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THE OFFICE OF INDEPENDENT COUNSEL AND THE FATAL FLAW: "THEY ARE LEFT TO TWIST IN THE WIND"

ABRAHAM DASH*

The independent counsel statute¹ lapsed on June 30, 1999, possibly forever.² The concept of an Office of Independent Counsel (OIC) emerged in 1978 as a result of the constitutional trauma of Watergate.³ The statute had a five-year "sunset" provision,⁴ and was reauthorized in 1982,⁵ 1987,⁶ and 1994.⁷ The demise of the independent counsel law was a direct result of the investigation of President Clinton—indeed, a legacy of that administration.

So, it is ironic that when President Clinton signed the reauthorization of the law in 1994, he stated:

I am pleased to sign into law S. 24, the reauthorization of the Independent Counsel Act. This law, originally passed in 1978, is a foundation stone for the trust between the Government and our citizens. It ensures that no matter what party controls the Congress or the executive branch, an independent, nonpartisan process will be in place to guarantee the integrity of public officials and ensure that no one is above the law.

Regrettably, this statute was permitted to lapse when its reauthorization became mired in a partisan dispute in the Congress. Opponents called it a tool of partisan attack against Republican Presidents and a waste of taxpayer funds.

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1. 28 U.S.C. §§ 591-599 (1994).

2. The Independent Counsel Reauthorization Act of 1994, which was signed into law on June 30, 1994, amended 28 U.S.C. § 599 by making the Independent Counsel Act "sunset" on June 30, 1999. Pub. L. No. 103-270, § 2, 108 Stat. 732, 732 (1994) ("Section 599 of title 28, United States Code, is amended by striking '1987' and inserting '1994.'").

3. See S. REP. NO. 103-101, at 5-6 (1994), *reprinted in* 1994 U.S.C.C.A.N. 748, 749 (discussing the origins of the independent counsel statute).

4. Ethics in Government Act of 1978, Pub. L. No. 95-521, § 598, 92 Stat. 1824, 1873 (1978) ("This chapter shall cease to have effect five years after the date of the enactment of this chapter . . .").

5. Ethics in Government Act Amendments of 1982, Pub. L. No. 97-409, 96 Stat. 2039 (1983).

6. Independent Counsel Reauthorization Act of 1987, Pub. L. No. 100-191, 101 Stat. 1293 (1987).

7. Independent Counsel Reauthorization Act of 1994, Pub. L. No. 103-270, 108 Stat. 732 (1994).

It was neither. In fact, the independent counsel statute has been in the past and is today a force for Government integrity and public confidence.

This new statute enables the great work of Government to go forward . . . with the trust of its citizens assured.

It is my hope that both political parties would stand behind those great objectives. This is a good bill that I sign into law today—good for the American people and good for their confidence in our democracy.⁸

By 1999, the President had done an about-face and the “good bill” that was “a force for Government integrity and public confidence” was now considered by the President and many in his party a tool of partisan attack against a Democratic president and a waste of taxpayer funds. The Democrats had come around to the position of many Republicans, who, prior to 1994, had viewed the OIC as an enemy of Republican presidents.

What is it that would turn such a “good law” into a fatally flawed statute with little support from either party, from the news media, or from the general public? There has been a large amount of literature written on the independent counsel statute, some in defense of the office, and many critical of the concept.⁹ One of the best critical analyses of the OIC is, perhaps, Justice Scalia’s dissent in *Morrison v. Olson*.¹⁰

However well-reasoned the “pro” or “con” literature on the OIC may be, it usually deals, for the most part, with constitutional ambiguities and legalistic questions concerning that office. The fatal flaw that has destroyed support for the independent counsel statute, and will continue to make the OIC concept unworkable, however, is actually a pragmatic, “real world” problem. Simply stated, there is no one, and no institution, with a duty or inclination to defend independent counsels when they are attacked in the public arena. The ambiguous constitutional position of the OIC leaves it “twisting in the wind” when attacked in the media.

Federal prosecutors—whether in a United States Attorney’s Office or in the Department of Justice—usually operate in relative ano-

8. President William J. Clinton, Statement on Signing the Independent Counsel Reauthorization Act of 1994, 1994 PUB. PAPERS 1168, 1168-69 (June 30, 1994).

9. See, e.g. *A Symposium on Morrison v. Olson: Addressing the Constitutionality of the Independent Counsel Statute*, 38 AM. U. L. REV. 255, 255-393 (1989); Sixty-Seventh Judicial Conference of the Fourth Circuit, *The Independent Counsel Process: Is It Broken and How Should It Be Fixed?*, 54 WASH. & LEE L. REV. 1515, 1515-1598 (1997); Symposium, *The Independent Counsel Act: From Watergate to Whitewater and Beyond*, 86 GEO. L.J. 2011, 2011-2389 (1998).

10. 487 U.S. 654, 697-734 (1988) (Scalia, J., dissenting).

nymity.¹¹ In high-profile cases, there may be some critical press, which is usually initiated by defense counsels. In those unusual cases, however, the federal prosecutors, backed by the Department of Justice, are encouraged to defend their work.¹² Indeed, as federal officers, these prosecutors can depend on the Department of Justice and, in some circumstances, the White House itself, to come to their defense.¹³ Further, when necessary, the executive branch can convince an impressive portion of the press and media to support its prosecutors' efforts.¹⁴ Federal prosecutors know that they will not be left "twisting in the wind" when, in the unusual case, they are subject to unfair public attacks, particularly when those attacks are spearheaded by the target of an investigation and their defense counsel.

The independent counsel, however, is a constitutional enigma. Yes, it is a federal office, but not of the executive branch.¹⁵ Neither the president nor the attorney general appoints the independent counsel.¹⁶ It is a special court made up of members of the judiciary that appoints these officials and spells out their jurisdiction.¹⁷ The

11. See Roscoe C. Howard, Jr., *Wearing a Bull's Eye: Observations on the Differences Between Prosecuting for a United States Attorney's Office and an Office of Independent Counsel*, 29 STETSON L. REV. 95, 96 (1999) (describing the author's career as an Assistant United States Attorney and noting that the job was one that could be pursued "with relative anonymity").

12. See, e.g., Ronald D. Rotunda, *Independent Counsel and the Charges of Leaking: A Brief Case Study*, 68 FORDHAM L. REV. 869, 870 (1999) (stating that Deputy Attorney General Eric Holder encouraged prosecutors to speak freely with the press in cases that involve "high profile white collar crime" and "well-known people").

13. For example, when the Microsoft antitrust complaint was filed (albeit not a criminal case), the Attorney General went public to defend the government attorneys against an initial critical attack by Microsoft and its attorneys. See Attorney General Janet Reno, Department of Justice Press Conference: *Court Order on Microsoft Split*, at <http://www.usdoj.gov:80/ag/speeches/2000/060700microsoftcom.htm> (June 7, 2000) ("I'm pleased that the court has ordered a strong, effective remedy to address the serious anti-trust violations that Microsoft has committed. . . . I am so very proud of all the hard work and efforts of this [DOJ Antitrust] team . . .").

14. See, e.g., Howard, *supra* note 11, at 127-28 (describing how U.S. attorneys use public and media scrutiny to their advantage in conducting prosecutions); cf. Samuel Dash, *Independent Counsel: No More, No Less a Federal Prosecutor*, 86 GEO. L.J. 2077, 2083 (1988) (stating that media "scrutiny is particularly intensive . . . [when] the independent counsel's investigation . . . involves the President and the White House, [which are] subjects of irresistible interest to print and electronic media").

15. See 28 U.S.C. § 594(a) (1994) ("An independent counsel . . . shall have . . . full power and independent authority to exercise 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, except that the Attorney General shall exercise discretion or control as to those matters that specifically require the Attorney General's personal action . . .").

16. See *id.* § 593(b)(1) (granting a special court the authority to appoint independent counsels).

17. See *id.*

only relationship the executive branch has to the independent counsel is that the attorney general may remove him from office for good cause,¹⁸ but even that is ultimately controlled by the *judiciary*.¹⁹ That limited relationship does not, in the eyes of the executive branch, make the independent counsel an executive figure or even an institutional concern. Justice Scalia's *Morrison v. Olson* dissent effectively summarizes why this is the case:

[T]he Court points out that the President, through his Attorney General, has at least *some* control [over an independent counsel] "Most importan[t]" among these controls, the Court asserts, is the Attorney General's "power to remove the counsel for 'good cause.'" This is somewhat like referring to shackles as an effective means of locomotion.²⁰

Therefore, under the independent counsel statute, we have an "Alice in Wonderland" situation; when the president is under investigation, the United States Department of Justice can be adversarial and even hostile to its own federal officer, the independent counsel.²¹ This naturally leads to public confusion and criticism.

In the past thirty years, there have been only three serious investigations of the president—one by a traditional special prosecutor who was appointed by an attorney general, and two by independent counsels under the Independent Counsel Act. In 1972, Attorney General Elliot Richardson appointed Archibald Cox as the special prosecutor for the Watergate investigation.²² In 1986, Lawrence Walsh was appointed independent counsel to investigate the Iran-Contra matter.²³

18. See *id.* § 596(a)(1) ("An independent counsel . . . 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 or mental disability, . . . or any other condition that substantially impairs the performance of such independent counsel's duties.").

19. See *id.* § 596(a)(3). While the attorney general can remove an independent counsel for good cause, "[a]n independent counsel removed from office may obtain judicial review of the removal in a civil action commenced in the United States District Court for the District of Columbia." *Id.*

20. *Morrison v. Olson*, 487 U.S. 654, 706 (1988) (Scalia, J., dissenting) (alteration in original) (citation omitted) (quoting *Morrison*, 487 U.S. at 696).

21. See Kenneth Starr, *Lessons Learned from the Recent Past*, 8 GEO. MASON L. REV. 349, 350 (1999) (explaining why the attorney general has no incentive to support an independent counsel).

22. KEN GORMLEY, ARCHIBALD COX: CONSCIENCE OF A NATION 240-41 (1997).

23. E.g., George Lardner Jr. & Howard Kurtz, *Iran Inquiry Counsel Selected; Broad Mandate Granted to Oklahoma City Attorney Walsh*, WASH. POST, Dec. 20, 1986, at A1; Philip Shenon, *The White House in Crisis; Counsel Selected in Iran Arms Case; Given Wide Power*, N.Y. TIMES, Dec. 20, 1986, § 1, at 1.

And, on August 5, 1994, Kenneth Starr was appointed independent counsel for the Whitewater investigation.²⁴

Since 1978 there have been several independent counsel investigations of high-ranking federal officials.²⁵ However, with the possible exception of one or two, none of those investigations aroused public outcry and criticism from the White House as did the two presidential investigations by Lawrence Walsh and Kenneth Starr. Whether independent counsels are needed to investigate officials other than the president and White House staff members is a debate to be left for another time. However, it was presidential and White House staff misdeeds stemming from Watergate in 1978 that created the perceived need for the OIC in the first place.²⁶

The main (if not the only) purpose of the independent counsel statute was to assure the public that any investigation of serious charges against a president or members of the White House staff would be fair, impartial, and complete.²⁷ Unfortunately, in the only two instances where independent counsels were used to investigate a president—Walsh in Iran-Contra and Starr in Whitewater—the statute failed to meet its purpose. The failure was not, however, the fault of the independent counsels. The statute was doomed from the beginning because of its fatal flaw.

Lawrence Walsh's appointment to investigate Iran-Contra "was broadly welcomed and applauded."²⁸ He had an excellent reputation as a former federal judge, litigator, government servant, and President of the American Bar Association.²⁹ Six years after Walsh's appoint-

24. Robert Fiske was appointed special prosecutor in January 1994 by Attorney General Janet Reno to investigate the Whitewater matter. *E.g.*, Michael Isikoff, *Whitewater Special Counsel Promises 'Thorough' Probe*, WASH. POST, Jan. 21, 1994, at A1; David Johnston, *Counsel Granted a Broad Mandate in Clinton Inquiry*, N.Y. TIMES, Jan. 21, 1994, at A1. When the independent counsel statute was reauthorized on June 30, 1994, however, the Special Court removed Fiske and appointed Starr. *E.g.*, Stephen Labaton, *The Whitewater Inquiry: The Decision; Judges Appoint New Prosecutor for Whitewater*, N.Y. TIMES, Aug. 6, 1994, § 1, at 1; Susan Schmidt, *Judges Replace Fiske as Whitewater Counsel; Ex-Solicitor General Starr to Take Over Probe*, WASH. POST, Aug. 6, 1994, at A1.

25. *See* Donald C. Smaltz, *The Independent Counsel: A View from Inside*, 86 GEO. L.J. 2307, 2323-24 (1998) (noting the eighteen publicly identified independent counsels that have been appointed under the independent counsel statute).

26. *See* Donald C. Smaltz, *On the Need for Independent Counsel to Conduct Investigations*, 47 U. KAN. L. REV. 573, 573 (1999) ("The [independent counsel] legislation was a result of the country's experience in the so-called 'Watergate' matter . . .").

27. *See* S. REP. NO. 103-101, at 5-6 (1994), *reprinted in* 1994 U.S.C.C.A.N. 748, 749 (discussing the impetus for the original independent counsel law).

28. Dash, *supra* note 14, at 2085.

29. *See* William Michael Treanor, *Independent Counsel and Vigorous Investigation and Prosecution*, 61 LAW & CONTEMP. PROBS. 149, 155 (1998) (setting forth Walsh's professional qualifications).

ment, however, the public had come to distrust him.³⁰ Walsh faced allegations of vindictiveness, unfairness, and prosecutorial abuse, and this resulted in general public support for allowing the independent counsel statute to lapse.³¹

Kenneth Starr was appointed independent counsel in 1994,³² and at that time any objective observer would have been impressed with his credentials. Starr was a former solicitor general, a former judge on the United States Court of Appeals for the District of Columbia Circuit, and a highly regarded attorney who was known for his moderate views.³³ In November 1998, when Starr appeared before the House Judiciary Committee to discuss proposed articles of impeachment, his reputation was in tatters and his public image of fairness and objectivity was nonexistent.³⁴

Whether Walsh or Starr made prosecutorial misjudgments is, perhaps, worthy of professional debate. It should be noted, however, that both Walsh and Starr had an office composed of many professional federal prosecutors—as is the case with all independent counsels.³⁵ In any case, their tattered reputations were not the results of any possible mistakes; rather, they were the results of organized and often vicious attacks on the independent counsels and their offices.³⁶

30. See Dash, *supra* note 14, at 2085-86 (explaining how the Iran-Contra investigation tainted Walsh's reputation).

31. See *id.* (noting that the unpopularity of Walsh's investigation led to the lapsing of the independent counsel statute).

32. See *supra* note 24.

33. See RICHARD A. POSNER, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON 66 (1999) (listing the qualifications of Ken Starr); Rob Atkinson, *Lucifer's Fiasco: Lawyers, Liars, and L'Affaire Lewinsky*, 68 FORDHAM L. REV. 567, 574-75 & n.22 (1999) (observing Starr's "many admirable, even epic qualities").

34. See Erwin Chemerinsky, *Learning the Wrong Lessons from History: Why There Must Be an Independent Counsel Law*, 5 WIDENER L. SYMP. J. 1, 15 (2000) (aligning the public's association of independent counsels with the perceived abuses of Kenneth Starr).

35. See Howard, *supra* note 11, at 96 (explaining that the federal prosecutors called upon to assist in independent counsel investigations were selected based upon their "experience in federal investigations and their ability to provide a typical federal investigatory approach to the independent counsel's office").

36. One knowledgeable commentator explained:

Independent counsel differ from other federal prosecutors . . . in that independent counsel are appointed to investigate alleged wrongdoing by a President or one of the President's senior officials. This kind of investigation inevitably triggers the powerful public relations mill of the President. The result is a barrage of attacks against the independent counsel disseminated through leaks to favored reporters, planned critical statements by chosen political spokespersons, and sometimes in accusations by the President, himself. Once these orchestrated attacks become public, the nature of the media is such that every newspaper and television station seems compelled to cover the attacks. This press coverage frequently leads to editorials critical of the investigation and fuels the general public

Unfortunately, an independent counsel who is selected to investigate a president will become fair game as a political adversary to that president's administration.³⁷ When the president is the target, destroying the independent counsel's credibility and integrity becomes an understandable defensive goal of the White House. Obviously, if the public becomes convinced that the independent counsel is a partisan figure, out to destroy the president, then the entire independent counsel's office cannot perform its duty—to conduct an investigation that has the trust and confidence of the public.³⁸ In his testimony to the House Judiciary Committee, Kenneth Starr attempted to defend his colleagues in the OIC, but to no avail.³⁹ Indeed, he used the barrage of unanswered public attacks from the White House as a reason for his *personal* opposition to the reauthorization of the independent counsel statute.⁴⁰

perception that something has gone terribly wrong with the independent counsel statute. Even more troubling, these attacks are based on a hopelessly skewed perception of the investigation. Because the independent counsel and his staff are required to work secretly during their investigation, they are prohibited from responding fully to these attacks. Thus, an influential editorial lambasting an independent counsel may have little factual support, but may rely instead on the spiraling propaganda daily generated by "sources close to the investigation" and reporters and editors competing with other newspapers to keep the story alive as long as possible.

Dash, *supra* note 14, at 2080; *see also* Smaltz, *supra* note 25, at 2333 ("As a political figure, [an independent counsel] will—like it or not—most likely be caught up in the Washington political swirl. . . . [T]he subjects of his investigation may choose to go public in an effort to turn public opinion against the investigation and 'chill' witnesses from cooperating.").

37. *See supra* note 36.

38. *See supra* note 8 and accompanying text.

39. *See Impeachment of President William Jefferson Clinton: The Evidentiary Record Pursuant to S. Res. 16, Vol. IX, S. Doc. No. 106-3, at 27* (1999) (statement of Kenneth Starr, Independent Counsel) (responding to alleged White House attacks on prosecutors who serve in the independent counsel's office).

40. Starr articulated this point in his first public speech after resigning as independent counsel. The speech, given on November 4, 1999, was entitled, "Lessons Learned from the Recent Past." Lesson number one, as noted by Starr, is as follows:

The institutions fashioned at the convention in Philadelphia 212 years ago stood the test of time, because their structure is undergirded by an exquisitely thought-out, quintessentially American political philosophy. The idea we learn as schoolchildren: government should be balanced, with appropriate divisions and checks, with accountability clearly resting where the power has been placed.

The Independent Counsel statute, under which I served . . . fragmented accountability, so that an Administration, whether Republican or Democrat, was not held fully and clearly accountable for its actions. Of particular importance in my experience was the statute's removal of the appointment power from the hands of the Attorney General, and placing it instead in the hands of three federal judges. The result was the worst of all worlds. The Attorney General—speaking generically—had no incentive to support an independent counsel. In fact, the structure created exactly the opposite—incentives to stand in the way, incentives to injure

Interestingly, if Walsh or Starr had committed any of the offenses charged against them, they could have been removed from office.⁴¹ But, of course, once an independent counsel has been demonized, there is no need (from a defensive viewpoint) to seek his removal; he is no longer a serious threat.

It is instructive to compare the fates of the two independent counsels who investigated presidents with the fates of the three special prosecutors who were appointed by attorneys general to investigate presidents. Archibald Cox was appointed special prosecutor by Attorney General Elliot Richardson in 1972 to investigate allegations against President Nixon's administration.⁴² Cox was a Democrat, a former solicitor general under President Kennedy,⁴³ and was considered an enemy by the Nixon White House. White House public criticism of him was muted, however, as he *was* the attorney general's appointment and he served under the attorney general pursuant to special regulations issued by the Department of Justice. Cox was not dismissed because of attacks against his integrity or because of alleged partisanship. He was dismissed because he refused to obey the President's order not to subpoena the "White House tapes."⁴⁴ Attorney General Richardson defended the Special Prosecutor, and resigned rather than dismissing Cox.⁴⁵ Deputy Attorney General Ruckelshaus also defended Cox and resigned because of his proposed dismissal.⁴⁶ Archibald Cox left as a public hero, with his reputation enhanced.⁴⁷ Cox was replaced by Leon Jaworski, who successfully completed the

and, above all, incentives to sit neutrally on the sidelines when the independent counsel, and even career prosecutors who were on assignment from the Justice Department, came under assault.

. . . [The Attorney General] should be able to choose an outside prosecutor Let the Attorney General decide, and then hold her accountable for that choice. That's the way business works, it's the way education should work and it is emphatically the way that the Executive Branch of our government should work.

Starr, *supra* note 21, at 350.

41. See *supra* note 18 and accompanying text (describing how an attorney general can remove an independent counsel).

42. See GORMLEY, *supra* note 22, at 232-46 (discussing the appointment of Archibald Cox as special prosecutor).

43. See POSNER, *supra* note 33, at 66 (noting Cox's Democratic leanings and his service as solicitor general under President Kennedy).

44. See GORMLEY, *supra* note 22, at 338-58 (describing the "Saturday Night Massacre" and the dismissal of Cox as special prosecutor).

45. See *id.* at 354-56 (describing the resignation of Attorney General Richardson).

46. Dash, *supra* note 14, at 2077.

47. See GORMLEY, *supra* note 22, at 378-79 (discussing the positive reception received by Cox after being dismissed); POSNER, *supra* note 33, at 66 (noting that "Cox's conduct as special prosecutor is widely admired").

Watergate investigation.⁴⁸ Jaworski's reputation was similarly enhanced, and the executive branch did not publicly attack his integrity.⁴⁹

Robert Fiske was appointed special prosecutor by Attorney General Janet Reno in January 1994 to investigate the Whitewater allegations against President Clinton, as well as other matters dealing with the White House.⁵⁰ After serving six months, the Special Court replaced Fiske with Starr, pursuant to the reauthorized independent counsel statute.⁵¹ Like Starr, Fiske was a member of the Republican party, and had served as solicitor general under a Republican administration.⁵² Fiske, however, was not publicly attacked by White House spokespeople as a partisan Republican out to get the President. His tenure was short, but during his time in office he was the Attorney General's appointee, and she could not and would not have permitted such attacks. I submit that had the independent counsel statute *not* been reauthorized in 1994, and had Fiske remained as special prosecutor, no public attacks would have been mounted against him, even if he had, at the request of the Attorney General, investigated the Monica Lewinsky allegations. The Attorney General would not have tolerated the executive branch attacking the integrity of a federal officer whom she appointed, and who was responsible to her.

The main arguments made against the independent counsel statute are that the prosecutor is not accountable, and is not constrained by limits on time and money.⁵³ The lack of support for the independent counsel statute, however, does not stem from the above criti-

48. See GORMLEY, *supra* note 22, at 381, 385 (discussing the appointment of Jaworski and his successful efforts to obtain the White House tapes).

49. See JAMES DOYLE, *NOT ABOVE THE LAW: THE BATTLES OF WATERGATE PROSECUTORS COX AND JAWORSKI* 374-76 (1977) (discussing Jaworski's reception in the media upon leaving office). See generally *id.* at 339-76 (discussing Jaworski's departure from office).

50. See *supra* note 24 (discussing the appointment of Robert Fiske).

51. See *supra* note 24 (discussing the appointment of Kenneth Starr after the reauthorization of the Independent Counsel Act).

52. POSNER, *supra* note 33, at 66.

53. See, e.g., Dash, *supra* note 14, at 2081-84 (making both arguments); Joseph E. diGenova, *The Independent Counsel Act: A Good Time to End a Bad Era*, 86 GEO. L.J. 2299, 2301 (1998) (arguing that the independent counsel lacks accountability and stating "[w]hat a dangerous creature we have now loosed upon our system of checks and balances: an independent counsel, removable only for cause, who in a real sense does not answer to Congress, the executive, or the judiciary, and, worst of all, is in no way accountable to the people"); Sixty-Seventh Judicial Conference of the Fourth Circuit, *supra* note 9, at 1584 (statement of Congressman Henry J. Hyde, Chairman, House Judiciary Committee) ("I think, for myself, I don't like the notion of creating a legal Frankenstein who is accountable to nobody, with an unlimited bank account, with a charter that is as comprehensive as many independent counsels have treated it—it just lacks accountability.").

cisms. The reason that the independent counsel statute failed to sustain public and congressional support is, again, that no one and no institution was responsible for the independent counsel. When an independent counsel investigates a president, he stands alone amidst a storm of criticism. Regardless of what political party controls the White House, it is a simple fact of political life that an independent counsel investigating a president will be subjected to an overwhelming campaign of public criticism. The independent counsel's options to counter these attacks, however, are limited under Department of Justice guidelines regarding public comments.⁵⁴

What further confuses the public's view of this constitutionally ambiguous office is that the Department of Justice, as it did in the Starr investigation, can take an adversarial position in court to the independent counsel.⁵⁵ For example, during the Lewinsky investigation, the Clinton administration attempted to prevent the Secret Service from being forced to testify against the President.⁵⁶ In so doing, the administration "created a legal conundrum, one in which the United States, as sovereign, found itself doing judicial battle with itself."⁵⁷

54. See 28 U.S.C. § 594(f)(1) (1994) ("An independent counsel shall, except to the extent that to do so would be inconsistent with the purposes of this chapter, comply with the written or other established policies of the Department of Justice respecting enforcement of the criminal laws."); 28 C.F.R. § 50.2 (2000) (detailing the limited amount of information a Justice Department prosecutor may divulge to the press). An excellent statement on this problem is as follows:

If the present public dissatisfaction with the independent counsel statute . . . is based on the crediting of the frequent vitriolic attacks on individual independent counsel reported by the news media, it is misplaced and misinformed. Such attacks are basically unreliable because they cannot be rooted in knowledge of the actual conduct of a particular independent counsel and her staff, who are under the restrictions of grand jury secrecy and professional responsibility. Instead, these attacks are usually fueled by defense strategy to vilify the prosecutor for the purpose of weakening her investigation. Journalists, acting as conduits, and not the filters their ethics require them to be, routinely report these attacks, lending credibility to them and thus shaping the opinions and perceptions of the public. As a result, the public perception is based on a myth, which, unfortunately, may contaminate the reality in the office of the independent counsel through the chilling impact on professional prosecutors by constant, and from their point of view, unearned public condemnation.

Dash, *supra* note 14, at 2094-95.

55. See 28 U.S.C. § 594(i) (1994) ("Each independent counsel . . . and the persons appointed by that independent counsel . . . are separate from and independent of the Department of Justice . . ."); *supra* note 40 (noting Starr's critique of the Justice Department's potentially adversarial position in independent counsel investigations).

56. See *In re Sealed Case*, 148 F.3d 1073, 1074 (D.C. Cir. 1998) (per curiam). .

57. Smaltz, *supra* note 26, at 580. Although the D.C. Circuit ultimately rejected the administration's attempt to "do battle with itself," *In re Sealed Case*, 148 F.3d at 1079, the animosity between the Department of Justice and the OIC remained.

The problem, therefore, with the independent counsel statute was not the independent counsel's lack of accountability. It also was not the independent counsel's ability to exert great amounts of power or to spend unlimited amounts of money investigating executive wrongdoing. The flaw was that the statute separated the independent counsel *completely* from the executive branch by giving the judiciary the authority to appoint an independent counsel and to establish his jurisdiction.⁵⁸ Because of the inherent flaw in the independent counsel statute, it is impossible for an independent counsel to investigate a president or members of the White House staff, and to obtain the public trust that is essential to the success of such an investigation.

Hopefully, there will be no future need for independent investigations of the White House. History, however, teaches us that inevitably another problem will occur. Serious allegations will be made, regardless of their legitimacy, against a president or member of the White House staff. Faith in our constitutional system requires a method to resolve such serious charges. Congressional investigations can be helpful in satisfying the public, but they alone cannot win complete public support.⁵⁹

Good intentions created the constitutionally ambiguous independent counsel law, and the questionable decision of *Morrison v. Olson*⁶⁰ gave it life, albeit short-lived. Proposals that tinker with the wording of the statute to respond to its critics will not solve its fatal flaw.

It is unfortunate that the dismissal of Archibald Cox and the resulting "Saturday Night Massacre" in 1973 discredited the use of the special prosecutor for high level investigations. Were it not for this incident, Congress likely would have never created a judicially appointed independent counsel in 1978.

Special prosecutors have a long and successful history.⁶¹ The attorney general has the unquestioned authority to appoint a special prosecutor. Nothing, however, prevents Congress from responding to public criticism of a "high level" investigation by statutorily granting

58. See 28 U.S.C. § 593(b)(1) ("Upon receipt of an application [to appoint an independent counsel], the division of the court shall appoint an appropriate independent counsel and shall define that independent counsel's prosecutorial jurisdiction.").

59. The Senate Watergate hearings and the impeachment process in the House of Representatives certainly made possible the successful conclusion of the Archibald Cox and Leon Jaworski criminal investigations, but it is not clear that in today's post-Clinton, politically charged environment, a congressional investigation would even be helpful to a special prosecutor.

60. 487 U.S. 654 (1988).

61. See Howard, *supra* note 11, at 99-102 (discussing the merits of past special prosecutor investigations).

itself the authority to request the appointment of a special prosecutor.⁶² Congress could, for example, require the attorney general to appoint a special prosecutor under certain circumstances.⁶³ Using the language of the Independent Counsel Act, Congress could also ensure that a special prosecutor has the authority to investigate high-ranking officials when a conflict of interest may exist in the Department of Justice.⁶⁴ Congress can require the attorney general to issue regulations granting special prosecutors both prosecutorial authority similar to that found in the independent counsel statute,⁶⁵ and similar removal restrictions.⁶⁶ Further, Congress could statutorily require that a special prosecutor, nominated by the attorney general, be confirmed by a majority of the Senate Judiciary Committee, or, for that matter, by a majority of the entire Senate. Indeed, Congress can statutorily require the attorney general to issue regulations that, in effect, mirror the requirements of the independent counsel statute.

Many critics may be concerned with the apparent power of the executive branch to peremptorily dismiss a special prosecutor (as in the Archibald Cox dismissal). What is forgotten by many of these critics, however, is that a properly issued regulation, promulgated pursuant to statutory authority, has the *force of law* that agencies must comply with.⁶⁷ In fact, a federal court later determined that the Cox dismissal was *illegal* due to a violation of the Justice Department regulation that governs special prosecutors.⁶⁸

62. See U.S. CONST. art. I, § 8, cl. 18 (authorizing Congress to pass “Laws which shall be necessary and proper to carry into Execution” Congress’s delegated powers).

63. See 28 U.S.C. § 592(g)(1) (stating that Congress, under certain circumstances, can formally request that the attorney general apply for the appointment of an independent counsel).

64. See *id.* § 591(b) (granting the attorney general the authority to investigate the president, the vice president, and high-level executive officials); *id.* § 591(c)(1) (detailing the attorney general’s authority to conduct a preliminary investigation when “an investigation or prosecution of a person by the Department of Justice may result in a personal, financial, or political conflict of interest”).

65. See *supra* note 15 (noting the prosecutorial authority of independent counsels).

66. See 28 U.S.C. § 596(a) (stating that an independent counsel can only be removed “for good cause, physical or mental disability, . . . or any other condition that substantially impairs the performance of such independent counsel’s duties”).

67. See *Chrysler Corp. v. Brown*, 441 U.S. 281, 295-96 (1979) (“It has been established in a variety of contexts that properly promulgated, substantive agency regulations have the ‘force and effect of law.’ This doctrine is so well established that agency regulations implementing federal statutes have been held to pre-empt state law under the Supremacy Clause.” (citation omitted)).

68. *Nader v. Bork*, 366 F. Supp. 104, 108 (D.D.C. 1973) (“The firing of Archibald Cox in the absence of a finding of extraordinary impropriety was in clear violation of an existing Justice Department regulation having the force of law and was therefore illegal.”).

Retaining the historic special prosecutor concept is important because the special prosecutor is unambiguously a part of the executive branch—within the Department of Justice. When the need for an investigation arises, the attorney general would have to appoint a special prosecutor and issue regulations that protect his or her independence. Once an attorney general appoints a qualified member of the private bar to the special prosecutor position, the attorney general then would have a responsibility to this subordinate federal official.

Replacing the OIC by a *statutorily mandated* special prosecutor would not create a perfect system for presidential investigations. It would have many of the imperfections of the independent counsel statute. For example, the triggering requirement would still be vague and left to the attorney general's discretion. Also, a special prosecutor, as a subordinate of the attorney general, would not be able to do some things an independent counsel could do.⁶⁹ However, a comparison of the Cox, Jaworski, and (to an extent) Fiske investigations to the Walsh and Starr investigations proves that a protected special prosecutor investigation can be more effective than an independent counsel investigation. In 1998, a well-known defender of the OIC made an observation that perfectly demonstrates this point. He observed:

An illustration may be useful to put in context the publicly reported disapproval of the independent counsel statute. For the purpose of this illustration, I will switch the roles of Archibald Cox and Lawrence Walsh. Assume that Walsh, not Cox, was picked by Attorney General Elliot Richardson to be the Watergate Special Prosecutor. I submit that Walsh would have performed his investigative responsibilities similarly to the way Cox did, and he would have reached the same confrontation with President Nixon. He would have been fired and gone down in history as a great American hero who courageously stood up for justice and integrity. On the other hand, assume that Cox had been selected by the Special Division of the court to be the independent counsel in the Iran-Contra matter. I submit that Cox would have performed his

69. For example, Starr's judicial battle with the Department of Justice over compelling the testimony of Secret Service agents could not happen under a special prosecutor law. This is not necessarily a bad thing. See Smaltz, *supra* note 26, at 580-81 (discussing the dispute over Secret Service testimony and implying that such a court battle could only occur between parties from independent governmental offices). Appointing a special prosecutor who is subordinate to the attorney general would also cure the fear expressed by many, but articulated best by Justice Scalia, that "[w]hat would normally be regarded as a technical violation . . . may . . . assume the proportions of an indictable offense . . . [to an] independent counsel and staff . . . with nothing else to do but to investigate you." *Morrison v. Olson*, 487 U.S. 654, 732 (1988) (Scalia, J., dissenting).

investigative and prosecution responsibilities similarly to the way Walsh did. Like Walsh, he would have been stonewalled and undercut by the President and the Attorney General, undermined by the Congress's misuse of its immunity power, and exposed to vicious attacks reported in newspapers and on television made by his opponents and others too ready to believe what they read or heard. Thus, in my illustration, Cox, instead of being revered as an American hero, would have been remembered as a failure and an abuser of power. Public disapproval of the independent counsel statute is not the fault of the statute or any particular independent counsel. Instead, it is the product of marketing—an image woven largely of public relations and reinforced by the press.⁷⁰

CONCLUSION

The standard criticism of the independent counsel statute—that it permits inflated expenses, overzealous prosecutions, and a lack of accountability—misses the essential problem with the concept of an independent counsel statute: that this constitutionally ambiguous office has no institutional home. The independent counsel is appointed by the judiciary, but is not of the judiciary; he is a federal prosecutor, but is not of the Justice Department or the executive branch.

Independent counsels that set out to investigate a president are therefore fair game. The vast White House public relations machinery can launch a nationwide attack on their integrity and “partisan bias,” and they can be vilified beyond redemption.⁷¹ The result is that

70. Dash, *supra* note 14, at 2095. I would only add that Independent Counsel Starr could be included in this observation—with the same result.

71. Assuming a reauthorization of the Independent Counsel Act occurs, one must wonder, after the Walsh and Starr examples, how many distinguished members of the bar would be willing and available to accept an independent counsel appointment.

An example of what any new independent counsel could expect occurred in August 2000. After Ken Starr resigned as independent counsel, the Special Court appointed Robert W. Ray, a relatively unknown professional prosecutor, to complete the Starr investigation. *E.g.*, Lorraine Adams, *Starr to Resign; Deputy to Assume Counsel Role*, WASH. POST, Oct. 15, 1999, at A6. On August 17, the day Vice President Gore gave his acceptance speech to the Democratic Convention, the Associated Press released a story that Ray had impaneled a grand jury to investigate President Clinton for possible criminal offenses. Pete Yost, *New Grand Jury Assembled to Probe Clinton in Lewinsky Scandal*, ASSOCIATED PRESS, Aug. 17, 2000. Immediately, Democrats called this a plot of the Independent Counsel to hurt Vice President Gore and help the Republicans. *See, e.g.*, Susan Schmidt & David Vise, *New Grand Jury Probe Set for Lewinsky Case; Criminal Charges for Clinton to Be Weighed*, WASH. POST, Aug. 18, 2000, at A1 (“The timing of the leak reeks to high heaven. Given the past record of the independent counsel, it’s hardly surprising,” said White House spokesman Jake Siewert.”); *id.* (“Gore campaign spokesman Chris Lehane said, ‘The timing of this raises questions.’”);

they cannot fulfill the essential purpose of the independent counsel statute—to insure public confidence and trust in their government.⁷²

A special prosecutor—appointed by an attorney general and protected by appropriate congressionally-mandated regulations—would be a federal prosecutor *within* the Department of Justice and the executive branch. The special prosecutor would not be fair game for White House attacks because any such attacks would also be aimed at the attorney general and the Department of Justice. Attorneys general would have to protect and defend their subordinate and their appointee. Indeed, attorneys general, who are usually responsible professionals, would caution the White House against making such attacks, as their own professional reputations would be at stake. Further, if allies of the White House, in the media or in Congress, were to voice unfair personal attacks against the special prosecutors, the attorney general would have the duty (and the desire) to defend against such abuse. A special prosecutor would not be left “to twist in the wind.”

A New Grand Jury Looks at Clinton's Past, N.Y. TIMES, Aug. 18, 2000, at A23 [hereinafter *New Grand Jury*] (“Rahm Emanuel, a former senior adviser to Mr. Clinton, said the news of Mr. Ray’s office was ‘brazenly political’ and predicted it would cause a backlash against Republicans.”). The uproar over Ray’s alleged lack of integrity continued for two days. Even the Republicans attacked Ray for allegedly leaking the story on Vice President Gore’s “big day.” See, e.g., *New Grand Jury*, *supra*, at A23 (“Karen P. Hughes, communications director for Gov. George W. Bush of Texas, the Republican presidential nominee, called the timing [of the release of the grand jury information] unfortunate. ‘We think the timing was wrong,’ Ms. Hughes said. ‘It was simply not appropriate for this type of news to come out on Al Gore’s big day.’”); *id.* (“‘I think the timing is terrible,’ said Rep. Nancy L. Johnson, a Republican moderate from Connecticut. ‘I wish [Ray] hadn’t done this in a political season.’”). Fortunately (in this instance) for Independent Counsel Ray’s office, Judge Richard D. Cudahy stepped forward and accepted responsibility for the leak. Judge Cudahy stated that he had “inadvertently” let out the information on the grand jury to a reporter. E.g., Susan Schmidt, *Judge Was Source of Clinton Jury Story; Leak ‘Inadvertent,’ Carter Nominee Says*, WASH. POST, Aug. 19, 2000, at A1. The OIC was “innocent” of any wrongdoing. Once again, however, public mistrust of the OIC was raised and an independent counsel’s reputation was tarnished.

72. See *supra* note 8 and accompanying text.