Monica Lewinsky, Impeachment, and the Death of the Independent Counsel Law: What Congress Can Salvage from the Wreckage - a Minimalist View

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In this Article, Professor Ken Gormley undertakes a post-mortem examination of the independent counsel law, and seeks to address the perplexing problem that faces Congress in the wake of the statute's demise: What, if anything, should Congress construct to replace the controversial Watergate-era legislation?

Rather than proposing a complex new piece of legislation that renew constitutional problems of the past, Professor Gormley seeks to advance a minimalist vision. He tackles these significant questions: What is the least that Congress can do to salvage something of value from the independent counsel wreckage? How can a post-Clinton-era Congress (on the heels of one of the most bitterly divided presidential elections in American history) unite to accomplish the statute's original, noble goal of restoring public trust in American government, and thus forestall future damaging scandals in the executive branch?

After examining a host of proposals, criticisms, and warnings offered by Democrats and Republicans alike during the contentious Senate hearings concerning the fate of the independent counsel law—and taking place in the aftermath of the Clinton impeachment trial—Professor Gormley reaches several unique conclusions. He proposes that in the overwhelming run of cases involving alleged misconduct in the executive branch, our nation should return to the old ad hoc method of appointing special prosecutors that existed prior to Watergate. In such “tier-one” investigations, Gormley concludes that the attorney general should personally appoint special prosecutors as needed. Control over such outside prosecutors should remain squarely within the Department of Justice. A new, detailed set of internal Justice Department regulations, Gormley argues, will add regularity and predictability to the attorney general's conduct in this sphere, and will eliminate public distrust of the system.

* Professor, Duquesne University School of Law. B.A., University of Pittsburgh; J.D., Harvard Law School. My thanks to the editors of the Maryland Law Review for publishing this special issue, and for inviting me to participate. This Article is dedicated to Madeleine Elena Gormley, born on March 16, 2000, whose arrival—to the thrill of three eager assistant diaper-changers (Carolyn, Luke, and Rebecca)—made writing this Article at home in the attic an unusually lively experience.
In a tiny subset of unique cases involving the president, the vice president, and the attorney general, however, Professor Gormley parts company with the prevailing wisdom in Washington and academia. In these special cases, Gormley contends that Congress should construct a fail-safe mechanism to require the appointment of a special prosecutor via statute, but only after an extremely high threshold has been met. In such "tier-two" cases, Gormley argues that the attorney general, special prosecutor, and American public will all benefit from having a statutory structure in place to guide such controversial criminal investigations if handled properly. In a creative twist, Gormley argues that all three branches of government should leave their imprimatur on the appointment of a neutral special prosecutor, thus dampening partisan mistrust and eliminating the constitutional and political nightmares that consistently plagued the now-defunct statute.

INTRODUCTION

As the author of the biography of the first Watergate Special Prosecutor, I was an unabashed supporter of the independent counsel law. One of the tangible, concrete monuments of Watergate-era reform, the independent counsel statute was constructed in direct response to the firing of Archibald Cox by President Richard M. Nixon during the infamous "Saturday Night Massacre." Cox's job was stripped away by Nixon in October 1973, in a last-ditch effort to save Nixon's scandal-ridden presidency. Five years later, after a swarm of congressional witnesses and exhaustive legislative deliberations, a special prosecutor law emerged as an integral part of the Ethics in

1. Ken Gormley, Archibald Cox: Conscience of a Nation (1997) (detailing the life of Archibald Cox from his youth, through his tenure as special prosecutor in the Watergate investigation, and to his retirement).
3. See S. Rep. No. 95-170, at 7 (1977) (explaining the need for an independent counsel and reasoning that "[t]he mere existence of an authority outside the Department of Justice and the Executive Branch . . . will act as a substantial deterrent to extreme situations such as Watergate"); Gormley, supra note 1, at 359-63 (describing the Nixon-ordered firing of Archibald Cox and the shut-down of the Special Prosecution Force).
4. See Gormley, supra note 1, at 938-77 (discussing the "Saturday Night Massacre," the motives behind it, and the nation's reaction to it).
Government Act.\(^6\) In October 1978, a highly optimistic President Jimmy Carter signed the Act into law.\(^7\)

The message of the independent counsel law—an outward symbol of the vow to restore good government after Watergate—was an appealing one. It was premised upon a simple notion: The executive branch should not be empowered to investigate itself during crises and scandals (like Watergate) that threaten the very soul of public confidence in government.\(^8\) When top executive officials are the targets of serious criminal investigations, the government should employ neutral special prosecutors to avoid actual and putative conflicts of interest.\(^9\) Moreover, those special prosecutors should be divorced from the attorney general and the Justice Department.\(^10\) The attorney general is a political appointee, whose office is inherently stained by a conflict of interest each time he or she investigates high-ranking executive officials—especially the president.\(^11\) To make matters worse, so long as the special prosecutor remains a creature of the executive branch, he or she is forever haunted by the specter of the Saturday Night Massacre. He or she can be abruptly terminated by the chief executive in mid-investigation if the chain of command leads back to the president’s desk.\(^12\) The only solution: Sever the link between the special prosecutor and his or her target.

For twenty-two years, the nation embraced the simple notion that, in order to play it safe, special prosecutors should be kept at arm’s length from the executive branch that they were investigating. Archibald Cox, the man who was fired during the darkest days of the Water-

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\(^7\) President Jimmy Carter, Ethics in Government Act of 1978: Remarks on Signing S. 555 Into Law, 1978 PUB. PAPERS 1854, 1854 (Oct. 26, 1978) (“Today I’m pleased to sign into law the Ethics in Government Act of 1978, which gives us added tools to ensure that the Government is open, honest, and is free from conflicts of interest.”).

\(^8\) See S. REP. No. 95-170, at 5-7 (1977) (discussing why a prosecutor based in the executive branch who reports to the attorney general, and ultimately to the president, should not have authority to investigate executive officials).

\(^9\) See id. at 6 (explaining the need to avoid conflicts of interest within the executive branch).

\(^10\) Id.

\(^11\) Id. at 5-7.

\(^12\) Such was the state of the law when President Nixon fired Special Prosecutor Archibald Cox. The Senate hoped that the independent counsel law would prevent similar abuses of power within the executive branch. See id. at 7 (“Any individual who is charged with investigating alleged criminal wrongdoing by high-level officials of the incumbent administration must have independence.”).
gate scandal, actively participated in the congressional debates that sought to find the magical key to a workable special prosecutor scheme. Within weeks of his firing in October 1973, Cox testified about the need for such legislation, telling Congress that a special prosecutor law would solve the problem of "divided loyalty or conflict of interest" that crippled the Justice Department during Watergate. As debate spilled over into the Ford presidency, Cox again returned to Washington as a central witness in congressional hearings, endorsing the constitutionality of legislation that would place the special prosecutor under a panel of judges, a concept that ultimately wove its way into the finished independent counsel statute. The judicial branch was a safe haven that the public generally trusted. For Cox and others who supported such legislation, the concept of having a special prosecutor who was overseen by a three-judge panel was a simple, practical antidote to the trauma of Watergate.

Throughout the stormy twenty-two-year life span of the independent counsel law, Archibald Cox remained a proud and unwavering supporter of the statute. He was fond of quoting his former boss, Judge Learned Hand, who spoke of the incremental steps—one step forward, two back, another forward—necessary to advance the rule of law in an enlightened society. In Cox's mind, the enactment of the independent counsel law after the painful experiences of Watergate was one of those positive, almost sacred steps forward after a period of stumbling near a dangerous precipice. Even in his old age, as he settled into retirement at his farmhouse in Maine, Cox remained a firm supporter of the independent counsel law. Despite criticisms by one party or another that certain investigations had been costly or

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13. See Hearings on Provision for Special Prosecutor, supra note 5, at 155-70 (testimony of Archibald Cox, Williston Professor of Law, Harvard University, and former special prosecutor); Special Prosecutor Hearings, supra note 5, at 294-327 (testimony of Archibald Cox, former special prosecutor).
17. Gormley, supra note 1, at 432-33.
18. Cox frequently invoked this notion of incremental advance when he described his own faith in the American system of government. See, e.g., id. at 436.
19. See id. at 431-33 (discussing Cox's unwavering support for some form of an independent counsel law even in the wake of the Iran-Contra and Whitewater investigations).
20. Id.
overly politicized, Cox continued to view the statute with steady optimism; he perceived it as a powerful tool necessary to repair the nation's shattered trust in American government.21

The Monica Lewinsky scandal, however, destroyed Cox's faith in the legislation that he had so long championed. When Cox gave up hope in the independent counsel statute in 1998,22 it became clear that the Watergate-era law was doomed to the legislative graveyard. As turbulent as the existence of the special prosecutor law had been, its sudden demise still came as a shock. Like most other law professors, I understood that the independent counsel law had its constitutional bumps and warts. It had been dogged by Appointments Clause, separation-of-powers, and removal problems that had generated controversy each time Congress had renewed the statute.23 Like other law professors who had studied the subject, I knew of Justice Scalia's widely-cited Morrison v. Olson dissent that spelled out the constitutional perils inherent in such a statutory scheme.24 I knew of the delicate dance that the Supreme Court had performed to uphold the law in the 1988 Morrison decision.25 But American democracy had survived for two hundred years as a result of creative solutions to concrete problems, particularly in the murky realm where the three branches of government had to interact with few constitutional guideposts. The independent counsel law—creating a prosecutor hitched onto the judicial branch in an odd, jerry-built union—seemed to work relatively smoothly.26 Like Cox, I had become an unapologetic fan of the statute; it was a creative legal construct that had succeeded in reversing much of the cynicism of the Watergate years. At the same time, after twenty years in operation, it seemed evident that the independent counsel law had become loose and overbroad in application, and was in need of a major tune-up.

21. See Archibald Cox, Curbing Special Counsels, N.Y. TIMES, Dec. 12, 1996, at A37 (defending the Independent Counsel Act as having "at its heart an institution essential to our constitutional government").

22. See infra notes 36-41 and accompanying text (discussing Cox's gradual abandonment of support for the independent counsel statute).

23. For a discussion of the Appointments Clause, separation-of-powers, and removal issues that plagued the statute from the time of its inception, see Gormley, supra note 16, at 613-17.


25. See Gormley, supra note 16, at 633-38 (discussing in greater detail the Court's Morrison opinion).

26. See, e.g., The Future of the Independent Counsel Act: Hearings Before the Senate Comm. on Governmental Affairs, 106th Cong. 2 (1999) (hereinafter Hearings on the Future of the Independent Counsel Act) (remarks of Senator Fred Thompson, Chairman) (noting in his opening statement that "[a] lot of people think that the act worked just fine until recently").
In the fall of 1997, I began work on an article proposing extensive reforms to the independent counsel law. The piece ultimately appeared in the Michigan Law Review at the end of 1998. When I turned on the computer and started that project, my proposals seemed, if anything, too radical. At that time, of course, the country had not yet heard the name “Monica Lewinksy.” Whitewater Independent Counsel Kenneth Starr appeared to be wrapping up his investigation after convicting several prominent Arkansas officials who were close to President Clinton. There was little reported evidence that directly linked President Bill Clinton or the First Lady to irregularities in the Whitewater land deal. At the end of 1997, the biggest controversy surrounding the independent counsel law dealt not with Whitewater, but with Attorney General Janet Reno’s refusal to appoint a special prosecutor to investigate allegations of campaign fundraising abuse by Vice President Al Gore and President Bill Clinton.

My premise in tackling this new project was that the independent counsel statute had drifted too far from its original purpose; it needed to be brought back to its original, sensible moorings. The statute was initially crafted in the post-Watergate years to deal with the rare constitutional crisis (as in Watergate or the Teapot Dome scandal) that arises when certain high-level executive branch officials are the targets of serious criminal investigations. In most cases, I believed, the Justice Department was perfectly capable of handling allegations of corruption in the executive branch. The Department had done so for two hundred years. After twenty years of application, however, the statute had become far too easy to trigger. It authorized investigations of countless lower-level officials in a tango that was shamelessly political. Its reach needed to be narrowed dramatically.

27. Gormley, supra note 16.
28. See, e.g., Susan Schmidt & Michael Weisskopf, Truth at Any Cost: Ken Starr and the Unmaking of Bill Clinton 11 (2000) (stating that by late 1997 “Starr had arrived at the view that Clinton’s conduct was lawless, his presidency a colossal moral failure. But his multiple investigations of the Clintons were drawing to a close.”).
31. Hearings on Provision for Special Prosecutor, supra note 5, at 155-56 (testimony of Archibald Cox, Williston Professor of Law, Harvard University, and former Special Prosecutor).
33. For example, Timothy Kraft, a campaign manager, Lyn Nofziger, a White House aide, and Eli Segal, Americorps chief and a 1992 Clinton campaign aide, had all been subjects of independent counsel investigations. See Sixty-Seventh Judicial Conference of
In 1997 and early 1998, academicians and legislative staffs in Congress (both Democrats and Republicans) were also tinkering with ways to fine-tune the law when it came up for renewal in 1999.\textsuperscript{34} Most of their proposals were far less drastic than the reforms I advocated. There was a general assumption at this time that the statute would be reauthorized. It was just a question of how extensive the adjustments would be.

By the time the Michigan article was published in late 1998, however, all of that had changed. Few mortals in the United States (it seemed) still supported any form of the independent counsel law.\textsuperscript{35} What happened in the interim was the Monica Lewinsky scandal and the impeachment of President William Jefferson Clinton.

Archibald Cox's decision to repudiate the independent counsel law, in which he believed so deeply, kept pace with the national frustration relating to the seemingly bottomless dish of scandal in Washington. During a panel discussion at Stanford Law School in October 1998 (shortly after the release of the Starr Report), Professor Cox seemed uncomfortable and noncommittal when asked by a member of the audience what could be done to correct the statute's apparently runaway nature.\textsuperscript{36} A month later, I sent Cox the galleys of my Michigan article, just as the House of Representatives was gearing up for an impeachment vote. During the course of a telephone conversation concerning my manuscript, he became uncharacteristically subdued and, referring to the independent counsel law, commented in connection with my draft article: "I'm starting to think we should just junk the damn thing, Ken."\textsuperscript{37} By the spring of 1999, shortly after the Senate impeachment trial, Cox had publicly joined Professor Phil Hey-
mann (his Harvard friend, colleague, and former deputy in the Watergate investigation) in authoring for the New York Times an unexpected piece advocating that the independent counsel law be scrapped entirely. Cox and Heymann had defended the statute until the bitter end. But now they reluctantly concluded that the Watergate-era law should be abandoned as a failure. It should be replaced, they believed, by a system under which special prosecutors would answer to the assistant attorney general in charge of the Criminal Division—a middle-of-the-road attempt to salvage some scrap from the special prosecutor rubble. As Cox and Heymann explained their painful conversion, the independent counsel statute had become nothing more than a crass political weapon that no longer served its once-noble purpose. Both political parties used independent counsels "as bombs to toss into the ranks of their opponents." Cox and Heymann reluctantly concluded: "The inherent faults in the Independent Counsel Act cannot be fixed merely by tinkering with the law's details."

Kenneth Starr's decision to expand his inquiry into the Monica Lewinsky scandal and the subsequent unleashing of bloody impeachment proceedings in the House and Senate will be remembered for many things. Among other unintended consequences, however, these events will be remembered for sounding the funeral dirge for the independent counsel law. Regardless of whether one considers this progress or defeat for good government, the divisive Lewinsky scandal and the vicious brawl over impeachment in Congress united Democrats and Republicans in their abject disdain for the special prosecutor law that seemingly spawned this national crisis. By the conclusion of the impeachment trial, the statute had spiraled into a dark political abyss. Independent Counsel Kenneth Starr, frustrated by the vilification of his office and the increasingly evident strain between himself and the Justice Department, took the unusual step of telling a senate committee in April 1999 that the independent counsel law had out-

39. Id.
40. Id.
41. Id.
42. For a discussion of the Starr Report, the consequent congressional hearings, and the dysfunctional relationship between the independent counsel statute and the impeachment proceedings, see Ken Gormley, Impeachment and the Independent Counsel: A Dysfunctional Union, 51 STAN. L. REV. 309, 312-13 (1999).
lived its usefulness. The statute had proved to be "structurally un-

sound, constitutionally dubious, and, in overstating the degree of

institutional independence, disingenuous." The hearings before the Senate Committee on Governmental Af-

fairs, which were convened immediately after the impeachment trial, provide an extraordinary glimpse of a Congress in philosophical tur-

moil. Committee Chairman Fred Thompson, a veteran of the Watergate hearings in the Senate, made clear his own disapproval of the statute. At the same time, Thompson permitted testimony from a wide array of witnesses, both for and against salvaging some form of the statute. These unique hearings, held just weeks after a bitterly-

fought impeachment trial, reveal a fascinating dynamic. They make clear that scholarly commentators and political leaders of both par-

ties—weary after a messy scandal that had spattered blood over the faces of everyone who had waded into the imbroglio—blamed much of the disaster on the independent counsel law. Of the twenty-two witnesses who appeared in the expansive Senate hearing room be-

tween February 24 and April 14, 1999, only a handful (one of whom was this author) supported the continuation of the independent counsel law, even in some radically overhauled form. Distinguished deponents, ranging from former Senate Majority Leader Howard H.

43. See Hearings on the Future of the Independent Counsel Act, supra note 26, at 425 (testi-

mony of Kenneth W. Starr, Independent Counsel) (stating that the goals of the Indepen-
dent Counsel Act are “more than the Act delivers and more than it can deliver under our constitutional system”).

44. Id.

45. See id. passim. During the hearings, witnesses recommended that Congress amend the Independent Counsel Act, replace the Act with an alternative, allow the Act to expire, or reauthorize the Act with little change. See infra note 47.

46. See Hearings on the Future of the Independent Counsel Act, supra note 26, at 1-5 (opening statement of Sen. Fred Thompson, Chairman) (discussing the problems he perceived with the statute).

47. See, e.g., id. at 6-9 (opening statement of Sen. Joseph Lieberman) (suggesting the Independent Counsel Act should be reauthorized with changes); id. at 56 (testimony of Joseph E. diGenova, Independent Counsel, Clinton Passport File Investigation) (suggesting that Congress should "end" the Act); id. at 155 (testimony of Nathan Lewin, Miller, Cassidy, Larroca, and Lewin) (suggesting that the Act should be reauthorized with amendments); id. at 245 (testimony of Attorney General Janet Reno) (stating that the Act "should not be reauthorized").

48. See, e.g., id. at 442 (testimony of Kenneth W. Starr) (stating that he believed the Independent Counsel Act was unconstitutional); id. at 243-45 (testimony of Attorney General Janet Reno) (discussing why the Independent Counsel Act is "structurally flawed").

49. See, e.g., id. at 372 (testimony of Kenneth G. Gormley, Professor of Law, Duquesne University) (stating that the Act should be salvaged with major changes); id. at 284 (testi-
momy of John Q. Barrett, Assistant Professor of Law, St. John’s University, New York, New York, and former Associate Independent Counsel, Iran-Contra Investigation) (stating that the Act should be reenacted with improvements).
Baker, Jr. (who had served as Vice Chairman of the Senate Watergate Committee), to Robert Bennett (President Clinton's attorney in the Paula Jones litigation and a one-time supporter of the law), to Attorney General Janet Reno (who had staunchly endorsed re-authorizing the independent counsel law when she took office), branded the statute as an unqualified disaster.\(^50\)

Although Congress allowed the independent counsel law to sunset on June 30, 1999, gasping its last breath, a critical question remains. It is a question that few scholars or legislators had contemplated seriously until the Lewinsky scandal blew a hole in the statute's sails: What (if anything) should Congress construct to replace it? Throughout the Senate hearings in the spring of 1999, even senators who had fiercely opposed the independent counsel statute for years seemed puzzled over what should be the next appropriate legislative step after the law was actually gone. What should the nation do the next time a scandal of the magnitude of the Lewinsky imbroglio (or Watergate) engulfs the American system of government? Should there be no replacement at all for the special prosecutor statute?

This Article will assume that the independent counsel law, as originally enacted in the period after Watergate, will not be resuscitated. The question, then, that becomes critical in the aftermath of the Senate hearings that ushered the statute out of existence is: Do any of the hodgepodge of proposals recommended to the Senate as successors to the special prosecutor law make sense? Do any of them offer hope that citizens' trust in government—further damaged as a result of the Lewinsky debacle—will be repaired? One thing is certain: The Starr investigation and the failed impeachment of President Bill Clinton reverberated with powerful aftershocks, which, in turn, directly impacted upon Congress's deliberations, sealing the coffin on the controversial independent counsel law. But the statute's burial only raises more pressing questions. What path should Congress now take to salvage something productive from the wreckage?

I will examine the question from a new, unexplored angle. Rather than seeking to construct the perfect special prosecutor statute—a path that many, including this author, have taken in the past—this Article will attempt to take a minimalist approach: What is the

\(^{50}\) See id. at 28 (prepared statement of Howard H. Baker, Jr., former Senate Majority Leader) (asserting that "if [the Independent Counsel Act is] not unconstitutional, [it has] been proved by experience to be unwise"); id. at 145 (testimony of Robert S. Bennett, Skadden, Arps, Slate, Meagher and Flom) (stating that the Independent Counsel Act "has simply failed to fulfill its purpose"); id. at 243 (testimony of Attorney General Janet Reno) (stating that "the Independent Counsel Act is structurally flawed").
least that Congress can do to salvage something productive from the scrapped piece of legislation?

This Article will argue that Congress can create a two-tiered structure that accomplishes the basic, laudable goals of the original independent counsel statute, without producing constitutional havoc in its wake. Under "tier one," the lion's share of criminal investigations involving the executive branch would be returned to the Justice Department, pursuant to the former ad hoc method of appointing special prosecutors that prevailed before Congress enacted the statute in 1978. Following the lead of the recent Dole-Mitchell Report, as well as the proposal advanced by former Attorney General Griffin Bell, the bulk of such investigations would be handled directly by the attorney general. She would exercise her own sound discretion, guided by a clear set of internal Justice Department regulations.

At the same time, Congress would construct a fail-safe mechanism to deal with a small subset of serious criminal investigations that implicate the president, vice president, or attorney general. In these rare "tier-two" investigations, once a very high triggering threshold is met ("substantial evidence that a felony has been committed"), a statute would mandate the appointment of a special prosecutor by the attorney general, with all three branches of government participating in the selection process. This minimalist scheme would accomplish the triple aims of the original special prosecutor law: assuring independence, maintaining accountability, and preserving public trust in the process. By returning ultimate responsibility for all special prosecutor investigations to the executive branch—in both tier-one and tier-two investigations—the most serious constitutional pitfalls that plagued the former statute could be erased.

In order to put flesh on the bones of this minimalist vision, it is useful to comb through the Senate hearings that were held in the spring of 1999. Packed into those proceedings are criticisms, defenses, and insights that provide valuable glimpses into a period of intense political turmoil in the United States. By piecing together many of the suggestions that were offered in the form of epithets to the Watergate-era special prosecutor law in 1999, one can begin to construct a minimalist vision for salvaging something productive from the statute's smoldering wreckage.

52. See infra notes 195-199 and accompanying text (discussing Bell's proposal).
I. The Senate Hearings

By the time the Senate hearings convened in front of the Committee on Governmental Affairs, members of the Senate had become uncommonly weary. The deliberations over the special prosecutor law had been expected to commence a half-year earlier. Once the Lewinsky scandal engulfed the Capitol, however, the House and Senate had fallen behind on a year’s worth of pressing business. The lengthy impeachment trial had consumed the Senate throughout January and most of February. As Senator Fred Thompson, the Committee Chairman, lamented after he inadvertently interrupted a witness on the second day of testimony: “We were pent up for a month in impeachment investigations and not allowed to talk, and I think it is bubbling up maybe a little bit.”

The hearings on the independent counsel law, ironically, provided a forum for senators from both parties to continue the hand-to-hand combat that had begun in the Senate hall during the bitter fight over the impeachment of President Clinton. Racing to meet a June 30th deadline at which time the statute would automatically sunset, the senators on the Governmental Affairs Committee missed few opportunities to take jabs at President Bill Clinton, Independent Counsel Kenneth Starr, Attorney General Janet Reno, and others—depending upon their level of satisfaction (or outrage) with respect to the impeachment vote.

Thompson shot a volley in the direction of former Iran-Contra special prosecutor Lawrence Walsh who, during the Reagan and Bush administrations, had carried out the longest-running independent counsel investigation in history. Although Thompson was careful not to become unduly aggressive in questioning the eighty-seven-year-old former judge, he stated sharply: “Suffice it to say I think that some of the criticism that you have received is justified.” Thompson drew stark parallels between the attacks leveled against Judge Walsh in the 1980s and those leveled against Independent Counsel Kenneth Starr.

54. Id. at 158 (remarks of Sen. Fred Thompson, Chairman).
55. See, e.g., id. at 184 (remarks of Sen. Arlen Specter) (commenting that Attorney General Reno expanded Independent Counsel Starr’s jurisdiction without adequate information); id. at 257 (remarks of Sen. Joseph Lieberman) (claiming that Starr was pursuing a person instead of a crime); id. at 454 (testimony of Sen. Richard Durbin) (accusing Kenneth Starr of abusing his position as independent counsel).
56. Walsh’s investigation lasted over seven years. Harriger, supra note 35, at 90.
during the Lewinsky scandal.\textsuperscript{58} In both cases, he pointed out, there had been allegations concerning leaks to the press, subpoenas served upon relatives of suspects, failure to follow Justice Department procedures, and other criticisms concerning mishandlings of the investigations.\textsuperscript{59} Thompson stated forcefully: "[W]hether these allegations are true or not, I think that the point is that all of these criticisms of investigations under the Independent Counsel Act, now contended to be structural by the Attorney General, were raised by others [during the Walsh investigation in Iran-Contra]."\textsuperscript{60}

Attorney General Janet Reno appeared before the Committee on March 17, 1999.\textsuperscript{61} Not surprisingly, she immediately drew a heavy barrage of criticism. Many senators (particularly, but not exclusively, Republicans) viewed Reno as a key ingredient in the unsatisfactory handling of the Clinton scandal.\textsuperscript{62} Reno, who had staunchly defended the reenactment of the independent counsel law in 1993,\textsuperscript{63} forswore her earlier position and now opposed reauthorization.\textsuperscript{64} The battle-worn Attorney General told the Committee: "I have come to believe, after much reflection and with great reluctance, that the Independent Counsel Act is structurally flawed and that those flaws cannot be corrected within our constitutional framework."\textsuperscript{65} Reno went on to charge that the statute "diffuses responsibility, divides responsibility, and fragments accountability. If I am going to get blamed for it, I would like to be responsible for it and have the tools to do the job."\textsuperscript{66}

This turnaround in positions by the Attorney General produced a roar from both Republican and Democratic members of the Committee, who viewed her (for different reasons) as an apostate. Republican Senator Susan Collins of Maine interjected: "I have to tell you that I think you had it right back in 1993. I think wisdom, in fact, came

\begin{itemize}
\item \textsuperscript{58} See id. at 326, 354.
\item \textsuperscript{59} See id.
\item \textsuperscript{60} Id. at 326.
\item \textsuperscript{61} See id. at 242-47 (testimony of Attorney General Janet Reno).
\item \textsuperscript{62} See infra notes 67-70 and accompanying text (depicting the criticism of Attorney General Reno by several senators).
\item \textsuperscript{63} See S. 24, The Independent Counsel Reauthorization Act of 1993: Hearing Before the Senate Comm. on Governmental Affairs, 103d Cong. 11 (1993) (testimony of Attorney General Janet Reno) ("I am pleased to announce that the department and the administration fully support reenactment of the Act, and we will work closely with this Committee and Congress to pass this very important piece of legislation.").
\item \textsuperscript{64} See Hearings on the Future of the Independent Counsel Act, supra note 26, at 243 (testimony of Attorney General Janet Reno).
\item \textsuperscript{65} Id.
\item \textsuperscript{66} Id. at 247.
\end{itemize}
early to you on this issue . . .” Republican Senator Arlen Specter of Pennsylvania, who had thrown up his hands and voted “Not Proven” on the impeachment matter, jabbed at Reno for authorizing the expansion of Kenneth Starr’s jurisdiction to encompass the Lewinsky investigation. Specter implied that Reno’s action, in effect, had set into motion the messy investigation that had wreaked havoc upon the independent counsel law. Democratic Senator Robert Torricelli of New Jersey was not far behind; he reproached the Attorney General for failing to respond to six letters he had mailed to the Justice Department, in which he had detailed a host of alleged abuses of prosecutorial power by Independent Counsel Kenneth Starr.

The senators, however, reserved their most rambunctious welcome for the testimony of Whitewater Independent Counsel Kenneth Starr himself. Starr appeared before the Committee on April 14, 1999—the final day of the hearings. Starr’s presence in the Dirksen Senate Office Building seemed to unleash a monsoon of pent up emotions on both sides of the political aisle, causing the debate to be punctuated with harsh words and unpleasant verbal volleys concerning the Lewinsky investigation. Starr surprised some senators by opening his testimony with a repudiation of the independent counsel law under which he served. “The statute,” Starr stated, “tries to cram a fourth branch of government into our three-branch system . . . .”

The embattled Starr—who had opposed the enactment of the statute from the time of its creation—now observed pessimistically: “There was no golden age of special prosecutors.”

Senator Arlen Specter replied dryly: “I am a little surprised at the forcefulness of your denunciation of the Independent Counsel Statute . . . let me ask you about your status to continue as Independent Counsel in light of your condemnatory language of the statute you operate under.”

Starr quickly replied: “Well, Congress frequently passes laws, the wisdom of which individuals may question, but their duty as law of---

67. Id. at 260 (remarks of Sen. Susan M. Collins).
68. See id. at 267 (remarks of Sen. Arlen Specter) (stating that “the expansion of jurisdiction for Judge Starr appeared to me to be very problemsome at the time”).
69. See id. at 267-68.
70. See id. at 277-78 (remarks of Sen. Robert G. Torricelli).
71. See id. at 419-25, 435-73 (testimony of Kenneth W. Starr, Independent Counsel); see also id. at 425-34 (prepared statement of Kenneth W. Starr).
72. See id. at 419-25 (testimony of Kenneth W. Starr) (explaining his view of the problems with the Independent Counsel Act).
73. Id. at 425.
74. Id.
75. Id. at 448 (remarks of Sen. Arlen Specter).
ficers is to live up to their legal obligations. One cannot quote Mr. Bumble in a Dickensian fashion and then say, 'I refuse to enforce or carry out those laws.'\footnote{Id. (testimony of Kenneth W. Starr).}

Senator Carl Levin of Michigan, a leading supporter of the independent counsel law and a senior member of the Committee, also jumped into the fray.\footnote{See id. at 445-46 (remarks of Sen. Carl Levin).} Levin castigated the special prosecutor for his over-zealousness and listed a bill of particulars setting forth a host of alleged excesses committed by Starr's office.\footnote{See id.} "In my judgment," stated Senator Levin, "you have gone beyond what an average prosecutor would do in the investigation of a private citizen, and you have failed to comply with Justice Department policies as intended under the Independent Counsel law."\footnote{Id. at 445.}

Senator Torricelli, who had begun by complimenting Starr (generally) for his impressive career in public service, nevertheless agreed that the special prosecutor had fallen off the saddle on the Lewinsky investigation. Torricelli observed darkly:

You will forgive me, but I do not understand how a learned man of good judgment allowed things to get to this state of affairs. It is true that you were under merciless attack. But it was not necessary to pin a target to your chest on all occasions either.\footnote{Id. at 458-59 (remarks of Sen. Robert G. Torricelli).}

Republican Senator Judd Gregg of New Hampshire scrambled to Starr's defense, reminding the assemblage of Starr's overall track record.\footnote{See id. at 456-58 (remarks of Sen. Judd Gregg).} The Whitewater prosecutor, Gregg noted, had convicted Arkansas Governor Jim Guy Tucker of conspiracy and fraud in connection with the Madison Guaranty Savings & Loan venture, and had obtained a guilty plea from former U.S. Deputy Attorney General Webster Hubbell in connection with fraudulent billings at the Rose Law Firm.\footnote{Id. at 455-56.} Gregg's defense of Starr proceeded as follows:

Senator Gregg: So I would say to you, Judge, that you did your job.

Judge Starr: Thank you.

Senator Gregg: Your job was to protect the people from individuals who had violated their oaths of office, and in those two instances and in the 14 other convictions, one presumes...
there was a serious event that required the public's rights to be protected. So I do not think they were the victims, although we may hear that from the other side of the aisle. 83

And so the hearings proceeded. One immediate aftereffect of the controversial Lewinsky investigation and the bitter impeachment fight, then, was to shift the battle to a new front—namely, the re-authorization of the independent counsel law. In an ironic twist, the grueling impeachment proceedings had left strange bedfellows in their wake. Democratic senators who had consistently endorsed the special prosecutor law during its twenty-two-year existence switched positions and lobbied against reauthorization. Republican senators who had railed against the statute for years were forced to defend a Republican special prosecutor who had hit rock bottom in the eyes of the American public.

Yet as the emotional hearings before the Senate Committee on Governmental Affairs ground forward, few senators or witnesses disagreed with the sentiment expressed by former Senate Majority Leader Howard H. Baker, Jr., in opening the proceedings. The highly respected Senator Baker, who had served as Vice Chairman of the Senate Watergate Committee in 1973, 84 had struck a universal chord when he issued a call for calm judgment in the wake of the impeachment tempest: "I recommend to the Senate, to this Committee, that we cool it and think about it for a while. We let the temper of these times subside." 85

Even among senators with radically divergent views concerning the most sensible approach to handling criminal investigations within the executive branch, there was a shared understanding that finding an answer to the independent counsel mess was like solving Rubik's cube. No matter how one moved around the colors to solve the puzzle, it was impossible to find an easy solution. As Chairman Fred Thompson summarized on the fourth day of the Senate hearings, there was an inherent conflict between the desire to ensure the appointment of truly independent special prosecutors in high-profile cases, and the equally powerful desire to ensure that special prosecutors were accountable to some branch of government so that they did not wreak havoc on our tripartite system of government. 86

83. Id. at 456 (remarks of Sen. Judd Gregg and Kenneth W. Starr).
86. Id. at 326 (remarks of Sen. Fred Thompson, Chairman).
As the Senate proceedings marched forward for nearly two months, there was debate and disagreement. At times there were sharp verbal exchanges. Yet a surprisingly thoughtful and useful discussion emerged on the pages of the Committee transcripts. As passions cooled and the hearings moved from February into late March, it became clear that senators of both political parties had become focused on a new issue that had simply not entered their consciousness previously. It was now a foregone conclusion that the statute would not be reauthorized on June 30th. The new question became: What, if anything, should Congress do to replace the doomed statute?

From the text of the Senate hearings, one can find the raw materials needed to begin this critical discussion. Picking up where the hearings left off, it is possible to move beyond the partisan disagreements that ushered the statute out of existence, and to shift to a question that is critical for Democrats and Republicans alike: What is the minimal legislative scheme that Congress might construct to preserve something positive from the past twenty-three years, thus accomplishing the rudimentary goals of the original special prosecutor law? Or, to put it another way: What is the least controversial statute that Congress could create that would assure independence and accountability while simultaneously rebuilding public trust in the American criminal justice system? This Article will address this fundamental question by dissecting the various proposals that were offered for replacing the independent counsel statute as it lay on its deathbed, and by proposing a relatively noncontroversial replacement for the Watergate-era statute.

II. WHAT OPTIONS SHOULD CONGRESS CONSIDER NEXT?

Most of the proposals for scrapping the independent counsel law involved some concomitant plan for replacing the statute with a substitute. Some of the proposals envisioned serious replacements; others suggested mere placebos. Most of these plans were restatements of the ideas of scholars and legislators who had sparred over the fate of the independent counsel law for the previous five years in anticipation of the law’s potential reauthorization. But there is much wisdom to be found in this hodgepodge of proposals. Assuming that Congress has reached an internal consensus that it will not reenact the former independent counsel statute in any recognizable form, it must now decide which substitute approach will allow the nation to salvage something beneficial from the messy scandal that marred the Clinton presidency.
This Article will conclude that the answer lies in splicing together several of the proposals that were offered during the course of the Senate hearings. By creating a system under which the bulk of special prosecutor investigations are handled pursuant to the old ad hoc system, the bare minimum will be accomplished. But securing this system requires the creation of a second tier—a fail-safe mechanism—under which special cases that involve serious charges against the president, vice president, or attorney general are handled. By isolating those cases that often spiral into crises and destroy public trust in government, this Article will suggest that Congress can accomplish the minimum goals that inspired the creation of the special prosecutor law without sacrificing accountability or damaging our tripartite system of government. A useful starting point in this effort to construct a minimalist replacement for the expired independent counsel law is an examination of a wide range of proposals advanced during the Senate hearings of 1999.

A. Permanent Special Prosecutors

By far, the worst suggestions for replacing the independent counsel law are those that involve creating some form of a permanent office. Some such proposals would create a free-standing operation; others would create an office appended to an existing unit in the executive branch. In either case, the primary duty of this entrenched office would be to sniff out ethical violations and criminal misconduct by executive branch officials. Such a concept was recently advanced in scholarly articles written by Inspector General Michael R. Bromwich and Professor Kathleen Clark, both of whom advocated replacing or supplementing the independent counsel law with an "Inspector General" for the White House, who would be assigned to keep a watchful eye for ethical violations and abuses by executive officials.87 Such a concept was recently advanced in scholarly articles written by Inspector General Michael R. Bromwich and Professor Kathleen Clark, both of whom advocated replacing or supplementing the independent counsel law with an "Inspector General" for the White House, who would be assigned to keep a watchful eye for ethical violations and abuses by executive officials.89

87. See Gormley, supra note 16, at 618 (stating that "the mere presence of such a 'watchdog' would presumably discourage abuses of the law in the first place").


89. Michael R. Bromwich, Running Special Investigations: The Inspector General Model, 86 GEO. L.J. 2027 (1998); Kathleen Clark, Toward More Ethical Government: An Inspector General for the White House, 49 MERCER L. REV. 553 (1998). A variation of this approach, although broader in scope, would create an Office of Public Prosecutor charged with prosecuting alleged ethical crimes committed by all public officials, as is the case in Britain and Northern Ireland. See Bell et al., supra note 34, at 477-78 (remarks of Lloyd Cutler, former counsel to Presidents Carter and Clinton).
An offshoot of the Inspector General proposal is a model that would create a permanent group responsible for selecting and supervising special prosecutors. During the 1999 Senate debates, former Iran-Contra Independent Counsel Lawrence Walsh proposed the creation of a permanent office that would be charged with appointing special prosecutors and overseeing their operations. Walsh's proposed office would have been akin to the Federal Reserve Board, with members appointed on a staggered basis, so that no one president could appoint all members of the board. Each appointee would be subject to confirmation by the Senate.

Such calls for permanent special prosecutors or permanent bodies to appoint and supervise special prosecutors are nothing new. In the 1970s, during the original congressional debates leading up to the enactment of the special prosecutor law, the air was filled with proposals for such permanent watchers. Senate Bill 495, the ill-fated Watergate Reorganization and Reform Act of 1975, was introduced by Senator Abraham Ribicoff at the start of the 94th Congress. This bill would have established an Office of Public Attorney that would have operated independently of the Justice Department and the president. The office would have been charged with investigating and prosecuting impropriety in the executive branch, as well as abuses relating to federal election laws. Selection of the special prosecutor would have been made for a five-year renewable term by a special judicial panel.

90. *Hearings on the Future of the Independent Counsel Act*, supra note 26, at 330 (testimony of Lawrence Walsh, former Independent Counsel, Iran-Contra Investigation). In a Slate cyberspace magazine dialogue, Professor Akhil Reed Amar also advocated the creation of a "permanent office of independent investigation . . . [that] could be headed by one person (as is the FBI) or five (the FTC)." Akhil Reed Amar & Ken Gormley, *Should We Ditch the Independent Prosecutor Law?* (Feb. 18, 1999), at http://slate.msn.com/dialogues/99-02-17/dialogues.asp?Msg=5. A recent article by Professor Thomas W. Merrill similarly proposed a system by which an office of career civil service prosecutors headed by a presidential appointee would be created to oversee investigations. Thomas W. Merrill, *Beyond the Independent Counsel: Evaluating the Options*, 43 St. Louis L.J. 1047, 1063-64, 1079-81 (1999).

91. See *Hearings on the Future of the Independent Counsel Act*, supra note 26, at 330 (testimony of Lawrence E. Walsh).

92. See id.


95. See *id.* at 160-61.

96. See *id.* at 161.

97. See *id.* at 160.
The proposal was swiftly and definitively rejected, in large part because of its inclusion of a permanent watchdog feature. Senator Howard H. Baker, Jr., who was a central figure during the Watergate drama, warned that such a feature would "establish a virtually inviolate fourth branch of Government," thus erasing accountability to the chief executive or any extant branch of government. Long-time presidential advisor Clark Clifford noted that the creation of a permanent special prosecutor would spawn other problems as well. Clifford predicted that "[e]xcessive zeal or possibly boredom by the Public Attorney, or a desire to avoid being tagged as a 'do-nothing', could lead to petty prosecutions and harassment of persons in the Executive Branch."

Ultimately, the hue and cry over the permanent special prosecutor concept doomed Senate Bill 495 to the legislative graveyard. That bill was replaced by Senate Bill 555, which ultimately prevailed, largely because it created a temporary office that would be used only when allegations of serious wrongdoing triggered it.

If the experiences of the divisive Lewinsky investigation and impeachment ordeal gave legislators pause about the continued efficacy of the existing independent counsel statute, proposals involving the creation of a permanent office should give Congress even more serious jitters. Once a temporary special prosecutor is replaced by a permanent office of watchdog prosecutors, or a "board" charged with appointing and supervising special prosecutors, the temptation to engage in overkill becomes irresistible. Like the Maytag Repairman waiting anxiously for a washing machine to break, the watchdog prosecutor has no raison d'être other than to identify scandal and stamp it out. If the past twenty-three years taught us anything about independent counsel investigations, they taught us that as long as there are special prosecutors available to lead the investigations, political actors of both stripes will swiftly learn how to manipulate and tilt the machine until it generates scandal. "Less rather than more" seems to be a useful starting point for any proposed replacement statute. Permanent offices and watchdog boards constitute the least desirable solution.

98. Gormley, supra note 16, at 618.
100. Id. at 204 (letter from Clark M. Clifford to Senators Abe Ribicoff and Charles H. Percy).
101. For a general discussion of the demise of Senate Bill 495 and the widespread disapproval of the "permanent special prosecutor" notion, see Gormley, supra note 16, at 617-23.
102. See id. at 624-26 (discussing the evolution of Senate Bill 555).
B. The Common Cause Approach

A novel proposal that made its debut in the thick of the Lewinsky scandal was that offered by Harvard Professors Philip Heymann, Archibald Cox, and Derek Bok,\(^\text{103}\) and later endorsed by the citizens group Common Cause.\(^\text{104}\) The Common Cause proposal, which spun out of a piece that Cox and Heymann wrote for the *New York Times*,\(^\text{105}\) was more fully articulated in Heymann’s testimony before the Senate Committee on Governmental Affairs on March 17, 1999.\(^\text{106}\) The Common Cause plan, in essence, involved returning independent counsel investigations to the Justice Department, where they could be supervised by the assistant attorney general in charge of the Criminal Division.\(^\text{107}\)

The Common Cause proposal was, in many ways, a last-minute effort to salvage something from the smoking wreckage of the independent counsel statute. The proposal had a certain amount of intellectual appeal. Through a rather elaborate mechanism, the assistant attorney general would handle all allegations of misconduct by high-level executive officials, thus constructing an invisible “firewall” that shielded him or her from the attorney general.\(^\text{108}\) This division would prevent the attorney general from participating in, or interfering with, a select category of investigations that might trigger serious conflicts.\(^\text{109}\) Under the Common Cause plan, before a final decision was made not to prosecute a handful of top executive branch officials—including the president, vice president, or attorney general herself—the assistant attorney general in charge of the Criminal Division would be required to consult with a panel of three of his or her predecessors in that office, one of whom would have to be a member of the opposing political party.\(^\text{110}\) If the assistant attorney general declined to prosecute, he or she would be required to state publicly his or her

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103. *Heardings on the Future of the Independent Counsel Act*, sup\(\text{3}\)ra note 26, at 322-24 (prepared statement of Common Cause). Common Cause is a citizens group, which at the time was chaired by former President of Harvard University Derek Bok. *Id.* at 324. Archibald Cox served as Chairman Emeritus, Ann McBride served as President, and Philip Heymann was a member of the group’s National Governing Board. *Id.*

104. *Id.* at 322-24.

105. Cox & Heymann, sup\(\text{3}\)ra note 38.

106. *See Hearings on the Future of the Independent Counsel Act*, sup\(\text{3}\)ra note 26, at 291-94 (testimony and prepared statement of Philip B. Heymann, James Barr Ames Professor of Law, Harvard University, and former Deputy Attorney General, U.S. Department of Justice, and former Associate Watergate Special Prosecutor).

107. *See id.* at 291.

108. *Id.* at 324 (prepared statement of Common Cause).

109. *See id.*

110. *Id.* at 291 (testimony of Philip B. Heymann).
The members of the panel would be free to make their views public if they disagreed with the decision not to prosecute. In this fashion, there would be a public airing of the deliberative process, and Congress would be free to initiate its own hearings if it questioned the assistant attorney general’s decision.

Under the Common Cause proposal, the separation-of-powers problem would be largely eliminated. The attorney general and deputy attorney general—as superiors in the chain of command—would always possess the power to overrule the decision of the assistant attorney general in charge of the Criminal Division in any investigation. But they would be required to do so publicly, thus eliminating partisan efforts to sweep legitimate investigations under the prosecutorial rug. Congress could investigate. The public could express outrage. The attorney general could be held accountable.

The Common Cause proposal was designed to resemble the informal method of investigation that Attorneys General Griffin Bell and Benjamin Civiletti had adopted during the Carter Administration (when Heymann worked in the Justice Department as head of the Criminal Division). The proposal was also built to resemble the British system, which creates a director of public prosecutions who is responsible for sensitive investigations. The Common Cause approach is admirable in its simplicity. It keeps the attorney general herself (a member of the president’s cabinet) out of prosecutorial decisions involving top executive officials, thus avoiding the reality or appearance of political monkey-business. It also maintains accountability for special prosecutor investigations within the Justice Department, thus eliminating much of the separation-of-powers bugaboo that haunted the independent counsel law from its inception.

Yet the Common Cause approach, while interesting and appealing, has a number of drawbacks. First, although it is true that the assistant attorney general in charge of the Criminal Division has his-

111. Id. at 293-94 (prepared statement of Philip B. Heymann).
112. Id. at 292 (testimony of Philip B. Heymann).
113. Id. at 294 (prepared statement of Philip B. Heymann).
114. Id. at 323 (prepared statement of Common Cause).
115. Id.
116. Id. at 294 (prepared statement of Philip B. Heymann).
117. Id.
118. Id. at 293.
119. Id. at 291 (testimony of Philip B. Heymann).
120. See id. at 293 (prepared statement of Philip B. Heymann).
121. See id. at 324 (prepared statement of Common Cause).
122. See Gormley, supra note 16, at 615-17 (discussing the separation-of-powers problems that plagued the independent counsel law, even prior to its enactment in 1978).
torically been far less politically linked to the president than the attorney general himself or herself,\textsuperscript{123} this equation would change swiftly if it was known that the assistant attorney general was destined to head all investigations involving executive misconduct. The assistant attorney general is a presidential appointee.\textsuperscript{124} The chief executive would view this appointment through an entirely new lens if the person selected for that post might ultimately be responsible for investigating scandal in the White House. It is true, as Common Cause contended in its written statement to the Committee, that the Senate confirmation process would ensure that the assistant attorney general is a person “of high integrity, professionalism, impartiality and independence,”\textsuperscript{125} but that is no less true of the Senate confirmation of the attorney general. The fact remains that the Common Cause approach would inevitably intensify the political skirmishing when it came to appointing an assistant attorney general to head the Criminal Division; it would replicate the problems that already exist with respect to attorneys general who are closely aligned with the president.

More importantly, the Common Cause approach creates a cumbersome set of hoops through which the assistant attorney general must jump, with very little payoff. Under the Common Cause model, the assistant attorney general would have absolute discretion to prosecute or not prosecute.\textsuperscript{126} The only constraint on this discretion would be that he or she would be required to consult with a wizard-like board of three predecessors, who would be free to publicly state their bases for disagreement if the prosecution were declined.\textsuperscript{127} The assistant attorney general also would be required to publicly state his or her reasons for declining to prosecute.\textsuperscript{128} The attorney general and deputy attorney general would be free to overrule the assistant attorney general, so long as they explained their reasons publicly.\textsuperscript{129} But in the end, the Common Cause approach would do nothing more than swap the assistant attorney general for the attorney general—changing the actors, but not the problems that accompany their

\textsuperscript{123} See Hearings on the Future of the Independent Counsel Act, supra note 26, at 322-23 (prepared statement of Common Cause) (explaining why the assistant attorney general in charge of the Criminal Division would be more independent than the attorney general).

\textsuperscript{124} Id. at 293 (prepared statement of Philip B. Heymann).

\textsuperscript{125} Id. at 323 (prepared statement of Common Cause).

\textsuperscript{126} Id. at 291-92 (testimony of Philip B. Heymann).

\textsuperscript{127} See id.

\textsuperscript{128} Id. at 299-94 (prepared statement of Philip B. Heymann).

\textsuperscript{129} Id. at 293.
As Attorney General Reno stated in her Senate testimony: "The Assistant Attorney General of the Criminal Division is appointed by the President, and once you shift responsibility from the Attorney General to the Assistant Attorney General, appointed by the President, we are going to be right back here, only it won’t be me sitting in this seat . . . ."

Moreover, a new set of separation-of-powers problems rears its head under the Common Cause model. As Attorney General Reno explained:

If you limit the authority within the Executive Branch so that the President or the Attorney General cannot remove a head of the Criminal Division, then you raise constitutional questions about the President’s responsibility for faithfully executing the laws. It is a difficult issue and I don’t think moving the boxes around is going to solve the problem.

The Attorney General concluded: “If I am going to get blamed for it, I would like to be responsible for it and have the tools to do the job.”

There is a final touch of irony about the Common Cause position, which was endorsed by Philip Heymann and Archibald Cox, both of whom played major roles in Watergate. If the Common Cause model had been in effect during the Watergate scandal, it would have shifted responsibility to the very person who had spawned conflicts between the Justice Department and the White House—Henry Petersen. Cox had been appointed special prosecutor precisely because the Justice Department and the White House were exchanging information concerning the investigation. It was later revealed that the chief cause of that informational leak was Petersen, who was head of

130. The Common Cause approach is similar to one advocated earlier by Senator Howard Baker, Jr., and others. Baker proposed bolstering the Public Integrity Section of the Justice Department, making the head of that Section, in effect, in charge of special prosecution investigations, and subjecting that individual to Senate confirmation. See id. at 47 (remarks of Sen. Howard H. Baker, Jr.). Senator Baker later questioned the wisdom of his own proposal, contemplating whether it constituted an unwarranted intrusion upon the authority of the attorney general and president. See id.

131. Id. at 271-72 (testimony of Attorney General Janet Reno).

132. Id. at 272.

133. Id. at 247.

134. See supra notes 103-104 and accompanying text (accounting for Cox’s and Heymann’s endorsement of the Common Cause model).

135. See GORMLEY, supra note 1, at 254-56 (discussing Petersen’s role in the Watergate scandal).

136. See id. at 232 (discussing Cox’s appointment as special prosecutor and explaining that “[t]he alleged scandal had come so close to the executive branch that it seemed wise to divorce the investigation from the Justice Department”).

137. See supra notes 103-104 and accompanying text (accounting for Cox’s and Heymann’s endorsement of the Common Cause model).
the Criminal Division of the Justice Department.\footnote{See id. at 254-60, 368-71 (discussing the extent of Petersen’s information leaks to the White House).} Although an honorable and decent man, Petersen was inordinately grateful to President Nixon for his appointment and was funneling information about the investigation directly to the President.\footnote{See id. at 368-69.} Thus, during Watergate, the Common Cause model would have placed responsibility in the hands of Petersen, who created the need for the appointment of a special prosecutor in the first place.

The Common Cause approach has one virtue—it largely escapes the constitutional minefields that dogged the original special prosecutor statute by reposing power in a member of the Justice Department who is one step removed from the attorney general.\footnote{See Hearings on the Future of the Independent Counsel Act, supra note 26, at 322-24 (prepared statement of Common Cause).} In that sense, the Common Cause model is worth considering as a fallback when the attorney general is thrown into actual conflict situations.\footnote{This point will be discussed later in the Article. See infra notes 218-229 and accompanying text (discussing the appointment of an independent counsel under a “tier-two” mechanism).} Yet it is not clear that the payoff would be sufficiently lucrative to justify constructing an entire special prosecutor mechanism around the assistant attorney general. Vesting power directly in the attorney general so that she remains accountable, in most instances, would be less cumbersome and more productive than building an apparatus around one of her subordinates.

C. Executive Branch Appointment of the Special Prosecutor

Another idea that has been kicked around since the inception of the independent counsel law is the notion of having a roster of potential special prosecutors appointed directly by the president—in advance of any crisis—and confirmed by the Senate. Recently, this concept has been floated by distinguished presidential advisor Lloyd Cutler.\footnote{See Bell et al., supra note 34, at 477-78 (remarks of Lloyd N. Cutler, former counsel to Presidents Carter and Clinton).} At a Mercer Law School roundtable session, Cutler proposed having the president nominate, and the Senate confirm, five or ten potential independent counsels from whom a three-judge panel could select a special prosecutor.\footnote{Id. at 477.} Once again, this “executive branch appointment” model is nothing new. In 1976, as Congress wrangled with various formulations of
an early special prosecutor bill, President Ford communicated his own plan to the Senate.\textsuperscript{143} Pursuant to the ill-fated Senate Bill 495,\textsuperscript{144} the special prosecutor under the Ford plan would be appointed by the president to a three-year term, with the advice and consent of the Senate.\textsuperscript{145} The special prosecutor would then remain under the control of the attorney general, who would maintain supervisory and removal power.\textsuperscript{146}

The executive branch appointment model has some strengths. It cleanly bypasses the separation-of-powers,\textsuperscript{147} Appointments Clause,\textsuperscript{148} and removal problems\textsuperscript{149} by reposing the power to hire (and terminate) special prosecutors directly in the hands of the chief executive.\textsuperscript{150} The model also produces an incurable defect, however. By placing control of the process directly in the president—even while layering this on top of the advice and consent of the Senate—this approach brings us full circle to the Saturday Night Massacre dilemma. Once the president’s hand is placed on the control lever, so that he can terminate a special prosecutor who “gets too close to the scent” in a criminal case—as President Nixon did with Archibald Cox in Watergate—the Sword of Damocles\textsuperscript{151} hangs over the special prosecutor’s head, thus creating two adverse consequences. First, such a placement of power jeopardizes the de facto independence of the special prosecutor. Second, it inevitably shatters the public perception of independence with respect to the investigation. This is particularly true


\textsuperscript{144} See supra notes 94-101 (discussing the rise and fall of this proposed bill).

\textsuperscript{145} H.R. Doc. No. 94-550, at 2.

\textsuperscript{146} Id.

\textsuperscript{147} For a discussion of the separation-of-powers issues related to the independent counsel law, see Gormley, supra note 16, at 615-17.

\textsuperscript{148} U.S. Const. art. II, § 2, cl. 2. For a discussion of the Appointments Clause problems that plagued the independent counsel law, see Gormley, supra note 16, at 613.

\textsuperscript{149} For a discussion of the removal issues related to the independent counsel law, see Gormley, supra note 16, at 614-15.

\textsuperscript{150} See supra notes 141-146 and accompanying text (describing Lloyd Cutler’s and President Gerald Ford’s proposals for an “executive branch appointment” model). Senator Orrin Hatch recently considered the benefits of allowing the president to appoint special prosecutors as a means of maintaining presidential authority and accountability in The Independent Counsel Statute and Questions About Its Future, 62 Law & Contemp. Probs. 145, 155, 158-60 (1999).

\textsuperscript{151} The “Sword of Damocles” refers to a legend in which Damocles, a friend of King Dionysius, was invited to a banquet. The invitation came after Damocles had wished for Dionysius’s power and wealth. While seated at the banquet, Damocles discovered a sword dangling precariously above his head to serve as a message that with great power and wealth comes imminent danger. The Book of Virtues 213-15 (William J. Bennett ed., 1993).
if the president himself (as in Watergate or the Lewinsky scandal) is the subject of the investigation. The last thing in the world that engenders public confidence in the system is having the president pick the prosecutor and control his own investigation.

An offshoot of the "presidential appointment" proposal is a model that requires the attorney general to propose a "roster" of suitable special prosecutor candidates at the start of a president's term. The attorney general's list then would be supplied to the special three-judge panel as the need arose, so that a selection could be made by the judicial branch. Professor John Q. Barrett, a former prosecutor who worked with Lawrence Walsh on the Iran-Contra matter, has advanced this proposal. Statutorily vesting the attorney general with the power to create a "short-list" of acceptable candidates for the position has some allure. It diminishes the scent of politics, yet keeps the attorney general in the loop, so that she can have a say in appointments within her own Justice Department. But who controls the investigations once the appointment is made? Professor Barrett's proposal, which was advanced before Congress declined to renew the independent counsel law, allowed the special three-judge panel to oversee the independent counsel's operation, albeit in a limited fashion. But Congress—as the Senate hearings made clear—has no present intention to re-establish a Special Court as an overseer of the special prosecutor.

Moreover, any plan that envisions the president (or the attorney general) identifying a pool of acceptable special prosecutors in advance and saving them for a rainy day seems hopelessly impractical. Few talented lawyers of the caliber one seeks to recruit for such sensitive investigations—involving the most powerful elected officials in the land—would wish to volunteer for a case without knowing all of...
the specifics. The idea that a team of nationally recognized attorneys would sit on the bench like all-star football players, waiting to be called onto the field for the "big game," is highly dubious. Few busy lawyers—particularly lawyers in the business of handling nationally visible criminal cases—would agree in advance to make such a commitment. At best, they would reply: "I'll think about it when the time comes—when I know the specifics."

There is no substitute for selecting a special prosecutor for a particular investigation as the specific case arises. Although developing a mechanism by which the attorney general (rather than the president) can create a neutral, qualified list of potential candidates is a proposal that bears further exploring, any rigid effort to appoint "special-prosecutors-in-waiting" at the start of a president's term is both impractical and nonproductive.

D. Returning to the Old System of Ad Hoc Appointments

In the aftermath of the Lewinsky scandal, the most powerful momentum for change has been in the direction of the system that existed prior to the 1978 enactment of the special prosecutor law. Democrats and Republicans alike have linked hands, weary of battle and dissension, in support of a return to the ad hoc method of appointing special prosecutors by the attorney general.

Former Senators Robert Dole and George Mitchell, joined by an impressive list of lawyers and public servants, produced a twenty-three-page report for the American Enterprise Institute and the Brookings Institution in May 1999 (on the eve of the expiration of the independent counsel law), advocating a return to the pre-Watergate approach. The Dole-Mitchell Report recommended that Congress enact legislation requiring the attorney general to issue standing regulations that would govern the appointment and functioning of special prosecutors to ensure their independence and guard against abuses. Other than mandating such internal regulations, however,

155. Such a proposal is, in fact, discussed later in this Article. See infra note 218 and accompanying text.

156. Dole & Mitchell, supra note 51. Other distinguished members of the drafting committee included Zoë Baird, Drew S. Days, III, Carla Anderson Hills, Bill Paxon, John G. Roberts, Jr., David E. Skaggs, Dick Thornburgh, and Mark H. Tuohy III. Id. at unnumbered page following cover page. Other scholars have supported this view as well. See, e.g., Katy J. Harriger, Can the Independent Counsel Statute Be Saved?, 62 Law & Contemp. Probs. 131, 141-43 (1999) (endorsing a return to the ad hoc method of appointment used prior to 1978); infra notes 158-167 and accompanying text (discussing the agreement among many witnesses that there should be a return to the ad hoc system).

the system of yore by which the attorney general maintained control and responsibility for special prosecutor investigations would be reinstated.

During the course of the Senate hearings, witness after witness extolled the virtues of returning to the ad hoc system.\textsuperscript{158} Former Attorney General Griffin Bell—who successfully appointed his own special prosecutors during the Carter administration when charges arose concerning alleged money laundering by the Carter Peanut Warehouse and other sensitive matters—told senators that the previous system had operated smoothly.\textsuperscript{159} "The government works well," Bell concluded, "if it is left alone."\textsuperscript{160} Joseph diGenova—former Independent Counsel in the Bill Clinton passport file investigation during the Bush administration, and later a vocal critic of the special prosecutor law—told the Senate Committee members: "The body politic has caught the cure and has died.... My position is a very simple one, that you should end it, not mend it."\textsuperscript{161} Robert S. Bennett—who defended Secretary of Defense Caspar Weinberger during the Iran-Contra investigation and later represented President Clinton in the Paula Jones matter—underwent an "epiphany" after observing the statute in operation.\textsuperscript{162} A former supporter of independent counsel legislation, Bennett confessed to the senators that he had now concluded that the statute was irreversibly flawed.\textsuperscript{163} In Bennett's opinion, it had been

\textsuperscript{158} See, e.g., \textit{Hearings on the Future of the Independent Counsel Act}, supra note 26, at 203 (testimony of Robert B. Fiske, Jr., Davis, Polk and Wardwell) ("In terms of my views as to the statute, I believe that in the vast majority of situations it would be far preferable to allow the career prosecutors in the U.S. Attorney's Office and in the Justice Department to investigate and prosecute these cases."); \textit{id.} at 245 (testimony of Attorney General Janet Reno). Reno explained:

\textit{[W]e have come to believe that the country would best be served by a return to the system that existed before the Independent Counsel Act, when the Justice Department took responsibility for all but the most exceptional of cases against high-ranking public officials and when the Attorney General exercised the authority to appoint a special prosecutor in exceptional situations.}

\textit{Id.}

\textsuperscript{159} \textit{Id.} at 30 (testimony of Hon. Griffin B. Bell, former U.S. Attorney General).

\textsuperscript{160} \textit{Id.} at 39.

\textsuperscript{161} \textit{Id.} at 56 (testimony of Joseph E. diGenova, Independent Counsel, Clinton Passport File Investigation).

\textsuperscript{162} See \textit{id.} at 144-48 (testimony of Robert S. Bennett, Skadden, Arps, Slate, Meagher and Flom). Realizing that the statute should not be reenacted, Bennett testified that at an earlier time he supported the Independent Counsel Act and that he had "felt that it was necessary for public acceptability to have such a statute." \textit{Id.} at 144. The "epiphany" characterization was made by fellow witness Joseph E. diGenova in relation to the sudden awakening of several former supporters of the Independent Counsel Act regarding the statute's shortcomings. \textit{Id.} at 84-85 (testimony of Joseph E. diGenova).

\textsuperscript{163} See \textit{id.} at 144-48 (testimony of Robert S. Bennett).
turned into a "nuclear weapon" in the arsenal of partisan politics, inciting scandals and destroying the public's respect for government at every level.\textsuperscript{164} Bennett stated: "In the passion that followed the Watergate scandal, it seems that the country and Congress may have ignored the most obvious lesson of Watergate. The system worked."\textsuperscript{165}

Attorney General Janet Reno and Whitewater Independent Counsel Kenneth Starr, who had developed a frayed working relationship after the Lewinsky matter boiled into a national disaster, at least agreed on one simple proposition following their mutually exhausting experience: It was best to return to the old system.\textsuperscript{166} A weary Kenneth Starr told the Committee:

I think it is fair to say that the Act has been a worthwhile experiment. It has yielded significant results. The results, I believe, support this conclusion: Jurisdiction and authority over these sensitive matters ought to be returned to the Justice Department. And who will oversee them? The Congress, the press, the public.\textsuperscript{167}

In its unadorned form, however, the ad hoc method of yesteryear is not the magical key to eliminating the problems of the past. All of the reasons that militated in favor of creating a special prosecutor statute in the first place percolate to the surface once we return to a system that places unfettered control over special prosecutors in the hands of the attorney general. First, and most obviously, the Saturday Night Massacre dilemma comes roaring back. Because the attorney general answers to the president in the chain of command, either of those top executive officials can effectively abort an independent counsel investigation with the snap of two fingers by terminating the special prosecutor at will.\textsuperscript{168} This problem does not disappear in the ad hoc system.

Second, returning such sensitive and critical investigations to the Justice Department with no strings attached does little to bolster public confidence in the investigations. Restoring faith in the system, after all, was a primary concern driving Congress's decision to hash out

\textsuperscript{164} Id. at 145, 149.
\textsuperscript{165} Id. at 148.
\textsuperscript{166} See id. at 245 (testimony of Attorney General Janet Reno) (stating that "the country would best be served by a return to the system that existed before the Independent Counsel Act"); id. at 425 (testimony of Kenneth W. Starr, Independent Counsel) (advocating a return of investigatory authority to the Justice Department).
\textsuperscript{167} Id. at 425 (testimony of Kenneth W. Starr).
\textsuperscript{168} See id. at 421 (discussing the problems inherent in leaving special prosecutor appointments within the executive branch).
special prosecutor legislation after Watergate.\footnote{169} Public trust in government had bottomed out.\footnote{170} It may be true that Attorney General Griffin Bell's ad hoc delegation of the Carter Peanut Warehouse investigation worked well (so well that the special prosecutor “accounted for every peanut and every nickel”),\footnote{171} but that was a relatively benign matter that never boiled to a head and never transmogrified itself into a national crisis or a political deathmatch. Would the public's confidence in Griffin Bell's approach have been as unvarnished in Watergate or in the Lewinsky scandal, when the allegations of presidential wrongdoing mushroomed (in a wholly unpredictable fashion) into ugly national scandals that ultimately wrecked the nation's trust in government? Allowing the attorney general to appoint special prosecutors works nicely when it comes to those run-of-the-mill scandals that constitute an inevitable part of political and governmental life. It does not work so well, however, in those rare instances that scandals—for reasons that can never be understood or anticipated in advance—metamorphose themselves into crises that test the foundations of our democratic republic.

Third, the American public has grown comfortable with special prosecutors. They have been a part of the political-legal culture of the United States for over twenty years.\footnote{172} As Senator Fred Thompson noted, despite his personal distaste for the statute, there is some wisdom in the argument “that we can’t go back again; that now that we have it, the public expects some kind of other mechanism even though it may be flawed; and that we are not really writing on a blank slate anymore in terms of public perception.”\footnote{173} There have been over twenty independent counsels appointed over the twenty-two-year life span of the statute.\footnote{174} Despite the criticism of specific investigations (which is often driven by political orientation), the American

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\begin{itemize}
  \item 169. \textit{See Special Prosecutor Hearings, supra} note 5, at 61 (remarks of Hon. William L. Hunte\-gate, Chairman, House Subcommittee on Criminal Justice of the Committee on the Judiciary) (“The need for restoring public confidence in Government has never been greater. The urgency for action has never been more immediate.”).
  \item 170. \textit{See Harriger, supra} note 35, at 44-46 (detailing survey results regarding the decline in public opinion over the course of the Watergate scandal).
  \item 172. \textit{See Gormley, supra} note 16, at 641-42 (discussing the number and proliferation of independent counsel investigations since the statute’s adoption in 1978).
  \item 173. \textit{Hearings on the Future of the Independent Counsel Act, supra} note 26, at 170 (remarks of Sen. Fred Thompson, Chairman). \textit{But see Harriger, supra} note 35, at 195-96 (asserting that the public does not have much confidence in the independent counsel approach).
  \item 174. \textit{See Gormley, supra} note 16, at 641-42 n.166 (listing twenty independent counsel investigations and their subjects).
\end{itemize}
public has grown accustomed to the notion of appointing neutral prosecutors from outside the Justice Department in special cases. Ever since Watergate, special prosecutors have become an accepted part of our criminal justice machinery.

Fourth, the death of the Watergate-era special prosecutor statute will not eliminate the need for some sort of law. In future years, when a scandal erupts at the highest levels of the executive branch, who will investigate such allegations? What rules will govern? When the Watergate scandal reached crisis proportions, Attorney General-Designate Elliot Richardson and Special Prosecutor-Designate Archibald Cox scribbled out ideas on hotel napkins to create a makeshift set of rules to govern a fast-moving criminal investigation.175 With the help of a hodgepodge of senators and staffers, Cox and Richardson ground out an impromptu charter governing the special prosecutor and established parameters that both parties could respect and the public could trust.176 One of the primary reasons for enacting a special prosecutor law after the shock of Watergate was to eliminate this haphazard approach to launching special prosecutor investigations when serious crises arose in the future.177

Fifth, the standard argument in favor of returning to an ad hoc system is misleading at best and flawed at worst. It was summed up by Attorney General Reno, a convert to the anti-special-prosecutor-law position, in this fashion: "Perhaps the real lesson of our Nation's experience with the special prosecutor during Watergate is not that the old system was broken, but that it worked."178 A parade of notable witnesses who appeared before the Senate Committee, including former Attorney General Griffin Bell, Kenneth Starr, and others, seconded that sentiment.179 Their arguments generally followed this path of

176. *Id.*
177. *Id.*
178. *Id.* at 246 (testimony of Attorney General Janet Reno).
179. See *Id.* at 29 (testimony of Hon. Griffin B. Bell, former Attorney General) ("It lasted for about 200 years and nothing terrible ever happened in the country."); *Id.* at 425 (testimony of Kenneth W. Starr, Independent Counsel) (recalling Winston Churchill and stating that "[r]eturning authority over these prosecutions to Attorneys General, and relying on them to appoint outside counsel when necessary, is the worst system, except for all the others"); *Id.* at 148 (testimony of Robert S. Bennett, Skadden, Arps, Slate, Meagher and Flom) ("In the passion that followed the Watergate scandal, it seems that the country and Congress may have ignored the most obvious lesson of Watergate. The system worked."); *Id.* at 57 (testimony of Joseph E. diGenova, Independent Counsel, Clinton Passport File Investigation) ("The system that we have in existence for investigating crime and prosecuting it is a good one. It has held us in good stead over many years, when we have had problems at the Executive Branch.").
logic: During Watergate, Attorney General Elliot Richardson ap-
pointed his own special prosecutor, Archibald Cox; President Richard
Nixon attempted to thwart the criminal justice system by firing Cox;
the American public and Congress rose up and unleashed a firestorm
of protest, forcing Nixon to appoint a new special prosecutor (Leon
Jaworski) who ultimately completed the Watergate investigation and
drove Nixon out of office; the American democratic system survived,
protected by the web of checks and balances, and by the effective
force of political pressure, public pressure, and a vigilant news me-
dia.\textsuperscript{180} The system worked.

What this convenient reconstruction of history overlooks, how-
however, is how close President Nixon came to successfully aborting the
Watergate investigation and wreaking havoc on the American consti-
tutional system. Henry Ruth, Cox's deputy who later served as Water-
gate Special Prosecutor, jolted the Committee by reminding the
assembled senators: "As one who was in charge during the Saturday
Night Massacre, it is impossible to describe how thin a thread existed
at that time, and for 3 weeks thereafter, for the continuation of the
Special Prosecutor."\textsuperscript{181} Challenging those senators who suggested
that Watergate had validated the old ad hoc system, Ruth stated:

[T]o say that you want to set up a system that can survive a
Saturday Night Massacre, to me, is inviting a Saturday Night
Massacre because in this age of PR, I believe, as current
events have proved, a very strong information machine at the
White House can create the atmosphere for a massacre to
succeed.\textsuperscript{182}

Sam Dash, who served as Chief Counsel to the Senate Watergate
Committee, similarly reminded Senator Thompson's Committee that:

[Watergate] is not a lesson to follow. Because President
Nixon was not about to appoint a new Special Prosecutor.
He thought the investigation was over and . . . [it was the]
publicity that the Senate Watergate Committee gave out that
summer [that] so outraged the American people that they,

\textsuperscript{180} See, e.g., id. at 148 (testimony of Robert S. Bennett) ("The practical reality is that
there could never be a cover-up of a serious crime by a President or other high-ranking
official."); id. at 57 (testimony of Joseph E. diGenova) ("Long before the existence of this
statute, Attorneys General and Presidents were forced to appoint outside counsel to investi-
gate crimes when there were obvious political conflicts of interest because the public wheel
required it. Congress and journalists demanded it, and there was a reaction to the elected
officials in the Presidency and in the Executive Branch that they had to respond.").

\textsuperscript{181} Id. at 194 (testimony of Henry Ruth, former Special Prosecutor, Watergate Special
Prosecution Force).

\textsuperscript{182} Id.
in millions of protests, forced the hand of the President to appoint one.\textsuperscript{183}

Dash concluded: "We cannot rely on that happening again."\textsuperscript{184}

Although this history is generally overlooked, Special Prosecutor Archibald Cox came very close to succumbing to pressure from the White House—in order to avoid a constitutional show-down—and abandoning his demand for the White House tape recordings that ultimately proved Nixon's complicity in the Watergate coverup.\textsuperscript{185} On the eve of the Saturday Night Massacre, President Nixon came within a hair of pulling off the so-called "Stennis Compromise" that would have kept the damning tapes out of the special prosecutor's hands.\textsuperscript{186} President Nixon failed to shut down the Watergate investigation only because of Cox's strength of character, the fact that there were few major college football games televised on the day of Cox's final press conference (allowing the American public to tune in),\textsuperscript{187} and other twists of fate.

Indeed, one strong current that swirled beneath the 1999 Senate hearings was how often the government had succeeded in exerting pressure to delay or derail potentially damaging criminal prosecutions at moments of intense governmental stress. Without some mechanism in place to distance the attorney general from certain sensitive investigations that involve the executive branch, dangerous, silent conflicts often play tricks on the system. This is true even where men and women of impeccable credentials and high-minded intentions are involved. George Beall, who served as U.S. Attorney in Maryland and handled the investigation of Vice President Spiro Agnew for accepting kickbacks as governor of that state, recounted uncomfortable experiences in which Attorney General John Mitchell and his Justice Department attempted to sidetrack prosecutions involving high

\textsuperscript{183} Id. at 388-89 (testimony of Samuel Dash, former Chief Counsel to the Senate Watergate Committee and former Ethics Advisor to Whitewater Independent Counsel Kenneth Starr).

\textsuperscript{184} Id. at 389.

\textsuperscript{185} GORMLEY, supra note 1, at 346-47.

\textsuperscript{186} For a detailed discussion of these events, see GORMLEY, supra note 1, at 323-31. President Nixon proposed that Senator John Stennis of Mississippi would review the nine subpoenaed tapes with nonpertinent portions deleted. Id. at 325-26. Senator Stennis would reword portions of the tapes that could be embarrassing to the President while deleting portions that posed a national security threat. Id. at 326. The tapes, as edited by Senator Stennis, would be turned over to Archibald Cox in compliance with the subpoena. Id.

\textsuperscript{187} See id. at 348 (recounting the decision by NBC and CBS to air the press conference and ABC's commitment to broadcast college football).
government officials. Henry Ruth, the Watergate prosecutor who was hired two decades later to investigate the U.S. Government's disastrous raid on a religious cult complex in Waco, Texas, called the initial FBI and Justice Department report on that matter a "whitewash."

When moments of crisis and scandal strike, even good systems populated by honorable officials break down. The whole point of constructing detailed special prosecutor legislation was to create a fail-safe system—a system that would kick into operation in rare circumstances to prevent a constitutional meltdown. Although a return to the former ad hoc system does resolve the separation-of-powers, Appointments Clause, and removal problems that plagued the now-defunct independent counsel law, it does not resolve a different set of issues. When the next crisis strikes, what rules, procedures, or statutory schemes will be in place to handle it? Will Congress be forced to scramble to reinvent a special prosecutor law twenty years from now when the next scandal involving the president, the vice president, or the attorney general explodes onto the front page of newspapers and media Web sites, startling a complacent nation?

Rather than throwing away twenty-three-years-worth of experience with special prosecutor investigations in the United States (some investigations are still proceeding forward under the statute based upon the "grandfather" provision), the more productive course is to determine what mechanism should be constructed in its place now that the pulse of the Watergate-era law has stopped beating. A careful distillation of the wisdom contained in the Senate hearings provides useful clues that can be turned into productive answers.

III. A Minimalist Replacement for the Expired Independent Counsel Law

Assuming that Congress is not inclined to overhaul the now-defunct independent counsel statute in order to cure its deficiencies, the next most sensible course for Congress to follow is to create a sturdy replacement structure. Even stripped to its bare bones, a successful

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189. *Id.* at 211 (testimony of Henry Ruth, former Special Prosecutor, Watergate Special Prosecution Force).

190. 28 U.S.C. § 599 (1994) (allowing the statute to remain in force "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").
plan for enabling special prosecutor investigations must do three things: It must ensure some basic level of independence for whomever undertakes the prosecution; it must ensure accountability to an extant branch of government; and it must restore a modicum of public trust in investigations that are targeted at high-level executive officials. Even under such a minimalist approach, it is impossible to achieve any baseline of success without some mechanism in place to prevent haphazard and chaotic investigations that have the ability to spiral into national disasters.

Senator Fred Thompson was correct in observing that the inherent tug-of-war between accountability and independence makes the creation of workable special prosecutor laws a complex feat in the existing tripartite system of American government. What the 1999 Senate hearings made clear is that Congress, after ample soul-searching, has reached this conclusion: In the vast run of cases, accountability must come first. Under the American constitutional system, the executive power is vested in the president, as the chief executive, and in those officials (including the attorney general) charged with enforcing the laws. As a chorus of voices reiterated throughout the Senate hearings, the chain of command for criminal investigations must, as a general rule, lead back to the attorney general, and, ultimately, to the president. Special prosecutors who are accountable


193. See, e.g., Hearings on the Future of the Independent Counsel Act, supra note 26, at 330 (testimony of Lawrence E. Walsh, former Independent Counsel, Iran-Contra Investigation) (stating that the power to control criminal investigations must ultimately remain in the executive branch); id. at 291-92 (testimony of Philip B. Heymann, James Barr Ames Professor of Law, Harvard University, and former Deputy Attorney General, U.S. Department of Justice, and former Watergate Special Prosecutor) (supporting the notion of an assistant attorney general in charge of special prosecutions, which would keep the chain of command within the executive branch); id. at 245, 247 (testimony of Attorney General Janet Reno) (advocating a return of investigatory power to the Justice Department). Attorney General Reno explained:

Our Founders set up three branches of government—a Congress that would make the laws, an executive that would enforce them, and a judiciary that would decide when they had been broken. The Attorney General, who is appointed by the President and confirmed by the Senate, is publicly accountable for her decisions.

... The ultimate issue is responsibility. I go back to the point that I made that the system as it exists now diffuses responsibility, divides responsibility, and fragments accountability. If I am going to get blamed for it, I would like to be responsible for it and have the tools to do the job.

Id. at 245, 247.
to no one are unhealthy for all concerned. Any useful replacement for the expired independent counsel statute, therefore, must first come to grips with this legislative consensus: A special prosecutor who is accountable to no one is worse than no special prosecutor at all.

The best solution therefore lies in a two-tiered approach. "Tier one" would resemble the plan set forth in the Dole-Mitchell Report, as well as the approach advocated by former Attorney General Griffin Bell. Under this expansive first tier, the attorney general would possess a wide amount of discretion in handling allegations of wrongdoing within the executive branch. In the large run of cases involving allegations of criminal misconduct by officials within the executive branch, we would return to the former ad hoc system. The attorney general would decide whether the appointment of a special prosecutor was warranted. The attorney general would decide who should be appointed for a specific investigation. The attorney general would be responsible for that investigation, would monitor it, and would make the decision whether an investigation (or an individual prosecutor) should be terminated.

Yet this does not mean that our nation should, or can afford to, return to the haphazard approach that existed prior to Watergate. The first step, as the Dole-Mitchell Report concluded and as a number of Senate witnesses agreed, is for the attorney general to establish clear internal Justice Department regulations that set forth concrete procedures for selecting, supervising, and terminating special prose-

194. DOLÉ & MITCHELL, supra note 51.

195. See Bell et al., supra note 34, at 464-65 (statement of Judge Griffin B. Bell). Judge Bell stresses the amount of skill and expertise available within the Department of Justice as a primary argument for allowing the Justice Department to handle investigations into and prosecutions of executive officials. Allowing the independent counsel statute to expire, he argues, would eliminate an impediment to the Department's task of prosecuting and would provide room "to trust our institutions and hold our institutions accountable." Id. at 465; see also Hearings on the Future of the Independent Counsel Act, supra note 26, at 31 (prepared statement of Hon. Griffin B. Bell, former U.S. Attorney General) ("The Department of Justice is perfectly adequate to handle any investigation; particularly if we hold the Attorney General and the Department of Justice to a standard of being a neutral zone in the government.").

196. See Gormley, supra note 16, at 653-59 (proposing a return to ad hoc decisionmaking under certain circumstances); see also DOLÉ & MITCHELL, supra note 51, at 11 (stating that when dealing with the appointment of a special prosecutor, "there is no substitute for the Attorney General's sound exercise of prosecutorial judgment on a case by case basis").


199. See DOLÉ & MITCHELL, supra note 51, at 12-21 (setting forth several suggestions for internal regulations and parameters guiding a special counsel's investigation).
There must be a meticulous set of rules, constructed in advance, that survive the transition from one attorney general (and one administration) to another. As Professor Julie O'Sullivan pointed out during her characteristically thoughtful Senate testimony, internal regulations that ensure genuine independence for special prosecutors will go a long way to blunt public skepticism and partisan finger-pointing. It is true, as Senator Joseph Lieberman of Connecticut noted, that the existing regulatory procedures in place at the Justice Department are loose and allow the attorney general too much discretion in deciding critical matters such as hiring special prosecutors. Yet there is plenty of rich foundation material for creating up-to-date Justice Department regulations. Twenty-three-years-worth of experience under the independent counsel statute can be put to good use; sensible provisions contained in that legislation can be grafted directly into the Justice Department procedures. If done carefully, this transfer can create a solid basis for ad hoc appointments of special prosecutors in the future. Creating a first-rate set of procedures must therefore be an immediate priority of the new attorney general in the year 2001.

In the bulk of cases—which would include matters such as the controversial Espy prosecution, the investigation of HUD Secretary Henry Cisneros, and other investigations that are viewed as examples of wasteful expenditures of time and resources under the independent counsel law—the attorney general would follow her own regulations in determining whether an inquiry was warranted. In many such instances, assigning the case to a particular U.S. Attorney or Justice Department prosecutor with unassailable credentials and special expertise for the particular investigation might be enough to ensure

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200. See id. at 9-21 (stating the need for such guidelines and proposing recommendations for regulations).

201. Hearings on the Future of the Independent Counsel Act, supra note 26, at 365-66 (testimony of Julie Rose O'Sullivan, former Assistant Prosecutor of the Whitewater Investigation and Professor of Law at Georgetown University Law Center).

202. See id. at 258 (remarks of Sen. Joseph Lieberman) ("I believe that the current regulations give the Attorney General total discretion regarding the appointment of special counsels . . .").

203. At present, the DOJ regulations in place constitute a somewhat outdated, "cobbled together," incomplete collection of bits and pieces of past versions of the independent counsel law. Id. at 401 (testimony of Julie Rose O'Sullivan). They do not incorporate the experiences of the past five years, in which glaring problems and omissions were identified in the statute. The Justice Department has indicated that it is working diligently at bringing the existing procedures up to date. Id. at 258-60 (testimony of Attorney General Janet Reno) (discussing proposed revisions to the current Justice Department regulations).

204. For a discussion of these and other investigations, see Gormley, supra note 16, at 653-59.
autonomy and eliminate any serious risk of public mistrust in the matter. 205

In the event that the attorney general did find herself faced with an actual or potential conflict of interest, however, the Common Cause model would provide a useful method for insulating her from the investigation, while at the same time leaving the matter within the umbrella of the Justice Department. 206 If the attorney general determined that an actual or potential conflict existed, the regulations would require her to delegate responsibility—including the decision whether to appoint a special prosecutor in the first place—to the assistant attorney general in charge of the Criminal Division. 207 This official would be in a position to construct a sturdy "firewall" around the investigation, and thus could keep the attorney general at arm's length, so the integrity of the Justice Department (and the criminal investigation) would not be jeopardized. Such a firewall would only be necessary, however, when an actual or potential conflict existed.

The first tier—shoring up the procedures for ad hoc appointments—is a good start. But it is not enough. A second tier must be created to provide a release valve in the event that pressure on the system becomes so intense that it threatens to damage one branch or multiple branches of government. Under any plan that returns control of special prosecutors to the Justice Department, there must be a fail-safe mechanism in order to deal with the most serious, potentially destructive crises at the very top of the executive pyramid. A reasonable amount of public mistrust in politics is healthy; an extreme amount, generated by a scandal like Watergate or the Lewinsky matter, can damage a democratic republic for years. As Senator Joseph

205. See Hearings on the Future of the Independent Counsel Act, supra note 26, at 295 (testimony of Charles G. La Bella, former Supervising Attorney, Campaign Financing Task Force) (discussing the enormous prosecutorial talent available to the attorney general within the federal system); Gormley, supra note 16, at 654-55 (recognizing the ability and two-hundred-year history within the nation's criminal justice system for dealing with investigations of executive officials). Within the Justice Department, there are unique pockets of expertise. The Public Integrity Section of the Justice Department, for instance, is populated by many experienced lawyers who span both Democratic and Republican administrations and are unassailable in terms of their neutrality. See Hearings on the Future of the Independent Counsel Act, supra note 26, at 280 (testimony of Attorney General Janet Reno).

206. See supra notes 103-140 and accompanying text (discussing the Common Cause model).

207. See Hearings on the Future of the Independent Counsel Act, supra note 26, at 322-24 (prepared statement of Common Cause) (proposing the adoption of regulations similar to those in place during the tenure of Attorney General Griffin B. Bell, which charged the assistant attorney general in charge of the Criminal Division with reviewing all prosecutorial decisions and protected against undue influence from high-ranking executive officials).
Lieberman noted after the Lewinsky investigation and failed impeachment: "I know cynicism has been part of American history, but the cynicism quotient [now] seems to be a bit higher and expresses itself in distrust of government."\(^{208}\)

Congress should therefore combine the Dole-Mitchell approach with legislation providing that when there is substantial evidence that a felony has been committed by the president, vice president, or attorney general, a back-up mechanism will be triggered. In such unusual cases, it is virtually impossible for the attorney general, or even an assistant attorney general, to make a determination that is free from bias, the appearance of bias, or the taint of conflicted loyalties. If such a situation bubbles to a head in a way that threatens the stability of our governmental system—as in Teapot Dome, Watergate, and, most recently, the Lewinsky scandal—there needs to be a mechanism in place that citizens, public officials, and targets of investigations can all trust. As Independent Counsel Curtis von Kann, who handled the Eli Segal "Americorps" investigation, told the 1999 Senate Committee on Governmental Affairs: "I believe there is great value in having already in place an established mechanism and procedures for dealing with those exceptional situations where the public would not likely accept the integrity of a Department of Justice decision to prosecute, or not to prosecute, officials at the highest level."\(^{209}\)

The answer, as we have learned from the experience of the past few years, does not lie in wresting authority away from the Justice Department and vesting it in a three-judge panel that has no power or ability to take action. In hindsight, the Supreme Court's decision in *Morrison v. Olson*,\(^{210}\) which upheld the independent counsel law, simultaneously doomed it to failure. By insisting that the three-judge panel could possess no supervisory power over the independent counsel, but rather could only appoint and rubber-stamp periodic reports of the independent counsel,\(^{211}\) the Supreme Court, in effect, created a prosecutor with no home base within our tripartite system of government. Not only was the prosecutor distanced from the executive branch, but he or she was also insulated from the legislative and judicial branches. Congress could do nothing but review perfunctory re-

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208. Id. at 175 (remarks of Sen. Joseph Lieberman).
209. Id. at 76 (testimony of Hon. Curtis Emery von Kann, Independent Counsel, Eli Segal Investigation, Americorps Chief).
211. See id. at 680-85.
ports and issue periodic paychecks. The three-judge panel could not engage in more than superficial interaction with the special prosecutor for fear of pushing the statute over the separation-of-powers precipice. Morrison's stern tone clearly guided the Special Court in its timorous vision of itself. As Presiding Judge David Sentelle of the Special Division of the Court of Appeals informed the Senate Committee: "We do not oversee the Independent Counsel. We appoint the Independent Counsel—if we supervised, we would cross the line of the separation of powers, and I do not think the Supreme Court in Morrison would have upheld a statute that allowed for that." Judge Sentelle's former colleague on the Special Court, Judge John D. Butzner, Jr., put it in even more stark terms. In an academic forum, Judge Butzner opined that once it appointed a special prosecutor, the Special Court's job was "[v]ery little, and less than that."

Perhaps the reading of the Constitution set forth in Morrison was both inevitable and correct. Perhaps it was inescapable that federal appellate judges would be particularly ill-suited to run criminal investigations. But it took ten years to discover that this reading also disembroned the statute. When Congress crafted the independent counsel law in the 1970s, it absolutely did not envision that the special prosecutor would be accountable to no person or entity. Rightly or wrongly, Congress envisioned that the three-judge panel would serve as a surrogate for the attorney general and would perform the role that Elliot Richardson had performed during Watergate—interacting with the special prosecutor and keeping the investigation on track. An unaccountable special prosecutor was the last thing that Congress intended to create. As the statute evolved in the years after Morrison, however, that is precisely what emerged.

The solution, therefore, is to begin by separating the appointive function from the supervisory function. Much of the game can be won—with minimal cost to the governmental system—simply by creating a set of ground rules that maximizes public trust in the appoint-
ment process. Where substantial evidence exists that a felony has been committed by the president, vice president, or attorney general, Congress should mandate the triggering of the "tier-two" mechanism. In such cases, a special prosecutor must be appointed in a fashion that violates neither the separation-of-powers doctrine nor the public trust. All three branches of government should leave their imprint on the selection process, thereby eliminating any serious future assertions that the appointment was biased or rigged.

Once the tier-two mechanism is triggered, the attorney general (in consultation with the president, if those two officials deem it appropriate) would recommend three suitable appointees. A special panel of federal judges—selected randomly for this limited purpose—would be given the statutory duty to select one of the recommended candidates. This selection would occur only after the panel considered background information concerning each individual as well as written input from the attorney general. If the special panel determined that none of the three names the attorney general supplied was suitable for the particular investigation at hand, the panel would request a fresh batch of names and would begin the process anew.

Once a special prosecutor-designee was selected by the special panel of judges, the judicial branch's involvement would be complete.

217. This is similar to the approach advocated in a report published by the Miller Center of Public Affairs at the University of Virginia, which is co-chaired by Griffin B. Bell and Howard H. Baker, Jr. See MILLER CENTER OF PUBLIC AFFAIRS, THE SEPARATION OF POWERS: THE ROLES OF INDEPENDENT COUNSEL, INSPECTORS GENERAL, EXECUTIVE PRIVILEGE AND EXECUTIVE ORDERS (final report) (1998). The Miller Center Report recommended that Congress enact a statute requiring that when the president, vice president, or attorney general was the subject of a serious criminal investigation, the attorney general must recuse herself. Id. at 4. She would then be required to appoint an outside special prosecutor or a Justice Department official who was not disqualified. Id. The attorney general would still maintain the power to remove the special prosecutor for good cause. Id.

218. Cf. Barrett, supra note 153, at 647-48. Professor Barrett suggests that the attorney general create an annual roster of approximately fifteen experienced prosecutors to be considered for any investigations that may arise. See id.; Hearings on the Future of the Independent Counsel Act, supra note 26, at 285 (testimony of John Q. Barrett, Assistant Professor of Law, St. John's University, and former Associate Independent Counsel, Iran-Contra Investigation); see also Bell et al., supra note 34, at 477-78 (remarks of Lloyd Cutler, Senior Counsel, Wilmer, Cutler & Pickering) (suggesting that the president nominate, with advice and consent of the Senate, five or ten individuals to serve as independent counsel candidates). As suggested in Part II.C, this author believes that it is preferable to select a small number of candidates for a specific investigation.

219. Professor John Barrett has proposed a "Lotto" system by which chief judges from the federal circuits would be randomly chosen to select a recommended candidate. Barrett, supra note 158, at 647.

220. See id. at 647-48 (suggesting that the attorney general provide a list of experienced candidates each year); Gormley, supra note 16, at 685-86 (identifying the need to ensure that the attorney general has input in the selection process where appropriate).
The designee would face confirmation by the United States Senate—a process similar to that which took place when Archibald Cox and, practically speaking, Leon Jaworski were appointed during Watergate.\textsuperscript{221} The Senate would be free to conduct hearings, just as it does whenever an executive branch appointee requires confirmation.\textsuperscript{222} This would ensure that the special prosecutor-designee was both fit for the job and sufficiently neutral. The Senate confirmation would also caution against improvident removal by the president or his alter egos.\textsuperscript{223}

If the above approach were followed, one of the central goals of the original post-Watergate special prosecutor law—maximizing a sense of trust in the process by citizens and elected officials of both parties\textsuperscript{224}—would be neatly accomplished. The attorney general would remain actively involved in the selection process, thus eliminating separation-of-powers concerns.\textsuperscript{225} At the same time, a neutral entity—the special panel of federal judges—would be injected for the limited purpose of ensuring objectivity and detachment in making the final selection from the attorney general’s list.\textsuperscript{226} Although we have learned that special courts are ill-suited to run special prosecutor investigations,\textsuperscript{227} allowing judges to perform this limited appointive

\textsuperscript{221} See James Doyle, Not Above the Law: The Battles of Watergate Prosecutors Cox and Jaworski 234-45 (1977) (detailing the selection and introduction of Leon Jaworski as Cox’s replacement). Leon Jaworski, who succeeded Cox, was not technically confirmed by the Senate. Rather, bowing to intense pressure from Congress, the White House agreed to appoint Jaworski. Id. at 234 (indicating that the missing tapes raised the urgent need for Acting Attorney General Robert Bork to identify a special prosecutor to replace Cox). Robert Bork appointed the new special prosecutor. Id. at 234-37. Pursuant to Jaworski’s extremely protective charter, he could not be removed “except for extraordinary improprieties” and then only after the President consulted the Majority and Minority leaders of Congress as well as the ranking members of the two Judiciary Committees to determine “that their consensus is in accord with his proposed actions.” Kutler, supra note 84, at 427. Thus, Congress was very much involved in the entire process.\textsuperscript{222} See U.S. Const. art. II, § 2, cl. 2. (granting the Senate confirmation powers over executive appointments).\textsuperscript{223} For a thoughtful discussion of the value of the Senate confirmation process, see Brett M. Kavanaugh, The President and the Independent Counsel, 86 Geo. L.J. 2133, 2149-51 (1998).\textsuperscript{224} See supra notes 8-12 and accompanying text (discussing Congress’s desire after Watergate to renew public confidence in American government).\textsuperscript{225} See Gormley, supra note 16, at 685-86 (discussing the attorney general’s proposed involvement in the selection process).\textsuperscript{226} See id. at 686 (stating that “[u]ltimately, the special court must (and will) decide whom to appoint as independent counsel, unconstrained by political shackles”).\textsuperscript{227} See Hearings on the Future of the Independent Counsel Act, supra note 26, at 484-85 (testimony of Hon. David B. Sentelle, Presiding Judge of the Special Division of the Court of Appeals) (discussing the Special Division’s lack of supervisory power over independent counsel investigations and the unconstitutionality of any sort of judicial oversight); supra
function still makes good sense. The public wants to feel assured that
the deck is not stacked against the investigators or the investigated.
Elected officials, particularly those of the same political party as the
target, want strong assurances that the investigation will not turn into
a political assassination. All those concerned want a ready-made guar-
antee, from the inception of the investigation, that politics is not
poisoning the decision-making with respect to this unique, politically-
sensitive criminal inquiry. The judicial branch is the only branch of
government in the federal system that is removed, in fact and in struc-
ture, from the unruly fray of politics. Leaving the ultimate power of
selection to a neutral panel of federal judges creates a sense of confi-
dence that the appointment was not "fixed," getting the investigative
process off to a good start.

Moreover, because the attorney general would have proposed the
designee—rather than leaving the matter to the random whim of the
three-judge panel—and because the Senate would have tested that in-
dividual through rigorous confirmation hearings, there could be no
serious question about the neutrality of the final selection. All three
branches of government, under this new tier-two approach, would
have added their touch to the critical appointment stage. From this
springboard, a fair and balanced special prosecutor investigation
could be launched.

Supervisory power over the special prosecutor, pursuant to tier-
two investigations, would remain squarely in the hands of the attorney
general. The same internal procedures that governed tier-one special
prosecutors would govern tier-two special prosecutors.228 The attor-
ney general and the special prosecutor would use their collective good
judgment to determine—based upon the nature of the investiga-

notes 211-215 and accompanying text (exploring the problem of the independent counsel
as "a prosecutor with no home base within our tripartite system of government").

228. Under the expired independent counsel law, the special prosecutor was required
to follow internal Justice Department procedures. 28 U.S.C. § 594(f) (1994). However,
those procedures, heretofore, have been loose and incomplete. Attorney General Reno
herself admitted that there were “major loopholes” in the Justice Department procedures
with respect to special prosecutors. Hearings on the Future of the Independent Counsel Act,
supra note 26, at 275 (testimony of Attorney General Janet Reno). The expired statute,
which required an independent counsel to follow these policies except where not possible,
created an open-ended exception allowing an independent counsel to side-step the De-
partment of Justice procedures. See 28 U.S.C. § 594(f)(1); Hearings on the Future of the Inde-
pendent Counsel Act, supra note 26, at 274 (testimony of Attorney General Janet Reno)
/agreeing with Senator Durbin that the independent counsel statute “provides that [an
independent counsel] shall follow the policies of the [Justice] Department, except where
inconsistent with the purposes of this Act. And that creates a significant exception that is
subject to considerable interpretation.”). Such loopholes, as a first order of business,
would have to be closed.
the identity of the target, and so on—the appropriate amount of interaction between their two offices. One of the great failures of the independent counsel law—and of many investigations carried out under that statute as it evolved, including the Monica Lewinsky matter—was the almost compulsive effort by the Office of the Independent Counsel and the attorney general to stay away from each other. This distancing was presumably based upon a fear that any interaction might create an appearance of collusion and monkey-business. Perhaps that was an understandable concern. But it led independent counsels to increasingly build solid walls between themselves and the Justice Department. And it led the Justice Department to seal those walls with impenetrable mortar.

In drafting the independent counsel legislation, the original plan was never to alienate the attorney general and special prosecutor from one another. It is true that there had to exist a sufficiently opaque dividing wall between the two, so that the investigation would remain uncompromised. But this did not mean that the attorney general and the special prosecutor were meant to look the other way when they saw each other in the halls of the Justice Department. Archibald Cox and Attorney General Elliot Richardson dealt with each other regularly during the darkest days of Watergate. Although Richardson pledged to the Senate that Cox would remain independent, the two officials interacted freely, whenever necessary to keep the investigation on its proper track. The two met in Richardson's private fifth-floor Justice Department office to discuss the limits of Cox's jurisdiction; to discuss sensitive issues concerning the granting of immunity to

229. One danger in allowing independent counsels to build walls around themselves involves their ability to expand the jurisdiction of their investigation. See 28 U.S.C. § 593(b)(3) (authorizing an independent counsel "to fully investigate and prosecute the subject matter with respect to which the Attorney General has requested the appointment of the independent counsel, and all matters related to that subject matter" (emphasis added)). Even if the attorney general does not grant the independent counsel's request as set forth under 28 U.S.C. § 593(c)(2)(B), the jurisdiction may still be expanded by way of a court determination that the issue is "related" to the matter originally under investigation. Gormley, supra note 16, at 666 & n.268 (discussing judicial expansion of the independent counsel's jurisdiction).

230. See GORMLEY, supra note 1, at 294-99, 318-20. During Watergate there was a growing skepticism by White House officials toward Cox's investigation, and the "relationship of mutual trust between Cox and Richardson grew and wrapped them like ivy tighter together." Id. at 299.

231. See id. at 241-45 (detailing the concern held by members of the Senate regarding Richardson's reluctance to give Cox the independence needed to fully investigate the Watergate scandal). The relationship, of course, had some limits. See, e.g., id. at 237-38 (describing the agreement between Cox and Richardson that Special Prosecutor Cox would not share all of the details of the investigation).
witnesses when national security might be implicated; to wrangle over a host of matters, big and small, whenever the White House complained to Richardson that the special prosecutor was "off the reservation." The two men kept a respectful distance when it came to the confidential inner-workings of the Watergate Special Prosecution Force's operation, but they found room for responsible interaction.

When Congress enacted the original special prosecutor law after the Watergate experience, it was not only attempting to create a statute that would produce another Archibald Cox—a special prosecutor of unassailable character and integrity—but it was also seeking to bottle and preserve his unique relationship with the Justice Department. Although many overlook this fact, "the other element of the successful Watergate formula was Attorney General Richardson." Attorney General Richardson was a key ingredient in the proper functioning of the system. He acted as a skilled go-between in the struggle between the White House and the Watergate Special Prosecution Force, and he ultimately stood behind Cox when the President directed that Cox be fired. This is a model worth replicating and preserving. Whether a special prosecutor is appointed through the ad hoc method or through a tier-two mandatory appointment, there is room for cautious yet professional interaction with the official running the Justice Department. The special prosecutor himself or herself is in a position to make sensible judgments concerning what the attorney general should hear and not hear, know and not know, based upon the specific facts of the investigation. As Professor Barrett has aptly stated:

232. Id. at 296. Richardson sought to maintain the lines of communication and pass on to Cox complaints from the White House. See id. at 297-99.

233. See id. at 297-99 (explaining that while keeping a cordial relationship with Cox, Richardson remained loyal to the President's position).

234. See id. at 318-22. The task Richardson and Cox faced was similar to navigating a minefield with "the sands of Watergate blowing fiercely in their eyes." Id. at 320.

235. See id. at 234-36 (explaining Cox's merits, as discussed during the special prosecutor selection process); id. at 346-52 (describing the tense moments leading to and including the press conference at which Cox announced he would not accept the President's forced compromise regarding the White House tapes).


237. See supra notes 230-234 and accompanying text (discussing Richardson's relationship with the White House and with Cox).

238. See GORMLEY, supra note 1, at 345-46 (outlining Richardson's reasons for resigning upon Cox's dismissal).
The scope and quality of this relationship would be in the discretion of the independent counsel. Some independent counsel will never "hit it off" with some Attorneys General because of who they are (for example, a close colleague of the independent counsel's subject), because of what and where they have been both professionally and personally, and because of other facts that may be unique to an investigation. But other independent counsel may try to develop a pattern of contacts and a level of trust in Attorneys General, especially if it becomes better understood that the independent counsel has the upper or only hand with regard to the conduct of his investigation.\textsuperscript{239}

A system premised upon creating a kryptonite wall between the attorney general and the special prosecutor is both undesirable and unhealthy. Special prosecutors, if their investigations are to proceed smoothly, need the help and support of the Justice Department, with whom they must act in synchronization. The Justice Department needs to develop a positive working relationship with special prosecutors so that their investigations stay on course without damaging the criminal justice system they are both sworn to protect.

Admittedly, under the two-tiered scheme set forth above, the Saturday Night Massacre dilemma does not vanish. Whether the attorney general appoints a special prosecutor pursuant to her own initiative (tier one), or whether the attorney general is statutorily mandated to appoint a special prosecutor (tier two), nothing will stop the attorney general from firing the special prosecutor if she decides to issue that command. Indeed, nothing can physically compel the attorney general to appoint a special prosecutor even in the most egregious circumstances—that is, even where the statutory threshold is patently met—if she is hell-bent on defying Congress.\textsuperscript{240}

\textsuperscript{239} Barrett, supra note 236, at 545.

\textsuperscript{240} Senator Arlen Specter of Pennsylvania, during the course of the 1999 Senate hearings, repeatedly sought to probe witnesses to determine whether there was some constitutional fashion by which Congress could ask a federal court to mandamus an attorney general to appoint a special prosecutor if she refused to do so. See Hearings on the Future of the Independent Counsel Act, supra note 26, at 95-96, 396-97 (remarks of Sen. Arlen Specter) (questioning Hon. Curtis Emery von Kann, Joseph diGenova, Samuel Dash, Julie O'Sullivan, and Ken Gormley). Witness after witness concluded that, in the final analysis, there was no way (consistent with the separation of powers doctrine) for Congress to hold a gun to the head of the attorney general and force her to initiate a criminal proceeding if she did not believe that the statutory threshold had been met and refused to take such action. See id. at 95 (testimony of Hon. Curtis Emery von Kann, Independent Counsel, Eli Segal Investigation, Americorps Chief); id. at 96 (testimony of Joseph E. diGenova, Independent Counsel, Clinton Passport File Investigation); id. at 397-98 (testimony of Julie Rose O'Sullivan, former Assistant Prosecutor of the Whitewater Investigation and Professor...
But this fly in the ointment is unavoidable if Congress wishes to return special prosecutor investigations back to the hands of the executive branch, which seems to be, at least at present, the overwhelming legislative consensus. At the same time, the chances of revolt by an attorney general, as a practical matter, would be greatly diminished by the creation of a careful set of internal regulations guiding the appointment (and dismissal) of tier-one special prosecutors. They would also be diminished by a statutory command that she appoint (and stand behind) a special prosecutor in circumstances that fall under tier two. Moreover, a provision requiring "good cause" to terminate a special prosecutor—under either tier—would reduce the chance of mischief.241 Although an attorney general bent on defying Congress and the American public could technically accomplish that goal, he or she would take such action at her own (and at the president's) peril.242

CONCLUSION: A TWO-TIERED SYSTEM THAT BENEFITS ALL PARTIES

The unsatisfying Lewinsky scandal and the bloody battle over the Clinton impeachment taught us a number of things. One was that a special prosecutor law that eliminates accountability to our tripartite system of government is a disaster for all concerned. The independent counsel statute, as originally conceived in the post-Watergate years, envisioned that the three-judge panel would monitor special prosecutor investigations and keep them on track.243 Rightly or wrongly, once Morrison v. Olson made it clear that all meaningful judicial supervision was impermissible,244 the special prosecutor became a creature without a home base. Not only did lack of accountability lead to charges that the Office of Independent Counsel had run

241. Cf. 28 U.S.C. § 596(a)(1) (1994) (providing that the attorney general can only remove an independent counsel for "good cause").

242. Witnesses before the Senate Committee argued against a mandamus provision in an independent counsel statute because Congress may instead rely on political pressure to encourage the attorney general to initiate an investigation. See Hearings on the Future of the Independent Counsel Act, supra note 26, at 97 (testimony of Joseph E. diGenova) (discussing the tools of the advise and consent process, the appropriations process, and the reauthorization process as helpful in encouraging the appointment of special prosecutors); id. at 95 (testimony of Hon. Curtis Emery von Kann) (asserting the value of public outcry in forcing the appointment of a special prosecutor).

243. See supra notes 215-216 and accompanying text (discussing Congress's early expectations and practical experiences involving the role of the three-judge panel in shaping special prosecutor investigations).

244. See Morrison, 487 U.S. at 680-85.
amok, but it also intensified friction between the Justice Department and the special prosecutor, causing the beleaguered Independent Counsel Kenneth Starr to complain "that a statutory Independent Counsel is out there alone," with no real back-up from the Justice Department.\textsuperscript{245}

We have learned from recent accounts concerning the Starr investigation that Attorney General Reno's staff and Independent Counsel Starr's staff reached a point of near-contempt for each other by the time the Lewinsky scandal was in full bloom. The recent book on the Clinton scandals authored by veteran reporters Susan Schmidt and Michael Weisskopf demonstrates that the relationship between the two offices—on the eve of Starr's testimony before the House Judiciary Committee regarding the impeachment of President Clinton—had become frayed and dysfunctional.\textsuperscript{246} Starr himself, during the course of his Senate testimony, openly and bitterly referred to the lack of support that his office received from the Justice Department, stating that this damaged his ability to perform his job properly.\textsuperscript{247} Starr told the Senate Committee: "I think it is a matter of public record we were not met with full cooperation in this investigation."\textsuperscript{248} In a recent article in the George Mason Law Review, adapted from his first speech after leaving the Office of Independent Counsel, Starr further commented:

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 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.\textsuperscript{249}

Rather than working as a team to pursue an investigation and perhaps bring it to a mutually satisfactory conclusion, the Attorney General's office and Starr's office drifted into opposing camps like

\textsuperscript{245} Hearings on the Future of the Independent Counsel Act, supra note 26, at 465 (testimony of Kenneth W. Starr, Independent Counsel).
\textsuperscript{246} Schmidt & Weisskopf, supra note 28, at 262-67.
\textsuperscript{248} Id. at 465.
\textsuperscript{249} Kenneth W. Starr, Lessons Learned From the Recent Past, 8 Geo. Mason L. Rev. 349, 350 (1999). This article was adapted from a speech Starr delivered at a luncheon hosted by the Fairfax County Chamber of Commerce on November 4, 1999, shortly after he left the Office of Independent Counsel. Id. at 349 n.*.
two pugilists in contrary corners. If there had been an ongoing relationship between the two offices, regular dialogue between Starr and Reno, and a clear chain of command that gave Attorney General Reno responsibility for the special prosecutor's actions, is it possible that the Lewinsky investigation would have followed a different path? Is it possible that Attorney General Reno would have appointed a different independent counsel to handle the Lewinsky matter when she realized that Kenneth Starr (by virtue of his Whitewater baggage) was perceived by a large segment of the American public as biased against the President? Even if Starr had been authorized to expand into this new matter—largely unrelated to his Whitewater charter—is it possible that Attorney General Reno would have put the brakes on the Lewinsky investigation if she had concluded that Starr's staff was acting in an unduly aggressive manner? Would regular meetings between Reno and Starr (of the sort Archibald Cox and Elliot Richardson engaged in), during which Reno voiced her concerns and suggested alternative approaches in the Lewinsky matter, have given the investigation a softer edge? If Attorney General Reno had directly participated in the selection of the Whitewater special prosecutor in the first place, rather than having the three-judge panel trump her selection of Robert Fiske and replace him with Starr, would she have stood behind her appointee when the investigation came under political attack? Would she have worked more closely with the special prosecutor to smooth out conflicts with the White House in order to salvage the trust and respect of the American public?

In the end, the now-defunct independent counsel statute proved harmful to all concerned—the attorney general, the special prosecutor, and the target of the investigation. The special prosecutor drifted around with no connection to, support from, or restraint by any branch of government. The two-tiered approach set forth above, although a minimalist replacement for the once grandiose independent counsel law, would at least cure that glaring defect. The attorney general would remain firmly in charge of the overwhelming bulk of special prosecutor investigations. Internal Justice Department regulations would exist to govern ad hoc appointments of special prosecutors. Only in rare and serious circumstances—where substantial evidence was brought to light suggesting that the president,

250. See supra notes 246-249 and accompanying text (discussing the tense relationship between the Office of Independent Counsel Kenneth Starr and the Attorney General's Office).

251. See supra notes 201-207 and accompanying text (discussing the creation of Justice Department guidelines to be used in "tier-one" appointments of special prosecutors).
vice president, or attorney general had committed a felony—would a statutory mechanism be triggered that mandated the appointment of a suitable special prosecutor, selected with the blessing of all three branches of government.\footnote{252} Even in such rare situations, this prosecutor would still have room to interact with and be accountable to the attorney general. The attorney general would also still have ultimate authority to reign in (and if necessary terminate) a special prosecutor. Another Saturday Night Massacre, in theory, could still occur. But at least a fail-safe mechanism would be in place to minimize the chance of runaway scandals and to head off constitutional crises.

In the end, neither guns, nor mandamus actions,\footnote{253} nor any other form of compulsion can force an attorney general to appoint a suitable special prosecutor if she is determined to resist it.\footnote{254} But in moments of crisis, creating an orderly set of rules that the attorney general must follow is vastly superior to creating no set of rules at all. The two-tiered approach set forth above, building a fall-back position atop the usual ad hoc method of appointing special prosecutors, provides a positive statutory boost for all concerned. First, it assists the attorney general. It gives her statutory cover if she is being pressured by the White House to take inappropriate positions with respect to investigations in which the president or vice president is directly implicated.\footnote{255} It gives the attorney general an easy statutory justification for making the decision to punt to a special prosecutor.\footnote{256}

More importantly, the two-tiered approach provides a statutory box into which the attorney general can be cornered if she resists the ad hoc appointment of a special prosecutor. Congress, the American public, and the ever-watchful news media can apply enormous pressure on the attorney general, if a matter like Watergate or the Lewinsky scandal reaches crisis proportions, forcing her to follow the statutory command. Rather than being left with a system that vests unlimited discretion in an individual presidential appointee in extreme circumstances, the availability of a tier-two investigation would

\footnote{252. \textit{See supra} notes 208, 217-223 and accompanying text (detailing the need for a guaranteed method of investigating the highest ranking executive branch officials for alleged misconduct and suggesting the two-tiered approach).}

\footnote{253. \textit{See supra} note 240 (discussing Senator Specter's inquiry into the constitutionality of mandamus to force an unwilling attorney general to appoint a special prosecutor).}

\footnote{254. \textit{See supra} notes 240-242 and accompanying text (addressing the lack of compelling authority to force an attorney general to appoint a special prosecutor).}

\footnote{255. \textit{See supra} notes 217-223 and accompanying text (presenting a mechanism that removes an investigation of the president, vice president, or attorney general to a special prosecutor outside the Justice Department).}

\footnote{256. \textit{See} \textit{Hearings on the Future of the Independent Counsel Act}, \textit{supra} note 26, at 329 (testimony of Lawrence E. Walsh, former Independent Counsel, Iran-Contra Investigation).}
provide a corner into which to nudge a reluctant or compromised attorney general.\textsuperscript{257}

Finally, the two-tiered approach would actually provide a form of protection for a special prosecutor by establishing a three-branch consensus with respect to his or her selection, backed by strict Justice Department procedures that limit the circumstances under which he or she could be dismissed. It would also provide more incentive for the attorney general and the special prosecutor to interact in a productive fashion, and for the attorney general to stand behind a special prosecutor (whom she helped select) when that neutral official came under fire.

Shakespeare's Marc Antony once observed that: "[t]he evil that men do lives after them; [t]he good is oft interred with their bones."\textsuperscript{258} In its death, the independent counsel law has shone a light on at least one path that can help ensure that scandals and crises do not sap the strength, vitality, and sense of public confidence out of our American democratic republic. Congress's challenge is to learn from, and build upon, the experiences of the past twenty-three years. It must not allow itself to purge those experiences, however unpleasant, from its memory.

Otherwise, future generations of citizens will simply have to face the adverse consequences the next time a crippling scandal strikes the executive branch, at some unexpected moment in American history.

\textsuperscript{257} See supra note 242 (identifying the political and other pressures that can be brought to bear upon a defiant attorney general).

\textsuperscript{258} WILLIAM SHAKESPEARE, JULIUS CAESAR, act 3, sc. 2. This analogy was previously made by Nathan Lewin. \textit{Hearings on the Future of the Independent Counsel Act, supra}, note 26, at 155 (testimony of Nathan Lewin, Miller, Cassidy, Larroca, and Lewin).