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"When the President Does It": Why Congress Should Take the Lead in Investigations of Executive Wrongdoing

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NOTES

“WHEN THE PRESIDENT DOES IT”: WHY CONGRESS SHOULD TAKE THE LEAD IN INVESTIGATIONS OF EXECUTIVE WRONGDOING

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INTRODUCTION

Asked by British journalist David Frost whether the President of the United States has the ability to authorize illegal acts when he believes such action is justified, Richard Nixon infamously replied: “Well, when the President does it, that means it is not illegal.”¹ A majority of Americans disagreed with the former President’s assessment.² But the question remains: If the President is theoretically capable of breaking the law while in office, what is the best way to determine whether a crime has actually been committed? This question has forced lawmakers to attempt to reconcile various investigatory mechanisms—all differing in their independence from presidential interference—and the constitutional separation of powers. Previous attempts to resolve the problem by assigning investigations to the Department of Justice (DOJ), from the independent counsel system to the current DOJ special counsel, have attracted vociferous criticisms on constitutional grounds.³ Special counsel investigations have also traditionally lasted for years,⁴ with the primary form of public disclosure coming in the form of criminal indictments.⁵ So if the public feels that an

1. *I Have Impeached Myself: Edited Transcript of David Frost’s Interview with Richard Nixon Broadcast in May 1977*, GUARDIAN (Sept. 7, 2007), <https://www.theguardian.com/the-guardian/2007/sep/07/greatinterviews1> [<https://perma.cc/G5RE-PBHC>].

2. A September 1974 Gallup poll found that 58 percent of the public believed that Nixon should be criminally charged with regard to his actions in the Watergate scandal. See Andrew Kohut, *How the Watergate Crisis Eroded Public Support for Richard Nixon*, PEW RESEARCH CTR. (Aug. 8, 2014), <http://www.pewresearch.org/fact-tank/2014/08/08/how-the-watergate-crisis-eroded-public-support-for-richard-nixon/> [<https://perma.cc/2HYD-YUC6>].

3. For a critique of the independent counsel, see Morrison v. Olson, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting). For a critique of the special counsel, see Steven G. Calabresi, *Opinion on the Constitutionality of Robert Mueller’s Appointment* 1-20 (Nw. Univ. Pub. Law & Legal Theory Series, Paper No. 18-14, 2018).

4. The Iran-Contra independent counsel investigation lasted seven years, and the Whitewater investigation lasted eight years. See George Lardner Jr. & Walter Pincus, *Iran-Contra Report Castigates Reagan*, WASH. POST (Jan. 19, 1994), <https://www.washingtonpost.com/archive/politics/1994/01/19/iran-contra-report-castigates-reagan/963af142-5b5a-460c-b4f7-28b7e25fbb25/> [<https://perma.cc/6UZE-YVZP>]; Neil A. Lewis, *Final Report by Prosecutor on Clintons Is Released*, N.Y. TIMES (Mar. 21, 2002), <https://www.nytimes.com/2002/03/21/us/final-report-by-prosecutor-on-clintons-is-released.html> [<https://perma.cc/6W5V-9AKX>].

5. The secrecy of the Mueller special counsel team became a running joke in Washington, with one journalist remarking, “You’d be embarrassed to ask Bob Mueller for a leak.... It’d be like asking him to watch a porn movie with you.” See Darren Samuelsohn, *Robert Mueller Has*

investigation is unwarranted or politically motivated, there is no way for them to register their disapproval. In a highly partisan political environment in which investigations of the executive are likely to continue indefinitely,⁶ it is necessary to devise a more durable solution.

This Note proposes an alternative solution to the challenge of conducting executive investigations, one that keeps in mind the dual goals of sufficient investigatory independence and sufficient public accountability. Rather than continued efforts to bureaucratize investigations of the executive by entrusting them to career prosecutors, Congress should instead shoulder the primary responsibility for initiating investigations and conducting executive oversight. This role would be consistent with the Supreme Court’s constitutional interpretation and Congress’s own historical practice, and would help to insulate future investigations from the possibility of executive interference without infringing on the President’s constitutionally delegated authority over all members of the executive branch. Such an approach would also be the fastest way to bring misdeeds to light, thereby serving the public interest in disclosure and enhancing executive accountability at the ballot box.

This Note will proceed as follows. Part I will describe previous attempts to institutionalize a formalized system within the executive branch for investigations of executive misconduct and the constitutional and practical problems inherent in each. Part II will describe the history of successful congressional investigations that inspired the proposed solution—relocating investigative authority from the executive branch to Congress—and the values of investigatory independence, constitutional faithfulness, and public accountability that such an approach would promote. Part III will address the strongest counterarguments, including concerns over constitutionality, partisanship, and justice.

No Comment, POLITICO (Oct. 2, 2017, 5:01 AM), <https://www.politico.com/story/2017/10/02/robert-mueller-russia-probe-secret-243345> [<https://perma.cc/7TDJ-TLVN>].

6. See Jonathan Swan, *Scoop: Republicans Secretly Study Their Coming Hell*, AXIOS (Aug. 26, 2018), <https://www.axios.com/2018-midterm-elections-republicans-preparation-investigations-180abf7b-0de8-4670-ae8a-2e6da123c584.html> [<https://perma.cc/ENM2-MZ22>].

I. HISTORY OF EXECUTIVE BRANCH INVESTIGATORY MECHANISMS

Investigations into executive branch misconduct that are simultaneously housed *within* the executive branch are a relatively recent invention in America. The DOJ was not created until 1870,⁷ and Congress continued to dominate the investigatory landscape throughout the subsequent century.⁸ This Part will assess the executive branch investigatory mechanisms that were eventually created, and the problems inherent in each.

A. *Flaws of the Independent Counsel System*

Before the Watergate scandal, there was no formalized system in place for conducting investigations into alleged executive misconduct.⁹ When suspicion of wrongdoing increased to the point that public pressure became impossible to ignore, the President would simply appoint a special prosecutor to investigate the matter on an ad hoc basis.¹⁰ This approach raised several obvious concerns, all rooted in the unitary decision-making authority entrusted to the President. Deciding whether a given situation warranted the appointment of a special prosecutor was the President's sole responsibility;¹¹ the identity and qualifications of the prosecutor, if appointed, were left to the President's discretion;¹² and the President defined the parameters of the investigation once it

7. "By 1870 ... the increase in the amount of litigation involving the United States had required the very expensive retention of a large number of private attorneys to handle the workload. A concerned Congress passed the [Judiciary] Act to Establish the Department of Justice." See *About DOJ*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/about/> [<https://perma.cc/ZQCS-NZ44>].

8. For a list of prominent congressional investigations conducted during this time period, see *A History of Notable Senate Investigations*, U.S. SENATE, <https://www.senate.gov/artandhistory/history/common/briefing/Investigations.htm> [<https://perma.cc/7JP7-ZST8>].

9. See KATY J. HARRIGER, *THE SPECIAL PROSECUTOR IN AMERICAN POLITICS* 15 (2d ed., rev. 2000).

10. *Id.* at 15-19.

11. "As press and public attention mounted ... Pres[ident] Calvin Coolidge began to feel the pressure to respond and to demonstrate his concern about the charges." *Id.* at 15-16.

12. "When [Truman] could not get his first choice to head the commission, he chose Newbold Morris, a Republican lawyer from New York ... 'who possessed no political instincts whatsoever.'" *Id.* at 17-18.

commenced.¹³ Such total trust in the good character of the Commander-in-Chief seems impossibly naïve to modern eyes, but in the few pre-Watergate instances in which the President utilized this system, it successfully produced accountability. The special counsels appointed to investigate the Teapot Dome scandal¹⁴ successfully prosecuted the individuals involved,¹⁵ and President Truman once dismissed his own Attorney General when he attempted to end a special counsel investigation without first obtaining the President’s approval.¹⁶

Watergate changed everything because it revealed the extent to which the existing special counsel system was vulnerable to retaliation from a President who had little incentive to assist an investigation.¹⁷ President Nixon initially agreed to appoint Special Prosecutor Archibald Cox only because the Senate threatened to block his appointment of a new Attorney General if he refused,¹⁸ and he reconsidered the wisdom of continued compliance with the investigation after the D.C. Circuit Court of Appeals ruled that Nixon must turn over “material evidence” consisting of subpoenaed White House tape recordings for *in camera* inspection.¹⁹ In response, Nixon proposed a solution to the impasse: he would release edited summaries of the tapes to the Senate Watergate Committee and the grand jury.²⁰

Cox refused to accept this improvisational offer, calling it “non-complian[t] with the court’s order” in a public press conference and

13. “Truman ... suggested to [Attorney General] McGrath that the new special prosecutor was reaching beyond his assignment.” *Id.* at 18.

14. The Teapot Dome scandal involved Secretary of the Interior Albert Fall dispensing naval oil reserves to private interests and personally profiting about “\$400,000 ... illegally through [the] secret deals.” KENNETH WHYTE, *HOOVER: AN EXTRAORDINARY LIFE IN EXTRAORDINARY TIMES* 288 (2017).

15. See HARRIGER, *supra* note 9, at 17.

16. *Id.* at 18.

17. If Nixon had not delayed and eventually forced the Supreme Court to override his claim of executive privilege over subpoenaed evidence, it is unlikely that he would have remained in office until August of 1974. See *United States v. Nixon*, 418 U.S. 683, 705-13 (1974) (analyzing Nixon’s constitutional argument).

18. See HARRIGER, *supra* note 9, at 20.

19. *Nixon v. Sirica*, 487 F.2d 700, 722 (D.C. Cir. 1973) (per curiam).

20. Warren Weaver Jr., *Cox News Conference*, N.Y. TIMES (Oct. 20, 1973), <http://movies2.nytimes.com/learning/general/onthisday/big/1020.html#article> [<https://perma.cc/E9WQ-WD3K>].

openly questioning whether the President (as opposed to the Attorney General) had the constitutional right to order him to do anything.²¹ Within hours, Nixon retaliated by ordering his Attorney General to fire Cox,²² citing as justification Cox's refusal to accept Nixon's offer.²³ In his statement announcing the firing, White House Press Secretary Ronald Ziegler claimed that the President was the party who acted "to avoid a constitutional confrontation" by proposing an innovative solution that sought to provide the investigators with the evidence they needed "with the least possible intrusion of Presidential privacy."²⁴ Cox's dismissal, coupled with the simultaneous departures of the two top officials at the DOJ,²⁵ provoked a massive public outcry²⁶ and led to the rapid appointment of a new special prosecutor who guided the investigation to its conclusion.²⁷

After Nixon's resignation, Congress set out to devise a new system for investigating the executive with the primary objective of protecting future prosecutors from the possibility of presidential retaliation.²⁸ The Ethics in Government Act of 1978 (the EGA)

21. *Id.*

22. Douglas E. Kneeland, *Nixon Discharges Cox for Defiance; Abolishes Watergate Task Force; Richardson and Ruckelshaus Out*, N.Y. TIMES (Oct. 20, 1973), <http://movies2.nytimes.com/learning/general/onthisday/big/1020.html#article> [<https://perma.cc/Z8QM-85AP>].

23. For an analysis of Nixon's use of congressional cooperation in this instance as a shield against the special prosecutor, see *infra* text accompanying notes 75-79.

24. Kneeland, *supra* note 22. On the other hand, "Mr. Cox's refusal to proceed in the same spirit of accommodation ... made it necessary for the President to discharge Mr. Cox," according to Ziegler. *Id.*

25. Both Attorney General Elliot Richardson and Deputy Attorney General William Ruckelshaus refused to fire Cox, and were summarily relieved of their duties. *Id.* For Ruckelshaus's perspective on these events, see William D. Ruckelshaus, *A 'Saturday Night Massacre' Veteran Offers Trump Some Advice*, N.Y. TIMES (July 27, 2017), <https://www.nytimes.com/2017/07/27/opinion/a-saturday-night-massacre-veteran-offers-trump-some-advice.html> [<https://perma.cc/S79D-FRDB>].

26. "Senior members of both parties in the House of Representatives were reported to be seriously discussing impeachment of the President ... because of Mr. Nixon's dismissal of Mr. Cox." Kneeland, *supra* note 22.

27. See John Herbers, *Nixon Names Saxbe Attorney General; Jaworski Appointed Special Prosecutor*, N.Y. TIMES (Nov. 2, 1973), <https://www.nytimes.com/1973/11/02/archives/nixon-names-saxbe-attorney-general-jaworski-appointed-special.html> [<https://perma.cc/H64B-EMZA>].

28. "[The legislation] embodies major reform proposals designed to improve the operation of the most basic institutions of the Federal Government and to assure the accountability of public officials." 123 CONG. REC. 20,956 (1977) (statement of Sen. Ribicoff).

created the independent counsel, an empowered version of the special counsel who operated under the aegis of the DOJ and could only be appointed by a designated panel of federal judges upon the request of the Attorney General.²⁹ The Attorney General would make the determination whether an independent counsel was needed without any input from the President.³⁰ Most importantly, the EGA restricted the conditions under which the Attorney General could dismiss an independent counsel to objectively discernible situations of “good cause, physical or mental disability ... or any other condition that substantially impairs the performance of such independent counsel’s duties.”³¹ Congress, aiming to restore public confidence in fair executive oversight, handcuffed future Presidents³² from exercising unreviewable discretion in firing a special prosecutor while also acting to deter the executive from installing political allies in the position.³³

The first signs of trouble for the independent counsel system came not from the political branches of government, but from the courts. In 1988, the Supreme Court ruled eight to one in *Morrison v. Olson* that the independent counsel system *was* constitutional, in a ruling that has never officially been overturned.³⁴ The majority held that the statute did not impermissibly undermine the President’s constitutional authority over the executive functions of the federal government because the ability of the Attorney General to hire and fire an independent counsel at her discretion “g[a]ve the

29. Ethics in Government Act of 1978, Pub. L. No. 95-521, § 592(c)(1), 92 Stat. 1868 (codified at 28 U.S.C. § 592 (2012)).

30. *Id.*

31. 28 U.S.C. § 596(a)(1).

32. The legislation was promoted primarily as a response to Watergate, with one senator noting that it was substantially similar to an unsuccessful prior bill, the Watergate Reorganization and Reform Act of 1976. *See* 123 CONG. REC. 20,956 (1977) (statement of Sen. Ribicoff). When the Senate considered the conference report that constituted the final version of the bill, the separation of powers implications went unmentioned. *See* 124 CONG. REC. 34,527 (1978) (statement of Sen. Percy).

33. “The public will much more readily accept the decision of an independent special prosecutor, who determines that no wrongdoing was committed by high officials, than that same opinion from an Attorney General who has been called upon to decide the fate of a friend or associate.” *Id.*

34. *See* 487 U.S. 654, 696-97 (1988).

Executive Branch sufficient control ... to ensure that the President [was] able to perform his constitutionally assigned duties.”³⁵

Justice Scalia, in the sole dissenting opinion, disagreed.³⁶ In his view, the EGA impermissibly robbed the President of a portion of the executive authority granted him under Article II, Section 1, Clause 1 of the Constitution³⁷ by creating a fully empowered federal prosecutor whom the President could not control; in fact, such a modification of the traditional separation of powers structure “[was] indeed the whole object of the statute.”³⁸ For Justice Scalia, the constitutional analysis was simple: if the power at issue was one specifically assigned to the executive (and he believed that the responsibility for law enforcement indisputably was³⁹), then it was not a power that Congress had the authority to revoke.⁴⁰

Though few agreed with him then, by the time of the Clinton impeachment drama, Justice Scalia’s dissent had gained widespread currency among political elites of both parties.⁴¹ After only two tumultuous decades, bipartisan legislative majorities agreed to let Congress’s solution expire without fanfare.⁴² After twenty-one independent counsel investigations in as many years⁴³ that inflicted political damage on presidential administrations of both parties,⁴⁴

35. *Id.* at 696.

36. *Id.* at 697-734 (Scalia, J., dissenting).

37. This clause is known as the Vesting Clause and stipulates that “[t]he executive Power shall be vested in a President of the United States of America.” U.S. CONST. art. II, § 1, cl. 1.

38. *Morrison*, 487 U.S. at 706 (Scalia, J., dissenting).

39. The textual justification for this belief will be addressed in Part IV.A. *See infra* text accompanying notes 112-14.

40. “[Article II, Section 1, Clause 1] does not mean *some* of the executive power, but *all* of the executive power.” *Morrison*, 487 U.S. at 705 (Scalia, J., dissenting).

41. “After 10 years of mouldering on law library shelves, the Scalia dissent in *Morrison v. Olson* is being cited and passed around in liberal circles like samizdat.” Linda Greenhouse, *Blank Check; Ethics in Government: The Price of Good Intentions*, N.Y. TIMES (Feb. 1, 1998), <https://www.nytimes.com/1998/02/01/weekinreview/blank-check-ethics-in-government-the-price-of-good-intentions.html> [<https://perma.cc/5MCQ-FQJJ>].

42. *See* Helen Dewar, *Independent Counsel Law Is Set to Lapse*, WASH. POST (June 5, 1999), <https://www.washingtonpost.com/wp-srv/politics/special/counsels/stories/counsel060599.htm> [<https://perma.cc/H9DB-NPU4>].

43. For records relating to these investigations, see *Special Prosecutors and Independent Counsels Records*, NAT’L ARCHIVES, <https://www.archives.gov/research/investigations/special-prosecutors-indept-counsels> [<https://perma.cc/87GV-G88R>].

44. Bill Clinton called his decision to request that Attorney General Janet Reno appoint an independent counsel to investigate Whitewater “the worst presidential decision I ever made.” BILL CLINTON, *MY LIFE* 574 (1st ed. 2004).

most in Washington felt that the treatment had been more painful than the disease.⁴⁵ Even if Congress somehow decided to revive the independent counsel statute today, it is not at all clear that an increasingly formalist Court would vote to uphold it in the face of a changed bipartisan consensus.⁴⁶

B. Flaws of the Special Counsel System

The independent counsel presented practical problems for the President that stemmed from a fundamental constitutional violation: an attempt by Congress to remove a subset of the federal law enforcement apparatus from the President’s direct control. Attorney General Janet Reno attempted to rectify these flaws in 1999, upon the expiration of the statute authorizing the office of independent counsel, by promulgating new regulations that allow the Attorney General to appoint a special counsel when she believes (1) that a criminal investigation is warranted and (2) that conducting such an investigation using ordinary DOJ prosecutorial resources would present some conflict of interest.⁴⁷ The Attorney General has appointed all special prosecutors since 1999, including the most recent, Special Counsel Robert Mueller, pursuant to these regulations.⁴⁸

These DOJ regulations fixed the constitutional flaw identified by Justice Scalia by housing future investigations of the executive squarely *inside of* the executive branch, but in her attempt to respond to that critique, Reno inadvertently created a new problem—or rather, as evidenced by the case of Richard Nixon,

45. “Many Republicans have long opposed the law.... Democrats’ ardor for the law cooled rapidly when it was employed against Clinton administration officials, including Clinton himself.... Even [Independent Counsel Kenneth] Starr has urged that the law be allowed to lapse.” Dewar, *supra* note 42.

46. “[A] bipartisan judgment had formed that the Independent Counsel was a kind of constitutional Frankenstein’s monster, which ought to be shoved firmly back into the ice from which it was initially untombed.” Adrian Vermeule, Morrison v. Olson *Is Bad Law*, LAWFARE (June 9, 2017, 8:14 PM), <https://www.lawfareblog.com/morrison-v-olson-bad-law> [<https://perma.cc/YTM8-ZU7X>].

47. 28 C.F.R. § 600.1 (2019).

48. ROD J. ROSENSTEIN, OFF. OF THE DEPUTY ATT’Y GEN., APPOINTMENT OF SPECIAL COUNSEL TO INVESTIGATE RUSSIAN INTERFERENCE WITH THE 2016 PRESIDENTIAL ELECTION AND RELATED MATTERS (2017), <https://www.justice.gov/opa/press-release/file/967231/download> [<https://perma.cc/7XJJ-T4C2>].

resurrected an old one. The decision to return special counsel investigations to the DOJ brought them once more under the authority of the President and removed the special protections that insulated the independent counsel from political interference.⁴⁹ In fact, the current regulations are not even subject to the notice-and-comment procedures that ordinarily accompany federal rulemaking “because they relate to ‘matters of agency management or personnel,’ and ‘agency organization, procedure, or practice.’”⁵⁰

In other words, the decision to fire the special counsel is now an internal DOJ matter that does not differ in any meaningful way from the decision to fire any other executive branch employee.⁵¹ This creates a glaring problem for anyone concerned about the independence of executive branch investigations and makes it difficult to hold the President accountable if he has committed a crime.⁵² The attempt to respond to the failures of the independent counsel system by moving towards greater faithfulness to the Constitution and away from greater investigatory independence has resulted in an overcorrection that needs to be balanced. The pendulum will keep swinging between these two bad options unless Congress acts to remove investigations of the executive from the purview of the executive branch.

II. THE SOLUTION: CONGRESS AS PRIMARY INVESTIGATIVE AUTHORITY

In order to avoid the constitutional issues raised by the independent counsel system and the independence concerns implicated by the

49. “[T]he special counsel regulations can be unilaterally revoked by the very executive branch that unilaterally created them.” George Conway, *The Terrible Arguments Against the Constitutionality of the Mueller Investigation*, LAWFARE (June 11, 2018, 5:54 PM), <https://www.lawfareblog.com/terrible-arguments-against-constitutionality-mueller-investigation> [<https://perma.cc/WT3G-LMAF>].

50. *Id.* As Conway notes, this “suggests they could be dispensed with equally unceremoniously.” *Id.*

51. *See id.*

52. It also means that ad hoc, extralegal methods have become the only defenses available to shield the special counsel from presidential retaliation. *See* Michael S. Schmidt & Maggie Haberman, *Trump Ordered Mueller Fired, but Backed Off When White House Counsel Threatened to Quit*, N.Y. TIMES (Jan. 25, 2018), <https://www.nytimes.com/2018/01/25/us/politics/trump-mueller-special-counsel-russia.html> [<https://perma.cc/P3R8-8WEG>].

current system, the primary responsibility for future investigations of the executive branch should be vested in Congress. This role for the legislature would not only be responsive to modern concerns about accountability and independence, but would also be consonant with the historical role of Congress as outlined by the Constitution and interpreted by the Supreme Court. It would also ensure that alleged executive misdeeds are subjected to public scrutiny, allowing the electorate to respond accordingly and enforce accountability for bad actors at the ballot box.

A. *Historical Support for Congressional Investigations*

In contrast to investigations by independent and special counsels, congressional investigations have been a feature of American political life since the start. Congress’s primary responsibility under the Constitution is the exercise of “legislative powers,”⁵³ a phrase defined as “[t]he power to make laws and to alter them.”⁵⁴ Since long before the American Revolution, this power has been understood in Anglo-American law as encompassing the ability to gather pertinent facts in order to produce legislation,⁵⁵ and the first instances of congressional investigation of the executive branch occurred during the Washington administration.⁵⁶ For the founding generation, congressional investigative power was an unremarkable and essential outgrowth of the power to legislate.⁵⁷

Every time that the Supreme Court has weighed in on the question, it has affirmed the congressional power to investigate.⁵⁸ The

53. U.S. CONST. art. I, § 1.

54. *Legislative Power*, BLACK’S LAW DICTIONARY (Bryan A. Garner ed., 10th ed. 2014).

55. “Although there is no explicit textual grant of investigative power to Congress in the Constitution, the proposition that a legislative body generally possesses investigative powers is not controversial as a historical matter.... By 1689, for example, Parliament had numerous committees in place investigating government operations.” William P. Marshall, *The Limits on Congress’s Authority to Investigate the President*, 2004 U. ILL. L. REV. 781, 785.

56. “[T]he early Congress also readily utilized investigative power. Its first occasion to do so was a House Committee investigation in 1792 of the ill-fated St. Clair expedition.... President Washington did not challenge Congress’s power to investigate the matter.” *Id.* at 786.

57. *See id.* at 786-88.

58. For foundational Supreme Court cases in this area, see *Marshall v. Gordon*, 243 U.S. 521, 543, 545-46 (1917) (affirming Congress’s power to hold an individual in contempt, but deciding that Congress was not justified in holding someone in contempt for “irritating and

seminal opinion on the congressional investigative power is the 1927 case *McGrain v. Daugherty*, in which the Court was asked to determine whether Congress had the authority to subpoena witnesses in the course of the Senate investigation into the Teapot Dome scandal.⁵⁹ The Court determined that it did, with Justice Van Devanter writing for a unanimous Court that “the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function.”⁶⁰ Subsequent decisions carried this logic even further, expanding the investigative authority of Congress to anything implicating “the public interest.”⁶¹ In other words, there is no constitutional requirement that congressional investigations must end in the creation of new legislation—or even that they must pretend that such is their objective. They simply must concern “the public interest,” and the possibility that members of the executive branch committed crimes unquestionably does.⁶²

B. Dual Congressional/Special Counsel Investigations

But if congressional investigations have existed since the dawn of the Republic, why can they not continue to exist as a counterpart to investigations conducted by professional prosecutors? To put it simply: because they often get in the way, impeding the ultimate goal of accountability for wrongdoers. The problem arises out of Congress’s power to immunize witnesses, a necessary outgrowth of its power to subpoena,⁶³ and one that is codified in federal statute.⁶⁴

ill-tempered statements” in a letter); *Kilbourn v. Thompson*, 103 U.S. 168, 190, 192 (1880) (holding that “no person can be punished for contumacy as a witness before either House, unless his testimony is required in a matter into which that House has jurisdiction to inquire” and that in this case the House of Representatives exceeded the limits of its authority); and *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 230-34 (1821) (holding that Congress had the power to hold an individual in contempt).

59. See Marshall, *supra* note 55, at 792-95.

60. *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927).

61. “The informing function of the Congress is in effect ‘a study by the government of circumstances which seem to call for study in the public interest.’” *Watkins v. United States*, 354 U.S. 178, 225 (1957) (Clark, J., dissenting) (quoting Hugo L. Black, *Inside a Senate Investigation*, 172 HARPER’S MAG., Feb. 1936, at 275, 278).

62. See *id.*

63. “The Supreme Court has long permitted prosecutors and Congress to overcome a witness’s Fifth Amendment privilege against compelled self-incrimination through the grant of immunity.” John van Loben Sels, *From Watergate to Whitewater: Congressional Use*

When Congress offers immunity to a testifying witness, it prevents prosecutors from using any part of the witness’s testimony—either directly or indirectly—in a criminal prosecution of that witness.⁶⁵ The power to immunize witnesses can ostensibly be used to compel lower-ranking members of a criminal conspiracy to testify about the activities of higher-ranking members,⁶⁶ but that is not always how events unfold.

The most famous example of congressional immunity run amok is the Iran-Contra investigation. The Iran-Contra Committee offered immunity to Lieutenant Colonel Oliver North and National Security Advisor John Poindexter, key players in the illegal effort to divert profits from Iranian arms sales to a Nicaraguan guerilla movement, due to a misguided belief that their testimony would expose bigger names within the Reagan administration to criminal liability.⁶⁷ In contrast to the practice of the Senate Watergate Committee, the Iran-Contra Committee did not demand any information regarding the substance of North’s testimony in exchange for the offer of immunity.⁶⁸ When North’s testimony ultimately exculpated others in the administration, the Committee was left with no recourse—and the ongoing independent counsel investigation was caught flat-footed by Congress’s blunder.⁶⁹

Even the beau ideal of congressional investigations, the Senate Watergate Committee, temporarily derailed the parallel

Immunity and Its Impact on the Independent Counsel, 83 GEO. L.J. 2385, 2388 (1995).

64. The provision, enacted as part of the Organized Crime Control Act of 1970, shields immunized witnesses from criminal prosecution for information revealed in their compelled testimony before Congress. See 18 U.S.C. § 6002 (2012); van Loben Sels, *supra* note 63, at 2388 n.9.

65. van Loben Sels, *supra* note 63, at 2388-89.

66. See *id.* at 2389.

67. See *id.* at 2397-98. “The Democrats in Congress believed that North and Poindexter, if given immunity, would provide the ‘smoking gun,’ implicating more senior Reagan administration officials.” *Id.* at 2398.

68. “[Chief Counsel to the Senate Watergate Committee Sam] Dash believes that initial questioning of an immunized witness in executive session or deposition is critical to the success of a congressional investigation.” *Id.*

69. See *id.* at 2399. “[Iran-Contra Independent Counsel] Lawrence Walsh finds fault with almost every aspect of the Committee’s treatment of North. He believes Congress should never have granted immunity to North absent a strong indication that he would implicate superiors.” *Id.*

investigation of a special prosecutor.⁷⁰ Initially, the Watergate Committee succeeded in bringing useful information to light⁷¹ in a way that helped, rather than hindered, the special counsel.⁷² That success was achieved because the members of the Committee decided to condition their grants of immunity on prior disclosure of witness testimony⁷³—clearly not a decision that all congressional investigations choose to make.⁷⁴ But even this exceedingly careful investigation ran afoul of the special counsel when the Senate Committee separately negotiated a deal with President Nixon⁷⁵ whereby he would release edited summaries of subpoenaed tape recordings to the Committee.⁷⁶ When the Special Prosecutor rejected this proposal that the Senate Committee was prepared to accept, he was dismissed.⁷⁷ Not only had the Senate Watergate Committee inadvertently provoked a confrontation between the President and the Special Counsel⁷⁸ in its eagerness to reach a deal, but it also provided Nixon with a convenient justification for his decision to

70. A new special prosecutor was appointed within a week and the investigation proceeded. See Herbers, *supra* note 27.

71. The existence of the critical White House taping system was first uncovered by the congressional investigation, not the special counsel. See *Senate Watergate Committee Testimony of Alexander Butterfield About Secret Tapes*, C-SPAN (June 14, 2018), <https://www.c-span.org/video/?c4735626/senate-watergate-committee-testimony-alexander-butterfield-secret-tapes> [<https://perma.cc/4LUL-69SF>].

72. See van Loben Sels, *supra* note 63, at 2396-97. This was primarily due to the efforts of Chief Counsel Sam Dash, who insisted that each potential witness reveal the substance of their testimony in closed session so that he could ensure that they “could advance the investigation by testifying to the acts of other players.” *Id.* at 2396.

73. See *id.*

74. “The Iran/Contra Committee ... could not control the public session, because it had no prior knowledge of North’s testimony. The Committee was forced to gamble that it could get the explosive testimony it needed from North without the prescreening advantage enjoyed by the Watergate Committee.” *Id.* at 2398.

75. See *supra* text accompanying notes 20-24 for further discussion of this plan.

76. These summaries were supposed to have been authenticated by an ostensibly independent third party, Senator John Stennis, who claimed to have never consulted with either the President or the leaders of the Senate Watergate Committee concerning the plan. See *Stennis Says Haste Doomed Tapes Plan*, N.Y. TIMES (Oct. 31, 1973), <https://www.nytimes.com/1973/10/31/archives/stennis-says-haste-doomed-tapes-plan-his-understanding-explained.html> [<https://perma.cc/6FQB-P3ZP>].

77. See *supra* text accompanying notes 17-27 for the full story of Cox’s firing.

78. Cox said that the negotiations between the White House and Congress had created “insuperable difficulties” for his investigation. Weaver, *supra* note 20.

fire Cox.⁷⁹ Investigations housed solely within the executive branch might be vulnerable to presidential interference, but investigations proceeding on two separate tracks in two separate branches are likely to collide in ways that are damaging to both.

C. How This Proposal Would Work

The congressional investigatory system under this proposal would kick into action when the Attorney General, after receiving information concerning potential criminal law violations within the executive branch,⁸⁰ refers the matter to the Senate Majority Leader for further investigation.⁸¹ Though the Attorney General has no power to compel the Majority Leader to act (nor should she), a public referral from the Attorney General will attract public attention and should prevent the Majority Leader from acting or failing to act on the basis of partisan considerations.

After receiving the referral, the Senate Majority Leader will introduce a resolution to appoint a bipartisan committee to investigate the matter. A temporary committee assigned to investigate a discrete matter is preferred to a permanent committee so that there will be no incentive to conduct continuous, meritless investigations. The investigation will be housed in the Senate rather than the House so that there will be no expectation that it will ultimately result in impeachment charges for any executive officer. However, any findings from the Senate investigation could eventually be referred to the House if the Senate committee uncovers serious misconduct. Although University of San Diego Professor Michael Rappaport’s proposal to allow members of each party to appoint the committee members of the opposite party in order to select for merit

79. In explaining the firing, Press Secretary Ziegler noted that the “action taken by the President [in proposing a deal] ... was accepted by responsible leaders in Congress.” Kneeland, *supra* note 22.

80. The independent counsel system also depended on an initial referral from the Attorney General, though to the judiciary rather than Congress. *See supra* text accompanying note 29.

81. The decision to entrust this decision to the Attorney General rather than the Senate Majority Leader was motivated by the recognition that the Majority Leader holds his position by dint of his leadership of a partisan faction, whereas the Attorney General leads an organization dedicated to “ensur[ing] fair and impartial administration of justice for all Americans.” *About DOJ, supra* note 7.

has some appeal,⁸² it is not clear that it is necessary to go quite that far. Rather, once each party has selected its desired committee members, the committee members of each party can be allowed to select the ranking member of the opposite party that they believe will best guide the investigation to its conclusion.

The Senate committee will be endowed with the ordinary congressional powers to subpoena, compel testimony, and immunize witnesses, which are powers beyond those possessed by ordinary federal prosecutors. Because there is no danger that an immunized congressional witness's testimony will be used to deprive them of their constitutional rights⁸³—and because the goal of a congressional investigation is not criminal conviction—congressional investigations typically offer fewer constitutional protections for witnesses than criminal investigations.⁸⁴ These enhanced investigatory powers will help ensure the rapid introduction of relevant facts into the public domain, thereby speeding the progress of the investigation and allowing voters to draw their own conclusions as to culpability.

III. BENEFITS OF THE PRESENT PROPOSAL

Giving Congress, rather than the DOJ, the responsibility for investigating allegations of misconduct within the executive branch would yield a variety of benefits that have not been simultaneously realized by any previous investigatory mechanism. Housing investigations in the legislative rather than the executive branch would ensure that the President has no constitutional authority to end an investigation when it causes him political pain.⁸⁵ It would do so by returning to a formalist interpretation of separation of powers, in which Congress investigates matters that implicate the public interest with the objective of either passing ameliorative legislation

82. Michael B. Rappaport, *Replacing Independent Counsels with Congressional Investigations*, 148 U. PA. L. REV. 1595, 1596 (2000).

83. This will be discussed in further detail in Part III.C. See *infra* text accompanying notes 105-09.

84. Nicholas C. Stewart, *The Kennedy-Hoffa Showdown: Why Congressional Investigations Need Greater Powers and Procedural Leeway than Prosecutions*, 36 OKLA. CITY U. L. REV. 607, 629-31 (2011).

85. The President has the power to appoint “ambassadors, other public ministers and consuls, judges of the Supreme Court,” but no similar authority over members of Congress. U.S. CONST. art. II, § 2, cl. 2.

or simply raising public consciousness concerning existing problems. This proposal would also operate more expeditiously and more publicly than either the independent counsel or the special counsel, making both the President and those investigating him more accountable to the people.

A. Shields Investigations from Presidential Interference

Most Americans feel that investigations of the President should be allowed to proceed without presidential interference,⁸⁶ and the possibility that a special counsel might be fired before an investigation has been completed is probably the preeminent concern for people who are not constitutional lawyers.⁸⁷ This proposal would address that concern by making Congress the party responsible for investigations of the executive, instead of a special prosecutor working within the executive branch.⁸⁸ After all, while the Constitution invests Congress with the authority to remove the President through the impeachment process, it does not confer any similar power upon the President to unilaterally dismiss members of Congress.⁸⁹ This lopsided allocation of removal power indicates that the legislature remains the most secure place for investigations of the executive to reside.

In drafting the EGA, Congress found it difficult to circumvent the constitutional authority conferred upon the President by the Appointments Clause over hiring and firing inside the executive branch.⁹⁰ Ultimately, Congress “solved” this problem by simply ignoring it, and gave portions of both the executive and judicial

86. As of October 2018, 63 percent of voters believed that Special Counsel Mueller should not be fired. See Lisa Hagen, *Poll: Majority Opposes Trump Firing Rosenstein*, THE HILL (Oct. 1, 2018, 5:01 PM), <https://thehill.com/homenews/campaign/409347-poll-majority-opposes-trump-firing-rosenstein> [<https://perma.cc/G6JN-BHHD>].

87. For example, see the bipartisan legislation (of dubious constitutionality) that was introduced in the Senate to shield Mueller from dismissal. Brian Murphy, *Tillis Draws Fire from Right While Pushing Bill to Protect Special Counsel from Firing*, NEWS & OBSERVER (Aug. 7, 2017, 8:51 PM), <https://www.newsobserver.com/news/politics-government/politics-columns-blogs/under-the-dome/article165885777.html> [<https://perma.cc/Q7XW-F9C2>].

88. See *supra* Part II.C.

89. U.S. CONST. art. I, § 2, cl. 5; *id.* art. I, § 3, cl. 6.

90. *Id.* art. II, § 2, cl. 2.

branches roles in the appointment of an independent counsel⁹¹ due to a misguided assumption that blurring constitutional lines was equivalent to erasing them.⁹² The Supreme Court majority in *Morrison* held that the resulting statute did not infringe on the President's appointment authority to an impermissible extent;⁹³ Justice Scalia, as discussed previously, argued that any diminution of the President's appointment authority was inherently unconstitutional.⁹⁴ This proposal would sidestep the Appointments Clause debate entirely by declining to place investigatory authority in any individual whom the President has the constitutional authority to fire. President Nixon's dismissal of the Watergate special prosecutor instigated the contemporary angst over investigatory independence,⁹⁵ and this proposal would effectively obviate that most basic concern.

B. Satisfies the Constitutional Separation of Powers

This proposal also addresses the constitutional issue identified by Justice Scalia in his *Morrison* dissent. Fear of the consequences of intermingling executive, legislative, and judicial powers in a single body has existed since the beginning of the Republic⁹⁶ and provided the primary motivation underlying the separation of powers enshrined in the Constitution.⁹⁷ The special counsel in its current form raises no separation of powers concerns, but the recent effort

91. 28 U.S.C. § 592(g)(1) (2012).

92. Although, it is unclear if Congress considered the constitutional implications at all. See *supra* note 32 and accompanying text.

93. *Morrison v. Olson*, 487 U.S. 654, 659-60 (1988).

94. See *id.* at 705 (Scalia, J., dissenting).

95. "[A]fter more than 25 years of covering presidents, I am still surprised that his successors did not fully comprehend the depth of distrust left by Nixon.... These presidents were inhabiting a new world, but they often seemed not to recognize it." See BOB WOODWARD, *SHADOW: FIVE PRESIDENTS AND THE LEGACY OF WATERGATE* xiv (Simon & Schuster eds., 1999).

96. James Madison famously argued that "[a]mbition must be made to counteract ambition," a fundamental tenet of the American constitutional system that this proposal strives to emulate. THE FEDERALIST No. 51 (James Madison).

97. Scalia identified the central question of the *Morrison* case as involving "[t]he allocation of power among Congress, the President, and the courts in such fashion as to preserve the equilibrium the Constitution sought to establish." *Morrison*, 487 U.S. at 699 (Scalia, J., dissenting).

to make dismissal contingent upon review by a three-judge panel⁹⁸ indicates that the anti-executive impulse that inspired the EGA still exists.⁹⁹

Transferring responsibility for investigations of the executive to Congress would not be a new innovation, but rather a return to historical practice. Before Watergate, special counsels were the exception and not the rule, and Congress regularly conducted investigations into executive branch misconduct.¹⁰⁰ The collisions that occurred in the 1970s and 1980s¹⁰¹ were the result of the recently created independent counsel encroaching on Congress’s original turf,¹⁰² and Congress eventually ceded that ground without much of a fight.¹⁰³ Members of Congress might want to shirk the responsibility of investigating the executive (and the controversy that normally accompanies such endeavors), but requiring the legislature to once again take the lead would allow voters the opportunity to hold both the President and his interlocutors accountable at the ballot box—an opportunity that voters currently lack.

C. Ensures Expedient Public Disclosure of Relevant Facts

Congressional investigations are not only structurally distinct from special counsel probes—they also differ in their objectives and

98. Special Counsel Integrity Act, S. 1741, 115th Cong. § 2(d)(2) (2017).

99. The independent counsel provisions of the EGA were applicable to only a narrow subset of executive branch officials. They were designed to ameliorate concerns about “conflicts of interest on the part of the President, the Vice President, [and] the Attorney General.” 123 CONG. REC. 20,957 (1977) (statement of Sen. Percy).

100. “Congressional oversight of the Executive continued throughout the nineteenth century. Yet, while disputes were common, the power of Congress to engage in such investigations was ... generally not questioned.” Marshall, *supra* note 55, at 788.

101. For further discussion of the problems inherent in parallel investigations, see *supra* notes 63-79 and accompanying text.

102. The constitutional system created by the Framers indicates they understood that “Congress’s power to investigate plays a critical role in the checks and balances of U.S. democracy” and that “the Executive Branch could not be trusted to correct itself.” Marshall, *supra* note 55, at 799-800.

103. In 1998, Congress deferred to the statutory prescription of the EGA in relying on the independent counsel to bring them evidence of impeachable offenses committed by the President—according to House Judiciary Chairman Henry Hyde, “[The independent counsel] is here to help us adduce and understand the facts.” *Impeachment Inquiry: William Jefferson Clinton, President of the United States: Hearing Before the H. Comm. on the Judiciary*, 105th Cong. 3 (1998) (statement of Rep. Henry Hyde, Chairman, H. Comm. on the Judiciary).

their procedures. While special counsels function as criminal prosecutors who gather information in an attempt to determine whether to issue indictments, a congressional investigation aims to “bring to light social conditions that require corrections, [and] to expose wrongdoing.”¹⁰⁴ Hence, a congressional investigation will not always end with the wrongdoers behind bars—but it will end with the public knowing which individuals have done wrong.

Because a witness in a congressional investigation does not face the same potential for harm to his or her constitutional rights as a defendant in a criminal case, witnesses receive fewer constitutional protections.¹⁰⁵ Combined with the need for members to quickly amass knowledge about complex subjects with which they might be totally unfamiliar, it becomes clear why “the sovereign legislative power armed with the right of subpoena and search” is essential to the conduct of Congressional investigations.¹⁰⁶ Congress enjoys the benefit of a plethora of tools that make congressional investigations easier than criminal prosecutions—from subpoenas that are protected from judicial injunction as long as “Congress is acting pursuant to a valid legislative purpose,” to the power to immunize cooperating witnesses and hold recalcitrant ones in contempt.¹⁰⁷ While these powers have often provoked criticism from witness advocates,¹⁰⁸ the Supreme Court has long affirmed Congress’s right to make use of them.¹⁰⁹

Congress’s recognized authority to conduct executive oversight, coupled with the expansive powers necessary to effectively do the job, make Congress the ideal forum for quickly gathering information about alleged executive branch misconduct and revealing it to the public. In contrast to the slow and secretive progress of special

104. James Hamilton et al., *Congressional Investigations: Politics and Process*, 44 AM. CRIM. L. REV. 1115, 1118 (2007).

105. “[A]ttempting to rationalize broad investigative powers, Felix Frankfurter wrote that unlike criminal trials, [congressional] hearings do not place a man’s liberty interest at stake.” Stewart, *supra* note 84, at 627.

106. *Id.* (quoting Hugo L. Black, *Inside a Senate Investigation*, HARPER’S MAG., Feb. 1936, at 275, 276).

107. *Id.* at 617-18 (quoting Hamilton et al., *supra* note 104, at 1126).

108. “Some commentators believe these aforementioned powers are so sweeping that, for witnesses, the question is not whether this is going to be a bad day—it is how bad.” *Id.* at 618.

109. For an early affirmation of Congress’s power to imprison those it has held in contempt, see *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 227-28 (1821).

counsel investigations,¹¹⁰ Congress can expeditiously immunize witnesses and compel testimony so as to expose wrongdoing inside of the executive branch to the American electorate and let the people decide how to respond. One former President even acknowledged that “[i]t is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees.... The informing function of Congress should be preferred even to its legislative function.”¹¹¹ The government would be more accountable to its citizens if Congress embraced that conception of its role today.

IV. COUNTERARGUMENTS

This Note has focused thus far on how this reform proposal would address the problems inherent in the current system of executive investigations, but there are a number of pertinent counterarguments that range from the structural to the practical. The strongest will be addressed here.

A. Violation of the “Take Care” Clause

The Take Care Clause appears in the enumeration of the President’s responsibilities in Article II, Section 3 of the Constitution, and mandates that the President “shall take care that the laws be faithfully executed.”¹¹² This directive will be familiar to any American schoolchild taught the most basic breakdown of separation of powers: Congress passes laws, the courts interpret them, and the President enforces them.¹¹³ The Take Care Clause has traditionally been interpreted to mean that the President holds the sole responsibility for determining how to enforce federal law.¹¹⁴ This exclusive

110. The special counsel is only required to provide updates to the Attorney General and has no obligation to inform the public of any developments in an investigation. *See* 28 C.F.R. § 600.9(b) (2018).

111. WOODROW WILSON, CONGRESSIONAL GOVERNMENT 303 (1913).

112. U.S. CONST. art. II, § 3.

113. “I am here to see that the laws get done, the ringmaster of the government!” Schoolhouse Rock!, *Three Ring Government*, YOUTUBE (Nov. 2, 2009), <https://www.youtube.com/watch?v=tEPd98CbbMk> [<https://perma.cc/7AJ8-NYJD>].

114. “[The Take Care Clause] contemplate[s] a role for the President, and for no one else, in the administration of the government.” Steven G. Calabresi & Saikrishna B. Prakash, *The*

mandate could pose a problem for the plan outlined in this Note: if Congress, rather than the DOJ, is given the primary responsibility for investigating misconduct within the executive branch, does this constitute a transfer of law enforcement authority from the executive to the legislature that runs afoul of the Take Care Clause?

It is unlikely that this proposal violates the Take Care Clause, because it is *not* a recommendation for Congress to shoulder the responsibility for criminal law enforcement as it is applied to individuals working in the executive branch; rather, it is a proposal for the DOJ to exercise their prosecutorial discretion and defer to Congress in this limited subset of investigations. Congress never has and never will enforce federal criminal law.¹¹⁵ Congressional investigations are not conducted with the expectation that members of Congress will ever prosecute lawbreakers; they are conducted in order to expeditiously provide information to both Congress and the public concerning the failure of executive branch officials to properly follow federal law.¹¹⁶ When a member of the executive branch breaks the law, it is not only a crime—it is also potentially an impeachable offense.¹¹⁷

This category of offense lies squarely within the authority of Congress to investigate, though not to punish. Adoption of this proposal would therefore require an uncomfortable trade-off: Americans would have to decide that they would rather quickly discover evidence of wrongdoing that they could then subsequently punish at the ballot box, instead of waiting an indeterminate period of time for a special counsel investigation to conclude and issue criminal indictments.¹¹⁸ If Congress adopted this proposal, executive branch lawbreakers would be granted immunity from prosecution in exchange for their public testimony regarding the criminal acts in which they participated. Hence, Congress would not be invading the

President's Power to Execute the Laws, 104 YALE L.J. 541, 582 (1994).

115. “[P]rovid[ing] federal leadership in preventing and controlling crime” is one of the primary responsibilities of the DOJ. *About DOJ*, *supra* note 7.

116. “[The congressional investigative power] encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes.” Stewart, *supra* note 84, at 616 (quoting *Watkins v. United States*, 354 U.S. 178, 187 (1957)).

117. See U.S. CONST. art. II, § 4 (“The President, Vice President and all Civil Officers of the United States, shall be removed from Office on Impeachment for and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”).

118. This concern will be addressed more fully in Part IV.C below.

executive’s monopoly on federal law enforcement authority—the Attorney General would simply exercise her legitimate prosecutorial discretion in recognition of the public interest in full disclosure when she decides to notify the Senate Majority Leader of credible evidence of wrongdoing.

B. Unworkability Due to Extreme Congressional Partisanship

Any proposal to give Congress greater responsibility in any realm raises the obvious concern of partisanship. Studies of congressional partisanship indicate that the ideological gap between members of the two parties has widened steadily since the early 1980s.¹¹⁹ This increased ideological polarization has driven an increase in party-line voting in Congress, which in recent years has become the rule rather than the exception.¹²⁰ It is reasonable to wonder whether anything would change if Congress were faced with a referral from the Attorney General concerning executive misconduct, or whether the tendency towards partisanship would only be exacerbated. Can a bipartisan Senate committee be trusted to reveal the truth, or will partisan pressures stymie any such effort?

Historical experience indicates that fears about partisanship crippling congressional investigations are overblown.¹²¹ The Senate

119. “[I]n the 111th Congress, for the first time in modern history, in both the House and Senate, the most conservative Democrat is slightly more liberal than the most liberal Republican. This is another way of saying that the degree of overlap between the parties in Congress is zero.” THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT’S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM* 45 (2016).

120. “As recently as the early 1970s, party unity voting was around 60% but today it is closer to 90% in both the House and Senate.” David Davenport, *A Growing Cancer on Congress: The Curse of Party-Line Voting*, FORBES (Dec. 13, 2017, 8:38 AM), <https://www.forbes.com/sites/daviddavenport/2017/12/13/a-growing-cancer-on-congress-the-curse-of-party-line-voting/> [https://perma.cc/L7EA-3TCL].

121. Partisanship may actually prompt a proliferation of questionably motivated congressional investigations. For criticism of House Majority Leader Kevin McCarthy’s comments tying Hillary Clinton’s sinking approval rating to the work of the House Select Committee on Benghazi, see E.J. Dionne, Jr., Opinion, *Kevin McCarthy’s Truthful Gaffe on Benghazi*, WASH. POST (Sept. 30, 2015), https://www.washingtonpost.com/opinions/kevin-mccarthys-truthful-gaffe/2015/09/30/f12a9fac-67a8-11e5-8325-a42b5a459b1e_story.html [https://perma.cc/FZ6K-7MES].

Watergate Committee included three Republican members,¹²² two of whom were successfully reelected¹²³ after their well-publicized participation in an investigation of a President of their own party.¹²⁴ The controversial vote in the House of Representatives to adopt two articles of impeachment for President Bill Clinton did not split perfectly along party lines, and the members of each party who did “defect” were not subsequently punished by their constituents.¹²⁵ Even in today’s rancorous political environment, academic measures of bipartisan cooperation in Congress show recent improvement.¹²⁶ Hence, there appear to be sufficient incentives for members of Congress to break with a President of their own party without suffering adverse electoral consequences.

But if partisanship truly exerts a stronger pull on members of Congress today than it did in years past, there are practical steps that Congress can take to ensure that the investigative process remains nonpartisan. McKay Smith and Alan Wehbé have proposed an innovative plan that delegates the initial grunt work of congressional investigations, such as subpoenaing documents and providing comparative historical research, to career civil servants in the

122. *Select Committee on Presidential Campaign Activities (The Watergate Committee)*, U.S. SENATE, <https://www.senate.gov/artandhistory/history/common/investigations/Watergate.htm> [<https://perma.cc/APM6-9WR6>].

123. They appeared to suffer no partisan penalty from their constituents: Watergate Committee ranking member Howard Baker won 83.44 percent of the GOP vote in his next primary. See *TN US Senate—R Primary*, OUR CAMPAIGNS (Jan. 10, 2008, 3:26 PM), <https://www.ourcampaigns.com/RaceDetail.html> [<https://perma.cc/3J29-CSKP>].

124. The third resigned from the Senate in the wake of criminal indictments for an unrelated bribery charge. See Tom Leithauser, *Ex-Senator Ed Gurney Dies*, ORLANDO SENTINEL (May 22, 1996), <https://www.orlandosentinel.com/news/os-xpm-1996-05-22-9605211544-story.html> [<https://perma.cc/UEQ6-XZ9M>].

125. On Article I, five members of each party defected; on Article III, twelve Republicans voted nay and five Democrats voted yea. See Alison Mitchell, *Impeachment: The Overview—Clinton Impeached; He Faces a Senate Trial, 2d in History; Vows to Do Job Till Term’s Last Hour*, N.Y. TIMES (Dec. 20, 1998), <https://www.nytimes.com/1998/12/20/us/impeachment-overview-clinton-impeached-he-faces-senate-trial-2d-history-vows-job.html> [<https://perma.cc/32D4-LJ2G>].

126. In 2019, Bipartisan Index scores produced by Georgetown’s McCourt School of Public Policy “improved for the third straight Congress after bottoming out in 2011-2012.” *The Lugar Center and McCourt School Unveil Bipartisan Index Rankings for 115th Congress*, MCCOURT SCH. OF PUB. POL’Y, <https://mccourt.georgetown.edu/Bipartisan-Index-Rating> [<https://perma.cc/VR8D-SWGV>].

various offices of inspectors general and the Government Accountability Office (GAO).¹²⁷

Inspectors general are creations of the legislative branch who are stationed in various executive branch departments to perform “audits, inspections, and investigations of federal government programs and operations” and who report their findings “concerning fraud[] and other serious problems, abuses, and deficiencies” directly to Congress.¹²⁸ The GAO is a legislative branch entity that Congress created in order to aid it in “investigat[ing] ... all matters related to the receipt, disbursement, and application of public funds” and which is not populated by elected officials or partisan staff.¹²⁹ These entities, along with other legislative branch organizations such as the Congressional Research Service, provide an in-house source of nonpartisan information that Congress regularly uses to inform its decision-making and which can be pressed into service for investigations of the Executive.¹³⁰ The ultimate decision concerning what to do with the information uncovered—including whether impeachment or censure is warranted—would remain the exclusive province of the elected members of Congress (inevitably guided by the opinions of their constituents),¹³¹ but the civil service can lay the factual groundwork for that determination.

The success of the proposal outlined in this Note does not depend on the adoption of McKay and Wehbé’s specific plan; it is offered merely to show that useful legislative branch resources *do* already exist, and *can* be utilized without asking members of Congress to distract their attention from other important matters during the information-gathering stages of an investigation. Professor Thomas Merrill of Columbia Law School criticizes the idea of using inspectors general for this work because they only have the power to issue administrative subpoenas for the production of documents—*not* the

127. See McKay Smith & Alan Wehbé, *A Bipartisan Vehicle for Change: Proposing a Novel Investigative Framework Designed to Improve and Empower Congressional Investigations*, 29 STAN. L. & POL’Y REV. 237, 254-57 (2018).

128. *Id.* at 254. For a complete elucidation of the role of inspectors general in the federal government, see *id.* at 254-55.

129. *Id.* at 255. The GAO staff includes “economists, social scientists, accountants, public policy analysts, attorneys, and computer experts,” bringing a broad range of expertise to bear on any investigation. *Id.*

130. See *id.*

131. U.S. CONST. art. I, § 2, cl. 5; *id.* art. I, § 3, cl. 6.

power to compel testimony or grant immunity.¹³² But Congress *does* have the requisite authority, and can bring it to bear on executive branch witnesses when the investigative work performed by non-partisan civil servants has revealed that they might have helpful testimony to share. One can criticize this proposal as “substitut[ing] one form of political dependence for another,”¹³³ but when it comes to investigations of the executive, political dependence on the legislature is always less dangerous than dependence on the executive himself. Furthermore, it is not at all clear that investigations directed by Congress would result in more overall partisan distortion than the prevailing model.¹³⁴

C. Public Accountability over Criminal Punishment

Finally, to address a concern briefly noted above,¹³⁵ the adoption of this proposal would require a value judgment that many observers might find distasteful. It would require Americans to decide that revealing the truth is more important than levying punishment on guilty parties—in other words, that it is more important to “prevent ongoing and future harm” than “to redress past wrongs.”¹³⁶ This is not a choice that everyone will be willing to make, because Americans generally believe that crime should be punished.¹³⁷ But “[s]ocial purposes can never be single or simple, or held unqualifiedly to the exclusion of all other social purposes; and an effort to make them so can result only in the sacrifice of other values which also are

132. For Professor Merrill’s critique of the proposal, see Thomas W. Merrill, *Beyond the Independent Counsel: Evaluating the Options*, 43 ST. LOUIS L.J. 1047, 1077-78 (1999).

133. *Id.* at 1077.

134. For one notable example, compare President Trump’s repeated characterizations of the special counsel investigation as a “witch hunt” with his conclusion upon the release of the final report that “[i]t’s 100 percent the way it should have been.” See Rebecca Morin, *Trump Says Mueller Acted Honorably in Russia Probe*, POLITICO (Mar. 25, 2019, 1:21 PM), <https://www.politico.com/story/2019/03/25/trump-mueller-acted-honorably-1235226> [<https://perma.cc/7JWU-GCH5>].

135. See *supra* Part IV.A.

136. Stewart, *supra* note 84, at 609.

137. In October 2016, a Gallup poll found that a plurality of Americans (45 percent) felt that “this country is ... not tough enough” in its handling of crime. An additional 35 percent said the balance is “about right.” *Crime*, GALLUP (Oct. 5-9, 2016), <https://news.gallup.com/poll/1603/crime.aspx> [<https://perma.cc/92RT-PNY7>].

important.”¹³⁸ The value of expeditiously exposing executive wrongdoing to the public is of overwhelming importance, and outweighs the valid desire to levy criminal punishment on lawbreakers. After all, a crime cannot be punished—whether by criminal sanction or electoral defeat—unless it is first exposed.

When the President or one of his aides commits a crime, that violation of the law is not merely a matter of concern for prosecutors in the relevant jurisdiction; it is a matter of concern for the entire country. It reflects a breakdown in the ordinary political process and demands rectification from those who are in a position to address the problem. The investigative role of Congress “includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them.”¹³⁹ By conducting investigations into allegations of criminal wrongdoing within the executive branch, Congress is performing its judicially acknowledged oversight function. It performs this function with a toolkit broader than that of the ordinary federal prosecutor, because the goal of a congressional inquiry is not criminal prosecution—it is the rectification of an existing problem, whether by statute or by “sunlight.”¹⁴⁰

In response to criticism of the labor racketeering inquiries of the 1950s, congressional investigator Robert Kennedy justified his aggressive tactics by explaining that “[n]o organization, union or business ... has a greater effect on the community life in this country [than organized crime].”¹⁴¹ What was true of the mob in the 1950s is doubly true of the presidency in all times and all places. If allegations of executive misconduct are overblown, then a congressional inquiry can quickly put the matter to rest and allow the President to get on with the business of the country. But if an inquiry does uncover criminal activity within the executive branch, then the public deserves to know that as well. Congress, as the only institution charged with the solemn authority to remove a lawbreaking

138. Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 401 (1958).

139. Stewart, *supra* note 84, at 616.

140. In the words of Justice Brandeis, “Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.” *Justice Louis D. Brandeis*, BRANDEIS U., <https://www.brandeis.edu/legacyfund/bio.html> [<https://perma.cc/7RKZ-DD4H>].

141. Stewart, *supra* note 84, at 613-14.

President from office, is also the only institution equipped to respond.

CONCLUSION

This Note argues that Congress should take the lead in future investigations of the executive, and that the various attempts to create some form of special counsel within the executive branch should be abandoned. The impulse towards innovation in investigatory processes that we have seen since Watergate is understandable but misguided; the institution best equipped to handle future investigations of the executive is the same one that handled them effectively in the past. Congress has poked its collective nose into executive affairs since the Washington presidency, and the Supreme Court has consistently upheld its right to do so as a concomitant aspect of the legislative power.¹⁴² The Watergate scandal frightened legal scholars and the American public into believing that Congress was no longer capable of performing this essential function,¹⁴³ but in fact Congress did its job perfectly during Watergate. The Senate Watergate Committee exposed the existence of the White House tapes which were subsequently subpoenaed by the special prosecutor,¹⁴⁴ and Richard Nixon ultimately resigned his office because it appeared likely that he would be impeached¹⁴⁵—*not* because he feared criminal indictment.

Congress has the necessary tools—to issue subpoenas, take testimony, grant immunity, and hold witnesses in contempt¹⁴⁶—to continue performing this vital role. Partisanship has not prevented it from doing so in the past, but if partisanship presented an

142. See *supra* note 58 and accompanying text.

143. See *supra* note 95 and accompanying text.

144. See James M. Naughton, *Surprise Witness Butterfield, Ex-Aide at White House, Tells of Listening Devices*, N.Y. TIMES (July 17, 1973), <https://www.nytimes.com/1973/07/17/archives/surprise-witness-butterfield-exaide-at-white-house-tells-of.html> [<https://perma.cc/9XQH-W4YD>].

145. “Mr. Nixon said he decided he must resign when he concluded that he no longer had ‘a strong enough political base in the Congress’ to make it possible for him to complete his term of office.” Carroll Kilpatrick, *Nixon Resigns*, WASH. POST (Aug. 9, 1974), <https://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/080974-3.htm> [<https://perma.cc/R6ML-XE4L>].

146. See Stewart, *supra* note 84, at 616.

impediment in the future then the initial stages of fact-gathering can be handled by nonpartisan civil servants working for the legislative branch.¹⁴⁷ But the ultimate decision of constitutional import—how to respond once a President’s misconduct has been publicly exposed—has only ever rested in the hands of Congress.¹⁴⁸ The branch that the Founders deemed sufficiently independent to make the decision to impeach is also capable of handling the more mundane work of investigating allegations of wrongdoing. No new law is required in order for Congress to continue performing this work; the special counsel was created by DOJ regulations, and can be eliminated using the same unilateral rulemaking process (and, as Lawrence Walsh learned to his chagrin during the Iran-Contra hearings, the special counsel has no authority to issue orders to Congress anyway¹⁴⁹). The power to investigate the executive branch has been Congress’s from the beginning, and can be theirs once again if only they decide that they are ready to wield it.

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147. *See supra* notes 131-34 and accompanying text.

148. “The House of Representatives ... shall have the sole Power of Impeachment.” U.S. CONST. art. I, § 2, cl. 5.

149. For a full discussion of the Iran-Contra hearings, *see supra* notes 67-69 and accompanying text.

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