

WHITE HOUSE INSPECTION

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ABSTRACT

Attempting to hold the President and White House officials accountable necessarily presents a fundamental conundrum—how to balance essential characteristics such as independence and neutrality with electoral accountability and investigative enforcement authority. Since Watergate, our country has relied on two primary methods for White House investigation—either a criminal prosecutor with some independence, or a congressional investigation. These mechanisms, as well as past approaches, have largely proven inadequate and have lately been the subject of extensive criticism. And these problems principally arise out of two overarching characteristics of all past accountability systems: (1) the power to investigate has always been combined with a power to sanction, and (2) sufficient power to compel the production of relevant information has been provided only to a criminal prosecutor.

This Article challenges the wisdom of these two characteristics and proposes a new paradigm for addressing accountability holistically. Crucially, this proposal would sever the pure investigatory function—what I call inspection—from any power to sanction, and it would empower—for the first time—an independent entity that is not a criminal prosecutor with the authority to compel the production of information and protect its confidentiality. The proposal fits comfortably within the constitutional framework, even under a robust unitary executive view of Article II. And numerous past and existing accountability models, such as independent commissions, judicial misconduct panels, and inspectors general, further support the wisdom and constitutionality of such a proposal.

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*The true rule, in determining to embrace, or reject any thing, is not whether it have any evil in it; but whether it have more of evil, than of good. There are few things wholly evil, or wholly good. Almost every thing, especially of governmental policy, is an inseparable compound of the two; so that our best judgment of the preponderance between them is continually demanded.*¹

INTRODUCTION

At the Constitutional Convention, James Madison recognized—in the context of discussing impeachment—the “indispensable” need “that some provision should be made for defending the Community” against the “perfidy” of a President.² The members of the Convention cited and enshrined in the Constitution the commonly discussed principle that “no one is above the law,”³ a fundamental principle that traces its origins back to the Magna Carta and that had been recognized by prominent Framers and influential writers such as Locke, Montesquieu, John Adams, and Thomas Paine.⁴

In *Trump v. United States*, that principle lay at the core of the question of a former President’s immunity from criminal prosecution.⁵ The dissent began with this precept and repeatedly castigated the majority for abandoning it.⁶ And the majority struggled to defend its conclusion as consistent with that principle.⁷ Other courts, Presidents, officials, and

1. Abraham Lincoln, Speech in the U.S. House of Representatives Regarding Internal Improvements (June 20, 1848), in 1 THE COLLECTED WORKS OF ABRAHAM LINCOLN 484 (Roy Basler ed., 1953).

2. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 65 (Max Farrand ed., 1911); see also MICHAEL J. GERHARDT, THE LAW OF PRESIDENTIAL IMPEACHMENT: A GUIDE FOR THE ENGAGED CITIZEN 120–21 (2024) (collecting and discussing these and other similar comments related to impeachment made during the Constitutional and Ratification Conventions).

3. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 2, at 65 (comments of George Mason).

4. See John Adams, *Novanglus; Or, a History of the Dispute with America, from Its Origin, in 1754, to the Present Time*, in THE REVOLUTIONARY WRITINGS OF JOHN ADAMS 125 (C. Bradley Thompson ed., Liberty Fund 2000); JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 142 (Peter Laslett ed., Cambridge Univ. Press 1988) (1689); 3 BARON CHARLES DE MONTESQUIEU, THE SPIRIT OF THE LAWS 96–111 (Anne M. Cohler, Basia Carolyn Miller & Harold Samuel Stone trans. & eds., Cambridge Univ. Press 1989) (1748); THOMAS PAINE, COMMON SENSE, *reprinted in* OUR NATION’S ARCHIVE: THE HISTORY OF THE UNITED STATES IN DOCUMENTS (Erik Bruun & Jay Crosby eds. 1999); *Magna Carta, 1215*, NAT’L ARCHIVES cl. 61, <https://www.nationalarchives.gov.uk/education/resources/magna-carta/british-library-magna-carta-1215-runnymede/> [<https://perma.cc/Q39Q-PUUF>].

5. 603 U.S. 593 (2024).

6. See *id.* at 657 (Sotomayor, J., dissenting) (“Today’s decision to grant former Presidents criminal immunity . . . makes a mockery of the principle, foundational to our Constitution and system of Government, that no man is above the law.”); *id.* at 659, 666–67; *id.* at 687, 690 (Jackson, J., dissenting).

7. See *id.* at 639–40, 642 (majority opinion).

prosecutors wanting to emphasize the impartiality and objectivity of the law and its sanction have also repeatedly invoked this maxim.⁸

One aspect of accountability—that at issue in *Trump*—is punishment. But another, often overlooked, aspect of accountability is the necessity and authority of the investigation itself. As Edmund Randolph recognized in the same debate over impeachment at the Convention, “[t]he Executive will have great opportunitys [sic] of abusing his power.”⁹ Those opportunities are even greater than Randolph likely could have imagined given the growth of the federal government, the rise of the “imperial presidency,”¹⁰ and the expansion of government secrecy tools and doctrines.¹¹ Sure, the President is not above the law. But the “law” only has force if it can be enforced. And it can only be enforced if its violations are known.

The country is at a pivotal moment when it comes to investigating misconduct at the highest levels of government. Recent years have witnessed, among other things, three impeachments of executive branch officials, an additional impeachment investigation, various forms of

8. The most famous statement may be that of President Teddy Roosevelt, who somewhat cryptically used it to admonish labor and management factions in his State of the Union address in 1803, that “[n]o man is above the law and no man is below it; nor do we ask any man’s permission when we require him to obey it.” President Theodore Roosevelt, Third Annual Message to Congress (Dec. 7, 1903), <https://www.presidency.ucsb.edu/documents/third-annual-message-16> [<https://perma.cc/84M6-BLT7>]. More recently, President Biden used the phrase in discussing the criminal trials of former President Trump, and Special Counsel David Weiss used it after convicting Biden’s son, Hunter Biden, on gun charges. See Victor Mather, *A Brief History of the Phrase ‘No One Is Above the Law,’* N.Y. TIMES (June 13, 2024), <https://www.nytimes.com/2024/06/13/us/politics/trump-biden-no-one-is-above-the-law.html> [<https://perma.cc/U2R7-LZCJ>].

9. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 2, at 67.

10. See generally ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY (2004); Claire O. Finkelstein, *The Imperial Presidency and the Rule of Law*, in SOVEREIGNTY AND THE NEW EXECUTIVE AUTHORITY 145 (Claire O. Finkelstein & Michael Skerker eds., 2018) (discussing the implications of the rise of the imperial presidency to the rule of law).

11. See generally HEIDI KITROSSER, RECLAIMING ACCOUNTABILITY: TRANSPARENCY, EXECUTIVE POWER, AND THE U.S. CONSTITUTION (2015) (discussing the mechanisms the U.S. government has developed to thwart transparency and accountability, particularly in the area of national security); Christina Koningsor, *Secrecy Creep*, 169 U. PA. L. REV. 1751, 1766 (2021) (discussing the way that secrecy doctrines have crept across jurisdictional lines, including into state law, focusing primarily on law enforcement secrecy); Kathleen Clark, *The Architecture of Accountability: A Case Study of the Warrantless Surveillance Program*, 2010 BYU L. REV. 357 (discussing mechanisms for oversight into surveillance and oversight of the executive branch more broadly).

impeachment “trials” in the Senate;¹² five special counsel appointments,¹³ numerous congressional investigations,¹⁴ mass firings of inspectors general,¹⁵ the firing of the heads of the Office of Special Counsel and the Office of Government Ethics,¹⁶ and the attempted gutting of the Merits Systems Review Board.¹⁷ Few are satisfied with the current mechanisms for investigation, and numerous scholars, commentators, and former officials have sought in recent years to illuminate and redress the existing problems

12. See H.R. Res. 863, 118th Cong. (2024) (impeaching Secretary of Homeland Security Alejandro Mayorkas); H.R. Res. 918, 118th Cong. (2023) (authoring an impeachment inquiry into President Biden); H.R. Res. 24, 117th Cong. (2021) (impeaching President Trump for “incitement of insurrection”); H.R. Res. 755, 116th Cong. (2019) (impeaching President Trump for abuse of power and obstruction of Congress); Claudia Grisales, Barbara Sprunt & Deirdre Walsh, *Senate Kills Articles of Impeachment Against Homeland Security Secretary Mayorkas*, NPR (Apr. 17, 2024), <https://www.npr.org/2024/04/17/1245377914/senate-articles-impeachment-mayorkas-vote> [https://perma.cc/5YUD-BNGE]; Domenico Montanaro, *Senate Acquits Trump in Impeachment Trial—Again*, NPR (Feb. 13, 2021), <https://www.npr.org/sections/trump-impeachment-trial-live-updates/2021/02/13/967098840/senate-acquits-trump-in-impeachment-trial-again> [https://perma.cc/3U5E-D93N]; Michael D. Shear & Nicholas Fandos, *Senate Opens Trump Impeachment Trial as New Ukraine Revelations Emerge*, N.Y. TIMES (Jan. 16, 2020), <https://www.nytimes.com/2020/01/16/us/politics/trump-impeachment.html> [https://perma.cc/3H4V-WLXU].

13. See APPOINTMENT OF DAVID C. WEISS AS SPECIAL COUNSEL, Att’y Gen. Ord. No. 5730-2023 (Aug. 11, 2023); APPOINTMENT OF ROBERT K. HUR AS SPECIAL COUNSEL, Att’y Gen. Ord. No. 5588-2023 (Jan. 12, 2023); APPOINTMENT OF JOHN L. SMITH AS SPECIAL COUNSEL, Att’y Gen. Ord. No. 5559-2022 (Nov. 18, 2022); APPOINTMENT OF SPECIAL COUNSEL TO INVESTIGATE MATTERS RELATED TO INTELLIGENCE ACTIVITIES AND INVESTIGATIONS ARISING OUT OF THE 2016 PRESIDENTIAL CAMPAIGNS, Att’y Gen. Ord. No. 4878-2020 (Oct. 19, 2020); APPOINTMENT OF SPECIAL COUNSEL TO INVESTIGATE RUSSIAN INTERFERENCE WITH THE 2016 PRESIDENTIAL ELECTION AND RELATED MATTERS, Att’y Gen. Ord. No. 3915-2017 (May 17, 2017).

14. See generally Press Release, H. Comm. on Oversight & Accountability, Chairman Comer Releases Oversight Committee’s Accomplishments for the 118th Congress (Oct. 17, 2024), <https://oversight.house.gov/release/chairman-comer-releases-oversight-committees-accomplishments-for-the-118th-congress/> [https://perma.cc/9VBE-RYDB] (noting the committee had conducted “over 130 hearings with over 100 government witnesses” and “issued more than 50 subpoenas and sent over 600 investigative letters” and listing the various investigations into the Biden administration); Alex Moe, *House Investigations of Trump and His Administration: The Full List*, NBC NEWS (May 27, 2019), <https://www.nbcnews.com/politics/donald-trump/house-investigations-trump-his-administration-full-list-n1010131> [https://perma.cc/M5X6-UQSE] (listing the various investigations being conducted by “[a]t least 14 Democratic-led House committees” into the first Trump administration).

15. See David Nakamura, Lisa Rein & Matt Viser, *Trump Defends Ousting at Least 15 Independent Inspectors General in Late-Night Purge*, WASH. POST (Jan. 25, 2025), <https://www.washingtonpost.com/politics/2025/01/24/trump-fire-inspectors-general-federal-agencies/> [https://perma.cc/LJ7D-3TQC].

16. See Sean Michael Newhouse, *Ethics and Whistleblower Officials Fired by Trump*, GOV’T EXEC. (Feb. 11, 2025), <https://www.govexec.com/management/2025/02/ethics-and-whistleblower-officials-fired-trump/402887> [https://perma.cc/6RC6-K7Z2].

17. See *Harris v. Bessent*, 775 F. Supp. 3d 164, 171 (D.D.C. 2025), *hearing en banc denied*, No. 25-5037, 2025 WL 1033740 (D.C. Cir. Apr. 7, 2025), *cert. denied before judgment*, 146 S. Ct. 76 (2025), *rev’d*, 160 F.4th 1235 (D.C. Cir. 2025).

with executive branch accountability in response to various congressional, special counsel, and impeachment investigations.¹⁸

Investigating a President or high-ranking officials necessarily presents a fundamental conundrum—how to achieve the independence, enforcement authority, objectivity, and expertise necessary to a neutral, effective investigation while maintaining accountability to the electorate or supervisors, and doing so without infringing on the President’s constitutional authority or unnecessarily interfering with the functioning of the executive branch. As Lincoln recognized in his 1848 speech, no choice among the available options is purely good; the choice of policy must balance the “good” achieved from providing mechanisms for such accountability against the potential “evil” these mechanisms potentially engender.

Recent decades have made clear that the current mechanisms for investigating the White House are insufficient and, at times, redundant. The institution of the special counsel has fallen prey to the same withering, bipartisan attacks that previously ended the reign of the independent counsel.¹⁹ And, in any event, the Court’s decision in *Trump* may be the death knell of the current special counsel approach. Congressional investigations

18. See, e.g., BOB BAUER & JACK GOLDSMITH, *AFTER TRUMP: RECONSTRUCTING THE PRESIDENCY* (2020); ANDREW COAN, *PROSECUTING THE PRESIDENT: HOW SPECIAL PROSECUTORS HOLD PRESIDENTS ACCOUNTABLE AND PROTECT THE RULE OF LAW* (2019); Noel L. Hillman, *Defenses Commensurate with the Danger of Attack: The Special Counsel Regulations, Separation of Powers and a Call for Reform in the Department of Justice*, 22 GEO. J.L. & PUB. POL’Y 453, 497 (2024); Saikrishna Bangalore Prakash, *Prosecuting and Punishing Our Presidents*, 100 TEX. L. REV. 55 (2021); Steven G. Calabresi & Gary Lawson, *Why Robert Mueller’s Appointment as Special Counsel Was Unlawful*, 95 NOTRE DAME L. REV. 87 (2019); Robert Delahunty & John Yoo, *The Presidential Immunity Decision*, 34 HARV. J.L. & PUB. POL’Y: PER CURIAM 1 (2024); Andrew Weissmann, *Three Flaws in the Supreme Court’s Decision on Presidential Criminal Immunity*, JUST SEC. (July 17, 2024), <https://www.justsecurity.org/97781/three-flaws-supreme-court-immunity/> [<https://perma.cc/EV4J-N8YT>]; Cass R. Sunstein, *Presidential Immunity and Democratic Disorder* (July 16, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4896559 [<https://perma.cc/Z4WF-MK62>] (unpublished manuscript); Emily Berman, *Recalibrating Interbranch Bargaining*, 66 WM. & MARY L. REV. 395 (2024); Saikrishna Bangalore Prakash, *“Not a Single Privilege Is Annexed to His Character”: Necessary and Proper Executive Privileges and Immunities*, 2020 SUP. CT. REV. 229; Jonathan H. Adler, *All the President’s Papers*, 2019 CATO SUP. CT. REV. 31; Heidi Kitrosser, *Like “Nobody Has Ever Seen Before”: Precedent and Privilege in the Trump Era*, 95 CHI.-KENT L. REV. 519 (2020); Annie L. Owens, *Thwarting the Separation of Powers in Interbranch Information Disputes*, 130 YALE L.J.F. 494 (2021); Jonathan David Shaub, *The Executive’s Privilege*, 70 DUKE L.J. 1 (2020); Nik Popli, *Experts Blast Mayorkas Impeachment Probe for Lack of Evidence*, TIME (Jan. 10, 2024), <https://time.com/6554103/mayorkas-impeachment-hearing-criticized/> [<https://perma.cc/2YPQ-YSPP>]; Frank O. Bowman, III, *The Biden Impeachment Inquiry: A Heedless Descent into Constitutional Anarchy*, JUST SEC. (Dec. 13, 2023), <https://www.justsecurity.org/90670/the-biden-impeachment-inquiry-vote-a-heedless-descent-into-constitutional-anarchy/> [<https://perma.cc/BP5X-9SN4>]; Michael Gerhardt, *Opinion: It’s Been 50 Years Since Nixon Resigned. Impeachment Hasn’t Held Up Well*, CNN (Dec. 21, 2023), <https://www.cnn.com/2023/12/21/opinions/trump-biden-impeachment-nixon-watergate-gerhardt/index.html> [<https://perma.cc/4FDS-HJTF>].

19. See *infra* text accompanying notes 46, 61–64, 159–65.

suffer from endemic partisanship and ultimately lack crucial investigative enforcement power. Inspectors general have limited jurisdiction, answer to appointed agency heads, are subject to removal, and similarly lack enforcement power. Impeachment is exceedingly difficult and inherently partisan—and perceived as such. Add to this existing mix the Supreme Court’s robust embrace of the unitary executive as well as its startling dicta in *Trump* calling into question the scope of Congress’s authority with respect to the Justice Department,²⁰ and the issue becomes even more complicated—and pressing.

Accordingly, this Article proposes a novel, comprehensive solution to the recurrent problem of investigating the White House. It identifies five attributes that must be considered and balanced in designing any system of White House investigation—(1) independence; (2) accountability; (3) investigative enforcement authority; (4) neutrality and objectivity; and (5) sanction—and argues that history has shown the impossibility of successfully balancing all five in a single entity. I therefore advocate for the implementation of two principles: first, the complete separation of the investigatory function—what I refer to as “inspection”—from the enforcement function, i.e., the power to act or even opine on the results or implications of that inspection; second, the existence of robust investigatory power—including the ability to use judicial process—outside of the criminal prosecutorial process. To implement these two principles, and drawing on insights collected from historical experimentation and proposed reforms, this Article proposes the establishment of a continuing, multi-headed, independent investigatory body within the executive branch to investigate—or, rather, inspect—the White House and the President. Crucially, this investigative entity would lack any power to advise on or impose sanction.

The proposal is, in reality, a collection of proposed reforms that could be implemented together as part of a comprehensive overhaul or implemented only partially in a piecemeal fashion. Part I sets out the varied history of presidential investigation in detail, including existing methods of accountability. Part II outlines various critiques from commentators and scholars about past and present methods of investigation and identifies other flaws in our existing mechanisms. And, drawing on both this history and the

20. In *Trump*, the Court characterized the Department of Justice’s functions investigating and prosecuting crime as within the “conclusive and preclusive” authority of the President and thus outside of congressional control. *Trump v. United States*, 603 U.S. 593, 620–21 (2024). See generally Shalev Gad Roisman, *President Trump in the Era of Exclusive Powers*, HARV. L. REV. BLOG (Apr. 12, 2025), <https://harvardlawreview.org/blog/2025/04/president-trump-in-the-era-of-exclusive-powers/> [<https://perma.cc/3SJA-9GRP>] (describing *Trump* as holding that the President has exclusive power over the law execution and a representation of the “apotheosis of the exclusive powers view”).

existing flaws in the system, Part III describes in detail and defends a comprehensive proposal for a continuing, independent commission charged with White House inspection. In so doing, Part III identifies several characteristics essential to the proposal that have relevance in any attempt at reform. First, in terms of *structure*, this proposal envisions a (1) multimember commission or council appointed by the President and confirmed by the Senate; whose members (2) serve staggered terms and (3) must meet statutory standards relating to objectivity and expertise. Second, as far as *authority*, the commission must have (4) robust investigative enforcement authority, through the use of the subpoena power and judicial process; but (5) no authority to sanction or punish. I explain why this type of commission must be (6) established within the executive branch, but (7) statutorily independent of the White House and the Department of Justice. Finally, the commission and its investigations would be governed by both (8) specific and robust confidentiality requirements and (9) mandatory reporting requirements to both Congress and the Justice Department. Other procedural requirements—such as requiring a supermajority for certain actions—would further ensure the commission could effectively perform its functions.

As explained in Part III, such a body would be neither unprecedented nor constitutionally suspect. Numerous existing and historical analogs exist, and its implementation would address many of the issues that currently plague White House investigations conducted by both Congress and prosecutors. Indeed, this model would in many ways mirror the little-discussed method on which the country relies to investigate judicial misconduct, including investigations that result in referrals for impeachment.²¹ Justice Kagan has even called for a similar type of independent committee as a means of enforcing the Supreme Court's ethics code.²² Even if the Supreme Court continues to further its robust unitary executive theory of Article II, as it appears likely to do,²³ this commission should pass constitutional muster.

Investigating the White House and the President is both a vitally important issue and an impossibly hard one. The contours of, and

21. See *Judicial Conduct & Disability*, U.S. COURTS, <https://www.uscourts.gov/administration-policies/judicial-conduct-disability> [https://perma.cc/7MV6-AWJY].

22. Ann E. Marimow, *Justice Kagan Calls for a Way to Enforce Supreme Court Ethics Code*, WASH. POST (July 25, 2024), <https://www.washingtonpost.com/politics/2024/07/25/supreme-court-kagan-ethics-code-reform/> [https://perma.cc/W6S2-W4DA].

23. See Transcript of Oral Argument at 137–38, *Trump v. Slaughter*, No. 25-332 (argued Dec. 8, 2025) (acknowledging that the “President is vested with all the executive power”); see also Beau J. Baumann, *Slaughter Oral Argument Recap: Humphrey’s Is Dead! Long Live Wiener?*, YALE J. REG.: NOTICE & COMMENT (Dec. 8, 2025), <https://www.yalejreg.com/nc/slaughter-oral-argument-recap-humphreys-is-dead-long-live-wiener-by-beau-j-baumann/> [https://perma.cc/X7NF-KLVV] (discussing the oral arguments in *Slaughter* and the Justices’ reliance on unitary executive theory).

democratic context for, investigating officials at the highest levels of government are constantly shifting. And even if some mechanisms for *punishment* as a means to ensure adherence to the law are either too difficult or now nullified by *Trump v. United States*, that does not mean that inspection as a means of accountability should also be thwarted. Indeed, the decreed unavailability of criminal sanctions and lack of other reliable methods of accountability make inspection and subsequent reporting on that inspection even more essential.

Accountability comes in many forms. But common to them all is a need for robust, independent, electorally accountable investigation. There is wide agreement, however, that our existing mechanisms have fallen short, and that *some* reform is necessary. The history and tradition of White House investigations and various attempts at reform highlight effective measures and deficiencies. And it includes examples—sometimes landmark ones—of the system working. This tradition utilizes and values innovation and experimentation. This Article seeks to continue that tradition.

I. HISTORY, METHODS, AND PRACTICE OF WHITE HOUSE INVESTIGATIONS

This Part collects and describes the past and current mechanisms the country has turned to for White House investigation. Two primary methods of investigation dominate all others—prosecutors with some form of independence and congressional inquiry. Although other forms of investigation exist, such as inspectors general, none has authority or jurisdiction to investigate wrongdoing in the White House.²⁴ This review of White House investigation reveals two important truths. First, the country has always combined the power to investigate with the power to sanction— independent prosecutors investigate for purposes of criminal prosecution, and Congress investigates wrongdoing with impeachment looming as a possibility in the background, even if a remote one. Second, the country has vested the authority to compel the production of information—by judicial process if necessary—*only* in a single prosecutor operating within the criminal investigatory process. Those two characteristics give rise to many of the shortcomings and critiques discussed in Part II. But first understanding this history and legal landscape is vital, both to understand existing critiques and to propose reform.

24. Scholars have recognized this lack of accountability for decades, with some arguing for an inspector general for the White House even during the time of the independent counsel. See Kathleen Clark, *Toward More Ethical Government: An Inspector General for the White House*, 49 MERCER L. REV. 553 (1998).

A. Special and Independent Counsels

Since Watergate, the principal means for White House investigation has been through independent and special counsels. The idea of appointing an independent counsel to investigate high-level misconduct did not begin with Watergate, however.²⁵ In the Grant administration, for example, the Whiskey Ring scandal led to the appointment of an outside lawyer to assist in the investigation and prosecution of those responsible.²⁶ Ultimately, that prosecutor's decision to go after Grant's personal secretary Orville Babcock and implicate the White House led to his dismissal.²⁷ Similarly, backlash from the Teapot Dome scandal, which involved both the Secretary of the Interior and Attorney General under President Harding, forced President Coolidge, Harding's successor, to agree to employ two "special counsel of high rank, drawn from both political parties," to investigate the matter.²⁸ Coolidge nominated this bipartisan duo, but they had to be confirmed by the Senate.²⁹

The Watergate era is undoubtedly, however, the most significant historical inflection point in presidential investigation and governmental accountability. Criminal investigations and congressional inquiries revealed not only the illegal activities of the Nixon White House but also secret uses of military force,³⁰ illegal campaign activities and "slush funds,"³¹ domestic

25. See COAN, *supra* note 18, at 23–45 (detailing the history of special counsels before Watergate); Donald C. Smaltz, *The Independent Counsel: A View from Inside*, 86 GEO. L.J. 2307, 2311–20 (1998); see also DAVID A. LOGAN, CONG. RSCH. SERV., GGR-6, HISTORICAL USES OF A SPECIAL PROSECUTOR: THE ADMINISTRATIONS OF PRESIDENTS GRANT, COOLIDGE AND TRUMAN (1973) [hereinafter HISTORICAL USES OF A SPECIAL COUNSEL] (detailing the history of using special and independent counsels and prosecutors).

26. HISTORICAL USES OF A SPECIAL COUNSEL, *supra* note 25, at 5–8.

27. *Id.* at 11–13; see also Josh Blackman, A Historical Record of Special Counsels Before Watergate 15–16 (Sept. 29, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4970972 [<https://perma.cc/4P8L-NJW6>] (unpublished manuscript) (noting that President Grant did not remove the prosecutor himself but nonetheless effected his removal through the Attorney General).

28. 65 CONG. REC. 1520 (1924) (statement of the President); see *id.* at 1719–23 (discussing the President's "midnight" decision to appoint special counsels); HISTORICAL USES OF A SPECIAL COUNSEL, *supra* note 25, at 22–23.

29. See S.J. Res. 54, 68th Cong. (1924); COAN, *supra* note 18, at 32–34.

30. See Andrew Glass, *Nixon Authorizes Invasion of Cambodia, April 28, 1970*, POLITICO (Apr. 28, 2015), <https://www.politico.com/story/2015/04/this-day-in-politics-april-28-1970-117377> [<https://perma.cc/WB88-ZVL8>].

31. John M. Crewdson, *Nixon's Taped Remarks on Apparent Slush Fund Called Key Evidence in Rebozo Inquiry*, N.Y. TIMES (Dec. 9, 1974), <https://www.nytimes.com/1974/12/09/archives/nixons-taped-remarks-onapparent-slush-fund-called-key-evidence-in.html> [<https://perma.cc/4LW4-Q354>].

spying,³² and other abuses,³³ and these revelations initiated a new era in attempting to create structures for investigating and holding accountable executive branch actors.³⁴ After the Saturday Night Massacre and its political fallout,³⁵ the Watergate special prosecutors were granted de facto independence from the Attorney General and President in order to conduct a comprehensive investigation of the scandal.³⁶ The provisions that governed the appointment specifically provided protections against interference and removal and allowed the special prosecutor to contest claims of privilege, provisions that ultimately led to the landmark decision in *United States v. Nixon* and the first presidential resignation in the Nation's history.³⁷

After Watergate, a number of reforms were considered, including a proposal to give the Attorney General independence from the President as a formal, statutory matter.³⁸ But the ultimate statutory reform was the Ethics

32. *Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities*, U.S. SENATE, <https://www.senate.gov/artandhistory/history/common/investigations/ChurchCommittee.htm> [<https://perma.cc/DAY7-S7NB>] (“Despite these numerous challenges, the Church Committee investigated and identified a wide range of intelligence abuses by federal agencies, including the CIA, FBI, Internal Revenue Service, and National Security Agency.”).

33. *See Executive Impoundment of Appropriated Funds: Hearing Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary*, 92d Cong. 3 (1971) (statement of Sen. Sam J. Ervin) (calling “impounding appropriated funds” allocated by the legislature “an illegal exercise of the power of” the presidency); Ciara Torres-Spelliscy, *The I.T.T. Affair and Why Public Financing Matters for Political Conventions*, BRENNAN CTR. FOR JUST. (Mar. 19, 2014), <https://www.brennancenter.org/our-work/analysis-opinion/itt-affair-and-why-public-financing-matters-political-conventions> [<https://perma.cc/6V5B-V35E>].

34. *See* Kimberly L. Wehle & Jackson Garrity, *Executive Accountability Legislation from Watergate to Trump—and Beyond*, 7 U. PA. J.L. & PUB. AFFS. 37, 50–71 (2021) (detailing these post-Watergate reforms); MICHAEL SCHUDSON, *WATERGATE IN AMERICAN MEMORY: HOW WE REMEMBER, FORGET, AND RECONSTRUCT THE PAST* 161–63 (1992) (recognizing the effect of Watergate on the public's trust in government and the presidency); *see also* H.R. REP. NO. 93-876, at 3 (1974) (noting the need to reform the Freedom of Information Act because “[i]f the pertinent and necessary information on government activities is denied the public, the result is a weakening of the democratic process”).

35. *See* JAMES HAMILTON, *THE POWER TO PROBE: A STUDY OF CONGRESSIONAL INVESTIGATIONS* 33–34 (1976) (discussing the resignations of Attorney General Elliot Richardson and Deputy Attorney General William French Smith in protest of President Nixon's order to fire Special Prosecutor Archibald Cox).

36. Archibald Cox, the initial special prosecutor, was given authority to investigate “all offenses arising out of the 1972 Presidential election” and the sole discretion to decide “whether and to what extent he [would] inform or consult with the Attorney General” about the investigation. Establishing the Office of Watergate Special Prosecution Force, 38 Fed. Reg. 14688 (June 4, 1973).

37. 418 U.S. 683 (1974).

38. *See Removing Politics from the Administration of Justice: Hearings Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary*, 93d Cong. 490 (1974). Senator Sam Ervin proposed legislation to create an independent Department of Justice by limiting the President's authority to remove the Attorney General only for “good cause” and giving the Attorney General a six-year fixed term. The legislation would also have vested in the Attorney General the power to appoint the FBI Director, U.S. Attorneys, and U.S. Marshals. *Id.* Many witnesses raised constitutional and policy

in Government Act of 1978, which, among other things, established the Office of the Independent Counsel.³⁹ The purpose of the law was “to establish ‘a neutral procedure for resolving the conflict of interest that arises when the Attorney General must decide whether to pursue allegations of wrongdoing leveled against . . . [his] close political associates,’”⁴⁰ and President Carter supported the creation of an independent counsel as a mechanism to “eliminate all appearance of high-level interference in sensitive investigations and prosecutions.”⁴¹ The Act put in place a number of mechanisms to insulate any high-profile investigation from White House and Justice Department interference.⁴² These provisions and the Office of the Independent Counsel were famously upheld—with only Justice Scalia dissenting—in *Morrison v. Olson*,⁴³ and the statute was reauthorized twice.⁴⁴ But the independent counsel fell into disfavor after the perceived abuses of Lawrence Walsh’s Iran-Contra investigation and Ken Starr’s wide-ranging investigation of President Clinton.⁴⁵ Although a number of independent counsels conducted successful, noncontroversial investigations, these high-profile investigations of the White House led to fierce attacks related to Walsh’s and Starr’s perceived partisanship and abuses of office, and general dissatisfaction with the law led to its expiration in 1999, which was supported by the Department of Justice despite its previous advocacy for the retention of the law.⁴⁶

concerns about this proposal, and the Office of Legal Counsel later released an opinion declaring that such reforms would be unconstitutional. See *Proposals Regarding an Indep. Att’y Gen.*, 1 Op. O.L.C. 75, 77 (1977) (“[T]here is no method, short of a constitutional amendment, to separate the Attorney General from Presidential control.”).

39. Pub. L. No. 95-521, 92 Stat. 1824 (1978); see also Carl Levin & Elise J. Bean, *The Independent Counsel Statute: A Matter of Public Confidence and Constitutional Balance*, 16 HOFSTRA L. REV. 11, 12–14 (1987).

40. *Dellums v. Smith*, 797 F.2d 817, 820 (9th Cir. 1986) (quoting *Banzhaf v. Smith*, 737 F.2d 1167, 1168 (D.C. Cir. 1984), and citing *Special Prosecutor Provisions of Ethics in Government Act of 1978: Hearings Before the Subcomm. on Oversight of Gov’t Mgmt. of the S. Comm. on Governmental Affs.*, 97th Cong. 1–3 (1981) (statement of Sen. Cohen)).

41. 123 CONG. REC. S13329 (1977).

42. See *Morrison v. Olson*, 487 U.S. 654, 660–65 (1988) (describing the statutory framework); *id.* at 706–10 (Scalia, J., dissenting) (highlighting the ways in which the independent counsel was independent).

43. *Id.* at 692 (majority opinion).

44. See JACK MASKELL, CONG. RSCH. SERV., R43112, INDEPENDENT COUNSELS, SPECIAL PROSECUTORS, SPECIAL COUNSELS, AND THE ROLE OF CONGRESS 2 (2013).

45. See *id.* The House and Senate each held a lengthy hearing on the question of reauthorizing the independent counsel provisions in 1999 and witnesses identified many of the problems discussed *infra* in Part II as reasons for not reauthorizing the statute and instead returning the issue to the Department of Justice to handle internally. See *The Future of the Independent Counsel Act: Hearings Before the S. Comm. on Governmental Affs.*, 106th Cong. (1999) [hereinafter *Independent Counsel Hearing*]; *Reauthorization of the Independent Counsel Statute, Part I: Hearing Before the Subcomm. on Com. & Admin. L. of the H. Comm. on the Judiciary*, 106th Cong. (1999).

46. See BAUER & GOLDSMITH, *supra* note 18, at 167–68.

At the 1999 expiration of the independent counsel,⁴⁷ the Department of Justice enacted regulations, still in force today, to replace the independent counsel with an internal, independent prosecutor with freedom to investigate presidential or high-level wrongdoing in the executive branch.⁴⁸ These regulations drew heavily from unanimous recommendations made by a bipartisan task force,⁴⁹ and the regulations were designed to “strike a balance between independence and accountability in certain sensitive investigations, recognizing that there is no perfect solution to the problem.”⁵⁰ The regulations departed—purposefully—in significant respects from the framework governing the independent counsel. The regulations gave significantly more discretion to the Attorney General to decide whether to appoint a special counsel,⁵¹ and the Attorney General retains significantly more control over special counsel investigations under the regulations.⁵² The regulations also purposefully chose not to adopt the requirements from the independent counsel statute that the counsel furnish a final report to Congress and report on impeachable offenses.⁵³

Importantly, these regulations provide only an *option* for Attorneys General faced with potential wrongdoing in the White House. They are not mandatory. Patrick Fitzgerald, for example, was appointed as a “special counsel” pursuant to general statutory authority, not the special counsel

47. The Ethics in Government Act expired initially in 1992, but it was reenacted in 1994 due to the desire to investigate Whitewater. MASKELL, *supra* note 44, at 3. There have since been attempts to reauthorize the Ethics in Government Act and independent counsel as recently as 2016. *See, e.g.*, Independent Counsel Reauthorization Act of 2016, H.R. 5271, 114th Cong. (2016) (providing for the reauthorization of the Ethics in Government Act for five years and explicitly providing for investigations of the President).

48. *See* Office of the Special Counsel, 64 Fed. Reg. 37038 (July 9, 1999) (codified at 28 C.F.R. pts. 0 & 600). Bauer and Goldsmith call these regulations the initiation of the “fourth period in this history of special counsels.” BAUER & GOLDSMITH, *supra* note 18, at 170.

49. *See* ROBERT DOLE & GEORGE J. MITCHELL, PROJECT ON THE INDEPENDENT COUNSEL STATUTE: REPORT AND RECOMMENDATIONS (1999).

50. Office of the Special Counsel, 64 Fed. Reg. at 37038.

51. *Compare* 28 U.S.C. § 592(a)–(b) (1998) (requiring the Attorney General to refer a matter to a special court when she had “reasonable grounds” to believe further investigation of a matter was warranted), *with* 28 C.F.R. § 600.1(a)–(b) (2026) (granting the Attorney General authority to decide to whether “extraordinary circumstances” and the “public interest” warrant appointment of a special counsel).

52. Although the special counsel is explicitly exempted from “day-to-day supervision,” the Attorney General has authority to define the jurisdiction of the investigation, overrule an “inappropriate or unwarranted” action, and control the budget. 28 C.F.R. §§ 600.4(a), 600.5, 600.7(b)–(c), 600.8(a) (2026).

53. *Compare* 28 U.S.C. § 595(c) (1998) (directing the independent counsel to send the special appointing court periodic reports and a final report and requiring that she inform the House of Representatives of “substantial and credible information . . . that may constitute grounds for an impeachment”), *with* 28 C.F.R. § 600.8(c) (2026) (directing that the special counsel shall provide the Attorney General with “a confidential report” at the close of the investigation). In explaining this change in the regulations, the Justice Department noted the problems with the public reporting requirement and its departure from normal practice.

regulations, to investigate wrongdoing in the Bush White House related to the revelation of Valerie Plame's CIA identity.⁵⁴ Indeed, between 1999 and 2020, only one special counsel was appointed pursuant to the regulations.⁵⁵ And even the recent appointments of special counsels such as Robert Mueller, David Weiss, and John Durham have either not been pursuant to the special counsel regulations or only followed the regulations *in part*.⁵⁶ As discussed in Part II, these regulations have been subject to intense criticism in recent years. But they aim at the same goal articulated by President Carter—to enable a federal prosecutor to investigate wrongdoing by the President or other high-level executive somewhat independent from the unitary command structure of the President and Attorney General.

These special counsel investigations operate as a traditional criminal investigation, with a grand jury empaneled by the special counsel able to subpoena documents and testimony. Jack Smith, for example, was able to compel high-level advisors to President Trump to testify before the grand jury about the events leading up to and on January 6, 2021, despite claims of executive privilege.⁵⁷ Although the court opinions that rejected the privilege claims remain sealed, the coercive authority of the prosecutor forced former Chief of Staff Mark Meadows and former Assistant to the President Dan Scavino, among others, to testify,⁵⁸ even though the House

54. Letter from James B. Comey, Acting Att'y Gen., to Patrick J. Fitzgerald (Dec. 30, 2003); Letter from James B. Comey, Acting Att'y Gen., to Patrick J. Fitzgerald (Feb. 6, 2004); James Comey, Deputy Att'y Gen., Press Conference on Appointment of Special Counsel to Oversee Investigation into Alleged Leak of CIA Agent Identity and Recusal of Attorney General Ashcroft from the Investigation (Dec. 30, 2003), <https://www.c-span.org/video/?179743-1/special-prosecutor-appointment/> (last visited Apr. 18, 2026).

55. BAUER & GOLDSMITH, *supra* note 18, at 171–72.

56. Mueller, for example, was not appointed pursuant to the special counsel regulations but pursuant to the same authorities that Comey relied on to appoint Fitzgerald, likely because the regulations apply only to a “criminal investigation,” and the Mueller investigation, at the outset, involved a counterintelligence investigation, not a criminal one. *See* APPOINTMENT OF SPECIAL COUNSEL TO INVESTIGATE RUSSIAN INTERFERENCE WITH THE 2016 PRESIDENTIAL ELECTION AND RELATED MATTERS, Att’y Gen. Ord. 3915-2017 (May 17, 2017); *see also* BAUER & GOLDSMITH, *supra* note 18, at 173 (discussing this limitation in the existing special counsel regulations). Both Durham and Weiss were employees of the Department of Justice who were already conducting investigations, and the regulations require that the special counsel “be selected from outside the United States government.” 28 C.F.R. § 600.3(a) (2026). Attorney Generals Barr and Garland, respectively, appointed Durham and Weiss as special counsels in orders that referenced some, but not all, of the special counsel regulations. *See* APPOINTMENT OF SPECIAL COUNSEL TO INVESTIGATE MATTERS RELATED TO INTELLIGENCE ACTIVITIES AND INVESTIGATIONS ARISING OUT OF THE 2016 PRESIDENTIAL CAMPAIGNS, Att’y Gen. Ord. 4878-2020 (Oct. 19, 2020).

57. *See* Robert Legare, *Appeals Court Rejects Trump’s Motion to Block Mark Meadows, Former Aides from Testifying in Special Counsel Probe*, CBS NEWS (Apr. 4, 2023), <https://www.cbsnews.com/news/trump-mark-meadows-special-counsel-appeal-rejected/> [https://perma.cc/W8P9-WYLP].

58. *See* Katherine Faulders, Mike Levine, Alexander Mallin & Will Steakin, *Special Counsel Probe Uncovers New Details About Trump’s Inaction on Jan. 6: Sources*, ABC NEWS (Jan. 7, 2024), <https://abcnews.com/US/special-counsel-probe-uncovers-new-details-trumps-inaction/story?id=106131854> [https://perma.cc/7K9F-PRFU].

select committee investigating January 6 had failed to compel their testimony (or to punish them for their failure to comply with the congressional subpoenas).⁵⁹ Smith was also able to compel testimony from former Vice President Mike Pence, which was testimony the January 6 committee had also failed to procure.⁶⁰

The special counsel regulations became familiar to most Americans over the course of the Trump and Biden administrations. The five special counsels appointed since 2016—Mueller, Durham, Smith, Weiss, and Hur—have all investigated exceptionally high-profile matters, expended considerable department resources, and made numerous decisions about pursuing prosecutions or other matters. The public evidence suggests that the Attorney General has not appeared to play much of a role in supervising or contradicting their investigative or prosecutorial decisions. But, as occurred with the independent counsels operating under the Ethics in Government Act, almost every one of their choices—as well as the institution of the special counsel itself—has come under withering criticism.⁶¹ When Special Counsel Robert Hur testified about his investigation into President Biden, for example, he fielded heated attacks from the entire committee—Republicans and Democrats alike—fiercely questioning his competency, neutrality, thoroughness, and legal conclusions.⁶² Robert Mueller encountered a similar fate in his investigation into Russian interference in the 2016 election and obstruction of justice by President Trump,⁶³ and Jack Smith has been subject to widespread criticism for his investigations into and prosecutions of Trump and others.⁶⁴

59. See Carrie Johnson, *Former Trump Aide Navarro Indicted, but Justice Dept. Won't Charge Meadows or Scavino*, NPR (June 4, 2022), <https://www.npr.org/2022/06/03/1102923746/former-trump-a-dviser-navarro-indicted-for-contempt-of-congress-over-jan-6-subpoe> [https://perma.cc/8LYG-FCNU].

60. See Kyle Cheney, *Appeals Court Denies Trump Bid to Block Pence Testimony to Jan. 6 Grand Jury*, POLITICO (Apr. 26, 2023), <https://www.politico.com/news/2023/04/26/appeals-court-trump-pence-testimony-grand-jury-00094122> [https://perma.cc/47DG-DJZW].

61. See *infra* Section II.A.

62. See Rebecca Beitsch & Brett Samuels, *Special Counsel Hur Gets Hammered by Lawmakers: 5 Takeaways*, THE HILL (Mar. 12, 2024), <https://thehill.com/homenews/house/4527290-special-counsel-hur-gets-hammered-by-lawmakers-five-takeaways/> [https://perma.cc/4CGA-PD28].

63. See, e.g., Pete Williams, Tom Winter & Rich Schapiro, *Mueller Defends Russia Probe amid Criticism from Top Prosecutor*, NBC NEWS (Sept. 29, 2020), <https://www.nbcnews.com/politics/justice-department/mueller-defends-russia-probe-amid-criticism-top-prosecutor-n1241419> [https://perma.cc/BM7Q-JHR8] (noting the criticisms levelled against Mueller by a member of his prosecution team in a book); Katie Benner, *Barr Escalates Criticism of Mueller Team and Defends Trump*, N.Y. TIMES (May 31, 2019), <https://www.nytimes.com/2019/05/31/us/politics/barr-mueller-team.html> [https://perma.cc/AA4Y-UTKV]; Ken Dilanian, *Republicans Step Up Attacks on Special Counsel Robert Mueller*, NBC NEWS (Dec. 13, 2017), <https://www.nbcnews.com/politics/justice-department/republicans-step-attacks-special-counsel-robert-mueller-n829306> [https://perma.cc/EV5U-54HQ].

64. See, e.g., Jack Goldsmith, Opinion, *Jack Smith Owes Us an Explanation*, N.Y. TIMES (Oct. 9, 2024), <https://www.nytimes.com/2024/10/09/opinion/jack-smith-trump-biden.html> [https://perma.cc/].

B. Congressional Authority

The most common investigator of the White House both today and historically is Congress. In recent years, these investigations have been opened and pursued almost religiously by a House of Representatives controlled by the opposite party,⁶⁵ and the myriad investigations have resulted in a number of high-profile standoffs and litigation between the two branches over access to information.⁶⁶ These congressional oversight investigations into the highest levels of the executive branch are not new, of course, and probably have the longest historical pedigree of any type of White House investigation. Nor are they necessarily always driven by partisan influences. Indeed, the very first high-level investigation was initiated by a relatively friendly Congress during the Washington administration over the failed St. Clair expedition.⁶⁷ Less commonly—though increasingly in recent years—the House has also turned to its impeachment power as a basis for White House and presidential investigation.

The constitutional basis for traditional congressional oversight investigations is the recognition of an implied power to demand information necessary to perform its legislative functions.⁶⁸ In 1927, the Court explicitly

cc/9TBL-U563]; Elie Honig, *The Word Jack Smith Will Never Say*, N.Y. MAG: INTELLIGENCER (Jan. 19, 2024), <https://nymag.com/intelligencer/2024/01/the-word-jack-smith-will-never-say.html> [https://perma.cc/963Z-ZETJ]; Jason Willick, Opinion, *Politics Are Now Clearly Shaping Jack Smith's Trump Prosecution*, WASH. POST (Dec. 12, 2023), <https://www.washingtonpost.com/opinions/2023/12/12/special-counsel-jack-smith-politicized-prosecution/> [https://perma.cc/DY8B-SJM2].

65. See generally DOUGLAS L. KRINER & ERIC SCHICKLER, *INVESTIGATING THE PRESIDENT: CONGRESSIONAL CHECKS ON PRESIDENTIAL POWER* (2016) (demonstrating that congressional investigations of the President increase in frequency and ferocity when conducted by an opposite party, particularly as polarization increases).

66. As a small but representative sample, several disputes—including at least one from each of the Obama, Trump, and Biden administrations—have been litigated, though each case has settled before the appellate court has had an opportunity to resolve the merits of the dispute. See, e.g., *Comm. on the Judiciary v. Garland*, No. 24-cv-1911 (D.D.C. filed July 1, 2024) (dismissed May 21, 2025) (litigation over President Biden's assertion of executive privilege over materials from Special Counsel Hur's investigation); *Comm. on the Judiciary v. McGahn*, 968 F.3d 755 (D.C. Cir. 2020) (en banc) (litigation over President Trump's direction to former Counsel Don McGahn not to testify); *Comm. on Oversight & Gov't Reform v. Lynch*, 156 F. Supp. 3d 101, 109, 119 (D.D.C. 2016) (litigation over President Obama's assertion of executive privilege).

67. See 3 ANNALS OF CONG. 493 (1792) (approving a resolution that established a committee to “inquire into the causes of the failure of the late expedition under Major General St. Clair” and empowered it “to call for such persons, papers, and records, as may be necessary to assist their inquiries”); see also WILLIAM B. MCALLISTER, JOSHUA BOTTS, PETER COZZENS & AARON W. MARRS, U.S. DEP'T OF STATE, OFF. OF THE HISTORIAN, *TOWARD “THOROUGH, ACCURATE, AND RELIABLE”: A HISTORY OF THE FOREIGN RELATIONS OF THE UNITED STATES* SERIES 9–11 (2015).

68. See *Watkins v. United States*, 354 U.S. 178, 187 (1957) (“The power of the Congress to conduct investigations is inherent in the legislative process.”). This power of inquiry is well established

recognized the congressional right to subpoena an individual for information and punish him for non-compliance.⁶⁹ And that case arose out of the Teapot Dome scandal, which involved allegations of wrongdoing at the highest levels of the executive branch.⁷⁰ As Professor Josh Chafetz and others have catalogued, this legislative oversight authority has deep historical roots in the practice of the English legislature and was widely recognized in the early colonial legislatures as well.⁷¹

The question of Congress's power to investigate the White House also inevitably brings up the two houses' respective authorities in impeachment. Article I of the Constitution grants the House the "sole Power of Impeachment"⁷² and the Senate the "sole Power to try all Impeachments."⁷³ Courts and the executive branch have acknowledged that the two houses' impeachment authority—like their legislative authority—includes an implicit authority to collect information.⁷⁴ Indeed, the Framers and subsequent constitutional commentators, judges, and scholars often compare the House's role in impeachment to that of a grand jury, collecting evidence and deciding whether to impeach a President, judge, or other

today, though the subject of some disagreement among early constitutional theorists. *See, e.g.*, THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE 6–8 (Washington, D.C., Samuel Harrison Smith 1801) (collecting arguments for and against—but not resolving the question of—the power of a house of the legislature to punish non-members for contempt).

69. *McGrain v. Daugherty*, 273 U.S. 135, 174, 181–82 (1927) ("We are of [the] opinion that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function.").

70. *Id.* For background on the Teapot Dome scandal and the congressional oversight into the corruption in oil-field leases, see Burl Noggle, *The Origins of the Teapot Dome Investigation*, 44 MISS. VALLEY HIST. REV. 237, 245–46 (1957) and *Portraits in Oversight: Thomas Walsh and the Teapot Dome Investigation*, LEVIN CTR. FOR OVERSIGHT & DEMOCRACY (Nov. 5, 2023), <https://www.levin-center.org/senator-walsh-and-the-teapot-dome-investigation/> [https://perma.cc/W2ZB-VTT8].

71. *See, e.g.*, JOSH CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 153–69 (2017) (cataloging the English precedents, which included the authority to hold even the monarch in contempt, and the early colonial legislatures' continuation of that practice); 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 837–49, at 607–21 (Melville M. Bigelow ed., 5th ed. 1944).

72. U.S. CONST. art. I, § 2, cl. 5.

73. U.S. CONST. art. I, § 3, cl. 6.

74. *See Kilbourn v. Thompson*, 103 U.S. 168, 190 (1881) (stating that, in impeachment, both houses have "the right to compel the attendance of witnesses, and their answer to proper questions, in the same manner and by the use of the same means that courts of justice can in like cases"); *In re Request for Access to Grand Jury Materials*, 833 F.2d 1438, 1445 (11th Cir. 1987) (noting that the House "holds investigative powers that are ancillary to its impeachment power"); *Trump v. Mazars USA, LLP*, 940 F.3d 710, 754–67 (D.C. Cir. 2019) (Rao, J., dissenting) (collecting historical examples and discussing the distinction between legislative oversight and impeachment authority), *vacated and remanded*, 591 U.S. 848 (2020); House Comms.' Auth. to Investigate for Impeachment, 44 Op. O.L.C. 64, 76–77 (2020) [hereinafter House Impeachment Authority].

official on the basis of certain charged conduct.⁷⁵ No court has ever considered the scope of Congress's power of inquiry in impeachment.

Where controversy has arisen about congressional oversight and impeachment investigations is in the interpretation of the breadth of this legislative oversight power and the ability of the executive branch to invoke defenses, such as executive privilege. The Supreme Court has made clear that oversight must be conducted "in aid of the legislative function,"⁷⁶ and must be "related to, and in furtherance of, a legitimate task of the Congress."⁷⁷ Its recent decision in *Mazars* reinforces that principle and, importantly, suggests that limits on oversight can be judicially enforceable.⁷⁸ The crux of the four-part test adopted in *Mazars* is the "fit" between the stated legislative purpose and the information demand,⁷⁹ and that test has been utilized repeatedly by courts, the executive branch, and private citizens to question congressional authority.⁸⁰ But *Mazars* involved only private information belonging to the President⁸¹ and ultimately

75. See JAMES WILSON, *On the Legislative Authority of the British Parliament*, in 2 THE WORKS OF JAMES WILSON 505, 520 (James DeWitt Andrews ed., Chicago, Callaghan & Co. 1896); Keith E. Whittington, *Must the House Vote to Authorize an Impeachment Inquiry?*, LAWFARE (Oct. 9, 2019), <https://www.lawfareblog.com/must-house-vote-authorize-impeachment-inquiry> [<https://perma.cc/RR5S-QNC8>]; see also THE FEDERALIST NO. 65, at 397 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (noting impeachment transforms the House into a "national inquest").

76. *McGrain v. Daugherty*, 273 U.S. 135, 176 (1927).

77. *Mazars*, 591 U.S. at 862–63 (2019) (quoting *Watkins v. United States*, 354 U.S. 178, 187 (1957)).

78. *Id.*; see also Quinta Jurecic & Molly E. Reynolds, *Mazars Creep and the Jan. 6 Committee*, LAWFARE (Feb. 24, 2022), <https://www.lawfaremedia.org/article/mazars-creep-and-jan-6-committee> [<https://perma.cc/SJ7N-24BF>] (arguing that *Mazars* "represents a potential shift in the balance of power between Congress and the courts" because it "establish[es] greater judicial scrutiny of legislative purpose").

79. *Mazars*, 591 U.S. at 869–71 (directing courts to (1) "carefully assess whether the asserted legislative purpose warrants the significant step of involving the President and his papers"; (2) "insist on a subpoena no broader than reasonably necessary to support Congress's legislative objective"; (3) "be attentive to the nature of the evidence offered by Congress to establish that a subpoena advances a valid legislative purpose"; and (4) carefully "assess the burdens imposed on the President by a subpoena").

80. See, e.g., *Bragg v. Jordan*, 669 F. Supp. 3d 257, 267 (S.D.N.Y. 2023) (examining whether a subpoena to a state official served a valid legislative purpose using *Mazars*); Comm. on Ways & Means v. U.S. Dep't of Treasury, 45 F.4th 324, 333–38 (D.C. Cir. 2022) (analyzing *Mazars* at length in litigation over Trump's tax returns after he had left office and finding it "clear from *Mazars* that we must consider how this [r]equest implicates the separation of powers"); *Trump v. Thompson*, 20 F.4th 10, 41–42 (D.C. Cir. 2021) (applying the "*Mazars* test" to determine if the January 6th Committee had a valid legislative purpose); Comm. on the Judiciary v. McGahn, 968 F.3d 755, 770 (D.C. Cir. 2020) (en banc) (noting the importance of *Mazars* for understanding information disputes between the branches). President Biden's ghostwriter—Mark Zwonitzer—refused to comply with a House subpoena for audio tapes of his private interviews of Biden, in part, because the committee's subpoena lacked a legitimate legislative interest. See H.R. REP. NO. 118-628, at 2–4 (2024); *id.* at 38–39 (dissenting views) (arguing that the majority had failed to comply with *Mazars* requirements and was "unable to articulate a legitimate legislative purpose").

81. *Mazars*, 591 U.S. at 864, 866, 868.

provided little insight into how “legislative purpose” should be interpreted when the investigation involves the White House or executive branch.

Committees and members of the two houses of Congress have, unsurprisingly, often claimed broad legislative oversight power to oversee the execution of the laws, to expose wrongdoing or waste, and to expose those findings to the American people.⁸² The requirement that oversight serve a “legislative purpose” is, in Congress’s view, “quite generous” and “rarely acts as a significant restriction on legislative investigations.”⁸³ At times, Congress has also claimed an “informing” function—the constitutional authority to inquiry into the workings of the executive branch and “inform” the American people about its findings.⁸⁴

The executive branch, by contrast, holds a narrower view of congressional oversight authority and a stricter interpretation of what constitutes a “legitimate legislative purpose.”⁸⁵ As set out in an extensive memorandum issued in the final days of the first Trump administration called *Congressional Oversight of the White House*,⁸⁶ the executive branch

82. See, e.g., BEN WILHELM, TODD GARVEY & CHRISTOPHER M. DAVIS, CONG. RSCH. SERV., RL30240, CONGRESSIONAL OVERSIGHT MANUAL 4–7 (2022) (explaining the various purposes of oversight, including the need to “draw public attention to issues” and “investigate alleged instances of poor administration, arbitrary and capricious behavior, abuse, waste, dishonesty, and fraud”); *id.* at 31 (“Investigations into whether the executive branch is complying with its obligation to faithfully execute laws passed by Congress also serve a legislative purpose, as do ‘probes into departments of the Federal Government to expose corruption, inefficiency or waste.’” (quoting *Watkins*, 354 U.S. at 187)).

83. *Id.* at 31.

84. See *id.* at 25 (noting that investigations “may aid in informing the public about the administration of laws”); *id.* at 31 (“The Supreme Court also appears to have recognized Congress’s legitimate role in informing the public ‘concerning the workings of its government’—a task the legislature has ‘assiduously performed’ since ‘the earliest times in its history.’” (quoting *Watkins*, 354 U.S. at 200 n.33)). In support of this function, Congress often quotes Woodrow Wilson’s statement that “[t]he informing function of Congress should be preferred even to its [lawmaking] function.” WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS 303 (1885); see also Josh Chafetz, *Congressional Overspeech*, 89 FORDHAM L. REV. 529 (2020) (discussing this informing function as congressional “overspeech”).

85. See, e.g., Response to Cong. Requests for Info. Regarding Decisions Made Under the Indep. Couns. Act, 10 Op. O.L.C. 68, 74 (1986) (“[A] threshold inquiry that should be made upon receipt of any congressional request for information is whether the request is supported by any legitimate legislative purpose.”); Assertion of Exec. Privilege with Respect to Clemency Decision, 23 Op. O.L.C. 1, 2 (1999) (concluding that Congress lacked authority to conduct oversight of President Clinton’s pardons because Congress “may only investigate into those areas in which it may potentially legislate or appropriate [and] cannot inquire into matters which are within the exclusive province of one of the other branches of the Government” (quoting *Barenblatt v. United States*, 360 U.S. 109, 111–12 (1959))); Assertion of Exec. Privilege Concerning the Dismissal & Replacement of U.S. Att’ys, 31 Op. O.L.C. 1, 3 (2007) (explaining that Congress had no legitimate oversight interest over the removal of U.S. Attorneys because the President had the exclusive constitutional authority to remove officers).

86. Cong. Oversight of the White House, 45 Op. O.L.C. ___, at *12 n.6 (Jan. 8, 2021) (slip op.). Notably, unlike almost every other OLC memorandum that is published in this manner, this memorandum was not issued in response to a specific question or controversy but just issued as a comprehensive explanation about the limits of congressional oversight of the White House. See generally

view is that Congress (1) lacks any legislative oversight authority to investigate the President's exercise of exclusive constitutional functions, such as the pardon power,⁸⁷ and (2) has few "legitimate" reasons to conduct oversight of the White House.⁸⁸ That memorandum was cited repeatedly by the Biden administration as well and poses a challenge to any legislative investigation into the White House.⁸⁹

The impeachment power adds another nuance to questions of congressional investigative power.⁹⁰ Congress, with some judicial support, appears to view its oversight and impeachment investigative power as a continuous, overlapping authority to inquire into the workings of the executive branch,⁹¹ while the Office of Legal Counsel (OLC)—in an opinion relied on by both the Biden and first Trump administrations—has recently articulated a sharp demarcation between the two authorities and suggested the House and its committees must explicitly denominate which

Memorandum from David J. Barron, Acting Assistant Att'y Gen., to Attorneys of the Office of Legal Counsel re: Best Practices for OLC Legal Advice and Written Opinions 2 (July 16, 2020) ("In providing advice, the Office should focus intensively on the central issues raised by a request and avoid addressing issues not squarely presented by the question before it."); *id.* at 3 ("The legal question presented should be focused and concrete.").

87. See Cong. Oversight of the White House, 45 Op. O.L.C. __, at *16 (Jan. 8, 2021) (slip op.) ("Congress may not conduct oversight of the President's discharge of his exclusive constitutional authority.").

88. See, e.g., *id.* at *10 ("[T]he Constitution does not otherwise confer on Congress or its committees an authority to 'oversee' or direct the Executive Branch in the conduct of its assigned duties and responsibilities under Article II."); *id.* at *12 n.6 ("[Congress] may not . . . conduct oversight solely for the purpose of making information public[,] because 'transmitting information 'to inform the public . . . is not a part of the legislative function.'" (quoting *Hutchinson v. Proxmire*, 443 U.S. 111, 133 (1979))); *id.* at *15 (stating that "congressional oversight requests directed at the White House . . . inherently raise separation of powers concerns"); *id.* at *22 (claiming that "oversight requests directed to the White House are typically the exception, rather than the norm" and that "oversight requests to the White House must be tailored to accommodate the President's need for autonomy and confidentiality").

89. See, e.g., Letter from Carlos Felipe Uriarte, Assistant Att'y Gen., to Jim Jordan, Chairman, H. Comm. on the Judiciary (Feb. 28, 2023) (on file with author). Although many of these letters are not public, I can attest from personal experience that this opinion was repeatedly relied upon by the Biden administration in its communications with congressional committees. In some instances, the Committee would respond by claiming the White House was not abiding by the principles in the opinion. See Letter from Jim Jordan, Chairman, H. Comm. on the Judiciary, to Andrew Slavitt 2–3 (Nov. 30, 2023) (contesting the White House's understanding of the requirement of exhaustion, as laid out in the 2021 memorandum) (on file with author).

90. For a recent attempt by this author to articulate some constitutional principles that govern the House's and Senate's investigative authority in an impeachment investigation, see Jonathan David Shaub, *Congress's Power of Inquiry in Impeachment*, 112 VA. L. REV. (forthcoming 2026), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=6401558 [<https://perma.cc/5NJC-UZTU>].

91. See *In re App. of House Comm. on the Judiciary for an Ord. Authorizing Release of Certain Grand Jury Materials*, 414 F. Supp. 3d 129, 169–176 (D.D.C. 2019) ("Nothing 'in the Constitution or case law . . . compels Congress to abandon its legislative role at the first scent of potentially illegality and confine itself exclusively to the impeachment process.'"), *vacated and remanded sub. nom.*, *Dep't of Just. v. House Comm on the Judiciary*, 142 S. Ct. 46 (2021) (mem.).

power they are exercising.⁹² Moreover, the first Trump administration, supported by OLC opinions,⁹³ incorporated numerous doctrines related to executive privilege into the impeachment context and, utilizing those doctrines, refused to comply with the document and testimonial subpoenas that were part of the House impeachment inquiry.⁹⁴ The Biden administration subsequently also relied on these OLC opinions in its arguments responding to information demands during the House's impeachment inquiry.⁹⁵

Combing judicial and historical precedents results in very little of relevance to the question of the scope of Congress's authority to investigate pursuant to its impeachment power.⁹⁶ Indeed, the question appears to have rarely arisen until recently. The relatively few past executive branch impeachments largely occurred after an investigation by an outside party or

92. House Impeachment Authority, *supra* note 74.

93. See Exclusion of Agency Couns. from Cong. Depositions in the Impeachment Context, 43 Op. O.L.C. 286, 287–88 (Nov. 1, 2019) (concluding that executive privilege applies in impeachment and that, accordingly, the constitutional requirement that agency counsel attend depositions applies as well); Letter from Steven A. Engel, Assistant Att'y Gen., to Pat A. Cipollone, Couns. to the President 3 (Nov. 3, 2019) (applying the doctrine of absolute testimonial immunity, based in part on executive privilege, to impeachment).

94. See Jonathan Shaub, *Obstruction of Congress, Impeachment, and Constitutional Conflict*, LAWFARE (Jan. 10, 2020), <https://www.lawfaremedia.org/article/obstruction-congress-impeachment-and-constitutional-conflict> [https://perma.cc/HHP7-4A8Z] (examining the basis for the impeachment article against President Trump for obstruction of Congress).

95. See Assertion of Exec. Privilege over Audio Recordings of the Special Couns.'s Interviews of the President and His Ghostwriter, 48 Op. O.L.C. __ (May 15, 2024) (slip op.) (advising President Biden he could assert executive privilege over recordings made by Special Counsel Hur despite the House's stated need for them as part of its impeachment inquiry); Defendant's Memorandum of Law in Support of Defendant's Cross-Motion for Summary Judgment at 52–53, 53 n.13, Comm. on the Judiciary v. Garland, No. 24-cv-1911 (D.D.C. Aug. 6, 2024) (arguing against the view that an impeachment inquiry renders executive privilege a nullity).

96. The clearest historical example involved an investigation into misconduct by George Seward, a minister to China, by a House committee charged with investigating the State Department. 3 ASHER C. HINDS, HIND'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES § 1699, at 55–56 (1907). The committee demanded papers from Seward and also acknowledged that it was interested in pursuing impeachment, and Seward refused to comply, citing his Fifth Amendment privilege against self-incrimination. *Id.* Ultimately, his privilege against self-incrimination was determined to excuse his contempt because impeachment was a potential purpose of the committee. *Id.* § 1700, at 56–61. There are also a number of historical statements and precedents reflecting a view that Congress's authority to demand information pursuant to its impeachment power is different in kind from its oversight authority. See, e.g., Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 732 (D.C. Cir. 1974) (en banc) (distinguishing between legislative and impeachment inquiries); Kilbourn v. Thompson, 103 U.S. 168, 192–95 (1881) (rejecting an attempt at legislative oversight but noting that the “whole aspect of the case would have been changed” if the committee had been pursuing impeachment); MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING: EXECUTIVE POWER UNDER THE CONSTITUTION 135–41 (2020) (noting the differences between impeachment and legislative oversight power); Shaub, *supra* note 18, at 79–87 (collecting past statements of Presidents and executive branch officials about enhanced congressional power in impeachment).

were based on widely acknowledged conduct.⁹⁷ And, as discussed in more detail below, judicial impeachment investigations are typically outsourced to a special judicial committee that reports to the House Judiciary Committee on the findings of its investigation.⁹⁸ Any discussion of White House investigation and accountability, however, must take into account congressional impeachment power as well as its more commonly used legislative oversight authority.

C. *Inspectors General and Independent Commissions*

There are a few other methods of executive branch investigation that bear mentioning. Most prominently, inspectors general, or IGs, are perhaps the primary means of investigating misconduct, waste, and abuse in the executive branch as a whole.⁹⁹ The Inspector General Act of 1978 grew out of the same desire to enhance government accountability that gave rise to the Ethics in Government Act,¹⁰⁰ borne from the outrage over Watergate and the Church Committee's findings.¹⁰¹ The Act began by establishing the first twelve presidentially appointed inspectors general within various federal agencies.¹⁰²

The Inspector General Act of 1978 was amended ten years following its passage to increase the number and expand the use of IGs substantially,¹⁰³ and enhance the powers of the respective IGs. There are now seventy-two inspectors general charged as "watchdogs" over the executive branch, and they wield considerable authority to expose wrongdoing and waste.¹⁰⁴ Perhaps the most important recent development has been the codification of the Council of Inspectors General for Integrity and Efficiency (CIGIE),¹⁰⁵ as an independent establishment within the executive branch. A body

97. The impeachments of Nixon and Clinton were largely based on evidence gathered by special or independent counsels, and the impeachments of Johnson and Trump were largely based on publicly acknowledged conduct, i.e., the firing of the Secretary of War, the call to the Ukrainian Prime Minister, and the riot at the Capitol, respectively.

98. See *infra* text accompanying notes 257–59.

99. BEN WILHELM, CONG. RSCH. SERV., R45450, STATUTORY INSPECTORS GENERAL IN THE FEDERAL GOVERNMENT: A PRIMER (2023).

100. See Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824; Jory Heckman, *Inspectors General, a Good-Government 'Experiment,' Celebrate 40 Years of Oversight*, FED. NEWS NETWORK (Oct. 15, 2018), <https://federalnewsnetwork.com/agency-oversight/2018/10/inspectors-general-a-good-government-experiment-celebrate-40-years-of-oversight/> [https://perma.cc/MBA8-UTNK].

101. Heckman, *supra* note 100; see also 162 CONG. REC. 2452 (2016).

102. Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101.

103. Inspector General Act Amendments of 1988, Pub. L. No. 100-504, 102 Stat. 2515.

104. *The Inspectors General*, COUNCIL OF INSPECTORS GENERAL ON INTEGRITY & EFFICIENCY (July 14, 2014), https://www.ignet.gov/sites/default/files/files/IG_Authorities_Paper_-_Final_6-11-14.pdf [https://perma.cc/K63A-VTJD].

105. *Id.*

similar to CIGIE was first established by President George W. Bush in an Executive Order and then formalized and given statutory authority in the Inspector General Reform Act in 2008.¹⁰⁶

Inspectors general are not, at present, relevant to White House investigation, though. No inspector general has authority to investigate the White House or the Executive Office of the President.¹⁰⁷ Each IG has a specific statutory jurisdiction, typically confined to the IG's home agency. Some special IGs have jurisdiction over the implementation of a particular program that transcends agency boundaries, however, such as the Special Inspector General for Pandemic Recovery.¹⁰⁸ But none have jurisdiction to investigate the President or high-level White House officials. This gap in accountability was recognized even during the existence of the independent counsel by Kathleen Clark,¹⁰⁹ but legislative proposals to create an inspector general for the White House have never been successful.¹¹⁰

As will be discussed further in Part III, the country has from time to time utilized statutory and regulatory commissions to investigate major events, typically due to a sense that the traditional investigation had fallen short or the feeling that the enormity of the event warranted a more searching and independent inquiry. Some of the most prominent of these are the Warren Commission¹¹¹ and the 9/11 Commission.¹¹² The 9/11 Commission was created after congressional and internal executive branch investigations in order to “make a full and complete accounting of the circumstances surrounding the attacks” on 9/11.¹¹³ Other historical examples include the Rogers Commission, established by President Reagan to investigate the Challenger space shuttle disaster,¹¹⁴ and the Commission on the Japanese

106. Inspector General Reform Act of 2008, Pub. L. No. 110-409, 122 Stat. 4302.

107. See GLENN A. FINE, WATCHDOGS: INSPECTORS GENERAL AND THE BATTLE FOR HONEST AND ACCOUNTABLE GOVERNMENT 164 (2024).

108. *Meet the Special Inspector General*, SPECIAL INSPECTOR FOR PANDEMIC RECOVERY, [<https://perma.cc/3X72-KQPN>] (only available by archive link).

109. See Clark, *supra* note 24, at 561–64.

110. See, e.g., H.R. 3872, 104th Cong. (1996); 142 CONG. REC. H8103 (1996) (remarks of Rep. Bass).

111. REPORT OF THE PRESIDENT'S COMMISSION ON THE ASSASSINATION OF PRESIDENT JOHN. F. KENNEDY (1964) [hereinafter WARREN COMMISSION REPORT].

112. THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES (2004) [hereinafter 9/11 COMMISSION REPORT].

113. Intelligence Authorization Act for Fiscal Year 2003, Pub. L. No. 107-306, § 602, 116 Stat. 2383, 2408 (2002).

114. See Exec. Order No. 12546, 51 Fed. Reg. 4475 (Feb. 3, 1986); REPORT TO THE PRESIDENT BY THE PRESIDENTIAL COMMISSION ON THE SPACE SHUTTLE CHALLENGER ACCIDENT (1986), [<https://ntrs.nasa.gov/citations/19860015255>] [<https://perma.cc/WH8C-JL62>].

Internment, established forty years after World War II to investigate the internment of Japanese Americans.¹¹⁵

These stand-alone entities typically have subpoena power and are composed of a bipartisan panel of experts and government officials.¹¹⁶ In recent years, the Afghanistan War Commission was created by Congress in 2021 to examine that conflict, U.S. decisions pertaining to the war in Afghanistan, and the tragedy that accompanied the U.S. withdrawal.¹¹⁷ And the Department of Homeland Security empaneled independent, expert commissions to examine high-profile failings of the Secret Service, including the fence jumpers in the Obama administration and the attempt on former President Trump's life in Butler, Pennsylvania.¹¹⁸

These bodies in some way resemble the bipartisan, and at times purely partisan, congressional panels and select committees that Congress has created in the past to investigate major events—such as the Watergate committee, the Benghazi select committee, or the January 6 select committee.¹¹⁹ Those congressional committees perform traditional congressional oversight, as discussed above, but focus on specific events or issues. Independent commissions are distinct, however, because they are created not by a single house or committee of Congress but through the full legislative process—typically with the President's signature.¹²⁰ They are empowered to pursue their investigation and receive information and documents by statute, not through implied authority, and they are not composed solely of legislators or even government officials.¹²¹ Indeed,

115. See Commission on Wartime Relocation and Internment of Civilians Act, Pub. L. No. 96-317, 94 Stat. 964 (1980); PERSONAL JUSTICE DENIED: REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS (1997).

116. Heather Szilagyi & Nicholas Tonckens, *Investigating a Crisis: A Comparison of Six U.S. Congressional Investigatory Commissions*, JUST SEC. (Apr. 6, 2021), <https://www.justsecurity.org/75671/investigating-a-crisis-a-comparison-of-six-u-s-congressional-investigatory-commissions/> [https://perma.cc/3ZGS-DE9N].

117. *About the Afghanistan War Commission*, AFG. WAR COMM'N, <https://www.afghanistanwarcommission.senate.gov/aboutus/> [https://perma.cc/632RH-HBX].

118. Press Release, U.S. Senate Homeland Sec. & Governmental Affs. Comm., Peters, Paul, Blumenthal and Johnson Release Bipartisan Report Examining U.S. Secret Service Security Failures and Assassination Attempt on Former President Trump (Sept. 25, 2024), <https://www.hsgac.senate.gov/media/dems/peters-paul-blumenthal-and-johnson-release-bipartisan-report-examining-u-s-secret-service-security-failures-and-assassination-attempt-on-former-president-trump/> [https://perma.cc/64GB-GDEZ].

119. See S.J. Res. 60, 93d Cong. (1973) (establishing the Select Committee to Presidential Campaign Activities to Investigate Watergate); H.R. Res. 567, 113th Cong. (2014) (creating the Select Committee on the Events Surrounding the 2012 Terrorist Attack in Benghazi); H.R. Res. 503, 117th Cong. (2021) (establishing the Select Committee to Investigate the January 6th Attack on the U.S. Capitol).

120. See Szilagyi & Tonckens, *supra* note 116.

121. See *id.*

many of the statutes creating these entities require certain considerations in the choice of members and the composition of the commission.¹²²

II. FLAWS IN THE CURRENT SYSTEM AND PROPOSALS FOR REFORM

The essential attributes of a system for holding a President or other high-ranking government officials accountable are no secret. First, independence is critical. The investigator must have some level of separation and distance from the subject of the investigation. Second, accountability for the investigator is imperative in a democratic society, otherwise an unelected, unaccountable individual could almost singlehandedly undermine or frustrate the electoral process—one of the most common critiques of the post-Watergate independent counsel framework. Third, the investigator must have investigatory enforcement authority. An investigation that lacks the authority to compel production of information and is forced to rely wholly on voluntary cooperation has little chance of holding accountable bad actors willing to obscure and hide evidence. Fourth, the investigation and investigator must be designed in a manner to promote objectivity and neutrality—and their appearance—and not be enmeshed in the passions of partisan politics. Finally, the system must have the ability to render a verdict that holds the subject of the investigation accountable in some manner—through prosecution, removal from office, or other sanction. Otherwise, the subjects of the investigation have nothing to fear from misconduct.

The intractable problem has always been finding the right balance of these values, particularly the often-competing demands that the investigator be both independent of elected officials and yet accountable to the electorate or to some other supervisor.¹²³ Various historical approaches to this problem have prioritized one trait over others. For example, the post-Watergate Ethics in Government Act prioritized independence and public reporting, but later came to stand for a problematic lack of accountability for the

122. See, e.g., National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 1094, 135 Stat. 1541, 1937 (2021) (requiring that members of the Afghanistan War Commission have “significant professional experience in national security”); Intelligence Authorization Act for Fiscal Year 2003, Pub. L. No. 107-306, § 603, 116 Stat. 2383, 2408–09 (2002) (requiring bipartisanship in appointment of 9/11 Commission members and requiring that all members be “prominent United States citizens, with national recognition and significant depth of experience in such professions as governmental service, law enforcement, the armed services, law, public administration, intelligence gathering, commerce (including aviation matters), and foreign affairs”).

123. See BAUER & GOLDSMITH, *supra* note 18, at 163 (noting that “[t]he appointment of a special counsel with some independence from the president and attorney general has been the traditional response” to investigating the President, but that “response has always run the risk that the special counsel’s ‘independence’ would translate as a practical matter into a loss of political accountability”).

investigator, particularly to the electorate.¹²⁴ The special counsel regulations that replaced it tweaked the formula, sacrificing some independence but gaining a measure of accountability through the Attorney General's control of appointment, jurisdiction, and investigative and prosecutorial choices.¹²⁵ And though Congress and congressional entities have both maximum independence and—as elected officials—accountability, congressional inquiries have been permeated by partisan influence and stymied by a lack of effective investigative enforcement mechanisms.

The recognition that each of the existing methods of White House investigation has severe shortcomings is not a novel or controversial claim. Scholars, commentators, and government officials have criticized the various aspects of the methods of investigation described in Part I and proposed reforms in recent years. As described below, these proposals have largely focused on a singular accountability mechanism—criminal investigation and prosecution, a focus reinforced by the high-profile criminal investigations involving Presidents Trump and Biden.¹²⁶ However, some scholars, including this author, have also commented on the current deficiencies in Congress's approach to executive branch investigations.¹²⁷ Concerns about the rising prominence and partisanship of impeachment have also been the subject of scholarship and commentary.¹²⁸

124. See *Independent Counsel Hearing*, *supra* note 45; see also 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/52X3-WEWZ>]; Akhil Reed Amar, Opinion, *Now Playing . . . A Constitutional Nightmare*, WASH. POST (Sept. 19, 1998), <https://www.washingtonpost.com/archive/opinions/1998/09/20/now-playing-a-constitutional-nightmare/7a0d7626-b0ff-44ae-858b-7efeb9bb959f/> [<https://perma.cc/HH8X-XU82>].

125. See BAUER & GOLDSMITH, *supra* note 18, at 170–72.

126. See ROBERT K. HUR, OFF. OF SPECIAL COUNS., REPORT ON THE INVESTIGATION INTO UNAUTHORIZED REMOVAL, RETENTION, AND DISCLOSURE OF CLASSIFIED DOCUMENTS DISCOVERED AT LOCATIONS INCLUDING THE PENN BIDEN CENTER AND THE DELAWARE PRIVATE RESIDENCE OF PRESIDENT JOSEPH R. BIDEN, JR. (2024) [hereinafter HUR REPORT]; 1–2 ROBERT S. MUELLER, III, OFF. OF SPECIAL COUNS., REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION (2019) [hereinafter MUELLER REPORT].

127. See, e.g., Emily Berman, *Good Governance Paper No. 2: The Congressional Subpoena Power*, JUST SEC. (Oct. 14, 2020), <https://www.justsecurity.org/72847/good-governance-paper-no-2-the-congressional-subpoena-power/> [<https://perma.cc/8262-3JDT>] (arguing that Congress's "existing tools" for enforcing its subpoenas are "insufficient"); Shaub, *supra* note 18, at 32–51 (describing in detail Congress's "impotence" in enforcing its information demands against the executive branch); BAUER & GOLDSMITH, *supra* note 18, at 346 (observing that the Trump presidency "left a serious question of whether Congress has any meaningful tools available to vindicate legitimate requests for information for investigative oversight purposes").

128. See KEITH E. WHITTINGTON, THE IMPEACHMENT POWER: THE LAW, POLITICS, AND PURPOSE OF AN EXTRAORDINARY CONSTITUTIONAL TOOL 211 (2024) (arguing that "[i]t would not be good news at all if the impeachment power has become outdated because our *partisan* sensibilities have overwhelmed it"); Peter Baker, *Inside Impeachment's Rise as a Weapon of Partisan Warfare*, N.Y.

Utilizing these five values of White House investigation—(1) independence; (2) accountability; (3) investigatory enforcement authority; (4) objectivity and neutrality; and (5) sanction—this Section outlines the flaws in the current system. The critiques and reform proposals illustrate why past and current approaches are inadequate on one or more of these value axes—inadequacies that have either been demonstrated in practice or have developed as a result of changes in our constitutional and electoral system. But each evolution and innovation in White House investigation teaches new lessons and provides new insights about potential mechanisms for holding our highest government officials accountable.

A. Shortcomings of Independent and Special Counsels: A Wolf in Wolf's Clothing and a Singular Focus

There have been numerous criticisms of both independent counsels operating under the Ethics in Government Act and special counsels operating within the Department of Justice. Some of these criticisms arise out of constitutional theory—particularly the unitary executive theory—but others reflect discontentment with the reality of the way independent and special counsels have operated. The two most prominent criticisms have been made of both the independent and special counsels: (1) a lack of accountability, and (2) a perverse incentive to over-investigate and uncover some type of criminal conduct.¹²⁹ Ironically, at the time the Ethics in Government Act was allowed to expire in 1999, the return of the institution of a special counsel to the Department of Justice was considered as a means to address some of these concerns.¹³⁰ But, today, the same concerns plague the regulatory special counsel. A third shortcoming common to both iterations focuses on the choice to appoint a single individual prosecutor—with all his or her history, baggage, and personality—to run this highly charged criminal investigation and potential prosecution. In addition, the decision in 1999 to locate the special counsel within the Department of

TIMES (Feb. 1, 2024), <https://www.nytimes.com/2024/02/01/us/politics/impeachments-weapon-partisan-warfare.html> [<https://perma.cc/23RV-26QZ>]; Domenico Montanaro, *Tracing the Roots of a Partisan Impeachment*, NPR (Dec. 19, 2019), <https://www.npr.org/2019/12/19/789033023/tracing-the-roots-of-a-partisan-impeachment> [<https://perma.cc/6TUC-76QT>]; Keith E. Whittington, *An Impeachment Should Not Be a Partisan Affair*, LAWFARE (May 16, 2017), <https://www.lawfaremedia.org/article/impeachment-should-not-be-partisan-affair> [<https://perma.cc/Z9E9-2GE9>]; Richard K. Neumann Jr., *The Revival of Impeachment as a Partisan Political Weapon*, 34 HASTINGS CONST. L.Q. 161 (2007).

129. See, e.g., Hillman, *supra* note 18, at 497 (“Whether constitutional or not, the Special Counsel regulations repeat every major structural error found in the ICA and set up the Department for the same unwarranted political attacks that plagued it under the ICA.”).

130. See DOLE & MITCHELL, *supra* note 49, at vi (recommending that the Attorney General have a more central role because “[w]hen regular Justice Department authority is displaced, we risk uneven application of the law and a weakening of the Department”).

Justice raises its own concerns, potentially undermining independence—particularly if the Attorney General is willing to violate or stretch existing norms of Justice Department independence—and subsuming the Justice Department within the partisan furor that often envelops the special counsel. Finally, the Court’s decision in *Trump v. United States* that federal criminal laws do not apply to at least some of the President’s actions may thwart the appointment of any special counsel. If there is no longer any potential crime, it’s not clear what grounds there would be to appoint a criminal prosecutor to investigate.

1. Lack of Accountability and Interference with Executive Function

In his *Morrison* dissent, Justice Scalia famously called the independent counsel a “wolf” that came not in disguise in “sheep’s clothing” but “as a wolf.”¹³¹ As he explained, in our government, “the primary check against prosecutorial abuse is a political one” because prosecutors who abuse their authority “can be removed by a President” and, if “crimes are not investigated and prosecuted fairly . . . the President pays the cost in political damage.”¹³² Although in lone dissent in *Morrison* itself, Scalia’s view that it was unconstitutional and inadvisable to insulate a special prosecutor wielding such substantial authority from the line of responsibility—and political accountability—that runs up through the President became the primary objection to the independent counsel law.¹³³ And it has now become one of the primary criticisms of its replacement: the Department of Justice Special Counsel regulations.

The central critique is straightforward: an individual with such significant responsibility must be held accountable by some means—ultimately through the political process. Under the independent counsel framework, there were very few means of holding independent counsels accountable.¹³⁴ The choice to let the independent counsel statute expire and to create a special counsel within the Department of Justice was designed to

131. *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

132. *Id.* at 728–29.

133. See *Independent Counsel Hearing*, *supra* note 45, at 246 (Attorney General Reno notes she is “paraphrasing Justice Scalia’s dissent in *Morrison*” about the problem with vesting so much responsibility in a single, unelected prosecutor).

134. Independent counsels were appointed by a special court and had the “full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice,” and could be removed by the Attorney General only for cause. 28 U.S.C. §§ 594(a), 596(a)(1). Moreover, the Attorney General had to submit a report to a special court and to both houses of Congress detailing the grounds for removal and “specifying the facts found,” and the counsel could also obtain review of the removal by a federal court. *Id.* § 596(a)(2)–(3).

address this accountability problem by giving the Attorney General a more robust role in deciding whether an independent investigation was necessary, and to ensure the Attorney General—accountable to the voters through the President—had the final authority to countermand individual investigative, budgetary, and prosecutorial decisions.¹³⁵ Moreover, rather than mandate reporting to the public and Congress, the regulations envisioned a “confidential report” to the Attorney General and then allowed the Attorney General discretion in providing relatively limited information to Congress.¹³⁶

But, as numerous commentators have pointed out, the Attorney General’s authority under the existing regulations is largely theoretical. Special counsel investigations have run up enormous costs,¹³⁷ made questionable staffing decisions,¹³⁸ filed indictments,¹³⁹ and made other enormously consequential decisions apparently without interference or even much input from the Attorney General. The reason is not hard to figure out. Any interference into an investigation by an Attorney General would almost certainly appear to be interference by a political ally on behalf of the President; moreover, decisions to countermand the special counsel’s choices have to be reported to Congress.¹⁴⁰ The regulations explicitly remove the special counsel from the “day-to-day supervision” of the Attorney General,¹⁴¹ and the appearance of partiality and political interference, in

135. See BAUER & GOLDSMITH, *supra* note 18, at 168–72.

136. See 28 C.F.R. § 600.8(c) (2026) (“At the conclusion of the Special Counsel’s work, he or she shall provide the Attorney General with a confidential report explaining the prosecution or declination decisions reached by the Special Counsel.”); *id.* § 600.9(c) (giving the Attorney General the discretion to decide whether public release of the minimal reports required to Congress would be in the public interest).

137. See Katelyn Polantz, *With Hunter Biden on Trial, Special Counsel Spending Grows*, CNN (Aug. 23, 2024), <https://www.cnn.com/2024/08/23/politics/special-counsel-office-funding/index.html> [<https://perma.cc/K9SZ-WQF9>]; Katelyn Polantz, *Mueller Investigation Cost \$32 Million, Justice Department Says*, CNN (Aug. 2, 2019), <https://www.cnn.com/2019/08/02/politics/mueller-report-cost/index.html> [<https://perma.cc/9CBA-MQ4N>].

138. See Mike Rappaport, *Presidential Attacks on Special Counsels: Two Reforms*, LAW & LIBERTY (July 25, 2017), <https://lawliberty.org/presidential-attacks-on-special-counsels-two-reforms/> [<https://perma.cc/G92W-65GQ>] (noting the criticism of Robert Mueller’s hires and Rappaport’s agreement with that criticism).

139. See Goldsmith, *supra* note 64 (critiquing Special Counsel Jack Smith’s decision to file a superseding indictment against former President Trump).

140. See 28 C.F.R. § 600.7(b) (2026) (providing that “[i]f the Attorney General concludes that a proposed action by a Special Counsel should not be pursued, the Attorney General shall notify Congress”).

141. *Id.*

reality, further insulate the special counsel from the Attorney General's control.¹⁴²

Relatedly, and also reflected in Scalia's dissent, the lack of accountability of the independent and special counsels leads to criticism based on the allocation of executive power to an individual not subject to presidential control. The core objection centers on the argument that, as Scalia put it, "[g]overnmental investigation and prosecution of crimes is a quintessentially executive function."¹⁴³ Because the Constitution vests "*all of the executive power*" in the President—the objection goes—Congress cannot insulate any exercises of that power from the President by statute.¹⁴⁴ This constitutional objection is not applicable to the regulatory special counsel because the Attorney General, who is removable by the President at will, retains ultimate control over all prosecutorial choices. But, as Steven Calabresi and Gary Lawson, among others, have argued, the exceptional authority special counsels still exercise requires that the position be established pursuant to statute—as an inferior officer.¹⁴⁵ Justice Thomas, writing only for himself, made this point in his concurrence in *Trump v. United States*,¹⁴⁶ leading a district court to subsequently declare the special counsel unconstitutional.¹⁴⁷

142. In practice, the Department of Justice has allowed the highest career officer in the Department, an Associate Deputy Attorney General, to make decisions about special counsel investigations to insulate them further from political control. See, e.g., Matt Viser, *Biden's Lawyers Forcefully Protested Hur Report Before Its Release*, WASH. POST (Feb. 15, 2024), <https://www.washingtonpost.com/politics/2024/02/15/biden-hur-memory-angry-lawyers/> [https://perma.cc/CWS8-EN3W] (noting that in the dispute over details in Hur's report, Attorney General Garland did not respond to letters from the White House Counsel's office and President Biden's personal attorneys but instead allowed Bradley Weinsheimer, the senior career official in the Department, to address the complaint); Hillman, *supra* note 18, at 506–12 (describing the important role of David Margolis, who served as the highest ranking career official for over twenty years, in dealing with highly sensitive and political investigations for the Department).

143. *Morrison v. Olson*, 487 U.S. 654, 706 (1988) (Scalia, J., dissenting).

144. *Id.* at 705, 726–27.

145. See Calabresi & Lawson, *supra* note 18, at 87.

146. *Trump v. United States*, 603 U.S. 593, 643–44 (2024) (Thomas, J., concurring).

147. *United States v. Trump*, 740 F. Supp. 3d 1245 (S.D. Fla. 2024), *appeal dismissed*, No. 24-12311, 2024 WL 6081345 (11th Cir. Nov. 26, 2024), *appeal dismissed sub nom.*, *United States v. Nauta*, No. 24-12311, 2025 WL 2017539 (11th Cir. Feb. 11, 2025). For a critique of Judge Cannon's ruling, see Marty Lederman, *United States v. Nixon at Fifty: Why Judge Cannon Is Wrong About the Attorney General's Authority to Select a Special Counsel*, JUST SEC. (July 24, 2024), <https://www.justsecurity.org/98037/doj-special-counsel/> [https://perma.cc/KJ76-YCVW]. The Justice Department appealed this ruling, but the case was rendered moot by the 2024 election. See *Trump*, No. 24-12311, 2024 WL 6081345, at *1.

2. *Perverse Incentives of a Singular Purpose*

The second most prominent criticism of both independent counsels and special counsels has been the inversion of the normal prosecutorial function that results from the creation of a single-purpose prosecutorial office with its only cynosure a specific government official—what Andrew Coan calls a “singular focus.”¹⁴⁸ As Attorney General Janet Reno testified in 1999, the Independent Counsel Act “create[d] a prosecutor who is unlike any other,”¹⁴⁹ and the special counsel regulations do not materially alter that critique. Again made prominent by Scalia in his *Morrison* dissent, quoting former Attorney General Robert Jackson, the independent and special counsel frameworks could be characterized as “picking the man and then searching the law books, or putting investigators to work, to pin some offense on him.”¹⁵⁰ Or, as Reno described it, the creation of an independent or special counsel “distorts th[e] process” normally followed by prosecutors because the counsel “is charged with investigating one person, and so all of his or her energy, ingenuity and resources are pointed in one direction” as opposed to many.¹⁵¹ Moreover, these counsels “labor in the public spotlight and under the watchful eye of history,”¹⁵² and if the counsel “uncovers nothing or fails to secure an indictment and conviction, some may conclude that he or she has wasted both time and money.”¹⁵³

These same criticisms have been levelled at special counsels in recent years as well. As Michael Rappaport has catalogued, these investigations have often resulted only in ancillary prosecutions based on obstructing the investigation—tangible results to which the special counsel can point to justify the appointment—and almost never result in prosecutions for the original wrongdoing that led to the appointment.¹⁵⁴ Similarly, the decisions

148. See COAN, *supra* note 18, at 16–17.

149. *Independent Counsel Hearing*, *supra* note 45, at 244 (statement of Attorney General Janet Reno).

150. *Morrison v. Olson*, 487 U.S. 654, 730 (1988) (Scalia, J., dissenting).

151. *Independent Counsel Hearing*, *supra* note 45, at 245.

152. *Id.*

153. *Id.* Michael Rappaport, among others, has made very similar criticisms about the special counsel framework. As he puts it, “The problem is that the special counsel has strong institutional incentives to ‘get’ the person he is investigating. Special counsels are often judged based on their success in convicting the big fish and can focus all of their time and resources on prosecuting that one person.” Mike Rappaport, *Reforming the Special Counsel*, LAW & LIBERTY (June 7, 2019), <https://lawliberty.org/reforming-the-special-counsel/> [https://perma.cc/4W9K-UVAG].

154. See Rappaport, *supra* note 153. Rappaport discusses the case of Scooter Libby, who was prosecuted by Fitzgerald for perjury, and references the Mueller investigation, which resulted in, among others, charges against Michael Flynn, George Papadopoulos, and Rick Gates for lying to investigators as well as a number of indictments largely distinct from the core rationale for Mueller’s appointment. See *id.*; *Here’s a Breakdown of Indictments and Cases in Mueller’s Probe*, ABC NEWS (Nov. 15, 2019),

of special counsels, such as John Durham and Robert Hur, to write exhaustive reports about their investigations and include many details about their thoughts and the investigation—despite not pursuing or recommending criminal charges—is likely a consequence of the special counsels’ need to justify their substantial expenditures and explain the actions of their office.¹⁵⁵ These lengthy reports are at odds with longstanding Justice Department policies and norms about prosecutorial declinations,¹⁵⁶ especially given the now accepted principle that the reports should be released publicly,¹⁵⁷ and they are directly contrary to the rationale for dispensing with the public reporting requirements of the independent counsel statute and requiring a “confidential report” to the Attorney General only in the regulations.¹⁵⁸

The creation of a new, single-purpose prosecutor also requires the creation of a new prosecutorial office, a substantial undertaking. When a

<https://abcnews.go.com/Politics/breakdown-indictments-cases-muellers-probe/story?id=61219489> [<https://perma.cc/TM3U-Z2HF>].

155. See *Independent Counsel Hearing*, *supra* note 45, at 252 (statement of Attorney General Reno) (noting that the reporting requirement “creates yet another incentive for an Independent Counsel to over-investigate—in order, again, to justify his or her tenure and to avoid criticism that the Independent Counsel may have left a stone unturned”); see also Chuck Rosenberg, *The Special Counsel Regulations Strike Again*, LAWFARE (Feb. 9, 2024), <https://www.lawfaremedia.org/article/the-special-counsel-regulations-strike-again> [<https://perma.cc/F5FK-A9Q9>]; Bob Bauer, *Keeping but Reforming Special Counsel Rules: A Reply to Jack Goldsmith*, LAWFARE (Apr. 1, 2024), <https://www.lawfaremedia.org/article/keeping-but-reforming-special-counsel-rules-a-reply-to-jack-goldsmith> [<https://perma.cc/WJ3G-3XZP>]; Elie Honig, *Note from Elie: The Failure of DOJ’s Special Counsel System — From Robert Mueller to Robert Hur, It Simply Hasn’t Worked*, CAFE (Mar. 15, 2024), <https://cafe.com/elies-note/special-counsel-robert-hur-mueller-jack-smith-trump/> [<https://perma.cc/S7RU-S62P>].

156. See *Independent Counsel Hearing*, *supra* note 45, at 252 (statement of Attorney General Reno) (noting the public reporting requirement “cuts against many of the most basic traditions and practices of American law enforcement”); Benjamin Wittes, *Comey’s Testimony as Precedent*, LAWFARE (July 8, 2016), <https://www.lawfaremedia.org/article/comeys-testimony-precedent> [<https://perma.cc/LUY9-GZAY>] (“As a general matter, when prosecutors and investigators decline to indict someone, we don’t want a report, much less congressional oversight of the unindicted conduct. We want them to shut the heck up.”).

157. See Hillman, *supra* note 18, at 538 (noting that the “compelled congressional reporting” under the Independent Counsel Act is “repeated *de facto* in the Special Counsel regulations” because of the “presumptive disclosure” of the report); see also Andrew Weissmann, *Good Governance Paper No. 3: Investigating a President*, JUST SEC. (Oct. 15, 2020), <https://www.justsecurity.org/72850/good-governance-papers-no-3-investigating-a-president/> [<https://perma.cc/B3V6-7ANG>] (acknowledging the Mueller team wrote the report, in part, for public release).

158. See, e.g., Att’y Gen. Order No. 2232-99, 64 Fed. Reg. 37038, 37040–41 (July 9, 1999) (noting the “problems with the Final Report requirement” in the Independent Counsel Act and providing that the new special counsel regulations instead would require only “a summary final report to the Attorney General” that “will be handled as a confidential document, as are internal documents relating to any federal criminal investigation”); *Independent Counsel Hearing*, *supra* note 45, at 33 (statement of Griffin Bell) (noting the problems with the report issued by Special Counsel Walsh); *id.* at 422 (statement of Independent Counsel Kenneth Starr) (noting that witnesses at the hearing had been “virtually unanimous in their opposition to final reports” and concluding, “I concur”).

special counsel is appointed, he or she must staff the office and, as Justice Scalia again predicted, that staffing raises its own set of issues.¹⁵⁹ He postulated that if there were a job posting for a temporary position dedicated to discovering wrongdoing on behalf of the head of the party in power, the fact that many who apply are ideologically opposed to the subject of the investigation should not be surprising.¹⁶⁰ This prediction came to fruition in the Starr investigation, a fact objected to at the time by Senator Carl Levin and discussed in the decision not to renew the statute.¹⁶¹ And the criticism has continued during the reign of the regulatory special counsel. Although Robert Mueller, a past Republican appointee, had bipartisan credentials and experience, his staffing of the office with individuals perceived to be partisan and aligned against Trump drew criticism.¹⁶² Other special counsels have faced similar criticism, including Robert Hur, a self-identified Republican whose report Democrats called a “partisan hit job.”¹⁶³

These single-purpose, start-with-the-target special prosecutorial offices thus have numerous perverse incentives that distort the traditional criminal process and undermine the public’s faith in the integrity and objectivity of their investigations. A microcosm of the problem is vividly illustrated in the contrast between the investigations into President Biden and former Vice President Pence after both acknowledged having classified materials from

159. See *Morrison v. Olson*, 487 U.S. 654, 730 (1988) (Scalia, J., dissenting) (noting the problems inherent in a special counsel’s need to assemble a new staff and the potential that applicants will be motivated by partisan passions because the special counsel must find “lawyers who are willing to lay aside their current careers for an indeterminate amount of time, to take on a job that has no prospect of permanence and little prospect for promotion”).

160. *Id.*

161. See, e.g., Marc Fisher, *Starr Warriors*, WASH. POST (Feb. 2, 1998), <https://www.washingtonpost.com/archive/lifestyle/1998/02/03/starr-warriors/e6a2f68c-a55c-4e27-ae9d-146f347098c1/> [<https://perma.cc/Y7KG-7VEY>] (referring to some of Starr’s team as “movement conservatives”). At the 1999 Hearing, Sen. Levin read aloud to Judge Sentelle, a witness, a letter he had written to Judge Sentelle at the time of the appointment of Ken Starr as independent counsel. In the letter, Levin objected to the appointment of Starr, not because of “personal integrity or competence” but because he “lack[ed] the necessary appearance of independence essential for public confidence in the process” due to his “recent partisan political activities.” See *Independent Counsel Hearing*, *supra* note 45, at 489; see *id.* at 507 (reprinting the full letter).

162. See, e.g., Matt Zapotosky, *As Mueller Builds His Russia Special-Counsel Team, Every Hire Is Under Scrutiny*, WASH. POST (July 5, 2017), <https://www.washingtonpost.com/news/post-politics/wp/2017/07/05/as-mueller-grows-his-russia-special-counsel-team-every-hire-is-under-scrutiny/> [<https://perma.cc/K7PN-LK5W>] (quoting past- and future-Attorney General William P. Barr as noting he would have liked to see Mueller “have more balance” in his hires); see also Nelson W. Cunningham, Opinion, *Yes, Special Investigations Can Be Witch Hunts. The Mueller Probe Is Not One*, WASH. POST (July 15, 2018), https://www.washingtonpost.com/opinions/yes-special-investigations-can-be-witch-hunts-the-mueller-probe-is-not-one/2018/07/15/9b8ad0f4-86b2-11e8-8589-5bb6b89e3772_story.html [<https://perma.cc/ST7F-UU5Q>] (comparing and contrasting the partisan make-up of the Starr and Mueller teams).

163. Martin Pengelly, *Special Counsel Report on Biden a ‘Partisan Hit Job,’ Democrats Say*, THE GUARDIAN (Feb. 9, 2024), <https://www.theguardian.com/us-news/2024/feb/09/democrat-opinion-special-counsel-report-biden> [<https://perma.cc/TL4G-KK6F>].

their past roles in their personal possession. Neither was ultimately punished or prosecuted for the retention of these documents. The Pence investigation, for which the Attorney General decided not to appoint a special counsel, was quiet with no public report or significant controversy.¹⁶⁴ But the Biden investigation was just the opposite: Special Counsel Robert Hur created an entirely new office, spent over five million dollars on a wide-ranging investigation, and then issued a 345-page report going into elaborate detail about the President's state of mind and disclosing extraordinary and largely unnecessary details learned during the investigation.¹⁶⁵ Had Attorney General Merrick Garland decided to appoint a special counsel to investigate the Pence classified materials as well, there is little doubt the matter would have been handled much differently.

The institution of a special counsel—with the inevitable pressure to conduct as exhaustive of an investigation as possible—also has collateral ramifications for the executive branch and the individuals investigated. Hur's investigation, for example, resulted in the special counsel's office (1) interviewing the sitting President and recording that interview; (2) obtaining hours of private interviews between Biden, mostly when he was a private citizen, and his ghostwriter; and (3) collecting an untold number of documents about the President's private life. All of these files—as part of the Justice Department's files—then became potentially subject to congressional demands and Freedom of Information Act (FOIA) requests. The result was an executive privilege claim over audio from the Hur interviews of President Biden and of his ghostwriter,¹⁶⁶ extensive litigation over that claim and the FOIA requests,¹⁶⁷ and congressional brow-beating—

164. See Jill Colvin & Eric Tucker, *Justice Department Says It Won't Charge Pence over Handling of Classified Documents*, ASSOCIATED PRESS (June 2, 2023), <https://apnews.com/article/mike-pence-classified-documents-doj-criminal-investigation-campaign-trump-af4ff0d829e32bf33a60e7a2197c761b> [https://perma.cc/XJV2-QQUW].

165. See HUR REPORT, *supra* note 126; see also Perry Stein, *How Justice Dept. Special Counsel Policies Let Hur Critique Biden's Memory*, WASH. POST (Feb. 10, 2024), <https://www.washingtonpost.com/national-security/2024/02/10/biden-special-counsel-james-comey-clinton/> [https://perma.cc/5QUY-9RUB]; Josh Meyer, *Did Special Counsel Cross the Line in Bashing Biden's Memory? Even Some Republicans Think So*, USA TODAY (Mar. 12, 2024), <https://www.usatoday.com/story/news/politics/2024/02/10/biden-special-counsel-report-crossed-line/72539550007/> [https://perma.cc/XB9Z-XC3C].

166. See Letter from Edward N. Siskel, Couns. to the President, to James Comer, Chairman, H. Comm. on Oversight & Accountability, and Jim Jordan, Chairman, H. Comm. on the Judiciary (May 16, 2024) (informing the Committees of the President's assertion of executive privilege); see also *Assertion of Exec. Privilege over Audio Recordings*, *supra* note 95, at *5–14 (concluding that a privilege assertion was constitutionally valid).

167. See, e.g., *Comm. on the Judiciary v. Garland*, No. 24-cv-1911 (D.D.C. filed July 1, 2024) (dismissed May 21, 2025) (litigation over Biden's executive privilege assertion); *Complaint and Prayer for Declaratory and Injunctive Relief*, *Heritage Found. v. U.S. Dep't of Just.*, No. 24-cv-645 (D.D.C. Mar. 6, 2024) (FOIA suit for Hur files); *Complaint and Prayer for Declaratory and Injunctive Relief*, *Heritage Found. v. U.S. Dep't of Just.*, 24-cv-952 (D.D.C. Apr. 3, 2024) (FOIA suit for Zwonitzer materials).

resulting in a committee vote to find him in contempt—of a writer over confidential source information from a then-former Vice President.¹⁶⁸ In short, the creation of an entirely new office to pursue a target zealously has enormous (and expensive) collateral ramifications, additional consequences of the distortion of the traditional prosecutorial role. And that does not even begin to discuss the number of hours spent by White House and Department of Justice officials managing both sides of the investigation.

3. *Additional Problems*

The lack of accountability and perverse prosecutorial incentives to justify the appointment and expenditures have been the most common—and forceful—objections to the institution of the independent and special counsel. As noted, the special counsel regulations were designed to address some of these problems, and they have largely failed to do so. But these are not the only shortcomings of the special counsel that have emerged, particularly given the recent experiences in the first Trump administration and Biden administration. And the entire premise of a criminal investigation into a President may, in some circumstances, be foreclosed by *Trump v. United States*.

a. *A Lone Prosecutor*

Special counsels, and, before them, independent counsels, are, by design, a single, appointed individual. That has not always been true—the best example being Coolidge’s decision to appoint two individuals, one representing each party, to conduct an investigation into the Teapot Dome scandal.¹⁶⁹ But, since Watergate, the country has decided to appoint a single individual to the position, and that individual, alone, is responsible for the conduct of the investigation and prosecution. That fact often undermines the perceived objectivity and neutrality of the investigation and also gives a single individual substantial power.

The decision to appoint a single individual as special counsel has led to the inevitable result that the individual appointed is subject to intense scrutiny, both of his or her background, experience, and political affiliations prior to the appointment and his or her decisions while in office, including

168. See Rebecca Beitsch, *House Judiciary Advances Resolution to Hold Biden Ghostwriter in Contempt*, HILL (June 27, 2024), <https://thehill.com/homenews/house/4744140-house-judiciary-biden-ghost-writer-contempt/> [<https://perma.cc/6KVS-N79H>]; see also H.R. REP. NO. 118-628, at 17 (2024) (contempt resolution for Zwonitzer).

169. 65 CONG. REC. 1520 (1924) (statement of the President); see S.J. RES. 54, 68th Cong. (1924); HISTORICAL USES OF A SPECIAL COUNSEL, *supra* note 25, at 22–23.

about whom to hire. As noted, the investigations headed by both Robert Mueller and Robert Hur were subject to intense criticism about their partisan leanings—as well as suggestions that these influenced their actions—in the same way that Ken Starr’s investigation was castigated earlier for its perceived political vendetta against the Clintons. Moreover, the structure of the special counsel as a single, appointed individual necessary gives the individual appointed enormous power, such that a single bad actor appointed to the position could much more easily weaponize the office for political or personal gain than an individual appointed to be one of several commissioners.¹⁷⁰

The unitary structure of the special counsel makes the investigation personal. It grants the appointed counsel enormous individual power and gives critics—whether fairly or not—a singular target to attack, a parallel, in a way, to the fact that the system provides the special counsel a single target against which to direct his or her prosecutorial energy. The fact that the special counsel is supposed to be appointed from *outside* the Department of Justice—though that requirement is not always followed—also means that it is typically someone who has served in important positions within the Department in the past and then left, a path common to *political* appointees. Indeed, as Judge Hillman has catalogued, the presence of long-time career employees in the Department of Justice—such as David Margolis—was a vastly underrated reason that many high-profile investigations remained neutral and often avoided conflicts of interest.¹⁷¹ The appointment of former or current political appointees to investigate a target, often of the opposite party, immediately lends credence to questions about motivation and partisanship. Because the appearance of neutrality and objectivity is so important, the importance of the individual investigator(s) should be minimized. For this reason, almost all of historical examples of investigative commissions and other investigations that strive for objectivity rely on multimember entities as opposed to a single investigator.¹⁷²

b. Interference and Political Loyalists

The return of the responsibility for these investigations to the Department of Justice after the expiration of the independent counsel statute creates the potential for more political influence on, and interference with, special

170. *Cf. Seila L. LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 223–25 (2020) (emphasizing how much more power an individual acting as the sole head of an agency has when compared to an individual who is one of one several commissioners in charge of an agency).

171. Hillman, *supra* note 18, at 506–12.

172. *See supra* text accompanying notes 111–22.

counsels. The current regulations give the Attorney General the final, unreviewable authority to decide whether to appoint a special counsel or not.¹⁷³ There is very little accountability—and no appeal—from an Attorney General’s decision that there is not sufficient evidence for an investigation, and an Attorney General inclined to support his or her President can short-circuit any investigation by simply refusing to appoint a special counsel.¹⁷⁴ This was the approach Trump had counted on to thwart any investigation into Russian influence on the 2016 election before his loyalist Attorney General—Jeff Sessions—recused himself, leading to the decision of Rod Rosenstein, the Deputy Attorney General and a longtime federal prosecutor as opposed to an administration loyalist, to appoint Robert Mueller as Acting Attorney General.¹⁷⁵

Even after the appointment decision, the Attorney General retains significant control that, particularly in the hands of a bad faith actor, could easily thwart an investigation.¹⁷⁶ The regulations—purposefully—give the Attorney General authority to countermand the special counsel, control the budget, and remove him or her for cause, an undefined standard subject to manipulation. Although it has not happened yet with a special counsel, public reporting suggests President Trump considered directing Deputy Attorney General Rosenstein to fire Mueller,¹⁷⁷ and, after the 2024 election, Trump made clear he would fire Special Counsel Jack Smith, and his entire team, including career civil servants, shortly after he was inaugurated.¹⁷⁸ The Saturday Night Massacre and firing of Archibald Cox also stands as a stark example of a President and Attorney General willing to short-circuit an investigation.

173. 28 C.F.R. § 600.1 (2026).

174. See LAWRENCE KEATING, STEVEN STILL, BRITTANY THOMAS & SAMUEL WECHSLER, *DEMOCRACY & THE CONST. CLINIC*, FORDHAM UNIV. SCH. OF L.: DEMOCRACY AND THE CONST. CLINIC, *BALANCING INDEPENDENCE AND ACCOUNTABILITY: PROPOSALS TO REFORM SPECIAL COUNSEL INVESTIGATIONS* 22, 25–36 (2021).

175. See Dartunorro Clark, *Trump Calls on Sessions to End Mueller Investigation ‘Right Now,’* NBC NEWS (Aug. 1, 2018), <https://www.nbcnews.com/politics/white-house/trump-calls-sessions-end-mueller-s-witch-hunt-n896481> [<https://perma.cc/R2QL-Z7GC>].

176. See KEATING ET AL., *supra* note 174, at 5.

177. See Eric Tucker & Mary Clare Jalonick, *McGahn: Effort to Get Mueller Fired Was ‘Point of No Return,’* ASSOCIATED PRESS (June 9, 2021), <https://apnews.com/article/donald-trump-europe-government-and-politics-9e22a7b004580d8da1e6ce7efaa7ba06> [<https://perma.cc/SD6K-CTRJ>] (reporting that White House Counsel Don McGahn considered resigning and viewed Trump’s efforts to get him to contact Rosenstein and direct the firing of Mueller as a inflection point similar to the Saturday Night Massacre).

178. See Amy Gardner, Josh Dawsey, Ashley Parker & Perry Stein, *Trump Plans to Fire Jack Smith’s Team, Use DOJ to Probe 2020 Election*, WASH. POST (Nov. 22, 2024), <https://www.washingtonpost.com/national-security/2024/11/22/trump-jack-smith-prosecutors-firing-justice-department-investigation/> [<https://perma.cc/WN26-ZYAU>].

Giving the Attorney General more control over the special counsel—and thereby increasing accountability—diminishes independence.¹⁷⁹ One recent prominent example was Attorney General William Barr’s decision to release a summary of Special Counsel Mueller’s report that did not accurately reflect the findings or conclusions of that report, leading to significant criticism, including from Mueller and his team.¹⁸⁰ Eventually the full report was released, and Barr’s actions had little consequence, but that may not be true in the future. And the political pressure that ultimately forced Barr to release the entirety of the report only acts as a check on Attorney General interference if the interference becomes known. In short, the current regulations provide very little protection for a special counsel against an Attorney General and President willing to do whatever is necessary to stop or severely hamper an investigation.

c. Constricted by the Justice Department and the Criminal Function

A number of limitations arise out of the fact that the current structure relies on a criminal prosecutor embedded within the Department of Justice. Most prominently, the Court’s determination in *Trump v. United States* that the President is absolutely immune from any application of criminal law to a wide range of actions makes it unlikely that a special counsel would be appointed to investigate those actions. Special counsels’ investigative power is limited to criminal conduct;¹⁸¹ they are thus unable to investigate actions that are “legal”—including immune presidential actions under *Trump*—but may constitute an “abuse of power” or misconduct warranting impeachment.¹⁸² After *Trump*, it is thus not clear whether a special counsel

179. Blake Emerson, *The Departmental Structure of Executive Power: Subordinate Checks from Madison to Mueller*, 38 YALE J. ON REGUL. 90, 169–70 (2021).

180. Devlin Barrett & Matt Zapotosky, *Mueller Complained that Barr’s Letter Did Not Capture ‘Context’ of Trump Probe*, WASH. POST (Apr. 30, 2019), https://www.washingtonpost.com/world/national-security/mueller-complained-that-barrs-letter-did-not-capture-context-of-trump-probe/2019/04/30/d3c8fdb6-6b7b-11e9-a66d-a82d3f3d96d5_story.html [https://perma.cc/6VF4-S2J6]; Del Quentin Wilber & Chris Megerian, *Democrats Blast Attorney General William Barr, Calling Him Trump’s ‘Paid Federal Public Defender’*, L.A. TIMES (Apr. 29, 2019), <https://www.latimes.com/politics/la-na-pol-william-barr-mueller-congress-20190429-story.html> [https://perma.cc/VM5U-KUTZ].

181. See 28 C.F.R. § 600.1 (2026) (granting Attorney General the power to appoint a Special Counsel “when he or she determines that *criminal investigation* of a person or matter is warranted” (emphasis added)).

182. Michael B. Rappaport, Essay, *Replacing Independent Counsels with Congressional Investigations*, 148 U. PA. L. REV. 1595, 1601–602 (2000) (discussing how a “criminal prosecution model to monitor and discipline executive branch misconduct . . . both underenforces and overenforces against executive wrongdoing”).

would *ever* be appointed if the alleged wrongdoing falls within the President's official acts.

Internal Department norms can also restrict a special counsel investigation. For example, a number of commentators faulted the Mueller investigation because Mueller considered himself bound by the Justice Department position—set out in two past OLC memoranda—that a sitting President could not be indicted or prosecuted.¹⁸³ By contrast, Ken Starr, operating under the independent counsel statute and outside the Justice Department, did not consider himself bound by this policy and, in fact, internal memorandum prepared for him argued against OLC's conclusions.¹⁸⁴ The fact that special counsels—as Department of Justice employees—must follow the department's norms and are locked into the existing structures and strictures of criminal prosecution can thus hamper their ability to take actions that they otherwise might feel compelled to take, or even foreclose their appointment altogether.¹⁸⁵

d. Infecting the Justice Department

Finally, even if an Attorney General approaches the issue of a special counsel investigation with objectivity and institutional, as opposed to political, motivations, the return of the special counsel to the Justice Department increases the likelihood that the Justice Department will be caught up in the partisan warfare that surrounds special counsel investigations. The five special counsel investigations during the Trump and Biden administrations—Mueller, Durham, Smith, Hur, and Weiss—all raised protestations and allegations about the politicization, or even

183. See 2 MUELLER REPORT, *supra* note 126, at 1–2 (“[W]e determined not to make a traditional prosecutorial judgment. The Office of Legal Counsel (OLC) has issued an opinion finding that ‘the indictment or criminal prosecution of a sitting President would impermissibly undermine the capacity of the executive branch to perform its constitutionally assigned functions’ in violation of ‘the constitutional separation of powers.’ Given the role of the Special Counsel as an attorney in the Department of Justice and the framework of the Special Counsel regulations . . . this Office accepted OLC’s legal conclusion.” (quoting *A Sitting President’s Amenability to Indictment and Criminal Prosecution*, 24 Op. O.L.C. 222, 222, 260 (2000))); *id.* at 13 (describing the Special Counsel’s decisions not to interview President Trump); see also Emerson, *supra* note 179, at 171 (recognizing that the norm created by the OLC opinions prevented Mueller from reaching a “traditional prosecutorial judgment”).

184. See, e.g., Walter Dellinger, *Indicting a President Is Not Foreclosed: The Complex History*, LAWFARE (June 18, 2018) (discussing the history of memos on this subject and Starr’s conclusions), <https://www.lawfaremedia.org/article/indicting-president-not-foreclosed-complex-history> [https://perma.cc/4XHL-RVDL]; see also KENNETH W. STARR, REFERRAL FROM INDEPENDENT COUNSEL KENNETH W. STARR IN CONFORMITY WITH THE REQUIREMENTS OF TITLE 28, UNITED STATES CODE, SECTION 595(C), H.R. DOC. NO. 105-310, at 131–32, 165 (1998).

185. See Emerson, *supra* note 179, at 171–73.

“weaponization,” of the Justice Department.¹⁸⁶ Had these counsels operated under the independent counsel statute, the same cries of partisanship would have inevitably arisen. But they would not have encompassed and threatened to undermine the neutrality and independence of the Justice Department more generally.

B. Shortcomings of Congress: Partisanship, Lack of Investigative Enforcement Power, and Confidentiality Concerns

Congress as investigator—whether pursuant to legislative oversight authority or impeachment authority—has a number of shortcomings, many, but not all, of which are well-known and noncontroversial. First, and perhaps most obviously, Congress is partisan, and, in our current polarized environment, this partisan character combined with the dominant two-party system hampers both the reality and perception of congressional investigation. Second, Congress lacks the ability to enforce its investigative demands on any realistic timeframe. Third, and perhaps less obviously, Congress is a poor choice because it lacks expertise and key institutional incentives—in part because of its politicization—related to the confidentiality of investigative files.

1. Partisanship and Polarization

Perhaps the biggest shortcoming of congressional investigations is that they are inherently partisan—and perceived as such.¹⁸⁷ Congressional investigations would appear to maximize the values of independence and accountability. As a separate branch of government—one elected separately and designed specifically to be independent and “counter[] ambition” in the executive branch¹⁸⁸—there is an argument that Congress is the ideal of an independent, otherwise accountable investigator. As Daryl Levinson and Rick Pildes famously recognized, however, that ideal separation between the branches has transformed into a separation of parties.¹⁸⁹ Accordingly,

186. See, e.g., *Hearing on the Weaponization of the Federal Government: Hearing Before the Select Subcomm. on the Weaponization of the Fed. Gov’t of the H. Comm. on the Judiciary*, 118th Cong. (2023) (numerous claims of weaponization and politicization related to special counsel investigations); Miranda Nazzaro, *Deputy AG: Claims of Government Weaponization Has Contributed to ‘Unprecedented Rise’ in Political Threats*, THE HILL (Dec. 24, 2023), <https://thehill.com/homenews/administration/4375751-deputy-ag-claims-of-government-weaponization-has-contributed-to-unprecedented-rise-in-political-threats/> [https://perma.cc/C94C-9KAE].

187. See Rappaport, *supra* note 182, at 1609–10 (noting that the fact that an investigation is conducted by members of Congress—political, elected officials—can delegitimize the investigation).

188. THE FEDERALIST NO. 51 (James Madison).

189. See generally Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312 (2006).

and due to the manner in which the two houses allocate and delegate investigative authority, the only actual independence today occurs when one or both of the houses of Congress is composed of a majority of the party opposite the President.¹⁹⁰ In the event of a party-aligned congressional majority and presidential administration, there is little independence, let alone incentive, to pursue investigations. And when the opposite party controls a house of Congress, the high-profile nature of White House investigations makes it almost impossible to ignore the political ramifications of the investigation—for the President *and* the party.

The result is that even if a congressional investigation were objective and entirely fact-based, it would likely not be perceived as such.¹⁹¹ The fundamental benefit to the opposite party of discovering misconduct in the White House and the exceptional motivations for doing so reasonably lead to skepticism about the true motives of the investigators. This is particularly true in a tribalist political environment in which such an investigation presents a zero-sum gain. Trump and Republicans repeatedly castigated the congressional investigations into President Trump as, among other things, part of a politically motivated “witch hunt” or an attempt at a “coup,”¹⁹² and Democrats referred to the Republican-led investigations into Biden as, among other things, “extreme politics at its worst.”¹⁹³ The ideal aspired to by the Department of Justice to ensure its actions have “the appearance and reality of fairness and impartiality,”¹⁹⁴ is, in essence, impossible for Congress given its inherent partisan nature and our two-party system.

This is not to say that other types of White House investigation are able to transcend the exceptionally strong partisan forces that drive the country at present. The attacks on the various special counsels demonstrate clearly that it is not just Congress that is accused of partisan intentions.¹⁹⁵ But, on the axis of objectivity and neutrality, Congress is likely near the bottom and regarded as so. And the two-party system means that the congressional

190. See KRINER & SCHICKLER, *supra* note 65 (measuring investigations of the President based on party control of Congress).

191. See Rappaport, *supra* note 182, at 1609–610.

192. See Caitlin O’Kane, *President Trump Compares Impeachment Inquiry to a ‘Lynching’*, CBS NEWS (Oct. 22, 2019), <https://www.cbsnews.com/news/president-trump-lynching-tweet-compares-impeachment-inquiry-to-lynch-senators-reaction-lindsey-graham/> [<https://perma.cc/3V66-J92R>].

193. Eric Cortellessa & Nik Popli, *Facing Pressure from Hard Right, McCarthy Orders Biden Impeachment Inquiry*, TIME (Sept. 14, 2023), <https://time.com/6313320/mccarthy-launches-house-impeachment-inquiry-biden/> [<https://perma.cc/A28P-ZAFC>].

194. U.S. DEP’T OF JUST., REPORT TO CONGRESS ON THE ACTIVITIES AND OPERATIONS OF THE PUBLIC INTEGRITY SECTION FOR 2019, at 1 (2019).

195. See Bob Bauer, *Hit Hard from Two Sides: The Special Counsel Rules After the Supreme Court Immunity and Cannon Classified Documents Decisions*, LAWFARE (July 29, 2024), <https://www.lawfaremedia.org/article/hit-hard-from-two-sides--the-special-counsel-rules-after-the-supreme-court-immunity-and-cannon-classified-documents-decisions> [<https://perma.cc/2SJX-5NT8>].

investigators *begin* the investigation with much to gain from discovering and publicizing wrongdoing. That fact alone makes it difficult to consider them neutral and objective investigators.

2. *Inability to Enforce Information Demands*

Perhaps of even greater significance than these partisan influences and appearances, congressional investigations are also inadequate because they lack investigative enforcement power. As I have detailed elsewhere, investigative committees can issue subpoenas pursuant to their house's inherent investigative and impeachment authority, but they generally have little-to-no ability to enforce those demands for information.¹⁹⁶ Thus, if the White House refuses to cooperate in an investigation—which is to be expected when the White House itself is under investigation—Congress lacks the power to compel the production of information necessary to conduct a comprehensive investigation.¹⁹⁷

For example, in the context of the oversight and impeachment investigations in the Clinton, George W. Bush, Obama, Trump, and Biden presidencies, the executive branch repeatedly refused to turn over documents or allow witnesses to testify, and then declined to pursue prosecution after the House held the individual at issue in contempt and referred him or her for prosecution.¹⁹⁸ As noted, in the impeachment investigation into President Trump—when the House's investigative powers were firmly grounded in the Constitution and presumably at their zenith—the White House, based on advice from the Department of Justice,

196. See Shaub, *supra* note 18, at 42–70.

197. As noted, the “Congressional Oversight of the White House” opinion was released at the very end of the first Trump administration and catalogued various limits on Congress’s authority to demand information from the White House. See Cong. Oversight of the White House, 45 Op. O.L.C. __ (Jan. 8, 2021) (slip op.). Notably, this opinion, unlike most OLC opinions, does not address a specific question posed by the White House or an agency but instead appears to have been intended to cement in a formal opinion all of the defenses to congressional oversight on which the Trump White House had relied.

198. See, e.g., Rebecca Beitsch, *DOJ Memo Says Garland Cannot Be Prosecuted for Contempt over Biden-Hur Audio*, HILL (June 12, 2024), <https://thehill.com/homenews/house/4718115-garland-contempt-doj-memo/> [<https://perma.cc/AXM7-2A85>]; Comm. on the Judiciary v. McGahn, 973 F.3d 121, 125–26 (D.C. Cir. 2020), *reh’g en banc granted, vacated* (Oct. 15, 2020) (discussing President Trump’s claim of immunity for former White House Counsel Don McGahn); Assertion of Exec. Privilege over Deliberative Materials Generated in Response to Cong. Investigation into Operation Fast & Furious, 36 Op. O.L.C. 1 (2012) (Opinion by Attorney General Holder justifying President Obama’s assertion of executive privilege); Assertion of Exec. Privilege Concerning the Special Couns.’s Interviews of the Vice President & Senior White House Staff, 32 Op. O.L.C. 7 (2008) (Opinion by Attorney General Mukasey supporting President George W. Bush’s assertion of executive privilege); Assertion of Exec. Privilege Regarding White House Couns.’s Off. Documents, 20 Op. O.L.C. 2 (1996) (Opinion by Attorney General Reno supporting President Clinton’s assertion of executive privilege).

declared multiple subpoenas invalid and without effect.¹⁹⁹ Congress could attempt to challenge and litigate these claims in court and compel compliance through judicial process, but such litigation takes too long to be effective.²⁰⁰ In contrast to what was required of witnesses in the special counsel investigation, these individuals did not have to appear and assert and justify a claim of privilege (something they were unsuccessful at in the special counsel investigation); they simply did not show up.

3. Confidentiality Concerns

Even if a congressional committee were able to demand and receive *all* the information they desired for a White House investigation, there are reasons to be concerned about providing Congress with that information. Longstanding common law privileges, FOIA, Supreme Court precedent, and a long line of bipartisan Presidents and Attorneys General all recognize and affirm that certain kinds of executive branch information should not be routinely disclosed, including presidential communications, internal deliberations, foreign affairs and national security information, and law enforcement files.²⁰¹ These confidentiality interests can at times be overcome by countervailing need, of course²⁰²—including by Congress²⁰³—but decisions about disclosure should be based on those interests and needs, not by partisan opportunism. Congress has little-to-no continuing interests in preserving confidentiality and overwhelming partisan incentives to disclose information damaging to the other party.

Moreover, Congress's lack of institutional incentives to maintain confidentiality and partisan incentives favoring disclosure are compounded

199. See Shaub, *supra* note 94 (cataloguing all of the constitutional defenses raised by the first Trump administration in the impeachment inquiry); see also IMPEACHMENT OF DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, H.R. REP. NO. 116-346, at 148–53 (2019) (detailing the actions Trump took to thwart the House's inquiry as the basis for the impeachment charge of obstruction of Congress).

200. In the first Trump impeachment inquiry, the House cited this delay as the reason for not trying to compel compliance with its subpoenas through judicial process. H.R. REP. NO. 116-346, at 156 (2019); see also Josh Chafetz, *The New Judicial Power Grab*, 67 ST. LOUIS U. L.J. 635, 643–48 (2023) (detailing the unsuccessful oversight litigation pursued against Trump).

201. See, e.g., 5 U.S.C. § 552(b) (2016) (setting out exemptions for required public disclosure under FOIA that cover these types of information); Jonathan David Shaub, *Common Law Executive Privilege(s)*, 100 IND. L.J. 923, 929–46 (2025) (detailing the common law protections for certain types of confidential governmental information); *United States v. Reynolds*, 345 U.S. 1, 6–8 (1953); *United States v. Nixon*, 418 U.S. 683, 708 n.17 (1974); *Black v. Sheraton Corp. of Am.*, 564 F.2d 531, 536 (D.C. Cir. 1977); Cong. Oversight of the White House, 45 Op. O.L.C. __ (Jan. 8, 2021) (slip op.).

202. See *Nixon*, 418 U.S. at 706.

203. See, e.g., Letter from Dana A. Remus, Couns. to the President, to David Ferriero, Archivist of the United States (Oct. 8, 2021) (informing the House Select Committee investigating the events of January 6 that the President would not assert executive privilege due to the “compelling need” of Congress “to understand the circumstances that led to these horrific events”).

by practical problems with confidentiality inherent in congressional investigations. Unlike the hierarchical nature of an executive branch investigation, in which the materials remain within an office, congressional investigations often require sharing information among dozens or more elected officials and their staffs, none controlled by the other. This diffusion of authority and information inevitably leads to more opportunities for, and less sanction of, information leaks and politically motivated selective disclosures, even of highly sensitive information.²⁰⁴

C. Recent Calls for Reform

The recognition that these existing methods of White House investigation have numerous shortcomings is not novel, though some of the shortcomings discussed above have been recognized and discussed more prominently than others. Reform proposals demonstrate a new approach is needed, and they each emphasize—by attempting to change—the problematic nature of some of our current mechanisms. But each of them also falls short, in part, because they do not look at the issue holistically or because they fail to correct or address some of the other shortcomings discussed above.

1. Special Counsel Reform

a. Bauer and Goldsmith Proposals

One of the most prominent and comprehensive attempts at proposing reform to the process for investigating White House misconduct—among other things—came from the unlikely pairing of Bob Bauer and Jack Goldsmith, each of whom had served as one of the top lawyers in administrations of opposite parties. In their view, the first Trump presidency demonstrated “that the current array of laws and norms governing the presidency is inadequate to protect institutions vital to the American constitutional democracy and to ensure that the President is, and appears to be, constrained by law.”²⁰⁵ Accordingly, their book, *After Trump*, lays out a series of reforms that seek to codify and reinforce norms that have in the

204. See Natasha Bertrand, *How the House Intelligence Committee Broke*, THE ATLANTIC (Apr. 4, 2018), <https://www.theatlantic.com/politics/archive/2018/04/how-the-house-intelligence-committee-broke/557234> [<https://perma.cc/3CM3-L9HX>] (describing the numerous leaks that came out of the House Intelligence Committee’s investigation into Russian interference in the 2018 election); see also HAMILTON, *supra* note 35, at 273–300.

205. BAUER & GOLDSMITH, *supra* note 18, at 4.

past cabined abuses of executive power. In their view, many of those norms have come under attack and have lost the power they once had to constrain uses and abuses of executive power.²⁰⁶

Bauer and Goldsmith propose a list of reforms to the current framework, such as codifying the special counsel regulations—including the limitations on removal—in statutory provisions, requiring the Attorney General to appoint a special counsel but only when she finds such appointment “warranted” based on “credible” allegations, and requiring public reporting of the special counsel’s findings and enhanced transparency to Congress about the Attorney General’s decisions in the investigation.²⁰⁷ They also propose other reforms related to presidential investigations, including a requirement that inspectors general lead any investigation into a past administration and that, if she uncovers evidence of wrongdoing, the Attorney General would be required to appoint a special counsel to lead the criminal investigation into a past President or her administration.²⁰⁸ They argue that only the Attorney General or Deputy Attorney General should have authority to announce charging decisions and other criminal and counterintelligence actions relating to candidates.²⁰⁹

In terms of the problems with the existing system, Bauer and Goldsmith view the current system as too permissive because it grants the Attorney General too much discretion about when to appoint a special counsel, whom to appoint, and whether to abide by all the applicable regulations.²¹⁰ But they also believe the current framework allows too much independence—and a corresponding lack of accountability—and advocate for giving the Attorney General more control over final prosecutorial decisions and legal questions that may arise.²¹¹ Bauer and Goldsmith would address the problem of the unaccountable special counsel by tightening supervision by the Attorney General, and address the potential that this would lead to political interference with the special counsel’s work by codifying removal protections and enhancing transparency and reporting requirements. As they note, their aim is to “give the special counsel a more clearly delineated and protected role in finding facts needed for the accountability role.”²¹² But, as they recognize, their proposal is heavily dependent on the neutrality and

206. *Id.*

207. *Id.* at 378–84. Some of these proposals, including codifying the removal protections for special counsels, were proposed and considered by Congress when the possibility of President Trump firing Special Counsel Mueller was raised. *See, e.g.*, Special Counsel Integrity Act, S. 1741, 115th Cong. (2017).

208. BAUER & GOLDSMITH, *supra* note 18, at 366.

209. *Id.* at 365–66.

210. *Id.* at 178–84.

211. *Id.* at 188–90.

212. *Id.* at 185.

integrity of the Attorney General and other top Justice Department officials.²¹³

Their solution to both ensuring that special counsels are appointed when independence is needed and to ensuring that the special counsel's investigation and decisions are appropriate and accountable is, at bottom, reliance on the Attorney General and, potentially, public blowback. But, as noted previously, what happens if the Attorney General is willing to sacrifice integrity for the sake of her boss, the President? Or, as has happened before, if the Attorney General is part of the wrongdoing? Representative of this faith in the Attorney General and Justice Department leadership that underlies their proposal, Bauer and Goldsmith advocate that Congress re-impose the original statutory requirements that the Attorney General be a "meet person" who is "learned in the law," add "integrity" as an additional qualification of the office, and extend these requirements to the rest of the DOJ leadership.²¹⁴

b. Ayres and Prakash's Prosecutor Jury

Another recent proposal that intentionally addresses and takes issue with the problems of a single-headed investigation and perceptions of partisanship and partiality is Ian Ayres and Saikrishna Prakash's proposal for a "Prosecutor Jury."²¹⁵ Their principal concern is with the ability of a special counsel or single prosecutor to decide to seek indictment of a President or high-ranking official without any additional checks—both to ensure the investigation is not actually motivated by an improper purpose and to attempt to eliminate even the appearance of improper motive.²¹⁶ As they note, a grand jury rarely provides much of a check on prosecutorial decisions,²¹⁷ and the current special counsels have few checks on their exercise of prosecutorial authority given their independence from the Attorney General.²¹⁸ Moreover, these investigations are, as noted, perceived as partisan, no matter their actual motivation.²¹⁹

Accordingly, Ayres and Prakash propose that any potential indictment of a President or high-ranking official be considered by a "Prosecutor Jury," a

213. *Id.* at 189 ("We appreciate that concentrating power in the attorney general in this way risks the possibility that an ill-motivated or feckless attorney general will ignore or purposefully misinterpret the law.").

214. *Id.* at 362.

215. Ian Ayres & Saikrishna Bangalore Prakash, *A Bipartisan Approach to Political Prosecutions*, 16 J. LEGAL ANALYSIS 140, 140 (2024).

216. *Id.* at 141–51.

217. *Id.* at 150–51.

218. *Id.* at 146–49.

219. *Id.* at 149–51.

grand jury composed of twenty former U.S. Attorneys.²²⁰ The jury would be randomly selected from a pool of former U.S. Attorneys, but they would require the ultimate jury to be composed of ten U.S. Attorneys appointed by Republican Presidents and ten by Democratic Presidents.²²¹ In addition, they would require that two-thirds of the jury vote in favor of indictment before the prosecution can move forward, borrowing the supermajority standard the Framers adopted for conviction in the Senate on charges of impeachment.²²² To Ayres and Prakash, empaneling a group of experts who equally represent both parties and requiring a supermajority vote would result in an informed, professional judgment about whether and which charges should go forward and effectively check any prosecutorial overreach or partisan vendetta by the prosecutor.²²³ The goal of the prosecutor jury is to thwart unwarranted or politically motivated indictments of a President or other official. And to do so in a manner that has some structural protections for impartiality and expertise. In their view, if the prosecutor jury were adopted, “[t]he American people should have great confidence in the charges that make it through this filtration process.”²²⁴

Ayres and Prakash’s proposal would seem well designed to suit that purpose, largely by removing the problems associated with leaving prosecutorial decisions up to a single individual and providing a partisan balance and supermajority requirement to provide objectivity and neutrality to the indictment. But their proposal is quite limited in scope in that it applies only to indictments. As an initial matter, indictments of Presidents are much less likely—if not impossible—after *Trump v. United States* granted Presidents immunity from criminal prosecution in most circumstances. Moreover, their proposal does not address the investigation itself at all. The same appearance of partisanship that they seek to avoid by establishing the prosecutor jury would infect an investigation run by a single appointed prosecutor. And their proposal is limited, by definition, to criminal investigations, which excludes a significant portion of White House investigations and also raises constitutional questions about the ability to insulate such prosecutions from presidential control. Fundamentally, Ayres and Prakash are addressing a problem distinct from the principal issue of White House investigations addressed by this Article, and, indeed, their proposal could be implemented in combination with the proposals set forth below if desired.

220. *Id.* at 152–53.

221. *Id.* at 152.

222. *Id.* at 158, 166.

223. *Id.* at 153–60.

224. *Id.* at 154.

c. Rappaport's Proposals

Mike Rappaport has been advocating the reform of the special counsel for a number of years, and he has suggested various alternatives to address some of the problems noted previously. Rappaport, echoing previous insight by Benjamin Wittes,²²⁵ identifies two principal functions of special counsels: the “accountability function” and the “criminal prosecution function,” and argues that reforms should emphasize the former function, which primarily consists of investigation and reporting the findings to the public and Congress.²²⁶ He has urged the minimization of special counsels’ criminal prosecution authority, to be replaced by an emphasis on public reporting, arguing “if the information of wrongdoing is disclosed to the public, and the public can address it through the ballot box and impeachment, that is more than sufficient[;] [i]t is the optimal result.”²²⁷

Rappaport has also attempted to address the problems inherent in granting such significant authority to a single prosecutor by, among other things, advocating the appointment of two separate special counsels—the first charged with investigating a specific crime and deciding whether to prosecute, and the second charged with the actual prosecution of the crime.²²⁸ In his view, this division of authority would reduce the incentives to attack the integrity of the initial special counsel and would insulate the special counsel conducting the prosecution given that she is relying on someone else’s work.²²⁹ Moreover, the “key discretionary decision” about whether to prosecute will, under this two-counsel model, be made by a person who will not be doing the prosecution and will not “derive fame” from the prosecution.²³⁰ Instead, the initial counsel’s moment of fame and import will be her report.²³¹

Rappaport has also argued for several other reforms, often in response to problems that have arisen or critiques similar to those above. He argues for reforms to the manner in which special counsels hire their staffs.²³² Specifically, he would require them to make bipartisan hires, just as a number of “[i]ndependent” agencies are required to maintain a certain bipartisan balance, to both enhance the potential for lawful and objective

225. See BENJAMIN WITTES, STARR: A REASSESSMENT (2002).

226. Rappaport, *supra* note 153.

227. *Id.*

228. *Id.*

229. Mike Rappaport, *Should Congress Adopt a New Independent Counsel Statute? The Policy Issues*, LAW & LIBERTY (Sept. 19, 2014), <https://lawliberty.org/should-congress-adopt-a-new-independent-counsel-statute-the-policy-issues> [<https://perma.cc/MHV2-AW7Z>].

230. *Id.*

231. *Id.*

232. See Rappaport, *supra* note 138.

decision making and reduce the force of criticisms related to the partisanship of the special counsel and her staff.²³³ He has also proposed a multimember commission to oversee and check the operation of the special counsel.²³⁴ Given the ineffectiveness and lack of independence inherent in supervision by the Attorney General discussed previously, Rappaport proposes a bipartisan, expert three-person committee (appointed by the President and confirmed by the Senate) to review and monitor the special counsel.²³⁵

The proposal set forth in this Article reflects an attempt to address many of the insights that inform Rappaport's proposals. In particular, Rappaport's argument that the country should move away from the "criminal prosecution function" and focus more on reporting and electoral accountability mirrors one of the fundamental arguments of this proposal and the reason it moves away from "investigation" and instead prioritizes inspection. But Rappaport's proposals have largely been ad hoc, smaller reform proposals in response to specific problems or critiques in individual investigations. And, at bottom, he would retain the structure of a special counsel's office headed by a single individual, at least for purposes of the investigation. In my view, more comprehensive reform is needed. Nevertheless, like Ayres and Prakash's proposal, Rappaport's proposals could also be implemented in whole or part alongside the core proposal of this Article.

2. *Proposals to Enhance Congressional Authority*

Other recent reform proposals have focused on enhancing congressional authority to conduct investigations of the executive branch. These calls for reform are often spurred by controversial claims of privilege or immunity by the executive branch that thwart congressional investigation,²³⁶ but often

233. *Id.*

234. Rappaport, *supra* note 153.

235. *Id.*

236. See, e.g., Jordain Carney & Katherine Tully-McManus, *Inside the Unusual House GOP Push to Hold Garland in 'Inherent Contempt'*, POLITICO (June 24, 2024), <https://www.politico.com/live-updates/2024/06/24/congress/explainer-inherent-contempt-garland-house-00164681> [<https://perma.cc/J3K9-JYLL>]; Amber Phillips, *'Inherent Contempt': How House Democrats Could Fine or Even Jail Trump Officials Who Refuse to Cooperate*, WASH. POST (Sept. 23, 2019), <https://www.washingtonpost.com/politics/2019/09/23/inherent-contempt-how-house-democrats-could-fine-or-even-jail-trump-officials-who-refuse-cooperate/> [<https://perma.cc/7LX4-AZGX>]; Brad Miller, *Here's How House Democrats Can Play Hardball with Trump*, DAILY BEAST (Jan. 2, 2019), <https://www.thedailybeast.com/heres-how-house-democrats-can-play-hardball-with-trump/> [<https://perma.cc/DNE5-V4QM>]; William McGurn, Opinion, *Lock One Up, Mr. Grassley*, WALL ST. J. (Sept. 25, 2017), <https://www.wsj.com/articles/lock-one-up-mr-grassley-1506381224> [<https://perma.cc/J9M7-XXBS>]; Adam Cohen, Opinion, *Congress Has a Way of Making Witnesses Speak: Its Own Jail*, N.Y. TIMES (Dec. 4, 2007), <http://www.nytimes.com/2007/12/04/opinion/04tue4.html> [<https://perma.cc/5KM7-X5ME>]; Josh Chafetz, *House Arrest: Congress, Go Get Condi, Karl, and Monica Yourself!*, SLATE (Apr.

peter out when that specific controversy has fallen out of the news cycle. Generally, reform proposals consist of calls to (1) enhance congressional power directly, by, for example, reinvigorating each house's power of inherent contempt, and/or (2) reform the judicial process in interbranch disputes to allow a house of Congress to get judicial enforcement in a more timely and effective manner.

The most common congressional reform proposal focuses on the inherent contempt power.²³⁷ Members of Congress, former congressional lawyers, advocacy groups, and scholars have all argued that the House or Senate should utilize its long dormant power of inherent contempt to force intransigent executive branch officials to comply with its subpoenas, or to at least bring the executive branch to the negotiating table.²³⁸ Longtime congressional lawyer Mort Rosenberg, among others, has proposed that the House utilize its inherent contempt power to impose fines on executive branch officials who refuse to comply with information demands,²³⁹ and these proposals have been taken seriously in the House, where members of both parties have proposed reinvigorating inherent contempt.²⁴⁰ A related proposal would allow Congress itself to appoint outside counsel to prosecute individuals for criminal contempt of Congress given the executive branch

26, 2007), http://www.slate.com/articles/news_and_politics/jurisprudence/2007/04/house_arrest.html [https://perma.cc/L23T-MS9W].

237. Congress has authority to enforce its own subpoenas through contempt, though it has not exercised this power in almost a century. See *Jurney v. MacCracken*, 294 U.S. 125, 148–49 (1935) (Congress may punish acts “of a nature to obstruct the performance of the duties of the legislature.”); TODD GARVEY, CONG. RSCH. SERV., R45653, CONGRESSIONAL SUBPOENAS: ENFORCING EXECUTIVE BRANCH COMPLIANCE 12–16, 30–35 (2019) (describing the historical practice of inherent contempt and recent proposals for reinvigoration and reform).

238. See, e.g., Grant Tudor, *Avoiding Another McGahn: Options to Modernize Congress's Subpoena Compliance Tools*, LAWFARE (Oct. 16, 2020), <https://www.lawfaremedia.org/article/avoiding-g-another-mcgahn-options-modernize-congresss-subpoena-compliance-tools> [https://perma.cc/S7NP-5VPK]; MORTON ROSENBERG, CONST. PROJECT, WHEN CONGRESS COMES CALLING: A STUDY ON THE PRINCIPLES, PRACTICES, AND PRAGMATICS OF LEGISLATIVE INQUIRY 24–25 (2017); Kia Rahnama, *Restoring Effective Congressional Oversight: Reform Proposals for the Enforcement of Congressional Subpoenas*, 45 J. LEGIS. 235, 237 (2018).

239. William J. Murphy & Mort Rosenberg, *Why Congress Can Impose Fines for Contempt*, GOOD GOV'T NOW (Apr. 8, 2019), <https://goodgovernmentnow.org/wp-content/uploads/2019/07/Why-Congress-Can-Impose-Fines-v4.pdf> [https://perma.cc/XG7W-6CPF].

240. See, e.g., Letter from Good Gov't Now Bipartisan Coalition to Nancy Pelosi, Speaker of the House of Representatives, Kevin McCarthy, House Minority Leader, James McGovern, Chairman, House Comm. on Rules, and Tom Cole, Ranking Member, House Comm. on Rules (Oct. 21, 2020), <https://lieu.house.gov/sites/evo-subsites/lieu-evo.house.gov/files/Coalition-Letter-HR-1029-Inherent-Contempt-Resolution-w-Signatures-v2.pdf> [https://perma.cc/GQH9-PHRN] (advocating that the rules package for the 117th Congress include the proposed “Congressional Inherent Contempt Resolution,” which would have provided procedures for imposing fines for noncompliance with subpoenas).

position that it will not prosecute certain contempt referrals.²⁴¹ These discussions have often arisen in response to investigations of the President or White House in which the House has been unable to exert sufficient investigative enforcement power to get the information it needs.

The other set of proposals looks to the judiciary instead of inherent contempt. The House has, since 2008, begun to file civil suits against executive branch officials in an attempt to compel the executive branch to comply with its information demands,²⁴² but these lawsuits have largely been fruitless, in part due to the time it takes to litigate them and the judiciary's hesitancy to adjudicate an interbranch suit.²⁴³ In response, some have advocated for legislation to affirmatively authorize and also "fast-track" congressional subpoena enforcement by imposing a duty on courts to expedite these cases.²⁴⁴ Another proposal would also speed up the entirety of the litigation by allowing the House and Senate to request a three-judge district court with direct appeal to the Supreme Court in such cases.²⁴⁵ Again, these proposals aim to address the deficiency in congressional investigative enforcement power highlighted previously, particularly in the context of presidential and White House investigations.

241. See Morton Rosenberg & William J. Murphy, *The Case for Direct Appointment by the House of Outside Counsel to Prosecute Citations of Criminal Contempt of Executive Branch Officials*, GOOD GOV'T NOW (Dec. 5, 2019), <https://goodgovernmentnow.org/wp-content/uploads/2020/02/The-Case-for-Direct-Appointment-by-the-House-of-Outside-Counsel-to-Prosecute-Citations-of-Contempt-v9.pdf> [<https://perma.cc/2WJZ-HHER>].

242. See, e.g., *Comm. on the Judiciary v. McGahn*, 973 F.3d 121 (D.C. Cir. 2020), *reh'g en banc granted, vacated* (Oct. 15, 2020) (litigation to enforce subpoena to former White House Counsel Don McGahn); *Comm. on Oversight & Gov't Reform v. Lynch*, 156 F. Supp. 3d 101 (D.D.C. 2016) (litigation to enforce subpoena to Attorneys General Eric Holder and Loretta Lynch); *Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53 (D.D.C. 2008) (litigation to enforce subpoena to former White House Counsel Harriet Miers); see also Jonathan David Shaub, *Interbranch Equity*, 25 U. PA. J. CONST. L. 780 (2023) (describing the history of this type of lawsuit).

243. See Josh Chafetz, *Congress Can't Rely on the Courts to Enforce Its Subpoenas. Don't Panic.*, WASH. POST (Mar. 2, 2020), <https://www.washingtonpost.com/outlook/2020/03/02/congress-cant-rely-courts-enforce-its-subpoenas-dont-panic/> [<https://perma.cc/N7FC-U2E5>].

244. For example, the Protecting Our Democracy Act, which passed the House in December 2021 but never went any further, included a number of provisions to enhance Congress's ability to pursue expedited judicial review. See H.R. 5314, 117th Cong. (2021). The proposed law would have (1) authorized the House of Representatives, the Senate, or a committee of either house to bring a civil action to enforce subpoena compliance, (2) imposed a duty to the court to "expedite to the greatest possible extent" the disposition of the action and appeal; (3) required the Judicial Conference to prescribe new rules to expedite the proceedings; (4) allowed courts to fine government officials directly for not complying with a subpoena; and (5) statutorily required compliance with a subpoena, a privilege log detailing any objections, and a statement of any privileges or objections (with waiver resulting from failure to do so). *Id.* §§ 401–405; see also Berman, *supra* note 127 (discussing the Protecting Our Democracy Act and advocating for reforms to civil actions).

245. See, e.g., Protecting Our Democracy Act, H.R. 5314, 117th Cong. § 403 (2021); BAUER & GOLDSMITH, *supra* note 18, at 349 (noting support for this proposal).

III. WHITE HOUSE INSPECTION

Like the old proverb about six blind individuals attempting to discover what an elephant is by feeling different parts and reaching vastly different conclusions,²⁴⁶ the existing approaches to White House investigation focus on individual pieces rather than looking at the matter holistically—including the various roles and authorities of executive branch, congressional, and judicial actors in holding Presidents and senior officials accountable.

As detailed in this Part, this Article proposes a new, comprehensive approach to White House investigation and presidential accountability that draws insight from the entirety of existing structures and various proposals for reform. But the lynchpin of this proposal is to challenge the entrenched structures that (1) combine investigation and sanction, and (2) restrict compulsory investigative power to criminal prosecutors. I propose instead to implement two innovations: (1) to sever the connection between investigation and sanction and instead prioritize purely investigatory authority; and (2) to provide an entity outside the criminal prosecution process with the authority to compel the production of all relevant information in a manner that also preserves necessary confidentiality. This proposal seeks to create and empower investigators who epitomize the values of independence, accountability, and neutrality—and who have robust investigative enforcement power to demand and receive information—but who lack any power of sanction and are entirely divorced from the criminal process. Given the inherent law enforcement connotations of “investigation,” I refer to this purely investigative function as “inspection,” which is also a nod to inspectors general, who play a central role in this proposal.

This Part advocates the adoption of an embedded system of White House inspection and offers some necessities and options for implementing such a system. Most prominently, it proposes an independent, multimember, continuing body within the executive branch charged with White House inspection and reporting that has both robust investigative enforcement tools and substantial protections for its independence and impartiality. This body would have statutory guideposts and requirements about its composition, duties, and reporting, and these provisions, along with aligned institutional incentives, would promote transparency and accountability without sacrificing legitimate needs for confidentiality. As demonstrated, there are

246. John Godfrey Saxe famously memorialized this parable from the Indian subcontinent in his poem *The Blind Men and the Elephant*. See John Godfrey Saxe, *The Blind Men and the Elephant*, in BEST REMEMBERED POEMS 150, 150 (Martin Gardner ed., 1992) (“The *Second*, feeling of the tusk/Cried... /To me ‘t is mighty clear/This wonder of an elephant/is very like a spear!”).

ample historical and current analogs to such a body, which could be implemented relatively easily—in whole or in part—by utilizing existing structures and officials such as inspectors general.

This proposal is intended to start a conversation about a potential path forward for holding the President and other White House officials accountable given the extensive criticisms and recognized failings of the current special counsel framework, and the inability and, at times, unwillingness, of Congress to act as an adequate investigator. This proposal could also be expanded beyond only White House inspection to include, for example, enforcing ethics rules for the Supreme Court²⁴⁷ or investigating members of Congress.²⁴⁸ Other, less extensive reforms would also address some of the shortcomings with the current system, either alone or in combination, and I discuss those potential approaches as well. But none would address the failings of the current systems as comprehensively as the primary proposal.

The central reform proposed here of a continuing, independent body responsible for presidential inspection inevitably evokes constitutional objections grounded in Scalia’s *Morrison* dissent and animated by the Supreme Court’s recent embrace of that dissent and the strong unitary executive theory in *Seila Law*²⁴⁹ and *Trump v. United States*,²⁵⁰ among other cases. My intent is to propose reforms that survive even under that robust unitary executive theory, and, as described, there is ample theory and

247. Justice Kagan, for example, has floated the idea of a similar type of commission to enforce the Supreme Court’s new ethics code, and her suggestion to have a committee composed of “highly respected judges with a great deal of experience with a reputation for fairness” could be implemented under this proposal or implemented in part if a portion of the commission members were required to be judges. See Russell Wheeler, Commentary, *Fleshing Out Justice Kagan’s Modest Idea for Supreme Court Ethics Enforcement*, BROOKINGS (Aug. 21, 2024), <https://www.brookings.edu/articles/fleshing-out-justice-kagans-modest-idea-for-supreme-court-ethics-enforcement/> [<https://perma.cc/293M-PLYP>].

248. Congress currently relies on internal ethics committees to investigate and sanction misconduct by members, including, in the House of Representatives, an eight-member independent, nonpartisan board composed of private individuals in the Office of Congressional Ethics. See *About the OCC*, OFF. OF CONG. CONDUCT, <https://oce.house.gov/> [<https://perma.cc/3XAV-MX82>]. See generally Josh Chafetz, Comment, *Cleaning House: Congressional Commissioners for Standards*, 117 YALE L.J. 165 (2007) (advocating for congressional control over investigations into members and proposing adoption of the British model). These internal mechanisms have been the subject of considerable criticism. See, e.g., Chafetz, *supra* note 248, at 166–67 nn.9–14 (collecting criticisms). The Department of Justice’s Public Integrity Section typically handles federal criminal investigations involving members of Congress. See *Public Integrity Section (PIN)*, U.S. DEP’T OF JUST., <https://www.justice.gov/criminal/criminal-pin> [<https://perma.cc/SFJ6-KJG9>].

249. See generally Christine Kexel Chabot, *Interring the Unitary Executive*, 98 NOTRE DAME L. REV. 129, 147–53 (2022) (describing the Roberts Court’s embrace of the unitary executive).

250. In *Trump*, the Court characterized Trump’s interactions with the Department of Justice about the investigation and prosecution of crime and threats to remove the Attorney General as part of the President’s “conclusive and preclusive” Article II power, citing, *inter alia*, *Morrison* and removal cases. 603 U.S. 593, 620–21 (2024).

precedent for the contention that inspection and reporting—the principal authorities that would be exercised by this body—are not quintessential executive powers and thus may be insulated from full presidential control. But even if some of these provisions insulating the body were found unconstitutional or objectionable on policy grounds, the proposal without those characteristics would still remain a better approach than the existing mechanisms.

A. Empowering Inspection and Separating It from Enforcement

Any choice among methods or mechanisms for investigating the White House is necessarily a choice among the various values discussed previously: independence, accountability, investigative enforcement, objectivity, and sanction. As Michael Rappaport has previously noted, it is not always clear which value is being served by a particular choice, however.²⁵¹ Special Counsels, for example, can be seen as reflecting a desire for sanction for criminal conduct, or they could be seen as fulfilling more of a reporting function and emphasizing chiefly the values of independence and objectivity in such an investigation. Andrew Weissmann, a member of the Mueller team who had significant federal law enforcement experience, made this point directly, noting the “disconnect” and “tension” between the public’s understanding of a special counsel investigation as “an independent fact-finding body” that would report to the public and its actual role as a confidential, law enforcement investigation.²⁵²

This Article seeks to maximize the values of independence, objectivity, accountability, and investigative enforcement by disentangling them from sanction and punishment. Attempts to balance all five of these values in a single person or body have proven unavailing, in large part because these values align differently with respect to the process of inspection and the process of punishment.²⁵³ Definitively separating the two such that the entity responsible for investigation—or inspection—has no authority to sanction or act on its findings fundamentally alters the assessment of these values. Concern about accountability for enforcement decisions such as prosecution would evaporate. And objections to the independence of special counsels grounded in the idea that the President has final authority over prosecutorial

251. See Rappaport, *supra* note 153.

252. Weissmann, *supra* note 157.

253. See Bauer, *supra* note 195 (“From the Mueller case to the present day, the special counsel rules’ troubled history may decisively influence the next stage in their legal life cycle. This is what brought down the independent counsel statute. The special counsel rules seem headed in the same direction: down.”).

decisions lose their power if the inspector lacks enforcement power and does not act in a law enforcement capacity.

Moreover, this separation addresses the current conundrum of congressional impeachment investigations. Most recognize that the House must have access to all relevant information to decide on impeachment, but it's difficult to accept the premise that the House—or really, a lone committee chairman utilizing the House's delegated authority—can demand any and all information from the White House simply by invoking the word “impeachment,” regardless of whether any evidence exists to support an allegation of wrongdoing.²⁵⁴ This difficulty arises out of the problematic aspects of Congress's investigative actions for the value of objectivity, not out of the problematic aspects of Congress's authority to sanction. Allowing Congress to retain its power of sanction but providing a separate, independent avenue for White House inspection through which the House receives all relevant information would address those objections.

The core of this proposal is the complete separation of inspection from enforcement and the prioritization of fact-finding and reporting. Arguably, this informing function²⁵⁵ has been the principal value of special counsels in recent years, i.e., their ability to exercise robust investigative enforcement authority to gather all necessary evidence and then provide a public, objective accounting of the alleged investigation. That function has certainly been the only real means by which special counsels have held Presidents accountable in recent years.²⁵⁶ And the predominant value of Congress's oversight and impeachment functions, in most instances, has not been to gather new evidence of misconduct but to consider reforms or sanction *after* receiving detailed facts from an independent investigation or on the basis of publicly available evidence.

This Article in a sense proposes a novel solution that is not novel at all. The most common process for judicial impeachments today provides perhaps the best example of how this system would work. Under the Judicial Conduct and Disability Act of 1980, a special committee appointed by the chief judge of the circuit investigates credible allegations of misconduct or disability and must “expeditiously” submit a “comprehensive written report” to the judicial council of the circuit.²⁵⁷ Upon receipt of the report,

254. See generally Shaub, *supra* note 90 (manuscript at 35–56) (recognizing this problem and proposing a congressional framework to moderate some of the potential abuses).

255. See Rappaport, *supra* note 153.

256. See COAN, *supra* note 18, at 2–6, 87–107; BAUER & GOLDSMITH, *supra* note 18, at 178–81, 184–88.

257. 28 U.S.C. § 353 (2002); see also STEPHEN BREYER ET AL., IMPLEMENTATION OF THE JUDICIAL CONDUCT AND DISABILITY ACT OF 1980: A REPORT TO THE CHIEF JUSTICE 14–16 (2006), <https://www.supremecourt.gov/publicinfo/breyercommitteereport.pdf> [<https://perma.cc/TGA2-K42Y>].

the council can investigate or take appropriate actions on the report: generally, the council “may, in its discretion,” refer a matter to the Judicial Conference, but the council is required—“promptly”—to certify to the Judicial Conference any determination that a judge has engaged in impeachable conduct and provide the relevant records.²⁵⁸ If the Judicial Conference concurs in the assessment or makes its own assessment that impeachment is warranted, it “shall so certify and transmit the determination and the record of proceedings to the House of Representatives.”²⁵⁹

Under the current system, if Congress wished to investigate potential misconduct in the White House, it would face innumerable hurdles related to getting information. Its only real choice in proceeding would be to either add an article of impeachment for obstruction—the path taken in past presidential impeachments²⁶⁰—or try to enforce its demands through the judicial process—something House Republicans faulted the Democrats for failing to do in the first Trump impeachment.²⁶¹ But the court process would take far too long to be useful for enforcing impeachment subpoenas, and, perhaps more importantly, having an impeachment inquiry dangling for a couple of years while the branches litigated information disputes would be detrimental for the country. Under this proposal, Congress could, in a sense, outsource its impeachment investigation to this independent Commission—as it does with judicial impeachments—and save its time and energy for its constitutional role in enforcement. Moreover, as described below, the Commission, unlike Congress, would be able to enforce its investigative demands and obtain the necessary relevant information.

B. A Commission for White House Accountability

To implement this separation of inspection from sanction, this Article proposes the formalization of a new, continuing mechanism for misconduct investigations involving the White House. To address the widespread criticisms of the use of special counsels and the limitations of congressional investigations, this Article calls for the creation of an independent, bipartisan, continuing, multimember body charged, at minimum, with inspection of the President and White House. As discussed below in more detail, there are numerous historical and current analogs for such a body,

258. 28 U.S.C. § 354 (2002).

259. 28 U.S.C. § 355(b) (2002).

260. IMPEACHMENT OF DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, H.R. REP. NO. 116-346, at 132–56 (2019) (article of impeachment for obstruction against President Trump).

261. See Jonathan Shaub, *Should the House Have Gone to the Courts on Obstruction Before Impeaching?*, LAWFARE (Jan. 10, 2020), <https://www.lawfaremedia.org/article/should-house-have-gone-to-courts-obstruction-impeaching> [<https://perma.cc/H85Z-Q5NR>].

and it should survive constitutional scrutiny even under a robust unitary executive view. The characteristics of this body, each of which is discussed and defended below, are:

- 1) Structure
 - a. Multimember Commission or Council
 - b. Staggered Terms and a Continuing Existence
 - c. Requirements for Objectivity and Expertise
- 2) Authority
 - a. Robust Investigative Enforcement Authority
 - b. No Sanction Authority
- 3) Location and Independence
 - a. Established within Executive Branch
 - b. Independent of White House and DOJ
- 4) Reports and Records
 - a. Specific Guidelines on Transparency and Confidentiality
 - b. Mandatory Reporting to Congress and DOJ

These characteristics are represented in their entirety in the Commission proposed here. But they are also, individually, essential ingredients of any system for White House inspection and, ultimately, for ensuring an accountable executive branch.

1. Structure

The entity envisioned here would be an independent, multimember Commission, whose members would serve staggered terms and would be selected in accordance with eligibility requirements ensuring bipartisanship, objectivity, and expertise. One of the most consistent criticisms of the post-Watergate independent and then special counsels has been the fact that the office is created for and filled by a single individual for a singular purpose, giving that individual considerable incentive to justify his or her appointment by achieving some tangible result—such as an indictment—or by issuing a lengthy, detailed report to demonstrate that the entire endeavor was not in vain. Additionally, the appointment of a single individual provides critics with an easy and direct target for ad hominem attacks that hone in on specific individual traits—such as political donations, staff hires, or past jobs—to accuse the special counsel of partisanship or a lack of objectivity.

This proposal would address these criticisms by creating a continuing, multimember body—in contrast to a single prosecutor appointed for a single

purpose—whose members serve staggered terms. Appointment to the Commission should be restricted to individuals who meet certain qualifications related to experience or expertise. The statute could, for example, require a balance of party identification, insist that appointees have prior investigative experience, or require the members to be former inspectors general or law enforcement officials. These requirements arise out of the same insights on which Ayres and Prakash relied to design their prosecutor jury, and they parallel many existing requirements applicable to agencies with some form or norm of independence from the White House and the political process.²⁶²

This structure would (1) temper the power of a single individual to make important decisions and foster more deliberative decision making;²⁶³ (2) enhance institutional memory and the continuity of policies and approaches;²⁶⁴ (3) blunt the opportunity for ad hominem criticisms of the type that have plagued independent and special counsels; (4) prevent the necessity of starting an office from scratch for an investigation—and the potential incentives for partisans to respond to that hiring call that Justice Scalia worried about;²⁶⁵ (5) grant some credibility and bipartisanship to the Commission's work and insulate it from presidential control;²⁶⁶ and (6) ensure the Commission has the necessary expertise and objectivity to perform its tasks. And, as Ayres and Prakash suggest, other procedural rules such as supermajority requirements for certain actions could further ensure consensus collective action.

2. *Investigative Enforcement Authority*

This proposal envisions both an amplification and diminishment of authority for the Commission as compared to either Congress or the special counsel. The Commission needs robust investigative enforcement power—mirroring that of the special counsel or the judicial panels and contrary to congressional investigative impotence—but should not be given any power

262. See Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 797–98 (2013) (collecting examples).

263. *Id.* at 794.

264. *Id.*

265. *Morrison v. Olson*, 487 U.S. 654, 730 (1988) (Scalia, J., dissenting).

266. See Datla & Revesz, *supra* note 262, at 798 (“Partisan balance requirements limit politically motivated decision making within an agency.”); Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 37–38 (2010) (arguing that single-headed agencies are more susceptible to presidential control and influence).

to sanction, prosecute, or recommend charges—only report on its inspection. Information is essential to accountability.²⁶⁷

The authority of special counsels to get the information they need—by grand jury subpoena if necessary—has led to their success in collecting relevant information. That includes President Biden agreeing to sit down with Special Counsel Hur for an interview²⁶⁸ and President Bush and Vice President Cheney sitting down for interviews with Pat Fitzgerald—recognizing that they could face grand jury subpoenas if they did not.²⁶⁹ Using this coercive power, Smith compelled the testimony of numerous individuals that refused to provide information to Congress,²⁷⁰ and Ken Starr similarly overcame many privilege objections to get information in the Clinton investigations.²⁷¹ The judicial committees charged with investigating misconduct or disability in the judicial branch have similarly broad subpoena power, allowing them to independently institute contempt proceedings for noncompliance.²⁷²

By contrast, Congress has much less authority to demand information from the executive branch. As discussed, Congress can demand, subpoena, hold in contempt, refer for prosecution, and sue an executive branch official or the President who refuses to provide information. But none of those options are actually effective at forcing the information to be provided. It all depends largely on political pressure and, perhaps, the President's need to get an appointment or piece of legislation through (something that rarely helps the House given its lack of role in appointments).²⁷³ Analogously,

267. See Clark, *supra* note 11, at 392–406 (detailing how the Bush administration evaded accountability for its warrantless wiretapping program by maintaining its secrecy and utilizing the confidentiality that inheres in national security programs to prevent information from reaching actors that might hold them accountable).

268. See HUR REPORT, *supra* note 126, at 28–32 (detailing Hur's investigative steps).

269. See Assertion of Exec. Privilege Concerning the Special Couns.'s Interviews of the Vice President & Senior White House Staff, 32 Op. O.L.C. 7, 7 n.1, 11 (2008) (noting the interviews and the possibility of a grand jury subpoena). Trump, by contrast, refused to sit for an interview with Mueller, and Mueller decided against a subpoena. See 2 MUELLER REPORT, *supra* note 126, at 13.

270. See Kyle Cheney & Josh Gerstein, *The Fruits of Jack Smith's 2-Year Investigation into Trump Will Land on Tanya Chutkan's Desk Today*, POLITICO (Sept. 26, 2024), <https://www.politico.com/news/2024/09/26/jack-smith-trump-investigation-dossier-00181108> [<https://perma.cc/RD9H-RQHL>] (noting that Smith prevailed in litigation to force testimony Congress could not compel from, among others, former Vice President Pence and senior presidential advisors such as Pat Cipollone, Mark Meadows, and Dan Scavino).

271. See, e.g., *In re Grand Jury Proc.*, 5 F. Supp. 2d 21 (D.D.C.), *aff'd sub nom.*, *In re Lindsey*, 148 F.3d 1100 (D.C. Cir.), *aff'd in part, rev'd in part*, 158 F.3d 1263 (D.C. Cir. 1998); *In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997); *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1997).

272. See 28 U.S.C. §§ 332(d)(1)–(2), 356.

273. For example, a group of Senators put President Obama's nomination of David Barron to the First Circuit on hold until the administration agreed to release a 2010 OLC memo authorizing a drone strike of a U.S. citizen. See Zeke J. Miller & Massimo Calabresi, *Inside the Obama Administration Fight*

inspectors general can similarly demand information and argue that they are statutorily entitled to it. But they are, in the end, subject to whatever decision the agency head or the White House makes with respect to providing the information. They, like Congress, lack the means to compel compliance or to use judicial process to enforce a subpoena against an executive branch individual or entity.

By contrast, the Commission must be able to make its own determinations about what information it needs and must be able to enforce those demands by using judicial process. Accomplishing this would be as simple as giving the Commission the authority to issue administrative subpoenas and to enforce them in district courts, in the same manner as the other administrative agencies.²⁷⁴ However, given the sensitive nature of these investigations and the potential that these court proceedings would lead to Congress or the public trying to seek the same information, the process for accessing this information should be confidential, in the same manner as a grand jury and as required for judicial investigations.²⁷⁵ In other words, the statute should adopt a mechanism for the Commission to enforce a subpoena in a sealed judicial proceeding against the White House or an executive branch agency, and any claims of privilege can be adjudicated in that proceeding. This process would thus mirror the process used by independent and special counsels in the past, including in the Starr and Smith investigations, and would be analogous to the process used for judicial investigation. But it would be entirely divorced from the criminal prosecution system, and the Commission would bear no responsibility for acting on the information.

3. *Location and Independence*

For the reasons explained below, the Commission must be an executive branch entity. But, as nearly everyone to have addressed this issue has recognized,²⁷⁶ it must also have some independence from the President and,

over the Drone Memo, TIME (May 13, 2014), <https://time.com/97613/obama-drone-memo-david-barron/> [<https://perma.cc/Y4TN-KUAR>].

274. OFF. OF LEGAL POL'Y, U.S. DEP'T OF JUST., REPORT TO CONGRESS ON THE USE OF ADMINISTRATIVE SUBPOENA AUTHORITIES BY EXECUTIVE BRANCH AGENCIES AND ENTITIES: PURSUANT TO PUBLIC LAW 106-544, at Section II.A.2 (2002), https://www.justice.gov/archive/olp/rpt_to_congress.htm [<https://perma.cc/ZC8W-BYVT>] (describing judicial enforcement of administrative subpoenas).

275. The Judicial Conduct and Disability Act of 1980 has express confidentiality provisions for information obtained during the investigation. See 28 U.S.C. § 360(a) (2012).

276. See, e.g., Brett M. Kavanaugh, *The President and the Independent Counsel*, 86 GEO. L.J. 2133, 2145 (1998) (noting that "a case has not been made" for eliminating all mechanism of appointing

potentially, from the Justice Department. This aspect of the proposal is perhaps the one that will raise the most constitutional objections, which are addressed below. This essential attribute for presidential inspection going forward draws both on the lessons of the independent counsel as well as the current situation of inspectors general.

Placement within the executive branch is critical for two reasons. First, if it were a congressional entity, even if it had statutory access to information, the executive branch would treat it as an agent of Congress—as it has treated other statutory commissions—and would accordingly engage in the “accommodation process” and rely on doctrines such as executive privilege to withhold confidential information.²⁷⁷ The executive branch will assert that it will accommodate the needs of the entity in a manner consistent with its institutional interests, but any provision of information to the entity would be subject to the President’s discretion about whether that disclosure should occur or not. These positions are well established within the executive branch and have been followed across administrations of both parties.²⁷⁸ A congressional Commission of this nature would face the same problems with investigative enforcement that congressional committees currently face.

Second, placement in the executive branch is imperative so that executive branch interests in confidentiality can be adequately taken into account and honored by the Commission. Any congressional entity is ultimately subject to control of the current Congress, including with respect to the disclosure of information. The proposed Commission, however, would be an executive branch entity, and it could communicate and discuss privilege and sensitive information in confidence with other executive branch actors, including the Attorney General and the White House. These conversations have already been occurring in the context of the special counsel investigations, mostly out of the public’s awareness, but the conversations are impossibly conflicted because the Attorney General is on

an independent counsel “*nor has anyone really attempted to make it*” because it would be “rather untenable as a matter of common sense” to suggest that an outside investigation is never necessary (emphasis in original)).

277. The executive branch currently engages with the Government Accountability Office and the Comptroller General in this way, as well as other congressional entities such as commissions like the Afghan War Commission. *See, e.g.*, Investigative Auth. of the Gen. Acct. Off., 71 Op. O.L.C. 171, 176–80 (1988) (describing how the executive branch would engage with the GAO through the accommodation process); Gen. Acct. Off. Request for Documents of the Fed. Emergency Mgmt. Agency, 4B Op. O.L.C. 773, 776 (1980) (noting GAO acts “as an agent of Congress”).

278. *See* Shaub, *supra* note 18, at 8–27 (describing the executive branch doctrine).

both sides of the dispute.²⁷⁹ As an executive branch actor and a continuing body with institutional interests in receiving information in the future and in procuring voluntary cooperation from future White Houses and other agencies, the Commission would have appropriate institutional incentives about confidentiality and the means to confer openly about appropriate protections and disclosures with executive branch actors and the White House without fear that a congressional committee will decide to publicize its communications for partisan purposes. As noted, information disputes could, if necessary, be resolved in court. But these disputes are less likely if both sides have shared interests in maintaining institutional confidentiality interests. By contrast, Congress lacks any such interests, either as a continuing institution or an investigative entity, lacks expertise about internal executive branch confidentiality interests, and is often driven by political expediency.

The Commission would thus be established as an independent entity within the executive branch, in many ways mirroring the Privacy and Civil Liberties Oversight Board (PCLOB) or CIGIE. For the reasons explained below, I contend that the commissioners could, in addition, be explicitly protected from removal absent good cause consistent with Article II. But, at the very least, the structure of the Commission as a multimember, continuing body with staggered terms along with both clarity in the statute that the Commission should operate independently of the Justice Department and White House and strong normative values of investigative independence would give the Commission the independence necessary to perform its tasks.²⁸⁰

4. *Records and Reporting*

Finally, the Commission should be governed by a detailed set of statutory guidelines governing disclosure to Congress, to the Justice Department, and to the public, similar to those applicable to judicial misconduct investigations.²⁸¹ Mandatory reporting requirements are a regular feature of these types of investigative entities: the current special counsel regulations

279. See Kavanaugh, *supra* note 276, at 2134 (recognizing that when a question of executive privilege arises in the context of an independent counsel investigation, “the Attorney General simultaneously must perform two potentially contradictory functions”—act as legal advisor to the executive branch about privilege and as a prosecutor seeking to gain access to evidence); see also *id.* at 2134 n.2 (quoting Watergate prosecutor Archibald Cox as making a similar observation).

280. See COAN, *supra* note 18, at 206–11 (contending that “[norms] are the most potent weapon the American people possess for holding their presidents and other high government officials to account”).

281. See 28 U.S.C. § 360 (2002) (requiring confidentiality but also requiring that written reports be made public).

require a report to the Attorney General and have, as a de facto matter, resulted in a public report about the investigation.²⁸² Statutes governing other oversight and accountability entities like inspectors general, PCLOB, and the Judicial Conference include similar mandatory reporting requirements and provisions governing public disclosure.²⁸³

These requirements could, as the statutes applicable to judicial misconduct investigations do, explicitly contemplate impeachment referrals and the provision of evidence to the House Judiciary committee in the case of such referrals.²⁸⁴ The Commission, given its purely inspection function, should not be tasked with determining or opining on the desirability or validity of pursuing impeachment, just as it should have no power to decide or opine on whether any subject of the investigation has committed a criminal act or should be prosecuted. Instead, as Bauer and Goldsmith also advocate in their proposed reform, the Commission should provide purely factual information resulting from its inspection confidentially, either at the conclusion of the inspection or on a rolling basis;²⁸⁵ indeed, Congress arguably has a constitutional right to such information to perform its impeachment function.²⁸⁶

The Commission should also be governed by clear guidelines about both transparency and confidentiality. It should, as PCLOB and other agencies do, issue guidelines for implementing FOIA and other disclosure and reporting obligations. And these transparency provisions would be relatively straightforward to implement given the many existing models which could be drawn from. Critically, the Commission should also be established with robust protections for the confidentiality of its investigations. Particularly while the investigation is ongoing, the Commission's governing statute and public records laws like FOIA should protect the confidentiality of its investigative files and should explicitly state that Congress may not access the commission's internal files unless the Commission determines otherwise. This serves both to protect the integrity of the process and to preempt any claims of congressional interference by

282. See BAUER & GOLDSMITH, *supra* note 18, at 186–92.

283. See MICHAEL GREENE, BEN WILHELM, WENDY GINSBERG & KATHRYN A. FRANCIS, CONG. RSCH. SERV., R43814, FEDERAL INSPECTORS GENERAL: HISTORY, CHARACTERISTICS, AND RECENT CONGRESSIONAL ACTIONS 12 (2016) [hereinafter *FEDERAL INSPECTORS GENERAL*]; 28 U.S.C. § 353 (2002).

284. See 28 U.S.C. § 355(b) (2002). The independent counsel statute provided for such a referral mechanism as well, which Starr utilized after the Clinton investigation. See STARR, *supra* note 184.

285. BAUER & GOLDSMITH, *supra* note 18, at 192–93.

286. See *supra* text accompanying notes 251–55.

demanding files.²⁸⁷ Moreover, the statutory provisions should clarify that decisions about the release of information gathered by the Commission shall be made by the Commission itself, though the Commission may consult the Attorney General, Archivist, and White House Counsel as desired.

Finally, mirroring one of the principal reforms advocated by Bauer, Goldsmith, and Rappaport, among others, the Commission should have explicit and mandatory reporting requirements about the results of its investigations, though these requirements should leave some discretion in the Commission to make decisions about the level of detail and the need to protect privacy and institutional interests. The Department of Justice traditionally does not release information about the subjects of law enforcement investigations who were not charged.²⁸⁸ But, as Bauer and Goldsmith recognize, the nature of these high-profile investigations weighs in favor of a different approach to public disclosure.²⁸⁹

Given the nature of the investigations at issue and the importance of informing the public, the Commission should be required to report on the ultimate conclusion of its investigations, describe the processes it followed, and provide whatever amount of information it believes appropriate and in the public interest. The Judicial Conference has a similar mandatory public reporting requirement that leaves it discretion as to the information released.²⁹⁰ The chair of the Commission should also be expected to testify to Congress about the Commission's decisions, but the Commission should not be expected to provide all files from its investigation upon its conclusion. Congress has little need to understand the details of the investigation absent a potential referral for impeachment,²⁹¹ and the expectation of such disclosure could chill future cooperation and undermine the Commission's institutional confidentiality interests.

C. CIGIE and Other Analogous Commissions

None of the individual characteristics of this Commission would be novel. Indeed, it is striking how *often* the country has turned to independent, multimember commissions composed of people chosen for their expertise

287. See Todd David Peterson, *Congressional Oversight of Open Criminal Investigations*, 77 NOTRE DAME L. REV. 1373, 1377–379 (2002) (summarizing arguments that Congress should not have access to information from open law enforcement investigations).

288. See U.S. Dep't of Just., Just. Manual § 9-27.760 (2024).

289. BAUER & GOLDSMITH, *supra* note 18, at 186–88.

290. See 28 U.S.C. § 360(b) (2002).

291. See Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 732 (D.C. Cir. 1974) (en banc) (“While fact-finding by a legislative committee is undeniably a part of its task, legislative judgments normally depend more on the predicted consequences of proposed legislative actions and their political acceptability, than on precise reconstruction of past events.”).

and integrity when a credible investigation and public accounting is most necessary—*except*, that is, when presidential misconduct is at issue. In that sole area, the country has followed a path of unaccountable, single-purpose, lone prosecutors or relied on purely political actors in Congress to hold the President accountable. It is time for a new approach.

What *would* be novel in this proposal is the creation of a non-criminal investigative body that has the robust investigative enforcement authority of the special counsel. Previously, only individual prosecutors have had the investigative enforcement authority necessary to procure all the relevant information, and their wielding of it against the White House has produced many of the current problems plaguing special counsels. This multimember Commission would be able to collect all of the information solely for reporting purposes and allow the entities with authority to sanction—prosecutors, Congress, and the voters—to perform their constitutional functions in light of the facts and information uncovered during the inspection. Numerous analogs—both existing and historical—demonstrate both the feasibility and efficacy of such a system. Indeed, because some of these bodies have done and currently do such professional, non-partisan work and protect confidentiality and institutional interests, they have given rise to relatively little controversy or even discussion.²⁹²

The most obvious existing body that reflects the ideals of this proposal is the Council of Inspectors General for Integrity and Efficiency. As noted, this body—originally created by Executive Order but now codified as an “independent entity” within the executive branch—already performs continuing executive branch inspection and administration.²⁹³ Indeed, the easiest way to implement the proposal of this Article might be to enlarge the jurisdiction of CIGIE to include White House investigations and add in the necessary investigative enforcement authority and the various protections for independence, accountability, records, and reporting discussed above, to the extent they do not exist in existing statutes governing inspectors general. Many of the proposed characteristics of a Commission for White House integrity already exist in the statutory frameworks governing the IGs, however, including requirements that the President chose nominees who have expertise and integrity.²⁹⁴ CIGIE also provides a mechanism for

292. See Clark, *supra* note 11, at 387–89 (discussing the prominent role of independent commissions in ensuring executive branch accountability).

293. Inspector General Reform Act of 2008, Pub. L. No. 110-409, 122 Stat. 4302.

294. See 5 U.S.C. app. §§ 3(a), 8G(c) (requiring that inspectors general be appointed without regard to political affiliation and on the basis of integrity and expertise); 50 U.S.C. §§ 3033(c), 3517(b) (requiring the same of IGs for the CIA and the IC and also requiring prior experience in the field of foreign intelligence or national security and compliance with relevant security protections).

holding the inspectors themselves accountable,²⁹⁵ oversight that Rappaport and others have argued is missing but necessary for special counsels.²⁹⁶ Inspectors general—like the Commission proposed here would be—are required to report on investigations to Congress,²⁹⁷ and these reports can form the basis for congressional investigations or even impeachments.

These “watchdogs” are already in place within the executive branch conducting inspections,²⁹⁸ and they are, by statute and tradition, required to be objective and independent in their inspections and to report on their findings. As part of implementing this proposal, existing agency inspectors general could be removed from their current positions embedded within agencies—and under the ultimate control of the agency head²⁹⁹—and put under the control of CIGIE, making for a single, independent Commission charged with executive branch inspection that has detailed guidelines and provisions specific to any inspection involving the White House. CIGIE’s investigative enforcement authority would need to be enhanced, in line with the proposal outlined above, because it currently cannot issue or enforce subpoenas issued to federal entities.³⁰⁰ This deficiency, as well as the placement of IGs within agencies and with specific jurisdiction tied to those agencies’ actions, has led the White House to refuse to provide IGs documents related to White House actions relevant to investigations.³⁰¹ The independence of IGs has also been threatened recently, with President Trump removing a number of IGs at the start of his administration, in contradiction of laws requiring notice and an explanation for such removals.³⁰²

CIGIE is not the only applicable analog, however. The Privacy and Civil Liberties Oversight Board, discussed previously, is expressly charged with oversight of the executive branch as it relates to the protection of individual

295. See BEN WILHELM, CONG. RSCH. SERV., IF12410, OVERSIGHT OF INSPECTORS GENERAL: THE CIGIE INTEGRITY COMMITTEE (2023).

296. See Rappaport, *supra* note 182; FINE, *supra* note 107, at 156–58.

297. See FEDERAL INSPECTORS GENERAL, *supra* note 283, at 6 (describing various reporting requirements).

298. See FINE, *supra* note 107.

299. See 5 U.S.C. app. § 3(a), 8G(d); see also FEDERAL INSPECTORS GENERAL, *supra* note 283, at 6.

300. 5 U.S.C. app. § 6(a)(4).

301. See, e.g., U.S. DEP’T OF JUST., AN INVESTIGATION INTO THE REMOVAL OF NINE U.S. ATTORNEYS IN 2006, at 4, 111, 154, app. A (2008), <https://oig.justice.gov/sites/default/files/legacy/special/s0809a/final.pdf> [<https://perma.cc/82GM-UE6B>] (2008) (noting that the IGs were “not provided documents from the White House that [they] believe[d] [we]re critical to [thei]r investigation” and including a letter from White House Counsel Emmet Flood explaining that the White House was declining to provide internal documents to the IGs).

302. See Josh Gerstein, *Raskin Pledges to Back Federal Watchdogs*, POLITICO (Dec. 5, 2024), <https://www.politico.com/live-updates/2024/12/05/congress/jamie-raskin-inspectors-general-trump-administration-00192861> [<https://perma.cc/GY6S-RR6L>].

liberties.³⁰³ It was created on the recommendation of the 9/11 Commission (more on that below)³⁰⁴ and has many of the authorities discussed in this reform proposal, including the ability to enforce its subpoenas in court and numerous mandatory and discretionary reporting requirements to Congress.³⁰⁵ The organic statute requires that the four part-time members of PCLOB equally represent the two political parties, and these members must be selected “on the basis of their professional qualifications, achievements, public stature, expertise in civil liberties and privacy, and relevant experience.”³⁰⁶ PCLOB also has a detailed set of guidelines about transparency and access to records.³⁰⁷ Like inspectors general, PCLOB is also provided statutory access to executive branch material but lacks the authority to issue or enforce subpoenas against executive branch agencies.³⁰⁸ Like CIGIE, though, it is a multimember commission within the executive branch given some independence from the White House and charged with oversight of the executive branch’s activities.

Another compelling analog for this Commission is the panels created pursuant to the Judicial Conduct and Disability Act to investigate judicial conduct. Although there has been criticism that these panels are not independent enough³⁰⁹—a problem addressed by this Article’s proposal in terms of executive branch inspection—they function in a manner similar to the Commission proposed here. Were impeachments of Presidents and other executive branch officials to follow a similar process, those impeachments might neutralize a small amount of partisanship inherent in the House process. Moreover, if this option were available and utilized for some White House inspections and subsequent impeachments, it would present a stark contrast to impeachment investigations driven solely by partisan politics.

Finally, the numerous, bipartisan expert panels established to investigate such events as the internment of Japanese Americans during World War II, the Kennedy assassination, the Challenger shuttle disaster, 9/11, the withdrawal from Afghanistan, and high-profile failings of the Secret Service

303. See 42 U.S.C. § 2000ee(c) (2022).

304. See 9/11 COMMISSION REPORT, *supra* note 111, at 395 (“[D]uring the course of our inquiry, we were told that there is no office within the government whose job it is to look across the government at the actions we are taking to protect ourselves to ensure that liberty concerns are appropriately considered. If, as we recommend, there is substantial change in the way we collect and share intelligence, there should be a voice within the executive branch for those concerns.”).

305. See 42 U.S.C. § 2000ee (2022).

306. 42 U.S.C. § 2000ee(h)(2) (2022).

307. See 6 C.F.R. §§ 1001, 1002 (2026).

308. 42 U.S.C. § 2000ee(g)(1) (2022).

309. See generally Lara A. Bazelon, *Putting the Mice in Charge of the Cheese: Why Federal Judges Cannot Always Be Trusted to Police Themselves and What Congress Can Do About It*, 97 KY. L.J. 439 (2009) (arguing that Congress should reform judicial accountability to provide for independent evaluation by someone other than the judges themselves).

provide similar historical examples of independent, expert, multimember commissions charged almost exclusively with inspection and reporting.³¹⁰ A number of these entities have the kind of robust investigative enforcement power contemplated for this proposal as well.³¹¹

D. Addressing Constitutional Objections

Any attempt to create independence within the executive branch is—particularly in today’s constitutional environment—almost certain to raise constitutional objection. The most significant objection would likely be to any removal protections provided for the members of the Commission.³¹²

As an initial matter, this proposal, unlike some, is designed to fit within even a robust unitary executive view of Article II. Scalia’s *Morrison* dissent has now effectively been adopted as the law by the Supreme Court.³¹³ Arguments grounded in the *Morrison* majority’s reasoning have little

310. See *supra* Section I.C.

311. The 9/11 Commission, for example, could issue testimonial and documentary subpoenas if the chairman and vice-chairman agreed to issue a subpoena or if six members voted to issue the subpoena, and the Commission could enforce the subpoena directly in federal court or also by referring failure to comply to the U.S. Attorney for prosecution. See Act of Nov. 27, 2002, Pub. L. No. 107-306, § 605, 116 Stat. 2383, 2410–11.

312. Other potential objections might relate to the commission’s subpoena enforcement power or the ability of Congress to vest lower executive branch officers with authority to report information directly to Congress. But the former objection is contradicted directly by the subpoena enforcement action found justiciable in *United States v. Nixon*, 418 U.S. 683, 692–97 (1974), as well as a host of cases involving the executive branch on both sides, see, e.g., *NASA v. FLRA*, 527 U.S. 229 (1999); *Dep’t of the Treasury, IRS v. FLRA*, 494 U.S. 922 (1990); *United States v. ICC*, 352 U.S. 158 (1956); *Sec’y of Agric. v. United States*, 347 U.S. 645, 647 (1954); *United States v. ICC*, 337 U.S. 426 (1949), and the numerous instances in which an independent counsel litigated a case against an executive branch actor, see, e.g., *In re Grand Jury Procs.*, 5 F. Supp. 2d 21 (D.D.C.), *aff’d sub nom.*, *In re Lindsey*, 148 F.3d 1100 (D.C. Cir.), *aff’d in part, rev’d in part*, 158 F.3d 1263 (D.C. Cir. 1998); *In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997); *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1997). The second potential objection arises almost solely out of a theory of executive power articulated by the Office of Legal Counsel that has no judicial support, cf. *Auth. of Agency Offs. to Prohibit Emps. from Providing Info. to Cong.*, 28 Op. O.L.C. 79, 81 (2004) (asserting the President’s constitutional authority “to supervise and control the dissemination of privileged government information” to Congress), and applies equally to existing whistleblower laws, cf. *Whistleblower Prots. for Classified Disclosures*, 22 Op. O.L.C. 92, 100 (1998) (raising constitutional concerns with proposed whistleblower legislation). Moreover, even the Office of Legal Counsel has long recognized that the executive branch doctrine of presidential control over information disclosed to Congress has much less purchase when an independent agency is at issue. See, e.g., *Applicability of Exec. Privilege to the Recommendations of Indep. Agencies Regarding Presidential Approval or Veto of Legis.*, 10 Op. O.L.C. 176, 176 (1986) (recognizing that “existing precedent separates the ‘independent agencies’ somewhat from the President’s direct supervision and control”); *Memorandum Regarding Prohibited Contacts with Agencies and Departments from Dana Remus, Couns. to the President, to the White House Staff* (July 21, 2021) (advising that “agencies [with] statutory structures, jurisdiction, or authority that provide them with some degree of independence from the President’s authority . . . may raise distinctive concerns about inappropriate influence”).

313. See Adrian Vermeule, *Morrison v. Olson Is Bad Law*, *LAWFARE* (June 9, 2017), <https://www.lawfaremedia.org/article/morrison-v-olson-bad-law> [<https://perma.cc/NV43-77U3>].

chance of surviving judicial review,³¹⁴ and the same is true of arguments relying on the “decaying husk” of *Humphrey’s Executor*, which, at the time of the publication of this Article, the Supreme Court appears set to overturn.³¹⁵ Numerous scholars have challenged the Court’s interpretation of Article II, particularly in the context of the removal power, as inconsistent with both original public meaning and historical practice.³¹⁶ But this Article takes the Court’s embrace of the unitary executive as a given. The Commission proposed here—unlike the independent counsel—would be consistent with that approach.

Precedent, practice, and history establish that the kind of inspection and reporting contemplated for the Commission cannot be classified as a purely executive function. As noted, Congress has long been recognized to have the power to investigate and compel responses with subpoenas, an authority understood as adjacent to the legislative power.³¹⁷ Congressional entities and agents such as the Government Accountability Office and Comptroller General exercise these powers as well, including to inspect potential misuse of money or misconduct within the executive branch.³¹⁸ The judicial panels established under the Judicial Conduct and Disability Act perform a similar investigative function, with accompanying power to enforce their subpoenas, but are composed solely of judicial branch officials. And the single-purpose commissions mentioned earlier, most of which consist of private individuals and some of which have even included current officials from outside the executive branch,³¹⁹ have been expressly charged with performing a similar constitutional function without constitutional objection.

Indeed, the Commission’s explicit purpose to gather and provide information situates it within the understanding of at least one type of *congressional* power recognized in *Buckley*. There, the Court divided the Federal Election Commission’s powers into three buckets: (1) “functions

314. See, e.g., *Special Counsels and the Separation of Powers: Hearing on S. 1735 and S. 1741 Before the S. Comm. on the Judiciary*, 115th Cong. 4 (2017) (statement of Akhil Reed Amar, observing that “Justice Scalia’s *Morrison* dissent has carried the day in legal and expert-opinion circles left, right, and center”).

315. Transcript of Oral Argument at 4, 169, *Trump v. Slaughter*, No. 25-332 (argued on Dec. 8, 2025); see Baumann, *supra* note 23.

316. See, e.g., Jed H. Shugerman, *The Indecisions of 1789: Inconstant Originalism and Strategic Ambiguity*, 171 U. PA. L. REV. 753 (2023); Chabot, *supra* note 249, at 129–30.

317. See *supra* text accompanying notes 68–71.

318. See *About*, U.S. GOV’T ACCOUNTABILITY OFF., <https://www.gao.gov/about> [<https://perma.cc/88ZZ-WVXM>]; *Bowsher v. Synar*, 478 U.S. 714 (1986).

319. Most notably, of course, Chief Justice Warren chaired the Warren Commission. WARREN COMMISSION REPORT, *supra* note 111. A dramatic example is the Hayes-Tilden Electoral Commission, on which served five members of the House, five members of the Senate, and five Supreme Court Justices. See Act Creating an Electoral Commission, ch. 37, 19 Stat. 227 (1877).

relating to the flow of necessary information—receipt, dissemination, and investigation;” (2) “functions with respect to the Commission’s task of fleshing out the statute—rulemaking and advisory opinions;” and (3) “functions necessary to ensure compliance with the statute and rules.”³²⁰ The first category, powers “essentially of an investigative and informative nature” fell, in the Court’s view, into “the same general category as those powers which Congress might delegate to one of its own committees” and, therefore, the Court found “no question” that the Commission could exercise those powers even though some of its members were appointed by Congress.³²¹ The powers of the Commission proposed here would be limited to those same “functions relating to the flow of necessary information, receipt, dissemination, and investigation;” importantly, its members, unlike those in *Buckley*, would be principal officers appointed by the President and confirmed by the Senate.

Accordingly, the Commission proposed here would fit comfortably within the existing constitutional structure. Numerous multimember commissions, some of whom are protected from removal at will, have similar requirements for bipartisanship or expertise in their composition.³²² Even if some of those legacy agencies—such as the FTC—are ultimately found unconstitutional because the Court decides to overrule *Humphrey’s Executor*,³²³ the Commission proposed here would be constitutionally distinct because it would have no authority to set policy, no enforcement power, and no regulatory authority. *Seila Law* affirmed the ability to protect from removal “multimember expert agencies that do not wield substantial executive power.”³²⁴ The Commission proposed here would be precisely that type of agency. Indeed, in the briefing and oral arguments in *Slaughter*, the key aspect of executive power some members of the Court focused on, including Justice Gorsuch, was the ability of the FTC and other traditionally independent agencies to pursue *criminal* investigation or to pursue civil

320. *Buckley v. Valeo*, 424 U.S. 1, 137 (1976) (per curiam).

321. *Id.* at 137–38.

322. *See* Datla & Revesz, *supra* note 262, at 797–98 (collecting agencies and noting that “there are partisan balance requirements for about half of the multimember agencies, both those with statutory removal protection and those without”).

323. In *Seila Law*, Justice Thomas wrote a concurrence specifically advocating for the “repudiat[ion]” of “what is left” of *Humphrey’s Executor*, calling it a “direct threat to our constitutional structure” and an “erroneous precedent.” *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 239 (2020) (Thomas, J., concurring in part and dissenting in part). Although the Court affirmed *Humphrey’s Executor* in *Seila Law* as an exception to the default rule of removal, *see* Chabot, *supra* note 249, at 149–50, it now appears prepared to overrule it entirely in the *Slaughter* case, *see* Baumann, *supra* note 23.

324. *Seila Law*, 591 U.S. at 203–05, 218.

enforcement actions against anyone.³²⁵ No one argued that the FTC’s non-criminal investigative power for purposes of reporting information to Congress (as opposed to investigating for purposes of civil enforcement actions) itself constituted “executive power” that had to be subject to full presidential control.³²⁶

Finally, even if the Court were to ultimately determine that the removal protections for members of the Commission were unconstitutional or the subpoena enforcement actions nonjusticiable, this type of commission remains the most viable option for White House inspection going forward. The norm against the removal of special counsels that currently exists and has shown some resilience would continue to exist—perhaps in greater force given the proposed Commissioners’ staggered terms and continuing office and the fact that there would be more than one of them to remove. And the potential for political blowback from interference that Coan called a “surprisingly powerful deterrent” would remain as well.³²⁷ In short, the independence of such a Commission and its exercise of authority *should*—based on existing precedent and historical practice—withstand constitutional objection. But even if the Court were to reject or revisit that precedent and practice, the Commission’s *de facto* independence as a separate agency charged specifically with inspecting the White House and government still warrants its establishment.

E. Reform Alternatives: Narrower and Broader Approaches

This proposal is intended to contribute to the ongoing conversation about how best to investigate and hold Presidents and White House officials accountable. Pieces of this proposal could be implemented separately, by, for example, creating an inspector general for the Executive Office of the President,³²⁸ codifying a new type of independent counsel that emphasizes

325. See Transcript of Oral Argument at 85, 94–96, 98, 119–22, *Trump v. Slaughter*, No. 25-332 (argued on Dec. 8, 2025); Reply Brief for the Petitioners at 6, *Trump v. Slaughter*, No. 25-332 (argued on Dec. 8, 2025) (arguing that “the power to bring civil enforcement suits is the ‘special province of the Executive.’”).

326. See Brief for the Petitioners at 25, *Trump v. Slaughter*, No. 25-332 (argued on Dec. 8, 2025) (noting that the FTC’s had authority to investigate not “only for the information of Congress” but also to “investigate potential violations to decide whether to pursue enforcement action—a core executive power” (internal quotation marks omitted)).

327. COAN, *supra* note 18, at 2.

328. This has been the subject of proposed legislation, see Federal Executive Accountability Act of 2017, H.R. 1016, 115th Cong. (2017); White House Inspector General Act of 1996, H.R. 3872, 104th Cong. (1996), and proposed by former officials, see Yevgeny Vindman, *A White House Inspector General for Accountability*, LAWFARE (Dec. 2, 2021), <https://www.lawfaremedia.org/article/white-house-inspector-general-accountability> [<https://perma.cc/67JX-DNYV>].

the inspection function,³²⁹ or combining some of the reforms suggested here with the prosecutor jury proposed by Ayres and Prakash. Such a regime might also incorporate the multi-headed structure advocated in this proposal by appointing a team of dual special counsels and requiring Senate confirmation, mirroring the choice by President Coolidge to give credibility to the first independent counsel investigation as well as implementing one of the reforms advocated by Kavanaugh in 1998.³³⁰

Just as the reforms pursued could be narrower and more targeted than the comprehensive reform proposed here, a new paradigm for accountability could also be broader. Such a bipartisan, expert commission could be charged with inspecting and reporting on potential misconduct or ethical lapses by Supreme Court Justices under the new ethics code.³³¹ As noted, Justice Kagan has already suggested a similar possibility,³³² and one former inspector general has argued strenuously for an inspector general for the judicial branch.³³³ Indeed, if desired, the Commission—instead of ad hoc judicial panels—could be charged with inspection and reporting on misconduct allegations against all Article III judges and Justices, or even members of Congress.

Even if the Commission's charge remained confined to the executive branch, its duties could be expanded. Pursuant to the Twenty-Fifth Amendment,³³⁴ Congress could decide to delegate authority for inspecting presidential competency to this Commission,³³⁵ just as judicial panels are tasked with examining disability and competency as well as misconduct

329. See Independent Counsel Reauthorization Act of 2016, H.R. 5271, 114th Cong. (2016).

330. Kavanaugh, *supra* note 276, at 2136.

331. See SUP. CT. OF THE UNITED STATES, STATEMENT OF THE COURT REGARDING THE CODE OF CONDUCT (2023) (promulgating a new code of conduct in response to the numerous critiques of Justices' conflicts of interest and lack of transparency); see also Jodi Kantor & Abbie VanSickle, *Inside the Supreme Court Ethics Debate: Who Judges the Justices?*, N.Y. TIMES (Dec. 5, 2024), <https://www.nytimes.com/2024/12/03/us/supreme-court-ethics-rules.html> [<https://perma.cc/JZJ4-2J99>] (questioning the propriety of using judges to investigate the ethical conduct of other judges).

332. Marimow, *supra* note 22.

333. See FINE, *supra* note 107, at 164–67.

334. The Twenty-Fifth Amendment became a topic of conversation in connection with both President Biden's advanced age and the January 6 attack on the U.S. Capitol. See, e.g., Jeannie Suk Gersen, *This Is What the Twenty-Fifth Amendment Was Designed For*, NEW YORKER (July 3, 2024), <https://www.newyorker.com/news/daily-comment/this-is-what-the-twenty-fifth-amendment-was-designed-for> [<https://perma.cc/KR8V-F9WA>]; Andy Craig, *Mike Pence Could Have (and Should Have) Invoked the 25th Amendment on Jan. 6*, CATO INST. (June 16, 2022), <https://www.cato.org/commentary/mike-pence-could-have-should-have-invoked-25th-amendment-jan-6> [<https://perma.cc/VZ6V-PLRE>].

335. U.S. CONST. amend. XXV, § 4. The Framers of the Twenty-Fifth Amendment specifically contemplated that Congress would charge a nonpartisan, expert medical body with decisions about competency. See JOHN D. FEERICK, *THE TWENTY-FIFTH AMENDMENT: ITS COMPLETE HISTORY AND APPLICATIONS* (3d ed. 2013).

under the Judicial Misconduct and Disability Act.³³⁶ The House made passing gestures at trying to get information relevant to President Biden's competency without any real legislative purpose,³³⁷ but, if the Commission were charged with inspecting competency, the statutory scheme could provide specific authorities relevant to gathering information as well as ensuring such sensitive medical information is kept confidential.

CONCLUSION

In his book on prosecuting the President, Coan concludes by recognizing that the "resolution of these issues today will have long-lasting effects on American democratic norms."³³⁸ In reality, these issues are unlikely to ever be fully resolved, but that lack of resolution is a feature of our system, not a flaw. The systems of accountability must adapt as the constitutional structure and government evolves and changes. Given shortcomings in our current system made evident in recent years, this Article suggests a new approach—the empowerment of a multimember, expert body instead of a lone criminal prosecutor or a partisan congressional committee—to compel the production of information from the White House and report on the results of its investigation: that is, a new system for White House inspection.

336. 28 U.S.C. §§ 351(a), 353–57 (providing the procedure for filing a complaint about either judicial misconduct or disability as well as a singular statutory scheme investigating both types of complaints).

337. See Ryan Nobles, Rebecca Kaplan & Megan Lebowitz, *Republican-Led House Committee Subpoenas White House Aides over Biden's Health*, NBC News (July 10, 2024), <https://www.nbcnews.com/politics/congress/house-oversight-committee-subpoenas-white-house-aides-biden-health-rcna161243> [<https://perma.cc/PZL7-Y2SA>].

338. COAN, *supra* note 18, at 211.