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The Ethics Backlash and the Independent Counsel Statute

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THE ETHICS BACKLASH AND THE INDEPENDENT COUNSEL STATUTE

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In this Article, Professor George D. Brown explores the role of the Office of Independent Counsel and the current ethics backlash surrounding its reauthorization. He examines the historical development of the institution through the accounts of two previous "special prosecutors," Archibald Cox and Lawrence Walsh. Professor Brown also explores the arguments of critics who call for the institution's abolition and counters with his own call for change and renewal. As an alternative to renewal, he suggests a short-term extension, a "cooling off" period to permit Congress to take a detached look at the independent counsel.

Professor Brown observes that the current reauthorization debate arises in the midst of a counterrevolution in government ethics. Despite this ethics backlash, he suggests that the statute be modified without severely altering the role of the independent counsel. Professor Brown continues by examining current proposals to revise the Office of Independent Counsel, which include: limiting the covered crimes; reducing the number of covered persons; modifying the role of the attorney general; specifying the qualifications of the independent counsel; limiting the cost and duration of investigations; changing the manner in which the independent counsel reports its findings to Congress and the judiciary; and limiting expansion of its jurisdiction. Professor Brown concludes, however, that whatever the fate of the offered revisions, it is essential that the Office of Independent Counsel remain "independent."

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433
"I wouldn't have trusted Ed Meese to prosecute Ronald Reagan and I don't trust Janet Reno to prosecute Bill Clinton."
Congressman Henry Hyde

INTRODUCTION

The scenario has a familiar ring. In the face of scandal, the Department of Justice is attacked "for its lack of objectivity and collusion with the White House." A special prosecutor is named, but his lack of prosecutorial experience is a potential liability. His critics attack him almost from the outset. In particular, the White House sees him as "bent on toppling" the presidency and conducting a "perpetual inquisition." Certainly, the special prosecutor's highly partisan background, including active participation in a political campaign against the incumbent president, helps reinforce such accusations. He assembles a team of "aggressive, prosecutorial, ambitious" lawyers, and the number of these "hungry, young prosecutors" grows quickly. The office of the president accuses the special prosecutor of engaging in a "blanket fishing expedition." More serious is the argument that the work of the special prosecutor could do "long term damage" to the office of the presidency, a danger that requires the invocation of executive privilege. The special prosecutor engages in the classic prosecutorial maneuver of "rolling over" lesser figures in order to get at higher-ups, with the White House as the ultimate goal. He seems to view what started out as an apparently mundane case as hiding serious issues of possible abuse of power and obstruction of justice. Kenneth Starr? No, Archibald Cox.

The availability of Ken Gormley's book, Conscience of a Nation, an in-depth examination of Cox's work as special prosecutor and its impact, is fortuitous. The nation is engaged in a heated debate over the future of the institution of a semi-permanent special prosecutor, now referred to as the independent counsel. The debate will come to a head in the 106th Congress, which must consider whether to renew

3. See id.
4. See id. at 296.
5. See id. at 115, 266-67.
6. See id. at 284.
7. See id. at 277 (quotation omitted).
8. See id. at 276 (discussing perceived need to invoke executive privilege in order to protect the office of the presidency).
9. See id. at 279.
the authorizing legislation or let it expire in June of 1999. The controversy is wide-ranging, raising not only legal and political issues, but broader questions about how to achieve public confidence in government without undermining the institutions of that government and damaging the careers of those who serve it. There is a string of extraordinary dramas, notably, but not exclusively, that of the Whitewater investigation and the resultant impeachment. There is also, in the background, a growing intellectual trend that will bear directly on the public policy contentions: a counterrevolution in government ethics that calls into question many of the anti-corruption initiatives of the post-Watergate era, including the independent counsel. Apart from elite views, the public generally may be in the early stages of an ethics backlash that views President Clinton as a victim and the independent counsel as an overzealous, partisan prosecutor. Needless to say, the White House and its allies have played a substantial role in encouraging this trend.

One of the goals of this Article is to provide a foundation for understanding the ongoing debate beyond its partisan dimensions. I will draw primarily on three significant recent texts. Besides the Gormley work, this Article will consider Lawrence Walsh's *Firewall*, and the important contribution to government-ethics literature by Peter Morgan and Glenn Reynolds entitled *The Appearance of Impropriety*. The first two books deal directly with the work of an independent counsel or special prosecutor, providing a look at the inner workings of this important institution. The third, by Morgan and Reynolds, devotes a relatively small portion of its pages to the independent counsel directly, but constitutes an excellent introduction to the

10. 28 U.S.C. § 599 (Supp. 1998) provides as follows:
   This chapter shall cease to be effective five years after the date of the enactment of the Independent Counsel Reauthorization Act of 1994, except that this chapter shall continue in effect with respect to then pending matters before an independent counsel that in the judgment of such counsel require such continuation until that independent counsel determines such matters have been completed.

11. See, e.g., SUZANNE GARMENT, SCANDAL 6 (1995) (criticizing "the increased enthusiasm with which the political system man hunts evil in politics and the ever-growing efficiency with which our modern scandal production machine operates").


broader issue of the counterrevolution in government ethics and how far it should extend. In particular, Morgan and Reynolds raise the question of whether the Office of Independent Counsel will be the counterrevolution's first victim.

The role of the independent counsel is foreshadowed in Gormley's biography, an examination of Cox's entire life and career. More than one third of the volume deals directly with what has become known as "Watergate" and Cox's role as special prosecutor in the scandal that launched a generation of ethics initiatives. Thus, we see both the beginning of the mechanism and a preview of many of its future problems. My focus on this text will be the extent to which it shows how the events of 1973 laid the groundwork for today's debate. As Gormley points out, the mechanism of a permanent independent counsel did not spring into being immediately after the firing of Cox and Nixon's ultimate resignation. It took almost five years for the independent counsel chapter of the Ethics in Government Act of 1978 to be enacted. Cox himself was not a major actor in the debates that led to the bill. His contribution consisted of showing—through the Watergate investigation—what such an office could do under modern political and media conditions.

Through Lawrence Walsh's Firewall, we see the independent counsel at work in its full-blown development. The perspective is not that of the scholarly biographer such as Gormley. Rather, this is a view from the heat of battle coming from one of the key participants: the independent counsel himself. Walsh was appointed under the Act in its current, semi-permanent form to investigate the Iran-Contra matter. As with Cox, the fact that the investigation could well reach the presidency influenced everything that happened during it. Similarities abound, in particular, the attitude of the White House and those who defended its position.

Walsh's account must, of course, be taken with more than a grain

14. See Garment, supra note 11, at 6-7 (discussing impact of Watergate on views toward political corruption); Gormley, supra note 2, at 229-392.
15. See Gormley, supra note 2, at 431.
17. See Gormley, supra note 2, at 380.
18. Walsh, supra note 12.
19. See id. at 26.
of salt. It is something of a justification, in the form of the last, last word. The independent counsel writes a report for the special court that appoints him.\textsuperscript{20} The reports, which are usually released to the public, have become one of the most controversial aspects of the entire independent counsel mechanism.\textsuperscript{21} In particular, analysts have charged that a public document gives the independent counsel the chance to make accusations which could not be proved in court but can seriously harm the subject's reputation.\textsuperscript{22} In \textit{Firewall}, Walsh is freed from whatever constraints might hedge a government report of this type. He uses that freedom in a manner that can fairly be called polemical. For example, his repeated salvoes at former Senate Minority Leader Robert Dole\textsuperscript{23} show that after a six-year investigation there are scores to be settled. Thus, we learn what the independent counsel can do as well as what his limits are, particularly when the investigation involves the president and issues of national security.

Walsh's fundamental message is threefold: first, he, as an independent counsel, went as far as he could under the circumstances but could not breach the firewall; second, the interaction between Congress and the independent counsel can pose extraordinary complications when they are investigating the same matter; and third, he acted as any prosecutor would. Indeed, it is this third point that makes Walsh's observations particularly relevant to current arguments over the future of the independent counsel.

Opponents of the independent counsel mechanism can point to Walsh's "failures" as evidence of what is wrong. A vast expenditure of time and money turned up little that ordinary processes of prosecution and congressional hearings would not have revealed. The political fallout was extensive, perhaps even costing the incumbent president the election, and many reputations and careers were seriously damaged. Proponents of the independent counsel, on the other hand, can argue that we need a mechanism outside of ordinary processes to get as far as Walsh did and to put what he found in the


\textsuperscript{21} See, e.g., Julie O'Sullivan, The Independent Counsel Statute: Bad Law, Bad Policy, 33 AM. CRIM. L. REV. 463, 496-501 (1996) (criticizing operation of reporting requirement). The independent counsel's report is required in all cases and is separate from the requirement of reporting to Congress "any substantial and credible information which such independent counsel receives, in carrying out the independent counsel's responsibilities under this chapter, that may constitute grounds for an impeachment." 28 U.S.C. § 595(c) (1993).

\textsuperscript{22} See, e.g., O'Sullivan, supra note 21; Judicial Conference, supra note 1, at 1582 (remarks of Terry H. Eastland discussing reporting requirement and possible abuses).

\textsuperscript{23} See, e.g., WALSH, supra note 12, at 314, 467-69.
public record. Thus, proponents can argue that his failure, if it was one, is less a result of Walsh's misjudgments or the faults of the institution than a result of the inherent difficulties of any high-profile investigation of the president.24 Finally, it is important to note the kinship between the controversies Archibald Cox generated at the outset and those Lawrence Walsh generated twenty years later. Both accounts illustrate the problems of having an independent counsel which functions outside of the normal institutional mechanism.

The question whether ordinary prosecution is sufficient for matters currently covered by the independent counsel mechanism is a central theme in the reauthorization debate. A third work to consider, *The Appearance of Impropriety* by Peter Morgan and Glenn Reynolds,25 helps us look at that issue and the broader debate, from a totally different angle. Their analysis is applicable to government across-the-board as well as to the private sector.26 Morgan and Reynolds contend that current societal attitudes overemphasize the *appearance* of ethical behavior.27 This makes it harder to seek and apply truly ethical standards and impairs the efficient functioning of those who must work under current standards. According to Morgan and Reynolds, this overemphasis on appearances leads to the creation of new machinery that is aimed at improving ethics but may actually make matters worse.28 The independent counsel merits discussion precisely because it is, in Suzanne Garment's words, "a central symbol of post-Watergate politics."29 Morgan and Reynolds see our public life as held hostage to the demands of "an Ethics Establishment"30 that wields enormous power due to the broad range of components that make it up: the "complex of interest groups, journalists, consultants, government ethics officers, and legislators owing its existence to the Watergate scandal."31

Morgan and Reynolds introduce a new dimension to the independent counsel controversy. They connect it to the broader question of how we achieve honesty—and a public perception of honesty—among

24. Of course Walsh was dealing with a matter that had substantial national security overtones. There was little of any such dimension in Watergate, and probably none in Whitewater. Nonetheless, the problems of investigating the president, including the issue of long-term damage to the office, are a constant.


27. *See id.* at 2 (stating that "[t]he emphasis on appearances has been dramatic").

28. *See id.* at 104.

29. GARMENT, *supra* note 11, at 83.


31. *Id.*
our public officials. Within this larger discussion, Morgan and Reynolds place themselves firmly in the camp of critics such as Suzanne Garment, and Frank Anechiarico and James Jacobs who believe that we have gone too far in seeking a degree of perfection that cannot be realized, while producing numerous detrimental side effects on those who must work in this environment. Obviously, the independent counsel is an integral and highly visible part of the institutional machinery that the counterrevolution attacks. Indeed, the independent counsel may well be the first victim of this intellectual development. On the eve of congressional action that will decide its fate, there is substantial momentum against renewal. While elite opinion is influenced by the counterrevolution, a broader-based ethics backlash reinforces this trend.

In Part I of this Article, I give a brief description of the institution and an outline of the arguments against it in order to set the stage for Part II, a detailed discussion of the empirical and theoretical light that Gormley, Walsh, and Morgan and Reynolds shed on the overall debate. In Part III, I present arguments for renewing the independent counsel. My goal is to draw lessons from the Cox and Walsh experiences to demonstrate that certain problems are endemic to the mechanism regardless of who is in charge, and to rebut critiques of those such as Morgan and Reynolds and other observers who have called for abolition of the mechanism. In particular, I focus on what I consider a number of key fallacies in the arguments of the critics while recognizing that their views must be taken into account.

In Part IV, I consider whether, recognizing the validity of some of the criticisms, there may be a middle ground: retaining the law while making substantial changes to it. This course of action appears to have considerable support among a broad range of observers and key players in the debate. My goal in Part IV is to consider all of the possible changes that have appeared as serious considerations of the still fluid debate. In particular, I focus on recent legislative proposals. My conclusion is that attempting to make a root-and-branch alteration of the independent counsel statute is simply not possible. There is less "wiggle" room than advocates of change seem to hope. Some alterations in areas such as covered persons, crimes eligible for


33. See, e.g., Todd S. Purdum, Former Special Counsels See Need to Alter Law That Created Them, N.Y. TIMES, Aug. 11, 1998, at A1 (discussing broad consensus among former independent counsels "that the statute was needed but might have to be overhauled if it was to be renewed by Congress when it expires next year").
investigation, and the role of the attorney general appear to hold promise for change that goes beyond the level of “tinkering,” however. Thus we might well see a somewhat different mechanism; but if Congress were to attempt to change the independent counsel mechanism radically, there is a real possibility that the counsel who operates under it would no longer be independent. Recognizing this possibility, Congress may conclude that the choice is between retention and abolition, and simply opt for the latter. The issue is complex and important, however. A rush to judgment is not the answer. A short-term extension might be the answer in order to permit review and deliberation.

I. THE INDEPENDENT COUNSEL MECHANISM AND THE DRUMBEAT OF CRITICISM AS RENEWAL APPROACHES

A. The Independent Counsel Mechanism

Few federal employees ever encounter the independent counsel mechanism except in newspapers and television. Its provisions are applicable only to a small group of high level officials generally referred to as “covered persons.” The high officials in question are essentially the president, vice-president, cabinet officials, senior Department of Justice officials, senior White House staff, and certain other specified individuals such as the director of Central Intelligence. The issue with respect to such persons is whether they will be investigated and potentially prosecuted by an independent counsel for having “violated any Federal criminal law other than a violation classified as a Class B or C misdemeanor or an infraction.” The attorney general is involved in a two-stage proceeding leading to the decision to appoint an independent counsel. She must conduct an initial screening of information concerning possible commission of a covered crime by a covered person in order to determine whether to proceed to the more formal second step of a “preliminary” investigation. The key factor at this initial stage is whether the attorney general has received information that is either specific or from a

34. See O'Sullivan, supra note 21, at 505 (discussing the approach of “tinkering” with the statute). Professor O'Sullivan reaches the conclusion that the effect of any changes would not be sufficient to cure what she views as fundamental flaws in the mechanism. See id.
36. See id. § 591(b)(1)-(7).
37. Id. § 591(a).
38. See id. § 591(c).
credible source. If not, she may close the matter. If, however, there is enough to satisfy this initial screening, the attorney general proceeds to the ninety-day preliminary investigation. The goal of the preliminary investigation is to determine whether the independent counsel mechanism is warranted for the matter in question. The key factor in this determination is whether there are "reasonable grounds to believe that further investigation is warranted." Unless the attorney general can state that no such grounds exist, the matter moves to the Special Division of the Court of Appeals for the District of Columbia, which "shall appoint an appropriate independent counsel and shall define that independent counsel's prosecutorial jurisdiction." Once the independent counsel is appointed, that person takes over and begins a process of investigation and potential prosecution.

The independent counsel enjoys a broad range of authority including the power to exercise virtually all "investigative and prosecutorial functions and powers of the Department of Justice, the attorney general, and any other officer or employee of the Department of Justice." Thus, the independent counsel can investigate and litigate like any other federal prosecutor. Particularly important is the independent counsel's ability to "appoint, fix the compensation, and assign the duties of such employees as such independent counsel considers necessary (including investigators, attorneys, and part-time consultants)." It is this open-ended budgetary authority that has led to much of the controversy over the cost of highly publicized investigations such as those by Lawrence Walsh and Kenneth Starr. The independent counsel must also file a final report with the Special Division, as well as Congress. In addition, reporting to Congress includes the now famous requirement of advising the House of Representatives "of any substantial and credible information which such independent counsel receives, in carrying out the independent counsel's responsibilities under this chapter, that may constitute

39. See id. § 591(d)(1).
40. See id. § 591(d)(2).
41. See id.; 28 U.S.C. § 592(a)(1) (1993); see also id. § 591(c) (treating possible conflicts of interest on the part of the attorney general as grounds for commencing a preliminary investigation of persons otherwise not covered).
42. Id. § 592(b)(1) (1993).
43. Id. § 593(b)(1) (1993). It should be noted that in conducting the preliminary investigation, the attorney general is not given such normal prosecutorial tools as the authority to convene grand juries, grant immunity, or issue subpoenas. See id. § 592(b)(2) (1993).
44. See id. § 593(b)(3) (1993).
45. Id. § 594(a) (1993).
46. Id. § 594(c) (Supp. 1998).
grounds for an impeachment."47

There is also a provision for removal of the independent counsel. The statute provides,

An independent counsel appointed under this chapter may be removed from office, other than by impeachment and conviction, only by the personal action of the Attorney General and only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties.48

The experience under this provision, however, has not been one of close supervision by the attorney general through use of the removal power.49

The result of all the provisions relating to the power and status of the independent counsel is that, once appointed, the independent counsel really is independent and an extremely powerful prosecutor with the ability to have a substantial impact on the lives of his subjects. In part, it is this power and its potential for abuse that have led to the criticisms of the mechanism that I propose to examine in the remainder of this section. My analysis will focus on the opposition's main themes. I should note, however, that strictly speaking, the burden of proof is on those who would renew the statute. I do not feel that a "sunset" provision can be read fairly as creating a presumption that a law should remain in place unless good reasons develop to abolish it.

In any event, what is striking about the present debate is the extraordinary outpouring of opposition to the independent counsel mechanism, with a relatively tepid response on the part of its defenders. The critics range from politicians and those with direct experience of the law's operation, to academic observers taking a somewhat broader perspective. The current status of the debate is that momentum is with the critics, but those critics must still get around the fact that it is politically difficult for an elected federal lawmaker to oppose the most visible anti-corruption mechanism in the American system.50 The critics, well aware of this, have attempted with some success to create an intellectual and political climate in which it is safe to be in opposition. The possibility of a generalized ethics backlash reinforces this climate. The critics' arguments can be grouped

47. Id. § 595(c).
48. Id. § 596(a)(1) (Supp. 1998).
49. But see Morrison v. Olson, 487 U.S. 654, 696 (1988) (emphasizing the importance of removal power in sustaining the independent counsel statute against constitutional attack).
50. See id. at 733 (Scalia, J., dissenting) (discussing political constraints).
under a number of categories.

B. The Principal Categories of Arguments Against the Independent Counsel

1. Civil Liberties Arguments

Some of the most forceful contentions against the operation of the independent counsel mechanism can be grouped under the general heading of concern for the civil liberties of the subjects of investigation and prosecution. One such concern is that the various incentives an independent counsel faces to do a successful job lead to much more vigorous prosecution than normal. The result is both financial and personal expense to the persons involved on the other end. As Professor O'Sullivan puts it,

The most obvious objection to providing an IC [Independent Counsel] with so much power, so many resources, and so broad a mandate is that it may, and given the IC's incentives probably will, subject the targets of IC investigations to far greater scrutiny and violate their privacy much more than would be the case if the targets were private citizens.

The civil liberties critique does not stop with the manner of the prosecution itself. Another issue analysts have identified is the extraordinary publicity surrounding the subject and his alleged wrongdoing as a result of an independent counsel's investigation. In particular, the public report submitted at the end of an independent counsel inquiry has drawn the ire of many critics. They note that the public release of such a report is the antithesis of what would occur under normal circumstances after grand jury proceedings.


52. O'Sullivan, supra note 21, at 488. The theme of incentives runs throughout the literature on the independent counsel. See, e.g., id. at 475, 477, 485, 495; MORGAN & REYNOLDS, supra note 13, at 79 ("An Independent Counsel is likely to leave few stones unturned in investigating a target, and less likely to exercise discretion by not prosecuting for merely technical or minor offenses."). See generally Cass R. Sunstein, Bad Incentives and Bad Institutions, 86 GEO. L.J. 2267 (1998).

53. See, e.g., GARMENT, supra note 11, at 90, 97.

54. See, e.g., O'Sullivan, supra note 21, at 484-85.

55. See, e.g., id. at 499-500 (describing the valuable role of the grand jury in protecting accused persons).
Even if the subject is indicted, he may be found not guilty, or guilty of relatively minor offenses. For the independent counsel, but not the ordinary prosecutor, this opens the possibility of discussing culpability for greater offenses in the final report, even though he obtained no such convictions, or they may have been reversed in the actual proceedings.

2. Partisanship

Critics often note how partisanship has the potential to vitiate independent counsel investigations and prosecutions. This phenomenon takes many forms, for example, charges that the selection of an independent counsel was based on political considerations. Professor O'Sullivan emphasizes that the high political stakes in any independent counsel inquiry virtually ensure that the opposition will attack the independent counsel as partisan. The charges of partisanship are likely to extend to the conduct and consequences of the investigation, as evidenced by the Bush camp's insistence that partisanship played a central role in Lawrence Walsh's indictment of Casper Weinberger shortly before the election of 1992. The political party of the individual being investigated is likely to develop reservations about the independent counsel statute while opponents are likely to see it as a way of rooting out corruption in the executive branch. The institution was created by a Democratic Congress. Republicans, however, have come to see the independent counsel mechanism as beneficial when Democrats find that their ox is being gored. At times it seems that political support for, or opposition to, the Office of the Independent Counsel ebbs and flows with the locus of political power. In fact, the outcome of the 1998 congressional elections will determine the future of the institution. In this respect, the Democrats' strong showing in the 1998 congressional elections bodes ill for the independent counsel.

56. See, e.g., id. at 471-75 (discussing various forms and sources of partisanship during recent independent counsel investigations).
57. See id. at 471-73.
58. See id. at 471.
59. See, e.g., WALSH, supra note 12, at 447-50 (describing the dramatic impact of a January 7, 1986 note indicating President Bush's knowledge of an "arms for hostages" trade and suggesting the exploitation of the memo by the Democratic presidential campaign); see also GARMENT, supra note 11, at 99 (referring to "the incorrigibly partisan character of the legislation").
60. See, e.g., O'Sullivan, supra note 21, at 472 (noting the phenomenon of "Republican converts" favoring the independent counsel statute when the issue was the Whitewater investigation of President Clinton).
3. The Independent Counsel and the Presidency

In his oft-cited dissent in *Morrison v. Olson*, Justice Scalia stressed that the independent counsel mechanism would weaken the president both as the person who controls federal prosecutions and as the potential direct or indirect target of any such prosecution. He focused on the latter aspect from a separation of powers perspective, and argued that control of prosecutions was an advantage that the founders intended to give to the executive for use during its inevitable confrontations with Congress. As Justice Scalia put it,

Besides weakening the Presidency by reducing the zeal of his staff, it must also be obvious that the institution of the independent counsel enfeebles him more directly in his constant confrontations with Congress, by eroding his public support. Nothing is so politically effective as the ability to charge that one's opponent and his associates are not merely wrong-headed, naive, ineffective, but, in all probability, "crooks."

It is certainly the case that in every major investigation involving the president, defenders of the executive have noted the risk of weakening the executive branch and distracting the president from more important matters facing the country.

4. The Independent Counsel as a Flawed Prosecutorial Mechanism

Many critical analysts focus on what they see as differences between the independent counsel mechanism and normal prosecutorial procedures. They argue that the latter are preferable for many reasons. Besides the issue of incentives discussed above, critics focus on the lack of budgetary constraints and general accountability. Additionally, commentators frequently complain about the tendency

62. See id. at 708-09.
63. See id. at 712-15.
64. Id. at 713.
65. See, e.g., Gormley, supra note 2, at 276 (recounting the concern of President Nixon's advisors over damage to the functioning of the office).
66. See, e.g., O'Sullivan, supra note 21, at 483-85 (contending that an independent counsel investigation, unlike all other criminal inquiries, is afforded virtually unlimited resources and time and is subject to greater political scrutiny, ensuring that any investigation will be probing to the point of intrusiveness).
67. See, e.g., Morgan & Reynolds, supra note 13, at 76 (noting the lack of "political control"); O'Sullivan, supra note 21, at 493-94 (outlining the lack of accountability); id. at 501-03 (comparing the high cost of some investigations to the financial operations of United States Attorneys' offices).
of independent counsels to focus on trivial offenses, which a prosecutor handling a broad scale of criminal matters would supposedly choose not to pursue.\(^{68}\)

Perhaps the most serious objection to the independent counsel mechanism in contrast to ordinary prosecution is that it subverts the function of prosecuting crimes by turning it into a judgment about fitness for office. Morgan and Reynolds, for example, warn about turning “debates about right and wrong into discussions of criminality and [turning] a finding of ‘not actually criminal’ into something that is politically advertised as a vindication.”\(^{69}\) Professor O'Sullivan, in particular, argues that what is at work is a serious misuse of the prosecutorial function in making decisions about ethical conduct or political fitness for office, which puts the prosecutor in the position of making judgments that he is neither “qualified [n]or equipped to fulfill.”\(^{70}\) Such judgments, O'Sullivan argues, are essentially political tasks, at total variance with the normal court-focused job of the American prosecutor “to use the awesome powers of his office to determine whether criminal conduct has been committed and if so by whom.”\(^{71}\)

5. The Preferred Role of the Political Process

Given the viewpoint that the independent counsel mechanism trespasses upon the proper role of the political process, it is only a small step to conclude that the mechanism, in fact, weakens the political process by allowing or forcing those who should make the hard decisions to stand by while a new, fourth branch of government does the job of elected officials. Certainly, Congress can conduct oversight hearings and possesses the ultimate weapon of impeachment of the same officials who are subject to independent counsel jurisdiction. Its incentives to take action are weakened, however, because someone else is available to do the job and bear the political costs. Many critics argue that Watergate, far from justifying such an extreme measure as creation of the independent counsel, demonstrates

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68. See, e.g., O'Sullivan, supra note 21, at 483-85 (asserting that “normal” prosecutors would be limited by resource constraints from pursuing minor violations in ways an independent counsel would not).

69. MORGAN & REYNOLDS, supra note 13, at 79; see also HARRIGER, supra note 16, at 206-07 (“[B]y turning [ethics] allegations over to an officer whose jurisdiction is restricted to criminal matters, a full and open debate about the behavior is stifled. The central question of ‘ethical fitness’ is lost to a discussion of whether the target is a criminal or not.”).

70. O'Sullivan, supra note 21, at 507-08.

71. Id. at 508.
that the political process worked.\textsuperscript{72} In sum, those who focus on the political dimension of the independent counsel’s work argue that it ends up subverting the very processes that it is meant to protect, and that these processes could function well without it, if challenged to do so.

6. Unequal Treatment of Covered Persons

Critics see another negative effect on American politics from the functioning of the independent counsel mechanism: the danger of unequal treatment of covered persons who may be subject to a harsher brand of justice than ordinary citizens.\textsuperscript{73} Here, there is a danger of subverting the governmental, non-electoral processes. It is important not to create disincentives to public service. Yet, the argument runs, there is a real risk that people will be unwilling to take jobs that may subject them to an independent counsel prosecution with all of its ramifications. The day it was announced that, after an attorney general’s preliminary investigation, Secretary of the Interior Bruce Babbitt would be the subject of an independent counsel investigation, he declared that “the list of hidden costs one has to pay for public service has just grown a little longer.”\textsuperscript{74}

7. The Counterrevolution in Government Ethics and the Broader Critique of Current Rules and Enforcement Mechanisms

Morgan and Reynolds, among others, argue that our society has reached a point of overemphasizing government ethics.\textsuperscript{75} The result is not only the creation of an “Ethics Establishment.”\textsuperscript{76} It has serious consequences for the government and the governed. I previously mentioned the possibility that high-level executive branch employees may be reluctant to serve and face the prospect of an independent counsel investigation. Among a broader spectrum of government employees “who must negotiate this ritual, the result is frustration and alienation.”\textsuperscript{77} Professor Robert Vaughn also views the increas-

\textsuperscript{72} See, e.g., id. at 505-06.
\textsuperscript{73} See, e.g., id. at 488-90 (discussing whether treatment of high public officials is more “harsh and invasive” than what ordinary citizens receive).
\textsuperscript{75} See MORGAN \& REYNOLDS, supra note 13, at 98 (explaining that “[a]t no time in the history of our country has government ethics been more intensively scrutinized and extensively regulated”) (citation omitted).
\textsuperscript{76} See id. at 74.
\textsuperscript{77} Id. at 98 (quoting ABA Comm. on Gov’t Standards, Cynthia Farina, Reporter, Keeping Faith: Government Ethics and Government Ethics Regulation, 45
ing recourse to "legalism," as detrimental to encouraging individual initiative in ethical matters on the part of government employees.\(^7\)

The real risk behind an increased reliance on rules for everything is that employees will either not take ethical standards seriously or will take them so seriously and spend so much time on paper compliance that accomplishment of their assigned tasks will suffer.\(^7\) Nor is it clear whether a plethora of ethics rules and new means of enforcement increases public confidence in government, the ultimate goal. Morgan and Reynolds note that despite all of these efforts, "faith in government . . . has probably never been lower.\(^8\) The notion that we are overdoing enforcement extends to the institution of the independent counsel. Suzanne Garment, who typifies growing counterrevolution sentiment against the institution, states:

> The publicity of the independent counsel process is also ill suited to promoting general confidence in the quality and character of federal officials. Political Washington may be mollified by it, but in the long run, the effect is the opposite: Citizens learn from these investigations that they had more grounds than they ever imagined for mistrusting the morals and competence of their political leaders.\(^8\)

8. The Starr Factor

Discussing the controversies surrounding the renewal of the independent counsel law without discussing at length the Whitewater investigation by Judge Kenneth Starr, and the resultant impeachment, might seem like Hamlet without the Prince. Judge Starr is undoubtedly a central figure in current controversies. His critics see him as a vengeful and partisan prosecutor, perhaps the embodiment of earlier predictions of the risk of a "runaway" independent prosecutor.\(^8\) To his supporters, Judge Starr is a conscientious prosecutor

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79. See, e.g., Anechiarico & Jacobs, *supra* note 32, at 179-80 (arguing that "goal displacement" is occurring in the combat of corruption whereby the adherence to rules becomes the primary task as opposed to ferreting out crime).


82. See, e.g., Anthony Lewis, *The Grand Inquisitor*, N.Y. Times, June 8, 1998, at A27 (stating that Starr has gone beyond the bounds of behavior for a prosecutor). Professor Harriger has noted that "just as the special prosecutor office was born out of the crisis of Watergate, it may take a similar abuse of power by a
who has been the victim of an orchestrated campaign of delay and vilification. The New York Times went so far as to publish a lead editorial entitled "Fairness for Ken Starr."

No doubt many in Congress will base their renewal decision vote on their assessment of the Whitewater investigation and its results, thus making renewal a referendum on that matter. Certainly, the emergence of an ethics backlash that views President Clinton as a victim and seeks to punish his accusers will play a powerful role. It is important, however, not to lose sight of the fact that virtually every issue in the current debate was present, at least in latent form, during the work of previous special prosecutors and independent counsels. In the next section of this Article, I consider the contributions of Gormley, Walsh, and Morgan and Reynolds in more detail, and discuss how they shed light on the renewal debate.

II. THREE IMPORTANT CONTRIBUTIONS TO THE ETHICS DEBATE AND THE ROLE OF THE INDEPENDENT COUNSEL

A. Archibald Cox—Present Before the Creation

In Archibald Cox, Professor Ken Gormley offers a portrait of the illustrious career of this extraordinary academic. Gormley begins the obligatory treatment of family and upbringing with a provocative flashback to the Senate's impeachment trial of President Andrew Johnson on April 28, 1868. William Maxwell Evarts, Johnson's

special prosecutor to instigate a reexamination of the desirability of having an independent prosecutor's office with so few formal checks on it. HARRIGER, supra note 16, at 167.


84. Editorial, Fairness for Ken Starr; N.Y. TIMES, Apr. 5, 1998, § 4, at 14. Despite the extensive publicity given to Judge Starr's investigation, and the progression from Whitewater to the Monica Lewinsky matter to impeachment, I do not propose to discuss extensively the impact of Whitewater on the renewal debate in this article. This decision is due, in part, to my affiliation with another independent counsel office. In addition, it must be noted that the role of the "Starr factor" changes almost daily, as the public reacts to his investigation and the impeachment of President Clinton. Moreover, my goal is to focus on broader institutional concerns that go beyond current headlines.

85. See, e.g., Katy Harriger, Damned If She Does and Damned If She Doesn't: The Attorney General and the Independent Counsel Statute, 86 GEO. L.J. 2097, 2104 (1998) (arguing that the initial compromise over the Attorney General's power "is at the root of the controversies that have swirled around the implementation" of the independent counsel statute).

86. See GORMLEY, supra note 2, at 15-22.
principal defender, was Cox's great-grandfather. The importance of lineage and family is a theme that recurs throughout Cox's life and career, rooted as they were in the proverbial eastern establishment.

After Harvard College and Harvard Law School, Cox obtained the all important clerkship with Learned Hand, arranged by then Professor Felix Frankfurter. The biography continues with the initial years at the prestigious Boston firm of Ropes & Gray, the early call to public service in Washington, and the beginning of Cox's career as a professor at Harvard Law School. Particularly intriguing is the discussion of his association with the political career of John F. Kennedy, culminating with membership in Kennedy's presidential campaign think tank. Kennedy's election led to Cox's appointment as Solicitor General, a position where he distinguished himself and established or cemented many of the Washington ties that would be important in his subsequent role in the nation's capital.

Watergate, of course, to which I will return shortly, is the high point of Gormley's account. Even so, Gormley presents an engaging portrait of Cox's life after Watergate, in which he continued as a productive teacher and scholar as well as a somewhat important actor in national affairs through the chairmanship of Common Cause. One might hesitate to describe Cox as a major, front-line player in the post-Watergate world of public policy concerning corruption, government ethics, and the institutions to combat them.

87. See id. at 3.
88. See, e.g., id. at 45. Gormley describes a conversation in which Judge Learned Hand appeared to express admiration for Cox's cousin Harry Tweed. See id. Gormley continues as follows:

Harrison Tweed was one of the many grandchildren of William Maxwell Evarts and a successful lawyer in the prestigious New York firm of Millbank Tweed. He was a high-profile attorney known for his frequent detours into public service. From bits and pieces of conversations, Archie soon figured out why Learned Hand wanted to be his cousin Harry Tweed. Tweed was "the polo player, the handsome young man at whose feet every young woman fell in New York City and on Long Island, the prominent figure in the Porcellian Club [at Harvard]."

Id. at 45 (footnote omitted).
89. See id. at 38-39.
90. See id. at 79-94 (discussing Cox's return to Harvard after a brief stint as Chair of President Truman's Wage Stabilization Board).
91. See id. at 124-39 (outlining his movement from "tag-along" at strategy conferences to his contribution as a member of the Kennedy brain trust and efforts as a speech writer for Kennedy).
92. See id. at 140-95.
93. See id. at 414-19 (describing the rise of Common Cause, a citizen group founded to make government more accountable to the public).
There is an intriguing element of disengagement, despite continued participation, almost as if Cox had made his greatest contribution in 1973 and could never do anything in that arena to surpass it.

As for Watergate, Cox advanced from a dark horse, at best, to Attorney General Elliot Richardson's prime candidate for the new position of special prosecutor to investigate that scandal. It was clear that Richardson's own nomination hung in the balance and that he had to pick a suitable special prosecutor in order to satisfy the Senate Judiciary Committee as well as the full Senate. Particularly interesting are the negotiations between Cox and Richardson over the breadth of the former's charter. Cox was astute enough to realize that, beyond independence, he needed wide jurisdiction over matters that perhaps were not foreseen at the time of his appointment but could lead to resolving the ultimate question of a cover-up by implicating the ultimate public official.

As previously alluded to, Cox staffed his office with a lean and mean team of "hungry young prosecutors . . . famished for action." It is hard to come away from Gormley's account without a distinct impression of intense partisanship in the initial establishment and ongoing functioning of the office. Gormley tells us that "[t]wo colleagues from Harvard Law School, James Vorenberg and Philip Heymann, volunteered to give up their summers to help Cox establish his office." Both Vorenberg and Heymann have held key positions in Democratic administrations, the latter as recently as the early days of Janet Reno's tenure as Attorney General. Gormley makes no effort to hide this dimension of the enterprise. For example, he quotes an admission of Heymann that "Nixon was a major villain to the crowd of liberal Democrats that Archie associated with in Washington and Cambridge." Gormley, however, strains to portray the office as not really partisan, citing the presence of a number of token Republicans and the fact that, in Washington, many persons, particularly lawyers, have ties with both political parties.

94. See id. at 232 (discussing initial call from Richardson offering the Special Prosecutor position to Cox).
95. See id. at 233, 240-42 (expressing the importance of Richardson's decision and the initial approval of Cox). It is interesting to note that one of the rejected early front-runners was Lawrence Walsh. See id. at 234. One Richardson aide was quoted as follows: "It was the old Yankee[s] . . . There's a lot to be said against the tribe of New England Protestants who populated the Northeast. But there's a lot to be said about the old-boy network of trust." Id. at 236 (footnote omitted).
96. See id. at 238-39.
97. Id. at 264 (footnote omitted).
98. Id. at 249.
99. Id. at 250.
100. See id. at 266 (stating that many individuals involved in Watergate inter-
This reader was not convinced.

In a way, it is hardly surprising that the ambitious group of the best and brightest who flocked to Cox's banner were largely Democrats. The country was in the second term of a Republican administration. One suspects that most Republican lawyers with an interest in government and politics were either already in the administration or not inclined to join an enterprise that seemed bent on attacking it. The hungry young lawyers who "wanted a taste of Washington action" knew full well what they were getting into. Indeed, the specter of partisanship, perhaps inevitable given Cox's involvement in Kennedy political campaigns, was indelibly present from the outset after a swearing-in ceremony attended by many "high-profile Democrats," including members of the Kennedy family.102

The aura of partisanship surrounding his office inevitably raised the question of whether Cox was to some extent "out to get" President Nixon. It requires little stretch of the imagination to reach that conclusion with respect to many of the lawyers, but what about the boss? At one point, Gormley discusses Cox's early thinking as including a hope that the president would not be found guilty of any wrongdoing during the special prosecutor's investigation.103 On the other hand, Gormley himself states that "Cox probably would not have come to Washington were it not for the issue of whether the president himself had been involved in the Watergate cover-up."104 In the same vein he quotes Cox's deputy, Hank Ruth, as saying, "It is clear to me that Archie's principal reason to be there was to discover if the president of the United States had committed a crime. If it was only the other issues . . . my guess is that he wouldn't have come."105

From a lawyer's perspective, one of the most fascinating aspects of this part of the Cox story is how he handled three extremely difficult sets of interactions between his office and other institutions. Particularly problematic for the newly-minted special prosecutor was managing relations with the Senate Watergate Committee. Gormley's detailed discussion of these relations leaves one with the impression that neither side ever worked the matter out in a satisfactory manner, and that had the Cox endeavor persisted, friction would have impeded operations on both sides.106

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101. Id. at 262.
102. See id. at 245-46.
103. See id. at 251 ("I do know that I was not anxious to find Richard Nixon was responsible for the break-in, for a cover-up, or for any other wrongdoing.").
104. Id. at 265.
105. Id.
106. See, e.g., id. at 269-74 (discussing initial conflicts and litigation between
Equally intriguing is the question of relations between the new office and the existing team of assistant attorney generals who were already handling the Watergate matter, treating it primarily "as a straightforward burglary case."\textsuperscript{107} It has been suggested that these relations were relatively amicable,\textsuperscript{108} but Gormley paints a distinctly different picture. Cox and his team seem to have felt that they needed the prosecutors for the short run but had to move them aside in order to progress beyond the burglary issue to that of the cover-up and the ultimate question of presidential involvement. Once again, Professor Heymann is candid in his explanation that "[n]one of us were prosecutors. It was clear we had to keep the U.S. attorney people doing their work . . . . I felt we had to string them along for a while. And then . . . get rid of them."\textsuperscript{109} Ultimately, the unhappy union could not last and Cox requested that the three prosecutors withdraw from the case. This resolution obviously led to mixed emotions on the part of individuals who felt that they had essentially resolved the matter but were being denied vindication. Gormley makes it clear that the special prosecutor and his team derived benefit from the work of their predecessors, but felt strongly that only their office could assert the independence necessary to do the job. As Gormley describes the end result, "[T]he U.S. attorney's office was now purged from the Watergate prosecution, for good."\textsuperscript{110}

Fundamental, of course, were relations between the special prosecutor's office and the White House itself. Gormley paints a gripping picture of what might have been as the two sides came tenuously close to an agreement over the White House tapes. Ultimately, negotiations broke down, resulting in litigation and resignation.\textsuperscript{111} With respect to Cox's own departure, Gormley gives us the Saturday Night Massacre in all its gory detail, primarily from an inside perspective. Particularly compelling is the account of Cox's dramatic press conference and the growing recognition by the President and those around him of its effect on the nation.\textsuperscript{112}

After Watergate, Cox's rich "semiretirement" included involvement with the 1976 presidential candidacy of Maurice K. Udall, his close
shot at a seat on the First Circuit Court of Appeals, his work as a Supreme Court advocate, and his involvement with Common Cause. In a fascinating "Epilogue," Cox shares his current thoughts on the Office of Independent Counsel, as well as some broader reflections. With respect to the semipermanent Office of Independent Counsel, Professor Cox continues to express support with some qualifications. He feels that it is important to have such a mechanism in place for those rare occasions, such as Watergate, when the normal machinery is either incapable of doing the job, or is widely perceived as such. Cox recognizes the possible "runaway application" of the statute, and offers the perception that the mandate is too large and that jurisdiction should largely be limited to "an abuse of power while in the White House." He is also concerned with the problems created by part-time independent counsels, and seeks a greater emphasis on "public exoneration of the innocent" as well as the prosecutor's natural inclination to indict the guilty. Despite these flaws, "Cox still believed in the importance of the independent-counsel law. The simple fact is that one cannot count on the Department of Justice to carry out a vigorous, fair, and publicly credible investigation of senior members of the same administration... It just isn't the way the world works, unfortunately."

Watergate was perhaps sui generis, but it had a lasting impact on the American political process. Part of that impact was a desire to never see a repetition of such a crisis; the new institutional mechanism of the independent counsel reflected this desire. As Professor O'Sullivan puts it, "The Watergate scandal—and the crisis in public confidence in government it spawned—left us many legacies, one of which is the Independent Counsel... statute." The creation of the independent counsel mechanism, however, did not immediately follow the Saturday Night Massacre. It took almost five years for the political process to institutionalize what Archibald Cox had pioneered. It may be that even those who thought he was right over-

113. See id. at 393-422.
114. See id. at 431-33 (explaining Cox's belief in the necessity of independent counsel investigations of wrongdoing in the executive branch).
115. See id. (expressing concern over "runaway application" of the statute while supporting its retention with changes).
116. See id. at 433.
117. Id. at 432.
118. See id. at 433 (footnote omitted).
119. Id. at 432-33 (footnote omitted).
120. O'Sullivan, supra note 21, at 463 (footnote omitted).
121. For an excellent account of these developments, see HARRIGER, supra note 16, at 40-72. Also, there have been previous special prosecutors in American history, including during Teapot Dome and the Tax Scandals of the 1950s. See id. at
all were concerned about the awesome power that Cox had shown such an office was capable of wielding. Indeed, the congressional debates immediately post-Watergate reveal a striking similarity to today's concerns. One example among many is testimony by then Attorney General Edward Levi concerning a 1976 proposal for temporary special prosecutors. In addition to constitutional concerns,

He pointed to the damage to reputation that could occur due to the lack of safeguards for confidentiality of the attorney general's report and to the possibility of multiple special prosecutors at any given time. Levi suggested that the proliferation of special prosecutors, each with only one case and independent of the department, would enhance rather than reduce "the likelihood of unequal justice." 122

In the end, of course, the special prosecutor mechanism took permanent institutional form in the guise of the independent counsel. Even here, Congress showed reservations by requiring periodic re-authorization of the statute.

Thus, one might say that Special Prosecutor Cox's overall legacy was creating a sense of need for such a mechanism, plus wariness on all sides about what it could do. Gormley's account suggests that Professor Cox did not play as significant a role in the creation of the independent counsel as did other contemporaneous participants such as Samuel Dash. 123 The Cox biography does, however, yield a number of insights that are relevant to today's debate. The first is that the work of a special prosecutor is likely to be of a high profile nature with a distinct risk of partisanship. Both of these features are greatly accentuated when the president himself is potentially involved. Beyond questions of partisanship, one cannot escape the fact that any special prosecutor will be a participant in, rather than an alternative to, the political process. Like his successors, Cox had to interact with the Congress, 124 the Department of Justice, 125 and a range of executive branch officials. 126 Even during his brief tenure, questions of cost and mandate surfaced. 127 Cox was anxious to have

13-16.
122. Id. at 58 (footnote omitted).
123. See HARRIGER, supra note 16, at 58 (discussing Dash's influence on the legislative process).
124. See GORMLEY, supra note 2, at 286-87 (recounting negotiations with Senator Ervin over release of Watergate tapes).
125. See id. at 254-55 (recounting the initial meeting between Cox and Department of Justice attorneys from the Criminal Division).
126. See id. at 323-27 (discussing meetings between Cox and the White House over the "Stennis compromise").
127. See id. at 296-97 (noting White House concern that Cox would investigate all aspects of the Nixon presidency for an indefinite period of time).
a broad range of jurisdiction, feeling that one could not know at the outset just how far the investigation might lead. At one point, according to Gormley, the team was "simultaneously investigating Watergate, the ITT matter, illegal campaign financing, political sabotage and espionage ('dirty tricks'), and the increasingly bizarre activities of the special White House investigations unit known as the 'plumbers.'" As for cost, "Cox and Vornberg settled on a $2.8 million budget, more money than they could ever need (they agreed) to prosecute one case." Overall, it is clear from Gormley's thorough treatment of the subject that many of the problems of today's independent counsel were foreshadowed during the brief existence of the Watergate Special Prosecution Force. To appreciate the extent to which the (recent) past is prologue, it is still necessary to examine in detail the operations of a major independent counsel operation under the current statute.

B. Lawrence Walsh—A Major Investigation and its Limits

Lawrence Walsh's Firewall is the product of an experienced public servant and practitioner who knows that he is a lightning rod, indeed a villain, for many people. Walsh's tenure as independent counsel investigating the Iran-Contra matter led to sustained criticism of the current mechanism across a wide array of political and intellectual circles. He was appointed to investigate the convergence of two serious matters involving national security and foreign policy: the covert sale of arms to Iran and the diversion of substantial funds from those sales to the Nicaraguan Contras. Because of the possible presidential involvement and the constitutional issues involved, Walsh clearly felt that there was a strong kinship between his mission and that of Archibald Cox thirteen years earlier. Certainly the parallels between the two operations are abundant. For example, Walsh tells us, "There was no shortage of eager applicants.

128. See id. at 238 (noting Cox's desire for broad investigative authority given the complexities of Watergate).
129. Id. at 305.
130. Id. at 254.
131. See WALSH, supra note 12, at 282-83 (noting that his decision to proceed with the remand hearing in the Oliver North case led to statements that he was not reasonable, "a vindictive wretch," and proceeding at unnecessary taxpayer expense).
132. See, e.g., GARMENT, supra note 11, at 210-22.
133. See WALSH, supra note 12, at 3-15 (giving Walsh's synopsis of key events in Iran-Contra).
134. See id. at 57 ("The scope of our assignment, like Watergate . . . necessitated a new government mini-agency . . . ").
A high-profile Washington investigation could make the reputation of a young lawyer.” As with Cox’s operation, accusations of partisanship colored the operation. Like Cox, Walsh wanted “broad investigatory authority” from the outset. Perhaps even more than his illustrious predecessor, Walsh felt all along that the President, in this case Ronald Reagan, “was within range of impeachment.”

Walsh’s account is a fascinating look at the inner workings of the independent counsel’s office dealing with complex matters at the highest levels of the federal government. I wish to note at the outset, however, an aspect of Walsh’s account, part stylistic, part substantive, that raises troubling questions about his approach to the entire enterprise. This aspect can almost be called an “enemies list mentality.” At times it is primarily stylistic. Here is how he describes an opposing lawyer:

The General Counsel to the National Security Agency, Elizabeth Rindskopf, was tough. An attorney trained as an advocate for plaintiffs’ class actions, she seemed to us not easily deterred by facts, reason, or appeals to fairness. Her concern was not only the preservation of intelligence sources, but also the protection of her agency from embarrassment. She exaggerated claims of national security risks so grossly that I wondered whether she was bucking for a White House appointment. (After George Bush became president, Rindskopf was promoted to succeed Russell Bruemmer as General Counsel of the CIA.)

One might say that this is simply an example of Walsh wielding a sharp pen, which he certainly does, it should be noted, on a gender-equal basis. Thus, at one point, Walsh describes Robert Bennett (yes, that Robert Bennett, who was defending Casper Weinberger) as “sprawled at the back corner of his counsel table, his girth protruding through his open coat and both arms extended along the rail that separated the well of the court from the spectators—a possessive posture that reminded me of the nineteenth century Thomas Nast cartoons of Boss Tweed.” At times, Judge Walsh’s pen seems dipped in stronger stuff than ink, and style tends toward ideology. Consider the following discussion of the Federalist Society, which I quote in its entirety:

135. Id. at 29.
136. See, e.g., id. at 470 (discussing Republican attacks on Walsh’s investigation on the ground that “Democratic activist lawyers” were on Walsh’s staff).
137. See id. at 26 (noting Walsh’s insistence on broad investigatory powers for the independent counsel before he accepted the position).
138. Id. at 3.
139. Id. at 176.
140. Id. at 437.
But I was concerned about the continuing political allegiance of Republican judges as manifested in the Federalist Society. Although the organization was not openly partisan, its dogma was political. It reminded me of the communist front groups of the 1940s and 1950s, whose members were committed to the communist cause and subject to communist direction, but were not card-carrying members of the Communist Party. In calling for the narrow construction of constitutional grants of governmental power, the Federalist Society seemed to speak for right wing Republicans. I was especially troubled that one of White House Counsel Boyden Gray's assistants had openly declared that no one who was not a member of the Federalist Society had received a judicial appointment from President Bush.141

When he discusses those who created problems for his investigation, Judge Walsh's ideology in the form of partisanship, despite his professed Republicanism, reaches troubling levels. On this point I do not simply refer to his treatment of the subjects and their lawyers. One would expect the opposing lawyers to try all means to block the probe and would also expect Walsh to be critical of their tactics, which he indeed is, as in his accusation of the use of media manipulation by Robert Bennett and Lloyd Cutler.142 What I find particularly troubling is Walsh's attack on the federal judiciary, at least those members who might have or did rule against him. Walsh tells us that when the Court of Appeals for the District of Columbia Circuit struck down the Independent Counsel Act as unconstitutional, it was "led by Judge Laurence H. Silberman, a hard-line Reagan loyalist."143 At another point, Walsh informs us that

[The final evaluation of the immunity that Congress had granted Oliver North and John Poindexter would be the work of yet another political force—a force cloaked in the black robes of those dedicated to defining and preserving the rule of law. Although the judiciary is theoretically a neutral arm of government and judges are expected to eschew partisan politics, the underlying political nature of all government institutions was evident when a three-judge panel from the United States Court of Appeals for the District of Columbia Circuit reviewed Oliver North's conviction in 1990.144

Also disturbing is his comparison of Federal District Judge Thomas F. Hogan with the Tammany judges of New York.145

141. Id. at 248. In the interest of full disclosure, I should note that I have been a member of the Society since its inception.
142. See id. at 413-15 (discussing press leaks by Bennett, Cutler, and others).
143. Id. at 70.
144. Id. at 247.
145. See id. at 438 (suggesting Judge Hogan's treatment of Robert Bennett,
The same willingness to impugn motive surfaces with a vengeance when it comes to congressional critics of the Iran-Contra Independent Counsel's work. Let me elaborate on my earlier reference to Judge Walsh's vendetta against former Senate Minority Leader Robert Dole. Walsh describes Dole as "sinister." Walsh does not hesitate to compare him to Senator Joseph McCarthy, referring to the latter as "Dole's mean-minded model." We learn that "[w]ith a sardonic ruthlessness reminiscent of Joseph McCarthy, Dole hurled a continuous barrage of unsubstantiated charges at us." The gist of Judge Walsh's complaint is that Dole's specific criticism of the indictment of Casper Weinberger, as well as his more general criticism of the independent counsel's office, constituted an "instance of a U.S. senator's trying to influence the disposition of a pending case." Thus, Walsh wonders "how any lawyer who had used his Senate office to interfere in a case pending in the courts could be so blind to his own contempt while accusing others of it." The former independent counsel seems to view Senator Dole's ongoing criticism of his office as not merely "partisan attacks," but "misconduct" which amounts to "the derogation of the rule of law."

On at least one matter, it appears Senator Dole had a better understanding of the law than the independent counsel. He wrote to Walsh asking for a list of employees of the office during the past six years at a time when the partisanship of James Brosnahan, a key staffer, had become a major issue. Walsh declined to furnish the information, labeling the request "inappropriate," and informing the Senator that "[y]our public charges of political motivation for decisions of this office consistently appear to be without foundation, but they constitute an intrusion into pending court proceedings."

Walsh may or may not have regarded the operations of his publicly-funded office as secret, but he seems to have been unaware of the bearing of the Freedom of Information Act on Senator Dole's request. The controversy was resolved as follows:

with whom the Judge was familiar, was similar to the treatment afforded by Tammany judges); id. at 443 (suggesting comparison between "the way cases were fixed in Washington" and "Tammany Hall in its heyday").

146. See id. at 417.
147. Id. at 529.
148. Id. at 470.
149. Id. at 468.
150. Id. at 509.
151. Id. at 530.
152. See id. at 478-81 (detailing Senator Dole's attack on Brosnahan for being a partisan).
153. Id. at 481.
[A] few days later, after experts on the Freedom of Information Act convinced me that any person was entitled to know who my employees were, I gave Dole the list that he had asked for. In response to a further request from Dole, I sent him a list that showed my employees' titles and their dates of employment.164

Although Senator Dole is the principal recipient of this treatment, he is by no means the only one. Senator Orrin Hatch is described as a "[s]ee-no-evil conservative,"155 although Walsh later softens the blow by stating that "Hatch didn't seem venal, but he certainly was blind; from the beginning, he had seen no crime by anyone—not even Oliver North."156 Walsh even makes a contemptuous reference to highly-respected former Senator Warren Rudman.157

I have dwelt on Walsh's propensity to denigrate critics at some length because I believe it tells us a lot about Walsh's approach to the job: He held the moral high ground. Anyone who opposed him was at best a partisan, at worst, a subverter of the rule of law. Of course, the stakes were high. Some Republicans were motivated primarily by a desire to protect two administrations of their own party. This particular dimension and Walsh's highlighting of it, however, should not obscure the fact that his investigation was a major example of an independent counsel's work being extensively criticized for its high cost, long duration and seemingly meager results.158 Indeed, in 1992, Republicans, although in the minority, succeeded in temporarily blocking renewal of the independent counsel statute, based on their displeasure with Walsh.159 Assuming some merit to

154. Id. Walsh felt vindicated when he learned from members of the press that Robert Lighthizer, a former key aide to Dole, was a partner of Robert Bennett and that there were other connections between Bennett's firm and the Senator's office: "To me, this epitomized Dole's hypocrisy in his professed concern about Brosnahan's contributions before he joined my office." Id. at 483.

155. Id. at 67.

156. Id. at 417.

157. See id. at 90 (attributing Senator Rudman's attempt to force Walsh to "prosecute North for destroying documents" as motivated by political concerns for both Reagan and Bush).

158. See Honorable J. Harvie Wilkinson III, Foreword to Judicial Conference, supra note 1, at 1523 tbl. (listing Walsh's investigation as costing $47.4 million with a result of seven guilty pleas, four convictions of which two were overturned on appeal, and six Presidential pardons); O'Sullivan, supra note 21, at 502-03 (comparing the Walsh investigation— which cost approximately $40 million for the investigation and nearly $60 million more for "the cost to government agencies of complying with the document requests and subpoenas issued by his office," and resulted in "indictment of fourteen persons,"— with the $39 million and $39.8 million budgets of two United States Attorneys' offices that handled a total of 8,000 criminal and civil cases).

159. See WALSH, supra note 12, at 439 (recounting a Republican Senate filibus-
both sides’ arguments, a crucial question about Walsh’s story emerges: how successfully does he justify his efforts and explain why they did not lead further.

As Walsh saw the matter, President Reagan had violated both the National Security Act and the Arms Export Control law; and North had “usurped Congress’s constitutional authority over government appropriations.”160 Moreover, their associates at high, medium and lower levels had aided and abetted these central wrongs.161 Walsh describes in detail his tactic of attempting to “flip” or “roll over” people in the latter two categories: “Our immediate goal was to indict and convict a guilty person who might turn into a valuable witness in the hope of receiving a lenient sentence.”162 An important theme in this attempt is the use of relatively minor offenses, like making false statements, in order to get the subordinates to plead guilty or to secure their conviction. Walsh did achieve a measure of success in this endeavor with initial convictions of John Poindexter,163 Claire George,164 and Oliver North.165 Elliott Abrams and Alan Fiers agreed to plead guilty to relatively minor offenses.166 Of course some convictions were reversed.167 Walsh makes a strong argument that it is necessary to use this prosecutorial technique, and that the independent counsel requires the availability of crimes such as obstructing congressional investigations, making false statements, and perjury,168 to lay the groundwork for getting to those in charge of the criminal enterprise.

The question remains why he could not successfully take this second step. Walsh’s contention is that the “Firewall” stopped him. By “Firewall” he means everything from the withholding of docu-

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160. WALSH, supra note 12, at 13.
161. See id. at 1-15 (summarizing Walsh’s view of the activities of the officials involved in the Iran-Contra affair).
162. Id. at 74.
163. See id. at 246 (noting John Poindexter was convicted on all counts).
164. See id. at 446 (noting George’s conviction “of two felony counts of lying to Congress” and acquittal on five other charges).
165. See id. at 206 (noting North’s conviction on three counts and acquittal on nine other charges).
166. See id. at 309 (Abrams “pleaded guilty to two misdemeanor counts of withholding information from Congress”); id. at 286 (Fiers pled guilty “to two misdemeanor charges of withholding information from Congress”).
167. See id. at 310 (reversal of Poindexter’s conviction); id. at 256 (reversal of North’s conviction).
168. See, e.g., id. at 415 (stating that the Weinberger indictment consisted of “five felonies, including one count of obstructing a congressional investigation, two counts of making false statements, and two charges of perjury”).
ments, and a variety of similar delaying tactics, to outright concealment, and the ultimate exercise of executive power—the presidential pardon. Walsh directs particular vehemence at the pardon of Casper Weinberger. The following excerpt is a good example of the “Firewall” that Walsh feels he faced:

The basic cause for our failure to proceed further against Meese had been the delay in the production of notes. Perhaps more than any other single failure, it drove home to me some of the major mistakes I had made: my initial underestimation of the scope of my job; my consistent understaffing; my reliance on document requests rather than subpoenas; and my drastic narrowing of our early investigation in an unsuccessful effort to escape the consequences of the congressional grants of immunity to Poindexter and North. While making my task infinitely more difficult, the cover-up had saved its chief architect from suffering the fate of President Nixon’s attorney general John Mitchell and following further in his footsteps—perhaps all the way to prison.

That excerpt captures the range of Walsh’s assessment, including his candid acknowledgment of mistakes on his own part. Still, one comes away with the distinct impression that no independent counsel could have succeeded in breaching the “Firewall.” Walsh is particularly critical of the Weinberger pardon and, despite protests to the contrary, seems to recognize as a form of poetic justice that the Weinberger indictment had played a role in George Bush’s re-election defeat in 1992. He even quotes President-elect Clinton on the pardon to the effect that “I am concerned about any action . . . which sends a signal that if you work for the government, you are above the law, or that not telling the truth to Congress under oath is somehow less serious than not telling the truth to some other body under oath.” Whether or not one agrees with Walsh’s laying of the major share of blame on the Reagan-Bush administrations, it is hard to argue with his contention that powerful people did and will thwart investigations of themselves, especially if prosecution, disgrace, or even im-

169. See, e.g., id. at 502 (discussing Weinberger’s withholding of his notes from Walsh for five years).
170. See, e.g., id. (accusing Weinberger of lying to Congress, the Congressional Counsel, and to Walsh’s office).
171. See id. at 490-92 (discussing previous pardons and initial reactions to those by Bush).
172. See id. at 504-08 (detailing the negative reaction to the Weinberger pardon). One of the critics was constitutional scholar Professor Laurence Tribe of the Harvard Law School. See id. at 507-08.
173. Id. at 386.
174. Id. at 493.
peachment are likely results.\textsuperscript{175} Certainly, if a determined, experienced independent counsel such as Walsh could not proceed further, it is highly unlikely that an attorney general under the control of the president could have gotten as far. Thus, it is not surprising that Walsh concludes with a qualified endorsement of retaining the statute, perhaps with some changes.\textsuperscript{176}

What, then, are the broader lessons about the future of the statute and its desirability that we can draw from this remarkably candid account with its almost larger-than-life virtues and flaws? One, as with Watergate, is that interaction with the White House will always be difficult when the president is a potential target. Walsh argues persuasively that Watergate was not unique in this respect.\textsuperscript{177} Indeed, he paints the independent counsel as somewhat the weaker party in a high-stakes Washington confrontation.\textsuperscript{178} It seems also clear that Congress's role will remain central, particularly if it is simultaneously investigating the same matters. The highly visible role of individual members as critics or defenders of the independent counsel—perhaps both as circumstances change—is certainly likely to continue. Walsh notes that Senator Carl Levin defended the length and time of his investigation because the subjects had sought to block and delay it,\textsuperscript{179} although Levin appears critical of Independent Counsel Kenneth Starr.\textsuperscript{180} Walsh recognizes the charge that his work was an example of criminalizing the political process, but does not seem to accept it.\textsuperscript{181} He also remains a staunch defender of independent counsel reports, while recognizing that they may be controversial.\textsuperscript{182} As for the notion that ordinary prosecutorial practices

\textsuperscript{175} See id. at 509 (noting Senator Carl Levin's statement that "powerful individuals had "helped to thwart the investigation of themselves").

\textsuperscript{176} See id. at 526-28 (suggesting a "public interest" standard in appointing an independent counsel, adding restraints to prevent abuse by an independent counsel, but opposing any requirement that the independent counsel relocate to Washington, D.C., during the investigation).

\textsuperscript{177} See id. at 22 (stating that he never expected the White House to cooperate with his investigation).

\textsuperscript{178} See id. at 32 (stating that his office lacked veterans of capital politics and even used makeshift office space: "I had none of the standard ingredients of political capital in Washington . . . .").

\textsuperscript{179} See id. at 509 (reporting Levin statement that those who had "helped to thwart the investigation" now complain about the long delay).

\textsuperscript{180} See Neil A. Lewis, Tripping Over the Ghosts of Watergate, N.Y. TIMES, May 17, 1998, § 4, at 1 (noting Levin's criticism of the tendency to expand investigations and use of the independent counsel to investigate conduct prior to assumption of office).

\textsuperscript{181} See WALSH, supra note 12, at 267 (reporting Schultz's critique that Walsh was attempting to criminalize the political process); id. at 494 (noting Bush's statement that Walsh's investigation was "politically inspired").

\textsuperscript{182} See id. at 527-28 (arguing that independent counsel's interim reports are
would have led to acceptable results, Walsh dismisses them out of hand, noting the inevitable bias of the Justice Department. In sum, one might conclude, as Professor Harriger recently noted, that the arguments are likely to repeat themselves. In this sense, Walsh's *Firewall* may not change anyone's mind, but it will certainly serve to reinforce existing positions about the independent counsel.

As a final observation, I was struck by the recurrence throughout Walsh's account of an issue that has emerged in current debates over the independent counsel: What should be the relationship between that office and the press? In Walsh's case, the press turns out to have been one of his key backers—a source of strength and information. He was careful to cultivate and maintain relations with what he refers to as the "mainstream" press. In this capacity, Nina Totenberg of National Public Radio made frequent appearances, even calling Judge Walsh at home to report to him on how an oral argument had gone. Walsh found frequent support in the columns of Anthony Lewis of the *New York Times*, who in recent years has been anything but a supporter of the Independent Counsel. For example, in discussing the Weinberger matter, Lewis wrote as follows:

"George Bush's falsehoods have none of the justifications sometimes offered for lying. They are not white lies, to save hurt feelings. They are not lies to serve some great cause. They are only lies, small and large, to serve George Bush's ambition.... They show us a man without the inner values that restrain human conduct: a man without a core."

While Walsh describes his practice of giving weekly interviews and refers to the reporters as his "principal constituency," he makes a distinction between the mainstream press and other news organi-
zations such as the Washington Times and the Wall Street Journal. Thus, this independent counsel had his own sense of public relations. To some degree it worked, although my sense of the literature is that the overall reaction to Walsh's extensive effort is more negative than positive. I do not think that one can fault him for reaching out to the press and naturally being grateful to those members who supported his efforts. The question of how any independent counsel interacts with the media remains an important one, especially if he is up against the heavy artillery of the White House spin machine and its allies. In this respect, it is essential to recognize that there is almost certain to be a high degree of public interest in an independent counsel investigation of a major political figure. It is precisely the phenomenon of public attention, specifically negative public attention, that Peter Morgan and Glenn Reynolds address in The Appearance of Impropriety. They are not only talking about the practices of a particular prosecutor or ethics enforcement official, but what they see as an overall frenzy concerning political wrongdoing in the post-Watergate years.

C. The Appearance of Impropriety—The Counterrevolution in Government Ethics and its Possible Impact on the Independent Counsel Debate

The thesis presented in The Appearance of Impropriety by Peter Morgan and Glenn Reynolds becomes more significant as the renewal debate continues to grow in intensity. For that reason I focus on this work to the same degree as the two previously discussed volumes that deal directly with the functioning of an independent counsel (or special prosecutor's) office, although only approximately 15 of the book's 233 pages pertain to the independent counsel. 

The Appearance of Impropriety is a useful, concise statement of the themes of the counterrevolution in government ethics which forms a major component of the intellectual background of that particular debate. The authors' thesis is that we have reached a point in ethics

190. See id. at 440 (noting a false story that Walsh and Craig Gillen were guilty of "tax evasion" and of a felony, unfounded allegations that formed the basis of a Wall Street Journal editorial); id. at 475 (noting that media support of Dole's attacks came only from the "unabashedly biased" Washington Times).

191. Compare O'Sullivan, supra note 21, at 474 (arguing that the words "Lawrence Walsh" refute any argument that an investigation will be "above politics" if a "nonpartisan figure of great repute" is appointed), with HARRIGER, supra note 16, at 203-04 (arguing that Congress's competing interest with Walsh hampered the investigation).

192. MORGAN & REYNOLDS, supra note 13.
enforcement where "the costs of vigilance outweigh the benefits." They present a picture of overkill, based in part on an emphasis on "appearances." Morgan and Reynolds see this amorphous standard applied to an extraordinary range of conduct in political and other sectors. They argue that "[h]ardly anyone seems able to evaluate the rightness or wrongness of conduct these days without gravely considering how it appears." Along with this hopelessly broad standard has come an excessive recourse to the criminal law, leading to a situation where "by so expanding the universe of federal crimes, we have dissipated one of our most precious resources for moral instruction." Along with stringent standards has come the development of an entrenched mechanism of enforcement.

Worse yet, the process of "reform" has had as its chief result the creation of an "ethics establishment" that itself possesses an active interest in keeping the flames of scandal burning even while soliciting funds to fight the fire. The growth of this establishment has caused appearance ethics, and its accompanying vices, to metastasize well beyond the political field, infiltrating many other aspects of society, from science, to academia, to the business world.

The authors see these developments as producing something akin to self-fulfilling prophecies. Since virtually everything is a scandal, it is hard to apply a meaningful judgment that labels particular conduct scandalous. Furthermore, those subject to the ethics rules have decreasing respect for them, and thus try to skirt them or engage in paper compliance. Perhaps the most serious consequence is the loss of the public's trust in public servants, given the fact that a wide range of the latter are constantly under investigation.

The authors begin their analysis of the development of this phenomenon in the public sector with a discussion of "the late 1970's explosion in ethics reform—a sort of cultural Big Bang, which began on August 5, 1974, in Washington, D.C." They discuss a number

193. Id. at xi.
194. Id. at 8.
195. Id. at 160.
196. Id. at 5.
197. See id. at 23 ("When everything's a scandal, nothing's a scandal.").
198. See id. ("As the ethical rules become more and more technical ... more and more people scheme to avoid them, and the rules are delegitimized.").
199. See, e.g., id. at 24-25 ("When Congress and an army of independent or special prosecutors are incessantly investigating violations by just about everyone, it is unlikely the public will maintain confidence in either the investigated or the investigators.").
200. Id. at 47 (referring to this as the date of the "last great Watergate disclosure").
of examples of the appearance standard and the ethics establishment at work. In addition, the authors direct a particularly withering analysis at the Office of Government Ethics.\textsuperscript{201} The Office has the unenviable task of translating an array of criminal statutes, civil provisions, and executive orders into regulations that will provide guidance to federal employees at all levels. Not surprisingly, some of these regulations, and the accompanying examples, appear to be exceedingly complex.\textsuperscript{202} Nonetheless, it may be preferable to have overly specific guidance, rather than none at all.

For present purposes, I wish to focus on Morgan and Reynolds's treatment of the independent counsel. They first examine the institution in somewhat general terms, particularly its operation during the Reagan years.\textsuperscript{203} Their critique of overzealous enforcement and unduly rigorous standards is linked with critiques previously discussed in this Article. These include the arguments that public servants are subjected to a harsher brand of justice, that trivial offenses are frequently involved, that the use of the criminal process "turns debates about right and wrong into discussions of criminality,"\textsuperscript{204} and that incentives lead an independent counsel to pursue all possible lines of inquiry, if only to obtain a conviction on a "technicality."\textsuperscript{205} Equally interesting is an appendix entitled "The Whitewater Appearance Wars."\textsuperscript{206} This pre-Lewinsky account was one of the earliest to treat the Whitewater investigation as an example of "obsession."\textsuperscript{207} The authors note the possible effects of partisanship in the appointment process and see the entire controversy as an example of appearances analysis run wild. In sum, it is fair to say that Morgan and Reynolds view the independent counsel not as an isolated phenomenon in need of possible correction, but as the culmination of the broader legal and cultural developments that they trace throughout the book.\textsuperscript{208}

Morgan and Reynolds are not alone in subscribing to this theory. Current writing about government ethics and enforcement contains two major strands, both of which can be labeled as critical. Some

\begin{quote}
\textsuperscript{201} See id. at 81-89; see also 5 U.S.C. §§ 401-08 (1996) (establishing the Office of Government Ethics and prescribing its duties).

\textsuperscript{202} See MORGAN & REYNOLDS, supra note 13, at 82-86 (giving excerpts from a complex memorandum on "travel expenses and related gifts").

\textsuperscript{203} See id. at 75-80.

\textsuperscript{204} Id. at 79.

\textsuperscript{205} See id. at 79-80.

\textsuperscript{206} See id. at 213-23.

\textsuperscript{207} See id. at 213.

\textsuperscript{208} I will not discuss their interesting analysis on how the appearance ethics phenomenon has spread to business and science, as that discussion is outside the scope of this article. See id. at 99-138.
\end{quote}
writers, such as Professors Kathleen Clark and Beth Nolan, emphasize the need for clearer rationales for government ethics rules as well as better drafted provisions to specifically target detrimental conduct. 209

A second group of writers takes much more of a root-and-branch approach to current ethics rules and their enforcement. This group includes Suzanne Garment, 210 Professor Robert Vaughn, 211 and Professor Cynthia Farina, notably in her work as reporter for the American Bar Association on Government Standards. 212 Garment refers to “the ever-growing efficiency with which our modern scandal production machine operates.” 213 Professor Farina warns of frustrating government employees and substituting paper compliance for values, 214 while Professor Vaughn warns of a “rules-based legalistic version of government ethics.” 215

The Pursuit of Absolute Integrity 216 provides important empirical reinforcement of the above observations. This extraordinary study, conducted by Frank Anechiarico and James Jacobs, details the impact of ethics enforcement on public administration in New York. The authors are critical of political corruption and its influence on public confidence in the basic system. Nonetheless, they “part company with much of the mainstream literature on corruption in its unreflective acceptance of the reigning anticorruption project and its prescription for more of the same.” 217 The study indicates “that the mainstream anticorruption project imposes serious costs on public administration while failing to control corruption” in New York City. 218

The authors provide numerous examples of how coping with anticorruption measures hampers the operation of governmental

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209. See, e.g., Kathleen Clark, Do We Have Enough Ethics in Government Yet?: An Answer from Fiduciary Theory, 1996 U. ILL. L. REV. 57, 77; Beth Nolan, Public Interest, Private Income: Conflicts and Control Limits on the Outside Income of Government Officials, 87 NW. U. L. REV. 57 (1992). Professor Clark, among others, notes the current tendency to use ethics accusations as political weapons, indicating that the proper formulation of ethical standards becomes all the more important. See Clark, supra, at 58.

210. See GARMENT, supra note 11.

211. See Vaughn, supra note 78, at 417.


213. GARMENT, supra note 11, at 6.

214. See Farina, supra note 212, at 290.

215. Vaughn, supra note 78, at 410.

216. ANECHIARICO & JACOBS, supra note 32.

217. Id. at xiii.

218. Id.
agencies yet fails to produce any higher level of honesty. This leads them to conclude that "we now have a corruption-control problem as well as a corruption problem." 219

My own view is that the root-and-branch approach goes too far. For example, it is not the case that people are prosecuted for appearances of impropriety. They are prosecuted for violations of criminal statutes. Laws like those prohibiting bribery and conflicts of interest do reflect appearance concerns, but they specify particular criminal conduct. The desire to preserve public confidence represents an important goal and certainly justifies the creation of more specific standards based on this general goal. As Professor Nolan explains, "the public can judge the effectiveness of government only by reference to what it sees." 220 There is also the question of whether critics such as Morgan and Reynolds are on target in emphasizing the recourse of prosecutors to "trivial" offenses such as those that fall under the scope of the false-statement statute. 221 Lawrence Walsh discusses the use of these statutes in cases where prosecutors cannot reach the underlying more serious offense. 222 Such use needs to be distinguished from the pursuit of offenses that are trivial in themselves, like a White House aide smoking marijuana.

A fundamental weakness on the part of those who criticize the current state of affairs is their failure to offer any alternatives. Morgan and Reynolds have a concluding chapter on this subject appropriately titled, "Now What?" 223 They are, however, somewhat short on specifics. It is hard to argue with generalities such as "when an accusation is made, we should expect responsibility from the accusers. A strong ethical system would demand more from accusers, as well as from the accused." 224 Their most specific suggestion is to "limit ap-

219. Id.
220. Nolan, supra note 209, at 78.
222. See Walsh, supra note 12, at 441-42 (discussing the dismissal of more serious charges against Casper Weinberger, which left prosecutors with essentially a false statement case); see also Donald C. Smaltz, The Independent Counsel: A View from Inside, 86 Geo. L.J. 2307, 2346-47 (1998) (raising the possibility that there are more false statements in cases involving political figures than in ordinary white collar crime cases).
223. See Morgan & Reynolds, supra note 13, at 199-211.
224. Id. at 205; see Jordan B. Hansell, Book Note, 96 Mich. L. Rev. 1778, 1790 (1998) (reviewing Peter W. Morgan & Glenn H. Reynolds, The Appearance of Impropriety (1997)) ("[The authors'] proposals are somewhat simplistic. In the end, they amount to little more than: 'Quit using the appearance standard.'"). It should be noted, however, that the reviewer agrees with Morgan and Reynolds's critique of the independent counsel. See id. at 1789-90.
pearance ethics to those narrow areas where it is appropriate, sectors involving specialized officials who are supposed to make nonpolitical decisions. Judges, for example, or baseball umpires. In other cases, we need to focus on substance and motive, even if doing so is harder than relying on appearances. At times, one finds in the work of the counterrevolutionaries a certain nostalgia for the good old days of Boss Tweed. However, I think that it is not enough to say "trust us." Rather, the question is how to move from a period of mistrust to its opposite. As Morgan and Reynolds freely admit, there simply are no "quick fixes." Certainly we need both rules and effective enforcement. The question of how to resolve the dilemma between general principles only, on the one hand, and excessive legalism on the other, is not new. Perhaps, however, the counterrevolutionaries are performing a major service by calling attention to a state of imbalance between the two. Within the universe of ethics rules, it is certainly important to focus on as narrow a tailoring as possible. At the same time, I think that a number of ethics rules and criminal statutes based on government-ethics goals, such as those banning gratuities, will continue to be broad in scope because of their prophylactic character. Moreover, they will reflect a substantial amount of what can only be called appearances concerns.

I also am concerned that there is a risk of the counterrevolutionary approach downplaying the importance of a government that is highly ethical and free from corruption. It is clear in both the third world and developed countries that a government that cannot be trusted leads to public cynicism and a turning away from basic institutions. Anechiarico and Jacobs recognize this:

Corruption is not harmless. We recognize that in some societies and at some points in history, corruption has totally demoralized society, eviscerated the government's legitimacy, and led to coups, revolutions, and societal collapse or, on occasion, simply to cynicism, alienation, and stagnation. For these reasons, corruption can hardly be legalized or ignored; it must be condemned, investigated, and punished.

225. MORGAN & REYNOLDS, supra note 13, at 203.
226. See, e.g., GARMENT, supra note 11, at 26-27.
227. See MORGAN & REYNOLDS, supra note 13, at 199.
229. ANECHIARICO & JACOBS, supra note 32, at 193. Professor Sunstein recognizes the dangers of corruption, but argues that "[i]t is not, however, one of the more serious problems facing American Government, either now or in the foresee-
It is ironic that the rest of the world is following America's lead on the subject of corrupt foreign practices while many of our own thinkers are calling for the dismantling of the domestic anticorruption structure. Morgan and Reynolds, for example, demonstrate the risk of trivializing corruption by contending that the country's preoccupation with Oliver North helped avoid dealing with "real" issues.\textsuperscript{230} Perhaps the counterrevolutionaries would respond that they are simply calling attention to the fact that we have gone too far. There is, however, a real risk of dismantling the present institutional structure without having anything to put in its place.\textsuperscript{231}

How does all of this bear on the debate over the independent counsel? Certainly the institution is an appearance-based one in that it rests on the assumption that the public cannot or will not rely on the Department of Justice to prosecute certain cases. In addition, some of the specific issues raised by writers such as Morgan and Reynolds, including harsh treatment, prosecution for trivial offenses, and disincentives to public service are at the heart of the debate over the independent counsel. Still, their real focus is on the day-to-day interaction between ethics rules and the work of federal officials, most of whom will never see an independent counsel. The same observation applies, \textit{a fortiori}, to employees and officials of state and local governments as well as those in other sectors. One might view the independent counsel as a unique institution aimed at investigating a narrow band of high officials whose connection to the administration requires that their questionable actions receive different treatment than that of federal public servants as a whole. The public almost certainly is not exposed to the latter group's set of ethics-related issues, particularly as the counterrevolutionaries describe them. What the public is exposed to, often on the front page, is the independent counsel. Negative popular perception of Judge Starr may constitute the beginning of a broad-based ethics backlash that mirrors growing elite opinions expressed by the counterrevolution. Thus, the end of the independent counsel might be a first step in the counterrevolution. It is clear that some members of this school desire that outcome.\textsuperscript{232}

\textsuperscript{230} See \textit{Morgan \\& Reynolds}, \textit{supra} note 13, at 173 (discussing \textit{JAMES FALLOWS, BREAKING THE NEWS} 133-34 (1996)).

\textsuperscript{231} As I suggested earlier, "trust us" may not, at present, be the answer. \textit{See supra} text accompanying notes 226-27.

\textsuperscript{232} See, \textit{e.g.}, \textit{Garment}, \textit{supra} note 11, at 302.
The Appearance of Impropriety is unquestionably a valuable contribution to the debate. More than anything else, it provides an intellectual frame of reference for any consideration of the independent counsel statute. Although current writing about the institution does not usually make the connection, I think that incorporating the counterrevolutionary theme can enrich the discussion, even though I do not agree with the direction in which it would lead.

III. IN DEFENSE OF THE INDEPENDENT COUNSEL

In Section I of this Article and in my discussion of the Appearance of Impropriety, I have highlighted the arguments against the independent counsel and their intellectual foundations. Clearly, if the institution is to be re-authorized, its defenders will have to rebut those arguments. This is not an impossible task, although thus far, the opponents have been more vocal than the proponents. This section critiques the critiques. To have an honest debate it is essential that one recognize their merits, but also their serious flaws. Matters are simply not as one-sided as the opponents of the institution would contend. Take, for example, the argument that the independent counsel's report is subject to abuse. There are dangers in allowing the possible use of a public and widely-disseminated report to achieve what could not be done before a grand jury or a trial jury. This accusation has been particularly levied with some force against Judge Walsh. Nonetheless, there are several responses to criticisms of the reporting requirement and its use.

The first revolves around the entire issue of accountability. Congress, the public, and the Special Division, will want to know the actions of an independent counsel and whether they were justified. Those who criticize the report requirement are likely to also criticize the cost and worth of independent counsel proceedings. Yet, the report is the primary way of knowing whether those costs were justified. I think it is also inconsistent to argue that one can rely on the

is worth. It has done a good job of investigating a number of cases that would also have been investigated well, and occasionally better, by ordinary prosecutors. And in a test like Iran-(C)ontra, it has proved incapable of reasonable self-discipline or maintaining a sense of proportion. The office has a vast capacity for making big scandals out of smaller ones, and this is something we no longer need.

Id.

233. See O'Sullivan, supra note 21, at 496-501.

234. See id. at 497-99.

235. See, e.g., id. at 493-501; Harriger, supra note 16, at 163 ("The link between the press, the public, and the final report is perceived by independent counsel to provide an important measure of accountability in the arrangement.").
accountability of the normal prosecutorial processes while criticizing the independent counsel for providing a broad range of information about the nature of investigations. Assuming no independent counsel mechanism, would the Department of Justice carry out the same investigations? How would this situation permit public judgment without public knowledge, without public awareness of the investigations and their results? Moreover, it must be emphasized that the kind of cases we are talking about are likely to be well known regardless of who is investigating them. Recent foreign political donations that have been under extensive investigation by "regular" prosecutorial entities and congressional committees have certainly been a matter of public knowledge without the appointment, let alone any report, of an independent counsel. It may be true that in some instances reports have been overused and have caused subjects to suffer damages that might not have occurred during normal prosecutorial processes. "Leaks," however, are not uncommon during normal prosecutions. Furthermore, some reports have remained sealed. Perhaps the answer to the legitimate concerns about the report is not to abolish the requirement, but as Professor Cox said, as quoted by Professor Gormley, and reiterated by Cox himself in a recent article: "In the end, independent counsel must see their function not as pursuit of a target to be wounded or destroyed, but as an impartial inquiry with as much concern for public exoneration of the innocent as for indictment of the guilty." Another flawed argument is that of the excessive cost of the statute. In the hands of critics such as James Carville this argument has become a potent tool in the opposition to Judge Starr and is certain to play a major role in the renewal debate. It is true that some independent counsel investigations have been lengthy and costly. However, it may be misleading to compare the work of the independent counsel with the operations of a normal prosecutorial office such as

236. See O'Sullivan, supra note 21, at 490 (stating that a regular prosecutor in a controversial case can "point to his record to justify prosecutorial decisions"). Justifying decisions certainly implies revealing them.

237. See, e.g., Don Van Natta, Jr., Democrat Cites Early Suspicion Over Donations, N.Y. TIMES, June 20, 1998, at A1 (discussing early concerns by Democratic officials about controversial fund-raising operations from foreign sources); see also Philip B. Heymann, Four Unresolved Questions About the Responsibilities of an Independent Counsel, 86 GEO. L.J. 2119, 2120 (1998); Ornstein, supra note 80, at 2191 (contending that the independent counsel process begins with press reports).

238. See Justice Delayed and Derailed, N.Y. TIMES, July 15, 1998, at A1. Indeed, much of the debate about this matter has focused on the decision by the Attorney General whether to appoint an independent counsel at all. See id.

that of a United States Attorney. Professor O'Sullivan notes that two United States Attorneys' offices with budgets similar to that of Judge Walsh handled "the filing of a total of approximately 8,000 criminal and civil cases and other unquantified investigative activity."240 A large percentage of those filings and activities may represent relatively minor cases or matters that were settled early on.241 Still, the point stands that an independent counsel investigation is more expensive than the alternative. However, as Judge Walsh contends, a major investigation of a high-ranking political figure is difficult. Given what is at stake, the subjects are likely to throw everything available at the independent counsel. Clearly, one of the issues swirling about Whitewater is whether it is Judge Starr's fault that he has spent so much time and money or the President's fault for making him do so, for example, by litigating a wide range of claims of privilege.242

Independent counsel proceedings are by no means the only ones that consume time and money. Professor Gormley reports that before becoming a special prosecutor, Archibald Cox reflected on the fact that it had taken Owen Roberts six years to handle the Teapot Dome scandal.243 Of course, that was a form of special prosecution. The eight-year investigation of Congressman Joseph McDade, however, was not. Indeed, a recent news account of this prosecution reads like a critical description of an independent counsel:

For eight years, federal prosecutors dug for evidence, probed witnesses, wired informants, and issued subpoenas looking for proof that Rep[resentative] Joseph McDade had violated the law. After a 7 1/2 week trial, the Pennsylvanian Republican was acquitted in August 1996 of charges that he had accepted $100,000 in bribes from defense firms and lobbyists in exchange for supporting millions of dollars' worth of government contracts. Several jurors later publicly declared themselves incredulous at the weakness of the government's case.244

240. O'Sullivan, supra note 21, at 502-03 (citation omitted).
241. See Lawrence E. Walsh, The Need for Renewal of the Independent Counsel Act, 86 GEO. L.J. 2379, 2387-88 (1998) (stating that cost comparison between the two types of offices is "irrelevant").
242. See, e.g., The Metabolism of Scandal, N.Y. TIMES, Feb. 8, 1998, §4, at 14 ("It is striking, for example, that the President's lawyers and political spokesmen keep relying on the scorched-earth tactics that work in the compact time frame of a campaign."); see also Smaltz, supra note 222, at 2344-46 (discussing jurisdictional challenges as a source of frequent delay when an investigation expands).
243. See GORMLEY, supra note 2, at 252.
Regular prosecution can also be expensive. Judge Walsh, along with other supporters of the independent counsel, notes that "the Justice Department spent nineteen million dollars to prosecute [General Manuel] Noriega in a much less complex case."\textsuperscript{245}

Another flaw implicit in arguments against the independent counsel statute is the apparent assumption that normal prosecutors regularly behave in an appropriate manner whereas the independent counsel statute is riddled with mechanisms that facilitate inappropriate behavior, for example, concentrating on only one individual.\textsuperscript{246} Of course, prosecutors differ. A random sample of the defense bar would frequently suffice by itself to dissolve any notions of the prosecutor as a benign institution. No independent counsel has been more controversial than Rudolph Giuliani when he was the United States Attorney for the Southern District of New York. This position is a powerful one in its own right, regardless of the incumbent. It is doubtful that any independent counsel has had a similar degree of power and reach.\textsuperscript{247}

Prosecutorial abuse may be in the eye of the beholder, but one could certainly find it in ABSCAM, another matter that cannot be laid at the doorstep of the independent counsel because it was carried out by the "normal" forces of investigation and prosecution.\textsuperscript{248} The criticism that independent counsels operate in a skewed fashion by focusing on only one individual is often incorrect. They may quickly broaden their investigation as evidence uncovers a pattern of wrongdoing that goes beyond the initial triggering facts. It often appears that those who criticize an independent counsel's tendency to be overly narrow would also oppose efforts by independent counsels to broaden their investigations. This is despite the fact that a broader investigation would make better use of time and resources and could indicate the extent of the corruption in which the covered person and those surrounding him engaged.

The articulation of the one-matter criticism might lead observers of the process to forget that Congress considered and rejected the

\textsuperscript{245} Walsh, supra note 12, at 431 (quoting Senator William Cohen).

\textsuperscript{246} See, e.g., O'Sullivan, supra note 21, at 475, 477, 485, 488, 493 (discussing various incentives conferred by the statute to independent counsels).

\textsuperscript{247} See Todd S. Purdum, Former Special Counsels See Need to Alter Law that Created Them, N.Y. Times, Aug. 11, 1998, at A1 ("The United States Attorney for the Southern District has almost unlimited power . . . ") (quoting former Independent Counsel Whitney North Seymour).

\textsuperscript{248} See, e.g., United States v. Williams, 705 F.2d 603, 607-13 (2d Cir. 1983) (involving an FBI sting operation conducted against a United States Senator that included offers of stock in corporations supposedly financed by "Abdul Enterprises," a fictional entity).
concept of a "permanent public attorney" with a somewhat general range of jurisdiction. At times, the critics seem to be saying not so much that the office of the independent counsel is a bad thing as that the wrong people are occupying it because the wrong people are appointing them. A good example of this somewhat condescending approach is a recent piece by Professor Heymann entitled *Predatory Special Prosecutors.* He criticizes the chair of the Special Division, Judge David B. Sentelle, for his "unusually active and partisan political background." Furthermore, Heymann notes that Kenneth Starr "had, and has maintained, close professional and personal ties with a number of organizations that can fairly be said to oppose President Clinton passionately." These observations underscore Heymann’s emphasis on the need for an independent counsel to “appear to be[ ] unbiased and nonpartisan.” He further criticizes "predatory" independent counsels for overly zealous pursuits of their subjects. These observations are strikingly reminiscent of Professor Heymann’s description of the partisan background of Professor Cox and his ambitious staff.

Some critics, such as Professor O’Sullivan, recognize that the matter is inherently political, or at least highly politicized, and recommend leaving the kind of issues currently triggering the use of the independent counsel to the political process. As an important


Dash envisioned the permanent office as one that would first receive complaints from people who had been wronged by the executive branch and then investigate these complaints. If the allegations constituted a prima facie case, the attorney would notify the attorney general, who would then be expected to proceed with the case. If the attorney general failed to do so, the public attorney could take the proceedings before a federal district court and request an order making the attorney general show why the public attorney should not become the special prosecutor in the case.

*Id.*

Cutler, described by Professor Harriger as “convinced that the conflict of interest inherent in the executive investigating itself was the core of the problem and that this problem could be solved through an independent investigatory apparatus,” felt that “a continuing public prosecutor might go a long way to restore public confidence in our institutions.” *Id.* at 65-66.


251. *Id.*

252. *Id.*

253. *Id.*

254. See *id.* (arguing that high government officials should not “be subject to being ‘hunted’ in . . . a single-minded way”).

255. See O’Sullivan, *supra* note 21, at 509 (emphasizing the political nature of
premise of this argument, critics assert that the system "worked" in Watergate given the fact that the political process was able to come forward with the appointment of Archibald Cox. Apart from the extraordinary nature of the underlying matter, this assertion ignores the particular constellation of political forces present in 1973. As Professor Gormley's book makes clear, President Nixon could not appoint any attorney general without the agreement of the Democratic-controlled Senate. Democrats conditioned their agreement on the appointment of a special prosecutor in whom they had confidence. Nixon had little choice in the matter, and his selection of Elliot Richardson was closely scrutinized.

Beyond dubious premises, there is the question of how the political process would substitute for the work of the independent counsel. Impeachment is a rarely invoked option, despite recent events. Oversight hearings are likely to turn into something close to a partisan shouting match, with defenders and opponents of the targeted official arrayed along party lines. Moreover, there is a serious question whether administration officials are as subject to political accountability as the critics of the independent counsel contend. For example, it is extremely unlikely that Attorney General Janet Reno will run for public office in 1999 or thereafter. Moreover, President Clinton cannot run for another term. As Judge Walsh explains, "most officials in the executive branch are not vulnerable to the electorate. Because the president and vice president are the only elected members of the executive branch, only they can be directly thrown out by dissatisfied voters." Alternatively, Professor O'Sullivan makes the intriguing suggestion of high-ranking public officials and recommending that primary responsibility for the process be given to Congress or a congressional delegee).

256. See id. at 505-06.

257. See GORMLEY, supra note 2, at 244 (explaining that President Nixon had to "placate . . . a skeptical Congress" for an appointment to take place).

258. See id. at 241-43 (discussing Senate reaction to Cox).

259. See id. at 232-44 (stating that "[u]nless Richardson gave stronger guarantees of independence for the special prosecutor, 'he wasn't going through'" (quoting Senator Edward M. Kennedy).

260. See, e.g., Francis X. Clines, Committee Republicans Accuse White House of 'Stonewalling,' N.Y. TIMES, Nov. 7, 1997, at A29 (pointing out "bare-knuckled . . . partisany divided Senate and House hearings" in campaign finance investigation); cf. WALSH, supra note 12, at 522 (noting the difficulty of focusing public hearings).

261. WALSH, supra note 12, at 522. Judge Walsh also notes the infrequency of the use of the impeachment power and its "important limitations." See id. In his view, "[t]o avoid legislative paralysis, Congress must continue its current practice of impeaching only the very highest officials. Thus, impeachment cannot serve as a direct deterrent for subordinates." Id. at 523.
tion that "Congress, or a delegate of Congress . . . should be the cen-
tral actor here, not a criminal prosecutor." She notes the problem
of partisanship in congressional committee investigations, and pro-
poses that Congress "consider delegating its investigative function to
a strictly bipartisan panel of lawyers and investigators, which would
have a circumscribed mandate (in terms of subject matter as well as
available time and resources)." Although I find Professor
O'Sullivan's article to be the most cogent presentation of arguments
opposing the independent counsel statute, this particular solution
strikes me as a tepid alternative for addressing the kind of wrongdoing
likely to be at issue.

Indeed, the nature and role of the prosecutor in general leads to
one of the central questions in the debate: If we are going to use a
prosecutor, should it always be the normal mechanism or is there a
case for "independence" some of the time? If one answers the latter
question in the affirmative, the issue then becomes one of how to
achieve that independence. Some critics suggest that we should not
use the prosecutorial avenue at all if our overall goal is to reach
judgments about fitness for office. However, shifting the matter
from an independent counsel to a regular prosecutor, or some variant
of the same, keeps the matter within the criminal justice system. I
view that as the appropriate arena if it appears that a criminal stat-
tute has been violated. A United States Attorney who prosecutes a
state official for extortion under the Hobbs Act judges that
official's fitness for office to the same extent as an independent coun-
sel who investigates a cabinet official for false statements. The notion
that only an independent counsel criminalizes ethical or political
decisions is erroneous.

I point out these flaws in the critics' arguments to suggest that the
matter is far from settled, and that the drumbeat of criticism cur-
tently surrounding the institution has considerably less force than
meets the eye. What factors will, then, be determinative in the de-
bate? Certainly, partisanship will play a role. Historically, Republic-
cans have opposed the institution while Democrats have been the
primary force in its creation and perpetuation. These opinions,
however, have not remained constant within the parties. In December of 1997, the New York Times reported that President Clinton was "foremost among converts from supporter to opponent."\textsuperscript{268} While partisanship can affect a legislator's position on the institution, it may be hard to take a stance that can be labeled as pro-corruption. That is why opponents need to elevate arguments such as those that I have labeled "civil liberties issues"\textsuperscript{269} to a credible position.

One might expect that empirical evidence detailing the performance of independent counsels would be the most important variable in this debate. However, as Professor O'Sullivan notes, "this is an issue that empirical study is unlikely to resolve."\textsuperscript{270} The debate over the independent counsel is a classic example of the adage "that where one stands depends on where one sits." As my discussion of \textit{Firewall} indicates,\textsuperscript{271} it is possible to view Judge Walsh as either a single-minded partisan (despite his professed Republican allegiances) bent on tackling the presidency, or as a conscientious public servant whose good-faith investigation was stymied by a cover-up orchestrated by powerful forces. No doubt, similar observations and contentions can be made about other occupants of the position. Many in Congress will present the debate over the independent counsel statute's future as a referendum on Judge Starr's performance.

The other important variable may be the extent to which there is still support for the proposition that the Department of Justice cannot be depended upon to conduct an impartial investigation and prosecution in particular cases.\textsuperscript{272} Certainly, much of Attorney General Reno's conduct during 1998 regarding allegations of campaign finance impropriety has served to reinforce this perception.\textsuperscript{273} One can envisage a congressional debate in which the proponents of the independent counsel statute (some of whom called for her impeach-

\textsuperscript{268} Stephen Labaton, \textit{Rethinking a Law}, \textit{N.Y. Times}, Dec. 13, 1997, at A10; see also Lewis, \textit{supra} note 180 (reporting that the Clinton administration initially supported renewing the independent counsel statute because it believed that it had "higher standards" than the Bush administration).

\textsuperscript{269} See \textit{supra} notes 51-55 and accompanying text.

\textsuperscript{270} O'Sullivan, \textit{supra} note 21, at 476.

\textsuperscript{271} See \textit{supra} notes 131-91 and accompanying text.

\textsuperscript{272} See, e.g., O'Sullivan, \textit{supra} note 21, at 476 (discussing the link between support for the independent counsel statute and the perception that the Department of Justice cannot always be counted on to conduct impartial investigations and prosecutions).

\textsuperscript{273} See \textit{Janet Reno May Finally Get It}, \textit{N.Y. Times}, Sept. 4, 1998, at A22 (stating that the Attorney General "should stop stonewalling and try to salvage her own reputation and that of the Justice Department").
ment) cite the case of the politicized attorney general, while the opponents cite the example of the runaway independent counsel. It is not clear that either side will have the political muscle and intellectual capital to prevail. One scenario is a tacit agreement to let the matter die. Alternatively, the natural tendency of the political process in matters such as this—to seek a compromise—may come into play. Therefore, I will devote the remainder of this Article to the question of whether it is possible to make changes in the law that mollify the critics while preserving something akin to the independent counsel statute in its current form.

IV. ALTERATION: A REALISTIC ALTERNATIVE TO ABOLITION?

The lists of both opponents and proponents of the independent counsel statute contain many distinguished names. A fair number of the latter, including Judge Walsh, condition their support on changes in the statute. At the end of Firewall, Judge Walsh states:

[T]hat the independent counsel system has been integrated successfully into our constitutional framework. The statute must be renewed every five years, which provides regular opportunities for amendments. But, inasmuch as the Supreme Court upheld the statute in Morrison v. Olson, it would be regrettable to endanger the statute's constitutionality by any radical change.

These views reflect the prevailing sentiment expressed by former independent counsels surveyed by the New York Times. The same sentiment is probably present, to varying degrees, among members of Congress. An important initial question concerns "how much play there is in the line"; that is, to what degree can the statute be changed while retaining its independent character? Numerous

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274. Walsh, supra note 12, at 528 (citation omitted).
275. See Purdum, supra note 247. The article reported that interviews with seven former independent counsels "produced broad consensus that the statute was needed but might have to be overhauled if it was to be renewed by Congress when it expires." Id. The only exception to this view was expressed by Joseph DiGenova, who stated that prosecutors are forced to bring "an unnatural degree of targeted attention to the case." Id.
276. See, e.g., Chris Black, Both Parties Push Change in Counsel Law, BOSTON GLOBE, Dec. 4, 1997, at A1 ("The independent counsel law . . . has become so steeped in partisanship that Democrats and Republicans alike are calling for change."); David A. Strauss, After the Clinton Storm, N.Y. TIMES, Aug. 6, 1998, at A27 ("The law establishing the independent counsel will expire in mid-1999, and the smart money says the office will not survive in anything like its current form."). But see Lewis, supra note 180 ("[E]xtinction seems like a real possibility; Congress appears to have little appetite for renewing the law."). Of course, it is the current Congress that will make the decision.
incidental changes would probably amount to little more than “tinkering.” Indeed, some of the proposed changes are essentially cosmetic. There are possible alterations, however, that can reduce the statute’s scope and, thereby, respond to some of the recurrent criticisms. Perhaps the most important question is whether it is possible to increase the attorney general’s role and discretion while preserving the independence of the independent counsel. In this section I will discuss the major proposals for change, focusing where possible on specific legislation filed in the Congress that preceded the one that will actually consider renewal.

A. Limiting the Number of Covered Crimes

One of the most popular proposals for change is the reduction of the number of crimes the possible commission of which could trigger an independent counsel investigation, along with the corollary notion that the number of covered persons should also be reduced. A frequent theme is that use of the independent counsel should be limited to instances of abuse of power. As Lawrence Walsh recently stated, “[i]t should be limited to misuse of Government power and should not include personal mistakes or indiscretions.” Clearly, proponents of this change are not advocating “abuse of power” as a free standing norm of conduct. Many citizens might feel that presidential recourse to White House interns for sexual gratification is a form of abuse of power. Such an open-ended standard would lead to the same criticisms that have been levied against the “appearance of impropriety” standard. Thus, proponents of this change must have in mind a particular subset of federal crimes, perhaps only those that a public official could commit or that somehow implicate his office. Archibald

277. See O’Sullivan, supra note 21, at 505 (discussing various ways to address the statute’s perceived problems).


279. See HARRIGER, supra note 16, at 208-14 (discussing various reform proposals); Purdum, supra note 247 (noting criticisms that “the law covered too many officials and too many potential acts of wrongdoing”).

280. Purdum, supra note 247; see also Judicial Conference, supra note 1, at 1530-84 (views of Jamie Gorelick); Lewis, supra note 180 (presenting Senator Carl Levin’s views that the law should be limited to “issues involving behavior while in office or at least should go no farther back than the political campaign that launched the administration”).
Cox has used the phrase, "crimes involving abuse of official power or improper influencing of executive, legislative or electoral decisions." Professor Harriger advocates focusing on "[t]raditional public corruption laws (including those against bribery, fraud, perjury, and obstruction of justice by public officials)." Still, the lines are hard to draw. Moreover, limiting the statute to abuse of office "crimes" finesse somewhat the underlying proposition that an independent counsel is needed because the attorney general cannot be relied on to investigate and prosecute any crime committed by a covered person. Limiting coverage to crimes committed while in office would exclude election offenses, clearly an undesirable result. Furthermore, investigating crimes committed after an official has left office would also present difficult problems. An important federal ethics provision criminalizes certain post-employment activities by former officials. Would these be excluded? A problem also exists in the delineation of the crimes once there is some agreement on how to categorize them. I have advocated exploring an enumeration of covered crimes along the lines of the RICO statute. Another approach would involve some form of certification by the attorney general that an independent investigation is warranted, although that leads back to the question of how much power she should be given to decide whether or not to appoint an independent counsel.

The bill proposed by Representative Wexler uses essentially the Cox formulation, referring to "any Federal criminal law (other than a violation classified as a Class B or C misdemeanor or an infraction) which involves an abuse of official power or improper influencing of executive, legislative, or electoral decisions." Representative Conyers' legislation proposes a slightly more nuanced formulation: "any Federal felony or any Federal misdemeanor for which there is an established practice of prosecution and which is alleged to have been committed by a covered person."
occurred or commenced while the target of the investigation was in office.\textsuperscript{287} The latter formulation would need to be amended to include campaign offenses. The "established practice of prosecution" language appears to be a reflection of the view that independent counsels sometimes strain to find indictable offenses.\textsuperscript{288} It does, however, suffer from a substantial degree of vagueness and would not be of much help in the case of newly-created offenses. Both formulations raise the problem mentioned above of how to determine whether a crime constitutes an abuse of office and who makes that determination.

B. Reducing the Number of Covered Persons

One suggestion that is equally popular among academic and other observers is limiting the number of persons covered under the statute.\textsuperscript{289} This may be a desirable and workable example of tailoring the law more narrowly to reach those cases that most seriously need it. It is far from clear that we need an independent counsel to investigate "the Director of Central Intelligence, the Deputy Director of Central Intelligence, and the Commissioner of Internal Revenue."\textsuperscript{290} Moreover, the provision permitting the attorney general to trigger the mechanism whenever she determines that a Department of Justice investigation "may result in a personal, financial, or political conflict of interest" constitutes a safety valve for any persons who might otherwise escape the net through a reduction.\textsuperscript{291} Disagreement arises over the suggestion of limiting the coverage of the statute when the analysis turns to who should remain covered. Archibald Cox refers to "the paradigmatic case of the President and the few cases of next importance—charges against the Vice President, a key Cabinet officer or a high-ranking member of the White House staff."\textsuperscript{292} Others would include some or all cabinet members.\textsuperscript{293}

\textsuperscript{287} H.R. 117 § 4.

\textsuperscript{288} See Heymann, supra note 237, at 2125-26 (pointing out the tendency of independent counsels to use tremendous resources to investigate allegations of relatively minor crimes).

\textsuperscript{289} See, e.g., HARRIGER, supra note 16, at 209; Martin & Zerhusen, supra note 51, at 541; O'Sullivan, supra note 21, at 475, 505; Purdum, supra note 247.


\textsuperscript{291} See id. § 591(c)(1) (Supp. 1998).

\textsuperscript{292} Cox, supra note 239.

\textsuperscript{293} Compare Lewis, supra note 180 (reporting that some proposals would limit the scope to the heads of the Treasury, State, Defense, and Justice departments), with Martin & Zerhusen, supra note 51, at 541 (stating that there is a general consensus that the statute apply to the President and his Cabinet) (citing INDEPENDENT COUNSEL SUBCOMM. OF THE CRIMINAL JUSTICE SECTION OF THE ABA
Following Professor Cox's lead, the Wexler bill limits "the individuals covered under the Independent Counsel provisions of the Ethics in Government Act to the President, Vice President, Cabinet and a handful of Executive Branch senior staff." Neither the Conyers nor the Dickey bill appears to follow this approach. However, it does seem to represent a workable means of limiting the scope of the Act and, at least, responds in part to the criticism that some public officials are receiving a harsher brand of justice.

The theory of a narrow targeting reflects the contrary concern that there are some whose high position makes it likely that they will receive a milder brand of justice. It should be noted that neither a reduction of the number of covered persons nor a reduction in covered crimes would affect the underlying operation of the Act once triggered. Therefore, it is not surprising that the most difficult question is whether to amend the statute by giving the attorney general a greater role in the process.

C. The Attorney General's Role and the "Triggering" Problem

The fundamental premise of the independent counsel mechanism is that there is an a priori class of cases in which the Department of Justice cannot be relied on to investigate and prosecute. Throughout the existence of the mechanism, congressional critics have charged attorneys general of both parties with overuse of the limited discretion that they do possess not to invoke the mechanism. On the other hand, one of the most frequent criticisms of the Act is its almost automatic operation. According to Professor O'Sullivan, "the statutory trigger is designed so that the attorney general has little choice but to over-refer cases for appointment of an IC. This criticism resonates throughout current discussions and proposals to improve the Act. One observer has called this "the most hotly contested part of the law." The two recurring themes of this critique are (1) that the attorney general should be given more tools at the preliminary stage, and (2) that the standard for appointing an independent counsel should give the attorney general greater leeway to

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294. Dear Colleague letter summarizing bill (on file with the author); see H.R. 3464 § 3(a) (reducing the number of covered individuals by striking provisions from the original statute).

295. See, e.g., Harriger, supra note 16, at 84-85 (criticism of Attorney General Edwin Meese). There have been similar criticisms of Attorney General Janet Reno. See Lewis, supra note 180.

296. O'Sullivan, supra note 21, at 479.

297. Lewis, supra note 180.
determine whether this action is warranted. As for the tools, she is currently barred from using grand juries, immunity, plea bargains, or subpoenas. It may well be that she could weed out cases with little merit if she were given at least some of these tools. On the other hand, there is the risk of suspects learning too much from a preliminary investigation so that they can thwart the independent counsel should there be an independent investigation. Moreover, if a case is truly frivolous, one would hope that the independent counsel would wrap it up quickly and discreetly. The legislative proposals appear to be unanimous in granting the attorney general subpoena power only at this preliminary phase. This may well be a compromise with which all sides can live. It gives the attorney general a greater role in the filtering process while preserving the essential role of the independent counsel once appointed.

As Professor Cox has stated, the role of this individual is not “simply to prosecute.” Professor Cox made this comment in the context of a discussion regarding the more controversial issue: what the attorney general must find or not find in order to move the process forward. Critics of the present law have charged that she is in the difficult position of having to prove a negative: “that there are no reasonable grounds to believe that further investigation is warranted.” Proposals abound for requiring some alternative formulation of what the attorney general should be looking for at this stage. In Firewall, Judge Walsh suggested that “[p]erhaps the attorney general should be required to make an additional finding that prompt investigation by an independent counsel is necessary in the public interest.” Lloyd Cutler has suggested changing the threshold finding into one of “reasonable grounds for believing that a significant federal crime may have been committed.” It was this suggestion that prompted Professor Cox’s emphasis on the broad role of the independent counsel, as well as his view that anything such as a “probable cause” standard would shift the balance too much in the

299. See Smaltz, supra note 222, at 2338-39 (arguing that even under current practice subjects gain an advantage by being on notice).
300. See H.R. 117 § 5 (Conyers); H.R. 139 § 3 (Dickey), H.R. 3464 § 2 (Wexler).
302. 28 U.S.C. § 592(b)(1); see also Lewis, supra note 180.
303. Walsh, supra note 12, at 526.
304. Roundtable Discussion, supra note 301, at 470 (remarks of former White House Counsel Lloyd Cutler).
direction of the attorney general.\textsuperscript{305}

It is, of course, possible that semantics are not the key here,\textsuperscript{306} but I am inclined to think that any language that substantially broadens the attorney general’s fact finding role will be taken as an opening to daylight. There could be a shift in the balance such that the independent counsel remains independent once appointed, but rarely comes into existence, even in cases that would warrant the institution. The issue of a change in the standard is likely to play a major role in any legislative consideration of current bills. Congressman Conyers does not appear to change the basic finding required of the attorney general, although he does grant her more leeway by eliminating the requirement that any decision not to proceed because the subject lacked the requisite state of mind be based on “clear and convincing evidence.”\textsuperscript{307} He also proposes an increase in her authority at the initial screening stage.\textsuperscript{308} Representative Wexler adopts the position of the critics in requiring that the attorney general, after a preliminary investigation, determine “that there are substantial grounds to believe that further investigation is warranted” as a precondition to the application for an independent counsel.\textsuperscript{309} Representative Dickey focuses on increasing the attorney general’s authority at the initial screening stage.\textsuperscript{310}

The trigger is a central issue on which compromise seems difficult. The essence of the current statute is that as long as there is something there or, at least, the attorney general cannot say that nothing is there, an independent counsel shall be appointed. To regress from this standard toward greater attorney general discretion may well take the “independent” out of the statute. For that reason, I think that this sort of change, unlike many of the others discussed in this section, runs counter to the basic thrust of the statute. I will now briefly consider several other proposals that will certainly play a role in the re-authorization debate.

\textsuperscript{305} See \textit{id.} at 471-72 (remarks of Archibald Cox).

\textsuperscript{306} See Martin & Zerhusen, supra note 51, at 544.

\textsuperscript{307} See H.R. 117 § 6. His bill would require “a preponderance of the evidence.”

\textsuperscript{308} See \textit{id.} § 4. This increase in authority occurs through a raising of the threshold in cases involving noncovered covered persons when the Department of Justice may face a conflict of interest.

\textsuperscript{309} H.R. 3464 § 4.

\textsuperscript{310} See H.R. 139 § 4. He would increase the specificity of information that the attorney general must receive before being required to act.
D. Selection and Qualifications of Independent Counsels

There is a broad spectrum of agreement that the position of independent counsel should be full-time. Current legislative proposals exhibit considerable support for this proposition. In the public debate, one also finds wide agreement on a requirement that any independent counsel have prosecutorial or similar experience. According to Whitney North Smith, "we simply cannot afford the spectacle of on-the-job training in such a sensitive position." Imposing the requirement might not be quite so simple given the fact that there is a potential range of relevant experience. For example, the position of Director of the Federal Office of Government Ethics could provide the type of experience necessary to qualify an independent counsel in a particular case. Moreover, as noted earlier, Professor Cox lacked such experience. Curiously, of the three legislative proposals analyzed here, only Representative Conyers addresses the issue, and his proposed bill does not require a particular form of experience. Curiously, of the three legislative proposals analyzed here, only Representative Conyers addresses the issue, and his proposed bill does not require a particular form of experience. Instead, he lists "whether the individual has substantial prosecutorial experience" as a factor for the Special Division to consider at the time of appointment.

One can perhaps expect controversy over how a person is appointed to the position, and particularly over whether the role of the Special Division should be altered. Lloyd Cutler has suggested that the president take the initial step of nominating five to ten potential independent counsels, subject to Senate confirmation. The Special Division would work from this list. None of the bills discussed in this Article go in this direction, although Representative Conyers takes a couple of slaps at the Special Division through requiring bipartisan membership and limiting ex parte communications. I do not think that the proposal for presidential appointment of inde-

311. See, e.g., Roundtable Discussion, supra note 301, at 476 (remarks of Judge Bell, Professor Cox, and Lloyd Cutler); see also O'Sullivan, supra note 21, at 481-82.
312. See H.R. 3464 § 7; H.R. 139 § 10.
313. See, e.g., Purdum, supra note 247 (citing virtual agreement among previous counsels "that wide experience as a criminal prosecutor or a defense lawyer—which Mr. Starr does not have—should be a requirement for the job").
314. Id.
315. See supra note 108 and accompanying text.
316. H.R. 117 § 3(e). The current statute requires the Special Division to seek "an individual who has appropriate experience." 28 U.S.C. § 593(b)(2) (1993).
317. See Roundtable Discussion, supra note 301, at 477-78 (remarks of Lloyd Cutler).
318. See id.
319. See H.R. 117 § 3(a), (c). Such communications would be permitted only if in writing or memorialized by a writing and would be public documents. See id.
pendent counsels would go far in the present climate. Moreover, it, like the issue of increased attorney general authority, seems to run counter to the goal of independence.

E. Limiting the Cost and Duration of Independent Counsel Activities

As noted earlier, and as anyone familiar with Republican criticisms of Judge Walsh or Democratic criticisms of Judge Starr knows, issues concerning the cost and duration of independent counsel investigations are quite contentious. It is somewhat unrealistic to assume at the outset that one can cap either the length or the expense of a criminal investigation. Nonetheless, each of the bills discussed refers to temporal limitations. Two years and the possibility of extension by the court appears to be the favorite limitation. Representative Conyers takes an interesting approach in allowing an initial appointment of only six months after which the counsel must report back on the need for further investigation. The most radical proposal is Representative Dickey's requirement of a specific appropriation after two years. Any sort of periodic review and oversight would perhaps have the desirable result of causing the independent counsel to focus on issues of cost and duration. However, allowing the possibility of extending the investigation is essential.

F. The Report

The role of the report remains an important issue in virtually all public discourse about the independent counsel. Some have called for its elimination. Others agree with Professor Cox's emphasis on the potential value of the report in clearing non-guilty persons. Congressman Dickey would apparently eliminate most reports by the independent counsel, including those that get into items that can

320. See Martin & Zerhusen, supra note 51, at 541-43 (stating that codification of temporal and budgetary limitations is unrealistic because a criminal investigation's progress is determined by the unique factors of the specific circumstances).


322. See H.R. 117 § 3(d).

323. See H.R. 139 § 8. Requiring an appropriation for a specific, ongoing investigation may well raise separation of powers issues.


325. See Roundtable Discussion, supra note 301, at 479-80 (remarks of Professor Cox and Judge Walsh).
affect individual reputations. Representative Conyers proposes a nuanced treatment of the report, stating that it “need not contain information which would (A) compromise or undermine the confidentiality of an ongoing investigation under this chapter, (B) adversely affect the outcome of any prosecution under this chapter, or (C) violate the personal privacy of an individual." I would think it unwise to eliminate reporting, based on the accountability considerations that I have discussed earlier. On the other hand, language like that of Representative Conyers would force the independent counsel to think about the sorts of considerations that Professor Cox and others have mentioned.

G. Limiting Expansions of Jurisdiction

Confining the jurisdiction of the independent counsel has emerged as something of a “sleeper” issue in the debate. There is concern among critics that the counsel can take the initial jurisdiction and run with it into what Senator Levin refers to as “unrelated matters.” James McKay has also expressed the view that “there ought to be some way to limit the ability of an independent counsel to expand his or her investigation, to keep their eye on the original target they were initially appointed to investigate.” This criticism, as I have noted, runs counter to the critique that independent counsels have too narrow a focus. Moreover, it raises serious issues of resource allocation and practical operation of an investigation. Having the independent counsel work on criminal matters that do not directly involve a covered person, but that have surfaced during an investigation of such a person, may be more sensible and cost-effective than bifurcating the nucleus of facts and referring some of them to the Justice Department. In any event, the legislative proposals under consideration here adopt the position of the critics, with a preference for a formulation that would limit the independent counsel to matters “directly related” to the initial violations that triggered the appointment.

It is possible that we could end up with a “reform” proposal along the following lines: the statute would cover fewer people; the number

326. See H.R. 139 § 11.
327. H.R. 117 § 10. The provision also requires that the report “provide information adequate to justify the expenditures which the office of that independent counsel has made, and indicate in general terms the state of the work of the independent counsel.” Id.
328. See Lewis, supra note 180.
329. Purdum, supra note 247.
330. See, e.g., H.R. 139 § 5.
of crimes that trigger it would be reduced, perhaps through an enumeration; the qualifications of the independent counsel would be further spelled out; the position would be full-time; there would be mechanisms to force further attention to duration and cost of independent counsel proceedings; the attorney general would have greater authority, at least subpoena power, at the preliminary investigation stage; and, the report would remain a public document, but there would be some emphasis on exoneration and other limitations. The result would be a different institution, but its fundamental nature and premises would remain intact. I would view such legislation as a positive step, but the abolitionists would not be satisfied. The question is whether such a bill could make it through the legislative process.

Of course, it is risky to predict how Congress will deal with the entire issue of the independent counsel. Nonetheless, there are some obvious considerations. Partisanship is one, but the direction in which it might lead an individual legislator is not obvious. Will Republicans continue their traditional hostility to the institution, especially if they see a good chance of capturing the presidency in the year 2000? Or will they continue in their apparent rethinking of the hostile position that has increased during Whitewater? As for Democrats, they are in something of a Frankenstein situation. They were the initial and long-time champions of a mechanism that has suddenly threatened to bring down their leader, if not their party. It would be hard for them to ignore where they stood in the past, but it is also hard for them to ignore what they have said about the independent counsel in the present. Therefore, notions of change and compromise may be attractive to both parties.

CONCLUSION

What will happen to the independent counsel is anybody’s guess. In its short life of twenty years, this institution has proven to be an extraordinarily influential one despite the relatively small number of investigations and prosecutions.\(^\text{331}\) It may be that the political process will simply not know how to deal with it during any re-authorization debate. The result could be a quiet death, a short-term extension, or re-enactment with changes as discussed in this Article. A short-term extension would give Congress “breathing room” after the impeachment process and would permit some detachment before in-depth review. Legal analysts have focused on what they see as seri-

\(^{331}\) See Purdum, supra note 247 (listing the 20 known special counsels and the results of their investigations).
ous faults in the institution, particularly its departure from normal prosecutorial mechanisms. These criticisms are strongly reinforced by the growing current of questioning our nation's approach to issues of government ethics. The counterrevolution that seems to be brewing in this field calls into question a harsh, prosecutorial approach to wrongdoings by public servants, and may well claim the independent counsel as its first victim. This intellectual trend is augmented by an incipient ethics backlash among the general public in response to a perceived unfairness in the treatment of President Clinton. The White House and supporters of President Clinton have made every effort to capitalize on this sentiment. Congress's action on the independent counsel may be portrayed as a referendum on these events.

The empirical evidence that one finds in the accounts of the activities of Professor Cox and Judge Walsh is, at best, mixed. On the one hand, there is support for an institution that can go up against entrenched centers of governmental power. On the other hand, there is the risk that those who undertake this task may have a political agenda of their own, or they would not be there in the first place. I do not think that the latter result is inevitable, although it may have happened in some cases. In my view the central question in any evaluation of the independent counsel is whether one accepts the institution's premise: that there are certain instances in which normal prosecutorial mechanisms will not work because of the status of the individual potentially subject to investigation and prosecution. We are, then, confronting the eternal question of who shall guard the guardians.