1998

Bad Incentives and Bad Institutions

Cass R. Sunstein

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INTRODUCTION

The Independent Counsel Act[1] is a case study in the law of unintended consequences. The Act was designed to increase trust in government. But it

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1. The official name of this statute as originally enacted is the Ethics in Government Act of 1978 92 Stat. 1842, 1824 (1978) (current version at 28 U.S.C. §§ 591-599 (1996)). I refer to it as "the Independent Counsel Act" or "the Act."

actually reduces trust in government, not because of serious misconduct on the part of high-level officials, but because of scandal mongering, and because of the transformation of political disputes into criminal allegations.[2] The Act should be allowed to expire in 1999; even better, it should be repealed.

The fundamental problem with the Act is that it imposes harmful incentives on Members of Congress, the media, and the independent counsel itself. An important effect of these harmful incentives is to damage processes of democratic deliberation by deflecting attention from serious issues involving the effects of policy on human lives, and instead focusing people—representatives, media, and citizens alike—on scandals that are often imaginary and that, even if real, usually do not deserve the prominence that the Act gives them.

One of the most central problems of American democracy in its current form consists in its emphasis on sensationalistic anecdotes, eye-catching accusations, and dehumanization of political opponents, accompanied by insufficient focus on the nature of actual problems and how they might be solved. It would be good to devote far more attention to measures to alleviate poverty and far less attention to questions about where, exactly, the Vice President was when he engaged in fund-raising. This problem is especially serious in Congress, which should be less focused on alleged law-breaking and more fundamentally concerned with the effects of existing and proposed laws on citizens. The principal effect of the Independent Counsel Act is to fortify bad tendencies in current practice. In doing so, the Act does a great deal of harm and little good.

I argue in this essay that the Act should be repealed as soon as possible or permitted to expire in 1999.[3] Part I sets out the general problem created by the Act—that it encourages scandal-mongering, thereby undermining the Constitution's structural goal of creating deliberative democracy. Part II discusses the motivations underlying the Act and its basic structure. Part III explores the incentives that the Act creates for politicians, the media, and independent counsels themselves. Part IV briefly explores some alternatives designed to remedy the Act's shortcomings, including total repeal of the Act, reliance on political checks, and relocation of investigatory responsibility to a specialized office of the Department of Justice.

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2. For the record, it should be made clear that this essay was written well before the publicity produced by the 1998 events involving Monica Lewinsky and President Clinton.

3. This essay is not an endorsement of the constitutional attack on the Act urged in Justice Scalia's dissenting opinion in *Morrison v. Olson*, 487 U.S. 654, 703-05 (1988) (Scalia, J., dissenting). On the constitutional issues, see Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 14-22 (1994). But many of Justice Scalia's objections do point to serious problems in the Act, and I stress those problems as a policy matter here. *See* Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 90-95 (1995) (arguing Independent Counsel Act costs outweigh benefits and old tradition of politically agreed upon independent counsel for serious scandal is adequate).

I. THE GENERAL PROBLEM

The American constitutional tradition aspires to be a deliberative democracy, in which issues are debated by reference to reasons and principles.[4] Officials are supposed to be accountable to the people, but they are also intended to be in a position to reflect and to deliberate on appropriate policies, rather than to implement mechanically some aggregation of pre-existing desires. The institutional safeguards of the original Constitution, including both national representation and checks and balances, were designed to implement this deliberative ideal.[5] In particular, the Framers wedded an understanding of likely incentive effects to the basic topic of institutional design, attempting to ensure that institutions would create the appropriate incentives.[6] Attention to the relationship between institutions and incentives was, in fact, one of their central preoccupations. The basic goal was to ensure that the structure of the national government would permit representatives to act in a reasoned fashion, above the fray of factions and (misplaced) passions.[7] National institutions, for example, would have a comparative advantage over smaller bodies, and the system of checks and balances would permit ambition to check ambition.[8]

It should not be controversial to say that in current politics, a general and pervasive problem is that deliberation and reason-giving are too frequently absent.[9] Many of those concerned with institutional reform have attempted to produce solutions to precisely this problem.[10] On the part of the media, many politicians, and numerous interest groups, there is particular pressure toward sensationalism. Real or imagined scandals therefore play a significant role in coverage of political issues. Emphasis on scandals can, of course, be in the political self-interest of elected representatives, who may be able to achieve a large name for themselves by identifying and attacking corruption whether or not it actually exists—particularly if the call is for further or more independent investigation. Emphasis on scandals can also be in the economic self-interest of the media, especially when a basic concern is inevitably to attract viewers, readers, and sponsors.[11]

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4. *See* JOSEPH M. BESSETTE, THE MILD VOICE OF REASON: DELIBERATIVE DEMOCRACY AND AMERICAN NATIONAL GOVERNMENT 1-2 (1994).

5. *See* THE FEDERALIST Nos. 10, 51 (James Madison).

6. See THE FEDERALIST No. 51 (James Madison) for the most explicit example.

7. *See* BESSETTE, *supra* note 4, at 13-16; CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 17-39 (1993).

8. See BESSETTE, *supra* note 4, at 16-17, for a general discussion.

9. *See, e.g.*, KIKU ADATTO, SOUND BITE DEMOCRACY: NETWORK EVENING NEWS PRESIDENTIAL CAMPAIGN COVERAGE, 1968 AND 1988, at 4-6 (Joan Shorenstein Barone Ctr. on the Press, Pol. and Pub. Pol'y, John F. Kennedy Sch. of Gov't, Harvard Univ. Research Paper R-2, 1990).

10. A prominent example is STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE (1993) (discussing institutional reforms designed to improve risk regulation by increasing systematic overview of risk problems).

11. *See* ROBERT H. FRANK & PHILIP J. COOK, THE WINNER-TAKE-ALL SOCIETY (1995).

Indeed, market pressures often lead away from substance and firmly in the direction of media sensationalism, and thus can produce sensationalism even if journalists, acting as individuals, would seek a better route. In this way, competitive forces often disserve deliberative or democratic ideals. Coverage of this kind may even be consistent with the public-spirited convictions of both representatives and the media, if it is believed that the real or imagined scandals bear on governance, or otherwise contain and produce illumination of one kind or another. But this type of coverage can have an extremely damaging effect on democratic self-government, especially if scandalous charges are frequent. Part of the problem is that sensational coverage tends generally to breed cynicism and distrust, whether or not these are merited.

A conceivable result is a form of "cascade," as people tend to believe that a scandal is important or real simply because others believe, or appear to believe, that it is important or real.[12] Individual citizens, even individual representatives and media members, often have little information about an apparent scandal, and any belief on each individual's part is likely to be greatly affected by what others say, or seem to believe. Without much in the way of individual information, it is possible that millions of people will come to believe in the possibility of a scandal whether or not it is real. The worst possible outcome is a general, falsely held view that government officials are corrupt or engaged in criminal activity, and that effective improvements are improbable or impossible, so that government is less able to do anything at all.

Sensational coverage creates distinctive problems, because it tends to crowd out discussion of other issues and to divert the attention of public officials. When the question is whether the Vice President committed a criminal act by raising funds from the White House, it is harder to discuss whether the Administration's welfare policy is producing good results, or how to handle the problem of global warming, or whether the well-being of Americans is getting better or worse. Substantive discussion of issues actually affecting American citizens is increasingly replaced by questions, often impossibly technical, about official criminality. The time of public officials becomes spent less on solving public problems and more on the public management of scandals. It is hard to quantify this cost, but there can be no doubt that highly publicized congressional hearings cost a nontrivial amount of dollars.

A focus on the possibility of technical illegality is unquestionably costly to the extent that it means that substantive questions of governance receive less or little attention. But it is possible to go further. To be sure, official law-breaking is almost always objectionable, and sometimes it is far worse than that. But at least under ordinary circumstances, the likely forms of official law-breaking in the United States are relatively trivial, and far less important, and far less

12. *See* Sushil Bikhchandani et al., *A Theory of Fads, Fashion, Custom, and Cultural Change as Informational Cascades*, 100 J. POL. ECON. 992, 994 (1992) (cascade occurs when it is optional to follow behavior of others without regard to own information).

worthy of public attention, than questions involving the direct effects of government policy on human lives. The central question for American government, almost all of the time, is not whether some official has acted improperly, but whether current policies are making lives better or worse, and how they might be improved. Attention to the question of whether the Attorney General or the Secretary of Commerce has committed some technical violation of the law is far less urgent.

This is not to deny that sometimes official law-breaking can be a serious problem. Nor is it to deny that in some nations, official corruption may indeed be enmeshed with government performance harmful to ordinary lives. But in the United States, it is far more probable that any official illegality will involve technical violations, not serious criminality. I return to the significance of this point below.

II. THE INDEPENDENT COUNSEL ACT

A. MOTIVATIONS

The original goal of the Independent Counsel Act was simple, laudable, and entirely appealing: to ensure that the decision whether to prosecute high-level government officials would not be made by high-level government officials. In the aftermath of the Watergate scandal, a genuine constitutional crisis, the Act seemed indispensable as a way of promoting public trust in government, by giving an assurance that high-level officials would be investigated by people who were not controllable by their hierarchical superiors. The idea that no person should be judge in his or her own cause is deeply rooted in American constitutional traditions;[13] it seems only natural to think that those investigating high-level criminality should be insulated from control of the highest executive officers. In this way, the Independent Counsel Act might be seen as continuous with the Founders' effort to design institutions so as to respond to the natural incentive effects of different governmental arrangements. It might even be seen as a Madisonian effort to ensure that "ambition [will] . . . counteract ambition."[14]

A possible response to this concern is that impeachment is the appropriate remedy for high-level official misconduct. But in the context of the Watergate era, it seemed sensible to reply that impeachment is extremely difficult and unnecessarily strong medicine, and that it should be used very rarely. The Act seemed far more precisely targeted. It would create an assurance, *ex ante* and *ex post*, that a disinterested person would investigate and if necessary prosecute high-level officials, in such a way as to give the public assurance that the investigation would be entirely neutral, and unaffected by politics. The question, hardly an unfamiliar one, is whether legislation driven by particular events might not have unintended consequences and create problems more serious than those that it was meant to prevent.[15]

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13. *See* THE FEDERALIST No. 78 (Alexander Hamilton).

14. *See* THE FEDERALIST No. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

15. See generally the discussion of crisis-driven legislation in AARON WILDAVSKY, BUT IS IT TRUE?:

B. STRUCTURE—AND OBSERVATIONS ON STRUCTURE

1. Law

As a matter of law, what sort of structure has emerged? Every year, of course, many complaints are made by people asserting that a high-level official has violated the law and that an independent counsel should be appointed. The Independent Counsel Act specifies a rigid procedure for handling these complaints.

More specifically, the Attorney General is required to act in accordance with three simple steps. First, she must conduct a "preliminary investigation" whenever she receives "information sufficient to constitute grounds to investigate whether" any covered person may have violated Federal criminal law.[16] Covered persons include (but are not limited to) the President and Vice President, the Attorney General, any Assistant Attorney General, the Director of the CIA, the Deputy Director of the CIA, the Commissioner of Internal Revenue, heads of the cabinet departments, and the chairman and treasurers of the principal national campaign committees seeking the election or reelection of the President.[17] To consider whether a preliminary determination is warranted, the Attorney General is allowed to consider only two factors: the specificity of the information received and the credibility of the source of information.[18] The Attorney General has thirty days in which to make the key decision.[19]

Second, if the Attorney General decides that a preliminary investigation is warranted, the Attorney General must decide within ninety days whether "there are reasonable grounds to believe that further investigation is warranted . . . ."[20] During the preliminary investigation phase—and this is a crucial provision—the Attorney General is not authorized to convene grand juries, plea bargain, grant immunity, or issue subpoenas.[21] Moreover, the statute was amended at the end of the Reagan Administration so that the Attorney General cannot decline further investigation because the defendant lacked the necessary state of mind, "unless there is clear and convincing evidence" of that fact.[22]

Third, if the Attorney General concludes that "there are reasonable grounds to believe that further investigation is warranted," the Attorney General must apply to the court for the appointment of an independent counsel;[23] this step is mandatory. The independent counsel, once appointed, has "full power and independent authority to exercise all investigative and prosecutorial functions

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A CITIZEN'S GUIDE TO ENVIRONMENTAL HEALTH AND SAFETY ISSUES (1995). There is a frequent problem with legislation based on anomalous recent events; often the events are not likely to be replicated in anything like the same form, and the solution introduces a host of new problems.

16. 28 U.S.C. § 591(c).
17. *Id.* § 591(b).
18. *Id.* § 591(d)(1).
19. *Id.* § 591(d)(2).
20. *Id.* §§ 592(c)(1), (a)(1).
21. *Id.* § 592(a)(2).
22. Pub. L. 100-191 § 2, 101 Stat. 1293, 1295 (1987) (codified as 28 U.S.C. § 592(a)(2)(B)(ii)).
23. 28 U.S.C. § 592(c)(1).

and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice . . . ."[24] Among the expressly enumerated authorities are the power to receive appropriate national security clearances, to apply for grant of immunity for any witness, to inspect, obtain, and use the original or copy of any tax return, and to bring indictments.[25] The independent counsel is also authorized to hire, fix the compensation, and assign the duties of "such employees as such independent counsel considers necessary . . . ."[26] The independent counsel may be removed by the Attorney General "only for good cause, physical or mental disability, or any other condition that substantially impairs the performance" of her duties.[27]

2. Observations

Let us make a few observations about this simple and quite rigid structure. How can the process of appointing an independent counsel be stopped if it is undesirable? There are several methods. The first is via a preliminary determination that the charges are insufficiently credible and specific. But credibility may be hard to deny if, as is often the case, the allegation has been reported in the newspaper and Members of Congress think that there is reason for concern. If so, a preliminary inquiry must be undertaken.

The second possible step is to conclude that there are no reasonable grounds to believe that further investigation is warranted. This is indeed a possible safeguard; judgments of law can stop the investigation at this stage. Attorney General Reno's controversial decision not to seek an appointment of an independent counsel for certain campaign-related activities by President Clinton and Vice President Gore attests to the fact. But under the Act, any such judgment must be reached without convening grand juries, granting immunity, or issuing subpoenas, and without considering, in the normal fashion, the issue of intent. Often, of course, a prosecutor will drop a case at an early stage, after issuing subpoenas, or considering the defendant's state of mind, or simply deciding, after an "all things considered" judgment, that this is not the kind of case that calls for a formal criminal investigation, even if there was a technical violation of law.

This use of prosecutorial discretion, it should be emphasized, is a major, if overlooked, safeguard of liberty under law. Not every technical violation of law is subject to criminal prosecution, or even serious criminal investigation. Indeed, it is likely that a significant percentage of American citizens have, at one point in the last decade, committed an action that would subject them to a jail sentence if the law books were taken extremely seriously. For high-level public officials, the percentage is probably even higher, if only because of the complex network of statutes that regulate their behavior. The fact that criminal prosecu-

24. *Id.* § 594(a).
25. *Id.* §§ 594(a)(6)-(a)(9).
26. *Id.* § 594(c).
27. *Id.* § 596(a)(1).

tors have limited budgets, and exercise common sense in deciding to which cases to allocate their limited resources, is an important protection against liberty-threatening intrusions on human beings—whose frailties produce criminality that ought not to result in an actual jail sentence, or even the realistic fear of a jail sentence.

As it has operated in practice, the Act offers several examples. Consider just a few. It was alleged that White House Chief of Staff Hamilton Jordan used cocaine, and an independent counsel was appointed to investigate the allegation. It was alleged that Assistant Attorney General Theodore Olson lied before Congress in the context of a hotly disputed set of issues involving the behavior of EPA Administrator Anne Gorsuch, and an independent counsel was appointed to investigate. Is it really reasonable to think that an Assistant Attorney General should have to fend off a criminal indictment because of the possibility that he has acted as something of—or very much—an advocate in discussing constitutional issues relating to executive privilege? It is conceivable, though highly debatable, that Vice President Gore violated an old statute, the Pendleton Act, by making certain phone calls from the White House. But no reasonable criminal prosecutor would bring an indictment in such a case, unless he was attempting to grandstand, or to make a name for himself. It is not worth belaboring the point that in cases like this, calls for an independent counsel are politically motivated, and have nothing to do with a realistic claim that people should actually face criminal charges.

These points raise an important question of law and fact: To what extent is the independent counsel within the technical control of the Department of Justice? As a matter of law, the question is not easy to answer. The counsel can be dismissed for "good cause," as the Supreme Court emphasized in *Morrison v. Olson*,[28] and indeed the basis for discharge was broadened from the original "extraordinary improprieties" to that current language. It would therefore be reasonable to think that the Attorney General has considerable authority to discharge an independent counsel, and perhaps also to control the counsel's performance. Certainly the Court did not rule otherwise in *Morrison*. But however the legal issues might be resolved, the practical reality is that any Attorney General will inevitably give a great deal of autonomy to the independent counsel. An Attorney General who discharged an independent counsel, or attempted to control an independent counsel's operations, would face enormous political pressure, and any Attorney General will know this. It is thus clear that while the technical law leaves room for dispute, in practice the independent counsel is an independent agent.

3. Practice

Since the 1978 enactment of the Independent Counsel Act, every administration has been investigated by an independent counsel. There have been sixteen

28. 487 U.S. 654, 686 (1991).

total investigations. Taxpayers have paid out well over $100 million on these investigations.[29] Thus far ten of the sixteen have produced no indictments. These include the following "scandals":

- Hamilton Jordan, President Carter's chief of staff, was said to have used cocaine.
- Timothy Kraft, President Carter's national campaign manager, was said to have used drugs.
- Theodore Olson, an assistant attorney general under President Reagan, was said to have committed perjury in testimony before Congress.
- Members of the Bush administration were said to have searched President Clinton's passport files.
- HUD Secretary Henry Cisneros was said to have lied to the FBI about his private life.

In each of these cases, an independent counsel was appointed, and in none of them has the independent counsel decided to indict the prospective defendant. But the investigations cost the taxpayers significant sums of money. Surely one of the most revealing, and absurd, was the investigation of Theodore Olson, who was subject to an extended criminal investigation growing out of his testimony defending the Department of Justice's position in connection with the executive branch's refusal to hand over to Congress the EPA's law enforcement files. This intensely political debate, over the environmental policies of the Reagan Administration, produced an utterly ridiculous charge—that Olson had committed the crime of perjury and should be indicted—and the result was a multimillion dollar investigation.

One of the most successful set of investigations was undertaken by Lawrence Walsh, who managed to obtain seven guilty pleas and four convictions as a result of the "Irangate" scandal (at a cost to taxpayers of $47.9 million). Arlin Adams and Larry Thompson have done even better, obtaining seven guilty pleas and eleven convictions from the HUD scandals of the Reagan Administration (at a cost of $30 million). Kenneth Starr's ongoing investigations have produced six guilty pleas and three convictions (at a cost of over $30 million). Of course it is unclear what will ultimately emerge from these investigations. (See Appendix for details.)

III. SMALL BENEFITS, LARGE COSTS, AND THE PROBLEM OF INCENTIVES

A. BENEFITS?

Has the Act produced more good than harm? It would not be unreasonable to answer this question by saying very categorically that the Act has produced no

29. *See* Appendix *infra*, at 2283.

good at all. But this would be too harsh. It is possible, even likely, that the Act has discouraged official illegality by letting high-level officials know of the seriousness with which any such illegality will be treated. To the extent that the Act has reduced criminal behavior, it must be counted as having produced some benefits as a deterrent. Moreover, some of the allegations under the Act cannot be dismissed as trivial, and the record suggests that in some cases the availability of the Act has ensured that justice has been done, by forcing people to face criminal liability for their crimes.

But are these gains worthwhile? If we look only at the investigations themselves, it is not at all clear that, on balance, the Act has made things better. A large number of the investigations appear to have been a waste of taxpayer resources, in the process frightening public servants, and possible defendants, with the prospect of a jail sentence and in any case tarnishing their reputations. It is not clear that the twenty total convictions, and the twenty-four total guilty pleas, offset these costs. It is clear that the Independent Counsel Act makes it more hazardous for someone to agree to a high-level position in government. But the more important point is that the Act breeds distrust of government and in the process diminishes substantive discussion of real questions, by focusing attention on imagined scandals or wrongdoing.

B. INCENTIVES

What incentives are created by the Act? What are the likely effects of the Act on the behavior of politicians, the media, citizens, and independent counsels themselves?

1. Politicians

Consider first the incentives of politicians as these incentives are altered by the Act. It is hard to imagine any presidential administration in which there will not be at least a colorable claim of official illegality by someone covered by the Act—a proposition supported by the fact that every administration has been subject to at least one independent counsel investigation since the Act's passage. And among political opponents of any administration, a number are likely to find it very much in their political interest to call for an independent counsel to investigate some real, possible, or even wholly imagined wrongdoing. Every political opponent of any administration knows this, and that knowledge increases each opponent's incentive to move first, or to join any bandwagon, or to speak about the value of future investigation of improprieties and illegalities.

Any call for criminal investigation has the appearance of neutrality and statesmanship; how can a mere investigation do any real harm? From the standpoint of political self-interest, such a call is far more likely than silence or a reasoned objection to a policy initiative to produce attention. And if most politicians know that eventually, some politician is likely to call for an independent counsel, for a nontrivial number of politicians there may appear to be a special advantage in being among the first to do so. Once one or two politicians

have done this, "cascade"[30] or bandwagon effects may well arise—and those who do not favor an independent counsel in the particular case, especially in the opposing party, may seem timid, or unduly allied to the interests of the current administration. It is thus likely that members of an opposition party may well find themselves in the seemingly odd position of publicly favoring—and by significant numbers—no less than a sustained criminal investigation and a possible jail sentence for their political opponents. What is especially important is that everyone knows this before any scandal begins, and this knowledge will make the unfortunate scenario all the more likely.

2. Media

From the media's standpoint, there are likely to be substantial and damaging incentive effects as well. If members of Congress have asked for an independent counsel, there is reason to think that high-level officials have actually committed crimes, and perhaps some of them should, or will, go to jail. That is certainly newsworthy; to say the least, it is worth considerable attention. Here are the critical points: A large part of the job of newspapers is to sell newspapers and advertisers. In many quarters, corruption sells. A large part of the job of television broadcasters is to attract viewers and sponsors, and a news program that is focused on a "growing scandal," or a call for official investigation of high-level criminality, is likely to attract viewers.

Newspapers and broadcasters are far more likely to attract readers and viewers if attention is focused on a call for an independent counsel—on the ground that a high-level official may deserve to go to jail—than on some issue of policy, such as the effects of minimum wage legislation, or the consequences of the recent welfare reform.[31] There is a kind of vicious circle in which

30. See the discussion of informational cascades in DAVID HIRSHLEIFER, *The Blind Leading the Blind: Social Influence, Fads, and Informational Cascades*, *in* THE NEW ECONOMICS OF HUMAN BEHAVIOR 188 (Mariano Tommasi & Kathryn Ierulli eds., 1995).

31. Consider the following observations:

(1) "Since the 1960s, bad news has increased by a factor of three and is now the dominant tone of news coverage of national politics." Thomas E. Patterson, *Bad News, Period*, 29 PS 17 (1996) (citing THOMAS E. PATTERSON, OUT OF ORDER (1994); S. Robert Lichter & Daniel R. Amundson, *Less News is Worse News: Television News Coverage of Congress, 1972-92*, *in* CONGRESS, THE PRESS, AND THE PUBLIC 131 (Thomas E. Mann & Norman J. Ornstein eds., 1994)).

(2) "Unlike the situation in the 1960s, increased news exposure is now positively correlated with a heightened mistrust of government . . . ." Patterson, *supra*, at 19 (citing Arthur H. Miller, et al., *Type-Set Politics: Impact of Newspapers on Public Confidence*, 73 AM. POL. SCI. REV. 67 (1979); Thomas E. Patterson, *More Style than Substance: Television News in U.S. National Elections*, 8 POL. COMM. & PERSUASION 145 (1991)).

(3) "By the rules of attack journalism, the mere whiff of a controversy or scandal is grounds for a story. Although there is no persuasive evidence that official corruption has risen in Washington[,] . . . [*see* SUZANNE GARMENT, SCANDAL: THE CRISIS OF MISTRUST IN AMERICAN POLITICS (1991)], scandals increasingly fill the headlines. In the last decade, ethical lapses have accounted for a fourth of the coverage of Congress compared with less than a tenth in the previous decade . . . ." Patterson, *supra*, at 18 (quoting Lichter & Amundsen,

politicians and media members follow their self-interest to the detriment of the public as a whole. The problem seems to be getting worse over time. Consider the following evidence, reporting references to the independent counsel in the *New York Times* and *Washington Post* in the years since the Act's passage:

Front Page Stories Mentioning Independent Counsels[32]

1978	0
1979	0
1980	3
1981	15
1982	12
1983	11
1984	12
1985	13
1986	40
1987	91
1988	41
1989	19
1990	12
1991	10
1992	22
1993	1
1994	39
1995	72
1996	108
1997 (as of 11/9/97)	120

To be sure, this is not the whole story. Responsible editorial writers also seek to be, or to appear, statesman-like, and it is quite easy to assume the posture of the concerned outsider favoring appointment of an independent counsel on the

Less News is Worse News, *supra*; Mark J. Rozell, *Press Coverage of Congress, 1946-92*, *in* CONGRESS, THE PRESS, AND THE PUBLIC, *supra*).

(4) "There are now more than 40 firms specializing in opposition research, and their number has grown by 200 percent in the 1990s . . . ." Charles S. Clark, *Political Consultants*, 8 CQ RESEARCHER 867, 868 (1996) (citing LARRY J. SABATO & GLENN D. SIMPSON, DIRTY LITTLE SECRETS: THE PERSISTENCE OF CORRUPTION IN AMERICAN POLITICS (1996)).

32. Search of NEXIS, News and Curnws Libraries (Nov. 1997). Intrepid readers are invited to collect the figures since that time.

ground that otherwise there can be no assurance that justice will be done. This is, for example, the typical stance of the *New York Times* editorial page, which is often focused, with all imaginable seriousness and sobriety, on the legitimate concerns raised by the allegations and the need for "the air to be cleared." (The utter predictability of these editorials, admittedly, can make them appear a bit hilarious to long-time readers.) Of course, politicians are aware of this fact. No one really loses by calling for an independent counsel. A kind of cycle is therefore likely to build, in which political and media incentives fortify the interest in scandal-mongering. The Independent Counsel Act creates extremely damaging incentives, in a kind of bizarre parody of the Founders' effort to match incentives to institutional design.

In this light it should not be at all surprising that the Act is used in a partisan manner. A special problem is that it enlists the criminal justice system in partisan maneuvering. Such charges are easy to make and hard to rebut. They tend to stick.

3. The Independent Counsel

What about the standpoint of the criminal justice system itself? What incentives are placed on the independent counsel? The best way to answer such questions is by comparing the independent counsel to an ordinary prosecutor. As I have noted, any ordinary prosecutor has a limited budget and a large set of actual or potential targets of investigation. Thus, the prosecutor herself has a *wide* rather than *narrow* focus.[33] Every prosecutor also knows that criminality of some sort or another is extremely widespread. In any law school class, for example, a large percentage of students are likely to have committed some crime within the last decade.

The Act eliminates some of the key safeguards built into the ordinary role of the prosecutor—safeguards that are frequently overlooked, but that operate as crucial contributors to liberty under law. It thus creates an incentive toward zealotry. An independent counsel who uncovers nothing is likely to look as if he has more or less wasted his time, or done nothing, whereas an independent counsel who brings a prosecution, or several prosecutions, is likely to look, in at least some circles, like another Archibald Cox, a kind of hero of democratic ideals. In this way, the Act creates an incentive for independent prosecutors to do what prosecutors should not be unduly ready to do: to prosecute.

One of the great achievements of the Framers of the American Constitution was to link the analysis of institutions to an understanding of incentives. As noted, the system of national representation was designed to protect against the influence of factions, creating an incentive to serve the public good, and the system of checks and balances was designed to ensure that "ambition" would "counteract ambition."[34] Some of the most valuable developments in institu-

33. *See supra* Part IIB2.

34. *See* THE FEDERALIST No. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

tional reform—including the oversight role of OMB with respect to both the budget and regulation—have also attempted to link incentives to institutions. From this point of view, the Independent Counsel Act is especially poorly designed because it creates, predictably, the wrong incentives for everyone involved.

To say this is emphatically not to say that the independent counsels have been dishonorable people, or even that any of them has behaved dishonorably. In most cases, no one has been indicted. But the Act creates a strong incentive to focus intensely on particular persons and to resolve doubts in favor of further investigation or even indictment. Past practice confirms this statement insofar as it shows protracted investigation of groundless or trivial charges (consider the Olson case *supra*, and see the Appendix).

C. NONDELIBERATIVE DEMOCRACY AND THE CITIZENRY

What are the aggregate results of all this? We do not have sufficient information to know with precision. But some speculations seem reasonable. The Act contributes to a general aura of distrust of government, distrust grounded not on an assessment of what existing or potential policies actually do, but instead on a belief that officials are basically corrupt. Hence it is possible for Americans to be doing relatively well, in part because of government policies, while also believing that their government is very bad, in part because they "know" that every recent administration contains many likely criminals. Political deliberation is likely to be crowded out if the national news is focused on whether the Vice President should be investigated for a crime. And political alienation is extremely likely if officials on all sides are accused of criminality. Such accusations can easily be exploited by conspiracy-mongers and third party candidates such as Ross Perot, themselves subject to character assassination, but able in the process to draw many officials under a skeptical cloud.

It cannot be said that the Independent Counsel Act is the basic cause of the American people's distrust of government. But it defies belief to think that the Act has done anything to relieve that distrust, and it is ludicrous to suppose that it has not contributed to it.

IV. HOW TO HANDLE HIGH-LEVEL ILLEGALITY, WITH A NOTE ON THE FUTURE

The most obvious question raised by these points is how to handle the problem of high-level criminality. If not the Independent Counsel Act, then what? For most of the nation's history, this problem was handled without any special procedures, and it is not at all clear that special procedures are indispensable or even desirable. The vigilance of opposing parties and the press is likely to be an obstacle to official wrongdoing and corruption. Until the enactment of the Independent Counsel Act, scandals were handled in successful ways, through such initiatives as the voluntary appointment of an investigator known to be relatively impartial and free from partisan control. Political checks worked

reasonably well.[35]

Usually invoked as a counterexample, the Watergate scandal is actually a case in point. Archibald Cox was made independent by Justice Department regulations. After Robert Bork fired Cox, Leon Jaworski was appointed, did his job well, and President Nixon had to resign. The system worked. And there was no Independent Counsel act. The true lesson of the Watergate scandal is that political safeguards and ordinary prosecutors are perfectly sufficient.

Disgrace and ultimately impeachment are of course available for the most serious wrongs, and public opinion, in a highly politicized, two-party system filled with incentives to ferret out corruption, the possibility of disgrace and impeachment are likely to do most of what needs to be done. Indeed, it is plausible to say that the rise of "attack journalism" has rendered independent prosecutors far less necessary. Because the relevant investigations generally begin with suspicions voiced by the press in any case, it may well make sense to require the press to do its own investigatory work, especially if markets reward such investigations. If journalists are able to amass enough inculpatory evidence, either political safeguards or legal reprisals are highly likely. This argument carries particular force if the primary purpose of these investigations is to deter wrongdoing. Reputational effects of press investigations are already high.

If the choice is between the continued use of the Independent Counsel Act and its repeal, the appropriate course is repeal. Indeed, this would probably be the best approach. But an intermediate step is possible. It may well make sense to create a particular, highly professionalized institution with a degree of independence, one of whose functions is to explore questions of this kind.

The simplest approach would be to establish an office within the Department of Justice, perhaps modelled on the FBI, and entrusted with several sensitive jobs, including that of investigating reports of illegality involving a small band of officials: the President, the Vice President, and the Attorney General. Crucially, people in such an office would have a history to draw on and a basis for reasonable comparisons. They would also have a menu of past cases rather than one-shot special appointees, and as career officials, they would have no special tendency toward zealotry. It is not necessary to discuss this proposal in detail; it has multiple analogues in existing offices in the Department of Justice, dealing, in a highly professional manner, with ethical issues and Freedom of Information Act requests.

Might a reform of this kind happen in the near future? On the one hand, there is some reason to think that it will. Almost everyone who has thought about it—including almost everyone in Washington—knows that the Act has been a dismal failure, that it creates bad incentives, and that its repeal would be a great service to the nation. Privately, most Members of Congress firmly believe that

35. A good discussion of the past viability of political checks is TERRY EASTLAND, ETHICS, POLITICS, AND THE INDEPENDENT COUNSEL: EXECUTIVE POWER, EXECUTIVE VICE 1789-1989 (1989).

repeal would be desirable. If a secret vote were possible, I suspect that the Act would be repealed by a substantial majority.

On the other hand, most people now agree that it is far from clear whether the Act will be repealed or allowed to expire. There is a real paradox in the fact that while people privately agree that the Act should be eliminated, many tend to support it in their public capacity. What accounts for this? The answer is illuminating and complex. First, there is an intriguing kind of collective action problem here; any particular official who calls for the Act's repeal might appear to be signalling a lack of concern with violations of the public trust, an excessive alliance with the current administration, or perhaps even his own corruption. The result is that each official, acting in his self-interest, will not call for repeal even when all officials, if able to act in concert, might well support exactly that.

But there is a further point. It is very hard to repeal any statute designed to produce "ethics in government" after that statute is in place. Public opinion is likely to stand firm against any such repeal; at least influential elements of the public sector might well mobilize in opposition. It is for this reason that even if the collective action problem could be solved and all Members of Congress could make their positions public at the same time, the statute might be preserved. A public outcry from repeal of the Act is entirely possible. Certainly such an outcry is to be expected from the media, with predictable damaging effects. In this way, we have come full circle.

CONCLUSION

The principal problem with the Independent Counsel Act is that it imposes predictable and harmful incentives on Members of Congress, the media, and the independent counsel himself. By so doing, it makes all relevant institutions work less well. Congress intended the Act to increase trust in government; instead it has diminished trust in government. The Act aggravates some of the most serious problems in Congress by deflecting attention from substantive issues and turning disputes about policy into allegations of criminality.

There are other problems, too. From the standpoint of the prospective defendant, the Act eliminates some of the principal safeguards of liberty under law—the fact that a prosecutor has a wide agenda, cannot easily focus on any single person, faces a budget constraint, and will not initiate proceedings against everyone who has committed a technical violation of the law. By contrast, an ordinary prosecutor has a menu of possible crimes to pursue, and must proceed only in the most serious cases. This is an important and overlooked guarantor of personal freedom. The Independent Counsel Act is thus a kind of cruel parody of the achievement of the Founders of the American Constitution, who merged an understanding of incentives and an understanding of appropriate institutions.

This is not to deny that the Act is a response to a legitimate concern: favoritism in the criminal prosecution of high-level wrongdoing. The problem is genuine. In some democracies, it is a fundamental problem. It is not, however,

one of the more serious problems facing American government, either now or in the foreseeable future. The most serious problems involve the actual effects of policies on people's lives; the Act deflects attention from those problems. In any case, official wrongdoing can and should be handled through other, less destructive means. These include impeachment, political controls of the ordinary sort, threats of prosecution from executive authorities, and perhaps new institutions that avoid the risks created by the independent counsel.

Most people who have explored the subject knows that the Act is a disastrous failure and that it should be repealed. On the merits there is no serious question. The only serious questions are how many people who have explored the subject will be willing to say that this is so, and how many members of Congress will have the courage to say it publicly as well as privately.

Appendix

There have been seventeen special prosecutors or independent counsels appointed to investigate wrongdoing by senior government officials since the Ethics in Government Act was passed in 1978. Their jurisdictions, durations, and expenses have grown over the years. As of September 30, 1996, the total cost of the probes, including three still under way, was $ 128.8 million.

Carter administration

Subject: Hamilton Jordan, White House chief of staff
Duration: 1979-1980
Counsel: Arthur Christy
Issue: Cocaine use
Outcome: No charges filed
Cost: $ 182,000

Subject: Timothy Kraft, White House aide
Duration: 1980-1981
Counsel: Gerald Gallinghouse
Issue: Cocaine use
Outcome: No charges filed
Cost: $ 3,300

Reagan administration

Subject: Raymond Donovan, Labor secretary
Duration: 1981-1982
Counsel: Leon Silverman
Issue: Lying about ties to organized crime
Outcome: No charges filed
Cost: $ 326,000

Subject: Edwin Meese III, White House counselor
Duration: 1984
Counsel: Jacob Stein
Issue: Incomplete financial disclosure
Outcome: No charges filed
Cost: $ 312,000

Subject: Theodore Olson, assistant attorney general
Duration: 1986-1989
Counsel: Alexia Morrison
Issue: Lying to Congress
Outcome: No charges filed
Cost: $ 2.1 million

Subject: Michael Deaver, White House deputy chief of staff
Duration: 1986-1989
Counsel: Whitney North Seymour
Issue: Lying about lobbying activities
Outcome: Convicted
Cost: $ 1.6 million

Subject: Iran-Contra affair
Duration: 1986-1994
Counsel: Lawrence Walsh
Issue: Lying to and obstructing Congress, destroying documents
Outcome: 7 guilty pleas; 4 convictions (Oliver North's and John Poindexter's)

Subject: Confidential
Duration: 1989
Counsel: Sealed
Issue: Confidential
Outcome: Confidential
Cost: $ 15,000

Subject: Department of Housing and Urban Development
Duration: 1990-1996
Counsel: Arlin Adams (1990); Larry Thompson (1995)
Issue: Influence-peddling by senior HUD officials and others
Outcome: 16 convictions
Cost: $ 26.4 million

Subject: Confidential
Duration: 1991-1992

Counsel: Sealed
Issue: Confidential
Outcome: Confidential
Cost: $ 93,000

Subject: Janet Mullins and Steven Berry, State Department aides
Duration: 1992-1995
Counsel: Joseph DiGenova (1992); Michael Zelden (1996)
Issue: Privacy invasion in search of Bill Clinton passport files
Outcome: No charges
Cost: $ 2.9 million

Clinton administration

Subject: President and Mrs. Clinton
Duration: 1994-present
Counsel: Robert Fiske (1994); Kenneth Starr (1994)
Issue: Whitewater; White House travel office firings; misuse of FBI personnel files
Outcome: 9 plea agreements; 3 convictions; 2 acquittals; ongoing.
Cost: $ 27.3 million

Subject: Mike Espy, former secretary of Agriculture
Duration: 1994-present
Counsel: Donald Smaltz
Issue: Illegal gifts
Outcome: 1 guilty plea; 9 convictions; 3 indictments, including Espy's on 39 counts; ongoing.
Cost: $ 7.9 million

Subject: Henry Cisneros, former secretary of Housing and Urban Development
Duration: 1995-present
Counsel: David Barrett
Issue: Lying to FBI about payments to a former mistress
Outcome: Ongoing
Cost: $ 1.9 million

Subject: Ron Brown, late Commerce secretary
Duration: 1995-1996
Counsel: Daniel Pearson
Issue: Financial improprieties
Outcome: Probe closed after Brown's death
Cost: $ 2.5 million

SOURCES: General Accounting Office, CQ research Globe staff chart

CARTER ADMINISTRATION

Subject	Position	Duration	Counsel	Issue	Outcome	Cost
Hamilton Jordon	White House Chief of Staff	1979-80	Arthur Christy	Cocaine Use	No Charges Filed	$182,000
Timothy Kraft	White House Aide	1980-81	Gerald Gallinghouse	Cocaine Use	No Charges Filed	$3,300

REAGAN ADMINISTRATION

Subject	Position	Duration	Counsel	Issue	Outcome	Cost
Raymond Donovan	Labor Secretary	1981-82	Leon Silverman	Lying about ties to organized crime	No Charges Filed	$326,000
Edwin Meese III	White House Counselor	1984	Jacob Stein	Incomplete Financial Disclosure	No Charges Filed	$3,300
Theodore Olson	Assistant Attorney General	1986-89	Alexia Morrison	Lying to Congress	No Charges Filed	$2.1 million