

# PUTTING LAW AND POLITICS IN THE RIGHT PLACES—REFORMING THE INDEPENDENT COUNSEL STATUTE

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## I

### INTRODUCTION

When a public official exercises judgment to make a discretionary decision of some significance, taking into account any factors her own common sense, experience, and understanding of the public interest consider relevant, and subsequently is called to account for the soundness of the decision, she performs one of the paradigmatic acts of politics. When a public official makes a decision because it has been mandated by a prior binding command, and subsequently is called to account only for whether the decision in fact complied with that command, she performs one of the paradigmatic acts of law.

The fundamental flaw in the independent counsel law—not the only flaw, but the root of many of its problems—consists of its attempt to convert a political decision, the decision whether to refer a case of public corruption to an investigator outside normal prosecutorial offices, into a legal one. When the Independent Counsel Reauthorization Act of 1994 (“the Act”)<sup>1</sup> expires on June 30, 1999, it should not be reenacted unless this flaw is eliminated.

Our existing law enforcement institutions have ample integrity and resources to investigate wrongdoing by high political officials. Whenever the Attorney General or the President reaches the political judgment that someone outside normal investigational channels ought to be asked to conduct a particular investigation, he or she has the authority to act on that judgment and to appoint such an investigator.

Even if concern about the ultimate accountability of the President or the Attorney General for such investigations lingers, the mandatory referral mechanism of the Act is a poor way to address those concerns. A better ap-

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1. Pub. L. No. 103-270, 108 Stat. 732 (1994).

proach builds on the experience gained from our system of constitutional democracy and strengthens the institutional structures that ensure accountability by making political actors answerable for their decisions.

One viable solution is for Congress to provide for a small advisory board on the investigation of high-level wrongdoing, which the Attorney General would keep informed about significant investigations and how the Justice Department is handling them. The board would have a limited power to report to Congress in the event it concluded that the investigation had stepped outside of reasonable, professional boundaries. This would both deter any inclination toward lax investigations and serve to give the public confidence in the integrity of such investigations.

## II

### THE RULE OF LAW BASIS FOR THE CURRENT SYSTEM

Perhaps one reason we have experimented with the independent counsel approach is that it was viewed as the continuation of an important long-term project aimed at removing political influence from law generally. Sometime during the sixteenth and seventeenth centuries, our legal system underwent a truly great transition, when the English monarch's ability to influence specific judicial outcomes became sufficiently attenuated so that the English people could reasonably expect fair treatment before their courts, notwithstanding the political influence of their opponent.<sup>2</sup> The struggle for the principle of equality before the law was fought over decades, proceeded in fits and starts, played a significant role in the contest between Parliament and King Charles, and constituted a victory for reasonable expectations rather than absolute assurances. It is a victory that must be protected continually.

Prior to the ascendancy of the principle that civil and criminal judicial judgments must be rendered without regard to the political power and influence of the parties, the Crown exercised all manner of influence over the functioning of the entire judicial system. Juries were rigged, threatened with fines, sent back to reconsider undesired verdicts, and imprisoned. Judges were given direct instructions. According to the political characteristics of the participants, sheriffs selectively enforced laws on the one hand and turned a blind eye to their violation on the other.<sup>3</sup> Although these intrusions did not occur in every proceeding, the potential always existed in cases whose outcome was important enough to the Crown.

In contrast to such manipulation, the rule of law and the principle of equality before the law mean that the interests of political rulers will not affect the outcome of judicial proceedings.

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2. A selective summary of the story can be found in DON HERZOG, *HAPPY SLAVES* 110-47 (1989). See also, e.g., DEREK HIRST, *AUTHORITY AND CONFLICT: ENGLAND, 1603-1658* (1986); LAWRENCE STONE, *THE CAUSES OF THE ENGLISH REVOLUTION, 1529-1642* (1972).

3. See HERZOG, *supra* note 2, at 121-26.

We could . . . cast the point as a matter of insulating law from the daily exigencies of politics. Or we can think of the point in terms of selective blindness. Judges should pay no attention to whether litigants are kingly or common; jurors should ignore the government's desires in deliberating and ruling; enforcers should pursue the guilty, not the politically liable. No one should be able to report that in law, "lucre and affection ruleth all . . . for, as it is commonly and truly also said, 'Matters be ended as they be friended . . .'"<sup>4</sup>

Our criminal justice system, however, rids itself of the daily exigencies of politics without eliminating the discretionary judgments of prosecutors. Instead, we trust prosecutors not to let current political power influence their prosecutorial decisions.

Ours is not a blind trust, of course, but a trust reinforced and verified through a system of separated powers. With a judiciary independent of the prosecuting executive branch, and a contemporary jury system much less vulnerable to tampering than was the case in seventeenth-century England, law enforcement operates within an institutional structure that provides significant protections against manipulated prosecutions. This system of separated powers, together with accompanying and reinforcing cultural norms, accomplishes well its primary goal of protecting our individual liberties by guarding against oppressive government action.

This combination of trust, norms, and structures that ensures accountability comes under stress whenever the law enforcers themselves, their political superiors, or individuals whose criminality would be damaging to one or the other of them become the subject of a criminal investigation. (For ease of exposition, I will refer to all three types of cases collectively as cases of "high-level wrongdoing.") Then, the worry about lax law enforcement—the cover-up—can seem as great as the worry about oppressive law enforcement.

Cover-ups pose a problem because prior to taking a case into open court, law enforcers must make crucial decisions about whether and how to investigate wrongdoing and whether and how to charge and prosecute; these decisions are notoriously difficult to monitor. Institutions designed primarily to guard against oppressive or unequal prosecutorial *action* are simply less well equipped to safeguard against unequal government *inaction*. And yet, just as the belief that those who enforce the criminal law will bend the law to impose an oppressive agenda on others can undermine the shared norm of equal treatment necessary for civil society to function, so can the belief that they will bend it to favor themselves by sweeping high-level wrongdoing under the rug.

There are only three basic approaches to addressing the challenge of lax or inadequate investigations of high-level wrongdoing. First, law enforcers can establish and maintain a reputation for the highest integrity and professionalism—attributes that they must possess in their day-to-day work in any event—and then handle the cases involving high conflict potential under the auspices of normal procedures and personnel, addressing any public concern with decla-

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4. *Id.* at 129 (quoting THOMAS STARKEY, A DIALOGUE BETWEEN REGINALD POLE & THOMAS LUPSET 86 (1948)).

rations of impartiality and thoroughness in their work. To increase public confidence, internal institutional constructs—such as divisions of internal affairs or offices of public integrity, staffed by personnel with the very highest reputations—can effectively be removed from direct influence by superiors.

A second approach appeals to higher levels of government, thought to be less susceptible to whatever the lower level source of potential improper influence may be. For example, a state bureau may be called in to investigate corruption charges against a county sheriff.

Finally, a third approach brings in persons from outside the normal structure of governmental law enforcement itself. This can be done either permanently, as with some citizen review boards for local police departments, or on a temporary basis, as when Attorney General Barr commissioned Judge Bua to investigate the Department of Justice's ("DOJ's") Inslaw controversy.<sup>5</sup>

At the federal level, the approaches are even more limited because the second option cannot be invoked, at least so long as calling upon the authorities of some international organization, such as the United Nations, remains unthinkable. Until that changes, only the internal approaches and the external approaches are available.

Prior to the Ethics in Government Act of 1978,<sup>6</sup> the federal government had operated for close to two hundred years using a combination of internal and discretionary external solutions for the problem of high-conflict potential cases. On all of the prior occasions in which either the President or the Attorney General had called upon an individual outside the government to assist in the investigation of allegations of high-level wrongdoing, the decision had not been mandated by law, but had resulted from the exercise of political judgment and common sense.<sup>7</sup>

Internally, DOJ and the FBI have sought to establish and maintain a reputation for the highest integrity. The Office of Public Integrity has been assigned the responsibility for investigating crimes of public corruption; the Office of Professional Responsibility has been charged with overseeing the conduct of professionals within DOJ, and the Inspector General's office has responsibility for investigating a wide range of alleged improprieties within DOJ.<sup>8</sup>

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5. For the Inslaw story, see Mary Fricker & Stephen Pizzo, *Outlaws at Justice*, S.F. CHRON., June 14, 1992, § 7, at 11. Attorney General Barr also exercised his discretion to appoint external investigators in the "Iraqgate" controversy, and in the investigation of the House Bank. See Ken Gormley, *An Original Model of the Independent Counsel Statute*, 97 MICH. L. REV. 601, 657 n.233 (1998).

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

7. Every time a President sought outside assistance, the matter involved a controversy of considerable political significance. These include the investigation of the Teapot Dome scandal under President Coolidge, the investigation of tax rigging by the Justice Department and the IRS under President Truman, and the investigation of the Watergate break-in under President Nixon. These investigations are summarized in KATY HARRIGER, *INDEPENDENT JUSTICE: THE FEDERAL SPECIAL PROSECUTOR IN AMERICAN POLITICS* 13-20 (1992).

8. The professionalism of persons within the Justice Department and the FBI has been called into question from time to time, most recently in events including the premature release of erroneous in-

Some indication that concerns about the integrity of the FBI during investigations of high-level wrongdoing are not paramount comes by virtue of the fact that the independent counsel's investigative arms routinely consist of FBI agents detailed to an independent counsel's office. Some indication that DOJ can adequately investigate high-level wrongdoing is suggested by its prosecution and conviction of former Representative Dan Rostenkowski (D.-Ill.) at a time when he was chairman of the powerful House Ways and Means Committee and was widely described as holding the key to the success of the major policy initiative of President Clinton's first term, the Health Security Act.<sup>9</sup>

### III

#### THE PRESENT SYSTEM—ITS SUCCESSES

Until 1978, no legal mandate existed that would compel the appointment of outside prosecutors; on each occasion in which the technique was employed, the President and the Attorney General thought the course prudent to ensure an adequate investigation or to maintain public confidence in the outcome of the investigation, or both.

The aftermath of one of these discretionary appointments, however, changed (at least temporarily) the public's confidence in the historical manner of dealing with high-level wrongdoing. This was, of course, President Richard Nixon's appointment of Archibald Cox to investigate the Watergate affair. When Cox subsequently refused to accept a compromise solution to a subpoena of the Nixon tapes, President Nixon instructed the Attorney General to fire Cox. Both the Attorney General and his deputy resigned rather than execute the order. After Solicitor General Robert Bork complied, and the dust had cleared, the two top offices in the Justice Department stood vacant, as did the special prosecutor's office; Bork was Acting Attorney General. Within weeks, the uproar over the "Saturday Night Massacre" resulted in Leon Jaworski's appointment as Cox's replacement, and a reinstatement of the Watergate Special Prosecution Task Force, under assurances to the Senate that Jaworski would not be dismissed except for good cause.<sup>10</sup>

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formation about Richard Jewell after the Atlanta Olympics bombing, as well as the improper handling of evidence by the FBI crime lab. Still, the reputations of these professionals remain generally high.

9. See Kenneth J. Cooper, *U.S. Attorney, a Democrat, Brings Judicial Experience to the Prosecutor's Task*, WASH. POST, June 1, 1994, at A15; Kenneth J. Cooper, *A High Profile and High Stakes for Prosecutor*, WASH. POST, Apr. 29, 1994, at A25. The successful investigation of then-Vice President Spiro Agnew by the Nixon Justice Department would serve as a further indication. For an account of the Agnew investigation and other successful investigations of high-level wrongdoing by the Justice Department, see TERRY EASTLAND, *ETHICS, POLITICS AND THE INDEPENDENT COUNSEL* 7-16 (1989).

10. Archibald Cox also had been operating under a tenure in office protection, limiting grounds for dismissal to "extraordinary improprieties on his part." 28 C.F.R. § 0.37 app. (1973). His firing in the face of that protection suggested to some that the discretionary system for appointing external investigators did not provide secure protection against lax investigations. The Watergate story has been told many times. See, e.g., RICHARD BEN-VENISTE & GEORGE FRAMPTON, JR., *STONEWALL: THE REAL STORY OF THE WATERGATE PROSECUTION* (1977). For a condensed version, with references to the primary documents, see HARRIGER, *supra* note 7, at 1-38; Sen. Carl Levin, *The Independent Coun-*

Congress conducted its own investigations concurrently with the Task Force, eventually convening an impeachment inquiry in the House Judiciary Committee, which issued articles of impeachment against President Nixon. The Task Force successfully prosecuted a number of Watergate participants; Nixon resigned and was shortly afterward pardoned, ending speculation about his possible indictment.

Our contemporary assessment of the Watergate affair is that the wrongdoing that occurred in and around the Nixon White House was unearthed and exposed. Aside from the identity of Deep Throat, there are few lingering doubts that significant information was covered up by inadequate investigation.

This positive assessment might have translated into continuing satisfaction with and public confidence in the discretionary appointment of special investigators. Drawing lessons from such events is always an act of contestable interpretation, however. For example, for advocates of nuclear power, the accident at Unit No. 2 at Three Mile Island in 1979 stands as a testament to how rigorous existing safeguards against catastrophic occurrences already were, just as securely as it stands for opponents of nuclear power as an alarming demonstration of how simple negligence and malfunctions can bring us to a point at which one more mistake would have produced a core meltdown.<sup>11</sup> In like fashion, Watergate can be interpreted as a demonstration that our system of government can successfully respond more or less spontaneously to allegations of wrongdoing in the very highest levels of power,<sup>12</sup> or as a chilling instance in which a sitting President sought to bluff and bully his way past accountability for the most serious misdeeds, almost succeeding but for the heroic action of others.<sup>13</sup>

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*sel Statute: A Matter of Public Confidence and Constitutional Balance*, 16 HOFSTRA L. REV. 11, 11-14 (1987).

11. For an account of the chain of events that led to the accident, see CHARLES PERROW, *NORMAL ACCIDENTS: LIVING WITH HIGH-RISK TECHNOLOGIES* 15-31 (1984).

12. Those who criticize the operation of the Act generally draw this message from the Watergate experience. See, e.g., Julie O'Sullivan, *The Independent Counsel Statute: Bad Law, Bad Policy*, 33 AM. CRIM. L. REV. 463, 475-79 (1996) ("Watergate demonstrated both that it is reasonable to trust 'regular' DOJ prosecutors to act professionally even in the most politically sensitive case, and that the system (Congress, the Attorney General, the public and the press) can in general be counted upon to ensure that the criminal system works as it should.").

13. Those who have supported retaining some version of the Act favor this interpretation. See, e.g., Joseph R. Biden, Jr., *Shared Power Under the Constitution: The Independent Counsel*, 65 N.C. L. REV. 881, 886 (1987) ("There are certain extraordinary moments of crisis when the people's faith in the integrity and independence of their elected officials is caused to waiver [*sic*] . . . . To restore the utmost public confidence in the investigation of criminal wrongdoing by high-ranking government officials, the appointment of a special prosecutor becomes necessary."); Samuel Dash, *Independent Counsel: No More, No Less a Federal Prosecutor*, 86 GEO. L.J. 2077, 2077-78 (1998) ("As Chief Counsel of the Senate Watergate Committee . . . I was shocked that the President could so easily terminate a criminal investigation targeted at him. The irony is that Nixon would have succeeded had there been no Senate Watergate hearings that summer. To the uninformed public, the firing of the special prosecutor would have been just another political donnybrook in Washington."); Simon Lazarus & Jane E. Larson, *The Constitutionality of the Independent Counsel Statute*, 25 AM. CRIM. L. REV. 187, 187 (1987) ("In the shock of [the Saturday Night Massacre], the American public got a taste of what it would be like to live in a country where their ruler is above the law.").

Congress's judgment came to rest on the latter, more pessimistic conclusion.<sup>14</sup> The Ethics in Government Act of 1978 was enacted during a period in which major indices of confidence in our public political institutions were at record lows. By establishing the mandatory use of special investigators—then called “special prosecutors,” subsequently changed by statute to “independent counsels”—in a specified class of cases, the legislation ostensibly removed the decision whether to appoint an independent counsel from the realm of discretion, where common sense and political judgment determine action. In the place of political judgment, the Act purports to substitute law: So long as the legal standard for referral of a matter to an independent counsel has been met, the administration will have no discretion in the matter, no occasion in which to be influenced one way or the other by political judgments.<sup>15</sup>

After twenty years of on-again, off-again operations, and several midcourse revisions, we need to recognize the (partial) success of the Ethics in Government Act's solution to cases of high-level wrongdoing. To my knowledge, no one has ever seriously claimed that any of the twenty-plus independent counsel investigations resulted in favoritism *toward* the targets of their investigations.<sup>16</sup> As a solution to the concern that the normal law enforcers will tread lightly in cases of high-level wrongdoing, the independent counsel law works.<sup>17</sup>

#### IV

#### THE PRESENT SYSTEM—ITS DEFICIENCIES

Having given the statute its due, however, it is equally obvious that it has been surrounded in controversy from its first exercise (the referring of allega-

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14. Congress was not alone in reaching this decision. Numerous individuals testified to the need for a mandatory independent counsel mechanism, as did Common Cause and the American Bar Association, among others. The ABA's 1976 report, *Preventing Improper Influence on Federal Law Enforcement Agencies*, was particularly influential in devising the triggering mechanism for appointment of the independent counsel. As Warren Spann, President of the ABA, testified, the ABA supported the mandatory appointment of an independent counsel because of “the legal profession's constant concern with whether or not justice is administered with complete impartiality and, equally important, whether or not there is an appearance of impartiality. The public must be assured that crimes involving government officials at the highest levels can be prosecuted with complete impartiality.” *Watergate Reorganization and Reform Act of 1975: Hearings Before the Sen. Comm. on Gov't Oper.*, 94th Cong., pt. II, at 163 (1975).

15. See generally American Bar Ass'n, *Preventing Improper Influence on Federal Law Enforcement Agencies* (1976) (report of the ABA's Special Committee to Study Federal Law Enforcement Agencies calling for appointment of a temporary independent special prosecutor when needed).

16. The verdict is not as unanimous on the separate question whether Attorneys General have asked for appointment of independent counsels in all appropriate cases, thus giving rise to the objection that the Act does not entirely succeed in attacking high-level wrongdoing because some covered cases are not referred to independent counsels at all. In particular, both Attorney General Meese and Attorney General Reno have been criticized for declining to seek independent counsel appointments in cases covered by the Act. The alternative proposed in Part V of this article would ameliorate this source of controversy to a degree, although it would not eliminate it.

17. The Senate Committee on Governmental Affairs, in reauthorizing the Act in 1993, found that the Act had gained “remarkable public acceptance in terms of restoring public confidence in criminal investigations of top executive branch officials.” S. REP. NO. 103-101, at 7 (1993), *reprinted in* 1994 U.S.C.C.A.N. 748, 752.

tions of recreational cocaine use by President Carter's top aide, Hamilton Jordan) to its most recent application (the referring of allegations of illegal kickbacks against Secretary of Labor Alexis Herman).

Controversy itself comes as no surprise. Allegations of wrongdoing against significant administration officials always spark controversy because the political as well as the legal stakes are high. All successful presidential campaigns in recent years have asserted that theirs will be a cleaner, more honest, more ethical government than the last one. In that environment, allegations of criminal behavior by significant officers inevitably taint the President. The media covers scandals avidly as major public events.<sup>18</sup> Should the media coverage taper off, the opposition party ensures that the media spotlight is rekindled. Thus, interest and stakes are high even if the allegations do not themselves reach directly into the Oval Office. When they do touch directly on the conduct of the President and his core advisors, as they did in the Iran-Contra investigation and in the Whitewater and Monica Lewinsky investigations, the interest and stakes increase astronomically.

If controversy does not by itself provide a basis for criticism of the independent counsel mechanism, however, neither does it justify complacency in the form of an easy conclusion that any other solution would fare no better.

In fact, experience with the Act has confirmed what could have been predicted: The effort to replace politically accountable discretion with law has had ramifications for both politics and law. The consequences of the Act in each arena have been deleterious. If other approaches to high-level wrongdoing could succeed in providing public confidence in adequate investigations while also minimizing the costs associated with the present approach, we ought to prefer them.

On the law and law enforcement side of the equation, the attempt to ensure that we did not need to rely upon contemporaneous political pressures and judgments to prompt the appointment of an independent investigator has had two damaging effects. First, in removing the discretion that DOJ normally possesses in making investigatory decisions, the Act substitutes a low triggering threshold for referral to an independent counsel, thus ensuring that low-culpability facts—often facts only slightly above the level of mere speculation—are assigned to special investigations regardless of their prosecutorial merit.<sup>19</sup>

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18. The Act facilitates media attention by its rigid deadlines, which enable the media to build up its coverage as the decision dates come closer, as well as by its judicial appointment procedure, which reveals the identity and jurisdiction of all but a very few independent counsels.

19. The Act actually contains two triggers. The first operates when DOJ initially receives any information whatsoever concerning alleged wrongdoing by a person covered by the statute. DOJ then has 30 days to determine whether this information is "specifi[c]" and "credib[le]" and constitutes grounds to investigate. 28 U.S.C. § 591(d)(1) (1994). This is the threshold that screens out mere speculation. Once specific and credible evidence is found, DOJ notifies the Special Division (a notification that is usually made public) and has 90 days (with a possible single 60-day extension) to conduct a preliminary investigation of whether the matter should be referred to an independent counsel. It is hard to avoid pulling this second trigger. "Once . . . you begin a preliminary investigation . . . it is often difficult to conclude that no further investigation is warranted. And so relatively few of the cases that go to preliminary inquiry are turned back at that stage . . ." Symposium, *The Independent Counsel*

Second, it creates an unaccountable prosecutor in an enforcement context containing ample incentives for high-intensity investigations. The net result is a propensity toward low-culpability and high-intensity investigations that are unfair to individuals and that unduly politicize the investigatorial process.

The Act also enables allegations of criminal wrongdoing to be deployed as potent political weapons. The political gains and costs that hang in the balance of any independent counsel investigation mean that observers will almost certainly evaluate these investigations as well as the motives of the participants in political terms, thereby defeating the goal of separating law and politics.<sup>20</sup>

The consequences of the Act both on law and on politics flow from exactly the same cause. The key concept of the Act lies in replacing a discretionary system of external appointments with a mandatory requirement covering a stipulated class of cases. Once the external investigator option is triggered, decisions that would otherwise have been made within DOJ are transferred to the independent counsel. Consequently, the Act removes one discretionary judgment from the Attorney General, replacing it with the Act's automatic trigger, and then displaces the Attorney General altogether, vesting all subsequent discretionary investigatorial and prosecutorial decisions in the independent counsel.

Removing and displacing discretion—for the sake of replacing political pressures with a legal standard—effectively eliminates the ability of the Attorney General and the Justice Department to exercise any of the normal discretionary authority they ordinarily possess in investigating and prosecuting cases. That discretionary authority provides our law enforcement system with a degree of flexibility that it frequently requires in order to function to our satisfaction.

The mandatory trigger mechanism seeks to prevent the Attorney General from manipulating the decision about whether to seek an independent counsel in the first place. To accomplish that goal, the Act must use a very low evidentiary threshold. The more evidence of wrongdoing required to trigger the statute, the easier it would be to avoid triggering the statute by failing to unearth sufficient evidence during the pre-independent counsel DOJ investigation, or by reaching a discretionary judgment that the level of evidence sufficient to trigger the statute had not been met.<sup>21</sup> Conversely, the lower the threshold re-

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*Process: Is It Broken and How Should It Be Fixed?*, 54 WASH. & LEE L. REV. 1515, 1528 (1997) (remarks by Jamie Gorelick, former Deputy Attorney General); see also *id.* at 1528-35 (remarks of former Attorney General William Barr); Gormley, *supra* note 5, at 644 (writing that this trigger "is so loose that virtually any half-credible allegation against an individual covered by the statute will . . . forc[e] . . . appointment even in cases that present only marginal evidence of criminal wrongdoing").

20. See O'Sullivan, *supra* note 12, at 464 ("[T]he growth of the perceived function and importance of the IC mechanism has heightened the political consequence of IC investigations. Given the public and press attention devoted to such investigations, partisans cannot afford to let the IC process simply unfold and the political chips fall where they may."); see also Brett Kavanaugh, *The President and the Independent Counsel*, 86 GEO. L.J. 2133, 2135 (1998) (pointing out how independent counsel investigations have become politicized).

21. Any such conclusion would be controversial, to be sure, but the more evidence required to trigger, the greater the range of disagreement there can be over whether it has been met. So long as

quired to trigger the Act, the less room there will be for argument that the threshold has not been met, and the more automatic the trigger mechanism becomes.<sup>22</sup>

As first enacted, a mandatory referral to an independent counsel was triggered whenever the Attorney General, after an initial inquiry in which she lacked normal law enforcement authority to subpoena witnesses or convene a grand jury, was unable to conclude that the allegations against a high official were "so unsubstantiated that no further investigation or prosecution is warranted."<sup>23</sup>

Even the Act's ardent supporters soon conceded that this threshold was too low. In the only amendment to the Act that actually sought to restore some of the Attorney General's discretion, Congress in 1982 changed the triggering standard, requiring referral unless the Attorney General concluded that "there are no reasonable grounds to believe that further investigation or prosecution is warranted."<sup>24</sup>

The precise burden that the "reasonable grounds" standard places on the sufficiency of the evidence has never been definitively articulated.<sup>25</sup> We do know that the 97th Congress viewed the prior threshold as too low, and thus raised the standard for appointment of an independent counsel to ensure that the Attorney General had the discretion to terminate cases that have "little or no merit."<sup>26</sup>

The slight movement back to a more discretionary system was short-lived. When the Act next came up for renewal in 1987, the Senate Government Affairs Committee was highly critical of nonreferral decisions made by Attorney General Meese in the intervening years. The revised bill it drafted, and which

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an Attorney General can garner some external support for the reasonableness of her conclusion, the merits of the decision can be muddied and hence the political damage from it reduced.

22. Ken Gormley's discussion of proposals to raise the threshold for triggering appointment of an independent counsel recognizes that the effect of raising the threshold is to increase the Attorney General's discretion. Gormley, *supra* note 5, at 644-45 (advocating that the standard be changed to "substantial grounds to believe that a felony has been committed and further investigation is warranted," and then stating that such a standard "grants the Attorney General much-needed discretion"). I concur in the desirability of granting the Attorney General more discretion. See *infra* Part V. Contrary to Gormley's analysis of the legislative history of the Act, however, I view such an infusion of discretion as inconsistent with what Congress has been trying to do with the Act over the years, namely, to restrict the Attorney General's discretion so that a too-friendly Attorney General will not be able to game the standard and thereby avoid appointing an independent counsel.

23. Pub. L. No. 97-409, § 4(c), 96 Stat. 2040 (1982). The phrase "or prosecution" was deleted in 1987. See Pub. L. No. 100-191, 101 Stat. 1296 (1987).

24. Pub. L. No. 97-409, § 4(c), 96 Stat. 2040 (1982).

25. In *In re Meese*, 907 F.2d 1192 (D.C. Cir. 1990), the Special Division found that the 1982 change "substantially changed the nature and amount of evidence required to support a request for the appointment of an independent counsel," *id.* at 1196, and that the Act now required "a showing that there was a fair probability or substantial chance that the subject engaged in some criminal activity" to justify such a request, *id.* at 1197. However, Attorneys General have not followed the *In re Meese* standard, and have interpreted the threshold to be lower. See Motion of Secretary of Labor Alexis M. Herman for an Order Declining Appointment of an Independent Counsel at 3, *In re Herman*, 144 F.3d 829 (D.C. Cir. 1998) (Div. No. 98-2).

26. S. REP. NO. 97-496, at 13 (1982), reprinted in 1982 U.S.C.C.A.N. 3537, 3549; see also *id.* at 4, 21, reprinted in 1982 U.S.S.C.A.N. 3540, 3557.

Congress passed, lowered the threshold once again. It removed “or prosecution” from the standard, to prevent the Attorney General from deciding against referral on the ground that an eventual prosecution seemed unlikely to succeed. It also prohibited the Attorney General from deciding against a referral on the ground that the accused lacked the requisite state of mind to commit the crime alleged, unless the Attorney General had clear and convincing evidence to that effect.<sup>27</sup>

This retreat back to a lower standard for mandatory referral was inevitable, given that the major objective of the Act is to make referral automatic in some identified class of cases, and given the continuing cynicism that political friends of the President would likely receive soft treatment.<sup>28</sup>

Equally inevitably, the current hair-trigger refers cases that involve very high-level and very visible public officials but that have very little merit to them, cases in which the evidence may be only marginally stronger than mere speculation.<sup>29</sup> These cases are then placed under a powerful microscope by an attorney operating independently of DOJ, acting without budget constraints, and working in an environment containing enormous incentives to continue investigations until provable crimes are unearthed or until all conceivable leads are exhausted.

While leaving no stone unturned may sound appealing, the appeal exists only when the object of such high-intensity investigations is someone else. In actuality, the Act transgresses the principle of equal treatment before the law no less than does the system without the Act, and perhaps more so.

The equal treatment principle requires that everyone be treated before the law in the same manner without regard to considerations of status, power, or privilege. By singling out designated officials for assignment to an entirely different institutional regime than other cases, the Act obviously does not treat all cases the same. Ostensibly this is done to restore the norm of equal treatment in substance, not to violate it: The argument is that it takes an alternative structure to make sure that allegations of high-level wrongdoing receive treatment that is materially the same as the ordinary cases handled by DOJ when political factors do not weigh in the balance. However, if the consequence of

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27. Many of the crimes alleged against high government officials require a specific state of mind, such as knowingly conveying false information. By restricting the Attorney General's use of state of mind, the Act further facilitates sending cases to an independent counsel.

28. See Katy Harriger, *Damned If She Does and Damned If She Doesn't: The Attorney General and the Independent Counsel Statute*, 86 GEO. L.J. 2097, 2111 (1998) (“Expanding the Attorney General's discretion in order to limit the number of cases [referred to an independent counsel], however, only seems to raise the level of distrust among members of Congress and the press, and thus interferes with the goal of reassuring the public that violations of federal law can be investigated impartially.”).

29. See Symposium, *supra* note 19, at 1529 (remarks of former Attorney General William Barr) (“The standard for commencing a preliminary investigation is very low. It is not evidence of a crime. It is information sufficient to warrant an investigation as to whether a person has violated the law; and once that is triggered . . . you are basically locked into going to court for an independent counsel . . .”); see also *id.* at 1528-35. Lloyd Cutler has described the current standard as “about one micro millimeter high.” Symposium, *A Roundtable Discussion on the Independent Counsel Statute*, 49 MERCER L. REV. 457, 470 (1998) (remarks of Lloyd Cutler).

this singling out is to subject those designated officials to investigations and prosecutions on terms that *are* materially different from those applicable to ordinary citizens, equal treatment has not been achieved. Instead, the Act will have replaced one type of unequal treatment for another.

Few people doubt that the Act does in fact replace one type of unequal treatment for another.<sup>30</sup> Even without perverse incentives, the absence of any budget constraint would lead predictably to an over-expenditure of funds compared with similar investigations by DOJ. But perverse incentives do exist, as well. Experience has shown that independent counsels are under considerable reputational pressure to obtain indictments and pursue prosecutions. With the public's dispositions fed by continuing cynicism, or by the political advantage gained by opponents of the President, or both, exonerations of covered officials inevitably leave some critics unconvinced.<sup>31</sup> Such exonerations will predictably be met with accusations of inadequate and hence incompetent investigations.<sup>32</sup> No experienced lawyer-turned-independent counsel wants to place herself in a position that enables others to question her competence. The solution: continue to spend the public's money turning stone after stone until something capable of prosecution can be found.

These incentives suggest that few independent counsels will want to terminate the investigation until all conceivable leads have been exhausted, or until the primary target of the investigation has been indicted. With respect to reputation, results count more than fidelity to the original jurisdictional charge—a conviction for obstructing the investigation of the original allegation is just as salient, for example, as is a conviction for the original allegation itself. Convicting ancillary parties also provides a measure of redemption for an independent counsel. While some independent counsels have successfully resisted

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30. "The targets of such investigations are . . . severely disadvantaged. The statute has led to a situation in which rather than being equal under the law, high level public officials . . . are given fewer rights than the average citizen." Joseph E. diGenova, *The Independent Counsel Act: A Good Time to End a Bad Idea*, 86 GEO. L.J. 2299, 2303 (1998).

31. This point was recognized by the very first independent counsel (then called a special prosecutor) appointed under the Ethics in Government Act. Arthur Christy, appointed to investigate Hamilton Jordan, has written that

[i]t is true, of course that . . . I could have decided in the first week or so that the matter, involving just two toots of cocaine, was so minimal . . . that there was no point in continuing the investigation. However, I then considered the ramifications if I were suddenly to announce . . . that I had decided that there was no point in going further because even if I concluded that Mr. Jordan had taken a couple of toots of cocaine, it was unlikely any jury would convict . . . I did not think that result would be politic after all the hoopla of being appointed the first special prosecutor.

Arthur H. Christy, *Trials and Tribulations of the First Special Prosecutor Under the Ethics in Government Act of 1978*, 86 GEO. L.J. 2287, 2289-90 (1998).

32. Thus, Professor O'Sullivan characterizes Ken Starr's situation as

know[ing] that he will be treated to even more of the same politically motivated fire unless he is able to demonstrate that he looked at every scrap of paper, relevant or not; talked to every conceivable witness, and then some; and in short pursued each and every crackpot avenue that any conspiracy theorist could imaginably posit.

O'Sullivan, *supra* note 12, at 485.

these perverse incentives, they exist in all cases and produce a heightened risk of unequal treatment in all cases.

The lack of a budget constraint and the perverse incentives created by the appointment of an independent counsel both predictably result in charges being investigated much more intrusively and exhaustively than comparable charges against ordinary citizens.<sup>33</sup> This has been true since the very first independent counsel appointment.<sup>34</sup>

The Act now requires that the independent counsel “comply with the written or other established policies of the Department of Justice.”<sup>35</sup> This statutory constraint might be thought sufficient to maintain equal treatment.<sup>36</sup> Neither it nor any other comparable provision can effectively succeed in that objective, however. DOJ policies frequently permit a range of actions, varying in their aggressiveness, intrusiveness, and cost. Even if every action taken by an independent counsel falls within this permissible range, the independent counsel investigation considered in its entirety can still result in considerable over-investigation, because investigators in any investigation necessarily make numerous decisions with respect to tactics, methods, and approach. If all of these individual decisions fall within the upper reaches of permissible prosecutorial discretion in terms of their aggressiveness, intrusiveness, or expense, the cumulative result can be an investigation that, taken as a whole, exceeds any investigation made of comparable allegations not involving high-level wrongdoing.

Ken Starr’s Lewinsky investigation is vulnerable to this sort of objection.<sup>37</sup> Defenders of Starr claim that his investigation proceeded only through well-accepted investigational strategies and tactics. They may well be correct, taking each decision in isolation: whether to subpoena Lewinsky’s mother, whether to repeatedly charge Webb Hubbell, whether to place a wire on Linda Tripp prior to a meeting with Lewinsky, whether to construe Lewinsky’s representation by Frank Carter as not requiring notification to him prior to interrogating Lewinsky, whether to subpoena Secret Service agents to testify about the President’s actions in the Oval Office, whether to subpoena the President’s lawyers to tes-

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33. See, e.g., *id.* at 464 (“I would submit that the statute, and the political dynamic the statute generates, encourage ICs to employ their vast, unchecked powers to impose a harsher and potentially inferior brand of justice upon those subject to IC investigation.”); Cass R. Sunstein, *Bad Incentives and Bad Institutions*, 86 GEO. L.J. 2267, 2282 (1998) (“From the standpoint of the prospective defendant, the Act eliminates some of the principal safeguards of liberty under law—the fact that a prosecutor has a wide agenda, cannot easily focus on any single person, faces a budget constraint, and will not initiate proceedings against everyone who has committed a technical violation of the law.”).

34. See Christy, *supra* note 31, at 2289-90.

35. 28 U.S.C. § 594(f)(1) (1994).

36. This amendment reflects that “Congress became concern[ed] that, in removing the potential for favored treatment of administration officials, the IC statute actually operated to subject public officials to a harsher, or at least a different, brand of justice than the ordinary citizen.” O’Sullivan, *supra* note 12, at 468. Like Professor O’Sullivan, I argue that Congress’s efforts to redress this inequity has not been successful.

37. See, e.g., Gormley, *supra* note 5, at 605-06 (1998) (reviewing a number of Starr’s investigational decisions and concluding they “can certainly be characterized as aggressive”).

tify about conversations with him, and so on.<sup>38</sup> The investigation as a whole, however, created the cumulative effect of a series of individually permissible decisions that became an excessively intrusive, expensive, and disproportionate investigation.

There is but one type of investigation outside the arena of high-level wrongdoing where comparable intensity and intrusiveness can regularly be found. DOJ and FBI efforts to snare known or widely suspected crime figures, such as John Gotti or Jimmy Hoffa, or extremely dangerous and elusive fugitives, such as the Unabomber or Eric Rudolph, might well be comparable. During such investigations, law enforcement regularly takes actions in the upper ranges of intrusiveness, intensity, and expense.<sup>39</sup> This comparison, though, does nothing to salvage the Act. Why would we endorse an institutional regime that, on that basis of evidence that will often be barely more serious than mere speculation, treats high government officials to investigations so intense that their only analogues are probes of mob leaders and members of the Ten Most Wanted List?

The Act, then, produces an inequality of treatment. The typical independent counsel investigation is a low-culpability and high-intensity affair. One might call the result a lack of proportionality, or a tendency to over-investigate charges brought under the Act.

This objection may be likened to the charge of selective prosecution, or the claim that a particular defendant has been singled out while others either similarly situated or perhaps engaging in even more serious law violations have not been prosecuted. Generally speaking, however, freedom from selective prosecution is not something that rises to the level of a judicially enforceable norm. A driver speeding fifteen miles per hour over the limit will not be exonerated simply by claiming that at the time he was pulled over, another nearby car was speeding thirty miles per hour over the limit but was not apprehended. Likewise, a burglar will not be heard to complain that policemen tracked him down while ignoring the investigation of more serious burglaries. Charges of over-

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38. It may be that in a procedural sense an independent counsel investigation can never replicate implementation of DOJ policies, because an independent counsel will necessarily lack the internal checks and balances within a hierarchy in which higher ranking officials who are not already heavily invested in a line prosecutor's zeal for a particular case have to approve certain prosecutorial decisions. See, e.g., Symposium, *supra* note 19, at 1546 (remarks of Robert B. Fiske, Jr.) ("[T]he whole purpose [of the system of review procedures in DOJ] is so that there can be a uniform, cohesive system of law enforcement throughout the United States . . . to make sure that some Assistant or some U.S. Attorney isn't going off half-cocked in a way that would be detrimental to law enforcement in general. There are no such checks and balances in the case of the independent counsel . . ."). *But see id.* at 1547 (remarks of Larry D. Thompson) ("[Y]ou do not really have, from a practical standpoint, very much supervision today [of DOJ prosecutors]; and I don't think . . . there is a real difference between the authority that an Independent Counsel exercises and the authority that a regular criminal prosecutor exercises in terms of supervision.").

39. White collar criminal investigations can be highly intrusive as well. See diGenova, *supra* note 30, at 2303. Prosecutors seldom start such highly intrusive investigations until they are very confident that a crime has been committed, and are seeking corroborating evidence admissible in court. Their investigations are thus dissimilar to the low-culpability/high-intensity investigations that typify independent counsel probes.

investigation likewise might not be a defense against an eventual prosecution or conviction.

The major reason that these norms do not succeed, however, is that in the context in which they are raised *ex post*, the only remedy typically worth discussing is dismissal of the charges. So long as the government has not entrapped the individual, and so long as the offense being charged rests on an adequate factual basis, the interest in detecting and punishing wrongdoing outweighs whatever preferences we might have that such singling out or disproportionate treatment not occur.

A second reason that claims of disproportionality are usually denied has to do with the complicated determination of what the appropriate level of investigation was in the first place. A number of variables are relevant to such a determination. For instance, the decision of U.S. Attorneys regarding whether to prosecute “depend[s] on a variety of factors, including the availability of non-criminal alternatives to prosecution, the federal interests served by prosecution, the deterrent effect of the prosecution, the nature and seriousness of the offense, and the subject’s culpability and past record.”<sup>40</sup> If anything, decisions regarding investigatorial strategies and tactics are subject to even more variables, including the investigator’s appraisal of the efficacy and timing of various possible actions. It would be terribly difficult for a court to second-guess the prosecutors’ assessment of these variables or the overall judgment required to weigh one against another.<sup>41</sup> Thus, a second argument explaining reluctance to accept charges of selective prosecution or disproportionality rests on the necessarily intrusive nature of judicial review of such issues, without much assurance that the judge’s judgment will be superior to the original decisionmaker’s.

An unwillingness to interfere with decisions made within an ongoing law enforcement structure on the basis of a particular norm does not, however, demonstrate the insignificance of the norm itself. The norm is still a goal to which our criminal justice system aspires. Under-enforced norms are especially cogent for the *ex ante* question of institutional design, in contrast to the *ex post* question of whether to quash a particular indictment. If we come to believe that an institutional system includes a heightened tendency to violate such norms compared to alternative systems, such a conclusion can and should legitimately be weighed heavily in the *ex ante* decision whether to prefer one system to another.

The tendency to over-investigate allegations of high-level wrongdoing can rightly be criticized as unfair to targets and collateral actors caught up in an intrusive and expensive independent counsel probe. Quite independently of its unfairness to individuals, over-investigation also provides a basis for the allega-

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40. S. REP. NO. 97-496, at 14 (1982), *reprinted in* 1982 U.S.C.C.A.N. 3537, 3550.

41. In his dissent in *Morrison v. Olson*, Justice Scalia focused on the prosecutor’s need to weigh competing considerations in a separation of powers context: “The balancing of various legal, practical, and political considerations,” he wrote, “is the very essence of prosecutorial discretion. To take this away is to remove the core of the prosecutorial function, and not merely ‘some’ Presidential control.” 487 U.S. 654, 708 (1988) (Scalia, J., dissenting).

tion that independent counsel investigations are politicized, because the impression that an independent counsel is being relentless and overbearing in his pursuit of a target can easily be characterized as a politically motivated drive to bring down a high political official. While that characterization may be false in a given case, the excessiveness of the investigation to the norm of proportionality naturally invites curiosity as to its cause. Defenders of the President or other target of the investigation have ample incentive to link the excessiveness to politics, thereby delegitimizing the investigation. The charge, once alleged, is hard to disprove.

Over-investigation, then, contributes further to the politicization of a legal regime that was ostensibly established to decrease the role of politics in the law. The highly visible appointment process and the hair-trigger for appointment built into the Act also ensure that the system will generate significant political consequences.

The immediate reason that the Act has notable political consequences is, of course, that accusations of corruption are politically potent weapons, as they would be with or without the Act in place. In other words, there is always an incentive for the opposition party to conduct ongoing “oppo” on executive branch officials. Congress itself has multiple resources of its own to investigate charges of corruption or fraud: oversight hearings, appropriations hearings, staff level investigations, demands for documents, General Accounting Office audits and inquiries, and reports from Inspectors General in each of the cabinet departments. As long as scandals have political consequences, political incentives will exist to publicize or produce scandals.

The Act exacerbates already-present tendencies toward scandal-mongering in four ways. First, the Act creates a special mechanism that deals only with criminal accusations. Criminal violations are far more serious than administrative wrongdoing or simple waste or incompetence. Criminal investigations are also expected to be above politics. Demanding a criminal inquiry therefore has a certain credibility that cannot automatically be dismissed as a partisan political attack. Whether the accusations actually were motivated by politics, the charges themselves raise the severity of the allegations to a higher level.<sup>42</sup>

Second, the Act targets individuals close to the President, and therefore carries its potentially damaging consequences closer to the President. This also increases the aura of seriousness surrounding the appointment of an independent counsel.

Third, the triggering structure of the Act creates a discrete event—the appointment of an independent counsel—that can be publicly touted as validating the seriousness of the accusations well before sufficient information about

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42. Michael R. Bromwich, Inspector General at the Justice Department, thus reflects a widely shared view when he writes that “[o]ne sure sign that allegations of misconduct have reached critical mass is when the preliminary and vague call for an investigation becomes a demand for the appointment of an independent counsel . . . . In the eyes of many, the only serious investigation involving public corruption or misconduct by high-ranking officials is an independent counsel investigation . . . .” *Running Special Investigations: The Inspector General Model*, 86 GEO. L.J. 2027, 2027 (1998).

whether the accusations are actually well founded has been gathered. Having an independent counsel appointed carries an immediate taint, even if the charges ultimately prove not to be meritorious. It is this aspect of the Act that led former Secretary of Labor Raymond Donovan to ask after he had been cleared of all charges, "which office do I go to to get my reputation back?"<sup>43</sup>

Finally, the hair-trigger appointment provision of the Act means that making allegations is enticing. In the past, the Act has been successfully invoked to investigate whether then-Secretary of Housing and Urban Development Henry Cisneros lied about how much money he was paying his mistress,<sup>44</sup> whether Hamilton Jordan had engaged in a single incident of cocaine use,<sup>45</sup> whether Assistant Attorney General Theodore Olson had lied to Congress in the course of an executive privilege dispute with Congress,<sup>46</sup> and whether government officials searched then-Governor Clinton's passport records.<sup>47</sup> An independent counsel has also been appointed to investigate a "he said/he said" dispute involving Secretary of Interior Bruce Babbitt because the Act prohibits the Attorney General from relying upon credibility determinations unless she has clear and convincing evidence for them.<sup>48</sup> A responsible prosecutor would have brought none of these charges forward, but the Act compels a high-intensity investigation.

The Act has produced thorough investigations of high-level wrongdoing. Beyond this single statutory goal, however, the overall assessment of the Act is considerably less positive. As succinctly stated by Senator Orrin Hatch elsewhere in this volume, "[t]he goal of the statute was to improve public trust in government by ensuring fair and impartial criminal proceedings when an administration investigates its own senior officials."<sup>49</sup> Against that yardstick, one has to conclude that the Act fails in both its immediate objective—it investigates public officials relentlessly, but not fairly or impartially—and in its ultimate purpose. By producing politicized investigations and providing a power-

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43. Selwyn Raab, *Donovan Cleared of Fraud Charges by Jury in Bronx*, N.Y. TIMES, May 26, 1987, at B2.

44. For an analysis of the dubiety of the charges made against Henry Cisneros, see Tamara Jones, *Henry and Linda*, WASH. POST SUNDAY MAG., Feb. 22, 1998, at 1. The charges against former Secretary Cisneros are still pending.

45. For an analysis of the dubiety of the charges made against Hamilton Jordan, see Christy, *supra* note 31, at 2289-90.

46. For an analysis of the dubiety of the charges made against Ted Olson, see EASTLAND, *supra* note 9, at 132-33.

47. For an analysis of the dubiety of the charges made against several officials in the Bush White House and State Department, see JOSEPH E. DIGENOVA, FINAL REPORT OF THE INDEPENDENT COUNSEL *IN RE* JANET G. MULLINS (1995). When he issued his report, diGenova issued an apology to Bush Administration officials on behalf of the American people for putting them through the ordeal of an independent counsel investigation. See Jim Drinkard, *Prosecutor Apologizes to Bush Officials for Inquiry*, AUSTIN AM.-STATESMAN, Dec. 1, 1995, at A7.

48. For an analysis of the dubiety of the charge made against Bruce Babbitt, see Robert Worth, *How The New York Times, the Washington Post and the Independent Counsel Law Screwed Bruce Babbitt*, WASH. MONTHLY, Apr. 1998, at 14. The charges against Secretary Babbitt are still pending.

49. Orrin G. Hatch, *The Independent Counsel Statute and Questions About Its Future*, 62 LAW & CONTEMP. PROBS. 145, 146 (Winter 1999).

ful weapon for scandal-mongering, the Act undermines the sense that law can function free from the daily exigencies of politics, and it feeds an unhealthy emphasis on scandal that undermines public trust in government.<sup>50</sup>

## V

### ALTERNATIVES

These negative consequences of the current Act can be traced directly to the Act's mandatory nature. That feature necessitates the hair-trigger referral mechanism, handing off a case to an external investigator that often lacks prosecutorial merit, but which ends up being relentlessly pursued anyway because of the perverse incentives created by the conditions within which the independent counsel operates. Political pressures build around the statutory flash point of the ninetieth day referral decision,<sup>51</sup> which acquires the power to taint an individual or the entire administration much in excess of what the meager evidentiary basis for the referral can honestly support. The political stakes of the investigation following the referral then build pressure around the investigation itself, thus risking the politicization of the entire investigatory process, and in any event subjecting individuals to disproportionately intrusive investigations.

Many of these perverse dynamics and attendant negative consequences would be eliminated if we abandoned the mandatory external system and returned to a version of the internal handling of high-level wrongdoing combined with discretionary referrals as a back-up system. The Attorney General would no longer make such a volatile decision at an arbitrary but widely anticipated time. It would also avoid sending the message that DOJ investigators are inevitably corruptible when the target is a high government official. And it would not refer weak cases to independent counsels who then feel compelled to pursue them doggedly for fear of being branded incompetent.

Returning to a discretionary appointment power acknowledges the impossibility of crafting plausible language to control a mandatory trigger. The real question that needs to be asked in a case of public corruption is whether, *on the particular facts and circumstances of that case*, we have sufficient confidence in the ability of DOJ to undertake a thorough investigation. The problem is that

there can be no definitive answer to this question . . . . Depending on the circumstances—who committed the alleged offense, the nature of the offense, the credibility of the Attorney General, the confidence of Congress in the Justice Department—

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50. "The worst possible outcome [to a cascade of scandal stories of the kind produced by the Act] is a general, falsely held view that government officials are corrupt or engaged in criminal activity, and that effective improvements are improbable or impossible, so that government is less able to do anything at all." Sunstein, *supra* note 33, at 2270. To the indictments listed in the text, Professor Sunstein adds the observation that the attention to scandals that the Act aids and abets detracts from the government and the public deliberating on public policy matters that should be the primary concern of government. *See id.*

51. *See* 28 U.S.C. § 591(d)(2) (1994).

there may be more or less of a perceived need for a special counsel to take over. It has proved wildly unwise for Congress to try to anticipate those situations . . . .<sup>52</sup>

We will be better off if we return these decisions to the sound judgment of the Attorney General and the President, and then hold them accountable for their decisions.

There is one thing, however, that returning to a discretionary system will not accomplish. It will not relieve the political pressures for an external referral that arise whenever accusations of high-level wrongdoing have been made. Nor should the goal of any institutional approach to this problem be the elimination of such pressures. The demand that government officials be held accountable for their actions is always a legitimate one in a constitutional democracy. Even if the appropriate response in a particular case is to keep the investigation internal, these political pressures create incentives for the government investigators to exercise care and caution in their work, in anticipation of being held accountable for the results.

Having conceded the present inevitability that probes of high-level wrongdoing will be politically charged and that the bona fides of DOJ will be doubted, it may be that the degree of skepticism toward the honesty and integrity of government officials in fact remains so high that internal investigations by themselves simply cannot produce a satisfactory degree of public confidence. Historically, of course, it was precisely this negative judgment that produced the Ethics in Government Act's mandatory referral mechanism as an alternative.

Critics of the Act thus confront a nasty dilemma. On the one hand, the Act produces substantial negative consequences for both law enforcement and for our political life that would be significantly mitigated by the return to a discretionary system. On the other hand, the discretionary system may lack the public credibility necessary to make it an adequate response to high-level wrongdoing, while the mandatory Act system has proven itself capable of ensuring that high-level wrongdoing is being adequately investigated.

There are three possible responses to this dilemma. Some may weigh the pluses and minuses of the mandatory system and conclude that the benefits of the system outweigh its negative effects and excesses, especially if the Act is modified in some significant ways to mitigate those effects.<sup>53</sup> Others may look at those same pluses and minuses and draw the opposite conclusion, thinking

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52. Kavanaugh, *supra* note 20, at 2153. Kavanaugh points out that any mandatory trigger risks being both over-inclusive—sending cases to an independent counsel that can be handled well by DOJ (the aspect of the problem emphasized here)—and under-inclusive—not sending cases to an independent counsel, even though public confidence concerns would argue for doing so, simply because the exact legal language of the trigger has not been met. He gives the campaign finance investigation as an example of the latter problem. *See id.*; *see also* Harriger, *supra* note 28, at 2104 (noting the same problem of over- and under-inclusiveness).

53. Senator Orrin Hatch's contribution to this volume discusses the major reform proposals. *See* Hatch, *supra* note 49, at 152-60.

that the benefits of the statute no longer justify the negative effects and excesses.<sup>54</sup>

Forced to make one of these two choices, my own judgment would favor permitting the Act to lapse. In my view, the officials within DOJ are honest and conscientious enough that they can discharge investigatorial and prosecutorial responsibilities for almost every case of high-level wrongdoing currently covered by the mandatory provisions of the Act. Where these qualities are doubted in a specific instance, political pressures and the good judgment of the administration should result in occasional use of a discretionary independent counsel.<sup>55</sup> And, of course, for wrongdoing that directly implicates the President, the constitutional process of impeachment remains available.

At this writing, the excesses of recent independent counsels have fortified the resolve of those who desire the Act to lapse, and so it may well be that the Act will lapse in June 1999. It is possible, however, that a new accusation of wrongdoing will subsequently test the resolve of Congress in that decision. The same combination of skepticism and political incentives to exploit that skepticism that stimulate regular calls for independent counsels under the existing regime will come into play when the next case arises that would have been covered by the Act but for its lapse—this time producing calls for the reenactment of the Act.

Such a dynamic produced the current version of the Act. Its predecessor had lapsed in the last days of the 102d Congress. Controversy over the Clintons' involvement in the Whitewater land deal was not resolved by Attorney General Reno's appointment of a discretionary independent counsel, Robert Fiske. Eventually, Congress reenacted the Act and the President signed it. Attorney General Reno's referral of Whitewater to the newly reconstituted Special Division, with a recommendation that Robert Fiske be appointed under that Act's provisions, resulted in the Special Division dismissing Fiske and appointing Ken Starr in his place.

Should such a scenario repeat, Congress would do well to consider a third response to the independent counsel dilemma. Instead of returning to the

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54. Such a conclusion might be buttressed by the relatively poor rate of return on the 20 independent counsels that have been appointed so far: Expenditures have totaled over \$150 million and no independent counsel to date has returned a guilty verdict against any principal target, although a number have convicted or gained plea bargains from collateral figures.

55. The Attorney General has statutory authority to appoint special counsels when the "public interest" requires. 28 U.S.C. §§ 515, 543 (1994). The current Justice Department regulations governing the creation of a discretionary independent counsel, 28 C.F.R. §§ 600.1-600.5 (1998), including its removal protections, also should remain on the books to govern such situations. Alternatively, Congress could codify provisions to govern any appointed independent counsel, but leave the trigger mechanism entirely discretionary in either the Attorney General or the President. *See, e.g.,* Kavanaugh, *supra* note 20. Kavanaugh's principal recommendation is to delete the mandatory appointment provisions of the existing Act entirely, replacing them with a statutory authorization for presidential appointment, with advice and consent of the Senate, "when the public interest requires." *Id.* at 2146. That core proposal thus mirrors the central argument of this article, and his proposed statute constitutes a plausible alternative to the proposal made here, although his statute does not incorporate an advisory board structure.

mandatory referral alternative with its built-in deficiencies, it ought to consider emendations to the discretionary referral system that would go far toward eliminating whatever “public confidence deficit” the system suffers. The kind of emendation I have in mind would not emphasize the independence of the independent counsel, as the current system does. Rather, it would increase the accountability of the discretionary system.

The existing system could be made more accountable if Congress created a small advisory board for the Attorney General, perhaps three in number, with whom she would consult with respect to the handling of allegations of high-level wrongdoing.<sup>56</sup> These three private citizens, chosen by the President, perhaps with Senate confirmation, ought to be people with prosecutorial experience and a high reputation for integrity. They would be given a status within the Justice Department authorizing them to be privy to all prosecutorial and grand jury information, subject to standard departmental and statutory requirements of confidentiality. To be credible, at least two of these citizens should be recognized as being independent of any political affiliation to the President or the President’s party.

The Attorney General would be responsible for keeping her advisory board periodically informed with respect to investigations of high-level wrongdoing. She would receive whatever advice the board thought appropriate to give her. All decisions, however, would remain hers alone. In essence, she would be accountable to the advisory board, in the basic sense of having to provide them with an account of her decisions and her reasons, as it would be incumbent upon her to explain and justify to them investigatorial decisions as they were made, including but not limited to the decision whether to refer a matter to an external independent counsel.

So long as her decisions fell within an acceptable range of discretionary judgment, the advisory board should remain satisfied with the conduct of any investigation. The board would, however, be authorized by statute to make a report to the Judiciary Committees of the House and the Senate in the event a majority of them concluded, after thorough discussion with the Attorney General, that some significant investigatory decision fell outside the zone of what any reasonable prosecutor would decide to do in similar circumstances.<sup>57</sup> That report could then become the focal point for political pressure to pursue a dif-

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56. The advisory board’s reach might be limited so that it did not extend as broadly as the definition of persons covered under the current Act. Under that too-broad definition, the Act seeks to “guard against ‘appearance’ problems in lower profile cases where no such problems truly exist.” O’Sullivan, *supra* note 12, at 464. The Attorney General should be able to seek out the advisory board’s advice on any investigation involving executive branch officials, however—and the best course may well be simply to leave the Attorney General’s use of the board completely to her discretion (thus becoming another discretionary decision for which she may be held accountable).

57. The advisory board, in other words, is to defer to the reasonable professional judgments of the Attorney General, and is not to substitute its own judgment for hers.

ferent investigatorial course, including the appointment of an external investigator.<sup>58</sup>

This approach has distinct advantages over the current independent counsel system. To the extent an additional accountability mechanism was thought necessary to ensure public confidence, this approach achieves that objective. Experience has shown that cases of high-level wrongdoing are too fraught with discretionary judgments to remove discretion and too fraught with political consequences to permit true independence.

The better way to handle the hydraulic pressures of politics is a variation on the system of separated powers that was the genius of the Founders' constitutionalism. The advisory board system incorporates the critical feature of checks and balances, or accountability, that ensures an actor cannot function unilaterally, but must account to another who does not share the same set of incentives or constituents.<sup>59</sup>

The advisory board system would go a considerable distance in curing the problem of asymmetrical information that lies at the heart of any concern that the pre-1978 system is insufficiently accountable. Because decisions within an investigation are so numerous and discretionary, and because the accumulation of relevant facts can be so complicated, time-consuming, and consigned to secrecy in order to protect innocents, it is difficult, if not impossible, for the public on its own to monitor the ongoing performance of such investigations. *Ex post* evaluations based on whether the investigation returned an indictment are inadequate substitutes for ongoing monitoring. The advisory board can operate as the public's agent in performing this monitoring function. The board's acquiescence signals that the investigation is proceeding within acceptable limits; its complaint can be evidence that the investigation needs the greater attention of the public and other political actors.

## VI

### CONCLUSION

The existing independent counsel statute deals with the problems of high-level wrongdoing and lack of confidence in internal investigations by placing

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58. Careful consideration needs to be given to the appropriate restrictions to be placed on what the advisory board could disclose. For instance, the contents of such a report would have to be controlled to prevent disclosure of secret grand jury information. See FED. R. CRIM. P. 6(e). In addition, tactics, methods, and sources of ongoing criminal investigations ought to be protected. These and perhaps other appropriate restrictions would not detract from the main purpose of the report, which is not to permit a public airing of the Attorney General's specific decisions, but rather to alert Congress, other officials, and the public that they need to pay particular attention to a specific investigation. These other actors would then exert political pressure on the Attorney General to account to them for her presumptively aberrant action, or else to change course.

59. Independent of the benefits of the advisory board system, returning the appointment power to the executive branch would tend to mute political criticisms of independent counsels that currently emanate from the Administration. It is simply much harder to castigate attorneys that have been selected and appointed by the President or the Attorney General than those who are appointed by the Special Division. See Kavanaugh, *supra* note 20, at 2149-50, for a forceful articulation of this point.

the entire investigation in independent hands. Notwithstanding its manifold deficiencies, the Act does enjoy the public's confidence that high-level wrongdoing will be adequately investigated. A potential public confidence deficit thus constitutes the major objection to simply jettisoning the Act entirely, an approach that would otherwise mitigate many of the Act's deficiencies.

In my judgment, reinstating the pre-1978 combination of internal investigations supplemented with discretionary external referrals would gain the public confidence sufficient to overcome this possible deficit. Abolishing the Act entirely would thus be the best solution to reforming the Act. Should the public confidence deficit not be satisfactorily cured by that step alone, however, the advisory board proposal would address it not through the flawed approach of mandatory referral to an independent counsel, but by making the existing government investigators accountable for the exercise of their sound discretion to an independent panel. While less satisfactory than simply eliminating the Act, such a system would constitute a major improvement over the current regime.