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Thomas W. Merrill
Columbia Law School, tmerri@law.columbia.edu

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BEYOND THE INDEPENDENT COUNSEL: EVALUATING THE OPTIONS

THOMAS W. MERRILL

The Independent Counsel Act¹ expires on June 30, 1999.² Should it be extended? Extended with modifications? Radically reformed? Or should it be allowed to sunset with nothing put in its place? To answer these questions, we need to address some more fundamental questions: (1) Do we truly need an independent office to investigate alleged wrongdoing by high-ranking officers of the executive branch? (2) If so, what are the options for the organizational structure of such an office? (3) By what criteria should the different institutional options be evaluated? (4) Under these criteria, which option represents the best, or perhaps more realistically, the least-worst choice?

The great danger is that the fate of the independent counsel law will be determined not by grappling with these fundamental questions, but out of a reaction, or more accurately over-reaction, to recent controversies involving the independent counsel. The history of the Independent Counsel Act, which has been revised at roughly five-year intervals since it was first adopted in 1978,³ has consistently been one of tacking back and forth in response to the most recent episodes involving investigation of executive branch officials.⁴

The original Act of 1978, of course, was passed in response to Watergate,

¹ John Paul Stevens Professor of Law, Northwestern University. I would like to thank Akhil Amar, Steve Calabresi, Michael Dreeben, and Michael Rappaport for their assistance.

1. 28 U.S.C. §§591-599 (1994 & Supp. 1996).

2. See 28 U.S.C. § 599 (1994 & Supp. 1996). The Act continues in effect after June 30 "with respect to then pending matters before an independent counsel that in the judgment of such counsel require such continuation until that independent counsel determines such matters have been completed." *Id.* Thus, the investigation of independent counsel Kenneth Starr into Watergate and related matters may well continue after the expiration date.

3. The Independent Counsel Act lapsed in 1992 in the face of opposition from the Bush Administration and Senate Republicans. The in-coming Clinton administration, however, strongly supported the idea of a statutory independent counsel, and Congress obliged in 1994 by renewing the Act for an additional five years.

4. See Katy J. Harriger, *The History of the Independent Counsel Provisions: How the Past Informs the Current Debate*, 49 MERCER L. REV. 489 (1998). For earlier historical accounts, see KATY J. HARRIGER, *INDEPENDENT JUSTICE: THE FEDERAL SPECIAL PROSECUTOR IN AMERICAN POLITICS* (1992); TERRY EASTLAND, *ETHICS, POLITICS, AND THE INDEPENDENT COUNSEL: EXECUTIVE POWER, EXECUTIVE VICE 1789-1989* (1989).

and especially the famous "Saturday night massacre" that resulted in the firing of special prosecutor Archibald Cox. The basic features of the Act—appointment of the independent counsel by a special Article III judicial panel and the restriction on any removal of the counsel by the Attorney General except for "good cause"—were designed to assure that never again would an independent prosecutor be subject to executive branch interference analogous to President Nixon's firing of Cox.

When the Act was amended and renewed in 1983, the most recent episodes seemed trivial by comparison to Watergate: Hamilton Jordan, a White House aide to President Carter, and Tim Craft, a Carter campaign official, had been targeted for investigation by independent counsels for alleged illegal drug use. Accordingly, the theme of the 1983 amendments was modest retrenchment in the Act in order to avoid the "unfairness" of subjecting executive officials to investigations over relatively minor offenses.⁵

By the time the 1987 amendments rolled around, the pendulum had swung again in the opposite direction. Now the burning issue of the day was the Iran-Contra scandal. Accordingly, the theme of the 1987 amendments was the need to expand the authority of the independent counsels and to further restrict the power of the Attorney General. Thus, independent counsels were given new authority to investigate crimes arising out of the behavior of the target during an investigation, such as perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses.⁶ In addition, independent counsels were given the authority to recommend that the Attorney General request an expansion of their original jurisdiction to include newly discovered unrelated matters, and required the Attorney General to give "great weight" to such recommendations.⁷

Today, independent counsel Kenneth Starr's exercise of the powers conferred in the 1987 amendments to investigate abuses committed by a popular President has, predictably, given rise to a chorus of complaints about overreaching by independent counsels. It does not take a great visionary to foretell that the debates over the renewal of the statute in 1999 will be dominated by the perceived excesses of the Starr investigation into Whitewater and the Monica Lewinsky scandals.⁸ Thus, we will hear repeatedly about the need to confine the independent counsel to investigating alleged crimes committed during an official's tenure in federal office (read: no more Whitewater investi-

5. See Harriger, *supra* note 4, at 508.

6. 28 U.S.C. § 593(b)(3) (1994).

7. *Id.* § 593(c)(2).

8. For proposed reforms inspired by the Starr investigation and additional citations to the literature, see Julian A. Cook, III, *Mend It Or End It? What To Do With The Independent Counsel Statute*, 22 HARV. J.L. & PUB. POL'Y 279 (1998); Ken Gormley, *An Original Model of the Independent Counsel Statute*, 97 MICH. L. REV. 601 (1998).

gations); about the need to narrowly define the independent counsel's jurisdiction and place limits on the expansion of that jurisdiction (read: no more Monica Lewinsky investigations); about the need to require that independent counsels devote themselves to the office full time (read: no more Ken Starrs who continue to practice law while serving as independent counsel); and about the need to place limits on the funding for independent counsels (read: no more \$40 million investigations of popular Presidents). All this is completely myopic, and simply adds another cycle of legislative reaction to what has gone before.

It is perhaps only natural that legislators, like generals, should always be preparing to fight the last war. But it is a tendency that should be strongly resisted, especially in considering a matter that goes to the heart of our constitutional structure of government. It will be no great tragedy if the Starr investigation leads to a repeal of the Independent Counsel Act and a return to affairs as they existed before Watergate. That, in the larger scheme of things, would be a relatively benign (and probably temporary) outcome. The greater loss would be if the near-universal disillusionment with the Act that now prevails does not become the occasion for a fundamental reconsideration of the dilemmas inherent in investigations of high ranking executive officials, and a sustained effort to discover a sounder, more stable balance of competing considerations. It is to that end that these remarks are dedicated.

The paper is organized as follows. Part I considers whether we need an independent investigator for alleged executive branch wrongdoing, and concludes that such an investigator is necessary in two circumstances—when allegations of misconduct are directed at the President or the Attorney General—and may be desirable in other circumstances where the Justice Department's impartiality may reasonably be questioned, depending on the costs of the institution created to undertake such investigations. Part II summarizes five institutional options for conducting such independent investigations. Part III sets forth three structural variables that should be used in assessing these institutional options: independence versus accountability; transience versus permanence; and compatibility with traditional constitutional understandings. Part IV then reviews the institutional options against these structural variables. I conclude that the independent counsel is almost certainly the worst of the options. The best (or least worst) option is more debatable, but I argue that independent investigations should be given over to an office of career prosecutors within the Justice Department headed by an officer who has been nominated by the President and confirmed by the Senate, but who enjoys greater independence from the President and the Attorney General than ordinary political appointees.

I. DO WE NEED AN INDEPENDENT INVESTIGATOR?

The first fundamental question to ask is: Do we need an office that is inde-

pendent of the President and the Attorney General to investigate allegations of executive branch wrongdoing? For most of our Nation's history, the answer to this question was "no." After twenty years of independent counsel investigations (which number now some twenty in total), the answer is more likely to seem a self-evident "yes." To truly grapple with this question, we need to identify the purposes of having such an independent investigator. Three different rationales for having an independent office to investigate high-level executive officials have been advanced in the post-Watergate era: to gather the information necessary to consider impeachment of a President; to undertake a good faith investigation of high-level executive officials in circumstances where the Justice Department has a conflict of interest; and to preserve public confidence in investigations of executive officials where the Justice Department suffers from the appearance of a conflict of interest. I will consider each in turn.

A. Presidential Impeachment

The first reason for having an independent investigator is to lay the groundwork for possible impeachment of the President. This rationale has been at least implicit in the three most important episodes involving investigations of the executive in the last twenty-five years: the investigations by independent prosecutors Cox and Leon Jaworski into the Watergate scandal, which led to President Richard Nixon's resignation to avoid almost certain impeachment by the House; the investigation by Lawrence Walsh into the Iran-Contra scandal, which Walsh thought might have led to President Ronald Reagan's impeachment if all the facts had come out sooner;⁹ and the investigation by Ken Starr into Clinton's alleged perjury and obstruction of justice in the Monica Lewinsky affair, which produced an impeachment by the House but acquittal by the Senate. Three impeachments or near-impeachments of Presidents in the last twenty-five years suggest that presidential impeachment is an issue of considerable importance and, in recent years at least, of some regularity.

From a structural constitutional perspective, there is a compelling need for an independent investigator to serve as an adjunct to the impeachment process. Impeachment is the constitutionally prescribed method for removing high-ranking executive and judicial officials from office before the natural end of their term. Although Congress has used this power only once to impeach an

9. See LAURENCE E. WALSH, FIREWALL: THE IRAN-CONTRA CONSPIRACY AND COVER-UP 494, 499 (1997) (recounting Walsh's statements to the press after the pardon of former Defense Secretary Casper Weinberger to the effect that Weinberger deserved criminal prosecution because his concealment of contemporaneous notes had "possibly forestalled timely impeachment proceedings against President Reagan").

executive official other than the President,¹⁰ it has impeached two Presidents and has impeached and convicted a number of federal judges, including three since 1986.¹¹

If Congress is to properly perform its constitutionally delegated impeachment function, it needs an agent to uncover the facts surrounding alleged impeachable offenses. It is unrealistic to expect the members of the House, or even the members of the Judiciary Committee, to do all the investigatory work themselves.¹² This is especially true of the preliminary investigatory fieldwork, such as gathering documents and interviewing witnesses. And it is obviously unrealistic to expect the Attorney General—a member of the President's cabinet who serves at the will of the President—to oversee an investigation by Justice Department personnel that may lead to the impeachment of the President. This suggests the need for a staff of investigators who are not members of Congress but also are independent of the President or the Attorney General.

In the Clinton impeachment, the investigatory fieldwork was done for the House by independent counsel Starr. This was pursuant to a provision of the Independent Counsel Act that directs an independent counsel to advise the House of any "substantial and credible information" which "may constitute grounds for impeachment."¹³ Starr construed this provision to authorize his referral to the House not only of a massive amount of evidence he had gathered using the grand jury and other traditional tools of prosecutorial investigation, but also a report summarizing the evidence that had the tone of a brief in support of Clinton's impeachment.

Of course, it is not necessary that the investigator who gathers evidence for impeachment proceedings be an independent counsel, nor is it necessary that the independent investigator make any evaluation or recommendations regarding evidence that has been gathered. The investigative function could be given to a "legislative" officer. For example, the staff of the House Judiciary Committee could be authorized to conduct investigations of high-level executive officers, or the General Accounting Office could be asked to perform this function. Alternatively, as I will argue below, the investigation could be un-

10. Secretary of War William W. Belknap was impeached by the House in 1876 just hours after he submitted his resignation. He was subsequently acquitted by the Senate. See MICHAEL J. GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* 185 n.3 (1996).

11. The three judges convicted and removed from office were Harry Claiborne, a district judge in Nevada in 1986; Alcee Hastings, a district judge in Florida in 1989; and Walter Nixon, a district judge in Mississippi in 1989. *Id.*

12. As Michael Gerhardt explains, there are few political rewards to Members of the House for expending time and effort on impeachment matters, especially those involving low visibility officers like federal district judges. *Id.* at 27-28.

13. 28 U.S.C. §595(c) (1994).

dertaken by a unit of the Justice Department staffed by members of the permanent civil service. Yet regardless how the office is organized, the agent that gathers the information necessary to determine whether to impeach the President must almost certainly be someone who is not immediately accountable to the President or the Attorney General.

I am not suggesting that there is a need for a permanent institution devoted to the investigation of possible impeachable offenses. Although presidential impeachment has loomed large the last twenty-five years, we should all hope this is an aberration. Presidential impeachment is highly distracting and time-consuming, and if over-used would undermine basic principles of democratic government and separation of powers. It should be reserved for only extraordinary circumstances. This strongly counsels against creating a permanent office of independent investigations solely to facilitate impeachment inquiries, since such an office should ordinarily have nothing to do, and if it felt a need to justify its existence, it would become a disruptive influence.¹⁴

In any event, we have one clear case where an independent investigator is at least episodically required: where the House is contemplating impeachment of the President. Are there any others?

B. Conflict of Interest

The second conception of the purpose of an independent investigator frequently advanced in the post-Watergate period is that it permits criminal prosecution of high-level executive officials in circumstances where the Attorney General and other high-ranking officers of the Justice Department have a "conflict of interest."¹⁵ Conflict of interest is a concept that is susceptible to a variety of meanings. I will distinguish here between traditional understandings of conflict of interest and what the Ethics in Government Act calls "political conflict of interest," and will argue that only the former provides a meaningful basis for identifying circumstances when an independent investigator is indispensable. As discussed below, the idea of a political conflict of interest seeks to address a problem better considered under the rubric of an appearance of partiality.

1. Traditional Conflict of Interest

As conventionally used in discussing when judges and prosecutors should recuse themselves from particular proceedings, the concept of conflict of inter-

14. See EASTLAND, *supra* note 4, at 132 (making a similar point about a permanent independent counsel's office).

15. See, e.g., *Morrison v. Olson*, 487 U.S. 654, 677 (1988) (stating matter-of-factly that "Congress of course was concerned when it created the office of independent counsel with the conflicts of interest that could arise in situations when the Executive Branch is called upon to investigate its own high-ranking officers").

est has a reasonably well established core of meaning.¹⁶ Most commonly, government officials are said to have a conflict of interest with respect to a particular matter when they have a financial interest in the outcome, or when a member of their immediate family is involved.¹⁷

This traditional understanding of conflict of interest suggests a narrow but important class of cases beyond presidential impeachment where an independent investigator is required: where an executive branch officer is asked to investigate potential criminal conduct by a superior officer. Such a request creates a conflict of interest analogous to having a financial stake in the matter under investigation, because such an investigating officer may reasonably fear that the superior will retaliate if criminal charges are brought against them. This conflict would be particularly acute in the case of a subordinate officer who is an employee at will not protected by the civil service laws. For example, the Assistant Attorney General in charge of the Criminal Division, who is a political appointee dischargeable at will, should be regarded as having a conflict of interest in investigating the Attorney General, who has the power to dismiss such an Assistant Attorney General and, short of dismissal, otherwise to adversely affect the conditions of his or her employment in many ways.¹⁸

Thus, traditional concepts of conflict of interest suggest a second category of cases in which some type of independent investigator is imperative: where the target of the investigation is an officer of the Justice Department whose office is in the chain of command above the officer charged with undertaking such investigations. Assuming the investigating officer was a U.S. Attorney, this traditional conflict of interest problem would arise if the subject of the investigation was the Attorney General, the Deputy Attorney General, or the Assistant Attorney General in charge of the Criminal Division. If the target was a U.S. Attorney, then the immediate subordinates of the U.S. Attorney would experience a traditional conflict of interest in conducting the investigation.

Except in cases involving the Attorney General, these superior-subordinate conflict of interest problems could presumably be handled by ordinary recusal policy. Every Justice Department employee is subordinate to the Attorney

16. See generally, Beth Nollan, *Public Interest, Private Income: Conflicts and Control Limits on the Outside Income of Government Officials*, 87 NW. U.L. REV. 57 (1992) (discussing various types of financial conflicts of interest).

17. See 28 U.S.C. § 528 (1994) (requiring disqualification of Justice Department prosecutors for personal or financial conflict of interest); see generally CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 453-54 (1986).

18. Justice Department regulations involving disqualification for conflict of interest do not expressly identify these circumstances as grounds for recusal, but the language of the regulations is broad enough to cover the case. The subordinate and superior have "a close and substantial connection of the type normally viewed as likely to induce partiality" and the superior has "a specific and substantial interest that would be directly affected by the outcome of the investigation or prosecution." 28 C.F.R. §§ 45.2(a)(2) & (c)(2) (1998).

General, and so the conflict of interest cannot be avoided where the Attorney General is the target of the investigation. But if the Deputy Attorney General or Assistant Attorney General for the Criminal Division or a U.S. Attorney is the target, we can mandate recusals right down the line until we find a prosecutor who is not conflicted—presumably a civil service prosecutor who is not a direct subordinate of the target. This prosecutor can report to the Attorney General—who as a superior officer to the target does not have a traditional conflict of interest problem—to see the investigation through to a satisfactory conclusion. At a minimum, however, the traditional concept of conflict of interest gives us a second case where an independent investigator will always be required: where the target of the investigation is the Attorney General.

2. Political Conflict of Interest

The current Independent Counsel Act of course sweeps much more broadly. It requires that an independent counsel be appointed to investigate not only the President and the Attorney General, but also the Vice President, all other cabinet officers, top White House staff, the Director and Deputy Director of the CIA, the director of the Internal Revenue Service, top presidential campaign officials, and all important officials of the Justice Department whether inside or outside the chain of command above the investigator.¹⁹ One common justification for requiring an independent investigator in this wider set of circumstances rests on a nontraditional notion of conflict of interest—what the Ethics in Government Act refers to as a “political conflict of interest.”²⁰

The phrase “political conflict of interest” was not further defined by Congress. But the idea appears to be that the Justice Department has a conflict of interest in conducting investigations that could prove to be politically embarrassing to the incumbent administration.²¹ For example, assume the President’s chief of staff is suspected of illegal drug use.²² Investigation by the Justice Department would appear to present no conflict of interest in the tradi-

19. See 28 U.S.C. §591(b) (1994).

20. The Ethics in Government Act of 1978 directs the Attorney General to develop rules and regulations that require disqualification of Justice Department officers and employees when their participation in an investigation or prosecution may result in “a political conflict of interest.” 28 U.S.C. §528 (1994). The Independent Counsel Act, for its part, authorizes the Attorney General to conduct a preliminary investigation and appoint an independent counsel in any case in which he determines that investigation by the Justice Department would present a “political conflict of interest.” 28 U.S.C. §591(c)(1) (1994).

21. Cook, *supra* note 8, at 296.

22. See Arthur H. Christy, *Trials and Tribulation of the First Special Prosecutor Under the Ethics in Government Act of 1978*, 86 GEO. L.J. 2287 (1998) (providing detailed account of investigation of Hamilton Jordan, then President Carter’s chief of staff, who had been accused of using cocaine in a Manhattan discotheque).

tional sense—neither the Attorney General nor any other employee of the Justice Department can be fired or otherwise have their compensation or terms of employment adversely effected by the chief of staff. Nevertheless, the Attorney General and top Justice Department officials may perceive that the President and other party leaders will be displeased if the chief of staff is charged with such a crime, because of the political embarrassment that would result. Therefore, it is argued, the Attorney General and top Justice Department officials—who are part of the political team of the incumbent administration—have a political conflict of interest that may prevent them from conducting such an investigation in good faith.

Whether political conflict of interest is a concept that can be coherently applied to determine when the Justice Department should be disqualified from undertaking an investigation is doubtful. The problem with the concept is that it naively assumes that we can neatly differentiate between politically-motivated prosecutorial decisions and neutral or apolitical prosecutorial decisions.

Historically, there is little support for the notion that decisions to prosecute can be completely divorced from politics. Prosecutors are political animals. Most state prosecutors are elected; federal prosecutors (primarily U.S. Attorneys) are presidential appointees subject to Senate confirmation. A fair number of successful politicians (Thomas E. Dewy of New York and James R. Thompson of Illinois immediately come to mind) have launched their careers as aggressive prosecutors cleaning up graft and corruption associated with the opposition party. Could any one realistically maintain that the decisions to undertake these prosecutions have nothing to do with politics or indeed that the prosecutors did not in some sense have a “political conflict of interest” in pursuing their targets?

In any event, even if there were such a thing as the politically neutral prosecutor, that prosecutor’s investigation of a sitting President or high-ranking executive branch officials could not be conducted in such a way as to remain free of political controversy. The Lawrence Walsh investigation of the Iran-Contra scandal provided a strong foretaste of this. Walsh, a life-long Republican, was attacked by the Reagan White House for engaging in a “partisan” investigation designed to harm the President and tarnish his legacy.²³ The Starr investigation of President Clinton confirms it. I have little doubt that Starr, a former D.C. Circuit judge and Solicitor General, has attempted to conduct an investigation that, by his lights, is as objective, fair, and by-the-book as is humanly possible.²⁴ Yet as soon as the investigation began

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

24. I should disclose here that I served as a Deputy to Starr in 1989-90 when he was Solicitor General.

to heat up, Starr was attacked by the White House and its political and media allies as being a right-wing conspirator, a sex-obsessed Puritan zealot, and so forth. In truth, no human being could have seriously pursued the Whitewater and Lewinsky investigations without being characterized as politically biased by the President and his allies—this was a central pillar of the President's legal defense strategy. If there is a perfectly politically neutral prosecutor out there, he or she will not be perceived as being political neutral by all segments of the public once the political stakes in the investigation become sufficiently high.²⁵

If every prosecutor will have a political bias—or at least can be portrayed in the media as having a political bias—then the idea that the Justice Department must automatically be replaced by an independent investigator when the top officials in the Department have a “political conflict of interest” makes little sense. In any case with high political stakes, every prosecutor will either be “too soft” on the target or “too hard” on the target—or will be vulnerable to being “spun” by the defense or by the allies of the prosecution as being too soft or too hard.²⁶ The Independent Counsel Act proceeds on the assumption that the only significant political bias problem is the “too soft” problem. This was perhaps an understandable assumption to make in the political climate immediately following Watergate. But we know now that there is an equal potential for bias in the opposite direction (real or “spun” by politicians to sympathetic media outlets). The political bias or political conflict of interest problem is universal and symmetrical (either too soft or too hard) and cannot be escaped by appointing independent counsels; indeed, I will argue below that the problem is probably exacerbated by appointing independent counsels.

The unworkability of the idea of political conflict of interest is indirectly recognized in the Justice Department's regulations on prosecutorial disqualification. The Ethics in Government Act, which gave us the independent counsel, also requires that the Department promulgate regulations specifying when prosecutors should be disqualified for “political conflict of interest.”²⁷ The Department's regulations restrict the scope of mandated recusals for political conflict of interest very narrowly. The key term, “political relationship,” is defined to mean “a *close identification* with an elected official, a candidate, . . . a political party, or a campaign organization *arising from service as a principal adviser thereto or a principal official thereof.*”²⁸ In other words, a Justice De-

25. See Donald C. Smaltz, *The Independent Counsel: A View From Inside*, 86 GEO. L.J. 2307, 2352 (noting that “[e]very one of the six independent counsels who instituted criminal proceedings to date found himself pilloried by the media”).

26. See Julie O'Sullivan, *The Independent Counsel Statute: Bad Law, Bad Policy*, 33 AM. CRIM. L. REV. 463, 464 (1996) (“One of the ‘lessons’ of the operation of the IC statute. . . is that in cases of potentially great political import it creates partisan incentives to generate the very ‘appearance’ problems that the statute sought to erase.”).

27. 28 U.S.C. §518 (1994).

28. See 28 CFR §45.2(a) (1994).

partment prosecutor should be recused from investigating a person only if that persons is, say, an elected official with whom the Department official is closely associated and formerly worked as a "principal adviser." The Department's instincts in narrowly restricting the idea of political conflict of interest are sound. Given that political motivation or at least the attribution of political motivation is universal and symmetrical, giving free reign to this concept would create endless possibilities for disqualification motions, together with a host of unsolvable line-drawing conundrums.²⁹

In sum, the conflict of interest justification for independent investigators turns out to be not very powerful. If confined to its traditional domain of financial and personal conflicts and reasonable extrapolations therefrom, it provides a justification for using independent investigators in cases involving the President and the Attorney General. Thus, the traditional understanding of conflict of interest adds one new case (the Attorney General) to our preliminary list based on investigations leading to impeachment (the President). But if extended to include political conflicts of interest, the concept fails to provide a workable basis for identifying when an independent investigator is warranted.

C. Appearance of Conflict

At this point, the advocates for the Independent Counsel Act trot out a third justification—the argument based on the *appearance* of conflict of interest. Indeed, the legislative histories of the renewals of the Independent Counsel Act in 1983, 1987, and 1994 reveal this to be the most frequently cited justification for the statute.³⁰

Despite its popularity, the "appearance" rationale also seems problematic, at least if linked to the concept of conflict of interest. What is meant by appearance of conflict of interest appears to be roughly the same thing as is meant by political conflict of interest—a situation where the Justice Department is perceived as having an institutional incentive to go soft on the target of an investigation because of the potential for political embarrassment to the incumbent administration.³¹ If this is so, then the argument based on the appearance of conflict of interest shares the same basic failing as the argument from

29. This is confirmed by the Eight Circuit's decision in *Starr v. Mandanici*, 152 F.3d 741 (8th Cir. 1998). Mandanici, an attorney proceeding pro se, sought to disqualify Starr from further investigation of Clinton because of the "political conflict of interest" caused by his acceptance of the Deanship at Pepperdine Law School, and the funds provided to the school by Richard Scaife, a wealthy Clinton opponent. The Eight Circuit held that Mandanici lacked standing to seek disqualification, but two judges in a concurring opinion went on to express their deep skepticism about whether the idea of "political conflict of interest" provides a meaningful basis for prosecutorial disqualification. *Id.* at 752-56 (Loken, J. joined by Beam, J., concurring).

30. See O'Sullivan, *supra* note 26, at 469-70.

31. *Id.* at 471-74.

political conflict of interest: the potential for political bias (or attributions of bias) in high-stakes cases is universal and symmetrical. Thus, if we do not wish to mandate disqualification of prosecutors based on a political conflict of interest, we should not mandate disqualification based on an appearance of conflict of interest either.

This does not mean we should not be concerned about the potential for institutional bias when the executive department is asked to investigate itself. From Teapot Dome to the Truman tax scandals to Watergate to the Inslaw case,³² concern about the potential for bias in having the executive branch investigate itself has given rise to some ad hoc arrangement for an independent investigator. The problem is a recurring one, and has been seen as sufficiently serious to call for an institutional response in the form of turning to an independent investigator. But describing this problem in terms of an appearance of conflict of interest is not particularly accurate or helpful. Appearance of conflict implies a discrete and identifiable problem (like financial conflict of interest), where in fact the appearance of bias can come about from an ill-defined mix of circumstances. And appearance of conflict implies that there is an easy fix to the problem, in the form of mandatory recusal of Justice Department investigators, when in fact the solution to the problem entails a careful weighing of the shortcomings of one institution against those of alternative institutions.³³

Rather than discuss this problem in terms of an appearance of conflict of interest, it would be better to speak of it as an appearance of partiality problem. Partiality can come from many different circumstances difficult to specify in advance. Perhaps a close family member of the President is a target of an investigation, as happened with President Carter's brother Billy, or President Clinton's wife Hillary.³⁴ Perhaps the target is a Vice President who is

32. For the use of independent prosecutors in Teapot Dome scandal, the Truman tax scandal, and Watergate, see Harriger, *supra* note 4, at 491-497. The Inslaw case involved allegations of wrongdoing by the Justice Department officials with respect to a contract involving litigation support computer programs. Attorney General William Barr appointed Judge Nicholas Bua to investigate these charges. See Brett M. Kavanaugh, *The President and the Independent Counsel*, 86 GEO. L.J. 2133, 2144 (1998).

33. Mandating automatic recusal in order to avoid appearances of conflict may also do affirmative damage in and of itself, either by deflecting attention from more serious problems and/or by giving rise to strategic behavior. Peter Morgan, in an interesting article, argues that Charles Keating and other savings and loan executives used concerns over "appearances of impropriety" by chief regulator Edwin Gray to deflect attention from real improprieties in the industry that Gray was beginning to uncover. Peter W. Morgan, *The Appearance of Propriety: Ethics Reform and the Blifil Paradoxes*, 44 STAN. L. REV. 593 (1992). Similarly, there have been allegations that a broad independent counsel statute—justified as necessary to avoid appearances of conflicts of interest—has been used by members of Congress to harass the executive branch when it has been controlled by the opposition party.

34. See O'Sullivan, *supra* note 26, at 506 (noting that Attorney General Griffin Bell appointed a special counsel to investigate the "Carter Peanut Warehouse Case").

perceived to be the likely head of the incumbent party's political ticket in the next election. Perhaps the charges involve allegations of misconduct by the Department of Justice itself or some of its key officials. It is far from clear that it is possible to formulate a rule that will identify in advance the circumstances in which an appearance of partiality will be present and sufficiently serious to warrant an independent investigator.

A softer phrase like appearance of partiality may also deflect the impulse to commit the Nirvana fallacy, assuming that identifying a problem with one institution automatically entails the conclusion that some other institution will do better.³⁵ If there were no countervailing considerations, then by all means we should stamp out appearances of partiality. But there clearly are potential countervailing considerations. Thus, the question whether we should modify our political institutions in order to eliminate appearances of partiality should await a fuller accounting of the benefits and costs of such a reform. If it turns out that independent investigators impose large costs on the polity, then I would be inclined to say that the concern with appearance of partiality does not justify perpetuating such an institution. On the other hand, if we can devise an office of independent investigations that performs reasonably well and meshes satisfactorily with existing institutions, then it may make sense to call upon such an institution in situations where the Justice Department's impartiality may reasonably be questioned.

II. INSTITUTIONAL OPTIONS

We have now identified two circumstances in which independent investigators are necessary—to investigate allegations that could lead to presidential impeachment and to investigate allegations of criminal wrongdoing by the Attorney General—as well as a general problem difficult to specify in advance where an independent investigator may be desirable—where there is an appearance of partiality associated with a Justice Department investigation. So we know at a minimum that some kind of independent investigator will be required from time-to-time, and that it may be desirable to make relatively more frequent use of independent investigators.

What are the institutional options for creating such an office? There are, it seems to me, five basic options. Numerous variations on these options are imaginable. But I will confine myself here to the basic options.

A. *Executive Branch Option*

The first option is to follow the path that prevailed up to and through the

35. See Thomas W. Merrill, *Institutional Choice and Political Faith*, 22 J. LAW & SOC. INQ. 959, 965-66 (1997) (reviewing NEIL N. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994)).

Watergate scandal—ad hoc appointment of independent prosecutors by the executive branch.³⁶ Under this option, all investigations of high-level executive officials would initially be conducted by Justice Department line prosecutors. However, once these prosecutors became aware that the investigation might lead to impeachment of the President or implication of the Attorney General, or once they became concerned that their impartiality might be questioned—or once public and/or congressional pressure for an independent prosecutor mounted to a high enough level—an independent prosecutor would be named by the Attorney General to take over the investigation. Presumably, this is the option that will be adopted by default if the Independent Counsel Act is allowed to expire in June.

The executive branch option is highly flexible and could be implemented in a variety of ways. Under current law, the Attorney General has the authority to appoint “special attorneys” when she deems it necessary or appropriate.³⁷ This authority could be exercised on an ad hoc basis, as it has been in the past. Alternatively, the Justice Department could adopt standing regulations that would specify the circumstances in which a special attorney must be named, as well as the process for identifying and hiring such attorneys. In other words, the Justice Department could by regulation adopt its own “independent counsel” law that would attempt to regularize the process by which ordinary Justice Department investigations are displaced in favor of independent investigations. Various intermediate options between ad hoc appointment and a complete code of regulations are possible. Whichever options are chosen, however, they would all be the product of discretionary choices made by the executive branch largely unconstrained by legislation.

B. Legislative Branch Option

The second option would be to rely on the legislative branch to undertake investigations of high level executive officials when an independent investigator is either necessary or desirable. This is in many respects the option that flows most naturally from the language of the Constitution. The Constitution says nothing about criminal prosecutions of incumbent executive officers, but instead provides that they may be impeached by the House, tried by the Senate and, if convicted, removed from office.³⁸ The power of impeachment extends not only to the President and Vice President, but to “all civil officers of the United States,”³⁹ which would appear to include all executive branch officers other than military officers.

Congress could readily conclude that it is “necessary and proper” in im-

36. See Harriger, *supra* note 4, at 13-39.

37. See 28 U.S.C. §§ 515, 543 (1994); see generally Kavanaugh, *supra* note 32, at 2139-40.

38. U.S. CONST. art. I § 2, cl. 5; § 3, cl. 6-7.

39. U.S. CONST. art. II, § 4.

plementing the impeachment power⁴⁰ that an office independent of the executive be established to undertake the initial investigative work to build the case for possible impeachment of the President, Vice President, or any other civil officer. Given the extreme demands on legislative time that any impeachment and trial impose, it is doubtful that Congress would actually start impeaching many executive officials. But disclosure of damaging evidence uncovered by the independent investigator would presumably be sufficient in many cases to trigger a resignation or dismissal of errant officials, in which case they could then be investigated for possible prosecution by ordinary prosecutors.

Again, there would be a variety of ways in which the legislative option could be implemented. Congress could vote to expand the staff of the House Judiciary Committee on an ad hoc basis whenever it became aware of the need to initiate a possible impeachment investigation, or conceivably could permanently expand the committee staff to include field investigators. Alternatively, Congress could adopt legislation directing the General Accounting Office or some other legislative agency to undertake investigations of executive officials under specified circumstances. A third possibility, suggested by the referral provision of the Independent Counsel Act,⁴¹ would be to enact legislation directing executive branch investigators in the Department of Justice or FBI to make referrals of information to the House whenever they uncover information that might warrant impeachment.

C. Independent Counsel Option

The third option is the status quo — the Independent Counsel Act or some variation thereon. If option one is the executive branch model, and option two is the legislative branch model, the independent counsel option is the “fourth branch” of government model. For the reality that has emerged under this statute is that the independent counsel operates with at least as much independence of the constitutional branches of government as the Federal Reserve Board, if not more.

This extreme independence is largely a product of deliberate statutory design. The Independent Counsel Act establishes a low threshold for triggering an independent counsel investigation. Whenever accusations of criminal activity are leveled against a list of high-ranking executive branch officials, and the Attorney General concludes after a brief preliminary investigation that there are “reasonable grounds to believe that further investigation” is warranted, the Attorney General is required to request appointment of an independent counsel.⁴² The selection of the independent counsel is made by a special panel of the D.C. Circuit appointed by the Chief Justice. The special

40. U.S. CONST. art. I, §8, cl. 18.

41. 28 U.S.C. § 595(c) (1994); *see supra* text accompanying note 13.

42. 28 U.S.C. § 592(c) (1994).

panel also defines the independent counsel's jurisdiction and determines when the independent counsel's investigation is over.

Once appointed, the independent counsel functions like a miniature Justice Department. The independent counsel exercises "all investigative and prosecutorial functions and powers of the Department of Justice."⁴³ The independent counsel may hire, fire and fix the compensation of such employees as the counsel deems necessary, including investigators, attorneys, and consultants. The Justice Department picks up the tab for all these expenses without limitation. The independent counsel is directed, "except where not possible," to "comply with the written or other established policies of the Department of Justice respecting enforcement of the criminal laws."⁴⁴ But no provision is made for the enforcement of this directive. In conducting the investigation and, if the independent counsel concludes it is warranted, prosecution of the target of the investigation, the independent counsel functions without any effective supervision by the Attorney General or other high ranking Justice Department officials.

For constitutional reasons, the statute provides that the Attorney General can remove the independent counsel "for good cause, physical or mental disability (if not prohibited by law protecting persons from discrimination on the basis of such disability), or any other condition that substantially impairs the performance of such independent counsel's duties."⁴⁵ But this imposes little or no constraint on independent counsels. The legislative history indicates that "good cause" does not include a determination that the independent counsel is not following Department policy.⁴⁶ In any event, any Attorney General who tried to fire an independent counsel for disregarding Department policies would provoke a fire-storm of controversy, given memories of the "Saturday night massacre" during Watergate.⁴⁷

It has been recently argued that the framers of the original Independent Counsel Act envisioned that the special panel would play a more active role in supervising the day-to-day activities of the independent counsel.⁴⁸ But the special panel has never been inclined to oversee the investigatory and prosecutory decisions of the independent counsel, and the Supreme Court in *Morrison*, in order to preserve the Act from separation of powers objections, emphatically stated that the special panel plays no supervisory role.⁴⁹ As a result, whatever the original drafters may have intended, the independent counsel has

43. *Id.* § 594(a).

44. *Id.* § 594(f).

45. *Id.* § 596(a). Any firing is expressly made subject to judicial review. *Id.* at § 596(a)(3).

46. *See* O'Sullivan, *supra* note 26, at 495.

47. *Id.*

48. *See* Gormley, *supra* note 8, at 678-684.

49. *Morrison v. Olson*, 487 U.S. 654, 681 (1988).

effectively operated as an unsupervised fourth branch of government.

Clearly, it is possible to tinker with the Act in order to reduce the independence of the independent counsel. The Attorney General could be given greater discretion in making referrals to the special panel, the special panel could be given greater powers of oversight over the special counsel, and so forth.⁵⁰ But as long as the essential characteristics of the institution are retained—appointment and termination by the special panel and institutional separation from the Justice Department—the special counsel will continue to function like a fourth branch of government.

D. Civil Service Option

Option four I will call the civil service model.⁵¹ This would entail the creation within the Justice Department of a special office of career prosecutors designated for the investigation and, if appropriate, prosecution of high-level executive branch employees. The prosecutors in this office would be full-time Justice Department employees, perhaps with some minimum number of years of service, all of whom would be members of the protected civil service. The closest existing institutional model would be the Public Integrity Section of the Criminal Division, which investigates charges of corruption leveled against federal judges and other public officials, and exercises some oversight of public corruption investigations by U.S. Attorneys. Like the Public Integrity Section, the proposed office of independent investigations might be charged with investigating a range of public corruption cases, not just cases involving high-level executive branch officials.⁵²

In order to differentiate the civil service option from the executive branch option, it would be necessary to make the head of such an office more independent of the Attorney General than are ordinary political appointees of the Department. There are various ways this might be done. One would be to give the head of the office a status akin to a commissioner of an independent regulatory agency, that is, to make the head a presidential appointee subject to Senate confirmation, but with a fixed-term appointment (say, four years to co-

50. See Gormley, *supra* note 8, for a complete discussion of some of the possible changes that would reign in independent counsels in this fashion.

51. I have previously endorsed this option, see Thomas W. Merrill, *High-Level, "Tenured" Lawyers*, 61 *LAW & CONTEMP. PROBS.* 83 (1998), as has Professor Cass Sunstein. See Cass R. Sunstein, *Bad Incentives and Bad Institutions*, 86 *GEO. L.J.* 2267, 2281 (1998). The original articulation of the idea may be Andrew L. Frey & Kenneth S. Geller, *Better Than Independent Counsels*, *WASH. POST.*, Feb. 14, 1988, at C7.

52. A variant on the civil service option would be to establish the office as an independent agency completely detached from the Justice Department. See Neil Kinkopf, *The Case for a Permanent Independent Counsel*, *WALL ST. J.*, March 30, 1999, at A26. I offer some reasons for preferring to keep the office as an executive branch entity within the Justice Department *infra* at note 96.

incide with a presidential term of office) that could be cut short only for good cause. Another would be to make the head a presidential appointee subject to Senate confirmation, but limit the President to selecting the head from among active career civil service prosecutors with certain minimum years of service. This would mean that the head of the office could be reassigned elsewhere in the Department by the Attorney General, but could not be fired from employment as a government prosecutor except for good cause. If the head were reassigned, the President would then have to appoint another head from within the ranks of the civil service, or allow the ranking deputy to become the head.

Independence could be further maintained by mandating the recusal from participation in prosecutorial decisions of any officer of the Justice Department who would have a traditional conflict of interest in the matter, i.e., any officer who is a subordinate of an individual under investigation. Thus, the Attorney General, the Deputy Attorney General, and possibly the head of the Criminal Division (if the independent investigator ordinarily reports to or consults with the Criminal Division) would be recused by law in investigations involving the President. But in cases in which superior officers of the Justice Department would not be recused because of a traditional conflict of interest (e.g., investigation of a cabinet officer other than the Attorney General), the independent investigator might remain subject to the ordinary channels of review and oversight by higher ranking officers of the Department.

The civil service option would differ from the independent counsel because the office would be a permanent functioning unit of the Justice Department. Thus, it would be subject to all rules, policies, and practices of the Department, much as a U.S. Attorney's office operates. It would have a predetermined annual budget, and would have to determine how best to spend this budget in investigating and prosecuting the various matters assigned to the office for investigation. Core cases that require the use of an independent investigator would by law be assigned to the office (i.e., those implicating the President, the Attorney General, and probably other high ranking Justice Department officials). But other cases that present only a possible appearance of partiality could be assigned either to the independent investigator or to the Criminal Division or a U.S. Attorney on a case-by-case basis, depending on relative work loads and an assessment of the potential for an appearance of partiality if investigation were undertaken by regular Justice Department prosecutors.

E. Inspector General Option

The final option, which has been suggested by Kathleen Clark and Michael Bromwich,⁵³ would be to have inspectors general investigate charges of

53. Kathleen Clark, *Toward More Ethical Government: An Inspector General for the White House*, 49 MERCER L. REV. 553 (1998); Michael R. Bromwich, *Running Special Investigations:*

misconduct by executive officials. This is in many respects the most innovative suggestion. Unlike the four previous options, inspectors general do not engage in investigations for purposes of bringing criminal charges against individual wrongdoers. Instead, they engage in noncriminal investigations of misfeasance within government agencies, provide regular audits of government programs, and make recommendations to agency heads about reforms that might improve agency performance.⁵⁴ If inspectors general uncover specific evidence of individual wrongdoing in the course of their investigations, they either refer the matter to the Justice Department for prosecution, or refer the information to the agency for possible discipline of employees. A prime venue for inspectors general is the Congress, where they make reports twice a year and are often featured in oversight hearings.⁵⁵

The most intriguing aspect of the inspector general option is that it would largely decriminalize the current system for investigating wrongdoing by high level executive officials. The objective of independent investigations of executive branch wrongdoing would be disclosure to Congress and the public, not an indictment. Thus, the inspector general model would rely on public opinion, rather than criminal sanctions, to deter illegal activity by executive branch officials. This would arguably diffuse the extremely partisan atmosphere that has surrounded independent counsel investigations.

Inspectors general enjoy more independence than ordinary political appointees, but less than independent counsels. Inspectors general are presidential appointees subject to Senate confirmation. They may be removed by the President, but only if a statement of reasons for the removal is supplied to Congress.⁵⁶ This has tended to give inspectors general a kind of quasi-tenure, and often they remain in office even if control of the government changes hands. On the other hand, inspectors general are permanent institutions that operate under fixed budgets. Thus, they tend to be selective in the matters they investigate and they resolve matters more expeditiously than independent counsels.⁵⁷

III. CRITERIA FOR EVALUATION

Those are the basic options: the executive branch model, the legislative branch model, the independent counsel model, the civil service model, and the inspector general model. How then should we choose among them?

The ultimate standard or criterion should be how well each option would perform in practice. This in turn is largely a function of how often each option

The Inspector General Model, 86 GEO L.J. 2027 (1998).

54. Clark, *supra* note 53, at 560.

55. *Id.*

56. Bromwich, *supra* note 53, at 2029.

57. *Id.* at 2028, 2039.

would “get it right,” meaning how often it would avoid both false negatives—failing to detect and prosecute serious executive branch misconduct—and false positives—investigating or prosecuting officials who are innocent or whose conduct does not warrant criminal investigation or prosecution.⁵⁸ False negatives are undesirable, insofar as they permit criminal misconduct by high level officials to go unsanctioned, because they undermine the rule of law and public confidence in government. False positives are also undesirable, because they impose unwarranted anxiety and expense on investigated officials, create a disincentive to others to undertake executive branch service, perpetuate an atmosphere of pervasive scandal which also undermines public confidence in government, and generally contribute to the poisoning of the political environment in Washington. The best (or least worse) institutional option should be the one that minimizes the sum of the costs associated with these false negatives and false positives.

We obviously have no data by which to assess the untried options (the legislative branch option, the civil service option, and the inspector general option). With respect to the options that have been tried (the executive branch option before 1978 and the independent counsel option after 1978), the only thing that can be said with much confidence is that the independent counsel option appears to generate a large number of false positives. Of the twenty independent counsel investigations authorized since 1978, a majority (eleven) have resulted in no charges being filed.⁵⁹ In those matters where charges have been filed, a significant number have resulted in acquittals or reversals of convictions on appeal. Thus, the independent counsel option has generated all the costs associated with high levels of false positives. Of course, we have no way of directly knowing how many false negatives are associated with the independent counsel option, or whether this number is lower than it would be under other options.

In the absence of hard information about the propensity of the different options to generate false negatives or false positives, it is necessary to fall back on structural variables that may serve as rough proxies for the propensities of the different options to perform in different ways. I suggest three such variables. Two of these variables entail well-known trade offs or alternatives in organizing any office of independent investigations: independence versus ac-

58. False negatives are often referred to as “Type II error,” and false positives as “Type I error”.

59. Nine publicly disclosed investigations resulted in no indictments. See Donald C. Smaltz, *The Independent Counsel: A View from the Inside*, 86 GEO L.J. 2307, 2323-24 (1998) (table). In addition, two investigations, one terminated in 1989 and the other in 1992, remain sealed. See Cass R. Sunstein, *supra* note 51, at 2283-85 app. Given the small reported cost of these sealed investigations (and the strong tradition of public trials in the United States), presumably these investigations were also terminated without charges being brought, bringing the total of cases without indictments to 11 out of 20.

countability and transience versus permanence. The third variable, how well the office comports with established constitutional traditions, does not affect the performance of the office so much as its perceived legitimacy, which is also an important factor in determining the general standing of the office in the eyes of the public.

A. *Independence Versus Accountability*

The first variable, independence versus accountability, reflects what is probably the most fundamental trade-off in designing an office of independent investigations. Independence here refers primarily to independence from the President and the Attorney General. The independent investigator, almost by definition, must have a degree of independence from these officials. More generally, we can speak of independence from any political body that might wish to influence a decision to prosecute for partisan reasons. As we have seen, it is impossible, certainly in cases with high political stakes, to remove all political considerations from prosecutions. But it is possible to design an office with greater or lesser degrees of insulation from those elected officials who have the greatest interest in the political implications of a prosecution.

Against this desire for independence must be balanced the desirability of assuring that the investigator remains accountable. Accountable here means liable to be called to account, or to answer for, one's responsibilities and conduct in office.⁶⁰ An accountable prosecutor is one who must be made to answer for his or her decisions to the public, either by periodically standing for election or by being subject to oversight and possibly to removal by those who must stand for election. By making prosecutors accountable, we encourage them to make prosecutorial decisions that are broadly acceptable to the public.

These two desiderata, independence and accountability, exist in significant tension. As Katy Harriger observes, "[t]he independence of the prosecutor cannot be guaranteed without risking the creation of an unaccountable and dangerous law enforcement agent."⁶¹ Moreover, each of these desired traits is associated with reducing one of the two basic types of costs discussed above. Independence is associated with reducing the costs of false negatives, because an independent prosecutor will presumably be more fearless in rooting out executive branch wrongdoing than a prosecutor who is beholden to the President and the Attorney General. Conversely, accountability is associated with reducing the costs of false positives, because an accountable prosecutor will be sensitive to the direct and indirect costs of commencing prosecutions that ei-

60. THE OXFORD ENGLISH DICTIONARY (2d ed. 1989); see also WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 16 (2d ed. 1956) ("Accountable" means "Liable to be called on to render an account; answerable; as, every man is *accountable* to God for his conduct").

61. Harriger, *supra* note 4, at 515.

ther come to naught or expose wrongdoing the public regards as too insubstantial to warrant criminal sanctions.

The principal conclusion that follows from these reflections is that the office of independent investigations must reflect some kind of accommodation or compromise between independence and accountability. Pursuit of total independence at the expense of all accountability makes no sense. To begin with, such "independence" is illusory: complete political neutrality in prosecutions is unachievable, and the more one detaches the investigator from one branch or party, the more likely he or she is to fall under the influence of the other party.⁶² More fundamentally, maximizing independence drives down the costs associated with false negatives at the expense of incurring higher costs associated with false positives. On the other hand, pursuit of total accountability at the expense of all independence makes no sense either, because this would drive down the costs of false positives at the expense of incurring higher costs in the form of false negatives.

One mechanism of accommodation that may be especially promising is to insist that the independent investigator undergo public scrutiny and approval before he or she is appointed. The standard mechanism for doing this is through the appointment of the independent investigator as a principal officer of the United States, requiring presidential nomination and Senate confirmation.⁶³ Such an appointment compromises independence to a degree, by allowing the President to pick his own prosecutor and by allowing the Senate to veto the President's choice of his own prosecutor. But if the appointment occurs *ex ante*—before any particular controversy has arisen that requires investigation—and if the prosecutor's conduct in any investigation is not subject to the review or sanction of the President or the Attorney General, then significant independence can be preserved in the way the chosen prosecutor executes his or her duties. On the other hand, although such pre-appointment scrutiny and approval would not make the independent investigator actually accountable for particular decisions after the fact, it would assure at least that the identity and credentials of the investigator are satisfactory to a broad cross section of the polity, and would underscore to the investigator that the public has a vital interest in how any investigations will be carried out. Thus, appointment as a principal officer would to some degree act as a substitute for after-the-fact accountability in assuring that the prosecutor's decisions are acceptable to the public.

B. Transience Versus Permanence

The second variable, transience versus permanence, is less often discussed

62. See Steven B. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 82-84 (1995).

63. See *infra* text accompanying notes 71-78.

in the literature but is also of vital importance. Transience here refers to a structure in which the independent investigator is created for the duration of one particular investigation, after which the office is terminated. When the need for another investigation arises, a new independent prosecutor is appointed. Permanence refers to a structure in which the independent investigator is a standing institution that undertakes all investigations falling within a particular description as they arise. Particular individuals may come and go as the heads or principal investigators of such an office, but the office itself enjoys on-going continuity of staff, procedures, and traditions from one case to the next.

Congress was well aware of the choice between transience and permanence when it adopted the Independent Counsel Act in 1978, and it deliberately chose transience.⁶⁴ Transience has some clear advantages. It probably facilitates the recruitment of high caliber lawyers, who may not want to commit to becoming career prosecutors but are willing to interrupt their careers in private practice or academia to work on a single high-profile case. It probably reduces the danger of "capture" associated with any permanent office that interacts frequently with other actors; in this case, the danger that a permanent office (on either the civil service or inspector general models) would come to identify too closely with the politicians they would be asked to investigate. Finally, a transient office is easier to characterize as an "inferior" office, and hence easier to sustain against constitutional objections based on the lack of presidential appointment or on separation of powers grounds.

On the other hand, a transient office has a number of costs, which may not have been appreciated very clearly in 1978. A transient office must be organized from scratch, requiring that prosecutors be recruited, office space rented, equipment purchased, and support staff hired.⁶⁵ This slows down investigations, and increases costs. There is no institutional memory to provide guidance as to how to handle problems that arise, which again slows down investigations and increases costs. More seriously, because the investigator has only one case involving one individual (or at most a few related individuals), there is an incentive to probe especially hard and to err on the side of finding criminality. In part, this is because of a natural human tendency to uncover some criminality to justify all the expense and bother of instituting an independent investigation; in part it is because a transient office has no context in which to compare the misdeeds of the target with other potentially more serious cases. Finally, a transient office has little incentive to preserve the norms of the prosecutorial office, since it will not have to interact with courts and other executive branch officials in the future. Thus, rules and understandings about grand jury secrecy, preserving executive privileges, maintaining diplomatic

64. Harriger, *supra* note 4, at 501-04.

65. Smaltz, *supra* note 59, at 2335.

confidences, etc. may be eroded by transient independent investigators.⁶⁶

A permanent office has virtues and vices that roughly mirror those of a transient office. A permanent office has its institutional infrastructure in place, which facilitates more rapid start up and completion of investigations. It has an institutional memory, which provides ready answers to most problems that arise. It has a portfolio of cases, and thus must rank-order the cases in terms of seriousness, allocating resources and time accordingly.⁶⁷ It will interact on an on-going basis with courts and other executive branch agencies, and thus has an incentive to preserve prosecutorial norms. Finally, because it has a permanent institutional existence, such an office is likely to develop a reputation over time with the general public (whether positive or negative). If the office performs well, it will build a reservoir of legitimacy that can help it weather times of political turbulence.⁶⁸

On the other hand, a permanent office may attract less ambitious and talented lawyers, and may come to identify with the political chiefs of the incumbent administration in a way that discourages aggressive investigation of alleged wrongdoing. A permanent office that is significantly independent also presents the danger of what my colleague Steven Calabresi calls the "J. Edgar Hoover syndrome." In particular, such an office presents the danger of creating a powerful and unaccountable apparatchnik who collects dirt on politicians of all stripes, and then uses this information to expand and perpetuate his own role as a power-broker within the government.

If we take a step back, we can see that the choice between transience and permanence again parallels the two principal types of costs that we should seek to minimize in designing an office of independent investigations. A transient office, by concentrating its firepower on a single case and creating incentives to engage in an especially aggressive investigation of that case, errs on the side of over-prosecution and hence functions to minimize the costs of false negatives. In contrast, a permanent office, by forcing the investigator to ration time and effort among multiple cases, and by providing incentives to preserve prosecutorial norms, trims in the direction of prosecutorial restraint and hence functions to minimize the costs of false positives.

With respect to the trade-off between transience and permanence, it is less clear that it is possible to reach some compromise between competing values. It may be that in the end we are forced to make a basic choice between either the transience model or the permanence model, and hence must live with the basic package of advantages and disadvantages associated with each. Never-

66. See Akhil Reed Amar, *The Flaw in the Law*, THE AMERICAN LAW. 13 (1998).

67. See O'Sullivan, *supra* note 26, at 491-92.

68. This probably explains how an institution like the Supreme Court can render decisions in controversial areas upsetting to many people, but still have its judgments obeyed by lower courts and state officials.

theless, some accommodating should be possible. For example, if the transience option is chosen, greater emphasis could be placed on requiring the independent investigator to use full time Justice Department prosecutors detailed to the independent investigation.⁶⁹ Alternatively, if the permanence option is chosen, the risk of creating another J. Edgar Hoover could be ameliorated by imposing a maximum limit on the years that the head of the permanent office of independent investigations may serve. Indeed, Congress has already adopted such a provision with respect to the FBI, whose head is now limited by statute to serving a maximum of ten years.⁷⁰ Thus, even if a basic choice must be made between one model or the other, we should remain alert to modifications that help overcome the distinctive problems associated with each.

C. Constitutional Concerns

The third variable, devising an office that conforms to constitutional requirements, has received by far the most attention in the literature. Consequently, I shall restrict my remarks to offering a bare outline of the salient considerations.

Three constitutional limitations are especially important to an office of independent investigations designed to root out high level crimes in the executive branch. The first is the Appointments Clause. If the independent investigator is a superior officer of the United States, then he or she must be appointed by the President and confirmed by the Senate.⁷¹ If the independent investigator is an inferior officer, then his or her appointment may be vested by Congress in "the Courts of Law" or "the Heads of Departments."⁷² The Independent Counsel Act vests the appointment of the independent counsel in an Article III court, and the Supreme Court in *Morrison v. Olson* upheld this arrangement, reasoning that the independent counsel may properly be regarded as an inferior officer for Appointments Clause purposes.⁷³

The Court's reasoning in support of this conclusion is questionable at best. The Court stressed formal factors, some of which are of doubtful relevance: that the independent counsel can be removed by the Attorney General for good cause,⁷⁴ that the counsel has no authority to set policy, and that the counsel's office is temporary and of limited jurisdiction.⁷⁵ Justice Scalia, in dissent, ar-

69. A step in this direction was taken in the 1994 amendments, and the Act now provides that administrative personnel and other employees of the Justice Department may be detailed to the staff of the independent counsel at his request. 28 U.S.C. § 594(d)(1) (1994).

70. 28 U.S.C.A. § 532 (1993).

71. U.S. CONST. art. II, § 2.

72. *Id.*

73. *Morrison v. Olson*, 487 U.S. 654, 671-72 (1988).

74. *Id.* The relevance of this is puzzling, since cabinet officers can be removed by the President at will, and they are clearly regarded as superior officers.

75. *Id.*

gued more persuasively that any officer who is not subject to the supervision of a superior officer cannot be an inferior officer. Consequently, the unsupervised independent counsel cannot be regarded as inferior.⁷⁶

In a more recent Supreme Court opinion explicating the Appointments Clause, the Court (speaking through Justice Scalia) opined that inferior officers are those "whose work is directed and supervised at some level by others who were appointed by presidential nomination with the advice and consent of the Senate."⁷⁷ In other words, the Court appeared to adopt the very test urged by Justice Scalia in dissent in *Morrison*. It would be premature to declare that *Morrison* has now been "overruled" and that any independent investigator must be a presidential appointee subject to Senate confirmation.⁷⁸ The holding of the Court rendered in a 7-1 landmark decision has more gravitational force than the reasoning of a minor decision authored by the sole dissenter in the earlier case.

Nevertheless, I would argue that the Scalia position here is more in keeping with our long-standing constitutional traditions. Certainly the Scalia view conforms more closely to the common sense understanding of what sorts of officers are important enough to be regarded as superior. Even if it were marginally plausible to describe independent counsel Alexia Morrison as an "inferior" officer in her investigation of whether Assistant Attorney General Ted Olson lied to Congress, it strains credulity to describe either Lawrence Walsh or Ken Starr as inferior officers. There is nothing inferior about an independent investigator who seeks to bring down a President and achieve what amounts to a regime change. Therefore it would be both prudent and proper for Congress to make any independent investigators established by future legislation presidential appointees.

The second constitutional constraint is based on the President's removal power. Article II's Vesting and Take Care Clauses have been read as conferring the "executive power" exclusively on the President, and important precedent prior to *Morrison* appeared to say that if an officer performs a purely executive function, then the President must have the power to remove that officer at will.⁷⁹ Only if the power can be construed as something other than purely executive may Congress condition the President's power of termination upon a finding of good cause.⁸⁰ Since the power to prosecute crimes is typically regarded as purely executive, this suggests that the Independent Counsel Act is

76. *Id.* at 720-21 (Scalia, J., dissenting).

77. *Edmond v. United States*, 520 U.S. 651, 663 (1997).

78. As suggested by Akhil Amar and others. See Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 810-11 (1999); Nick Braven, Note, *Is Morrison v. Olson Still Good Law? The Court's New Appointments Clause Jurisprudence*, 98 COLUM. L. REV. 1103 (1998).

79. *Myers v. United States*, 272 U.S. 52 (1926).

80. See generally *Humphrey's Ex'r. v. United States*, 295 U.S. 602 (1935); *Wiener v. United States*, 357 U.S. 349 (1958).

unconstitutional insofar as the Attorney General can remove an independent counsel—a federal prosecutor—only for good cause.

Morrison avoided this conclusion by reinterpreting the removal precedents. Its “present considered view,” the Court said, was that the scope of the President’s removal power ought not to turn solely on whether the powers exercised by an official can be characterized as being “purely executive.”⁸¹ Instead, “the real question is whether the removal restrictions are of such a nature that they impede the President’s ability to perform his constitutional duty.”⁸² Relying on such factors as the “inferior” status of the independent counsel, the fact that the Attorney General was not totally disabled from removing an independent counsel, and the importance of preserving the independence of the office, the Court concluded that the limitation on the President’s removal power was constitutional.

The Court’s disposition of the removal issue was as much a departure from constitutional tradition as was its disposition of the Appointments Clause issue. Yet I am somewhat more sympathetic to its revisionism in this context. The old distinction in removal jurisprudence based on whether the power being exercised was “purely executive” as opposed to “quasi-legislative” or “quasi-judicial” was threadbare, and bore no relation to the actual powers that modern independent regulatory agencies—headed by commissioners who may be removed only for good cause—actually exercise.⁸³ In this sense, current constitutional practice is out of line with the conceptualism of the older precedents. Thus, I think Congress would be on firmer ground in imposing a good cause requirement on removal of an independent investigator.

That being said, some caution is still in order here. *Morrison* appears to endorse a functionalist test for determining whether the President’s executive power has been unduly diminished. Whether the President has an unfettered power of removal power is but one element in this inquiry. To the extent that Congress takes away the power to remove at will an executive official, it is important that other constraints on such an officer be preserved so as to avoid fragmenting the President’s ultimate control over executive branch policy.

The third constitutional constraint involves the role of the federal courts. Article III appears to limit the courts to deciding cases and controversies, and thus as a rule “executive or administrative duties of a nonjudicial character may not be imposed on judges holding office under Art. III of the Constitution.”⁸⁴ The Independent Counsel Act appears to run afoul of this principle, by vesting in the special panel the power to appoint the independent counsel,

81. *Morrison v. Olson*, 487 U.S. 654, 689 (1988).

82. *Id.* at 691.

83. See Geoffrey F. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 65-83 (reviewing evolution of powers of independent agencies).

84. *Buckley v. Valeo*, 424 U.S. 1, 123 (1976).

the power to define the counsel's jurisdiction, and the power to terminate the counsel's investigation.

Morrison was clearly uncomfortable with the Article III challenge to the Independent Counsel Act. It upheld the power to appoint on the ground that Article III courts are expressly given the power to appoint "inferior" officers.⁸⁵ It narrowly construed the power to determine the counsel's jurisdiction by suggesting that the special panel had little discretion in this matter.⁸⁶ It narrowly construed the panel's power to terminate an investigation so as to avoid any suggestion that the Article III court may remove the counsel from office.⁸⁷ And it disclaimed any power on behalf of the special panel to supervise the investigations of the independent counsel.⁸⁸

The impression one gets after this radical surgery is that the *Morrison* Court was stretching to the limit to uphold the role of the special panel in independent counsel investigations. Given that a key premise of the Court's holding—that the independent counsel is an inferior officer—is highly questionable, it would be dangerous to read *Morrison* as sanctioning a significant administrative role for Article III courts in future independent counsel investigations. Moreover, now that the impartiality of the special panel has been challenged in the Whitewater and Lewinsky investigations, the Court will almost certainly be more wary in the future of approving innovative roles for Article III courts that threaten to inject them into major political controversies. Thus, it would probably be advisable for Congress to keep Article III courts out of the process of administering future independent investigators. Federal courts should be left to deciding cases brought by independent investigators, not supervising them.

The central conclusion I would draw from this brief survey of constitutional issues is that it would be a mistake to treat *Morrison* as having resolved all constitutional doubts in favor of independent counsels and analogous institutions. *Morrison* is a deviant decision in most respects, and should not be regarded as establishing a constitutional safe harbor for all innovations designed to facilitate investigations of executive officials.⁸⁹ Instead, the constitutional issues raised by such legislation should be viewed from a longer term perspective, and should be regarded as an important element affecting the legitimacy of the office of independent investigations. In the final analysis, the legitimacy of the office will be a function of how well it minimizes the sum of the costs associated with false negatives and false positives. It will certainly

85. *Morrison*, 487 U.S. at 679.

86. *Id.*

87. *Id.* at 682-83.

88. *Id.* at 681.

89. I am not alone in this assessment. See, e.g., Akhil Reed Amar, *Now Playing . . . A Constitutional Nightmare*, WASH. POST, Sept. 20, 1998, at C1.

help if the office is perceived by the public as resting comfortably within our constitutional traditions, as opposed to being an alien intrusion.

IV. ASSESSING THE INSTITUTIONAL OPTIONS

Applying the foregoing criteria, it should be apparent that there is no perfect choice for the institutional design of an independent investigator. Independence and accountability are in considerable tension with one another, so any arrangement for assuring independence will entail some sacrifice in accountability, and any movement toward greater accountability will entail some sacrifice in independence. Transience and permanence are largely mutually exclusive, and each has advantages and disadvantages. Constitutional considerations impose further constraints on the available range of choices. Nevertheless, when we take all three criteria into account, I think that the civil service option is the best of an imperfect lot. Before defending that judgment, I will offer some brief comments as to why the independent counsel option and the other institutional options are even more seriously flawed.

A. The Independent Counsel – Worst Choice

It should be apparent from the foregoing discussion of structural variables that the independent counsel is an extremist solution. The drafters of the Independent Counsel Act created an office positioned as far as toward the independence pole of the independent-accountability scale as is constitutionally conceivable. The counsel is not a presidential appointee, and hence is not required to undergo the process of Senate confirmation. He or she exercises the powers of the Justice Department, but is not subject to any meaningful oversight by the Justice Department. The prospect of removal for good cause is politically too remote to be of any significance. Nor does the special panel exercise effective control over the counsel.

The drafters also created an office as far toward the transience pole of the transience-permanent scale as imaginable. The independent counsel has a case load of one. The counsel pursues this case with a newly assembled staff, many of whom have never worked in a prosecutor's office before. There is no institutional memory; no requirement of living within a fixed budget; no need to make judgments about how scarce resources of time and limited personnel should be allocated among competing concerns. Basically, the independent counsel has no long term institutional perspective.

Together, these structural features give us an institution that ruthlessly seeks to minimize false negatives—undetected executive branch wrongdoing—but at the expense of driving up false positives—investigations and prosecutions of executive officials that are unwarranted in the eyes of the public. This strong skewing would be justified only if the costs of false negatives were thought to be very large (perhaps because of pervasive but difficult-to-

detect corruption in the executive branch) and/or if the costs of false positives were thought to be comparably trivial (perhaps because executive officials are indifferent to being criminally prosecuted). But few people believe that the first of these judgments is accurate, and the second is clearly false. Thus, because the Independent Counsel Act strikes a bad balance between reducing the costs of false negatives and false positives, it is a very unlikely candidate to produce the most satisfactory results overall (minimization of the sum of the two costs).

What may be worse, the skewed strategy of the Independent Counsel Act has reduced the effectiveness of the independent counsel even as a tool for ferreting out executive misconduct. The independent counsel is almost completely unaccountable; as a transient institution it lacks any reservoir of reputation or good will with the public; and it is perceived to be an odd duck in terms of recognized constitutional structures. This has made the independent counsel extremely vulnerable to attack by those under investigation and by their media sympathizers. Walsh, for instance, was pilloried by the editorial page of the *Wall Street Journal*, which portrayed him as a vicious partisan out to get Reagan and Bush.⁹⁰ And Starr has been subject to an even more ruthless smear campaign by the Clinton White House and its surrogates. These attacks succeeded in undermining public support for both investigations. Because the political stakes are so high in cases involving high-level executive wrongdoing, it is critical that the independent investigator have significant legitimacy in the eyes of the public. The independent counsel fails utterly on this score.

The transient nature of the independent counsels exacts its toll in other, probably less significant, ways. This feature drags out the time it takes to complete investigations and drives up the costs. It creates an institution that has little or no incentive to abide by Justice Department policies, to adhere to traditional prosecutorial norms than have evolved over time, or to preserve principles like executive privilege or the confidentiality of grand jury proceedings.

The net result has been a disaster for our polity. The investigation of high level executive officials has become a kind of blood sport within the American political scene, exacerbating partisan hostility, spawning public cynicism about government, and driving talented people out of the process.⁹¹ The courts have been drawn into political disputes, traditional legal norms have been trashed, and impeachment now threatens to become a standard feature of political life. This is quite a record for one piece of do-good legislation. Congress should drive a stake through the heart of the Independent Counsel Act and hope that nothing of its kind ever walks the face of the earth again.

90. See Lynch & Howard, *supra* note 23.

91. See O'Sullivan, *supra* note 26, at 471; Sunstein, *supra* note 59, at 2269-71.

B. Other Bad Ideas

I will offer relatively brief observations about three other options. The legislative branch option appears on its face to satisfy both the independence and accountability objectives. Certainly, an investigator located in the staff of the House Judiciary Committee or in the General Accounting Office would have more than ample independence from the Attorney General. Such an office would also be accountable to Members of Congress, who are elected by the people.

But the independence of the legislative investigator from the executive branch would be achieved only at the expense of creating an office that would be highly dependent on the legislative branch. A legislative branch investigator would be closely controlled by the congressional leadership of the party in majority control of Congress. Thus, the "independence" of such an investigator would not be true independence from partisan politics; it would just substitute one form of political dependence for another.

The close partisan control of the legislative branch investigator would make it extremely difficult to reach a proper level of intensity of investigations into executive branch wrongdoing. If the President and the Congress were controlled by the same party, then the legislative investigator would be just as unlikely if not more unlikely to uncover wrongdoing than if the investigation were left to regular Justice Department prosecutors. On the other hand, if the President and the Congress were controlled by different parties, as seems to be the case more often than not these days, then the legislative investigator might well become excessively zealous in its investigations of possible wrongdoing. Criminal investigations of the executive would become even more a weapon of partisan politics than is the case under the independent counsel today.

I also have concerns about whether a legislative investigator would develop a long term perspective and a reputation for professionalism. This could happen, but there is no preexisting tradition of criminal investigatory operations within the congressional staff, and building this kind of institutional capital would take patience and dedication, which seem often in short supply on the Hill.

The inspector general option is intriguing, primarily because it promises to defuse the tensions created by criminalizing political disputes. The main question here would be whether inspectors general would be effective in uncovering executive branch crimes. Inspectors general have the power to issue administrative subpoenas for the production of documents,⁹² but they do not have the power to issue testimonial subpoenas. Perhaps more critically, they do not have power to grant immunity from prosecution. This is a critical tool in unraveling conspiracies and cover-ups of the most serious breaches by the

92. Bromwich, *supra* note 53, at 2036.

executive, as in Watergate.

The White House has also steadfastly rejected the introduction of any inspector general into the Executive Office of the President, citing separation of powers concerns.⁹³ This is understandable, given the intensely political nature of White House operations, and the close association between inspectors general and Congress. It might be nice if the White House would let the sun shine in on every discussion and meeting that occurs in and around the Oval Office, but that is unrealistic. If inspectors general and the White House do not mix, then it is not plausible to think that inspectors general can be a general solution to the problem of executive branch investigations.

The executive branch option—ad hoc appointment of independent prosecutors at the discretion of the Attorney General—may be in fact the second-least-worst choice. Certainly this option has the virtue of being time tested. This was the option followed for roughly the first 180 years of our political existence, and no great disaster befell the republic. Based on the test of experience alone, the executive branch option would have to be rated as superior to the independent counsel option.

The Watergate episode provides support for this conclusion. Foes of the independent counsel statute often cite Watergate as an example of how executive branch scandals can be thoroughly and independently investigated without an Independent Counsel Act. This is true, although Watergate does not suggest that we can do without independent investigators. It only suggests that it is possible to do without a standing independent counsel law. Public pressure in the Watergate scandal forced the Attorney General to appoint two independent prosecutors (Cox and Jaworski) without a statutory mandate. Indeed, recent experience suggests that whenever potential impeachable offenses are involved, as was the case in Watergate, Iran-Contra, and Lewinsky, public and Congressional pressure will quite likely always compel the appointment of an investigator independent of the Attorney General, whether there is a standing law that calls for one or not.⁹⁴

Nevertheless, the executive branch option clearly has its flaws. Where investigations involve lesser executive branch officials such as White House aides and cabinet offers, this option may err too much on the side of accountability at the expense of independence. Without a law mandating the investigation of such cases by an office having a significant degree of independence, the initial investigation would be undertaken by regular Justice Department officials subject to oversight by political appointees. Given the natural ten-

93. Clark, *supra* note 53, at 562.

94. Not only were independent prosecutors appointed during Watergate without a statute mandating that this be done, but Attorney General Janet Reno, acting on her own authority, appointed Robert Fisk as an independent prosecutor to investigate Whitewater at a time when the Independent Counsel Act had been allowed to lapse.

dency of the leadership of the Justice Department to protect the President and his party, there would be a danger that the Department would go easy on such targets in such investigations. And given the confidentiality of criminal investigations, it is possible that the decision to forego prosecution would never be publicly disclosed. It is too much to expect that some Woodward and Bernstein will always come along to expose high-level executive wrongdoing that the Justice Department has failed to uncover or has investigated and incorrectly concluded not to prosecute.

The executive branch strategy also results in the appointment of ad hoc, one-shot special prosecutors, who share many of the same vices as the independent counsel. Although independent prosecutors would undoubtedly be appointed less frequently than they are under the Independent Counsel Act, when they were appointed they would tend to behave the same way the one-shot independent counsels perform under the Act—slowly, expensively, without much sensitivity to established Department policies and prosecutorial norms, and with a zealous proclivity to err on the side of finding criminal wrongdoing. Given that such ad hoc special prosecutors would also not be presidential appointees and would lack an established institutional reputation, they would also encounter the same vulnerabilities regarding their perceived legitimacy that have plagued independent counsels.

C. The Civil Service Model – Least Worst Choice

The civil service option—an office of career civil service prosecutors headed by a presidential appointee—would reflect a compromise between independence and accountability. The office would not be as independent as the independent counsel, and its presence within the Justice Department would to some extent give rise to an appearance of partiality. It would nevertheless enjoy significant independence. The lawyers in the office would be Justice Department “lifers,” many of whom would have served under multiple administrations. They would be largely immune from any threat of dismissal, transfer, or reduction in salary. Their conduct would be largely shaped by professional norms assimilated over the span of a career.

There are a variety of possibilities for giving the head of the office, whom I assume would be a presidential appointee, greater independence than ordinary political appointees. One possibility would be to protect the head against removal except for good cause, as is currently done for the commissioners of independent regulatory agencies. Another possibility would be to restrict the President to appointing career prosecutors as heads. A third possibility would be to permit removal, but require a public statement of reasons delivered to Congress explaining why, as with inspectors general. For practical purposes, the choice probably would not matter too much. In the midst of an investigation of a serious executive branch scandal, political realities would prevent the President from removing the head except for true derelictions of duty.

While giving up a measure of independence, the civil service option would gain a significant measure of accountability. The head of the office would be nominated by the President and confirmed by the Senate. Given the high visibility of the office and its importance to the constitutional scheme, considerable attention would be directed to the selection of an office head. Thus, it is unlikely that the President could appoint a crony lacking in any credibility. Limiting appointment to persons with a minimum number of years experiences as a prosecutor (say five years) would provide some additional protection against insertion of a political hack.

Such a civil service office would also enjoy additional legitimacy if, as I anticipate would be the case, it would eventually acquire a reputation for professionalism and competence. Membership in the office would be a prestigious appointment with the Department, highly sought after by prosecutors in U.S. Attorneys offices and the Criminal Division. These career prosecutors would no doubt have a high level of dedication, and would be respected and trusted by judges, defense attorneys, and all other players with whom they regularly interact.⁹⁵ All this would translate into greater legitimacy in the eyes of the press and the public, and would insulate the office from the kinds of charges of partisan politics that have dogged independent counsels.

The civil service option would also capitalize on the more intangible advantages of being a permanent professional office rather than a transient institution. The civil service option would create an office with a long term rather than a short term perspective on high-level criminal investigations. The office would operate under a budget, and would have to determine how to allocate its limited resources among competing cases. This, plus the maturity and perspective that come from long service, should mean that the office would focus its attentions on the most meritorious cases with the most serious implications. The number of investigations would probably fall, and almost certainly the number of indictments would go down. When investigations and prosecutions did occur, they would be resolved more rapidly and at lower cost. The publicity surrounding investigations would diminish if not disappear, as the standard norm of not commenting on pending proceedings until an indictment is announced would take over. All this would be a welcome relief after the experience with independent counsels.

This is not to suggest that there are no risks associated with the civil service option. One danger is that the office, nestled inside the Justice Department and subject to review and oversight by the leadership of the Department on most issues (except where the leadership was recused for traditional conflicts of interest), would be too pusillanimous in pursuing executive wrongdoing. One would hope that the professionalism and pride of the staff and the com-

95. See Merrill, *supra* note 35 (explaining how the use of civil service lawyers in the Solicitor General's office has contributed to its considerable reputation with the Supreme Court).

parative independence of the head would work against this, but nonetheless it clearly might happen. Of course, if worst came to worst, public pressure would mount for appointment of an ad hoc independent prosecutor. In this sense, the executive branch option would always be available to backstop the civil service option.

Another and opposite danger would be that the office would become an autonomous empire, holding the rest of the executive branch hostage to threats of criminal prosecution for minor derelictions. Again, traditions of professionalism among career prosecutors should work against such a scenario. As an additional form of protection against such an eventuality it probably would be a good idea to establish an outer limit on the term of service for the head of this office, perhaps four years to coincide with a presidential term of office.⁹⁶

V. CONCLUSION

Congress should take the opportunity presented by the present disquiet over the Independent Counsel Act and its scheduled expiration in June to fundamentally rethink the premises of independent investigations of executive branch officers. Independent counsels have proven to be a uniquely bad idea and should be done away with. Would an office of civil service prosecutors be a panacea? Clearly not. Would it be better than the current arrangement or other options? I think on balance it would be.

Amending the Act to give independent investigations to an office of civil service prosecutors would probably not return American politics to "normalcy," defined as the condition that prevailed before Watergate. Constant investigations of executive officers has become too much an element of our political culture to be weeded out overnight. But I think there is a chance of moving to a situation that more closely approximates sanity. That, it seems to me, is high praise—given what we have endured in recent times.

96. It is primarily for these reasons that I would object to the creation of a permanent office of independent counsel created along the lines of an independent agency. Such an office would lack the constraints on its behavior that would come from being a functioning unit with the Justice Department. In addition, we should not suppose that corruption is so endemic in the executive branch that a full-time independent office will always be needed to investigate high-level government officials. An office located within the Justice Department could be used to investigate federal judges, members of Congress, and state and local officials as well as executive officials, and if the happy day should come when politicians at all levels are clean, it could be detailed to work on other types of white collar criminal investigations. An independent agency devoted solely to investigating executive officials would have to justify its existence, which could translate into too much investigating of trivial allegations.

