Torture, Impunity, and the Need for Independent Prosecutorial Oversight of the Executive Branch

Fran Quigley

Available at: https://works.bepress.com/fran_quigley/2/
Torture, Impunity, and the Need for Independent Prosecutorial Oversight of the Executive Branch
Fran Quigley

Abstract

When executive branch misconduct is alleged, an inherent conflict of interest is presented by investing prosecutorial discretion in a U.S. Attorney General appointed by, and serving at the pleasure of, the President. Various commentators, including Justice Antonin Scalia, Professor Stephen Carter, and the many critics of the former independent counsel statute, have posited that this conflict will be overcome by checks on executive power provided by the legislative branch, the judiciary, and political pressure.

That sanguine view of adequate executive branch oversight was put to the test when acts of torture were authorized by high-level members of the George W. Bush administration. Congress and the courts responded with efforts to rein in the administration’s actions, and the public expressed its displeasure with the torture activities. Ultimately, the president who sanctioned torture was replaced by a president who expressed sharply different views on torture.

Yet all these efforts and developments failed to stop illegal torture during the Bush administration, and have not led to prosecution of the executive branch leaders complicit in torture. The Department of Justice under the George W. Bush administration not only refused to investigate and prosecute allegations of sanctioning illegal torture, its attorneys led the efforts to overcome Congressional, judicial and popular resistance to the executive branch conduct—and did so while explicitly acknowledging that the executive branch could expect little or no judicial oversight for its actions.

Just as significantly, but perhaps less predictably, the subsequent Barack Obama administration, affiliated with a different party and on record opposing the acts of torture sponsored by the previous administration, also has declined to pursue prosecution of high-level members of the Bush administration.

This most recent development shows that the conflict presented by presidential control over executive branch prosecution transcends predictable concerns of self-preservation. The conflict also encompasses the natural desire of a sitting president to avoid prosecutions of previous executive branch members when such prosecutions would consume political capital needed for the president’s broader legislative and foreign policy agendas. When it comes to controlling executive branch criminal conduct, a U.S. governing structure designed to provide checks and balances comes up empty, and thus must be reformed.

I. U.S. Executive Branch Impunity Under an “In-House” Attorney General
   a. The Bush Administration and Torture
   b. The Sanguine View of Prosecutorial Conflict of Interest Assessed in the Context of Torture

---

1 Visiting Professor, Indiana University School of Law—Indianapolis; Associate Director, Indiana-Kenya Partnership/AMPATH; and Staff Attorney, Indiana Legal Services. The author thanks Florence Wagman Roisman and Bill Quigley for their review and comments on earlier versions of this article, and Andrea Ciobanu for her research assistance.
c. A New President; Continued Impunity for Torture

II. The Missing Legal and Historical Foundations for President-Controlled Federal Prosecutions
   a. The English and Colonial Traditions
   b. The Constitutional Convention and First Congress

III. More Prosecutorial Independence Would Lead to Better Governance
   a. Empirical Evidence That Executive Control Over Prosecution Increases Chance of Corruption
   b. Empirical Evidence that an Unbundled Executive Provides More Representative Governance

IV. Options for Independent Prosecutorial Oversight of the Executive Branch
   a. Direct Election of a Federal Attorney General
   b. A Revived—and Revised—Independent Counsel
      i. History of the Independent Counsel
      ii. Special Counsel
      iii. Envisioning a Revived and Revised Independent Counsel
   c. Breaking Up the Prosecutorial Monopoly: Alternatives for Pursuing Executive Branch Misconduct
      i. Victim-Initiated Actions Against Executive Branch Officials
      ii. Pursuit of Ethical Complaints Against Attorneys General and Department of Justice Officials
      iii. Greater Investigative Power for Congress and Inspector General
      iv. Non-Federal Prosecution of Executive Branch Crimes

Conclusion

Introduction

The clear conflict of interest presented by the President of the United States controlling the appointment and removal of the Attorney General, who is entrusted with prosecutorial oversight over the President and his top appointees, gives lie to any claim that no U.S. office holder is above the law. The argument that this conflict is controlled by countervailing interests and powers in the legislative and judicial branches of government and by the political process has been debunked by the impunity which George W. Bush administration officials have enjoyed, now under two very different presidential administrations, for sanctioning acts of illegal torture.

Part I of this article evaluates the sanguine view of the federal prosecutorial conflict of interest in the context of the sanctioning of torture by the Bush administration. Part II reviews the historical and legal basis for an Attorney General beholden to the President, uncovering the fact that the founders were not at all wedded to the idea of President-controlled federal law
enforcement. Part III discusses the empirical evidence demonstrating that more prosecutorial independence would lead to better governance and less corruption. Part IV analyzes different options for reform, including direct election of the Attorney General, revival of an independent counsel position which remedies the flaws of the Independent Counsel Act, and various proposals for breaking up the Attorney General’s monopoly on prosecutions of the executive branch.

I. U.S. Executive Branch Impunity Under an “In-House” Attorney General

a. The Bush Administration and Torture

By 2008, President George W. Bush’s final year in office, members of his administration had been implicated in so many alleged criminal activities that a popular news website, Slate, created a multi-color, interactive graphic to chart possible criminal charges and the high-level executive branch officials who might be facing indictment for, among other activities, approving torture, illegally wiretapping U.S. citizens, and politicizing Department of Justice hirings and firings. The existence of such an array of possible criminal activity by a two-term administration is less remarkable than the fact that, in a country that prides itself in being a nation “of laws and not men,” none of these accusations had led to the prosecution of a single high-level executive branch official.

A particularly notorious example of unprosecuted criminal activity in the Bush executive branch was the explicit and repeated authorization for agents of the Central Intelligence Agency to physically and emotionally abuse al-Qaeda suspects. The acts which were officially approved by the Bush Administration Department of Justice included:

- Slamming suspects into walls
- Slapping and grabbing suspects
- Placing detainees in small “confinement boxes” for up to 18 hours

---


3 MASS. CONST. Part 1, Art. XXX. The famous statement of the rule of law was authored by John Adams.

4 See, Mark Thompson Obama's Growing Dilemma on Torture Prosecution, TIME, April 22, 2009. A special prosecutor was appointed to investigate the destruction of evidence of CIA interrogations during the Bush administration, but no charges have yet been filed. See, Mark Mazetti, Grand Jury Inquiry on Destruction of C.I.A. Tapes. N.Y. TIMES, Jul. 2, 2009.
• Placing of insects in the confinement boxes with detainees
• Compelling detainees to remain in “stress positions” for hours at a time
• Depriving detainees of sleep for as many as 11 days at a time
• Waterboarding, which produces the sensation of drowning and suffocation\(^5\)

According to a heavily redacted 2004 report from the Central Intelligence Agency Office of the Inspector General, made public in 2009, the issuance of these guidelines by the Department of Justice was followed by CIA agents using the waterboarding technique on one suspect 183 times in a single month,\(^6\) and on another suspect 83 times in a single month,\(^7\) while the waterboarding technique used larger volumes of water than prescribed, along with extra efforts to block the detainees’ air flow.\(^8\) In addition, detainees were threatened with a power drill and handgun,\(^9\) were told that their daughters and mothers would be sexually abused in front of them,\(^10\) and that the detainees’ children would be killed if another attack occurred on the U.S. after 9/11.\(^11\) Detainees were choked,\(^12\) subjected to mock executions,\(^13\) left in extreme cold while shackled and naked,\(^14\) and beaten with rifle butts and large metal flashlights.\(^15\)

\(^5\) CIA OFFICE OF INSPECTOR GENERAL COUNTERTERRORISM DETENTION AND INTERROGATION ACTIVITIES (SEPTEMBER 2001- OCTOBER 2003) 15 (May 7, 2004) (Hereinafter CIA OIG Report), available at [http://luxmedia.vo.llnwd.net/o10/clients/aclu/IG_Report.pdf](http://luxmedia.vo.llnwd.net/o10/clients/aclu/IG_Report.pdf) Waterboarding is described in the report as follows: “... the individual is bound securely to an inclined bench .... The individual’s feet are generally elevated. A cloth is placed over the forehead and eyes. Water is then applied to the cloth in a controlled manner. As this is done, the cloth is lowered until it covers both the nose and mouth. Once the cloth is saturated and completely covers the mouth and nose, the air flow is slightly restricted for 20 to 40 seconds due to the presence of the cloth. This causes an increase in carbon dioxide level in the individual’s blood. This increase in the carbon dioxide level stimulates increased effort to breathe. This effort plus' the cloth produces the perception of ‘suffocation and incipient panic,’” i.e., the perception of drowning. The individual does not breathe water into his lungs. During those 20 to 40 seconds, water is continuously applied from a height of [12 to 24] inches. After this period, the cloth is lifted, and the individual is allowed to breathe unimpeded for three or four full breaths. The sensation of drowning is immediately relieved by the removal of the cloth. The procedure may then be repeated. The water is usually applied from a canteen cup or small watering can with a spout. ... [T]his procedure triggers an automatic physiological sensation of drowning that the individual cannot control even though he may be aware that he is in fact not drowning. [I]t is likely that this procedure would not last more than 20 minutes in anyone application.” \(^6\) Id. at 91.
\(^7\) Id. at 36.
\(^8\) Id. at 37.
\(^9\) Id. at 41-42.
\(^10\) Id. at 42-43.
\(^11\) Id. at 43.
\(^12\) Id. at 69.
\(^13\) Id. at 70.
\(^14\) Id. at 75.
\(^15\) Id. at 79.
Similar techniques, including stripping detainees naked, threatening them with dogs, depriving them of sleep, and making detainees wear dog leashes and perform dog tricks, were used by U.S. military personnel against detainees at Guantanamo Bay Naval Base.\(^{16}\) The CIA subsequently briefed senior Bush administration officials on the Agency’s use of “enhanced interrogation techniques” and were reassured that the conduct was approved by the Department of Justice.\(^{17}\)

This informal reassurance was backed up by six formal memoranda issued by the Department of Justice beginning in August of 2002 and concluding in December of 2005.\(^{18}\) In each point of analysis within each memo, the Department of Justice concluded that the CIA’s proposed or existing interrogation techniques were fully lawful,\(^{19}\) ignoring well-settled definitions of what constitutes the illegal act of torture.\(^{20}\) The techniques were further approved and endorsed by executive branch officials, including Cabinet members and the President himself.\(^{21}\) As the Senate Armed Service Committee later concluded:

\(^{17}\) CIA OIG REPORT, supra note 5 at 101.
\(^{19}\) Id. at 4.
\(^{20}\) See, e.g., Memorandum for Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. 2340-2340A (Aug. 1, 2002), TORTURE MEMOS at 41. (Concluding that an act isn't torture unless the pain inflicted is “equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.”) This definition was not in line with established domestic and international definitions of the term, see infra note 22, and was repudiated two years later by Jack Goldsmith, a subsequent Assistant Attorney General in the Office of Legal Counsel. See, Jeffrey Rosen, Conscience of a Conservative, N.Y. Times Mag., Sept. 9, 2007, at 40. Among the reams of precedent ignored in the August 2002 memo was the fact that the act of waterboarding alone had resulted in multiple criminal convictions of U.S. and foreign defendants in U.S. tribunals. See, Scott Horton, Justice After Bush: Prosecuting an Outlaw Administration HARPER’S, Dec. 2008.
\(^{21}\) Jan Crawford Greenburg, Howard L. Rosenberg And Ariane De Vogue, Bush Aware Of Advisers' Interrogation Talks, ABCNEWS.COM, April 11, 2008. Available at http://abcnews.go.com/TheLaw/LawPolitics/story?id=4635175&page=1&page=1 (Quoting Pres. Bush as saying in reference to “enhanced interrogation techniques”: "Well, we started to connect the dots in order to protect the American people. And yes, I'm aware our national security team met on this issue. And I approved.") See, also, Armed Services Committee Report, supra note 16 at xv, xix, xxvi (Finding that President Bush’s Feb. 7, 2002 memorandum stating that the Third Geneva Convention did not apply to the conflict with al Qaeda and that Taliban detainees were not entitled to prisoner of war status or the legal protections provided by the Third Geneva Conventions “opened the door” to subsequent mistreatment of prisoners, that members of the President’s cabinet and other senior officials, including Secretary of Defense Donald Rumsfeld, Attorney General John Ashcroft, Director of Central Intelligence George Tenet and then-National Security Advisor Condoleezza Rice were personally involved in the review and approval of the interrogation techniques) and Dan Eggen, Cheney's Remarks Fuel Torture Debate, WASH. POST Oct. 27, 2006 (citing Vice President Dick Cheney’s remarks that approving waterboarding was a "no-brainer for me.")
The abuse of detainees in U.S. custody cannot simply be attributed to the actions of “a few bad apples” acting on their own. The fact is that senior officials in the United States government solicited information on how to use aggressive techniques, redefined the law to create the appearance of their legality, and authorized their use against detainees.\(^{22}\)

As has been outlined in great detail elsewhere,\(^{23}\) these acts of torture and of sanctioning torture were in violation of Common Article 3 of the Geneva Conventions,\(^{24}\) the Conventions Against Torture,\(^{25}\) Article 7 of the International Covenant on Civil and Political Rights,\(^{26}\) and

\(^{22}\) ARMED SERVICES COMMITTEE, supra note 16 at xxi.

\(^{23}\) See, e.g., TORTURE MEMOS, supra note 18 at 6-40; Seth F. Kreimer Torture Lite, “Full Bodied” Torture, And The Insulation Of Legal Conscience 1 J. Nat'l Security L. & Pol'y 187, 201-25 (2005); Owen Fiss The Example Of America 119 Yale L.J. Pocket Part 1 (2009); Jordan J. Paust, Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees, 43 Colum. J. Transnat'l L. 811, 838-62 (2005); Phillipe Sands, Torture Team: Abuse, Lawyers, And Criminal Responsibility, 48 Washburn L.J. 353 (2009); Daniel Kanstroom, On “Waterboarding”: Legal Interpretation And The Continuing Struggle For Human Rights, 32 B.C. Int'l & Comp. L. Rev. 203 (2009); and Bob Woodward, Detainee Tortured, Says U.S. Official: Trial Overseer Cites ‘Abusive’ Methods Against 9/11 Suspect, WASH. Post, January 14, 2009 (Quoting Susan J. Crawford, convening authority of military commissions the U.S. military, concluding that the U.S. tortured Saudi national Mohammed al-Qahtani atGuantanamo: "We tortured Qahtani . . . His treatment met the legal definition of torture. . . . The techniques they used were all authorized, but the manner in which they applied them was overly aggressive and too persistent. . . . You think of torture, you think of some horrendous physical act done to an individual. This was not any one particular act; this was just a combination of things that had a medical impact on him, that hurt his health. It was abusive and uncalled for. And coercive. Clearly coercive. It was that medical impact that pushed me over the edge [to call it torture].")

\(^{24}\) Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (Ratified unanimously by the Senate in 1955, Common Article 3 prohibits parties to the treaty from committing certain acts upon prisoners, including “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment, and torture; … outrages upon personal dignity, in particular, humiliating and degrading treatment.”)

\(^{25}\) Conventions Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1(1), Dec. 10, 1984, 1465 U.N.T.S. 85. (Hereinafter Conventions Against Torture) (Each party to the treaty “shall take effective legislative, administrative, judicial or other measures” to prevent acts of torture or other acts of cruel, inhuman, or degrading treatment or punishment in any territory under its jurisdiction, i.e. the U.S. has accepted an affirmative obligation to investigate and, where appropriate, prosecute acts of torture.) The U.S. Senate ratified the treaty subject to reservations that the prohibited activities were the equivalent of those already prohibited under the Fifth, Eight and Fourteenth Amendments to the U.S. Constitution. See, 136 Cong. Rec. 25, 36198-99 (1990) U.S. ratification and reservations of October 27, 1990 available at http://thomas.loc.gov/cgi-bin/query/z?rtyrs:100TD00020. The Supreme Court has ruled that intentional infliction of physical or emotional harm in order to obtain information from a detainee “shocks the conscience” and thus violates the Due Process Clause. See, Chavez v.Martinez, 538 U.S. 760, 775 (1994). The May 30, 2005 memorandum by the Department of Justice acknowledges this “shocks the conscience” standard governs the legality of interrogation methods. TORTURE MEMOS, supra note 18 at 227.

Article 5 of the Universal Declaration of Human Rights,\(^\text{27}\) all of which have been ratified by the U.S., and equally contrary to other express provisions of U.S. law which prohibit “cruel, inhuman, and degrading treatment” of detainees.\(^\text{28}\) Further, the Geneva Conventions and Conventions Against Torture expressly require the U.S. and other parties to the treaties to investigate allegations of violations and prosecute the offenders.\(^\text{29}\) As Professor Jordan Paust has written, “Never in the long history of the United States has there been such widespread serial criminality authorized and abetted at the highest levels of our government.”\(^\text{30}\)

The lack of prosecution for crimes like these may be cause for surprise for students of U.S. civics, who are taught that even powerful officeholders are not above the law.\(^\text{31}\) But students of human nature in general, not to mention basic rational choice theory showing human beings to be largely maximizers of their own self-interest,\(^\text{32}\) would say the absence of criminal charges was entirely to be expected, given the powerful self-interests working against prosecution. The U.S. grants a monopoly on the power to prosecute U.S. executive branch officials to the nation’s Attorney General, who not only oversees the Department of Justice, which was at the core of the torture crimes, but serves at the pleasure of the President who controls the entire executive branch of government.\(^\text{33}\)

Under the current U.S. constitutional and statutory scheme, the ironies—and the conflicts—abound: Although the significant responsibility bestowed on the office has led the


\(^{29}\) See, Geneva Conventions supra note 24 at art. 146, and Conventions Against Torture, supra note 25 at art. 7.


\(^{31}\) See, e.g., Marbury v. Madison, 5 U.S. 137, 163 (1803). (“The Government of the United States has been emphatically termed a government of laws, and not of men.)

\(^{32}\) See, e.g. GARY BECKER. THE ECONOMIC APPROACH TO HUMAN BEHAVIOR 5-14 (1978).

\(^{33}\) See, e.g, The Judiciary Act of 1789, An Act to Establish the Judicial Courts of the United States, ch. 20, Sec. 35, 1 Stat. 73, 92-93 (1789). See, also, Myers v. United States, 272 U.S. 52 (1926), (holding that the President has the exclusive power to remove executive branch officials, and does not need the approval of the Senate or any other legislative body) and Humphrey's Executor v. United States, 295 U.S. 602 (1935), (quasi-legislative or quasi-judicial officers can only be removed with the consent of Congress). The Bush administration exercised a historically high level of control over U.S. Attorneys, firing nine U.S. Attorneys in mid-term based on what many concluded were partisan reasons. See, generally, David C. Weiss, Note, Nothing Improper? Examining Constitutional Limits, Congressional Action, Partisan Motivation, and Pretextual Justification in the United States Attorney Removal, 107 Mich. L. Rev. 317 (2008)
Attorney General to be labeled as “America’s lawyer,” who is subject to ethical rules which prohibit her from showing favoritism in any prosecution decision, the Attorney General has the closest possible organizational ties to a potential target of prosecution, serving as a member of the President’s cabinet and overseeing an executive branch department. The Office of Legal Counsel has been described as the “constitutional conscience” of the Department of Justice, yet was the very office which repeatedly approved systemic acts of torture in contradiction to clear legal mandates. Alberto Gonzales was described as “America’s top cop” during the two and one-half years he served as Attorney General in the George W. Bush administration, but was also personally connected to most of the crimes alleged to have been committed by administration officials. As the Slate interactive chart notes in the introduction to its diagram of Bush administration misconduct, “And if all else fails, fall back on the golden rule of wrongdoing in the (Bush) White House: All roads lead to Gonzales.”

The problem presented can be understood by anyone capable of grasping the intuitive dysfunction of the fox guarding the henhouse—or familiar with the historic lesson provided by Thomas More’s fate when he dared to interpret the law contrary to Henry VIII’s wishes. Under the flawed U.S. system, the most powerful office-holder in the land, chooses,

---

34 U.S. Senator Orrin Hatch (R-UT) Holds Hearing Regarding Ashcroft Nomination: Before the S. Judiciary Comm., 107th Cong. (Jan. 30, 2001) (statement of Sen. Herbert Kohl, Member, S. Judiciary Comm., “Not only must the President trust his Attorney General, the nation must also trust him, for, after all, the Attorney General is America’s lawyer”).


38 See, TORTURE MEMOS, supra note 18. Harold Hongju Koh, former Dean of Yale Law School and former Assistant Attorney General in the Office of Legal Counsel, in testimony before the Senate Judiciary Committee, stated, “[i]n my professional opinion, the August 1, 2002 OLC Memorandum is perhaps the most clearly erroneous legal opinion I have ever read.” Confirmation Hearing on the Nomination of Alberto R. Gonzales to be Attorney General of the United States Before the S. Comm. on the Judiciary, 109th Cong. 158 (2005), available at http://www.access.gpo.gov/congress/senate/pdf/109hrg/99932.pdf.

39 See James Oliphant, Top Cop Must Serve Many Masters: Job Demands Legal, Political, People Skills, CHI. TRIBUNE, Aug. 28, 2007, at Zone C, 10 (referring to Attorney General Alberto Gonzales as the nation’s “top cop”).

40 See, Bazelon et al. supra note 2.

41 Id.

supervises, and can terminate at will the chief law enforcement officer who has sole authority to initiate criminal proceedings against the chief executive and his appointees.

b. The Sanguine View of Prosecutorial Conflict of Interest Assessed in the Context of Torture

This glaring conflict of prosecutorial interest is too obvious to deny, but some prominent constitutional scholars have defended the status quo with reassurances that the nation’s systems of checks and balances will remedy the problem.

In his dissenting opinion in the 1988 case of Morrison v. Olson, which upheld the constitutionality of the Independent Counsel Act, Justice Scalia insisted that plenty of checks exist on executive branch powers, any number of which would inevitably be deployed to curb the power of an executive who was not prosecuted by her hand-picked Attorney General:

The checks against any branch’s abuse of its exclusive powers are twofold: First, retaliation by one of the other branch’s use of its exclusive powers: Congress, for example, can impeach the executive who willfully fails to enforce the laws . . . Second, and ultimately, there is the political check that the people will replace those in the political branches (the branches more “dangerous to the political rights of the Constitution,” Federalist No. 78, p. 465) who are guilty of abuse. Political pressures produced special prosecutors for Teapot Dome and for Watergate.

In response to the Morrison decision, Professor Stephen Carter echoed Justice Scalia’s view that there was no need for an independent prosecutor with jurisdiction over executive branch officials:

In an age when the mass media build from every ethically questionable molehill a mountainous betrayal of public trust, a serious presidential effort to rein in a prosecutor who works in the executive branch is hardly a realistic possibility . .

---

43 Morrison, 487 U.S. at 697-733.
For further discussion of the history and content of the Independent Counsel Act, see Section IV (b), infra.
45 Morrison, 487 U.S. at 711.
In fact, the last President who took it upon himself to determine how far criminal prosecutions of his own administration should go was turned out of office within a year. Ironically, the same Watergate scandal that led to the Ethics in Government Act (creating an independent counsel) has brought about a post-Watergate morality that arguably makes the Act superfluous . . .

Professor Carter also had faith in the powers of the legislative branch to curb executive misconduct even if criminal charges are never pursued:

So what if the executive branch won’t prosecute? The Congress has quite an impressive portfolio of powers of its own, and need not wait for criminal conduct—or rest its judgment on criminal standards—before meting out its own effective means of punishment and control. The Congress, for example, may use committee investigations, backed by subpoena power, to bring to light any malfeasance in the executive branch: it may slash the budget of agencies not doing their jobs; it may decline to confirm presidential nominees for literally hundreds of positions; and ultimately it may impeach executive officials and remove them from office.

In the 1990’s, one-time supporters of the Independent Counsel Act turned critics after Kenneth Starr’s wide-ranging investigation of President William Clinton, and argued that the availability of an Attorney General-appointed (and controlled) special counsel would protect against executive overreach. Professors Stephen Calebresi and Nicholas Terrell later offered their own vote of confidence for Congress’ ability to control executive misconduct via the power of the purse, conducting oversight hearings, and blocking confirmations. “The bottom line is that the congressional committees have more sway over the executive branch and the bureaucracy than the president” does, Calabresi and Terrell wrote.

---

47 *Id* at 136-37.
48 *See, e.g.,* James K. Robinson *After The Independent Counsel Act: Where Do We Go From Here?*, 51 Hastings L.J. 733 (2000).
49 Stephen Calebresi and Nicholas Terrell, *The Fatally Flawed Theory Of The Unbundled Executive* 93 Minn. L. Rev. 1696, 1701 (2009).
But this laissez-faire confidence in the existing system of indirect executive branch oversight has not been supported by recent events. In the example of Bush administration sanctioning illegal torture, Congress did attempt to control executive branch malfeasance by the same types of hearings\(^{50}\) and media advocacy\(^{51}\) which Carter, Calabresi, and Terrell claimed would be quite effective.\(^{52}\) Led by the public advocacy of Senator John McCain, a survivor of torture during his years of captivity as a prisoner of war during the Vietnam War, Congress enacted the Detainee Treatment Act of 2005, which expressly prohibited cruel, inhuman or degrading treatment of any person in U.S. custody.\(^{53}\) Yet no special counsel was appointed, the executive branch remained free of criminal accountability for violations of the many laws governing prisoner treatment prior to the passage of the Detainee Treatment Act, and the Department of Justice anticipated the new legislation by redefining by memorandum the existing torture activities in such a way that they did not appear to violate the terms of the new law.\(^{54}\)

The judicial branch attempted to intervene in the executive branch torture practices as well, ruling in the 2006 case of *Hamdan v. Rumsfeld* that the Geneva Conventions’ prohibition of


\(^{52}\) See, Calabresi and Terrell, *supra*, note 49.

\(^{53}\) *Supra* note 28, stating in pertinent part, “No person in the custody or under the effective control of the Department of Defense or under detention in a Department of Defense facility shall be subject to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation . . . . No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment . . . . (a) defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984. U.S. U.S. Dep’t of Army Field Manual 34-53, Intelligence Interrogation (28 Sept. 1992) sets forth the military’s approach to intelligence interrogations and flatly prohibits the use of force, including all acts of “physical or mental torture, threats, insults, or exposure to inhuman treatment as a means of or aid to interrogation.”

\(^{54}\) *TORTURE MEMOS, supra* note 18 at 241-74.
mistreatment of war detainees applied to al-Qaeda suspects, a decision that contradicted President Bush’s stated policy. Hamdan joined existing court precedent holding that intentional infliction of pain for interrogation purposes “shocks the conscience” and thus violates the Due Process Clause of the U.S. Constitution, the standard adopted by the Senate in ratifying the Conventions Against Torture. Again, Department of Justice lawyers responded by simply redefining by memo existing CIA activities until they complied on paper with the judicial rulings.

The legislative and executive branches having failed in their efforts to control executive branch torture activities, the only remaining hope was the Justice Scalia-touted “political check” on executive powers. But if legislative and judicial branch attempts to curb the executive branch torture crimes resulted in complete strike-outs, the political check was a sharp line drive finding its way into the opponent’s waiting glove--a more promising prospect that nevertheless resulted in nothing more than the final out.

c. A New President; Continued Impunity for Torture

In 2008, U.S. voters elected Barack Obama to replace President George W. Bush. Obama, who is a member of a different political party than his predecessor, expressed sharply critical views of the Bush administration’s activities regarding torture, and appointed an Attorney

---

55 Hamdan v. Rumsfeld, 548 U.S. 557, 629-630 (2006) (“[T]he Government asserts, that Common Article 3 does not apply to Hamdan because the conflict with al Qaeda, being ‘international in scope,’ does not qualify as a ‘conflict not of an international character.’ That reasoning is erroneous.”).

56 See, SENATE ARMED SERVICES COMMITTEE, supra note 16 at xii.

57 Chavez v. Martinez 538 U.S. 760, 775 (2003) (opinion of Thomas, J.) (noting due process prohibits conduct that “shocks the conscience.” The justices disagreed about the specific conclusions to be drawn from the facts in the case, but all who addressed the issue regarding deliberate infliction of pain on an individual in order to compel him to talk agreed that this practice would shock the conscience and violate the Constitution.)

58 See, Conventions Against Torture, supra note 25.

59 TORTURE MEMOS, supra note 18 at 263-72. (“For the reasons stated, we conclude that CIA interrogation techniques, with their careful screening procedures and medical monitoring, do not ‘shock the conscience.’”)

60 Morrison, 487 U.S. at 711.


63 JOSH ROVENGER. ANALYSIS: OBAMA VS. MCCAIN ON TORTURE, CITIZENS FOR GLOBAL SOLUTIONS (May 28, 2008) available at http://www.globalsolutions.org/in_the_news/analysis_obama_vs_mccain_torture (Quoting Obama as saying, “What we cannot do is have the President of the United States state, as a matter of policy, that there is a loophole or an
General who shared those same critical views, thus removing the self-preservation conflict-of-interest barriers that so predictably discouraged the Bush administration from pursuing torture investigations and prosecutions.

Yet, as of late 2009, the new president has not pursued either investigations or prosecutions of high-ranking executive branch officials from the previous administration. In August of 2009, Obama administration Attorney General Eric Holder announced that he was asking a federal prosecutor to conduct a preliminary investigation of the CIA’s interrogation practices, but indicated that the scope of the investigation would not include high-ranking executive branch officials, including members of the Department of Justice, where the memoranda sanctioning torture originated. Despite the mandates of the Conventions Against Torture, where the U.S. explicitly agreed to submit allegations of torture to authorities for criminal prosecution, it appears that none of the executive branch officials who sanctioned torture will be subject to criminal prosecution in the United States.

Why haven’t President Obama and his Attorney General pursued criminal prosecution for these executive branch torture crimes? When asked about conducting investigations and filing indictments, the President did not dismiss the possibility, but said, "Generally speaking, I'm more interested in looking forward than looking backwards.” a sentiment echoed by Attorney

---

64 Scott Shane, Remarks on Torture May Force New Administration’s Hand, N.Y. TIMES, Jan. 16, 2009. (Quoting Holder as saying at his Congressional confirmation hearing, “We prosecuted our own soldiers for using it in Vietnam . . . Waterboarding is torture.”)


66 Press Release, Statement of Attorney General Eric Holder Regarding a Preliminary Review into the Interrogation of Certain Detainees (August 24, 2009) (hereinafter Holder Press Release) (“ . . . the Department of Justice will not prosecute anyone who acted in good faith and within the scope of the legal guidance given by the Office of Legal Counsel regarding the interrogation of detainees. I want to reiterate that point today, and to underscore the fact that this preliminary review will not focus on those individuals. I share the President’s conviction that as a nation, we must, to the extent possible, look forward and not backward when it comes to issues such as these.”) Available at http://www.justice.gov/ag/speeches/2009/ag-speech-0908241.html

67 See Conventions Against Torture, Art. 7, supra note 25.

68 As noted in Section IV (c)(iv), infra, prosecutions of high-ranking executive branch officials are being contemplated in other jurisdictions outside the U.S.

General Holder.\textsuperscript{70} As a presidential candidate, then-Senator Obama said, “I would not want my first term consumed by what was perceived on the part of the Republicans as a partisan witch hunt, because I think we've got too many problems to solve.”\textsuperscript{71} Likely, the fear of political distraction caused by torture prosecutions is a valid one, and the President’s wide array of duties suggests that the electorate will not punish him for this dereliction of law enforcement duty.\textsuperscript{72}

U.S. prosecutions of executive branch officials for sanctioning torture would not be easy. The Department of Justice Office of Legal Counsel memoranda were clearly requested and designed to give legal cover to U.S. officials involved in approving and carrying out torture—as former Office of Legal Counsel attorney Jack Goldsmith has written, such opinions were considered to be “get-out-of-jail-free” cards.\textsuperscript{73} U.S. criminal law recognizes a defense of “reasonable reliance” for accused who were advised by government officials that their conduct was lawful.\textsuperscript{74} Also, Congress in the Military Commissions Act of 2006 pledged immunity to post-9/11 interrogators.\textsuperscript{75} And it is notoriously difficult to convict “law enforcement” defendants of criminal charges, not to mention high profile leaders of the nation’s government.\textsuperscript{76}

But the immunity-conferring power of an Office of Legal Counsel opinion has recently been called into serious question.\textsuperscript{77} If charges are filed against Bush administration officials, the facts that the Office of Legal Counsel memos attempted to redefine torture in the face of settled law to the contrary,\textsuperscript{78} and did so only after oral discussions with Bush Administration regarding the types of techniques the administration wished to employ on detainees,\textsuperscript{79} surely will inhibit the

\textsuperscript{70} Holder Press Release, \textit{supra}, note 66.


\textsuperscript{72} See note 126, \textit{infra}. (Noting that President Bush won re-election in 2004 despite public’s belief that U.S. was engaging in illegal torture and opposition to the practice.)

\textsuperscript{73} J\textsc{ACK} G\textsc{OLS}M\textsc{ITH}, T\textsc{HE} T\textsc{ERROR} P\textsc{RESIDENCY}: L\textsc{AW AND JUDGMENT} I\textsc{N}SIDE THE B\textsc{USH} A\textsc{DMINISTRATION} 97 (2007).


\textsuperscript{76} \textit{See} Steven Puro, \textit{Federal Responsibility for Police Accountability Through Criminal Prosecution}, 22 St. Louis U. Pub. L. Rev. 95, 118 (2003). (Noting that, between 1984 and 1995, the Criminal Section of the U.S. Department of Justice had a 71% success rate in prosecuting law enforcement officers charged with civil rights violations, compared to a 95% success rate for prosecuting non-law enforcement individuals)

\textsuperscript{77} \textit{See}, Note, \textit{The Immunity-Conferring Power Of The Office Of Legal Counsel} 121 Harv. L. Rev. 2086 (2008).

\textsuperscript{78} \textit{See}, \textit{supra} note 23.

\textsuperscript{79} Mark Mazzetti, \textit{Bush Aides Tied to Talks on CIA Interrogations}, N.Y. TIMES., Sept. 25, 2008, \texttt{http://www.iht.com/articles/2008/09/25/america/cia.php} (stating that Office of Legal Counsel attorney and
legal opinions’ prophylactic effect. Similar doubts have been raised regarding the efficacy of the Congressionally-promised immunity from the Military Commissions Act.

Potential prosecution could be based on criminal liability for directly violating the Conventions Against Torture and/or aiding and abetting an international crime, participating in a joint criminal enterprise, or dereliction of duty by civilian and military leaders. Prosecution could proceed in federal court under the War Crimes Act and/or the federal torture statute. Potential legal barriers have not prevented the Obama administration from reviewing possible criminal prosecution against low-level torture actors, suggesting that the lack of similar inquiries into high-level executive branch officials’ roles in torture has more to do with the President’s acknowledged political calculus than the challenges of criminal law.

Moreover, the critical question is not whether torture prosecutions would be successful. The question is whether the U.S. will live up to its obligations under international agreements to pursue such crimes, and the even more established obligations under the rule of law as defined by generations of American jurisprudence. It seems clear that the Obama-appointed Attorney General has no more intention to fulfill these obligations than the Bush-appointed Attorneys General did.

Thus, in the context of multiple and egregious violations of the laws against torture, the political check on executive branch misconduct has been no more effective than the legislative and judicial attempts to sanction illegal executive branch torture activities. While Bush administration lawyers misstated the law on torture, the same lawyers were right on target in assessing the risk of significant review of executive branch actions. In one of the torture memoranda, the Department of Justice attorneys admitted that their permissive interpretation of

memoranda author John Yoo gave oral advice regarding interrogation methods before formal memoranda were produced).

The defense of reliance on internal statements attempting to paint controversial activities as legal was rejected in the Nuremberg Military Tribunals. See, United States v. Von Leeb and Others (The High Command Case (1948)), 15 Int'l L. Reps. 376 (1949) (Hitler's directives "had the force and effect of law[,]" but “[a] directive to violate International Criminal . . . Law is therefore void and can afford no protection to one who violates such law in reliance on such a directive . . . ”).

Paust, supra note 30 at 1548. (Attempt to confer immunity via the Military Commissions Act must fail because “Congress has no power to violate the separation of powers by such a blatant denial of a constitutionally mandated, traditional, and essential judicial power to implement treaty laws of the United States that, as the Constitution expressly requires, ‘shall extend ot all cases . . . arising under … treaties.’”)

Jordan Paust, Prosecuting the President and His Entourage, 14 ILSA Int’l and Comp. L 539, 542-43 (2008).


Supra note 66.
the law on torture might not be upheld in a court review, but reassured our country’s leaders with a chillingly accurate assurance that there was little to worry about, since “the courts have nothing to do and can give no redress.” 86 The memo concluded by stating that, “although we cannot predict with confidence whether a court would agree with this conclusion [finding enhanced interrogation techniques legal], though, for the reasons explained, the question is unlikely to be subject to judicial inquiry.” 87

After a new presidential election, the fox may no longer be guarding the henhouse, but he is certainly being allowed to slink away in impunity, feathers and chicken bones trailing in his wake. The country’s founders, dedicated to curbing unchecked powers, certainly would not approve of this state of affairs. As it turns out, a review of the creation of the office of Attorney General and the system of federal prosecution shows the founders never intended for the President to exercise the exclusive control over federal criminal prosecution that has led to this state of executive impunity.

II. The Missing Legal and Historical Foundations for President-Controlled Federal Prosecutions

a.) The English and Colonial Traditions

As with many other aspects of their work designing a new government, the founders were informed by English tradition when they considered the creation of a chief legal officer. From the Middle Ages onward, the Attorney General in England was at once the chief legal advisor to the Crown, a consultant to both houses of Parliament, and the chief administrator of attorneys acting on his behalf representing government agencies in court. 88 Criminal prosecutions were instigated by individuals, but the Attorney General retained the ability to defeat a prosecution by

86 THE TORTURE MEMOS, supra note 18 at 272. In his analysis of these concluding remarks in the memorandum, David Cole writes, “In other words, when it comes to the ban on cruel, inhuman or degrading treatment, the CIA operates for all practical purposes in a “law-free zone,” or at least in a zone where the law is what the executive says it is— in secret—and no court will ever have the opportunity to disagree.” Id. at 34.
87 Id. at 274. This final memo of May, 2005, was the bookend to the first memo of August, 2002, which argues that neither the legislative or judicial branch have any authority to question the President’s actions with regard to detainees. Id. at 85-90.
88 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 459-61 (2D ED. 1937).
filing a writ of *nolle prosequi*. Previously a position of life tenure, the office of the Attorney General was modified by Henry VIII to serve at the pleasure of the Crown.

The model was followed by all thirteen colonies at the time of the United States’ founding, with variations including attorneys general sometimes being popularly elected (Rhode Island), sometimes being granted a lifetime appointment by the legislature (North Carolina), and sometimes being appointed by the governor (New York, Delaware, etc.).

b.) The Constitutional Convention and The First Congress

The constitutional framers’ creation of a unitary executive was a deliberate and bold act. The executive councils of government under the Articles of Confederation had been remarkably diffuse, and just as remarkably ineffective, inspiring James Madison to argue in Federalist No. 51 that a divided executive would be weakened in its competition with the legislative and judicial branches, thus jeopardizing the necessary checks and balances. Alexander Hamilton, in Federalist No. 70, insisted that a unitary executive is needed to foster energy and efficiency, and criticized a divided executive on accountability grounds, saying a plural executive “tends to conceal faults, and destroy responsibility.”

But this pre-convention lobbying, and the clear if sparse language of Article II, Section 1 (“The executive power shall be vested in a President of the United States of America”) notwithstanding, a system of federal criminal prosecution independent of the executive would

---

89 S. F. MILSON. HISTORICAL FOUNDATIONS OF THE COMMON LAW. 403-21 (2D ED. 1981)
90 Id.
92 U.S. CONST. ART. II Sec. 1. See, also, CATHERINE DRINKER BOWEN, MIRACLE AT PHILADELPHIA 55 (1966) (describing a hush coming over the convention when a single executive was first proposed). The term “unitary executive” here refers to a structure with a single executive officer, should not be confused with the arguments in support of a presidential prerogative to act contrary to legislation. See, *infra* note 134.
93 Letter from James Madison to Edmund Pendleton (Feb. 24, 1787), in 9 THE PAPERS OF JAMES MADISON, 294, 294-95 (Robert A. Rutland & William M. E. Rachal eds., 1975) (“Indeed the present System neither has nor deserves advocates; and if some very strong props are not applied will quickly tumble to the ground.”)
94 THE FEDERALIST NO. 51, at 321-22 (James Madison) (Clinton Rossiter ed., 1961). (“[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition.”)
95 THE FEDERALIST NO. 70 at 427 (Alexander Hamilton) (Clinton Rossiter ed., 1961.) (“But one of the weightiest objections to a plurality in the executive, and which lies as much against the last as the first plan is that it tends to conceal faults and destroy responsibility.”)
96 ART. II, *supra* note 92.
not have been anathema to the founders. They were well aware of the historical model of independent prosecution in England and in several of the original states, yet took no action to define the office of Attorney General in the text of the Constitution, and appear to have conducted no debate on the appointment, removal or duties of the country’s chief legal officer.\(^{97}\) Instead, it was left to the First Congress to establish the office.

The Congress, too, did not seem to feel strongly about the need for a dependent relationship between the Attorney General and the president, much less presidential control over federal prosecutions overall. Initial drafts of the Judiciary Act of 1789 had the Attorney General being appointed by the Supreme Court.\(^{98}\) The limited available records suggest that it was only conflict of interest concerns raised by the judiciary, not a desire for presidential control, which led to the Attorney General’s office being created with a presidential relationship in the final sentences of the Judiciary Act:

> And there shall ... be appointed a meet person, learned in the law, to act as attorney-general for the United States, who shall be sworn or affirmed to a faithful execution of his office; whose duty it shall be to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned, and to give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any departments, touching any matters that may concern their departments, and shall receive such compensation for his services as shall by law be provided.\(^{99}\)

Congress was silent on the question of whom the Attorney General should report to within the new government. As Susan Low Bloch has pointed out, this vagueness was in marked contrast to the Constitution’s and Congress’ very explicit efforts to invest significant presidential authority over the secretaries of war and foreign affairs:

> Although the framers decided that the Constitution should vest the executive power in a single President—not a “plural executive”—none of the early interpreters seemed to believe that that constitutional decision dictated that the President have the same degree of control over all executive officers. To be an effective head of state, the President needed maximum control over the Secretaries of War and Foreign Affairs and, accordingly, was given the power to appoint and remove these officers and to direct their activities. However, with the

---


\(^{98}\) *Id.*

\(^{99}\) The Judiciary Act of 1789, *supra* note 33 at 92-93. Bloch also notes the absence of a significant record of why the final version of the Act included a switch from judicial appointment of the Attorney General, but suggests it may have been inspired by judges’ suggestions to members of Congress. Bloch, *supra* note 97 at 571.
Attorney General, where centralized control was apparently not deemed essential, the President was explicitly given only the power to appoint; the power to remove and to direct were left unspecified.  

Other historians have reviewed this same record and concluded that there is no historical or constitutional basis for concluding that the country’s founders intended to establish criminal law enforcement as an exclusive function of the executive branch.

c.) Post-Founding Evolution of the U.S. Attorney General

For many decades after its creation, the position of U.S. Attorney General was not a particularly important or powerful one, nor did it seem exclusively attached to the office of the president. This part-time job was held by an attorney with no staff and no office space, and appeared to report to, and serve, Congress as much as the President. He had no supervisory authority over district attorneys, who operated in part autonomously and in part as assistants to judges and grand juries. In 1792, one Supreme Court justice noted that the Attorney General was empowered to respond to the interests of the government regardless of explicit presidential approval: “[H]e is not called the Attorney General of the President, but Attorney General of the United States.”

By the mid-nineteenth century, the power of the office was beginning to grow, first by receiving a salary on par with other cabinet officials, then by gaining control over district attorneys, marshals, and eventually a fully staffed Department of Justice. As the office of the Attorney General expanded its reach, so did the broader executive branch of government in relation to the judicial and legislative branches, to the extent that some have concluded that

---

100 Bloch, supra note 97 at 636-37.
102 Krent, id. at 286-89.
103 Bloch, supra note 97 at 581-82.
104 HOMER CUMMINGS AND CARL McFARLAND, FEDERAL JUSTICE 8-12 (1937)
105 Bloch, supra note 97 at 602 (citing Justice James Iredell, Notes in Argument).
106 Act of June 22, 1870, ch. 150, 16 Stat. 162. Section 1 of the Act provided:
There shall be, and is hereby, established an executive department of the government of the United States, to be called the Department of Justice, of which the Attorney General shall be the head. His duties, salary, and tenure of office shall remain as now fixed by law, except so far as they may be modified by this act. Id. § 1, at 162.
107 See, e.g., Steven G. Calabresi & Christopher S. Yoo, The Unitary Executive During the First Half-Century, 47 Case W. Res. L. Rev. 1451 (1997); Steven G. Calabresi & Christopher S. Yoo, The Unitary Executive During the Second Half-Century, 26 Harv. J.L. & Pub. Pol’y 668 (2003); Christopher S. Yoo et al, The Unitary Executive
both the Attorney General and the leader he serves have become more similar to the Henry VIII model than the framers would ever have imagined possible.\textsuperscript{108}

\textbf{III. More Prosecutorial Independence Would Lead to Better Governance}

Several commentators have argued that the establishment of a prosecutor independent of the executive branch would not only avoid the conflicts of interest discussed here, but also lead to greater transparency of decision-making,\textsuperscript{109} as well as increased accountability to voters.\textsuperscript{110} The electorate would have a more direct impact on policy with an independent prosecutor, since the plethora of issues in the election of a President likely prevents that election from serving as an effective referendum on prosecutorial decision-making.\textsuperscript{111} These arguments are well-supported by empirical evidence that prosecutorial independence from executive control will lead to both less corruption and overall better governance.\textsuperscript{112}

\textit{During the Third Half-Century, 1889-1945}, 80 Notre Dame L. Rev. 1 (2004); and Christopher S. Yoo et al \textit{The Unitary Executive In The Modern Era, 1945-2004}. 90 Iowa L. Rev. 601 (2005). (A four-part series demonstrating how Presidents have acquired and maintained power as the unitary executive throughout U.S. history.)

\textsuperscript{108}See, e.g., Martin S. Flaherty, \textit{The Most Dangerous Branch}, 105 Yale L.J. 1725, 1727 (1996) (“The dominance of executive power ought by now, to lift a phrase from Charles Black, to be a matter of common notoriety not so much for judicial notice as for background knowledge of educated people who live in this republic.”) and Marshall, \textit{supra} note 91 at 2470-71. (“On paper at least, there is a watchdog guarding against executive branch excess . . . But under the unitary executive framework, it is the President's, and not the Attorney General's, position on the duties and obligations of the Office that controls. And by his power of appointment or otherwise, the President can assure that the Attorney General's and Department of Justice's primary fealty is to his administration and not to some abstract view of the law. Without any structural assurance of independence, in short, the Office of the Attorney General is only as independent as the President wants it to be.”)

\textsuperscript{109}Marshall, \textit{supra} note 91 at 2475.


\textsuperscript{111}Diana N. Viggiano. \textit{Aiming The Canons At The General: How Should Traditional Canons Of Legal Ethics Guide And Constrain An Attorney General?} 22 Geo. J. Legal Ethics 1193, 1208. (“It is also unlikely that displeasure with the actions taken by the Attorney General would be the issue foremost in the mind of a voter on Election Day when he or she must also be considering the nation's foreign policy, economy, and overall domestic agenda. Impeachment is an equally unattractive alternative remedy, since displeasure with one cabinet member's behavior does not seem to be a reasonable basis upon which to impeach the President.”)

\textsuperscript{112}It is worth noting that new democracies in eastern Europe have been characterized by separating the chief prosecutor from control by the executive. See, Alenka Seilh, \textit{The Prosecution Process and the Changing Role of the Prosecutor} in \textit{CRIME AND CRIMINAL JUSTICE IN EUROPE}, CHRISTOPHER NUTTAL , ED. 93, 96 (2000) (Advocating for appointments for a fixed period of time in order to avoid prosecutors being dependent on other government officials, and noting that new eastern European governments are more likely to have chief prosecutor chosen by parliament to avoid dominance of the position by the chief executive) See, also, Darina Sabyova, \textit{Role and Status of the Public Prosecution Service}, in \textit{WHAT PUBLIC PROSECUTION IN EUROPE IN THE 21ST CENTURY: PROCEEDINGS 79} (Pan-European Conference Strasbourg, May 2000).
Empirical Evidence that Executive Control Over Prosecution Increases Chances of Corruption

Aaker, Feld and Voigt tested the hypothesis, well-supported in theory but not previously measured, that prosecution agencies that are dependent on the executive have less incentive to prosecute crimes committed by government members, and thus the risk associated with official misconduct is decreased.\textsuperscript{113} In so doing, they evaluated whether an independent prosecutorial agency reduced the likelihood of government officials committing crimes.

Aaker, Feld and Voigt constructed two cross-national indicators of prosecutorial independence, the first a seven-variable indicator of \textit{de facto} prosecutorial independence.\textsuperscript{114} This indicator included evaluation of whether prosecutors could be removed from office by the executive, budget and salary adequacy and independence, and fluctuations in the legal foundation for prosecuting official misconduct.\textsuperscript{115} They collected these data from 78 countries, compared them to corruption perception measures, and concluded that \textit{de facto} prosecutorial independence was highly and robustly significant for explaining variation in measures of perceived corruption.\textsuperscript{116} Aaker, Feld and Voigt thus empirically verified the intuitive assumption that the existence of factually independent prosecutorial oversight decreases the chance of official misconduct.\textsuperscript{117}

\textsuperscript{114} Id. at 11-12.
\textsuperscript{115} Id.
\textsuperscript{116} Id.
\textsuperscript{117} Aaker, Feld and Voigt also conducted analyses of \textit{de jure} prosecutorial independence, which showed a negative relationship to \textit{de facto} prosecutorial independence and a positive relationship to perceived corruption, which they suggest reflects the pressure exerted on governments by international development agencies to adopt anti-corruption measures. Id. at 16. Their analysis showed that the \textit{de jure} measure was significantly impacted by recently-passed legislation promising procedural improvements that did not yet show up as having a \textit{de facto} impact. For example, Aaker, Feld and Voigt’s measures showed that the presence of an anti-corruption agency, presumably created in response to incidents of official misconduct, had an overall positive relationship to corruption measures. Id. at 18. These findings that promises do not equal performance are consistent with Oona Hathaway’s quantitative analysis finding no human rights treaty for which ratification by a country was associated with that country’s engaging in better human rights practices, and several treaties where ratification was actually associated with worse practices. Oona A. Hathaway, \textit{Do Human Rights Treaties Make a Difference?} 111 Yale L.J. 1935, 1976-2000 (2002). \textit{See also,} Fran Quigley, \textit{Growing Political Will From the Grassroots: How Social Movement Principles Can Reverse the Dismal Legacy of Rule of Law Interventions} 41.1 Col. Hum. Rts. L Rev. (Forthcoming, 2009) (discussion of disparity between Kenya’s formal human rights pledges and the presence of justice in the country)
b. Empirical Evidence that an Unbundled Executive Provides More Effective Governance

As discussed in Section II (b), the U.S. federal system features a unitary executive with a wide and seemingly broadening array of powers invested in the President alone. Christopher Berry and Jacob Gersen argue that “unbundling” the federal executive by adding one or more additional directly-elected federal executive offices, such as the Attorney General, would produce political outcomes that are closer to public preferences than those produced by the current system. Peter Shane agrees, laying out the problem of the electorate choosing a President who is invested with the authority over an overstuffed portfolio of issues:

There is no evidence that the President, at any given moment, embodies that set of policy predilections across a wide set of issues that is held by a contemporaneous majority -- or, more accurately, by contemporaneous majorities of Americans . . . [T]here is one most obvious reason why the President would mirror public opinion polls quite imperfectly -- the President is a single person. Assuming it is even possible to identify, at a given moment, the full array of value judgments that various majorities of Americans hold across a comprehensive range of important public policy issues, it is doubtful that the resulting attitudinal profile would be sufficiently coherent to impute it to any single personality.

While Aaker, Feld and Voigt evaluated cross-national political systems, Berry and Gersen focus on U.S. state and local governments, where the dominant model is an unbundled executive. Analyzing these government models, Berry and Gersen find that adding executive-level officials produced greater clarity in voter control over policy issues and shifted policy outcomes toward voter preferences. Similar results were found by Besley and Coate, who contrasted elected and appointed utility regulators in U.S. states and found that elected regulators adopted more consumer-friendly policies than appointed regulators.

At state and local levels, the trend is toward increasing the number of executive office-holders, which Berry and Gersen postulate will decrease the slack between citizen preferences

---

118 See, Section II, supra notes 92-95.
119 Christopher Berry and Jacob Gersen. The Unundled Executive 75 U. Chi. L. Rev. 1385, 1387 (2008). (Hereinafter Berry and Gersen I)
120 Shane supra, note 110 at 197-98
121 Berry and Gersen I, supra note 119 at 1386 (citing data that 42 states elect their attorneys general).
122 Christopher R. Berry and Jacob E. Gersen, Fiscal Consequences of Electoral Institutions, 52 J L & Econ (forthcoming 2009). (Hereinafter Berry and Gersen II)
and government policy, at least until the number of office-holders grows too large for the public to effectively monitor.\footnote{Berry and Gersen II, supra note 122.} Applying the data to their argument for unbundling the federal executive, Berry and Gersen write:

An unbundled executive systematically reduces agency problems in representative government by enhancing accountability to natural citizen constituencies . . . \(A\) vote for or against a presidential candidate is remarkably crude; it is a weighted average of voter approval of dozens if not hundreds of policy dimensions. A vote for or against an elected secretary of education is less so.\footnote{Berry and Gersen I supra note 119 at 1387, 1408.}

This argument that the electorate is unable to fully express many executive policy preferences because of the breadth of the presidential job description gains further credence in the context of the Bush administration’s sanctioning of illegal torture. Public opinion data in the summer of 2004 showed that Americans by a margin of 2-1 disapproved of torture and most believed that the Bush administration was conducting torture.\footnote{David Morris and Gary Langer, Most Americans Oppose Torture Techniques. ABCNEWS.COM, May 27, 2004. Available at http://abcnews.go.com/sections/us/Polls/torture_poll_040527.html} Yet Bush was re-elected to office that same November by voters who cited other priorities like the war in Iraq, the economy, and health care in making their presidential choice.\footnote{Poll: Voters Relieved By Decisive Election, AP, November 8, 2004. Available at http://www.usatoday.com/news/politicalselections/2004-11-08-voters-relieved_x.htm}

Despite Bush’s later claim that, “We had an accountability moment, and that’s called the 2004 election,”\footnote{Transcript of Bush Interview, WASH. POST Jan. 16, 2005.} it seems clear that his re-election was not a statement of widespread approval for his administration’s torture actions. It is quite possible that an independent Attorney General candidate who pledged to vigorously investigate and prosecute torturers and their enablers would have won election in the same contest, thus reducing the slack between voter preferences and executive action identified by Berry and Gersen.\footnote{Berry and Gersen II, supra note 122.} In 2005-2008, at least, an Attorney General independent of the chief executive would likely have better represented the public’s will and better defended the rule of law.
IV. Options for Independent Prosecutorial Oversight of the Executive Branch

a. Direct Election of a Federal Attorney General

The obvious flaw of placing prosecutorial authority in the hands of the President of the U.S. who could also be the target of such prosecution suggests an equally obvious solution: the direct election of a federal Attorney General. As Professor William Marshall argues in his essay provocatively entitled “Break Up the Presidency,” an elected federal Attorney General would be clearly independent of the President, be directly accountable to the electorate,\(^{130}\) and would follow the dominant U.S. model for the selection of prosecutors, since most of the U.S. publicly elects their state attorney general and local-level prosecutor.\(^{131}\) Although it would arguably take a constitutional amendment to Article II to remove the Attorney General from the purview of the President,\(^{132}\) this is clearly an instance where the extraordinary measure of constitutional change is warranted in order to preserve the integrity of a government designed to ensure that no office holder is above the law.\(^{133}\)

There are certainly defenders of the status quo of the “unitary executive,” not to be confused with the arguments in support of a presidential prerogative to act contrary to legislation.\(^{134}\) Professors Stephen Calabresi and Nicholas Terrell oppose the unbundling of the federal executive, saying that adding more elected federal officials would tax the attention span

\(^{130}\) Marshall, supra note 91.

\(^{131}\) Eric Rasmusen, Manu Raghav and Mark Ramseyer. Convictions Versus Conviction Rates: The Prosecutor's Choice 11 Am. L. & Econ. Rev. 47, 67-68 (2009) (citing fact that chief prosecutors are elected everywhere except for Alaska, Connecticut, the District of Columbia, and New Jersey. In Alaska, Delaware and Rhode Island, criminal prosecution is the primary responsibility of the Attorney General (appointed in Alaska and elected in Delaware and Rhode Island) and in the District of Columbia the U.S. Attorney has jurisdiction over felonies and misdemeanors.)

\(^{132}\) See, Proposals Regarding an Independent Attorney General, 1 U.S. Op. Off. Legal Counsel 75, 77-78 (1977) (concluding that proposals to make the Attorney General independent would be unconstitutional as a violation of Art II Section 3 statement that the President “shall take Care that the Laws be faithfully executed.”) and Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 489 (1999) (citing United States v. Armstrong, 517 U.S. 456, 463-65, 687 (1996)) (holding that prosecutorial discretion is “special providence” of executive branch). But, see, notes 97-100 supra for discussion of evidence that framers did not specifically address the question of whether the Attorney General would be appointed by the President, and the first Congress did not see Presidential control of federal prosecutions as a constitutional mandate.

\(^{133}\) See, e.g., Marbury, 5 U.S. at163. Berry and Gersen I, supra note 119, acknowledge the difficulty of enacting constitutional changes but also notes the trend at state and local levels toward more directly-elected executive offices and says there is ample reason to be open to such a change at the federal level. “The structure of the executive branch has changed enormously since the founding . . . As society changes, political institutions do as well. If old unbundled executives should be eliminated and new unbundled executives create, so be it.” Id. at 1429.

\(^{134}\) Calabresi and Terrell, supra note 49 at 1696.
of voters, weaken the executive in contrast with the legislative branch, and blur the boundaries of executive power in times of national crisis.\textsuperscript{135}

But those arguments are well-refuted not just by the empirical evidence of effective divided executives cited in Section III here, but also by the dominance of prosecution by independently elected officials throughout the U.S. In 45 states, the Attorney General is an officer independent of the Governor,\textsuperscript{136} an arrangement designed to check the power of the states’ chief executives.\textsuperscript{137} An independent Attorney General arrangement has never been reversed by a state which adopted it,\textsuperscript{138} and is in fact the harbinger of a trend of increasing the number of directly elected executive officers at the state level.\textsuperscript{139} While some state attorneys general have prosecutorial powers, that power is most often invested in local prosecuting attorneys, who are almost always directly elected.\textsuperscript{140}

A chief legal officer elected independently of the federal chief executive remedies the inherent conflicts of interest presented by presidential control over her would-be prosecutor, along with the oft-expressed concerns over the accountability of a judicially-appointed independent counsel.\textsuperscript{141} This is not an unproven model, or even an imported one—rather, it is the dominant model of prosecution in the United States, where local chief prosecutors are elected everywhere except in Alaska, Delaware, and Rhode Island.\textsuperscript{142} In those states, the criminal

\begin{flushleft}
\textsuperscript{135} Id. at 1705, 1712, 1739. Berry and Gersen are the main foils for the Calabresi and Terrell argument, but Berry and Gersen return the favor with a humorous but pointed refutation of any suggestion that an unbundled executive would lead to lesser candidates for the presidency:
The candidates most likely to run for president in the current regime who would not do so in the unbundled regime are likely to be candidates for whom aggregate power is the most important concern. These candidates prize being the person in control of everything. Perhaps this group of candidates make for especially good presidents, but they seem to have most in common with megalomaniacs. In other countries, this would be a group of likely dictators, not responsive and responsible officials. Making the election of megalomaniacs or aspiring dictators less likely hardly seems a mark of shame for any executive regime. Berry and Gersen I, \textit{supra} note 119 at 420.
\end{flushleft}

\begin{flushleft}
\textsuperscript{137} Marshall, \textit{supra} note 91 at 2451-52 (quoting \textit{State ex rel. Mattson v. Kiedrowski}, 391 N.W.2d 777, 782 (Minn. 1986), where the Minnesota Supreme Court outlined that state’s rationale for independent executive officers: “Rather than conferring all executive authority upon a governor, the drafters of our constitution divided the executive powers of state government among six elected officers. This was a conscious effort on the part of the drafters, who were well aware of the colonial aversion to royal governors who possessed unified executive powers.”
\textsuperscript{138} Id. at 2452.
\textsuperscript{139} Berry and Gersen I, \textit{supra} note 119 at 1400.
\textsuperscript{140} Rasmusen et al. \textit{supra} note 131.
\textsuperscript{141} See, Section III (b), \textit{infra}
\textsuperscript{142} Rasmusen et al. \textit{supra} note 131 at 49 (Noting that, in 1994, U.S. state courts convicted 870,000 people of felonies, and the federal courts another 44,000.)
\end{flushleft}
prosecution is the province of attorneys general, themselves elected in both Rhode Island and Delaware. Since these state and local prosecutors handle a much heavier caseload than their federal counterparts, 95% of felony criminal cases in the U.S. are investigated, filed, and pursued by prosecutors accountable to direct election.

It is hard to conceive that an elected prosecutor who chose to ignore her local executive branch’s transgressions the way federal Attorneys General have done with the Bush administration would not face significant challenges in her next election cycle. It is equally difficult to conceive that the Founders, whose goals were to check the power of any one branch of government, ensure responsiveness to the citizenry, and to allow for constitutional change when events merit, would object to an amendment to Article II that would create a directly elected Attorney General, and thus a more responsive and accountable executive branch.

b.) A Revived--and Revised--Independent Counsel

i.) History of the Independent Counsel

Quite unintentionally, President Richard Nixon provided the inspiration for the creation of an independent counsel to investigate and prosecute executive branch crimes. First, in 1971, Nixon allegedly ordered Deputy Attorney General Richard Kleindienst to drop the government’s antitrust suit against International Telephone and Telegraph Corp (ITT), a major contributor to the 1972 Republican Convention. Then, on October 20, 1973, Nixon carried out his infamous “Saturday Night Massacre,” ordering Attorney General Elliot Richardson to fire Watergate

143 Id.
144 Id.
147 THE FEDERALIST NO. 52 at 360 (James Madison) (Tudor Publishing Co. 1947) ”As it is essential to liberty that the government in general should have a common interest with the people, so it is particularly essential that the branch of it under consideration should have an immediate dependence on, and an intimate sympathy with, the people. Frequent elections are unquestionably the only policy by which this dependence and sympathy can be effectually secured.”
148 U.S. CONST. ART. V (“The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress .”)
special prosecutor Archibald Cox after the D. C. Circuit Court ordered Nixon to turn over tape recordings which Cox had subpoenaed. 150 Richardson refused to obey Nixon’s order and resigned, as did Richardson’s deputy William Ruckelshaus, before Solicitor General Robert Bork obeyed Nixon’s order and fired Cox. 151

Nixon’s brazen efforts to place himself above the law led to dozens of Congressional proposals for reform in the investigation and prosecution of matters involving the executive branch. 152 These included unsuccessful proposals to make the Department of Justice an independent agency with the Attorney General appointed for a fixed six-year term, 153 to allow the courts or Congress to directly appoint a special prosecutor to investigate acts of wrongdoing within the executive branch, 154 and narrower but successful efforts to allow the Comptroller General, who is appointed to a 15-year term by the President with advise and consent by the Senate, 155 to obtain information from executive departments, investigate fraud in those departments and sue to challenge executive impoundments. 156

Ultimately, Nixon’s over-reach led to the passage of the 1978 Ethics in Government Act, which included the creation of an independent counsel. 157 The Act required the Attorney General to investigate upon learning of alleged criminal activity by high-ranking executive officials (including the President, Vice President, cabinet-level officials, high-ranking officials in the Executive Office of the President and the Department of Justice, Central Intelligence Agency, Internal Revenue Service and the president’s national campaign). 158 If she finds reasonable grounds for further investigation, the Attorney General was to apply to a three-judge panel known as the Special Division, chosen by the Chief Justice of the Supreme Court, for the

151 Id.
154 Removing Politics from the Administration of Justice, id.
158 Id.
appointment of a special prosecutor, which came to be known as the independent counsel.\textsuperscript{159} Once the matter was referred to the Special Division, which was required to appoint the independent counsel, the Attorney General and the Department of Justice was to suspend all of their own investigations and proceedings in the referred matter, and the independent counsel would proceed with “all investigative and prosecutorial functions” the Attorney General and Department of Justice possess.\textsuperscript{160} The Attorney General retained the ability to remove the independent counsel due to incapacity or for “extraordinary impropriety,” and either the independent counsel or the Special Division could terminate the office.\textsuperscript{161} The Act included a five-year sunset provision and was subsequently renewed three times, with some amendments, and renamed the Independent Counsel Act.\textsuperscript{162}

In 1988, the U.S. Supreme Court upheld the constitutionality of the Independent Counsel Act in \textit{Morrison v. Olson}.\textsuperscript{163} The Court first found that the Act did not violate the Appointments Clause of the U.S. Constitution,\textsuperscript{164} which invests major appointment powers with the President, based on the Court’s conclusion that the independent counsel was an “inferior” officer and thus could be court-appointed.\textsuperscript{165} The Court then found that any separation of powers concerns were satisfied by the control retained by the Attorney General and the President to make the initial referral of the matter to the Special Division and to remove the independent counsel for good cause.\textsuperscript{166}

Despite the Supreme Court’s imprimatur, delivered in a 7-1 majority decision over Justice Scalia’s dissent, the independent counsel was widely criticized by conservative legal

\textsuperscript{159} \textit{Id.}
\textsuperscript{160} \textit{Id.}
\textsuperscript{161} \textit{Id.}
\textsuperscript{162} \textit{Id.}
\textsuperscript{163} \textit{Morrison}, 487 U.S. 654.
\textsuperscript{164} \textsuperscript{U.S. CONST. ART. II, \S 2, cl. 2. (The Appointments Clause reads: “[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”)\textsuperscript{165} \textit{Morrison}, 487 U.S. at 672.
\textsuperscript{166} \textit{id. at 695 (“The Act does give the Attorney General several means of supervising or controlling the prosecutorial powers that may be wielded by an independent counsel . . . Notwithstanding the fact that the counsel is to some degree “independent” and free from executive supervision to a greater extent than other federal prosecutors, in our view these features of the Act give the Executive Branch sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties.”)
scholars, who found the legislation to be both unnecessary and a violation of the separation of powers."167 In the 1990’s, these scholars gained allies across the ideological spectrum after former D.C. Circuit Court of Appeals Judge Kenneth W. Starr’s wide-ranging five-year investigation of the William Clinton administration.168 Starr’s investigation strayed far from its original mandate, moving from alleged improprieties in the Clintons’ pre-presidential real estate dealings in Arkansas to include investigations into the firings of White House travel office staff, allegations of illegal foreign campaign contributions, and then the President’s extramarital affair with White House intern Monica Lewinsky.169 The Starr investigation was widely criticized as partisan in motivation, and when Starr and the Special Division proved to be impervious to the public criticism, attention was drawn to the lack of accountability in the independent counsel scheme.170 Popular and Congressional concern over the Starr investigation drove the nails into the coffin of the Independent Counsel Act, and Congress allowed it to sunset in 1999.171

ii.) Special Counsel

As the independent counsel statute expired in 1999, the Department of Justice issued new regulations creating a special counsel to investigate allegations of wrongdoing in the executive branch.172 Although the stated goals of the special counsel provision sound similar to the independent counsel legislation—separation from the ordinary prosecution review is called for if the investigation “would present a conflict of interest for the Department (of Justice)” and “it would be in the public interest”173—it is fitting that the adjective “independent” is removed from


168 David Halperin. Ethics Breakthrough Or Ethics Breakdown? Kenneth Starr's Dual Roles As Private Practitioner And Public Prosecutor 15 Geo. J. Legal Ethics 231, 242-43 (2002) (calling the scope of Starr’s investigation as approved by the Special Division as “an extraordinary expansion of his jurisdiction.”)

169 Id.

170 Erwin Chemerinsky, Learning The Wrong Lessons From History: Why There Must Be An Independent Counsel Law, 5-WTR Widener L. Symp. J. 1, 2 (2000). (“After the Whitewater debacle, the idea of an independent counsel seems clearly doomed. Many Republicans have always opposed the law because of its anti-Nixon origins and because of its use against Republican presidents, such as in the Iran-Contra scandal. Now Democrats have equal reason to hate the independent counsel statute because of how it was used against the Clinton administration.”)

171 Id. See also, Halperin, supra note 168 at 235 (the decision to allow the Independent Counsel Act to sunset “reflected a collective judgment by the Clinton Administration, Congress, and many leading scholars, journalists and other observers, that the benefits gained in avoiding abuses and conflicts of interest by means of the independent counsel law were outweighed by negative consequences of the law: the potential for abuses of power by independent counsels themselves, excessive expenditure of resources, and undue burdens on innocent officials.”)

172 Office of Special Counsel Regulations, 28 CFR Sec. 600 et seq. (2004)

173 Id. at 600.1
any designation of this position.\textsuperscript{174} This counsel is completely in the control of the Attorney General from start to finish, with the Attorney General determining whether to appoint the special counsel,\textsuperscript{175} who to select,\textsuperscript{176} what the jurisdiction of the counsel will be,\textsuperscript{177} and whether to suspend the investigation at any time, with only the proviso that the Attorney General notify Congress of the suspension decision.\textsuperscript{178} In short, all of the roles invested in the Special Division in the independent counsel statute have now been returned to the province of the Attorney General.\textsuperscript{179}

iii.) Envisioning a Revived and Redesigned Independent Counsel

Given the lack of an independent permanent prosecutor, the absence of an independent counsel statute, and the toothlessness of the Special Counsel structure, it is not surprising that the Bush administration sanctioned torture with the confidence that comes with self-provided impunity.\textsuperscript{180} This disturbing turn of events suggests that Congress overreacted to the Starr-era abuse of the independent counsel statute, in essence throwing the independent prosecutor baby out with the bathwater spoiled by Starr’s Lewinsky et al. investigations.\textsuperscript{181} If the outrage of Watergate and Nixon administration behavior led to the birth of the independent counsel, the Bush administration’s crimes of torture could inspire its revival in an improved structure informed by the lessons learned during its previous incarnation.

A fundamental flaw of the Independent Counsel Act, exposed by the sprawl of the Starr investigation even in the face of public disapproval, was that neither the independent counsel or the Special Division who controlled its jurisdiction were accountable to the electorate.\textsuperscript{182} This

\textsuperscript{174} Id.
\textsuperscript{175} Id. at 600.2.
\textsuperscript{176} Id at 600.3.
\textsuperscript{177} Id. at 600.4.
\textsuperscript{178} Id. at 600.7(b).
\textsuperscript{180} See, TORTURE MEMOS, supra notes 86-87. (Department of Justice officials’ assurance to executive branch members that judicial scrutiny of torture decisions was extremely unlikely.)
\textsuperscript{181} See, Chemerinsky, supra note 170 at 2 (“The lessons to be learned from the abuses of the Whitewater special counsel should be about how to reform the law, not why to end it.”)
\textsuperscript{182} See David A. Strauss, The Independent Counsel Statute: What Went Wrong?, 51 ADMIN. L. REV. 651, 652 (1999). (“You simply cannot have a criminal prosecutor, with so much power, subject to such limited checks.”) See, also Rappaport, supra note 162 at 1600-01 (“(A) problem is that independent counsels exercise significant discretion but are not accountable to the electorate. Independent counsels perform important duties that involve a substantial amount of policymaking discretion, including deciding whether certain conduct by an official warrants an indictment. In a democracy, persons who exercise such discretion are generally made accountable to the public . .
flaw could be remedied by redesigning the independent counsel along the lines of two proposals formulated post-Watergate. One would make the Department of Justice an independent agency a la the Federal Trade Commission,183 with the appointment of the Attorney General by the President or Congress for a fixed term of years.184 The second proposal calls for the appointment by Congress of a special prosecutor with the exclusive purpose of investigating allegations of criminal behavior in the executive branch.185 In either instance, the appointing body would be directly responsible to the electorate in a way the Special Division, which allowed Starr to run amuck, was not.186

An essential component of a truly “independent” counsel would be the removal of discretion from the Attorney General and President in applying for the appointment of the prosecutor, defining the jurisdiction, or removing the prosecutor. The Independent Counsel Act’s allowance of the Attorney General to influence the process in these areas undermined any claim to true independence of prosecution. Especially in the wake of the Bush administration’s defiance of both the rule of law on torture and other branches’ attempts to regulate the executive conduct sanctioning torture, it is easy to conceive that a President could instruct an Attorney General to refuse to initiate an independent counsel appointment process even when one appears called for by less self-interested observers.187 Indeed, to President Clinton, the take-home lessons from the Starr investigations was not that the independent counsel overstepped his bounds, but

---

183 Removing Politics from the Administration of Justice, supra note 153. See, also Brett M. Kavanaugh, The President and the Independent Counsel, 86 GEO. L.J. 2133, 2145-49 (1998) (suggesting that the President appoint the independent counsel subject to Senate confirmation).

184 Removing Politics from the Administration of Justice, id.

185 Id. This proposal bears a resemblance to the later suggestion by Michael Rappaport to endow a new Congressional investigative committee with additional subpoena powers and professional investigative staff to review and expose executive branch misconduct. See infra note 208.

186 A practical challenge to legislation that removes the executive branch entirely from the independent counsel appointment and review process is that these very oversight provisions were cited by the U.S. Supreme Court in justification for upholding the constitutionality of the Independent Counsel Act in Morrison, 487 U.S. at 695. Even though it appears clear that the framers intended the Attorney General to be a weak office and did not envision a great deal of Presidential control over federal prosecution, supra notes 97-101, the Morrison reasoning would argue for the choice of an executive-appointed fixed-term Attorney General over a Congressionally-appointed investigator/prosecutor.

187 See, Chemerinsky, supra note 170 at 6.
that Clinton should have never allowed his Attorney General to request an independent counsel to begin with.\footnote{Taylor Branch. The Clinton Tapes: Wrestling History with the President 428 (2009) (paraphrasing Clinton as saying that he “had been a fool to establish the Whitewater special prosecutor”). See, also, Bob Woodward, The Choice: How Clinton Won 444 (1997) (Quoting Clinton as telling 1996 election opponent Sen. Bob Dole, who had opposed reauthorization of the Independent Counsel Act, “You were right and I was wrong on the independent counsel.”)}

If one is interested chiefly in the friction-free exercise of presidential power, that may be a legitimate lesson to take from the Starr era. But it is anathema to a government built on a system of checks and balances. The Starr investigation showed that a truly independent counsel can lead to plenty of friction and inefficiencies in executive branch activities, but such impediments to the ambitions of any one branch of government were exactly the structure the founders of the country were seeking to create.\footnote{See, The Federalist No. 51, supra note 94, at 321-22 (“Ambition must be made to counteract ambition.”). See, also, Chemerinsky, supra note 170 at 2. (“This tension between independence and accountability is not unique to the debate over the independent counsel law. Quite the contrary, it is at the core of countless constitutional issues.”)} Reacting to the Starr investigation’s flaws by removing independent prosecutorial oversight of the executive branch was short-sighted, and can be remedied by a revival and redesign of the independent counsel structure.

c. Breaking Up the Prosecutorial Monopoly: Alternatives for Pursuing Executive Branch Misconduct

An alternative to removing the prosecutorial power over the federal executive branch from the President-controlled Attorney General is to introduce competition to the heretofore monopoly power to pursue and punish executive branch members for their misdeeds. Economists would expect that such competition would lead to a higher number of prosecutions of executive branch members and less incentive for executive branch leaders to influence the dominant method of prosecution.\footnote{See, Aaker, et al., supra note 113 at 9.} Four alternatives for breaking up the prosecutorial monopoly will be briefly reviewed here, including increased capacity of victims to punish executive branch misconduct, pursuing ethical complaints against Attorneys General and their attorney staff who show favoritism toward possible prosecution targets, bolstering the power of Congressional or internal government investigations, and the pursuit of criminal charges against executive branch leaders by international or local prosecutors not controlled by the President.
i. Victim-Initiated Actions Against Executive Branch Officials

In the context of the Bush administration’s alleged acts of sanctioning torture, attempts by apparent victims to seek justice in the civil arena have not yet yielded results on the merits of the claims. Former Attorney General John Ashcroft, FBI Director Robert Mueller, and former Secretary of Homeland Security Tom Ridge, as well as numerous U.S. immigration officials, have been sued by Maher Arar, a Syrian-born Canadian citizen, who U.S. officials in 2002 rendered to Syria where he was interrogated and tortured before being released without charges. The Eastern District of New York dismissed Arar’s suit, which alleged violations of the Torture Victims Protection Act, the Fifth Amendment, and international law, and the Second Circuit Court of Appeals, sitting en banc, upheld the dismissal in late 2009.

Jose Padilla, held under the designation of "enemy combatant" in solitary confinement for more than three years in Charleston, S.C., has sued Bush Department of Justice official and torture memoranda author John Yoo for actions that Padilla claims led to his being tortured. The Northern District Court of California in 2009 rejected Yoo’s claim of qualified immunity and allowed Padilla’s suit to go forward.

Even if these or other suits succeed in obtaining significant civil remedies against executive branch officials who sanctioned torture and other illegal acts, they are best viewed as a supplement to, rather than a replacement for, criminal prosecution. Anyone in the U.S. who was recently treated to the sight of high-profile civil and criminal defendant O.J. Simpson smiling on the golf course or cavorting in Las Vegas after being found civilly liable for two deaths but criminally acquitted for the same acts can attest to the significant gap in punitive impact.

192 Id.
193 Padilla v. Yoo, 633 F.Supp.2d 1005, (N.D.Cal. 2009). A torture-related case which does not name government officials as defendants is Mohamed v. Jeppesen Dataplan, Inc., 563 F.3d 992 (9th Cir.2009). Five foreign nationals who allegedly had been transferred in secret to foreign countries for detention and interrogation pursuant to “extraordinary rendition” program operated by Central Intelligence Agency sued under the Alien Tort Statute, 28 U.S.C. Sec. 1350, against Jeppesen, a Boeing subsidiary company alleged to have taken part in the program. Before Jeppesen filed an answer to the complaint, the United States intervened, asserting that the state secrets privilege required dismissal of the entire action on the pleadings. The U.S. Court of Appeals for the Ninth Circuit reversed a trial court dismissal of the complaint. Id.
between civil and criminal liability. In the context of torture, the CIA Inspector General reported that the agents involved in the torture of detainees were extremely concerned about the potential for criminal prosecution of their activities. Although that concern did not prevent torture from occurring, it is certainly possible the activities would have been more brutal but for the fear of criminal sanctions, or that the torture would have been significantly reduced or even absent if the Department of Justice had not issued approving legal opinions in advance. Beyond the pragmatic analysis of the deterrent effect which potential prosecution places on official misconduct, the larger question remains: in a system where no man is supposed to be above the law, why should executive branch leaders be subject only to civil liability for acts that would likely result in imprisonment for others?

There is precedent for allowing victims of crimes to transcend the limitations of a civil remedy by pursuing criminal charges. At the time of the founding of the United States, several states still followed the English tradition of allowing private citizens to initiate criminal prosecutions. Victim-initiated prosecution is not allowed in the U.S. today, but in some continental systems, victims may file and pursue criminal charges. In Spain, even non-victims can lead a criminal prosecution. In the context of official misconduct, which is more likely to produce widespread generalized harm than a few victims with identifiable harm, allowing public interest groups to file and pursue criminal charges may be the ideal procedure.

ii. Pursuit of Ethical Complaints Against Attorneys General and Department of Justice Officials

Prosecuting attorneys are subject to ethical guidelines expressed in rules of professional conduct. For example, Washington D.C. Rules of Professional Conduct 3.8, under the heading of “Special Responsibilities of a Prosecutor,” states, “The prosecutor in a criminal case shall not:

197 See, TORTURE MEMOS, supra note 18 at 15. (Introductory Comment calling the Office of Legal Counsel approval of torture the “original sin” in the torture narrative, and suggesting that the absence of legal approval may have ended the Bush torture activities before they began.)
198 See, Aaker et al. supra note 113.
201 Id.
202 See, Aaker, supra note 113 at 9
203 See, e.g., ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION, Std. 3-1.2 (1993).
(a) In exercising discretion to investigate or to prosecute, improperly favor or invidiously discriminate against any persons." Since the Attorney General of the U.S. and high-level members of the Department of Justice practice law in the nation’s capital, it has been argued that any decision to refrain from prosecuting executive branch misconduct because of the relationship between these attorneys and their executive branch colleagues—or boss—should subject the federal attorneys to discipline for violation of this professional rule.

In the wake of the Bush Administration torture revelations, there have been calls for disciplinary actions against former Department of Justice officials and torture memoranda authors John Yoo, now a law professor at University of California Berkeley, and Jay Bybee, now a federal judge in Nevada. A pending opinion by the Office of Professional Responsibility, an internal ethics unit within the Justice Department, has been reported to include a referral to state bar associations to consider possible action against Yoo and Bybee.

But, like civil claims arising from illegal executive branch misconduct, pursuit of ethical charges against an Attorney General or top Justice Department officials are legitimate but not sufficient responses to that misconduct. Such ethical charges against attorney torture enablers are certainly justified, and may well inspire future government attorneys to hold themselves to a higher standard of behavior. But professional ethics complaints do not address the need to ensure that executive branch officials are subject to the same level of impartial prosecutorial oversight as other citizens.

iii. Greater Investigative Power for Congress or an Inspector General

Professor Michael Rappaport has suggested that a remedy to conflicts of interest in executive branch prosecution is to endow a new Congressional investigative committee with additional subpoena powers and professional investigative staff to review and expose executive

205 Viggiano supra note 35 at 1200-01.
branch misconduct. \textsuperscript{208} Professor Kathleen Clark has proposed the creation of a permanent inspector general within the White House, who would be empowered to investigate executive branch wrongdoing and report to Congress. \textsuperscript{209}

While Rappaport’s proposal would solve the Independent Counsel Act problem of independent executive branch oversight not being accountable to the electorate, and Clark’s proposal would place a quasi-independent investigator on the scene of the executive branch activities, neither would not allow for prosecution of criminal acts, an essential component of any system where no man or woman, be she the President or one of her top aides, is above the law.

iv. Non-Federal Prosecution of Executive Branch Crimes

Domestic and international actors frustrated with the lack of U.S. investigation or prosecution of torture-related activity by the Bush administration have pursued international avenues, with limited positive results to date. In 2009, Baltasar Garzón Real, a Spanish judge known for his prosecutions of alleged international human rights abusers such as Chilean dictator Augusto Pinochet, launched an investigation of Bush administration officials for crimes of torture, citing the Geneva Conventions and the 1984 Convention Against Torture. \textsuperscript{210} In 2006, the U.S.-based human rights organization Center for Constitutional Rights and other organizations requested that a German judge issue an indictment against Bush administration officials for similar crimes, \textsuperscript{211} but that request was denied. \textsuperscript{212} In 2009, an Italian judge convicted in absentia 23 Americans, almost all of whom were C.I.A. operatives, of kidnapping a Muslim cleric from the streets of Milan and transporting the cleric to Egypt, where he says he was tortured as part of the U.S. practice of “rendition,” seizing suspects and transporting them for interrogation to countries which conduct torture. \textsuperscript{213} Although such international prosecution may have received a

\begin{itemize}
  \item \textsuperscript{208} Rappaport, \textit{supra} note 162 at 1595-97.
  \item \textsuperscript{210} Marlise Simons \textit{Spanish Court Weighs Inquiry on Torture for 6 Bush-Era Officials}. \textit{NY TIMES}, March 23, 2008.
  \item \textsuperscript{211} Mark Landler. \textit{Rumsfeld Faces War Crimes Suit In Germany}. \textit{INTL. HER. TRIB}. November 14, 2006.
  \item \textsuperscript{212} GERMAN WAR CRIMES COMPLAINT AGAINST DONALD RUMSFELD, ET AL. CENTER FOR CONSTITUTIONAL RIGHTS (2008). Available at http://ccrjustice.org/ourcases/current-cases/german-war-crimes-complaint-against-donald-rumsfeld,-et-al.
  \item \textsuperscript{213} Rachel Donadio, \textit{Italy Convicts 23 Americans for C.I.A. Renditions}, \textit{NY TIMES}, November 4, 2009.
\end{itemize}
boost from the U.S. efforts to provide immunity for torturers from domestic prosecution,\textsuperscript{214} it is unclear whether any of these actual or possible prosecutions will result in imprisonment or other penalties being imposed upon any Americans, including executive branch officials.

To date, U.S. executive branch officials have enjoyed an unusual protection from domestic prosecution due to the uniquely non-local nature of prosecution in Washington D.C. If an executive branch leader were to commit a criminal act in Maryland, Virginia, or Indianapolis, Indiana for that matter, the odds are high that the crime would be prosecuted by a locally elected prosecuting attorney.\textsuperscript{215} But that is not the case in the District of Columbia, where the U.S. Attorney’s office, ultimately accountable to the President, prosecutes felony crimes committed under the D.C. Code.\textsuperscript{216} Thus, though the D.C. Code contains provisions which could apply to executive branch official misconduct, including obstruction of justice\textsuperscript{217} and bribery,\textsuperscript{218} the same conflicts of interest inherent in federal prosecution make those charges quite unlikely to be filed or pursued at the local level.

However, District of Columbia officials\textsuperscript{219} and legal scholars\textsuperscript{220} have argued that the responsibility for local criminal prosecution be placed with a District of Columbia governmental entity. Rep. Eleanor Holmes Norton, the Congresswoman representing the District of Columbia, has introduced legislation to establish an Office of District Attorney for the District of Columbia, to be headed by a District Attorney elected by D.C. residents.\textsuperscript{221} The bill has the philosophical advantage of being aligned with the framers’ preference for local law enforcement over federal police and prosecution,\textsuperscript{222} and the more tangible advantage of being aligned with the previous

\textsuperscript{214} See, Sands, supra note 23 at 370. (Quoting a European prosecutor as saying it was “very stupid” of the U.S. to attempt to provide immunity in the Military Commissions Act of 2006, as this provides a justification for foreign prosecutors to pursue charges in their own jurisdictions.)

\textsuperscript{215} See, Rasymesen et al. supra note 131 at 49.

\textsuperscript{216} D.C. Code § 23-101(c) (2001).


\textsuperscript{218} D.C. Code § 22-713 (2001).


\textsuperscript{220} John Payton. Should The District Of Columbia Have Responsibility For The Prosecution Of Criminal Offenses Arising Under The District Of Columbia Code? 11 U. D.C. L. Rev. 35, 37 (2008). (“Democracy supplies an important check on the exercise of a prosecutor’s discretion. Democracy helps ensure that the criminal laws reflect the concerns and values of the community. This democratic accountability of the prosecutorial function is not present in the District. “)


\textsuperscript{222} See, Bloch supra note 97 at 568.
statements of the current President, a co-sponsor of the District of Columbia Voting Rights Act of 2007. If the bill were to become law, domestic monopoly over prosecution of executive officials could be busted the same way it is in the 50 states of the union where local prosecution is more the rule than the exception.

Conclusion

Due to a conflict of interest as blatant as the proverbial fox guarding the henhouse, two consecutive presidents and their Attorneys General have declined to investigate or prosecute illegal executive branch activities in sanctioning torture. If the U.S. is to maintain our aspiration to be a government of laws and not men, this structural flaw must be remedied. The direct election of an Attorney General is the most precise and effective remedy for this flaw. But a revived and improved independent counsel or provisions to break up the current monopoly over executive branch prosecution are also vastly preferable to letting stand any longer a system which flouts the principles of equal justice and checks on individual power.