react if the Special Counsel regulations are struck down or are revoked by the Department itself? In light of decades of failed experiments through Watergate, independent counsel, and special counsel, is there is no mechanism to advance the interests the public has in integrity at all levels of government?

IV. <u>David: Where For Art Thou?: Institutionalizing the Role of the Career ADAG</u>

A. David Margolis and Conflict of Interest Enforcement

The Special Counsel regulations represent one approach, and the biggest weapon in the current toolbox, in addressing a problem that pervades criminal enforcement in a representative democracy. It is a well-worn axiom of politics that in an election to the winner goes the spoils. In our federal system, that means the appointment of political loyalists to all the key management positions in the Department of Justice starting with the Attorney General whenever a new administration assumes the reins. This does mean, however, that political appointees from either political party have run amok or roughshod over the rule of law, rewarding their friends and indicting their enemies for the slightest transgression. In fact, the opposite has been true with the overwhelming majority of political appointees at the highest levels of DOJ taking their oaths to heart, although not without some help. Although lacking formality, a small group of senior career officials have long served to guide political appointees in upholding the Department's adherence to first principles.[228]

As a cabinet level official and the head of the most powerful law enforcement agency in the free world, one would expect therefore that the Office of the Attorney General of the United States ("OAG") is an expansive operation. In fact, it is quite small. According to the so-called "Plum Book" which tracks such matters,[229] the OAG has only eleven employees, all political

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[226] *See* Appointment of John L. Smith, *supra* note 203.

[227] *See* United States v. Trump, *supra* note 209.

[228] *See infra* note 229 and 243.

[229] The Plum Book is a list of all potential political appointments with the executive branch. It is named for both its purple cover in the printed version and its role as the comprehensive checklist for filling "plum" spots when an administration turns over. It is printed by the United States Printing Office every four years. The contents are provided by either the House Oversight and Government Reform Committee or the Senate Committee on Homeland Security and Governmental Affairs who alternate that role after each presidential election. *See* COMM. ON HOMELAND SEC. AND GOVERNMENTAL AFFAIRS , 114TH CONG., *POLICY AND SUPPORTING POSITIONS* (2016), https://www.govinfo.gov/content/pkg/GPO-PLUMBOOK-2016/pdf/GPO-PLUMBOOK-2016.pdf [https://perma.cc/5H6W-535F] (hereinafter "Plum Book"); s*ee generally* Press Release, U.S. Government Publishing Office, *GPO Releases Plum Book*, https://www.gpo.gov/who-we-are/news-media/news-and-press-

appointees. There are no career attorney positions in the OAG. When administrations change, so does the roster of employees of the OAG. Subject to the advice and counsel of the Senate, the President has the right to choose his or her Attorney General and the AG has the same right to surround himself or herself with trusted and like-minded advisors.

With such a small staff and the incessant domestic and international demands of a cabinet level position, conspiracy and Machiavellian theorists alike will be disappointed to hear that the AG has little to do with core operations of the Department. Certainly on paper—in the form of the *Justice Manual*, the Department's bible of internal operating procedures,[230] and the Code of Federal Regulations[231]—the buck stops with the AG on many important matters and taking a personal interest in a particular matter sometimes occurs or is even required.[232]

But many of *Justice Manual* functions are expressly delegated to other officials, so the primary duties of the AG are to guide overarching policy initiatives and to act as the public face and voice of the Department as a whole. Cabinet meetings, external and internal speeches, announcement of policy changes and program priorities including coordination with state and local enforcement agencies, foreign travel to reinforce treaty commitments, and the forging of new alliances in an ever-shrinking world all demand much of the AG's time and energy. It would be wrong to say the position is largely ceremonial, but it would also be misleading to not recognize that ceremony and glad-handing, both domestically and internationally, and leadership writ large constitute a large part of the AG's daily routine. The presumption of a hands-on role in case-related minutiae is largely untrue and at times can be a controversial step.[233]

Well then, whose hand is it on the tiller of the DOJ ship as it winds its way on a daily basis past dangerous shoals, through shifting currents, and into the occasional headwind? That task—and the more mundane day-to-day operation of the Department—falls on the Office of the Deputy Attorney General ("ODAG") and its officeholder, the Deputy Attorney General. Importantly, the ODAG has a feature the OAG does not—a non-political career employee. It is in the ODAG that one finds the highest-ranking career official in the Department of Justice, one of five Associate Deputy Attorneys General ("ADAG"), the other four all political appointees. It falls on the career ADAG to be the Department's institutional memory, the keeper of its unwritten traditions and policies, and perhaps most importantly, the layer of insulation and cover for the political appointee who wants to make the right, apolitical, decision in a sensitive matter in the face of political pressure to exceed or break the normative. From some time in the 1990's through his death in 2016, that person was David Margolis.

As each administration changes, the offices of the AG and DAG—as well as the front office suites of the various DOJ divisions—are awash with the often well-coiffed, manicured and sartorially resplendent denizens of Big Law and their dutiful associates fresh through the revolving door. David Margolis stood out in a different way if only because you do not usually wear cowboy boots in the ODAG especially if you are a prep-school kid from Hartford,

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releases/gpo-releases-plum-book (recounting history of the publication and announcing release of latest edition).The Plum Book made its debut in 1952 when, fast on the heels of Dwight Eisenhower's election, the Republican Party asked the federal government for a list of positions the new president could fill. *Id*.

[230] *See* JUSTICE MANUAL, *supra* note 48.

[231] *See* Attorney General, 28 C.F.R. § 0.5 (setting out the general duties of the Attorney General).

[232] *See supra* Section II. D., pp. 32-35, for a description of General Reno's involvement in key aspects of the CFTF investigation.

[233] Karl Rove, *Did Holder mislead Congress about targeting reporters like James Rosen?*, FOX NEWS (May 24, 2013), https://www.foxnews.com/opinion/did-holder-mislead-congress-about-targeting-reporters-like-james-rosen(discussing controversy over role of AG in approving subpoena for reporter phone records in leak case).

Connecticut as he was. And if anyone might comment on Dave Margolis's necktie it was not to compliment it. It was more likely to simply note that he was wearing one—albeit one dotted with food stains.[234] Unlike the temporary political employees whose office doors opened to the fourth-floor corridor near the DAG's suite, Margolis's office fronted the waiting area for the conference room where the DAG held the most important meetings. The proximity was telling as if to say, "I have been here for some time now and unlike you I'm not leaving anytime soon."

It is hard to pinpoint when David Margolis became – at least for the Department's most sensitive criminal matters—its *eminence grise*.[235] His personal journey began as a political hire as an Assistant U.S. Attorney in the District of Connecticut. Forced to leave that office, as was the custom, when Richard Nixon became President, the outgoing United States Attorney, later Judge, Jon O. Newman[236] recommended Margolis to John ("Jack") Keeney and Henry Peterson for hire in the Criminal Division's Organized Crime and Racketeering Section placing him in the early company of two of the Department's other giants. He rose to become Chief of the Section overseeing the over one hundred Main Justice and Strike Force prosecutors strategically placed in the Mob's most verdant and lucrative territories and in those cities where the Mob also exerted political clout.

Under Margolis's leadership, and those Chiefs before and after him, and with the many talented lawyers that passed through the Section, La Cosa Nostra became and is now but a remnant of the criminal and corrupting force it once was. After almost thirty years, Robert Kennedy's vision of a committed force-multiplier of independent and incorruptible prosecutors unbeholden to local elected officials unwilling or unable to challenge the status quo was eventually realized. Margolis would also play a leadership role in the famous or infamous—depending on your perspective—ABSCAM undercover operation which snared several politicians including a United States Senator.[237]

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[234] A celebration of David Margolis's fifty years of continuous service to the DOJ was held on June 17, 2015 in the Great Hall of the Robert F. Kennedy Building, the DOJ's headquarters building at 10th and Constitution Avenue, the venue for the Department's most celebratory, as well as its most solemn, occasions. The masters of ceremonies were then acting Drug Enforcement Agency Administrator Chuck Rosenberg, who had served as Chief of Staff during James Comey's tenure as Deputy Attorney General, Comey himself, who was then serving as Director of the FBI, and then DAG Sally Yates. As part of the festivities, Comey faked an emergency as an excuse to leave the event only to emerge later from behind the stage curtain in a half-tucked pink flannel shirt and half-tied and askew orange and green "rep" tie around his neck. Comey's tribute was funny, fitting and a sincere tribute to Margolis's unique status in the Department. Equally poignant comments came from Kathryn Ruemmler, Paul Coffey, and Scott Schools, all of whom had served with Margolis at various times in his career. Loretta Lynch presented Margolis with his 50-year lapel pin and read a citation from President Obama. *See David Margolis' 50th Anniversary at the Department of Justice*, FBI.GOV (June 17, 2015), https://www.justice.gov/opa/video/associate-deputy-attorney-general-david-margolis-50th-anniversary-department-justice; *David Margolis' 50th Anniversary at the Department of Justice – Part 2*, FBI.GOV (June 17, 2015), https://www.justice.gov/opa/video/associate-deputy-attorney-general-david-margolis-50th-anniversary-department-justice-part [https://perma.cc/96LY-PFEK].

[235] The celebration of Margolis's years with the DOJ, *see* Justice Department, *supra* note 234, occurred on the same day as Loretta Lynch's swearing-in as Attorney General. In her remarks, only partly tongue-in-cheek, DAG Yates noted that, by her count, Lynch's appointment marked the 19th Attorney General "to serve in Dave Margolis's Justice Department." More telling was her observation that "political appointees come and go, but Dave Margolis is a constant" and that he "was the living embodiment of the Department's [apolitical] mission." *Id*.

[236] Margolis was first hired by the Department in 1965 fresh out of Harvard Law School by Newman, then a United States Attorney in Hartford. Margolis's father, Louis, was a locally prominent Democratic political figure. At that time, line federal prosecutors, like their bosses, were political appointees. Judge Newman, who also served as District Judge, is now a senior judge of the Second Circuit Court of Appeals.

[237] *See generally Famous Cases & Criminals*, FBI.GOV https://www.fbi.gov/history/famous-cases/abscam [https://perma.cc/F7WJ-E3AN].

These experiences placed Margolis at the center of a vortex of senior DOJ officials, the political elite and in the public eye. In the crucible of these herculean efforts, Margolis learned to navigate what some now call the Swamp. To be successful you had to be mindful of the power structure within the hallways of Main Justice, help choreograph the ever-repeating and delicate dance between career officials and political appointees endemic to the administrative state, stand tall against territorial United States Attorneys, earn the trust of the investigating agents—all while remaining true to the ideals of the Department. There are many in the modern era who took on these myriad often inharmonious tasks and failed. Margolis managed to survive, even thrive, through a combination of hard work, good cheer, at times ribald humor, politics with a small "p", and an unwavering willingness to speak truth to power. Importantly, while not lacking in some measure of ego, his demeanor was paternal and devoid of condescension. Almost to a person, the political appointees with whom he worked, regardless of their political affinity, would say that when Margolis advised against their worse instincts he did it as much to protect them as he did the Department.[238]

From Section Chief, Margolis became Robert Mueller's chief of staff during Mueller's term as AAG for the Criminal Division (1990-93), a role that further honed his skills dealing with difficult United States Attorneys and high profile investigations. When Mueller, with whom Margolis would form a respectful bond, left Main Justice to enter private practice in 1993, Margolis moved to the ODAG where he soon fell out of the pan and into the fire. The discovery of Associate White House Counsel Vincent Foster's body in Northern Virginia's Fort Marcy Park stunned official Washington, if not the nation.[239] Uncertain if the death was murder or suicide and concerned about any nexus between his death and his sensitive position in the West Wing, the Department struggled with the White House over protocol for the immediate and necessary steps inherent in any competent investigation of the violent death of a prominent public official. The FBI wanted to search Foster's office in the White House. The White House Counsel, Bernard Nussbaum, balked, mindful of executive privilege or Foster's close personal and professional history with the President and the First Lady, or both.

In support of the FBI, the Deputy Attorney General Phil Heymann spoke to Nussbaum by telephone. Heymann would later testify that he thought he had reached a compromise with Nussbaum to conduct a limited and monitored search. He dispatched his deputy Margolis and another DOJ attorney Roger Adams to the White House to finalize the details. The agreement, if one had ever been reached, unraveled in acrimony. In the ensuing standoff, Margolis, in that moment the literal embodiment of the independence of the Department, stood his ground. Later, whether coincidental or not, a torn up suicide note would emerge from Foster's office, reportedly from a briefcase that had already been searched. Margolis would later testify that he felt Nussbaum had frustrated the Department's legitimate interests.[240] While solidifying his stature as a DOJ loyalist, Margolis's interaction with Nussbaum at the behest of Heymann, the outgoing Republican DAG, would seem to have placed Margolis in some career jeopardy. If it did not, credit should go to the political appointees who came to preside over the Department in President Clinton's first term. Perhaps aided by the long wait before Clinton's third choice for AG, Janet

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[238] For an interesting anecdote showing Margolis in action as well as accurately describing Margolis's role in the Department *see* Shanlon Wu, *Where have you gone David Margolis?,* THE HILL (Dec. 31, 2018), https://thehill.com/blogs/congress-blog/politics/423283-where-have-you-gone-david-margolis [https://perma.cc/U7B3-U2X7].

[239] Except where noted, the narrative facts set forth in this section are derived from the WHITEWATER FINAL REPORT*, supra* note 126.

[240] *Id*. at 200–38.

Reno, was confirmed, Margolis not only stayed in place, but would assume comfortably the role of the Department's most senior career official,[241] a position he held until his death in 2016.

It was from that lofty and singular perch that Margolis would spend roughly the next two decades (and then some) putting out fires as they arose and helping the DAG manage the day-to-day affairs of the Department, including its challenging conflict of interest decisions. United States Attorneys are political appointees, products of complicated partisan environments, and they are deeply rooted in their local legal community. They are, at times, grateful and loyal to elected officials and their surrogates who approved or sponsored their appointment as U.S. Attorney. This historical phenomenon is common in even the largest judicial districts and, in cases of smaller districts, often sharply pronounced. The risk in such situations is improper influence in important cases, especially political corruption matters.

Early on in his tenure in the ODAG, Margolis took on the job of interviewing every United States Attorney candidate, often before their nomination. The ever-loyal career employee, he neither held veto power over political employees nor wanted that responsibility. His task was more subtle and nuanced: to make mental notes of those who might need additional ODAG supervision in the future and to be at the ready when sensitive matters required the ODAG to direct a full or partial recusal. Examples of his behind the scenes efforts to protect the integrity of investigations and the reputation of the Department are legion.[242]

The delicate relationship with the U.S. Attorney community aside, some matters required more active management directly from the ODAG. One example was the investigation of Bush White House Officials over the unmasking of CIA officer Valerie Plame while working undercover. Another was the selection of John Durham, a respected career prosecutor from Connecticut, to investigate the CIA's destruction of videotapes—under congressional subpoena at the time—of the Agency's use of so-called enhanced interrogation techniques on high value subjects held in the offshore "black-site" detention centers. Margolis even took on one of the most sensitive matters himself, determining on behalf of the Department that attorneys in the Department's Office of Legal Counsel had not committed professional misconduct in authoring a series of legal memoranda justifying those techniques.[243]

Margolis's extraordinary, albeit unofficial, role at the center of the Department's most sensitive matters was best summed up by former Deputy Attorney General James Comey: "We would give all the hairballs to him, all the hardest, most difficult problems, the most politically

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[241] *See* PLUM BOOK*, supra* note 229, at 92.

[242] Examples of Margolis's deft touch and thoughtful use of the Public Integrity Section in managing conflicts of interest and the potential of an appearance of impropriety included appointing the Section Chief as either consulting attorney, co-lead prosecutor, Acting U.S. Attorney, or approving official in matters as diverse as the investigations and prosecutions of a former governor of Alabama, the senior Senator in Alaska, the senior Senator of New Jersey, a county executive in New Jersey, a congressman from California, a congressman from Louisiana, a federal judge from Louisiana, senior federal government employees in Chicago, a politically connected plaintiff's attorney in Mississippi, election fraud schemes and campaign finance violation by both parties in Ohio, New Hampshire, and Wisconsin. In each of those matters, the relevant United States Attorney's Office was either partially recused, completely recused, or, under the UNITED STATES ATTORNEYS MANUAL (now JUSTICE MANUAL), required Main Justice approval for certain investigative or prosecutorial steps.

[243] *See generally* Mark Denbeaux, et al., How America Tortures 14–16, Seton Hall University School of Law Center for Policy and Research (November 27, 2019), , http://dx.doi.org/10.2139/ssrn.3494533 (describing issuance of DOJ Office of Legal Counsel memoranda approving CIA use of "enhanced interrogation techniques" on certain "high-value" detainees at CIA offshore black sites and subsequent adoption of such techniques by DOD at Guantanamo Bay).

controversial."[244] When Margolis died on July 12, 2016 at the age of 76, the void did not go unnoticed in the popular and legal press.[245] While others of likeminded integrity have filled the position temporarily,[246] it is unclear what procedure is in place to ensure a person with the necessary level of experience and the gravitas will assume and, perhaps most importantly, stay in that role.

B. James Comey and the Physics of a Vacuum

However, even before his death in the summer of 2016, Margolis had been in ill-health and it would turn out to be the time his wisdom and quiet leadership was needed most by the Department. By that same summer, James Comey's star in the legal firmament was well-fixed. Few lawyers in public service had a better resume: like Margolis, a mob-busting Assistant United States Attorney; deputy special counsel to the Senate Whitewater Committee; Attorney-in-Charge of a branch office of the United States Attorney's Office for the Eastern District of Virginia; United States Attorney for the Southern District of New York ("SDNY"); Deputy Attorney General; and finally, Director of the Federal Bureau of Investigation. Matters he handled personally or oversaw ran the gamut from Wall Street to Main Street to blighted back alleys. Add in stints as a federal law clerk, law firm associate, general counsel of a major defense contractor, and advisory roles with a hedge fund and international bank, there were few legal issues in and out of government beyond his grasp. He even had the rare opportunity as DAG to select a special prosecutor and appoint a former SDNY colleague to investigate and prosecute those responsible for the unmasking of CIA officer Valerie Plame.[247]

Perhaps most importantly, like Robert Mueller and David Margolis, Comey had a well-earned reputation as principled and apolitical with the gravitas and rare courage to speak truth to power—not as a gadfly or talking head but in the very corridors where that power was

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[244] *See* Ellen Nakashima, *David Margolis's 50 Years of Quips and Controversies at Justice Department*, WASH. POST (July 15, 2015) (quoting then-FBI Director James Comey), https://www.washingtonpost.com/world/ national-security/david-margoliss-50-years-of-quips-and-controversies-at-justice-department/2015/07/15/920c33c2-1f38-11e5-bf41-c23f5d3face1_story.html [https://perma.cc/YWZ3-8QFK].

[245] Obituaries appeared in Time Magazine, the Washington Post, the New York Times, Chicago Tribune and other prominent publications. See, e.g., Massimo Calabresi, David Margolis, Force for Justice Department Independence, Dead at 76, TIME (July 14, 2016), https://time.com/4406322/david-margolis-obituary/ [https://perma.cc/JW5Z-QBQ7]. National Public Radio's All Things Considered aired a tribute. See Carrie Johnson, Remembering a Career Prosecutor Who Leaned into Controversy—and Took the Heat, NATIONAL PUBLIC RADIO (July 13, 2016), https://www.npr.org/2016/07/13/485850411/remembering-a-career-prosecutor-who-led-the-way-and-took-the-heat [https://perma.cc/CW6J-2VHS].

[246] See Leon Neyfakh, *The Most Important Unknown Person in D.C.*, SLATE (June 26, 2017), https://slate.com/news-and-politics/2017/06/the-dojs-scott-schools-is-the-most-important-unknown-person-in-d-c.html [https://perma.cc/JNU2-P7ZM] (noting the appointment of Scott Schools to the career ADAG position).

[247] After John Ashcroft recused himself, then-DAG Comey appointed Patrick Fitzgerald, a former colleague from SDNY and then-U.S. Attorney for the Northern District for Illinois to prosecute I. Lewis ("Scooter") Libby, chief of staff to Vice-President Dick Cheney. According to the government's theory, Libby identified Plame as an undercover CIA case officer in an effort to discredit statements her husband had made to Congress that sought to undermine a justification for the second Iraqi war—namely that Saddam Hussein had attempted to procure raw materials for nuclear weapons in Africa. Fitzgerald later received substantial assistance from Peter Zeidenberg, a trial attorney with the Public Integrity Section and a former Assistant U.S. Attorney in the District of Columbia where the Libby indictment was returned. Fitzgerald was not a special counsel under the formal regulations, as they require that Special Counsel not be employed by the government. *See* 28 C.F.R. § 600.3 (Qualifications of the Special Counsel).

wielded.[248] This garnered him bipartisan respect and helped ensure his easy Senate confirmation to the sensitive spots he held. He was a George W. Bush appointee as U.S Attorney and Deputy Attorney General and a Barack Obama appointee as Director of the FBI. That perception, while never in doubt previously, was cemented for many as a result of an incident involving the NSA's post-9/11 electronic surveillance program called the Terrorist Surveillance Program ("TSP").[249]

In March 2004, Attorney General John Ashcroft required emergency gall bladder surgery. He would be under general anesthesia and needed pain medication and bed rest to recover. Accordingly, he temporarily recused as Attorney General and placed the reins of the Department in the hands of his Deputy Comey. As fate with have it, Ashcroft's surgery coincided with the expiration of the aggressive, sensitive, and productive TSP program aimed at preventing another large-scale terrorist attack. However, because of the breadth of the surveillance, it presented an ongoing risk of intelligence gathering on U.S. soil and possibly covert collection from U.S. persons.

Since at least the aftermath of World War II and the expansion in scope and capabilities of the intelligence community, U.S. law has restricted the domestic operations of the intelligence community and U.S. military. While the intelligence community and military operate freely overseas within the confines of international law, domestic counterintelligence and law enforcement are the bailiwick of the FBI. Constitutional and statutory provisions protect privacy rights. Non-consensual surveillance requires a Title III warrant from a United States District Judge upon probable cause. Warrant requirements from the Foreign Intelligence Surveillance Act Court ("FISA") further govern domestic collection. Prudently, President Bush had sought advice, and received approval, from DOJ that the TSP did not violate domestic law.

But this time it was different. Officials in the DAG's office, including Comey, had concerns that the program could not be certified absent certain modifications and expressed those views to the White House and the FBI. What happened next has been the subject of conflicting reports and, like many stories of its kind, there are so many versions that most or all of them have to be apocryphal to some degree. But certain basic events are undisputed. Andrew Card, then Chief of Staff for the President, and Alberto Gonzales, then White House Counsel, were concerned that if the program expired any period of "going dark" would present an unacceptable risk of failing to detect a terrorist attack. To avoid that risk they hurried to Ashcroft's hospital room with the requisite approval papers in hand.

Comey, learning that Card and Gonzales had gone to Ashcroft's bedside, headed to the hospital himself, with two of his deputies in tow, where a confrontation of sorts occurred. In one

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[248] *See* Lou Dubose, *When James Comey Was Our Hero*, WASH. SPECTATOR (Nov. 3, 2016), https://washingtonspectator.org/james-comey-fbi-clinton/. Comey had received special praise for his working against political headwinds in the indictment of those allegedly responsible for the terrorist attack that killed nineteen, most American servicemen, and wounded almost 500 more in the Khobar Towers complex in Khobar, Saudi Arabia. Saudi allegations of Iranian involvement in the attack had presented a political problem for the Clinton Administration but not the Bush Administration which gave the green light to a SDNY indictment. *See* FREEH, *supra* note 43, at 31–33 (St. Martins 2005). A federal judge later found Iran, acting through its surrogate Hezbollah, responsible for the attack. *See* Carol D. Leonnig, *Iran Held Liable in Khobar Attack*, WASH. POST (Dec. 23, 2006), https://www.washingtonpost.com/wp-dyn/content/article/2006/12/22/ AR2006122200455.html [https://perma.cc/G5QJ-894H].

[249] Except where noted, the narrative facts set forth in this section are derived from James Comey's testimony before the Senate Judiciary Committee during hearings concerning the dismissal of certain U.S. Attorneys during the Administration of George W. Bush. *See* PRESERVING PROSECUTORIAL INDEPENDENCE: IS THE DEPARTMENT OF JUSTICE POLITICIZING THE HIRING AND FIRING OF U.S. ATTORNEYS? - PART IV: HEARING BEFORE THE SENATE JUDICIARY COMMITTEE, 110TH CONG. (2007), https://lccn.loc.gov/2023694522 [lccn permalink].

version, Ashcroft, while clearly in no shape to make important decisions, nonetheless retained the presence of mind to lean forward, point to Comey, and exclaim to Gonzales and Card: "I don't know why you are here. He's the Attorney General." With Ashcroft not yielding to any pressure being brought to bear,[250] Comey's concerns would have to be addressed. Comey had threatened to resign rather than sign off on the unmodified TSP, as did then-FBI Director Robert Mueller. After a subsequent hastily-arranged White House meeting, presided over by President Bush himself, the plan was modified to the Department's liking and Comey's certification as acting AG was secured.

Comey's confrontation with Card and the future Attorney General Gonzales, however spun by the participants, is a telling vignette into the unique role of the Department of Justice in the federal government. If they do not learn the basic premise of choosing right over expediency from your parents or some other moral teacher, every law student learns in any well-taught professional responsibility course that virtually every lawyer at some point in their career will have to tell a client 'no, you can't do that." And you say that even if it means losing the client. And just as every lawyer must put loyalty to the law above loyalty to the client, so too does the Department when man and law inevitably conflict. Dedication to the rule of law and fidelity to its letter and spirit are the Department's *pièce de résistance*. This attitude permeates the institution from top to bottom. As General Ashcroft himself observed, the Department of Justice is the one federal agency which has for its name a virtue.

Comey's confrontation with Card and Gonzales, reminiscent of the efforts of Phil Heymann and David Margolis to convince Bernard Nussbaum to agree on a search protocol for Vince Foster's office, also shows both how difficult and meaningful DOJ's role in the Executive Branch is. Comey's handling of that difficult conflict-ridden situation—in his words, a DOJ "hair ball"—and President Bush's acceptance of this advice, however begrudgingly, solidified his reputation as someone who put the law above political loyalty, a reputation that contributed to his appointment by President Obama and easy confirmation as FBI Director. Moving from the DAG's office to be the Director of the FBI is a move down the organizational chart. More importantly, it is a little like jumping out of the frying pan and into the fire. Prosecutors are, generally speaking, reactive. Indeed, federal prosecutors are selectively reactive. Not every criminal act can be charged as a federal crime, despite what some defense lawyers and civil libertarians might fear. Federal prosecutors often have the luxury of deferring to parallel state prosecutions when the evidence is weak, the federal interest insubstantial, or law enforcement misconduct threatens to taint the prosecution. Declinations to prosecute are more routine than actual prosecutions. Wielding enormous power, a prosecutor's greatest attribute is the exercise of "discretion."

To some extent the FBI does not have that luxury. They are often invited into the most difficult cases for the purpose of solving them, not declining them. The agency receives a daily barrage of raw intelligence leads and must allocate its limited resources effectively and efficiently. Moreover, especially as it relates to terrorism, they must be proactive, preventative, and even disruptive of those with mal intent. Reactive can be too late. Agents live with the

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[250] President Bush's version of the hospital visit and subsequent compromise portrays Gonzales's and Card's motives and conduct in a much more benign light. According to Bush, he had sent Card and Gonzales to the hospital to talk the problem through with Ashcroft not knowing that Ashcroft had relinquished his authority. Bush felt that he had the power under Article II to approve the TSP despite DOJ's legal misgivings. But having heard from Comey and Mueller that they intended to resign, and desirous of avoiding another Saturday Night Massacre, Bush reluctantly agreed to adopt the FBI's proposed modification. *See* GEORGE W. BUSH, DECISION POINTS 172–74 (Crown 2010).

constant stress that the lead not pursued yesterday was the one that would have prevented today's mass casualty event.

For these reasons, and others, U.S. law, unlike the European continental model, has separated the investigative and prosecutorial function. Investigators should be able to pursue leads as they see fit and to act at times in stealth, disguise, and with the ethical use of subterfuge to ferret out and frustrate criminal activity. To be investigated is not necessarily to be guilty and it is longstanding law enforcement policy to avoid comment on investigations open and closed. It takes years, a few obituaries, and usually years of FOIA litigation to pry even the most basic information about unindicted cases.[251] Most FBI agents act in obscurity even if it is their work that makes or breaks every high-profile prosecution. Always circumspect and acting at best in the penumbra, after an indictment is returned, agents—likely and always potential witnesses—retreat in deference to the prosecutor.

A federal prosecutor, on the other hand, is the public face of the indicted case. The indictment bears the prosecutor's name and perhaps bar number. He or she emerges from the shadows of the investigation to announce publicly with studied confidence that the Department has brought a significant case and has just two things to say outside the courtroom: a) the defendant is presumed innocent and b) the government will overcome that presumption by proving the allegations of the indictment to the satisfaction of a jury beyond a reasonable doubt. Public comments are strictly limited to the "four corners" of the indictment and other pleadings on the public docket. The time for public comment will come when the matter is presented to a petit jury in an open courtroom where the prosecutor will at times literally point his or her finger at the accused.

But there is at least one thing which unites agents and prosecutors. Whether bound by grand jury secrecy rules or just good sense, public comments on those investigated but not charged are generally verboten. Narrow exceptions for unindicted co-conspirators and uncharged conduct admissible at trial under the rules of evidence or facts relevant to sentencing notwithstanding, a prosecutor's public statements do not stray from the charged case. Nor does he or she try the case in the court of public opinion. And because the Department of Justice exists to investigate people and entities rather than exonerate them, the standard of proof necessary to convict is high, and evidence, subjects, and targets change over time. DOJ rarely if ever clears someone suspected of criminal behavior. Today's declination could well be tomorrow's prosecution if new evidence arises. All good federal prosecutors know these guidelines and the time-honored rules that guide and govern their conduct. By the summer of 2016, James Comey was widely respected for being more than a good one—he was a great one. Yet somehow he seemingly departed inexplicably from these standards.[252]

During her tenure as Secretary of State, Hillary Clinton maintained a private non-governmental email server, separate from her government account.[253] Various reasons for this unusual arrangement have been proffered—some sinister, some benign. By July 15, 2015, the FBI had opened a criminal investigation which itself took a series of odd twists and turns and at

[251] To its credit, the FBI maintains a comprehensive public database, called the Vault, of its FOIA disclosures. *See FBI Records: The Vault*, FBI.GOV, https://vault.fbi.gov/ [https://perma.cc/3LPX-CLGH].

[252] *See* Benjamin Wittes, *Comey's Testimony as Precedent,* LAWFARE (July 8, 2016) https://www.lawfaremedia.org/article/comeys-testimony-precedent [https://perma.cc/7WVC-25ZK] ("As a general matter, when prosecutors and investigators decline to indict someone, we don't want a report, much less congressional oversight of the unindicted conduct. We want them to shut the heck up.").

[253] Except where noted, the narrative facts set forth in this section are derived from the *DOJ-OIG Midyear Report*, *supra* note 12.

times deviated from standard investigative protocols. To some, the Justice Department and FBI were overly solicitous to someone ostensibly under criminal investigation. But then again, Hillary Clinton had served as First Lady, Senator from New York, Secretary of State and was the presumptive favorite to be the next President. In light of her prominence was DOJ's inquiry less than a fulsome effort?[254]

By June 26, 2016 Attorney General Loretta Lynch, who would have been briefed regularly on the investigation if she chose, felt comfortable enough to allow Bill Clinton to board and meet with her on her airplane while it sat on the tarmac of the Phoenix airport. Lynch denied speaking about the investigation with the powerful and influential husband of the subject of the investigation but the calls for her recusal were swift. However, Lynch did not recuse, making the odd announcement of a sort of semi-recusal. She would accept whatever the FBI would ultimately recommend—in essence intentionally or not making Comey, the head of the FBI, a *de facto* special counsel in the matter.[255] As if on cue, the investigation would in fact soon end. Hillary Clinton gave a statement to investigators within days of the tarmac meeting and the FBI closed its investigation on July 2, 2016 concluding that it would not recommend criminal charges. What followed is nothing short of remarkable and would become the subject of a blistering critique from the DOJ Inspector General Michael Horowitz.

On July 5, 2016, just three days after the Clinton interview, James Comey convened a press conference, not in the Robert F. Kennedy Building at Tenth and Constitution—known colloquially as Main Justice—where public announcements of prosecutorial decisions are ordinarily made but instead on his home turf of the J. Edgar Hoover Building, the FBI headquarters building directly across Pennsylvania Avenue from Main Justice. Decrying the action of Clinton and her some of her top aides as "extremely careless," Comey nonetheless concluded that "no reasonable prosecutor would bring such a case" effectively slamming the door on any potential prosecution for conduct that exposed numerous classified emails to foreign interception.

Comey's public end to the Clinton email investigation left many unanswered questions. On its face, the announcement was either unprecedented or facially wrong in at least three ways. First, the statement seemed to lack a fundamental understanding of the relevant statute and its purpose. By coupling his statement that Clinton and her staff had merely been "extremely careless" with his statement that no prosecutor would bring the case, Comey left the public with the impression that the statute required intentional disclosure of classified materials. However, the statute is broader than that and had been purposefully drafted to capture the mental state Comey described. Title 18, United States Code, Section 793(f) expressly criminalizes as a ten-year felony the loss, theft, abstraction or destruction of classified information through "gross negligence."[256]

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[254] See Andrew C. McCarthy, *It Wasn't Comey's Decision to Exonerate Hillary – It Was Obama's,* NAT'L REV. (Sept. 2, 2017) (describing unusual manner in which the investigation progressed and deviated from normal procedures) available at https://www.nationalreview.com/corner/not-comeys-decision-exonerate-hillary-obamas-decision/ (last visited March 27, 2020).

[255] *See* DOJ-OIG MIDYEAR REPORT, *supra* note 12, at v.

[256] 18 U.S.C. § 793(f) provides:

> Whoever, being entrusted with or having lawful possession or control of any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, note, or information, relating to the national defense, (1) through gross negligence permits the same to be removed from its proper place of custody or delivered to anyone in violation of his trust, or to be lost, stolen, abstracted, or destroyed,

There are several reasons why Congress chose to include a gross negligence *mens rea* in addition to the intentional crime also encompassed within the statute. One is to help defeat a colorable but ultimately false defense that the defendant did not act with intent to harm the United States, something even a modestly clever spy could easily conjure up. But by legislative choice even the non-spy is culpable if he or she acts in a grossly negligent way. The policy balance struck by the statutory text is clear. The loss of classified materials is too consequential to immunize those who do not take seriously their obligation to keep them secure.

Far from exculpating Hillary Clinton, Comey's statement—apparently intended as a public scolding—that she had been "extremely careless" inculpated her in a felony carrying a ten-year maximum term of imprisonment. Having engaged in conduct matching the conduct proscribed by the statute and made criminal, Comey's statement that no reasonable prosecutor would ever bring a Section 793 prosecution based on extremely careless behavior was not consistent with the plain language of the statute. With each element of the statute met, a federal prosecutor would have to consider charges and in many, maybe most, situations would bring them. To exercise prosecutorial discretion in a particular case is one thing, but Comey's statement was not couched in such terms. Rather he seemed to unilaterally excise the gross negligence standard from the statute.[257] To never prosecute conduct made criminal by Congress is pure executive branch hubris and an abject abdication of the executive branch's obligation to see that the law is faithfully executed.

The second egregious error was the conflation of the investigative and prosecutorial role long kept separate in American law. While FBI agents may swear out pre-indictment criminal complaints before magistrate judges, they are accompanied by Assistant United States Attorneys who by statute stand as the representative of the United States in federal court. As explained above, although there are times when the lines are blurred, in general, federal agents investigate the facts of a case and report those findings to a federal prosecutor who then determines after applying the principles of federal prosecution whether charges should be brought. This demarcation serves important purposes. Agents may act to spur prosecutorial interest. Prosecutors may act to curb overzealous agents. Or those roles may be reversed. In sum, agents and prosecutors act as accelerators or brakes vis-à-vis one another increasing the likelihood of the correct investigative and prosecutorial outcome. Their roles are fundamentally different as are their institutional goals and values.[258] This distance and independence, a microcosmic check

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> or (2) having knowledge that the same has been illegally removed from its proper place of custody or delivered to anyone in violation of its trust, or lost, or stolen, abstracted, or destroyed, and fails to make prompt report of such loss, theft, abstraction, or destruction to his superior officer—

Shall be fined under this title or imprisoned not more than ten years, or both.

[257] As one commentator accurately and succinctly put it: "In essence, in order to give Mrs. Clinton a pass, [Comey] rewrote the statute, inserting an intent element that Congress did not require." Andrew C. McCarthy, *FBI Rewrites Federal Law to Let Hillary Off the Hook,* NAT'L REV. (July 6, 2016) (noting that Comey's statement "checked every box" needed to charge Clinton with a violation of 793(f), which does not require intent to harm national security, and explaining that "having a statute that criminalizes **gross negligence** is to underscore that government officials have a special obligation to safeguard national defense secrets" (emphasis in original)), https://www.nationalreview.com/corner/fbi-rewrites-federal-law-let-hillary-hook/[https://perma.cc/X435-S9DR].

[258] Agents and prosecutors often joke, in somewhat macabre fashion, that an agent earns a statistic when an arrest is made. A prosecutor, on the other hand, is judged only by conviction rate. For a thoughtful and comprehensive discussion of the relationship between federal prosecutors and agents including this tension, see Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749 (2003) (discussing the "dynamics of interaction between federal prosecutors and federal law enforcement agents" and offering a normative model of how each side might "monitor" the other).

and balance, helps to ensure that investigations do not become echo chambers with the conclusion pre-ordained before the evidence is complete. A prosecutorial decision should not provide an opportunity to vindicate your own investigative competence or hide the opposite.[259]

But the grossest institutional failure was the one perhaps most nuanced. The average American citizen might be forgiven for not questioning why the head of the FBI was in effect announcing a prosecutorial declination. The excesses of J. Edgar Hoover are far in the rearview mirror. The FBI is largely a trusted, respected, even revered, institution that prides itself on technical expertise, competence, toughness, and above-the-political-fray professionalism. At least on the criminal, as opposed to the counterintelligence, side of the house, the Bureau has long had rigorous investigative protocols in place to prevent undercover operations and other sensitive investigations from infringing on civil rights or dragging the Bureau into political controversy.[260]

But as the DOJ Inspector General ("DOJ-OIG") would later find,[261] it was not Comey's call to make in the first place. At least it was not his decision without a formal recusal of several layers of DOJ management and an express delegation of authority. Enforcement of the relevant statute in the email server case, the espionage statute,[262] is centered in the mine-run case in the Counterintelligence and Export Control Section ("CES") of the Department's National Security Division ("NSD").[263] NSD is headed by an Assistant Attorney General ("AAG"), a presidentially nominated and Senate-confirmed position. Like the head of the FBI, the AAG for NSD reports to the Deputy Attorney General ("DAG") and, of course, the DAG reports to the Attorney General.

Yet for reasons that remain somewhat obscure despite the DOJ-OIG report, none of these officials had a direct role in the decision to decline prosecution in the Clinton email case before Comey's public announcement. Nor as would be typical in such a high-profile matter, was there an indictment review committee or other evaluation by, and consultation with, career prosecutors experienced in a highly specialized area of enforcement until *after* Comey had made his public announcement. The post-announcement review and linguistic gymnastics had all the earmarks of

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[259] *See* K. Pavlich, *CONFIRMED: Comey Decided He Wasn't Going to Refer Hillary For Prosecution Long Before FBI Investigation Was Over,* TOWNHALL (Aug. 31, 2017) (describing August 30, 2017 letter from Senate Judiciary Committee to FBI Director Christopher Wray requesting response to evidence James Comey began drafting declination memorandum and prepared statement of exoneration before end of investigation), https://townhall.com/tipsheet/katiepavlich/2017/08/31/confirmed-comey-decided-he-wasnt-going-to-refer-hillary-for-prosecution-before-interviewing-key-witnesses-n2375767 [https://perma.cc/J7VM-2QU2].

[260] One such process is the Confidential and Undercover Operations Review Committee ("CUORC"). The CUORC is headed by the Assistant Director of the FBI overseeing all criminal investigations and is comprised of other supervisory senior agents as well as career Section Chiefs of the DOJ Criminal Division. Sensitive matters, dubbed "Group I" operations go through a rigorous written and oral review process before operations can begin. DOJ engaged in a comprehensive review and overhaul of its undercover and sensitive investigation protocols in 2008 under the direction of then-Attorney General Michael Mukasey. *See* U.S. DEP'T JUST., THE ATTORNEY GENERAL'S GUIDELINES FOR DOMESTIC FBI OPERATIONS at VI (Sept. 29, 2008), https://www.justice.gov/archive/opa/docs/guidelines.pdf [https://perma.cc/4UTL-YSLC].

[261] *See* DOJ-OIG MIDYEAR REPORT, *supra* note 12 at VI.

[262] *See* 18 U.S.C. § 793.

[263] The function of CES is described on the DOJ website as follows: "The Counterintelligence and Export Control Section (CES) supervises the investigation and prosecution of cases affecting national security, foreign relations, and the export of military and strategic commodities and technology. The Section has executive responsibility for authorizing the prosecution of cases under criminal statutes relating to espionage, sabotage, neutrality, and atomic energy." See *National Security Division, Sections & Offices*, JUSTICE.GOV, https://www.justice.gov/nsd/national-security-division-nsd-organization-chart-text-version.

a *pro forma* justification of an irreversible *fait accompli*.[264] By then it was simply too late. Comey had taken it upon himself to act alone, without any express approval to do so, leaving the DAG and AG in the dark as to his intentions.[265]

Comey's act of climbing out on the proverbial limb by assuming for himself the role of prosecutor, judge, and jury only got worse in the last weeks and days before the 2016 presidential election. After an unexplained delay, the FBI finally began an examination of the laptop of former congressman Anthony Weiner, the husband of Hillary Clinton's chief of staff. The FBI had known for some time that the laptop stored emails and other data relevant to the Clinton server investigation. Only when the case agent in New York pressed the matter to superiors at FBI Headquarters was a review conducted, literally in the last days before one of the closest presidential elections in history.

Comey himself became aware of the laptop on October 27, 2016. He now had squarely on his desk a David Margolis-worthy "hairball" and no one to assign it too. He told the DOJ-OIG he had two choices: disclose the renewed examination of the laptop for evidence and absorb the political heat or not disclose it and put himself in legal and reputational jeopardy of being accused of misleading Congress having previously described the matter as closed. Aware that the forensic review of the data would take at least a few days and apparently concerned the renewed investigation would leak to the press, Comey informed the ODAG and OAG through a surrogate of his intention to send a letter to Congress informing them that the Clinton email investigation was no longer closed as he had previously testified. The DAG, Sally Yates, and AG Lynch, also through surrogates, expressed their collective view to Comey the letter was a "bad idea." But they hesitated to order him to stand down out of concerns over a perception of interference and how Comey, well-known for his independent streak, might react.

Comey, for his part, told the DOJ-OIG that if he had been told by superiors not to send the letter he would have followed orders but that he otherwise felt free to disregard what he viewed as merely advice. Comey's October 28, 2016 letter to Congress, promptly leaked to the press, and the soon-to-follow re-closing of the Clinton email server matter caused a political firestorm. History will judge the letter's impact on the 2016 election but its impact on Comey's career at the FBI and reputation was clear in the wake of a scathing DOJ-OIG report.

The ire that has been directed at James Comey for his investigative transparency and spontaneous Congressional reporting has been bipartisan, perhaps the most compelling evidence that his motives were never political in the first place. Many partisan Democrats hold him directly responsible for Hillary Clinton's election loss to Donald Trump although that proffers a simplistic scapegoat for a much more complex event. Equally partisan Republicans will not give Comey that credit but rather ascribe to him the role of front person (and fall guy) for a conspiratorial cover-up of FBI corruption and political bias in both the email server case and the

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[264] According to the DOJ-OIG, the post-hoc evaluation concluded that 18 U.S.C. § 793(f)(1) "likely required a state of mind that was 'so gross as to almost suggest deliberate intention,' criminally reckless, or 'something that falls just short of being willful'" ***and*** "evidence that the individuals who sent emails containing classified information 'knowingly' included or transferred such information onto unclassified systems." DOJ-OIG MIDYEAR REPORT, *supra* note 12, at VI. This is nothing less than an extraordinary and sweeping rewrite of the statute. Acting with "knowledge" is a separate offense under § 793(f). *See* 18 U.S.C. § 793(f)(2). The statute separates (f)(1) and (f)(2) by the word 'or,' which was plainly intended to act in the disjunctive. *See id.* Second, DOJ's post-hoc analysis lacks legal precision. How is a prosecutor, or lawyer counseling a client on compliance, much less a juror, supposed to comprehend what "as to almost suggest" or "falls just short of" means? This introduces vagueness into a statute where none exists. Congress defined the standard as "gross negligence." *See id.* While such a standard is not perfect, it is not unconstitutionally vague as the suggested standard surely is.

[265] *See* DOJ-OIG MIDYEAR REPORT, *supra* note 12, at V–VI.

Clinton Foundation investigation. For many who have served in the Department and know the pressures attendant to the job, the question may be less political and more procedural. How could this awful series of missteps have occurred in the first place?

One explanation is the one offered by James Comey himself —namely that in the face of relentless congressional oversight in a hotly contested election cycle he had been caught in a trap—albeit one partially of his own making. Having taken the unusual but apparently voluntary step of publicly announcing the closing of the email server case and being hauled within days before Congress to explain his decision, he felt he had no choice to reopen the matters when he learned that agents had been sitting on emails from the Clinton server on Weiner's laptop. Like anyone appearing before Congress, he had the obligation to tell the truth and supplement the record when prior statements might no longer be true. Of course, that dilemma was a self-inflicted crisis caused by Comey's earlier conflation of the investigative and prosecutorial functions.[266]

A somewhat less benign explanation is that Comey succumbed to a particularly bad case of the hubris displayed by prosecutors from the Southern District of New York ("SDNY"). A source of fraternal pride for those who have served in the most prestigious of all the U.S. Attorney's Offices, SDNY's unofficial nickname as the "Sovereign District of New York" reflects the frustration and eye-rolling common to others in the Department who perceive that the SDNY honors DOJ rules and internal procedures in the breach.[267]

The most benign explanation is that Comey operated in an ethical and institutional vacuum left by the passing of David Margolis just three months before. The head of the FBI arguably held the fate of the 2016 presidential election in his hands and had no written policies or procedures existed to consult, abide by, or guide his decision-making in the face of profound conflicts of interest. There was no central authority he felt comfortable consulting or formal internal arbiter on matters of ethics or protocol. And there was no longer the wise counsel and experience of a David Margolis to act as a sounding board, to second his best instincts, or cabin his worst. Instead, Comey assumed the role of special agent, prosecutor, intelligence community liaison, chief ethics officer, Assistant Attorney General for the Office of Legislative Affairs, DOJ press officer, and ultimately Attorney General, hoping his broad shoulders would be enough to carry this extraordinary burden.

A darker spin, hinted at by the DOJ-OIG report but not expressly addressed, is that the Special Counsel regulations, and the possibility that they might apply to any ongoing investigation of a President Hillary Clinton, hurried and badly skewed the email server investigation. Comey acknowledged to the OIG that he had discussed with the ODAG that the Special Counsel regulations might apply to the investigation. But while Hillary Clinton's position as Secretary of State placed her squarely in the category of high-ranking officials potentially subject to an independent counsel under the old regime, or a special counsel under the new one, she was no longer with the government, lessening the pressure that the matter could not be handled in the ordinary course. But Comey also acknowledged that he expected that to change. Donald Trump's defeat of Hillary Clinton was a surprise to more people than just FBI Supervisory Special Agent Peter Strzok. Just as Janet Reno and the Campaign Finance Task Force operated under the threat of a statutory IC, and just as Ken Starr revisited topics that were investigated and dismissed by Robert Fiske, a reader of the *DOJ-OIG Midyear Report* could very

[266] *See id*. at X.

[267] *See* Freeh, *supra* note 43, at 118 (acknowledging SDNY's nickname reflects its "strong degree of independence . . . . even though it is officially under Justice's thumb").

well conclude that the threat of a post-election special counsel propelled a manufactured pre-election finality to the Clinton email server investigation.

C. *Rod Rosenstein, Andrew McCabe and the Dueling Ethicists*

James Comey's mishandling of the Clinton Midyear investigation was not the only miscue in the vacuum left by the passing of David Margolis. A separate disturbing event discussed in the *DOJ-OIG Midyear Report* provides another example of the profound structural flaws in the Department of Justice's ethics program and the lack of coordination across divisions and agencies in the sprawling bureaucracy.[268] During the time that Andrew McCabe served as the Deputy Director of the FBI, his wife Jill was a Democratic candidate for state office in Virginia. She received campaign funds controlled by then-Governor Terry McAuliffe, a longtime Clinton confidant and political ally. Personal appearances by Hillary Clinton helped fund the campaign war chest.

To his credit, McCabe sought ethics advice from an FBI ethics officer who advised him that he could continue to work on Clinton-related matters. The *DOJ-OIG Midyear Report* does not fault that advice but also suggests that the officer did not have the full details of the over $675,000 in campaign donations arranged by McAuliffe and therefore failed to appreciate the potential for the appearance of a conflict. Whatever ambiguity existed was eliminated by an October 23, 2016, *Wall Street Journal* article setting out the extensive financial relationship between Hillary Clinton's campaign and Jill McCabe's. McCabe was forced to recuse himself on November 1, 2016, but only after McCabe had overseen the email server investigation, assisted in Comey's declination, and made other critical decisions in the Clinton-related investigations. Particularly disturbing is the DOJ-OIG finding that he subsequently violated the recusal in the Clinton Foundation investigation.

Comey's eventual firing, based in part on the advice of Deputy Attorney General Rod Rosenstein, reportedly set the stage for an angry confrontation between McCabe—the newly elevated Acting Director of the FBI after Comey's dismissal—and Rosenstein. The meeting arose soon after the appointment of Robert Mueller as Special Counsel for the Russian investigation.[269] Rosenstein is said to have counseled McCabe to recuse himself from Mueller's investigation, citing public pictures of McCabe's overt support of his wife's state senate candidacy which had been funded by the Democratic Party. According to news reports, McCabe was angered by the suggestion.

If the reports are true, it apparently did not dawn on McCabe that it might not be wise, or in the best interests of the Department of Justice, for him to oversee an investigation that relied in part on opposition research allegedly paid for by the same Democratic Party. The DOJ-OIG would later chastise him for failing to recognize that an appearance of a conflict can be as serious as an actual one. McCabe not only refused to recuse, presumably relying on past advice from an FBI ethics official, but he also demanded Rosenstein's recusal because Rosenstein had fired Comey at the request of President Trump. According to the report, Rosenstein had too sought the advice of a "senior department ethics officer" who had advised him his recusal was unnecessary.

At best, this was another Margolis "hair ball" with no one in place to resolve it. At worst, it would be an endless sore spot and a Kafkaesque standoff unworthy of the weighty issues at hand and a Department grounded in adherence and respect for the rule of law. On a practical level, it is

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[268] *See* DOJ-OIG MIDYEAR REPORT, *supra* note 12 at XIII.

[269] *See* Jarrett, *supra* note 13.

difficult to understand how the two could continue to trust each other on the critical issues to be decided ahead. Presumably, Rosenstein, as Acting Attorney General could reassign McCabe or force his recusal but at what cost, externally and internally? Rosenstein, a principled and dedicated public servant, would not have taken such a step lightly or unduly risk further harm to the Department. McCabe had apparently received ethics advice from an ethics official in the FBI. But so too had Rosenstein. Could they both be right? What if one or both were wrong? Why were they obligated to consult different ethics officials in the first place? Or does one merely seek out the ethics advisor in your component you know will give you the answer you want? Was there no one to resolve this conflict about conflicts with clarity and finality?

Whether one considers the missteps at DOJ and the FBI during the later stage of the Obama Administration, the Trump Administration, or the Biden Administration, there appears to be plenty of blame and, at best, second guessing to spread around. If anything is clear, it is that the Department of Justice and the FBI have become the favorite whipping boys of every partisan zealot, each side convinced that the highest levels of federal law enforcement have been co-opted to neuter the opposition. One solution might be the emergence of a 21st Century Edward Levi to calm the roiling waters. However, that seems unlikely in an era of social media, partisan hyperbole, and foreign bots spreading disinformation. Rather than turn to persons or personalities, a more enduring and likely effective reform should be structural and self-enforcing, protecting the Department from unwarranted criticism whoever may hold the reins of prosecutorial discretion.

V. A Call for Structural Reforms Within the Department of Justice

A. A DOJ "Integrity Division"

The discussion of the career of David Margolis is not intended to canonize him, although many have for good reason. Rather, recounting the trust that both Democratic and Republican administrations placed in him, the difficult matters he managed by reputation and force of will, and the failures that occurred in the vacuum of his death all beg an important question. Was Margolis's well-earned, but in some way self-appointed, role as the conscience of the Department a wise and sufficient construct for a modern bureaucracy responsible for so much of what we hold dear in our democracy? The search of Vince Foster's office, the Campaign Finance Task Force, and the FBI's Midyear investigation all show the Department at times makes up the crisis management playbook as it goes along. The Department can and should do better.

Nor is the story of James Comey's conduct in the Midyear declination fiasco and Andrew McCabe's ethical dilemmas meant to impugn their judgment or integrity. Sadly, it appears that at times—even in the Department of Justice—men and women of good will exercise power in very trying circumstances without adequate guideposts and transparency. Employees should not have to wait for a damning report from the DOJ-IG or a Special Counsel to understand what is expected of them. What these incidents most clearly show is the lack of infrastructure, hierarchy, defined rules of ethics and conflicts of interest, and, most importantly, an agreed upon mechanism to assign critical and sensitive criminal matters to unbiased and responsible prosecutors and to definitively resolve ethics disputes as they arise. Perhaps these ambiguities exist in all federal agencies. But such a state of affairs should not be true for the one federal agency, as John Ashcroft would often say, that has for its name a virtue. If the main purpose of the Department of Justice is to advance the rule of law and equal justice, its internal structure and

procedures should ensure that those values, protected by transparency and objective standards of conduct, triumph over the foibles of any one man or woman. The Department of Justice should not be the most recent example of how government gets it wrong. It should be the standard bearer for ethics and adherence to integrity throughout the Executive Branch.

So how can this be fixed? One solution is to fortify the mechanisms within the Department to insure the fair, vigorous and conflict-free exercise of prosecutorial power on matters of public integrity. To that end, this article proposes the creation of new division—an "Integrity Division"—placing together under one roof and singular leadership all of the Department's anti-corruption and ethics functions. Such a profound restructuring of the Department is not unprecedented. Watergate precipitated major changes in DOJ's organization chart.[270] More recently, after the terrorist attacks on September 11, 2001, Congress created a National Security Division ("NSD") which moved two prosecution units, the Counterterrorism Section ("CTS") and Counterespionage Section ("CES"), from the Criminal Division and combined them with the DOJ unit charged with obtaining domestic orders and warrants under the Foreign Intelligence Surveillance Act ("FISA"). This change was designed, in part, to minimize silos of relevant and actionable information, to otherwise promote efficiency and uniformity wherever possible, and to adopt clear policy directives and procedures in an enforcement area of upmost importance.

The same should hold true for matters of governmental integrity, transparency and ethical enforcement of the criminal law. Just as we should be protected from outside threats, our democracy should be protected from inside threats to our nation of laws. A Justice Integrity Division ("JID") would be headed by an Assistant Attorney General ("AAG-JID"), a superior officer, as that term is constitutionally defined, nominated by the President and confirmed by the Senate. Consistent with Justice Scalia's dissent in *Morrison*, as a political appointee, the AAG-JID would serve at the pleasure of the President. However, as a measure of insulation from malevolent political considerations, she or he would serve an extended ten-year term of office, mirroring that of the FBI Director,[271] to ensure that investigations begun under one administration would continue into the next. While the AAG-OIG would be allowed certain positions for political appointments such a chief of staff and counselors, the Division would have at least two Deputy Assistant Attorneys General who would hold Senior Executive Service career positions and be designated in the Plum book as such.

Seven core components would anchor the JID. Three would come from the Criminal Division – the Public Integrity Section, Office of Enforcement Operations and a new section carved out from the Fraud Section to enforce the Foreign Corrupt Practices Act. One component would come from NSD—its Oversight Division. Further, the JID would include two of DOJ's key ethics offices—the Professional Responsibility Advisory Office and the Office of Professional Responsibility. Lastly, the JID would be the home of a newly created Office of Justice Ethics which would consolidate under one Director all DOJ ethics office functions now scattered through the Department. Each component of this proposed Division is discussed below.

B. Key Components of the Integrity Division

i) Returning the Public Integrity Section to its Original Role

[270] *See supra* note 55.

[271] *See* Crime Control Act, Pub. L. 94–503, § 203, 90 Stat. 2407, 2427 (1976). A ten-year term for the FBI Director was yet another Watergate reform.

The Public Integrity Section ("PIN") was created by order of Attorney General Edward H. Levi on January 14, 1976 as part of a broader effort by General Levi and Criminal Division Assistant Attorney General Richard L. Thornburg's post-Watergate efforts to reform the operations of the Criminal Division.[272] As a core component of the JID, PIN would retain all its current enforcement duties including federal, state, and local anti-corruption, election crime and campaign finance prosecutions.[273] But its mission would also be redefined in accord with the original intent of Watergate reformers especially those who took over the Department in the wake of the scandal.

While PIN took on a subservient role during the years of the ICA[274] and a less prosecutorial and more advisory role as the United States Attorney's Offices grew in influence over recent years,[275] PIN's original jurisdiction encompassed "all federal offenses involving official corruption."[276] That broad jurisdiction should be restored and for certain categories of government employees made presumptively exclusive. More specifically, PIN, as a component of JID would have the express and exclusive, but delegable, authority to investigate senior executive branch employees—up to and including the President—using the ICA's definition of a "covered person" as a model.[277] PIN's exercise of this authority would be governed by robust internal operating procedures memorialized in the *Justice Manual* and external regulations, promulgated under the Administrative Procedure Act ("APA"),[278] with the goal of ensuring confidence in its decisions. All Section attorneys would be career prosecutors recruited from the ranks of the best U.S. Attorney's Offices and geographically diverse. To the extent permissible under the First Amendment, Section attorneys' personal and professional histories would demonstrate a lack of partisan bias. In the words of Justice Scalia, unlike the offices of some Independent Counsel and Special Counsel in recent memory, there would be no "staff refugees from the recently defeated administration."[279]

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[272] *See* Press Release, U.S. Dep't of Just., Office of Public Affairs (Jan. 14, 1976), https://digital.library.pitt.edu/islandora/object/pitt%3Aais9830.08.02.0003/viewer#page/1/mode/1up [https://perma.cc/ZY5Y-YLJ2].

[273] *See Public Integrity Section* ("PIN"), JUSTICE.GOV, https://www.justice.gov/criminal/criminal-pin/about (stating PIN's jurisdiction and responsibilities) [https://perma.cc/YJL5-SLVJ].

[274] For an example of PIN's role in evaluating whether the ICA had been triggered, *see supra* Section II. D., p. 33.

[275] *See generally* Beale, *supra* note 44 (discussing the independence of U.S. Attorneys in enforcing federal criminal law).

[276] *See* Press Release, *supra* note 272, at 1.

[277] The presumption of exclusive jurisdiction in PIN over certain sensitive matters would not be new. Although not memorialized in the *Justice Manual,* PIN has taken the public position that it has exclusive jurisdiction over the investigation and prosecution of Article III judges under the theory the local United States Attorney's office could not investigate and, if warranted, prosecute a judge its attorneys appear before regularly. *See* PIN *supra* note 273 ("The Section has exclusive jurisdiction over allegations of criminal misconduct on the part of federal judges . . . ."). This is de facto true as it has not been seriously challenged. The *Justice Manual* does require that the Chief of PIN approve any plea agreement with a member of Congress and that United States Attorney's Office consult with PIN on election crimes and campaign finance offenses to insure appropriate and uniform enforcement. U.S. DEP'T OF JUST., JUSTICE MANUAL § 9–85.110 (2023).

[278] *See* 5 U.S.C. § 551 *et seq*. The APA guides agencies in the development and issuance of federal regulations. The process includes publishing notices of proposed and final rulemaking in the *Federal Register* and the opportunity for public comment on proposed rulemaking.

[279] Morrison v. Olson, 487 U.S. 654, 731 (1988). *See* Olivia Beavers, *CORRECTED: Three Members of Mueller's Team Have Donated to Democrats*, THE HILL (June 12, 2017), https://thehill.com/homenews/administration/337428-four-top-legal-experts-on-muellers-team-donated-to-democratic-causes [https://perma.cc/2PMP-CPQL].

To ensure the integrity, intellectual honesty, and proportionality of every approved charge, all indictments would be reviewed, vetted, and approved by an indictment review committee of career prosecutors[280] applying existing Department charging guidelines.[281] And while recognizing and honoring the concept of a unitary executive, the Department would promulgate clear regulations, not policy statements that shift from one administration to the next, as to when the White House might receive briefings on pending criminal matters and by whom. Consistent with existing law, PIN would continue to file annual reports to Congress on its operations and enforcement efforts.[282] Finally, the Department would publicly dispel the myth that it has internal guidelines regarding the timing of corruption or other charges against a candidate in advance of an election and actually promulgate specific and clear regulations to address that legitimate concern.[283]

ii) Expansion of PIN's Election Crimes Branch

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[280] *Cf.*, *Morrison*, 487 U.S. at 731–32:

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

Id. (quoting Brief of Edward H. Levi, et al. as Amici Curiae at 11, Morrison v. Olsen, 487 U.S. 654 (1988)).

[281] *See* U.S. DEP'T OF JUST., JUSTICE MANUAL § 9–27.000, et seq. (2023) ("Principles of Federal Prosecution").

[282] Section 603 of the Ethics in Government Act requires PIN to report its annual operations to Congress. *See Annual Reports*, JUSTICE.GOV, https://www.justice.gov/criminal/criminal-pin/annual-reports [https://perma.cc/6QQA-7BTW].

[283] The long held but mistaken belief that the Department has regulations concerning the timing of indictments and elections arises not from corruption investigations but from published policy statements issued over the years by PIN's Election Crimes Branch concerning the Department's investigation and enforcement of election crimes in elections where a federal candidate is on the ballot. All elections, whether a federal candidate is present on the ballot or not, are run not by federal officials but by state, county, and local officials who maintain exclusive authority over the election process as well as the custody of ballots and other tabulations of election results. When elections are contested, those records provide the forensic record for examination of the voting record and the certification of election results. The Department has long taken the position that it should not take overt investigative steps before an election, even when it suspects election fraud, and should not seize election records after an election is held, if such actions could affect an election, otherwise interfere with the right of states to run elections, or complicate state litigation over elections results. *See generally* PIN *supra* note 273; ELECTION CRIMES BRANCH, U.S. DEP'T OF JUST., FEDERAL PROSECUTION OF ELECTION OFFENSES 10–9 (Richard C. Pilger, ed., 8th ed. 2017) ("Because the federal prosecutor's function in the area of election fraud is not primarily preventative, any criminal investigation by the Department must be conducted in a way that minimizes the likelihood that the investigation itself may become a factor in the election"). However, this policy guidance does not preclude covert operations that remain covert until after the election. *Id*. ("Accordingly, it is the general policy of the Department not to conduct *overt* investigations, including interviews with individual voters, until after the outcome of the election allegedly affected by the fraud is certified.") (emphasis added). Perhaps the most egregious violation of this unwritten policy regarding the timing of public charges involving public officials arose in Lawrence Walsh's Iran-Contra investigation under the first iteration of the Independent Counsel Act. *See* Bill Whelan, *Before Anyone Whines About Comey and Clinton, Try Revisiting Weinberger And Walsh*, FORBES (Oct. 29, 2016), https://www.forbes.com/sites/billwhalen/2016/10/29/before-anyone-whines-about-comey-and-clinton-try-revisiting-weinberger-and-walsh/#40b4f846396a [https://perma.cc/62L6-XPJB] (recounting the superseding indictment of Casper Weinberger five days before the 1992 presidential election). According to Bob Dole, the new Weinberger charges were "'the straw that broke the camel's back' of Bush's re-elect hopes." *Id*. As an independent counsel, Walsh by statute had no obligation to explain the timing of the indictment to the Attorney General. *See* 28 U.S.C. § 594.

In 1980, then-Attorney General Richard Thornburg added campaign finance and election crimes to PIN's portfolio through the establishment within PIN of an Election Crimes Branch ("ECB").[284] Several of the initial recruits to ECB would be alums of the Office of the Watergate Special Prosecutor. Watergate marked the beginning of modern campaign finance regulation,[285] which expanded and accelerated in the 2000's with the passage of the Bipartisan Campaign Reform Act.[286] While limits on campaign contributions are currently under assault from conservative circles,[287] other aspects of campaign finance regulation remain sacrosanct, and should remain so, such as the ban on foreign contributions.[288] Although the nomenclature was wrong,[289] the basic legal premise of the Mueller Investigation—that a foreign person who coordinates electioneering activity with a U.S. campaign, candidate, or party makes an illegal campaign contribution—cannot be seriously questioned.[290] Nor is a campaign contribution necessary, as U.S. law bars even independent expenditures by foreign nationals in advance of an election.[291]

Yet PIN's ECB is woefully understaffed to address these threats of foreign money influence on U.S. elections.[292] The single full-time ECB Director has the assistance of one or two part-time PIN Trial Attorneys at any given time, relying instead on Designated Election Officers ("DEOs") in each U.S. Attorney's Office who turn their attention to such matters only in the weeks before a federal election. Yet, fundraising and campaigning, at least for a seat in the House of Representatives, is a full-time activity.[293] Moreover, another lesson from the Mueller investigation is the increasing threat of cyber operations designed to influence federal elections. While DOJ's Criminal Division and many United States Attorney's Office have cybercrime experience and expertise,[294] ECB has no standalone capacity in that area despite the clear threat such activities pose to the integrity of federal elections, ECB's primary mission.

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[284] *See supra* note 273 (recounting ECB history).

[285] *See supra* note 55.

[286] *See* Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107–155, 116 Stat. 81.

[287] *See* McCutcheon v. Federal Election Comm'n, 572 U.S. 185 (2014) (declaring unconstitutional certain aggregate limits on campaign contributions by individuals).

[288] *See* Citizens United v. Federal Election Comm'n, 558 U.S. 310, 357 (2010) (striking on First Amendment grounds restrictions on independent, non-coordinated, expenditures in support of political candidates but recognizing that "prearrange[ed] and coordinat[ed] expenditure[s] with the candidate or his agent" carry the risk of *quid pro quo* corruption and remain unlawful) (quoting Buckley v. Valeo, 424 U.S. 1, 47 (1976)).

[289] *See supra* note 187.

[290] *See* 52 U.S.C. § 30121(a)(1)(A) (prohibiting campaign contributions by foreign nationals).

[291] *Id*. at § 30121(a)(1)(C) (prohibiting both expenditures and independent expenditures by foreign nationals in U.S. elections).

[292] PIN has approximately 25 to 30 trial attorneys and supervisors. At any one time, two or three of them may be assigned to ECB, although any PIN trial attorney may, and does, handle election crime and campaign finance investigations and prosecutions. *See* FEDERAL PROSECUTION OF ELECTION OFFENSES, *supra* note 283, at 66 n.281 (noting PIN attorneys' contributions and prior work of former ECB Director Craig Donsanto and Trial Attorney Nancy Simmons). For more than a decade, Donsanto and Simmons were the only attorneys assigned to the ECB. While the ECB was ably led by PIN trial attorney Richard Pilger after Donsanto's retirement until his own retirement, the breadth and importance of the work more than justifies substantial additional resources.

[293] *See generally,* Dave Levinthal, *Congress' Never-Ending Political Money Chase*, CTR. FOR PUBLIC INTEGRITY (Nov. 20, 2014) (noting how an election does not end political fundraising), https://publicintegrity.org/politics/congress-never-ending-political-money-chase/.

[294] A standalone unit within the Criminal Division, the Computer Crime and Intellectual Property Section ("CCIPS") investigates, prosecutes and coordinates DOJ's nationwide effort to combat hacking crimes. As the names of the Section suggests, its primary focus is to prevent thefts of U.S. intellectual property and other sensitive

Moreover, the vulnerability is multi-faceted. It exists on the macro level through the use of internet trolls and manipulation of ubiquitous social media platforms.[295] And it exists on the micro level as the mechanics of all elections, including internet connectivity, is controlled by state, county and even local authorities.[296] While, as a matter of federalism, DOJ should continue to respect the preeminent and constitutional role of the states in the election process,[297] a more robust capability, centered in ECB and PIN, is necessary to counter this ongoing threat to national security in a politically, geographically and legally diverse republic.[298]

iii) OEO and FCPA Enforcement

Besides PIN, JID's other two core components would also come from the Criminal Division. The Office of Enforcement Operations ("OEO"), which oversees domestic Title III wiretap applications,[299] has, like PIN, been historically, and importantly, insulated from political influence. Under current and long-standing management practices in the Criminal Division, both OEO and PIN report to one of the two career Deputy Assistant Attorneys General in the Criminal Division[300] and would report to only career deputies in JID by design. Electronic surveillance is, on the one hand, one of the most effective tools in uncovering corruption, but as Watergate proved, an equally powerful tool in the hands of the corrupt. Placing OEO in the JID will ensure its powerful tools are only used for valid criminal law enforcement purposes and not gather intelligence on political opponents.

The third component would require some splitting up of the Criminal Division's Fraud Section. The Fraud Section prosecutes and supervises the prosecution of large domestic and international property fraud schemes under the mail, wire, health care, and securities fraud statutes but it also has exclusive jurisdiction over the Foreign Corrupt Practices Act ("FCPA") which bars U.S. persons from paying bribes overseas.[301] The FCPA, a reform that also arose out of Watergate, is a bit of an anomaly. The FCPA is codified in the securities laws as such conduct

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data. *See generally* U.S. Department of Justice, Criminal Division, Computer Crime and Intellectual Property Section, available at https://www.justice.gov/criminal-ccips [https://perma.cc/J8X4-2S3X].

[295] *See* United States v. Internet Research Agency, et al., 18-cr-00032-DLF, Doc. No. 1 (D.D.C, Feb. 16, 2018)(indictment charging Russian organizations and individuals with various crimes arising from offshore operations to interfere with U.S. elections and political processes).

[296] The U.S. Election Assistance Commission ("EAC") was established by the Help America Vote Act of 2002 ("HAVA") after the paper ballot problems in the 2000 presidential election. *See* 116 Stat. 1666 (Oct. 29, 2002), *codified at* 52 U.S.C. §§ 20901–21145. The EAC is an independent, bipartisan commission charged with helping states meet minimum federal voting systems standards. *See generally*, U.S. Election Assistance Commission, *About the EAC,* available at https://www.eac.gov/about-the-useac [https://perma.cc/2HSF-5KKN] (explaining the federal role in state-run elections). By statute, the Chief of the Public Integrity Section, or his or her designee, is a member of the EAC's Advisory Board. See United States Election Commission, EAC Home, About the EAC, Board of Advisors, available at https://www.eac.gov/about/board_of_advisors (last visited January 21, 2024).

[297] U.S. Constitution, Art. I, Section 4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof.").

[298] *See* Adam Goldman, et al*., Lawmakers Are Warned That Russia Is Meddling to Re-elect Trump*, N.Y. Times (Feb. 20, 2020)(reporting that members of Congress told in classified briefing of continuing Russian attempts to influence U.S. politics), available at https://www.nytimes.com/2020/02/20/us/politics/russian-interference-trump-democrats.html [https://perma.cc/EL6N-SN9P].

[299] *See* Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 197 (June 19, 1968), *codified at* 34 U.S.C. § 10101 *et seq.*

[300] *See* Plum book, *supra* note 229 at 93.

[301] *See* The Foreign Corrupt Practices Act of 1977, as amended, 15 U.S.C. §§ 78dd-1, *et seq*.

historically arose in the context of U.S. corporations paying foreign officials in exchange for foreign contracts and theoretically skewed the market's perception of the bona fides of a company's products and services. A public company that relied on bribery to succeed would eventually fail and with the resulting harm to investor equity.

While that is still its core prohibited conduct, the FCPA has since been amended to apply more broadly to domestic entities and persons. Moreover, international anti-corruption is a much larger universe now than it was in 1977 when the FCPA was first enacted, the United States an admirable pioneer in outlawing foreign bribery by U.S. persons. The United States has taken the lead in promoting and has now ratified several international anti-bribery conventions and treaties which obligate member states to criminalize all forms of domestic and foreign bribery.[302] Moreover, these statutes require mutual legal assistance and reciprocal extradition of nationals.

Simply put, bribery is bribery and there is no logical reason why domestic and foreign bribery laws, both domestic and international, should not be prosecuted by the same Section at DOJ. The world is shrinking and federal law enforcement is increasingly an international endeavor. And there is every reason why such investigations and prosecutions should be part of the JID portfolio. Recent events show the potential for American public officials to be involved in, or be the beneficiaries of, alleged bribery schemes, both onshore and off.[303]

iv) OPR, PRAO and an Office of Justice Ethics

Certain other components from other corners of the Department would round out and complement JID's investigative and enforcement responsibilities. As several reports discussed in this article make clear, there is no more important office in the Department than its Office of Inspector General (OIG) in spurring reform and insuring integrity within DOJ. Accordingly, the AAG-JID would have dotted-line reporting obligations to the OIG for purposes of implementing recommendations that arise from the OIG's oversight role to report serious violations of Department ethics rules when they arise. The new division would also include the current Office

[302] One such convention operates under the auspices of the Organization for Economic Co-operation and Development (OECD*). See OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, available at http://www.oecd.org/corruption/oecdantibriberyconvention.htm [https://perma.cc/S35V-KHD8]. Another is the Council of Europe's Group of States Against Corruption ("GRECO"). *See* https://www.coe.int/en/web/greco [https://perma.cc/Z3CS-9YY4]. The treaty with the largest international reach is the United Nations Convention Against Corruption ("UNCAC") overseen by the United Nations Office of Drugs and Crime in Vienna, Austria. *See* https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf [https://perma.cc/XZ4G-H2X7]. In the view of one commentator, the U.S.'s obligations and rights under these mutually binding agreements represented Donald Trump's best defense to Article I of the impeachment proceedings brought against him. *See* Andrew McCarthy, *The President's Best Ukraine Defense: Not an Impeachable Offense,* National Review (October 27, 2019) available at https://www.nationalreview.com/2019/10/ the-presidents-best-ukraine-defense-not-an-impeachable-offense/ [https://perma.cc/ZG79-F8ES].

[303] *Cf*., United States House of Representatives, Report of the Committee on the Judiciary, *Impeachment of Donald J. Trump President of the United States*, to accompany H. Res. 755, 116th Congress, 1st Session, December 13, 2016 (Article I of impeachment for conditioning congressionally authorized military aid on investigation of Hunter Biden), available at https://docs.house.gov/billsthisweek/20191216/CRPT-116hrpt346.pdf [https://perma.cc/MWS3-MLZS] *with* Sarah Chayes, *Hunter Biden's Perfectly Legal, Socially Acceptable Corruption,* The Atlantic (Sept. 27, 2019), available at https://www.theatlantic.com/ideas/archive/2019/09/hunter-bidens-legal-socially-acceptable-corruption/598804/ (arguing Hunter Biden's conduct emblematic of systemic corruption) [https://perma.cc/L7WN-LT4D].

of Professional Responsibility ("OPR")[304] and Professional Responsibility Advisory Office ("PRAO")[305] as well as a newly created Office of Justice Ethics ("OJE") which would consolidate under one Director all DOJ ethics office functions now scattered through the Department. The new office would issue department-wide, binding, ethics and conflict of interest rules under the APA, interpret them, enforce them, and resolve disputes under them, including the power to force recusals on the unwilling.

The inclusion of OPR in JID would be especially fitting as it owes its origins, like PIN, to post-Watergate reform efforts led by Attorney General Levi.[306] It would continue to act as it always has to ensure that Department attorneys act at all times in compliance with their ethical obligations, those both external and internal to the Department, to impose sanctions when necessary and to make referrals to bar officials in appropriate cases.[307] PRAO, too, would simply continue, as a component of OJE and the Department's overall ethics program, to insure that Department attorneys have the advice they need to advance the interests of law enforcement while complying with the Rules of Professional Conduct in force in the states and jurisdictions where they are barred.

v) Foreign Intelligence Surveillance Act Oversight

Substantial reform is also needed in the area of domestic surveillance of foreign adversaries because of the risk of over-collection of the activities and communications of U.S. persons and the political misuse of such information. The National Security Act of 1947 sets the demarcation for responsibility for intelligence collection at the U.S. border.[308] Outside the United States, such

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[304] *See generally*, U.S. Department of Justice, Office of Professional Responsibility, available at https://www.justice.gov/opr [https://perma.cc/Z8AP-AZJA].

[305] *See generally*, U.S. Department of Justice, Professional Responsibility Advisory Office, available at https://www.justice.gov/prao/about-office [https://perma.cc/LU79-QTSH]. PRAO was established to implement the Ethical Standards for Attorneys for the Government Act, Pub. L. 105-277, Div. A, § 101(b), 112 Stat 2681-118 (Oct. 21, 1998), codified at 28 U.S.C. § 530B, known colloquially as the McDade Amendment. The McDade Amendment requires Department attorneys to abide by state bar rules. The McDade Amendment resulted, in part, because of Congressional reaction to the failed prosecution of Pennsylvania Congressman Joseph McDade. McDade publicly criticized the ethical behavior of the federal prosecutors on his case, an issue that has become increasingly difficult under the modern prosecutorial model in which federal prosecutors supervise undercover operations and the use of confidential informants, once the exclusive province of the investigating agents. The McDade Amendment has raised federalism concerns as well as implementation challenges. *See generally*, Hopi Costello, *Judicial Interpretation of State Ethics Rules Under the McDade Amendment: Do Federal or State Courts Get the Last Word?,* 84 FORDHAM L. REV. 201 (2015).

[306] *See supra* note 304, *About OPR*, available at https://www.justice.gov/opr/about-opr [https://perma.cc/M754-B3QN]. OPR was established in 1975:

> [F]ollowing revelations of ethical abuses and serious misconduct by senior Department officials during the Watergate scandal, Attorney General Edward Levi issued an order establishing the Office of Professional Responsibility (OPR). The Attorney General's order directed OPR to "receive and review any information concerning conduct by a Department employee that may be in violation of law, regulations or orders, or applicable standards of conduct."

Id.

[307] Current standards for ethical conduct may be found at 5 C.F.R. § 2635 (Standards of Ethical Conduct for Employees of the Executive Branch), 5 C.F.R. § 3801 (Supplemental Standards of Ethical Conduct for Employees of the Justice Department), 28 C.F.R. § 45.2 (Disqualification arising from personal or political relationship), and Executive Order 12731 (Principles of Ethical Conduct for Government Officials and Employees).

[308] *See* National Security Act of 1947, 61 Stat. 495 (July 26, 1947), *codified at* 50 U.S.C. § 402 et seq.

activities are within the purview of the intelligence community, primarily the Central Intelligence Agency and National Security Agency. Domestic counter-surveillance and counterintelligence operations against foreign nationals are conducted primarily by the Federal Bureau of Investigation.[309]

Both Democratic and Republican administrations, starting in 1940, took the position that the executive branch had the inherent authority to wiretap domestically sited persons who presented a national security threat.[310] However, Richard Nixon's so-called "plumbers," who sought to wiretap Nixon's adversaries in the Democratic Party, demonstrated that clandestine wiretapping and surveillance activities by or for the president could be used for illicit political ends. After the Supreme Court questioned whether the Fourth Amendment could cabin executive branch wiretapping power[311] and as part of wider Watergate-era reforms, Congress passed the Foreign Intelligence Surveillance Act ("FISA")[312] to create judicial oversight over domestic spying undertaken for reasons other than criminal law enforcement.[313]

Applications made to the special district court created for that purpose—the Foreign Intelligence Surveillance Court—are different than wiretaps applications in criminal cases. Title III warrants, used for criminal investigations,[314] require a finding of probable cause that a federal crime is being committed and may only be sought when other less intrusive means are unavailable or dangerous.[315] While such applications and the resulting intercept orders are *ex parte* for obvious reasons, they have elements of transparency because of post-interception notice requirements to intercepted parties and discovery obligations in any subsequent criminal prosecution.[316]

While FISA warrants also require a finding of probable cause—that the intercept target is an agent of a foreign power—there is no similar nexus to a violation of certain enumerated criminal statutes. Moreover, it is not the primary goal of FISA warrants to collect evidence for a later criminal prosecution. Rather, the intent is counter-surveillance, counterintelligence and disruption of foreign intelligence operations. Criminal prosecutions arising from FISA warrants threaten the disclosure of the closely guarded means and methods of spy tradecraft and provide clues to related and ongoing investigations. For these reasons, very few FISA warrants see the light of day.

FISA collection is broad or can be so. Post 9/11, the Patriot Act[317] expanded the use of FISA warrants to cover U.S. persons acting on behalf of a foreign power and, like Title III, warrants may be "roving," dispensing with a tie to a particular communication facility or device.[318] Agents monitoring FISA warrants have minimization obligations similar to Title III in

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[309] *See supra* note 28.

[310] *See* Rebecca A. Copeland, *War on Terrorism or War on Constitutional Rights? Blurring the Lines of Intelligence Gathering in Post-September 11 America*, 35 TEX.TECH.L.REV. 1, 10 n. 76 (2004); *see also* Mitchell v. Forsyth, 472 U.S. 511, 531-32 (1985) (tracing presidential wiretapping to Franklin Roosevelt).

[311] *See* United States v. United States District Court, 407 U.S. 297 (1972).

[312] *See* Foreign Intelligence Surveillance Act of 1978, 92 Stat. 1783 (Oct. 25, 1978) *codified at* 50 U.S.C. § 1801 et seq.

[313] Copeland, *supra* note 310 at 12 (FISA arose from post-Watergate concerns about unrestrained presidential power).

[314] *See supra* note 299.

[315] *See* 18 U.S.C. § 2518(1)(c).

[316] *See* Fed. R. Crim. P. 16.

[317] U.S.A. Patriot Act, Pub.L. 107-56, 15 Stat. 272 (Oct. 26, 2001). Patriot Act amendments are codified throughout the U.S. Code.

[318] *See* Copeland, *supra* note 310 at 9.

order to avoid collection beyond the scope of the court-authorized warrant and a separate obligation to "mask" the identity of U.S. persons intercepted incidentally. However, unmasking authority exists with high level political appointees across the executive branch which has spawn controversy and fueled allegations FISA was used to spy on the 2016 Trump presidential campaign.[319] Defenders of the process of obtaining a FISA warrant have described the process as "very demanding,"[320] but these broad, untethered, surveillance powers and lack of true transparency in the FISA application and interception process create the on-going risk, absent rigorous oversight, that the FISA court will be abused for political purposes.

This risk, and the lack of procedural safeguards to minimize it, is laid bare in the DOJ-OIG's comprehensive post-hoc investigation of the origins of the infamous Christopher Steele dossier, the Mueller investigation and the FISA warrants targeting Trump campaign aide Carter Page.[321] The DOJ-OIG report prompted a rare public statement from the FISA court,[322] demanding additional information regarding material misstatements and omissions in the Page warrant applications. It is somewhat ironic that FISA court operations have now become the subject of allegations of surveillance abuses for political ends when the origins of the Court were to prevent such corruption.

Although the DOJ-OIG Crossfire Hurricane investigation did not find that the FISA process was tainted by political motives,[323] poor management practices[324] nonetheless may facilitate abuse of power. Use of the government's surveillance power for political ends should frighten all citizens in a democracy. We live in a connected world, our cell phones are tracking devices, and algorithms accurately predict our future conduct. These capabilities will only expand as artificial intelligence is deployed across all wired platforms and utilities. To ensure the integrity of FISA applications and the processes that inform their content, the National Security Division's Section,

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[319] *See* John Solomon, *Intelligence chairman accuses Obama aides of hundreds of unmasking requests*, The Hill (July 27, 2017)(detailing allegations that senior Obama administration political appointees made hundreds of unmasking requests without justification), available at https://thehill.com/policy/national-security/344226-intelligence-chairman-accuses-obama-aides-of-hundreds-of-unmasking [https://perma.cc/4JGG-6C6T].

[320] *See* David Kris, *How the FISA Court Really Works*, Lawfare (Sept. 2, 2018), available at https://www.lawfaremedia.org/article/how-fisa-court-really-works [https://perma.cc/K6ME-JRVG] (quoting then-FISA presiding judge Reggie Walton); *see also* Judge Royce Lamberth, *The Role of the Judiciary in the War on Terrorism*, Frontline (April 13, 2002) (speech before University of Texas Law Alumni Association on April 13, 2002 describing operation of the FISA court by former presiding judge), available at https://www.pbs.org/wgbh/pages/frontline/shows/sleeper/tools/lamberth.html [https://perma.cc/QYN3-JSK5].

[321] *See* U.S. Department of Justice, Office of the Inspector General, Review of Four FISA Applications and Other Aspects of the FBI's Crossfire Hurricane Investigation, Oversight and Review Division, No. 20-012 (December 2019 revised and redacted) (review of foreign counterintelligence investigation denominated by the FBI as "Crossfire Hurricane")(hereinafter "*DOJ-OIG Crossfire Hurricane Report*"), available at https://www.justice.gov/storage/120919-examination.pdf [https://perma.cc/2NCZ-KRKA].

[322] *See* United States Foreign Intelligence Surveillance Court, Order (Collyer, J.) (December 5, 2019)(Doc. No. redacted) (unclassified) available at https://saraacarter.com/wp-content/uploads/2019/12/FISC-Order-on-FISA.pdf [https://perma.cc/5KV5-LWZE].

[323] *See DOJ-OIG Crossfire Hurricane Report supra* note 321 at iii-iv ("We did not find documentary or testimonial evidence that political bias or improper motivation influenced the decisions to open the four individual [Page] investigations).

[324] *Id*. at xiv ("That so many basic and fundamental errors were made by three separate, hand-picked teams on one of the most sensitive FBI investigations that was briefed to the highest levels within the FBI, and that FBI officials expected would eventually be subjected to close scrutiny, raised significant questions regarding the FBI chain of command's management and supervision of the FISA process.").

a component of Office of Intelligence and charged with FISA compliance,[325] would be best sited in the JID. From there, and independent from the activities it seeks to monitor, career employees would monitor and enforce unmasking rules and insure that FISA warrant applications are not tainted by efforts to defeat a political opponent or gain a political advantage.

C. The Role of the ODAG in Insuring Department-Wide Integrity

Lastly, the Department must institutionalize the role that David Margolis played so well through the creation of a Chief Ethics and Conflicts Officer ("CECO") for the Department. That title would be co-terminus by regulation, not *ad hoc* tradition, with a position that already exists and the one held by David Margolis for many years and at his death—the sole career Associate Deputy Attorney General ("ADAG") slot in the ODAG. The ODAG's career ADAG position is the highest-ranking career position in the Department.[326]

The CECO would have final say, subject of course to any contrary view by an un-recused DAG or AG, over any appeals from determinations made by the OJE. The CECO would also resolve conflicts of interest and appearance of such conflicts by appointing the responsible official for all investigative and litigation matters, both civil and criminal, throughout the entire Department.[327] Consistent with EGA, the CECO would be the Department's Designated Agency Ethics Officer and coordinate with OGE on training, enforcement and policy development.

The Department can no longer count on another David Margolis to rise up through the ranks spontaneously and without the necessary institutional support firmly in place. The stakes for our democracy are too important to leave such matters to chance, whim and the shifting sands of upcoming elections. And with all of these reforms firmly in place DOJ could, and should, toss the Special Counsel regulations on the dustbin of history, alongside the ICA, as nothing less than well-intentioned but failed experiments in a split executive.

Watergate taught us that presidential corruption is neither theoretical nor inconsequential. The ICA, Justice Scalia and the Whitewater investigation should have convinced us that the ICA had a cost to presidential autonomy and effectiveness that was far too much to pay. The history of the Campaign Finance Task Force instructed that the Attorney General could not exercise prosecutorial power, under the looming presence of the ICA, without paying an unnecessary political cost. And the Mueller Russian Investigation, and the Special Counsel investigations of both President Biden and former President Trump, should have taught us that operating under the structurally flawed Special Counsel regulations is a distinction without a meaningful difference. It should not be the function of the Department of Justice to undo or influence an election by serving as the investigative arm of a politically hostile Congress.

But there is a better way. What DOJ needs now, what our nation has always needed, and what our constitution requires, is a strong, independent, comprehensive and permanent division within DOJ, insulated from political influence from without and within, and charged with

[325] *See generally,* U.S. Department of Justice, National Security Division, Office of Intelligence, Oversight Section, available at https://www.justice.gov/nsd/office-intelligence [https://perma.cc/W75E-P43P] (describing role of Oversight Section).

[326] *See* Plum Book*, supra* note 229 at 92.

[327] In the interim, the Department should increase transparency in those situations in which special prosecutors are appointed under the Executive Branch's inherent and supporting statutory authority and take care to distinguish them from special counsel appointed under the more exacting standards of the Special Counsel regulations. One modern example of the appointment of special prosecutor is the appointment of U.S. Attorney Patrick Fitzgerald in Plamegate, and his reliance on a career PIN prosecutor for assistance, is described *supra* note 247.

enforcing the criminal law fairly, faithfully and without fear or favor. A Department of Justice Integrity Division, as constructed and populated above, will achieve that laudable goal without violence to the legitimate power of the presidency.

VI. Conclusion

The United States Constitution is an imperfect document. Drafted by men of disparate geographical and economic loyalties, motives, and political views, and born in the aftermath of rebellious war, we have little right to expect more. Despite its fractured origin, or perhaps because of it, it remains a remarkable blueprint for the diffuse allocation of governmental power. If it could be said to have one goal it would be to create structural impediments to tyranny, especially one wielded by the majority. It was also prescient (or perhaps merely cognizant of a learned risk) in that it clearly anticipated that, even in a liberal democracy, men of ill will and capable of corrupt behavior would aspire to and achieve high public office. Where the Constitution fails—if failure it be—is describing with sufficient clarity the role of the three branches in remedying such momentous breaches of the public trust.

It should be uncontroverted, the majority decision in *Morrison v. Olsen* notwithstanding, that the founders saw no role for the judiciary—outside its traditional role as neutral magistrate—in the criminal prosecution of any citizen, much less the president.[328] In the context of high office holders such an outsized re-alignment of two branches in concert against the third would be antithetical to the separation of powers. And where the alignment includes the judiciary this conflation of roles runs the unacceptable risk of dragging the third branch through the political mud. Scandals will come and go. Congress, and the courts,[329] must resist the temptation

[328] There is no reason why the ordinary role of the inferior federal courts would not hold in the criminal investigation and prosecution of a current or former President as it would in any criminal case. Magistrate judges would return indictments, issue arrest and search warrants and approved requests for stored electronic data. District judges would approve subpoenas for tax records, supervise the grand jury, grant statutory immunity requests, approve Title III wiretaps, preside over petit jury selection and trial and impose sentence and final judgment in the case of a conviction. Higher courts would exercise their regular powers of appellate review. These routine and uniform functions of the "judicial Power of the United States, Article III, Section 1, should not vary according to the defendant on trial. The only express deviation from these core judicial powers contemplated by the Constitution is that the Chief Justice preside over the impeachment trial of a sitting President. U.S. Constitution, Article 1, Section 3, cl. 6 ("When the President of the United States is tried, the Chief Justice shall preside[.]"). However, the role of the Chief Justice is limited by Senate rules if not the Constitution. *See* Todd Ruger, *Roberts would hold the gavel, but not the power, at Trump impeachment trial,* Roll Call (Jan. 8, 2020) available at https://rollcall.com/2020/01/08/roberts-would-hold-the-gavel-but-not-the-power-at-trump-impeachment-trial/ [https://perma.cc/3KAM-CUZG].

[329] The danger that the Courts will be dragged, even unwittingly, into political quagmires is real and an existential threat to the integrity and independence of the judiciary. A controversy over DOJ's sentencing recommendation in the prosecution of Roger Stone provides a recent example. Stone faced sentencing in the U.S. District Court for the District of Columbia on seven felony counts of witness intimidation and lying to Congress. The line prosecutors assigned to the matter, formerly of Robert Mueller's Special Counsel office, filed a sentencing memorandum recommending an aggregate seven to nine-year term of incarceration. *See* Spencer S. Hsu, et al., *Roger Stone deserves 7 to 9 years prison for lying to Congress in Russia probe, U.S. says in sentencing recommendation for Trump confidant*, Wash. Post (Feb. 10, 2020) available at https://www.washingtonpost.com/local/legal-issues/trump-confidant-roger-stone-deserves-7-to-9-years-in-prison-for-lying-to-congress-prosecutors-say-in-new-filing/2020/02/10/90bc6e9a-4906-11ea-9164-d3154ad8a5cd_story.html [https://perma.cc/32XM-HPBQ]. That recommendation was amended almost immediately at the direction of Attorney General William Barr who considered the recommendation too harsh. The amended

every time one arises to fabricate and inject a role for the judiciary in exercising the powers the founders entrusted to the political branches. There is no greater risk to the independence of the judiciary than the perception of federal judges exercising partisan will.

Similarly, the Constitution's careful balance is skewed if the investigative power of the executive branch mergers with the prosecutorial function of impeachment. Through the mechanism of compelled congressional reporting, this inherent flaw in the ICA[330] is repeated *de facto* in the Special Counsel regulations. We may admire the integrity, independence, and even courage, of an Archibald Cox or a Robert Mueller. But when one combines the vast investigative resources of the executive, the presumptive disclosure of an otherwise internal report, with the political theatre of impeachment it is but one small step to an overzealous Javert.

Some have argued that by reinforcing the obvious platitude that "no man is above the law," that special counsel, and the special prosecutors and independent counsel before them, serve a vital constitutional purpose. Indeed the argument is made that they are themselves some species of constitutional officer in service to Everyman – or at least every voter in the next election.[331] This is a dangerous and anti-democratic myth. There is no foundation in the letter or spirit of the Constitution for even an *ad hoc* inspector general for the West Wing outside of the executive branch. Such a function already exists in congressional oversight and the power of impeachment.

The time has come for constitutional law to finally recognize what should have been obvious at least since Justice Scalia's dissent in *Morrison*. Special counsel, special prosecutors, independent counsel—by whatever name you may call them—are *extra*-constitutional. We have created them out of whole cloth and made up their authority for the sake of expediency and to

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sentencing recommendation sought no more than a three to four-year term prompting the line prosecutors to resign. *See* Chris Strohm, *Barr Unleashes Justice Department Turmoil Over Stone Case*, Bloomberg (Feb. 12, 2020) available at https://www.bloomberg.com/news/articles/2020-02-12/barr-unleashes-justice-department-turmoil-over-roger-stone-case [https://perma.cc/EM84-EAQ6]. The resulting political controversy appeared to engulf the whole federal judiciary at least in the media. According to reports, a group of over 1,000 federal judges had decided to convene an "emergency meeting" to address DOJ's changed sentencing recommendation. *See e.g.*, *Group of more than 1,000 judges calls emergency meeting amid Trump concerns*, The Guardian (Feb. 19, 2020) (staff report), available at https://www.theguardian.com/us-news/2020/feb/18/trump-barr-judges-emergency-meeting-concerns (last visited March 28, 2020). The report was misleading and false. First, no sitting federal judge could comment on a matter pending before another federal judge. *See* Code of Conduct for United States Judges, Canon 3(A)(6)("A judge should not make public comment on the merits of a matter pending or impending in any court.") available at https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges [https://perma.cc/HJT8-WEHK]. Second, the notion that virtually every federal judge on the country would attend such a meeting, putting aside how logistically such meeting could occur, was patently absurd. None of this stopped the mainstream media to breathlessly report an imminent and urgent meeting. It was true that U.S. District Judge Cynthia Rufe, the president of Federal Judges Association ("FJA") a private professional organization, intended to discuss the Stone matter in a regularly scheduled FJA executive committee meeting. *See* Devon Cole, et al., *Group of federal judges calls emergency meeting over concerns about DOJ's intervention in politically sensitive cases*, CNN (Feb. 18, 2020) available at https://www.cnn.com/2020/02/18/politics/federal-judges-association-meeting-donald-trump-roger-stone/index.html [https://perma.cc/6JLG-JC34]. The FJA later issued a private statement to its members disavowing any role in the Stone/Barr controversy. *See* Federal Judges Association, *Memorandum From The Officers of the Federal Judges Association* (Feb. 24, 2020) (accusing press of false reporting and stating, "At no time was there any intent to involve the FJA in any political controversy or in any pending case.")(on file with the author). Stone was sentenced to 40 months, a sentence in line with the Attorney General's in-court recommendation. *See infra* note 343.

[330] *See supra* note 75.

[331] *See* Andrew Coan, *Prosecuting the President, How Special Prosecutors Hold Presidents Accountable and Protect the Rule of Law* (Oxford 2019).

calm the chattering class.[332] Nothing in the Constitution compels the institution of the presidency to self-immolate. And nothing in the Constitution allows Congress to upset its careful balance by mere legislation and the executive branch to do so simply by issuing self-governing regulations that impede, share, or obfuscate the otherwise proper exercise of executive branch power.

Recognizing special counsel as lacking in constitutional legitimacy does not make the Executive Branch unique or especially vulnerable to corruption. The other branches of government protect their respective constitutional turfs with equal jealousy and tenacity. How else to explain aggressive Congressional efforts against encroachment of the protections of the speech or debate clause,[333] and the Supreme Court's allergy to the Judicial Code of Conduct and more generally, an inspector general for the Third Branch?[334] The Supreme Court asks us to trust them as they keep their own counsel because the alternative of outside oversight so clearly undermines the separation of powers. Similarly, Congressional reform of their respective ethics committees, in the face of corruption scandals, was clearly in defense of Congressional autonomy within its constitutional sphere to determine—on its own terms—the integrity of its members and to fashion an appropriate remedy when the standard is not met.

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[332] *Cf.*, *Morrison,* 487 U.S. at 735 ("The *ad hoc* approach to constitutional adjudication has real attraction . . . [because] [i]t is guaranteed to produce a result, in every case, that will make a majority of the Court happy with the law.").

[333] *See* U.S. Constitution, Article I, Section 6, cl. 1. In May 2006, the FBI obtained a warrant and searched the Capitol Hill offices of Representative William J. Jefferson (D. La.) in furtherance of a bribery investigation. Bipartisan condemnation of the FBI raid followed immediately as Congressional leaders asserted the search at the Rayburn House Office Building violated the Speech or Debate Clause and intruded on the separation of powers. DOJ prosecutors from the Eastern District of Virginia and the Criminal Division's Fraud Section had sought to manage the Speech or Debate Clause issues by employing a "taint team" of agents and prosecutors to review the seized materials and withhold from the prosecution team those documents subject to the legislative claim of privilege. Jefferson moved before the District Court for a return of seized materials. The District Court, in a comprehensive and thoughtful opinion, denied the motion. *See* In re *Search of the Rayburn House Office Bldg. Room No. 2113,* 432 F. Supp. 2d 100 (D.D.C.)(Hogan, C.J.), *rev'd sub nom*., *United States v. Rayburn House Office Building, Room 2113, Washington, D.C. 20515*, 497 F.3d 654 (D.C. Cir. 2007). Jefferson successfully appealed to the D.C. Circuit where a unanimous panel held that not only was the search unconstitutional the privilege was so powerful—indeed "absolute"—it barred the use of a taint team by the executive branch in searches of congressional offices, a long-established and approved measure in cases of other privileges. Only a procedure that would allow the subject Member the pre-seizure "opportunity to identify and assert the privilege with respect to legislative materials before their compelled disclosure to Executive agents" would pass constitutional muster. *See id.*, 497 F.3d at 663. The risk that evidence will be missed or misunderstood by someone who has not investigated the matter is clear. Justice Scalia would not be chagrined. The undivided and unimpeded exercise of an enumerated constitutional power should trump the risk of undetected corruption. Jefferson was later convicted on multiple counts of bribery and related crimes based on evidence obtained elsewhere and by other means. *See United States v. William J. Jefferson*, No. 09-5130 (4th Cir. 2012).

[334] The Supreme Court and the Administrative Office of the Courts have long resisted, or remained silent in the face of, calls for an inspector general for the judicial branch. *See generally*, U.S. House of Representatives, *Letter from Rep. Elijah E. Cummings (D. Md.), Chairman, House of Representatives, Committee on Oversight and Reform, and Gerald E. Connolly, Chairman, Subcommittee on Government Operations to James C. Duff, Director, Administrative Office of the U.S. Courts* (September 5, 2019) (urging creation of an office of inspector general for the AOC). The Cummings and Connolly letter was written in response to the 2018 published report of the Federal Judiciary Workplace Conduct Working Group established by Chief Justice Roberts to address allegations of sexual misconduct by Ninth Circuit Court of Appeals Judge Alex Kosinski and others. The Court accepted the Report's recommendation that it appoint a chief integrity officer for the lower courts. While a meaningful and important change, it falls short of the broader institutional reforms critics have called for. Recently, the Court took a significant step forward in adopting a Code of Conduct for Justices of the Supreme Court of the United States, available at https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_11-13-23 [https://perma.cc/4CWB-SWQ9].

Each of these branches ask us, both practically and constitutionally speaking, to presume that each branch of government acts with integrity within its allotted space[335] and, more importantly, can design effective self-policing anti-corruption policies and procedures. Donald Trump's political enemies may portray him as Nixon redux, but one might argue that the power of the executive should no more be limited by outliers than any other branch of government so long as sufficient checks and balances are in place. We must resist a cure worse than the disease.

At least at it relates to the ICA, and now its administrative progeny in the form of the Special Counsel regulations, the institutional reactions to Nixon's corruption did not fix the presidential corruption problem or insulate the institution from such risks. At best, they have distorted and debased a core executive function. At worst, they have created a new cost of constitutional dimension—the unnecessary and constitutionally infirm usurpation of executive power. The gradual concentration in one branch of otherwise disparate powers—Madison's prescient warning in Federalist No. 51[336]—remains, in these times, and in the form of the Special Counsel regulation's de facto symbiosis with the Legislative Branch, a clear and present danger.

So is the Republic at risk if we resist the temptation to allow an unconstitutional ganging up on the President? That seems hyperbolic. Tyranny and a rush to judgment can come in many forms. One can argue persuasively, as the *Morrison* dissent suggests, that this ambiguity surrounding the power to investigate and prosecute the president is not a flaw at all but an intended strength.[337] We should tolerate this gray area as, at worst, an acceptable cost inherent in a democratically elected constitutional government—so long as the other checks instilled by the Framers function as intended. And they do. Congress may build an investigative record for the issuance and trial of articles of impeachment on its own—and has[338]—without resort to the fruits

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[335] As Justice Scalia's dissent in *Morrison* pointed out, we have no difficulty as a matter of constitutional law allowing Congress to exercise its legislative authority to exempt its members from otherwise uniform laws, including ones barring discrimination. *Morrison,* 487 U.S. at 710 (noting government exemptions under Title VII). The check is a political one. Such a Congress can be voted out. Similarly, we allow judges to interpret the meaning of Article III and statutes affecting them even if the impact is financial because that power belongs to judges*. Id*. (citing *United States v. Will*, 449 U.S. 200 (1980)).

[336] *See* The Federalist No. 51 at 321-322 (Madison, J.).

[337] Scalia may not have been so sanguine. One might be forgiven for sensing a certain melancholy in Scalia's dissent in *Morrison*, or at least a resignation of sorts. If it follows from his arguments that we must sacrifice executive integrity on the altar of three separate co-equal branches, in the end he posits a cost. But does it have to be? Is that a price we have to pay? An optimist can argue there is a better way in the form of an executive branch that can heal itself—through the fortitude of individual actors supported by an infrastructure designed to instill, enforce and vindicate the rule of law.

[338] *See Impeachment of Donald J. Trump President of the United States*, *supra* note 303; United States House of Representatives, Report of the Committee on the Judiciary together with Additional, Minority and Dissenting Views, *Impeachment of William Jefferson Clinton,* to accompany H. Res. 611, 105th Congress, 2nd Session, December 16, 1998, available at https://www.congress.gov/105/crpt/hrpt830/CRPT-105hrpt830.pdf [https://perma.cc/KP5A-PZDW].

of the grand jury,[339] through its subpoena power,[340] authority to conduct hearings and take testimony under oath, grant immunity, examine public records generated from the prosecutions, if any, of others as well as executive agency action.[341] Moreover, private entities and persons, even if witnesses before the grand jury are not subject to the grand jury secrecy prohibitions.[342]

And where appropriate, Congress may enlist the executive branch in prosecuting those who seek to obstruct its lawful investigations and oversight activities.[343] It may also be the case, as

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[339] Federal Rule of Criminal Procedure 6(e) binds the executive branch to strict grand jury secrecy. *See* Douglas Oil Co. of Cal. V. Petrol Stops Nw., 441 U.S. 211, 218 (1979)("[T]he proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings"). While exceptions to the general rule were expanded after the terrorist attacks on September 11, 2001 to avoid stove piping, grand jury secrecy remains a fundamental tenet codified by rule. *See* McKeever v. Barr, 920 F.3d 842 (D.C.Cir. 2019)(district court lacked inherent authority to release grand jury materials), cert. denied, 140 S.Ct. 597 (Mem) (January 21, 2020). Then-Justice Breyer issued a statement accompanying the denial of certiorari calling the breadth of Rule 6(e) secrecy "an important question[]" and urging review by the Criminal Rules Committee of the Judicial Conference. *Id*. *See* In re Application of the Committee On the Judiciary, U.S. House of Representatives, For An Order Authorizing The Release of Certain Grand Jury Materials, Grand Jury Action No. 19-48 (BAH)(D.D.C. 2019)(Howell, J.)(ordering release of full Mueller Report to Congress because an impeachment inquiry is a "judicial proceeding" under Fed.R.Crim.P. 6(e)), aff'd*,* 951 F.3d 589 (D.C. Cir. 2020), vacated and remanded sub nom., Department of Justice v. House Committee on the Judiciary, 142 S.Ct. 46 (2021)(without opinion, vacating judgment and remanding case to the D.C. Circuit with instructions to direct the District Court to vacate its October 25, 2019 order as moot (citing United States v. Munsingwear, 340 U.S. 36 (1950)). If Judge Howell's and the D.C. Circuit's interpretation of 6(e) is correct, the role of the Special Counsel regulations in effecting a violation of the doctrine of separation of powers is even more pronounced. Any thorough and competent investigation would utilize the investigative powers of the grand jury and it might fairly be called prosecutorial malpractice not to do so. So it is a virtual certainty that in every case of presidential impeachment, the fruits of any parallel special counsel investigation would be fair game in the impeachment process. It is unclear whether the drafters of the special counsel regulations accounted for such a situation. Judge Howell's order became moot when the Congress concluded impeachment proceedings, but the larger issue is not moot. Changes to Rule 6 to allow historically important grand jury materials disclosable only after 50 years and to expand grand jury secrecy to witnesses through gag orders, changes first proposed during the Trump Administration and later supported by the Biden Administration, are now under consideration by the Judicial Conference's Criminal Rules Committee which advises the Supreme Court on changes to the Federal Rules of Criminal Procedure. See Devlin Barrett, *Justice Department seeks 50-year bar to release of grand jury material*, Washington Post (July 20, 2021) available at https://www.washingtonpost.com/ national-security/grand-jury-secrecy-gag-orders/2021/07/19/22585580-e898-11eb-8950-d73b3e93ff7f_story.html [https://perma.cc/BX67-3LBN].

[340] *See* Comm. on Judiciary, U.S. House of Representatives v. McGahn*,* 968 F.3d 755, 764, 778 (D.C. Cir. 2020)(upholding Article III power of district court to hear action brought by a congressional committee to enforce subpoena duly issued "in the performance of constitutional responsibilities" such legislating, oversight and impeachment); *see also* Comm. on Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53, 55 (D.D.C. 2008) (Bates, J.)(same).

[341] Freedom of Information Act litigation may provide a method to access executive branch materials relevant to impeachment. *See* Jacqueline Thomsen, *FOIA Suits Seek to Pry Ukraine Docs Loose*, National Law Journal (Nov. 27, 2019), available at https://www.law.com/nationallawjournal/2019/11/27/as-white-house-stonewalls-on-ukraine-docs-wave-of-foia-suits-seek-to-pry-them-loose/ [https://perma.cc/62M6-4XFD] (discussing use of FOIA litigation to seek disclosure of State Department, Defense Department, and Office of Management and Budget documents related to military aid to Ukraine).

[342] *See* United States v. Sells Eng'g, Inc., 463 U.S. 418, 425 (1983)("[G]rand jury witnesses are not under the prohibition [of grand jury secrecy] unless they also happen to fit into one of the enumerated classes [found in Fed.R.Crim.P. 6(e)); *see also* Notes of Advisory Committee, Note to Subdivision (e)(2).

[343] See United States v. Stephen K. Bannon, 1:21-cr-00670-CJN (D.D.C.), Docket No. 161 (judgment sentencing defendant to two concurrent four month terms of incarceration for contempt of Congress); c*f.*, United States v. Roger Stone, 1:19-cr-00018-ABJ-1 (D.D.C.), Docket No. 260 (jury guilty verdict on seven counts including false testimony to House Intelligence Committee). The Stone prosecution does not directly support the

some have argued, that the executive privilege defense to disclosure of presidential communications, an already weak defense both legally and practically, is even weaker in the context of an impeachment inquiry.[344] Beyond impeachment other remedies for Congress loom to cabin executive branch power and corruption such as committee oversight at least when government is divided, the powers of the purse, and advice and consent in the appointment process especially as it relates to key posts in the Justice Department. Ultimately, the people will have their vote, both for the investigating Congress and the subject of their inquiry. These are checks that are constitutionally necessary in a true democracy but also sufficient.

In the interim, if not impeached and convicted, a duly elected President should be able to govern unimpeded by a hybrid beast sniping from deep within his or her own branch of government—its assault emboldened and protected by congressional and judicial shields of armor. In the context of the special counsel regulations, Congress would appear to want its cake and eat it too. If its Article I power to investigate for purposes of impeachment is as fulsome as it contends, it has no need to enlist the executive branch as its ally. If its view is wrong and the framers held a narrower view of the impeachment power then enlisting the investigatory and prosecutorial power of the executive branch to enhance legislative action is nothing short of an unconstitutional coup d'état. The Special Counsel regulations have become the means to that end.

And what makes matters worse for the executive branch and somewhat ironic is that, unlike the statutory ICA, the Special Counsel regulations are a self-inflicted wound. The Department could eliminate them as quickly as they were passed and by doing so—to paraphrase James Madison—re-fortify the executive.[345] If Congress responded as they contemplated in the bills discussed above,[346] or more broadly passed a new ICA, such legislation would rejoin the separation of powers issue addressed in *Morrison* and now dormant in light of the post-*Morrison* sunset of the ICA. Critics of *Morrison* would chomp at the bit, banking briefs before the first subpoena was even issued. *Stare decisis* notwithstanding, it is unclear if given the opportunity today the Supreme Court would stand by *Morrison* if Congress were willing to take that risk. And, even in the absence of congressional action, the Court may now get that chance as the

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stated proposition as the case was brought by the Office of Special Counsel. It is, nonetheless, an important reminder that lying to an obstructing a Congressional committee is a serious federal felony. *See* 18 U.S.C. § 1001(a) and (c)(2) (defining false statement statute to apply to "any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of [Congress]"); 18 U.S.C. § 1505, para. 2. (5 year felony to *inter alia* "obstruct, or impede . . . the due and proper exercise of the [congressional] power of inquiry . . . ."). *See* Spencer S. Hsu, *Roger Stone guilty on all counts of lying to Congress, witness tampering*, Wash. Post (Nov. 15, 2019), available at https://www.washingtonpost.com/local/public-safety/roger-stone-jury-weighs-evidence-and-a-defense-move-to-make-case-about-mueller/2019/11/15/554fff5a-06ff-11ea-8292-c46ee8cb3dce_story.html [https://perma.cc/J7ED-UYKY] (describing jury verdict). Stone received a 40-month term of imprisonment. See United States v. Roger Stone, 1:19-cr-00018-ABJ-1 (D.D.C.), Docket No. 328 (judgment).

[344] *See* J. Shaub, *Executive Privilege Should Have No Power When It Comes to an Impeachment,* The Atlantic (Nov. 15, 2019) available at https://www.theatlantic.com/ideas/archive/2019/11/no-executive-privilege-in-impeachment/602044/ [https://perma.cc/4UG3-N92V](arguing that disputes of privilege during oversight proceedings inapplicable in impeachment context); *but see* U.S. Department of Justice, Office of Legal Counsel, *Exclusion of Agency Counsel from Congressional Depositions in the Impeachment Context* (November 1, 2019) (opining that executive branch official make invoke executive privilege in impeachment proceedings) available at https://www.justice.gov/olc/file/1214996/download [https://perma.cc/PQL9-7QUM].

[345] *See* The Federalist No. 51, pp. 321-322 (Madison, J.) ("As the weight of the legislative authority requires that it should be thus divided, the weakness of the executive may require, on the other hand, that is should be fortified.").

[346] *See supra* Section III. B, pp. 40-42.

Trump Special Counsel prosecutions proceed to trial and appellate review under the authority of the current regulations.[347]

For those who fear such a regime creates the king we long ago rebelled against,[348] this article proposes a remedy consistent with the separation of powers. The founders envisioned that the President would only be immune during a term of office but not thereafter. Our Constitution expressly provides for such circumstances. A Justice Department Integrity Division - structurally insulated from political influence—using all the investigative tools available only to the executive branch, would promptly gather and preserve all competent, credible, unimmunized[349] evidence of criminal behavior of a sitting President whether such conduct occurred before or during a term of office, for use in a later prosecution post-term. The post-term prosecutorial decision would be made by the Attorney General of the next President, or his or her designee, either after conviction on a bill of impeachment or after the end of the president's term or terms

[347] The Supreme Court, deftly applying *stare decisis*, sidestepped whether *Morrison* was wrongly decided in its decision in *Selia Law v. Consumer Financial Protection Bureau,* 591 U.S. 197 (2020). In *Selia*, the Court concluded that the structure of an executive branch agency, in this case the Consumer Financial Protection Bureau ("CFPB"), in which a single director who could only be removed from office "for cause," violated the separation of powers. In doing so, the Court acknowledged two limited exceptions to this otherwise clear bar on encroachment of presidential power. First, it acknowledged the exception found in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). In *Humphrey's Executor*, the Supreme Court held that it did not violate the separation of powers to curb the power of the President to remove members of the Federal Trade Commission because they did not exercise the powers of the executive branch but rather existed as a quasi-legislative body adjudicating cases and promulgating rules. *Morrison v. Olson* also did not constrain the Court's decision because the independent counsel at issue in *Morrison* was, unlike the director of the CFPB, an "inferior officer" of the United States. The language chosen by the majority in *Selia* to distinguish *Morrison* is meaningful: *Morrison* dealt with "inferior officers with limited duties and no policymaking" role. *Seila*, 591 U.S. at 218. But how can that difference have any meaning in the context of the current Special Counsel regulations? As written, the Special Counsel regulations delegate to the Special Counsel almost the full prosecutorial powers of the Attorney General. The regulations contemplate a hands-off delegation of prosecutorial power unless the Attorney General determines that the Special Counsel's exercise of prosecutorial power is in the words of the regulations "so inappropriate or unwarranted under established Departmental practices that it should not be pursued." 28 C.F.R. § 600.7(b). It is here that Chief Justice Roberts chosen language in *Selia* may be prophetic: in determining that the CFPB structure violated the separation of powers Roberts wrote that the CFPB structure "is also incompatible with the structure of the Constitution, which—with the sole exception of the presidency—scrupulously avoids concentrating power in the hands of any single individual." *Seila*, 140 S. Ct. at 2202. *Selia* would appear to set the stage for a determination by the Supreme Court that in the right context that because the Special Counsel regulations place two much power in an admittedly inferior officer they are inherently unconstitutional. It may very well get that chance soon. See *supra* note 217 (noting motions to dismiss in the prosecutions of Donald Trump brought by Special Counsel Jack Smith).

[348] *See* Comm. on Judiciary, U.S. House of Representatives v. McGahn*,* Civ. No. 19-cv-2379, Doc. No. 46 (Jackson, J)(D.D.C. Nov. 25, 2019)("the primary takeaway from the past 250 years of recorded American history is that Presidents are not kings")(citing The Federalist No. 51 (James Madison) and The Federalist No. 69 (Alexander Hamilton)), rev'd, 951 F.3d 510 (D.C.Cir. Feb. 28, 2020), rehearing en banc granted sub nom., U.S. House of Representatives v. Mnuchin, 2020 WL 1228477 (D.C.Cir. March 13, 2020), aff'd in part and remanded, Comm. on Judiciary, U.S. House of Representatives v. McGahn*,* 968 F.3d 755 (D.C. Cir. 2020).

[349] Although Congress has often agreed to Department of Justice requests to stay oversight hearings to avoid complicating ongoing criminal investigations the truce is often an uneasy one. It also remains an inherent possibility that a Congress opposed to a President could weaponize immunity to frustrate active investigations and prosecutions. Completely separating Congressional oversight investigations from criminal investigations minimizes these risks. *Cf.* Kastigar v. United States, 406 U.S. 441 (1972) (burden on prosecution to prove affirmatively that evidence introduced in criminal case is wholly independent of compelled testimony) *with* United States v. North, 910 F.2d 843 (D.C. Cir. 1990)(applying *Kastigar* to compelled congressional testimony).

of office.[350] In our federalist system, such a decision might also be made, and has been made,[351] by a state prosecutor.

Whatever the proper remedy should be, the present course of action under the constitutionally suspect and corrupted Special Counsel regulations must end. The current regulations do little more that create a succession of naked emperors[352] exercising powers they do not wear under the Constitution. All to avoid the accountability to the people that serves as the bedrock of our constitutional system of government of the people, by the people, and for the people. The time has come to fortify, strengthen, and clarify that the power to prosecute belongs solely to the Executive Branch in a carefully and thoughtful system of checks and balances designed by the Founding Fathers. Congress may impeach, control the purse, and exercise oversight, and any prosecution of a high-ranking officer must face the gauntlet of an independent judicial officer, a jury of citizen peers, and appellate review.

It serves no purpose except to mislead the body politic for the Executive Branch to hide behind the illusion that special counsel are truly independent. The decision to prosecute must remain with and be exercised transparently only by a constitutional officer, duly nominated and appointed by the President and confirmed by the Senate. And if those appointing and approving officers choose to place that power in the hands of the inept, unwise, or corrupt it is for the people to hold the political branches accountable through the ballot box. This is the system that Madison and Hamilton and others envisioned. It has worked for over two hundred years. We must return to it with conviction and dedication before the people, already distrustful of government and soured on our democracy,[353] careen more deeply into overt contempt for those in whom they have placed a sacred trust to faithfully discharge the law.

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[350] *See, e.g.,* United States Department of Justice, Watergate Special Prosecution Force, Memorandum, From Carl B. Feldbaum and Peter M. Kreindler to Leon Jaworski, Special Prosecutor, *Factors to be Considered in Deciding Whether to Prosecute Richard M. Nixon for Obstruction of Justice* (August 9, 1974)(concluding Nixon participated in a conspiracy to obstruct justice, and citing five reasons for and five reasons against indictment and prosecution), available at https://www.archives.gov/education/lessons/watergate-constitution/memo-transcript [https://perma.cc/D9TA-YLBD]. The Feldbaum and Kriendler memorandum was mooted by Gerald Ford's decision to pardon Nixon one month later. *See* Gerald R. Ford, *Presidential Proclamation 4311 of September 8, 1974*, granting a pardon to Richard M. Nixon, 09/08/1974, Record Group 11: General Records of the United States Government, 1778 – 1992; NARA, Washington, DC. (ARC #194597), available at https://catalog.archives.gov/id/299996 [https://perma.cc/HB3M-YE2D]. Several factors cited by Feldbaum and Kreindler against prosecution are echoed in both the pardon proclamation itself as well as President Ford's televised national speech announcing the pardon. *See Speech of Gerald R. Ford* (Sept. 8, 1974), available at http://www.historyplace.com/speeches/ford.htm [https://perma.cc/W9WN-DEF6] (pardon proclamation and accompanying speech).

[351] See The State of Georgia v. Donald J. Trump, et al., 23SC188947 (indictment), Fulton County (Ga.) Superior Court (August 14, 2023); The State of New York v. Donald J. Trump, IND-71543-23/001(New York Supreme Criminal Court). Trump was convicted on all 34 counts of the New York state indictment on May 30, 2024. An appeal is a factual certainty. See Jonathan Turley, *Buzz Kill: The Trump Conviction Presents a Target-Rich Environment for Appeal*, https://jonathanturley.org/2024/06/03/buzz-kill-the-trump-conviction-presents-a-target-rich-environment-for-appeal/comment-page-1/ [https://perma.cc/V9TX-WSBL].

[352] See *supra* note 217, Brief of Former Attorney General Edwin Meese III and Law Professors Steven G. Calabresi and Gary Lawson As Amici Curiae at page 24 ("Not clothed in the authority of the federal government, Smith is a modern example of the naked emperor.).

[353] A recent Gallup poll reveals that only 28% of the American people have faith that American democracy is working the way it should. https://news.gallup.com/poll/548120/record-low-satisfied-democracy-working.aspx [https://perma.cc/LT7M-DL58]. This figure is five percentage points below a similar poll taken shortly after the January 6, 2021 attack on the Capitol.