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Prosecutorial Indiscretion and the United States Congress: Expanding the Jurisdiction of the Independent Counsel

Brian A. Cromer
University of Kentucky

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Prosecutorial Indiscretion and the United States Congress: Expanding the Jurisdiction of the Independent Counsel

*If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government, but experience has taught mankind the necessity for auxiliary precautions.*

**INTRODUCTION**

With the firing of Watergate Special Prosecutor Archibald Cox at the behest of President Richard Nixon,¹ the issue of prosecutorial independence was thrust abruptly to the forefront of political and legal debate.² President Nixon’s bold conduct was the catalyst behind the subsequent passage of the Ethics in Government Act of 1978,³ which provided that independent counsels would investigate allegations of executive branch mis-

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¹ *The Federalist No. 51, at 322 (J. Madison) (C. Rossiter ed. 1961) [hereinafter The Federalist].

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conduct. The statute recently received the imprimatur of the United States Supreme Court.

However, the question remains whether the Ethics Act stopped short of its goal of ensuring political neutrality in the application of the federal criminal laws. This Comment addresses whether the legislative branch would benefit if members of Congress were investigated by independent counsels rather than by the Justice Department. Part I discusses the constitutional protections that may be invoked by members of Congress. Part II documents and evaluates the history of executive branch investigations into legislative wrongdoing. Part III explores the feasibility of two alternatives for use of independent counsels when members of Congress are under investigation. Finally, this Comment concludes that the purview of the Ethics Act should be broadened to include criminal investigations of members of Congress.

I. OSTEBSIBLE CONSTITUTIONAL SAFEGUARDS AGAINST EXECUTIVE BRANCH ENCROACHMENT ON THE LEGISLATURE

The power of the executive branch of the federal government to prosecute violations of federal criminal law is grounded in article II of the United States Constitution. Furthermore, the United States Supreme Court has declared that executive branch prosecutorial discretion under article II is exclusive and absolute.

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4 See infra notes 124-28 and accompanying text.
5 Morrison v. Olson, 487 U.S. 977, 108 S. Ct. 2597, 2622 (1988) ("[W]e conclude that it does not violate the Appointments Clause for Congress to vest the appointment of independent counsels in the Special Division; that the powers exercised by the Special Division under the [Ethics] Act do not violate Article III; and that the [Ethics] Act does not violate the separation of powers principle by impermissibly interfering with the functions of the Executive Branch.").
6 See infra notes 125-28 and accompanying text.
7 See infra notes 11-54 and accompanying text.
8 See infra notes 55-111 and accompanying text.
9 See infra notes 112-83 and accompanying text.
10 See infra notes 184-87 and accompanying text.
11 U.S. Const. art. II, § 3 ("[The President] shall take Care that the Laws be faithfully executed ").
12 United States v. Nixon, 418 U.S. 683, 693 (1974) (citing the Confiscation Cases, 74 U.S. (7 Wall.) 454 (1869); and United States v. Cox, 342 F.2d 167, 171 (5th Cir. 1965), cert. denied, 381 U.S. 935 (1965) ("[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case ").
the destructive nature of the power to prosecute,\textsuperscript{13} and the inherent constitutional conflict between the President and the Congress,\textsuperscript{14} members of Congress are uniquely vulnerable to abusive exercises of prosecutorial discretion.

The framers of the Constitution recognized the risk of such executive abuse, and incorporated legislative privilege into the Constitution as a proscriptive measure.\textsuperscript{15} Significantly, the framers' well-documented fear of legislative tyranny\textsuperscript{16} did not obviate the adoption of legislative privilege. The obvious inference to be drawn from this is that prosecutorial abuse aimed at the legislature was viewed as a serious threat to the legislative process. The history of legislative privilege certainly supports such an inference, as, traditionally, the privilege has served to protect

\textsuperscript{13} See, e.g., F. Miller, Prosecution: The Decision to Charge a Suspect with a Crime (1970):

The charging decision has obviously serious implications for the individual involved. Not only does a decision to charge represent an affirmation of the need to condition the personal freedom of the accused on his ability to provide bail, it is also the decision that the accused should bear the economic and social costs of a trial. That he may avoid some of these costs by pleading guilty only enhances the impact of the decision. On the economic side, loss of earnings and the cost of preparing a defense may be considerable. On the social side, temporary loss of prestige and position are certain, and permanent damage to reputation not unlikely.

\textit{Id.} at 3.

\textsuperscript{14} See The Federalist No. 51, at 322 (J. Madison) ("Ambition must be made to counteract ambition."); see also L. Dodd & R. Schott, Congress and the Administrative State (1979):

In our separation of powers system, legislative, judicial, and executive authority is divided among three different branches. In addition, each branch is given certain checks that it can use against encroachment by the other branch, resulting in an ultimate system of shared powers. Explicit in this conception of government is the expectation that tension will exist among the branches of government, a tension deriving in part from the natural ambitions of political leaders within each institution.

\textit{Id.} at 354.

\textsuperscript{15} See infra notes 18-50; see also United States v. Johnson, 383 U.S. 169, 169 (1966) ("[T]he privilege was born to prevent intimidation by the executive"), cert. denied, 385 U.S. 889 (1966).

\textsuperscript{16} See, e.g., The Federalist No. 48, at 309 (J. Madison) ("The legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex."); see also Buckley v. Valeo, 424 U.S. 1, 129 (1976) ("[T]he debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches.") (citations omitted).
lawmakers from civil suits and to prevent improper impingement upon legislative power by the executive branch.17

A. The Arrest Clause

Legislative privilege stems from the Arrest Clause and the Speech or Debate Clause found in article I, § 6, cl. I of the Constitution.18 The Arrest Clause provides that "he Senators aid Representatives . shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same."19 Despite the broad immunity that a literal reading suggests, judicial construction has neutralized the clause vis-a-vis the executive branch.20

Although the Arrest Clause has been discussed at length in two Supreme Court cases,21 the scope of the clause was narrowed in each instance. In Long v Ansell,22 the Court held that the clause does not shield members of Congress from civil process.23 Williamson v. United States24 held that criminal arrests fall within the ambit of the "treason, felony, and breach of the peace" exemption.25 Consequently, the clause was found to be ineffectual as protection for a member of Congress facing criminal charges.26

Today, the Arrest Clause provides immunity from arrest in civil cases, a common practice when the Constitution was adopted but one that is no longer extant.27 Clearly, the narrow construc-

18 The Arrest Clause and the Speech or Debate Clause are both found in U.S. CONST. art. I, § 6, cl. 1.
19 Id.
20 See infra notes 21-28 and accompanying text; see also J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW § 7.10 (1986) ("[T]he terms treason, felony and breach of the peace, as used in the [Arrest Clause], except [] from the operation of the privilege all criminal offenses.").
21 See infra notes 22 and 24.
22 293 U.S. 76 (1934).
23 Id. at 82.
24 207 U.S. 425 (1908).
25 Id. at 438-43.
26 Id. at 446 ("[T]he terms treason, felony and breach of the peace, as used in the [Arrest Clause], except [] from the operation of the privilege all criminal offenses.").
27 Long, 293 U.S. at 83 ("When the Constitution was adopted, arrests in civil suits were still common in America. It is only to such arrests that the provision applies.").
tion accorded the Arrest Clause \[^{28}\] eliminates any protection from the executive branch that may have been intended by the framers.

B. The Speech or Debate Clause

The Speech or Debate Clause provides that “for any Speech or Debate in either House, [Senators or Representatives] shall not be questioned in any other place.” \[^{29}\] This provision has been recognized as the only clause in the Constitution that explicitly reflects the separation of powers doctrine. \[^{30}\] Indeed, the Supreme Court in *United States v Helstoski* \[^{31}\] acknowledged that the purpose of the speech or debate privilege “was to preserve the constitutional structure of separate, coequal, and independent branches of government.” \[^{32}\]

Early case law found the speech or debate immunity to be broad and expansive, preserving the integrity and independence of the legislative branch. \[^{33}\] The seminal case for this school of thought is *Kilbourn v Thompson*, \[^{34}\] wherein the Supreme Court held that the privilege encompasses “things generally done in a session of the House by one of its members in relation to the business before it.” \[^{35}\] In short, in the first case requiring the nation’s highest court to interpret the Speech or Debate Clause, speech or debate immunity was extended beyond that suggested by a literal reading of the clause. \[^{36}\]

Subsequent cases, \[^{37}\] however, abandoned the *Kilbourn* liberality in exchange for a more narrow and restrictive construc-
tion of the Speech or Debate Clause, ushering in a subtle erosion in the "parchment barriers" separating the branches of government. For example, in *United States v Johnson*, the executive branch was allowed to pursue conspiracy charges against a former member of Congress, although evidence of a speech given on the floor of the House of Representatives was deemed inadmissible. Earlier cases endorsing liberal construction of the Speech or Debate Clause were distinguished because they did not involve criminal prosecutions of members of Congress.

More recent cases sustain the departure from *Kilbourn*. Distinctions between legislative and political activities were drawn in *United States v Brewster*, with the latter found to be outside the speech or debate immunity. More specifically, running errands for constituents, making appointments with government agencies, assisting in securing government contracts, preparing newsletters, and delivering speeches outside Congress were all found to be unprotected activities. In *Gravel v. United States*, protected legislative acts were narrowly defined:

Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes.

covers actions "in the sphere of legitimate legislative activity," a less expansive immunity than the *Kilbourn* congressional "business" standard; see also *Powell v. McCormack*, 395 U.S. 486, 501-06 (1969) (Speech or Debate immunity does not prohibit civil suit against House of Representatives employees).

38 See generally J. NOWAK, supra note 20, at § 7.8.
39 The Federalist No. 48, at 308 (J. Madison).
41 *Id.* at 180 ("The essence of [the] charge is that the Congressman's conduct was improperly motivated, and that is precisely what the Speech or Debate Clause generally forecloses from executive and judicial inquiry.").
42 *Id.* (distinguishing *Kilbourn*, 103 U.S. 168 and *Tenney*, 341 U.S. 367).
43 See infra notes 44-50 and accompanying text.
45 *Id.* at 512 ("[I]t has never been seriously contended that these political matters, however appropriate, have the protection afforded by the Speech or Debate Clause.").
46 *Id.*
47 408 U.S. 606 (1972).
by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.⁴⁸

Finally, the Court in Helstoski⁴⁹ held that "'[a] promise to deliver a speech, to vote, or to solicit other votes at some future date is not 'speech or debate.'"⁵⁰

In summary, despite the existence of protective mechanisms in the Constitution⁵¹ and unequivocal original intent to erect a wall of immunity before the Congress,⁵² subsequent judicial pronouncements have disabled the Arrest Clause⁵³ and greatly restricted the scope of the Speech or Debate Clause.⁵⁴ Whether such diminutive immunity has a chilling effect on the legislature is unclear. However, it is apparent that any substantial protection from prosecutorial abuse must be found beyond the four corners of the Constitution.

II. CONGRESSIONAL VULNERABILITY TO PROSECUTORIAL MALFEASANCE

Violations of federal criminal law are prosecuted by United States attorneys.⁵⁵ However, as members of the executive branch, U.S. attorneys face intense partisan political pressure whenever an investigation of legislative impropriety is undertaken.⁵⁶ Con-

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⁴⁸ Id. at 625.
⁴⁹ 442 U.S. 477.
⁵⁰ Id. at 490.
⁵¹ See supra note 18.
⁵² See supra notes 15-17 and accompanying text.
⁵³ See supra notes 18-28 and accompanying text.
⁵⁴ See supra notes 29-50 and accompanying text.
⁵⁵ 28 U.S.C. § 547(1) (1968) ("[E]ach United States attorney, within his district, shall prosecute for all offenses against the United States.").

Regardless of whether the U.S. attorney or the department makes the final decision to go ahead on a sensitive case, and irrespective of its merits, the individual who brings such a case can expect to become embroiled in controversy. It is exceedingly difficult to dispel effectively charges that partisan political considerations really inspired such prosecutions.

Id. at 32.
gressional vulnerability to such investigations is underscored by both the growth and potency of federal criminal law enforcement and the multifarious roles that are assumed by U.S. attorneys. Far from being limited to ministerial decisions over whether to institute prosecution, U.S. attorneys generally are the central figures in the investigatory phase of executive branch criminal law enforcement. Significantly, the Supreme Court has acknowledged that prosecutorial responsibility encompasses investigative duties. Particularly troublesome for members of Congress is the fact that investigative misconduct will not bar a conviction unless "a demonstrable level of outrageousness" is evinced. In application, this evidentiary burden has proven most difficult to satisfy.

Investigative misconduct by the executive branch is illustrated most graphically by Abscam, the most extensive investigation into legislative corruption in our nation's history

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58 See B. GERSHMAN, PROSECUTORIAL MISCONDUCT, § 1.1 (1988) ("A prosecutor performs many different roles in the criminal justice system. He can be an administrator, an accuser, an adjudicator, a litigator, and a trial advocate.").

59 See J. EISENSTEIN, supra note 56, at 151 ("When you're dealing with the FBI, they understand and you understand what a lot of people don't understand—and that is that the FBI does what the U.S. attorney tells him to do. The FBI can't make arrests without the authority of the U.S. attorney.") (emphasis in original) (quoting unidentified U.S. attorney).

60 Imbler v. Pachtman, 424 U.S. 409, 430-31 (1976) ("We have no occasion to consider whether [absolute immunity is required] for those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer rather than that of advocate."); see also McSurely v. McClellan, 697 F.2d 309, 319 (D.C. Cir. 1982) (court acknowledging that a state prosecutor's role encompasses investigatory responsibilities), cert. denied, 474 U.S. 1005 (1985).

61 Hampton v. United States, 425 U.S. 484, 495 n.7 (1976) (plurality opinion) (Powell, J., concurring) ("This would be especially difficult to show with respect to contraband offenses. One cannot easily exaggerate the problems confronted by law enforcement authorities. Enforcement officials therefore must be allowed flexibility to counter effectively such criminal activity.").

62 See infra notes 63-81 and accompanying text.

63 "[Abscam] is an acronym combining the first two letters of Abdul Enterprises, Ltd., a fictitious Middle Eastern corporation, and the word "scam," a slang expression for a swindle or a confidence game." Gershman, Abscam, the Judiciary, and the Ethics of Entrapment, 91 YALE L.J. 1565, 1565 (1982).

64 See id.
Abscam was an FBI undercover operation where members of Congress were approached by undercover agents posing as intermediaries for wealthy Arab sheiks. The Arabs were interested in meeting the lawmakers and investing large sums of money in their legislative districts. Targeted legislators were asked to wield their influence to help the Arabs obtain federal grants, gambling licenses, residency in the United States, and access to certain real estate transactions. Several members of Congress were videotaped or tape-recorded accepting cash or securities.65

Based upon convictions, Abscam was an unmitigated and resounding success. Six members of Congress, a United States senator, and various public officials were convicted of bribery and corruption.66 Furthermore, every conviction withstood challenge on appeal.67 However, the sting operation was controversial in part because the investigation was not prompted by a specific allegation against any member of Congress.68 This point was not lost upon the Second Circuit in United States v Alexandro,69 although the court concluded that the end justified the means:

En passant, we note that the Abscam affair has generated a heavy assault upon the FBI's investigative procedures. Abscam was indeed an intricate artifice, a stratagem of convoluted ploys and schemes designed to test the faith of those in the high echelons of government who are the repositories of the public trust.70


68 See infra notes 69-79 and accompanying text.

69 675 F.2d 34.

70 Id. at 43.
Defenses of objective\textsuperscript{71} and subjective\textsuperscript{72} entrapment were wholly unsuccessful in the Abscam cases, despite the fact that the investigation’s "test the faith"\textsuperscript{73} premise seems to acknowledge that targeted lawmakers were not predisposed to break the law\textsuperscript{74}.

District Court Judge Fullam in \textit{United States v. Jannotti}\textsuperscript{75} was highly critical of executive branch conduct in Abscam, noting that "in their zeal to make sure that the defendants would accept the tendered payments, the government agents offered such attractive inducements as to preclude any reliance upon the defendant's acceptance of the money as proof of predisposition."\textsuperscript{76} District Court Judge Bryant in \textit{United States v. Kelly}\textsuperscript{77} was unequivocal in expressing his outrage over the Abscam

\textsuperscript{71} Under the minority or objective approach, if the police conduct at issue is abusive or offensive, then the defendant cannot be convicted as a matter of public policy. Whether the defendant was predisposed to break the law is immaterial. See, e.g., \textit{Casey v. United States}, 276 U.S. 413, 423 (1928) (Brandeis, J., dissenting) ("The Government may set decoys to entrap criminals. But it may not provoke or create a crime and then punish the criminal, its creature."); see also \textit{W. LaFave & A. Scott, Criminal Law} 423-25 (1986).

\textsuperscript{72} See \textit{Sorrells v. U.S.}, 287 U.S. 435, 442 (1932) ("[E]ntrapment occurs when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute."); see also B. Gershman, supra note 58, at § 1.2(a) ("Under the majority or subjective approach, a law enforcement official is guilty of impermissible entrapment when he originates the idea of crime and then induces the defendant, who was not otherwise disposed, to commit an offense.").

\textsuperscript{73} See supra note 70.

\textsuperscript{74} \textit{Contra G. Caplan, Abscam Ethics} (1983):
Courts have developed the entrapment defense to protect unsophisticated people who could be lured or pressured into criminality without a clear appreciation of the consequences of their actions. It is farfetched to suggest that members of Congress were so naive or impressionable that they could be tricked or trapped into doing something that they were not predisposed to do. It was the Congress which had determined that this conduct should be deemed criminal in the first place.

\textit{Id.} at 13.

\textsuperscript{75} 501 F Supp. 1182 (E.D. Pa. 1980) (holding that two Abscam defendants are entitled to judgments of acquittal because entrapment was established as a matter of law and governmental overreaching violated due process of law), rev'd, 673 F.2d 578 (3d Cir. 1982), cert. denied, 457 U.S. 1106 (1982).

\textsuperscript{76} \textit{Id.} at 1200. The court added that "[s]tanding alone, the very amounts of the bribes were a substantial temptation to a first offense." \textit{Id.} at 1200 (paraphrasing \textit{Scriber v. U.S.}, 4 F.2d 97, 98 n.4 (6th Cir. 1925)). The two defendants in \textit{Jannotti} received $30,000 and $10,000, respectively. \textit{Id.} at 1184.

affair, characterizing such sting operations as "offensive," and declaring that "[g]overnment agents, hard about the business of corrupting public officials who are free of suspicion, essentially subvert our government." Notwithstanding such vocal criticism of Abscam investigative techniques, the targeted lawmakers were unable to exonerate themselves.

Upon completion of the investigatory process, federal prosecutors seek an indictment before a grand jury, which has been characterized as one of the prosecutor's most powerful tools. The grand jury system plays a critical, albeit controversial, role in the American justice system. Indeed, in federal court, "unless a valid waiver has been entered, no person may be brought to

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78 Id. at 373.
79 Id.
80 See also G. CAPLAN, supra note 74, at 3, 4:
[T]he results of the trials and appeals have not stilled the controversy surrounding the techniques employed in the [Abscam] investigation. While jurors and voters have spoken uniformly and unequivocally, questions continue to be raised by defense counsel, commentators, and at least two district court judges about the fairness and propriety of this operation and, more generally, about the future use of undercover operations to ferret out public corruption and white collar crime.

Id.
81 See supra note 67.
82 See B. GERSHMAN, supra note 58, at § 2.1:
Historically an independent body standing between the citizen and the state, the grand jury today resembles a prosecutorial agency, possessing an awesome range of powers, and emphasizing secret interrogation and accusation as opposed to exoneration. Moreover, the proceedings are closed to all but the prosecutor, the jurors, and the witness. No judge monitors the proceedings, nor is a lawyer present to protect the witness' rights. Indeed, the witness has only limited rights before the grand jury. Plainly, the grand jury presents a natural setting for prosecutorial misconduct.

Id., see also Rejecting Change, Nat'l L.J., Apr. 17, 1989, at 12, col. 1 ("[I]t is well known that, as the chief judge in New York once said, a prosecutor with a grand jury could 'indict a ham sandwich.").

83 Compare United States v. Smith, 104 F Supp. 283, 288 (N.D. Cal. 1952) ("[T]he grand jury] was preserved by the Constitution of the United States not only to protect the defendant but to permit public spirited citizens, chosen by democratic procedures, to attack corrupt conditions. A criticism of the action of the grand jury is a criticism of democracy itself.") with Whyte, Is the Grand Jury Necessary?, 45 VA. L. REV 461, 488 (1959) ("Grand juries are inefficient. Rarely do they fully comprehend their responsibility. Grand jurors are not trained in the law. Therefore, the average grand juror is unable to direct questions to genuine relevancies or to form a definite judgment as to the evidence presented.").
trial on certain criminal charges unless he has been indicted or presented by a grand jury.\(^5\) Furthermore, the prosecutor's authority and discretion in this arena are near absolute, and the potential for abuse is great.\(^6\)

The telephone toll records of one member of Congress were the focus of a federal grand jury subpoena in In Re Grand Jury Investigation, Etc.\(^7\) The imbalance of power between the prosecutor and the accused may be reflected in the court's presumption that the records fell outside the scope of legislative privilege. Nonetheless, a limited privilege was allowed,\(^8\) with "the burden of going forward and of persuasion by a preponderance of the evidence" falling upon the member of Congress.\(^9\) While the case law concerning conduct before the grand jury does not disclose any egregious abuses by prosecutors at the expense of members of Congress, the aphorism put forth by Judge Learned Hand is worth recounting: "Save for torture, it would be hard to find a more effective tool of tyranny than the power of unlimited and unchecked ex parte examination."\(^10\)

After completion of the grand jury proceedings, assuming an indictment was handed down, a decision must be made whether to pursue a conviction.\(^11\) Along with many collateral decisions, the determination of whether to press criminal charges rests with the federal prosecutor.\(^12\) Accompanying this grant of authority


\(^6\) See infra note 90 and accompanying text.

\(^7\) 587 F.2d 589 (3d Cir. 1978) (federal grand jury investigating potential violations of federal criminal law associated with the construction and financing of a Philadelphia hospital; the congressman whose records were subpoenaed was one of the targets of the inquiry).

\(^8\) Id. at 597.

\(^9\) Id.

\(^10\) See also In Re Grand Jury, 821 F.2d 946 (3d Cir. 1987) (court rejects common law speech or debate privilege for state legislators where grand jury subpoena duces tecum is directed to state legislative committee; a more narrowly drawn privilege for confidential deliberative communications is recognized), cert. denied, 108 S. Ct. 749 (1988).


\(^12\) See infra note 92.

\(^13\) See B. Gershman, supra note 58, at § 4.1 ("The prosecutor decides whether or not to bring criminal charges; who to charge; what charges to bring; whether a defendant will stand trial, plead guilty, or enter a correctional program in lieu of criminal charges; and whether to confer immunity from prosecution.").
is broad discretion over its exercise. Accountability for the charging decision is virtually nonexistent, as the prosecutor's discretion in this phase of the law enforcement process is not subject to judicial review.

A legislator's sole recourse when abuse of the charging function is suspected is to assert the defense of selective prosecution. However, such efforts have met with marginal success. United States v Peskin may be indicative of the judiciary's perception of the selective prosecution defense as raised by a politically prominent legislator In affirming the lawmaker's conviction of conspiracy and tax fraud charges, the court remarked:

Assuming that the decision to indict Peskin and press for trial was based in part on consideration of his political prominence, this is not an impermissible basis for selection. It makes good sense to prosecute those who will receive the media's attention. Publication of the proceedings may enhance the deterrent effect of the prosecution and maintain public faith in the precept that public officials are not above the law.

While the court's deferential position is well-reasoned, it also highlights the fact that legislators essentially are defenseless when

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93 Id.
94 See, e.g., Vorenberg, Decent Restraint of Prosecutorial Power, 94 HARV. L. REV. 1521, 1523-24 (1981) ("[Prosecutorial discretion is] the ability to make decisions about guilt and degree of punishment without the limits of rules or other constraints on freedom of action, including judicial review, generally imposed on other public officials making decisions of comparable import.").
95 To support a defense of selective or discriminatory prosecution, a defendant bears the heavy burden of establishing, at least prima facie, (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights. These two essential elements are sometimes referred to as 'intentional and purposeful discrimination.' Mere 'conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation.'

United States v. Ojala, 544 F.2d 940, 943 (8th Cir. 1976) (citations omitted).
96 See, e.g., id. (former state legislator unsuccessfully asserts selective prosecution defense in tax evasion case).
97 527 F.2d 71 (7th Cir. 1975), cert. denied, 429 U.S. 818 (1976).
98 Id. at 74.
99 Id. at 86.
the charging function is exercised in a politically partisan manner

Congressional vulnerability to partisan prosecutorial attack has increased due to twentieth century advancements in communications technology. Undeniably, the advent of television and radio has redefined the import of the prosecutor's "duty to inform the public regarding cases which are pending in his office." The rise of the modern media has been problematic from the perspective of the accused, however "[T]he duty of a prosecutor to recognize the rights of a defendant to a fair and impartial trial" may be breached when inflammatory extrajudicial statements are made before the television cameras. Nowhere is this conflict more poignantly illustrated than in the Abscam investigation, where, long before trial, the public was inundated with media reports. Many of these pretrial reports unequivocally presumed that the defendants were guilty. Moreover, much of the media sensationalism was fueled by leaks from the Abscam investigators.

However, despite characterizing the behavior of government officials who leaked information to the media as "grossly improper and possibly illegal," the lower court in one Abscam case held that "neither application of the Fifth Amendment nor any requirement that we oversee the proper administration of criminal justice in our court through invocation of our 'super-

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100 Foster v. Pearcy, 387 N.E.2d 446, 448 (Ind. 1979) (prosecuting attorney enjoys absolute immunity for statements made to the media regarding pending cases), cert. denied, 445 U.S. 960 (1980).
102 See supra notes 63-81 and accompanying text.
103 See United States v. Meyers, 510 F Supp. 323, 324 (E.D.N.Y. 1980) ("[T]he voluminous appendices to the parties' papers, containing thousands of pages of reprinted newspaper and magazine articles as well as transcripts of radio and television broadcasts attest to the fact that the public was deluged with media reports of the Abscam investigation into these defendants' activities.").
104 Id. at 324-25 ("Many of [the pretrial media reports] were replete with what may charitably be characterized as hostile statements and innuendo, treating the defendants' guilt as a foregone conclusion, iteming the 'evidence' against them, and reporting that 'indictments' were forthcoming.").
105 Id. at 325 ("[W]e must, in light of the government's admission of the fact, accept the contention that many of [the pretrial media reports] contained information supplied by one or more Justice Department officials.").
106 Id.
visory powers' mandates dismissal of the indictments."'\textsuperscript{107} Clearly, the prosecutor's ability to incite the public may be counterbalanced by the accused only by publicly maintaining his or her innocence; the Abscam cases illustrate the likely ineffectiveness of any available judicial remedies.

In summary, the preceding cases reflect the imbalance of power that exists when the executive branch investigates and prosecutes a member of the legislature. The prosecutor's discretionary authority is expansive,'\textsuperscript{108} and the judiciary is highly deferential to prosecutorial decision-making throughout the criminal law enforcement process.'\textsuperscript{109} In sharp contrast is the targeted lawmaker, whose arsenal includes few efficacious defense mechanisms.'\textsuperscript{110} While the same may be said of the ordinary citizen, such reasoning ignores both separation of powers, the linchpin of the Constitution, and the ubiquitous partisan political pressures that accompany investigations of congressional wrongdoing.'\textsuperscript{111}

III. A Solution: The Independent Counsel

The blueprint for congressional vulnerability to prosecutorial abuse is found in the statutory scheme governing the appointment and removal of U.S. attorneys.'\textsuperscript{112} 28 U.S.C. § 541(a) provides that "'[t]he President shall appoint, by and with the advice and consent of the Senate, a United States attorney for each judicial district.'"'\textsuperscript{113} The language of the statute is clearly intended to comport with the Appointments Clause,'\textsuperscript{114} in that

\textsuperscript{107} Id.
\textsuperscript{108} See supra notes 12, 61, 82, 85, 90 and accompanying text.
\textsuperscript{109} Id.
\textsuperscript{110} See supra notes 18-54, 61, 71-74, 95-107 and accompanying text.
\textsuperscript{111} See supra note 56 and accompanying text.
\textsuperscript{112} See infra notes 113-22 and accompanying text.
\textsuperscript{113} 28 U.S.C. § 541(a) (1968).
\textsuperscript{114} [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.
U.S. attorneys are considered to be "principal" officers of the United States. The Congress is assigned a consultative role in the appointment process, which gives legislators a measure of control over the identity of their accuser. However, the advice and consent role of the Congress is arguably of limited utility in light of the great number of U.S. attorneys, the purpose of the Appointments Clause, and the empirical evidence of prosecutorial abuse.

Furthermore, once the appointment is consummated, the power of removal is vested solely in the President, who may exercise it at will. Thus, with respect to the threat of removal, U.S. attorneys may act against members of Congress with impunity. In other words, considering the adversary nature of executive-legislative relations, the President is unlikely to re-

115 Id.
116 See, e.g., The Federalist No. 76 (A. Hamilton):
[The President's] nomination may be overruled: this it certainly may, yet it can only be to make place for another nomination by himself. The person ultimately appointed must be the object of his preference, though perhaps not in the first degree. It is also not very probable that his nomination would often be overruled. The Senate could not be tempted by the preference they might feel to another to reject the one proposed; because they could not assure themselves that the person they might wish would be brought forward by a second or by any subsequent nomination. They could not even be certain that a future nomination would present a candidate in any degree more acceptable to them.

Id. at 457
117 See J. Eisenstein, supra note 56, at 11 ("Congress mandated a U.S. attorney for each judicial district in the Judiciary Act of 1789, and it has never altered the arrangement. The United States and its territories [are divided] into ninety-four districts.")
118 See L. Tribe, supra note 36, at 246 ("The core concern of [the Appointments Clause]—concern tied closely to the Constitution's Madisonian rejection of parliamentary government—is to ensure that federal executive power remain independent of Congress and of the congressional power base.").
119 See supra notes 55-107 and accompanying text.
120 28 U.S.C. § 541(c) (1968) ("Each United States attorney is subject to removal by the President.").
121 See Parsons v. United States, 167 U.S. 324, 343 (1897) ("The intention of Congress [was to] enable [the President] to remove an officer when in his discretion he regards it for the public good, although the term of the office may have been limited by the words of the statute creating the office.").
122 President Nixon's "enemies list," compiled in 1971, included 28 members of Congress. See, e.g., S. Ervin, Jr., The Whole Truth: The Watergate Conspiracy
move an overzealous prosecutor who is conducting an oppressive investigation of a member of Congress.

The solution to executive branch domination and manipulation of federal prosecutors who are investigating members of Congress is twofold. First, a party unconnected to the Justice Department must conduct the investigation. Second, this individual must not labor under the constraints imposed by the current allocation of appointment and removal power. The independent counsel provisions of the Ethics Act provide a helpful starting point when considering solutions to this complex problem. This becomes more apparent when the purposes of the Ethics Act are revisited.

Many of the justifications proffered for the creation of an independent counsel to investigate executive branch misconduct are equally applicable when a member of Congress is under investigation. The Ethics Act independent counsel system was created to remedy the conflict of interest that exists when the Justice Department investigates senior executive branch officials. However, it is equally apparent that lawmakers intended to “remov[e] politics from the administration of justice.” Indeed, the broadly stated purposes of the Ethics Act are “to preserve and promote the accountability and integrity of public officials and of the institutions of the Federal Government and to invigorate the Constitutional separation of powers between the three branches of Government.” The independent counsel’s role in achieving these goals was articulated by the Water-
gate Special Prosecution Force, which declared that "[n]o one who has watched 'Watergate' unfold can doubt that the Justice Department has difficulty investigating and prosecuting high officials, or that an independent prosecutor is freer to act according to politically neutral principles of fairness and justice."128

Clearly, the Ethics Act was passed in response to a perceived misapplication of the federal criminal laws to members of the executive branch. Whereas members of Congress are subjected to a no less improper partisan distortion of the criminal justice system, it is logical to conclude that an independent prosecutor's politically neutral application of the law is equally desirable.129

The legislative history of the Ethics Act also indicates that lawmakers relied upon Humphrey's Executor v United States130 in justifying the creation of an independent counsel.131 In upholding a provision of the Federal Trade Commission Act that restricts the President's ability to remove any commissioner other than for "inefficiency, neglect of duty, or malfeasance in office,"132 the Court in Humphreys stated that

[t]he authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control, cannot well be doubted; and that authority includes, as an appropriate incident, power to forbid their removal except for cause. For it is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will. 133

More recently, in Bowsher v Synar,134 the Court again acknowledged that government officers do not act independently

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128 Id. at 4219 (quoting WATERGATE SPECIAL PROSECUTION FORCE FINAL REPORT at 137-38).
129 But see Lowell, Ed Meese's 'Revenge', Nat'l. L.J., Apr. 3, 1989, at 17 ("The statutory independent counsel law was passed not to prevent generalized politics from entering into prosecutorial decisions but to eliminate one small aspect of politics—the difficulty of the president's lawyer deciding who in the top echelons of the Executive Branch would or would not be investigated.") (emphasis in original).
130 295 U.S. 602 (1935).
131 See supra note 128.
132 Humphrey's, 295 U.S. at 623.
133 Id. at 629.
of the governmental branch to which they are answerable. Provisions of the Gramm-Rudman-Hollings Act that assigned executive duties to the Comptroller General of the United States were held to violate separation of powers principles. Though appointed by the President, the Comptroller General is removable only by impeachment or joint resolution of Congress. Thus, the Court, while distinguishing Humphrey's, declared that

[i]o permit an officer controlled by Congress to execute the laws would be, in essence, to permit a congressional veto. Congress could simply remove, or threaten to remove, an officer for executing the laws in any fashion found to be unsatisfactory to Congress.

In constitutional terms, the removal powers over the Comptroller General's office dictate that he will be subservient to Congress.

Applying the rationale espoused in Synar and Humphrey's to executive branch prosecutions of members of Congress, it is clear that federal prosecutors "cannot be depended upon to maintain an attitude of independence" in contravention of the President's wishes. The resultant likelihood of prosecutorial abuses demonstrates that considerations of equity, fairness, and due process militate strongly in favor of expanded independent counsel jurisdiction.

Moreover, events leading to the historic resignation of House Speaker James Wright earlier this year illustrate that Congress

135 See infra note 139 and accompanying text.
136 Synar, 478 U.S. at 736.
137 Id. at 720.
138 See id. at 724-25 n.4 ("Humphrey's Executor involved an issue not presented in this case—i.e., the power of Congress to limit the President's powers of removal of a Federal Trade Commissioner. This case involves a statute that provides for direct congressional involvement over the decision to remove the Comptroller General.").
139 Id. at 726, 730.
140 Humphrey's, 295 U.S. at 629.
141 Toner, Speaker Wright gives up post to quell House 'anger, hostility', Courier-Journal, Jun. 1, 1989, at A1, col. 1 ("Wright's decision made him the first speaker forced to resign in midterm.").
has endorsed the independent counsel system for investigations of fellow lawmakers. By selecting Chicago lawyer Richard Phelan as special outside counsel to investigate the Speaker, the House Ethics Committee ensured that its findings would enjoy bipartisan support on Capitol Hill. Therefore, the issue presented is how to tailor the structure of the independent counsel to the needs of the Congress.

A. Adoption of the Independent Counsel Regulation

Prior to leaving office, former Attorney General Edwin Meese, III promulgated a federal regulation providing for special independent counsels to investigate and prosecute violations of federal criminal law by members of Congress. Although the Independent Counsel Regulation became effective on August 14, Phelan was selected on July 26, 1988, after the House Ethics Committee opened an official inquiry in response to a formal complaint filed by Rep. Newt Gingrich. Earlier, citizens lobby Common Cause alleged that the publication and sale of Wright's book, "Reflections of a Public Man," were improper. Id. at A1, col. 4.

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143 See id. at A1, col. 1 ("[T]he House Committee on Standards of Official Conduct accused [Wright] of violating House rules 69 times"); see also Jackson & Rogers, Small Clues, Red Flags and Simple Miscalculation By Wright Combined to Topple the House Speaker, Wall St. J., Jun. 5, 1989, at A16, col. 1:

The Ethics Committee's investigations of other lawmakers had given the panel a reputation as a graveyard for political-corruption charges, and at the outset of the Wright investigation even [Rep. James] Myers[,] senior Republican on the committee[,] didn't think the speaker had many worries.

But Mr. Phelan smelled dishonesty from the start, discovering, for instance, that the publisher of a book of the speaker's writings had sold more copies than had been printed. Soon, he had concluded that Mr. Wright was a petty cheat on a grand scale. And for nearly a year he worked relentlessly to prod the reluctant ethics panel toward the same judgment.

Inexorably, the Chicago lawyer and his staff turned up a mountain of embarrassing facts, from suspicious oil-well profits to a free Cadillac for Mr. Wright's wife, that simply crushed the speaker under its sheer weight.

Id.

144 53 Fed. Reg. 31,322 (1988) (to be codified at 28 C.F.R. § 0.14) [hereinafter Independent Counsel Regulation]. Meese promulgated the regulation under 5 U.S.C. § 301 (1968), by which the United States Attorney General is empowered to "prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property." See also 28 U.S.C. § 515(a) (1968) (authorizing the Attorney General to specially appoint attorneys for purpose of conducting a broad range of legal proceedings).
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11, 1988, new Attorney General Richard Thornburgh recently suspended its operation pending congressional review of President George Bush’s proposed legislation to extend the independent counsel procedure to members of Congress.

Under the mechanics of the Independent Counsel Regulation, only the Attorney General may decide whether to appoint an independent counsel. If the Attorney General receives any information indicating that a member of Congress has violated federal criminal law, then the Attorney General may commence a preliminary investigation. If, after conducting the preliminary investigation, the Attorney General concludes that “there are reasonable grounds to believe that further investigation is warranted,” then the matter is referred to an independent counsel.

The Attorney General is also the sole repository of the appointment and removal powers. The Attorney General appoints and defines the jurisdiction of the independent counsel, who is vested with broad powers. Once appointed, the independent counsel may be removed only for “extraordinary improprieties.”

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146 See infra notes 159, 164, 166, 168 and accompanying text.
147 53 Fed. Reg. 31,323 (to be codified at §0.14(b, c)) (“The Attorney General shall appoint a special independent counsel to investigate any Member of Congress where under paragraph [b] of this section that appointment is required.”).
148 Whenever the Attorney General receives information from any source indicating that either a United States Senator or Member of the House of Representatives has violated any Federal criminal law other than a violation classified as a Class B or C misdemeanor, he shall determine within 15 days whether there are sufficient grounds to initiate a preliminary investigation.
149 Id. (to be codified at §0.14(a)).
150 Id. (to be codified at §0.14(b)).
151 Id. (to be codified at §0.14(c)) (“The Attorney General shall appoint a special independent counsel to investigate any Member of Congress.”).
152 Id. (“The Attorney General shall define the special independent counsel’s jurisdiction and may expand it whenever he deems necessary.”).
153 Id. (to be codified at §0.14(d)) (“Any special independent counsel appointed under this section shall exercise, within the scope of his jurisdiction, the full power and independent authority to exercise all investigative and prosecutorial functions of the Attorney General.”).
154 Id. at 31,324 (to be codified at §0.14(g)) (“The special independent counsel will not be removed from office except for extraordinary improprieties.”).
On its face, the Independent Counsel Regulation offers to members of Congress much greater protection from prosecutorial abuse. By circumscribing executive branch removal power, the regulation appears to remedy the Humphreys' dependency problem. In other words, freed from the executive branch manipulation and control that accompany unchecked removal power, the independent counsel should feel less compelled to pursue the President's political agenda.

However, such a conclusion ignores the magnitude of the power of appointment, which is retained by the Attorney General. The effect of this retention is that the President's limited ability via the threat of removal to control the independent counsel may be circumvented through careful exercise of the appointment power. To illustrate, should the Attorney General select a prosecutor who is loyal to the President and who has a political and ideological axe to grind, the removal issue is largely rendered moot.

Certain notable omissions also illustrate that the Independent Counsel Regulation is flawed. For example, even if the Attorney General appoints an independent counsel, nothing prohibits the Justice Department from commencing or continuing its own investigation. In addition, legislators who are exonerated by use of the independent counsel process are not entitled to reimbursement for their legal expenses. Clearly, the Independent Counsel Regulation offers an incomplete solution to the problem confronting the legislature.

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154 Id.
155 See supra notes 130-40 and accompanying text.
156 See supra note 150 and accompanying text.
157 Furthermore, in cases where "allegations involving criminality against a Member of Congress arise out of a criminal investigation being conducted by the Attorney General, the Attorney General may allow that ongoing investigation to continue and include said Member of Congress instead of invoking the procedures set forth in [the Independent Counsel Regulation]." 53 Fed. Reg. 31,324 (to be codified at § 0.14(j)).
158 Many commentators have characterized the Independent Counsel Regulation as little more than a parting shot at Congress by former Attorney General Edwin Meese, who was frequently criticized by members of Congress and the media. Meese was also the subject of two independent prosecutor investigations. See, e.g., Barrett & Abramson, As Attorney General, Thornburgh Pushes Meese-Like Agenda, Wall St. J., Mar. 29, 1989, at A1, col. 1; see also Lowell, supra note 129, at 137 ("[The Independent Counsel Regulation] should be recognized for what it is—a last-minute, in-the-darkness-of-night attempt to even the political score.").
B. Expansion of the Ethics Act

Application of the Ethics Act independent counsel provisions in toto, as President Bush proposed recently along with certain amendments, may be a viable alternative solution. While, ob-

159 On January 25, 1989, President George Bush established the President's Commission on Federal Ethics Law Reform, which was charged with reviewing the ethical standards to which public servants are held. See Exec. Order No. 12,668, 54 Fed. Reg. 3,979 (1989). The Commission presented its report to the President on March 9, 1989. See Report of the President's Commission on Federal Ethics Law Reform (1989). In addition to making various recommendations regarding post-employment restrictions, financial disclosure, and the general structure of federal ethics regulation, the Commission also recommended that the independent counsel be extended to the Congress. Id. at 111.

In contrast to the analysis presented in this Comment, the rationale given for the Commission's recommendation was the possibility that members of Congress were breaking the law and going unpunished. For example, one reason given was that "[e]xecutive branch investigations of [members of Congress] are inherently awkward, and there is at least the prospect that intensive investigations may be discouraged by the risk of offending the target of the investigation." Id. at 112. A second reason given was that extension of the independent counsel to the Congress "could heighten the motivation of Congress to police itself diligently and could strengthen public confidence in the integrity of the legislative branch." Id.

On April 12, 1989, President Bush, seeking to incorporate many of the Commission's recommendations, submitted to Congress for review the Government-Wide Ethics Act of 1989 [hereinafter "Government-Wide Act"]. See Lauter & Ostrow, Bush Proposal Would Curb Special Prosecutor Powers, L.A. Times, Apr. 13, 1989, § 1, at 1, col. 5. Section 402 of the Government-Wide Act amends 28 U.S.C. § 591(b) by adding a section that extends the independent counsel system to "any Member of Congress, Delegate to Congress or Resident Commissioner to Congress." The Government-Wide Act also proposes changes in the current procedures related to appointment, removal, and defining the independent counsel's prosecutorial jurisdiction. The effect of these changes is to fortify the executive's control over the independent counsel, which would eliminate many of the benefits that expanded independent counsel jurisdiction offers to members of Congress. See infra notes 164, 166, 168.

However, one change that would help protect both members of Congress and executive branch personnel is found in § 405(f) of the Government-Wide Act. According to this proposal, 28 U.S.C. § 594(h)(1)(B) will be amended such that, before his or her office is terminated, the independent counsel must file with the court "a statement indicating the cases brought by the independent counsel and the disposition of these cases." Government-Wide Act at § 405(f). This would replace the requirement that the independent counsel file a report "setting forth fully and completely a description of the work of the independent counsel, including the disposition of all cases brought, and the reasons for not prosecuting any matter within the prosecutorial jurisdiction of such independent counsel." 28 U.S.C. § 594(h)(1)(B). Because the court may release this report to the public, the unindicted target of an independent counsel investigation is treated more equitably under President Bush's proposal. That is, by not requiring a detailed analysis of the independent counsel's reasons for not prosecuting certain matters, the proposed amendment is more protective of the target's reputation.
viously, this result can be achieved by passing legislation, at least one commentator argues that the Ethics Act already provides for independent counsels to investigate members of Congress.\footnote{160}

Several provisions of the Ethics Act and the Independent Counsel Regulation are largely identical. Among these provisions are the Attorney General’s responsibility for both preliminary investigations\footnote{161} and deciding whether the appointment of an independent counsel is warranted.\footnote{162} Likewise, the independent counsel is vested with broad prosecutorial powers,\footnote{163} and limited power of removal may be exercised by the Attorney General.\footnote{164}

\footnote{160} Under the existing statute, if an attorney general truly believes there is a case involving a member of Congress in which there are real political perception issues, he or she can invoke the statutory independent counsel and ask the neutral, three-member court to appoint a counsel who will then operate in the system already established. The statute expressly provides that the attorney general can invoke the preliminary investigation procedures, leading up to the appointment of an independent counsel when he or she “determines that an investigation or prosecution [by] the Department of Justice may result in a personal, financial, or political conflict of interest.” Lowell, supra note 129, at 37 (emphasis in original) (quoting 28 U.S.C. § 591(c)(2)). While this interpretation of the statute may be correct, it is also true that the quoted provision does not require the Attorney General to use the statutory procedure. Rather, the Attorney General “may” conduct such a preliminary investigation with respect to persons outside the executive branch. See 28 U.S.C. § 591(c). Therefore, this provision is unlikely to remedy the problem of prosecutorial abuse directed at the legislature.

\footnote{161} See 28 U.S.C. § 592(a); 53 Fed. Reg. 31,323 (to be codified at 28 C.F.R. § 0.14 (a, b)).

\footnote{162} See 28 U.S.C. § 592(b)(1); 53 Fed. Reg. 31,323 (to be codified at 28 C.F.R. § 0.14(c)).

\footnote{163} See 28 U.S.C. § 594(a) (“[A]n independent counsel shall have full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice.”); 53 Fed. Reg. 31,323 (to be codified at 28 C.F.R. § 0.14(d)).

\footnote{164} The removal language used in the Independent Counsel Regulation and the Ethics Act is not identical, although the import appears the same. Grounds for removal under the Ethics Act are “good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel’s duties.” 28 U.S.C. at § 596(a)(1). Under the Independent Counsel Regulation, removal is warranted for “extraordinary improprieties.” 53 Fed. Reg. 31,324 (to be codified at 28 C.F.R. § 0.14(g)).

The Government-Wide Act seeks to strengthen the Attorney General’s role in terminating the independent counsel. That is, when the independent counsel’s investigation is sufficiently complete to allow the Justice Department to take over and perform any phase of the investigation or prosecution that remains, the Ethics Act provides that
However, despite these similarities, the Ethics Act and the Independent Counsel Regulation are fundamentally different.

Under the Ethics Act, if the Attorney General determines that independent counsel appointment is necessary, application is made to a special division of the United States Court of Appeals for the District of Columbia Circuit. Upon receipt of the application, the special division is charged with the appointment of the independent counsel. Sole responsibility for appointment is vested thereby in the judiciary, a theoretically neutral party, rather than the executive branch, as in the Independent Counsel Regulation. In addition, again the judiciary, rather than the executive branch, defines the jurisdiction of the independent counsel. In summary, under the Ethics Act, the executive branch must relinquish actual control over the independent counsel.

Further, unlike the Independent Counsel Regulation, "whenever a matter is in the prosecutorial jurisdiction of an independent counsel or has been accepted by an independent counsel" under the Ethics Act, "the Department of Justice, the Attorney General, and all other officers and employees of

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"[t]he division of the court, either on its own motion or upon the request of the Attorney General, may terminate" the independent counsel. See 28 U.S.C. § 596(b)(2) (emphasis added). The Government-Wide Act provides, under identical circumstances, that the court, "upon the request of the Attorney General, shall" terminate the independent counsel. See Government-Wide Act at § 407(a) (emphasis added).

165 See 28 U.S.C. § 593(b)(1) ("Upon receipt of an application under § 592(c), the division of the court shall appoint an appropriate independent counsel.

166 Id. The Ethics Act does not limit in any way the court's ability to select an individual to hold the office of independent counsel. Conversely, the Government-Wide Act, in amending 28 U.S.C. §§ 593(b)(1), (e), mandates that the appointee be chosen "from a list submitted by the Attorney General of 15 persons chosen from among past and present United States Attorneys and experienced career prosecutors." See Government-Wide Act at §§ 404(a), (j).

167 See supra note 150.

168 See 28 U.S.C. at § 593(b)(1) ("[T]he division of the court shall define [the] independent counsel's prosecutorial jurisdiction."). The Government-Wide Act deletes so much of the latter provision as is necessary to eliminate the court's power to define the prosecutorial jurisdiction of the independent counsel. See Government-Wide Act at § 404(a). Instead, by amending 28 U.S.C. §§ 592(d), 593(b)(1), (b)(3), (c)(1), (e)(2)(B), (c)(2)(C), the Government-Wide Act gives this authority to the Attorney General. See Government-Wide Act at §§ 403(f), 404(a), (c), (d), (g)-(i).

169 See supra note 157 and accompanying text.

the Department of Justice shall suspend all investigations and proceedings regarding such matter. 171 Thus, the Ethics Act avoids the possibility of simultaneous investigations by the independent counsel and the Justice Department. Moreover, legislators who remain unindicted following an independent counsel’s investigation would be entitled to petition the court for reimbursement of reasonable attorneys’ fees. 172 This provision is also not included in the Independent Counsel Regulation. 173

Obviously, the President’s inability under the Ethics Act to control the independent counsel, an officer of the executive branch, raises questions concerning the separation of powers. For years after its passage, the Ethics Act was the focus of protracted debate among legal scholars over whether the independent counsel provisions would pass constitutional muster. 174 The Supreme Court recently resolved this issue in Morrison v Olson, 175 upholding the Ethics Act over the vehement dissent of Justice Scalia. 176

The Court held that because independent counsels are inferior officers under the Appointments Clause, the Congress constitutionally may vest the appointment power in the judiciary 177 The Court likewise was undisturbed by the President’s limited removal power, declaring that “we simply do not see how the

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171 Id.
172 Id. at § 593(f)(1). The court has sole discretion over whether the request will be granted. Id.
173 See supra note 144.
176 Id. at 2640 (Scalia, J., dissenting) (“By its short-sighted action today, I fear the Court has permanently encumbered the Republic with an institution that will do it great harm.”).
177 See id. at 2608-09. The Court stressed several factors in concluding that independent counsels are inferior officers: 1. The Attorney General may remove the independent counsel; 2. Independent counsels have limited duties; 3. Independent counsels have limited jurisdictions; and 4. The independent counsel’s office is limited in tenure.
President's need to control the exercise of [the independent counsel's prosecutorial] discretion is so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President.\footnote{Id. at 2619.} Clearly, because identical separation of powers issues are raised when the Ethics Act independent counsel investigates the Congress, \textit{Morrison} demonstrates that there are no constitutional impediments to expanded independent counsel jurisdiction.

In summary, expanding the jurisdiction of the Ethics Act independent counsel to include members of Congress is manifestly superior to adopting the Independent Counsel Regulation. While the regulation has the appearance of ensuring prosecutorial independence, such a result is foreclosed by the Attorney General's retention of the appointment power.\footnote{See supra note 150.} Conversely, by vesting the power of appointment in the judiciary,\footnote{See supra notes 165-66.} and restricting the executive's removal power,\footnote{See supra note 164.} the Ethics Act provides perhaps the greatest degree of prosecutorial independence that is constitutionally permissible. In response, one may rightfully point out that the Ethics Act does not prevent a politically-motivated panel of jurists from selecting a like-minded prosecutor.\footnote{Justice Scalia raised this issue in \textit{Morrison}, though in the context of the judiciary appointing a prosecutor who is hostile to the executive branch: An independent counsel is selected, and the scope of her authority prescribed, by a panel of judges. What if they are politically partisan, as judges have been known to be, and select a prosecutor antagonistic to the administration, or even to the particular individual who has been selected for this special treatment? There is no remedy for that, not even a political one. Judges, after all, have life tenure, and appointing a sure-fire enthusiastic prosecutor could hardly be considered an impeachable offense. So if there is anything wrong with the selection, there is effectively no one to blame. \textit{Morrison}, 108 S. Ct. at 2639 (Scalia, J., dissenting).} However, while this is certainly true, "the weakest of the three departments of power"\footnote{The Federalist No. 78, at 465-66 (A. Hamilton).} clearly is less prone than the executive branch to be driven by the desire to disadvantage the legislature.
CONCLUSION

Strict construction of the constitutional guarantee of legislative privilege has led to an imbalance in power between the executive and the legislative branches. This relative inequality has been exacerbated by traditional judicial deference to the discretion of the prosecutor. While the result has not brought about a constitutional crisis, separation of powers principles are distorted nonetheless, and members of Congress must face the risk of partisanship in the application of the federal criminal laws. The issue presented was identified over two hundred years ago by James Madison:

It will not be denied that power is of an encroaching nature and that it ought to be effectually restrained from passing the limits assigned to it. After discriminating, therefore, in theory, the several classes of power, as they may in their nature be legislative, executive, or judiciary, the next and most difficult task is to provide some practical security for each, against the invasion of the others. What this security ought to be is the great problem to be solved.

The Ethics Act and the Independent Counsel Regulation represent alternative solutions to prosecutorial encroachment upon the legislature. Despite its appearance of fostering prosecutorial independence, the Independent Counsel Regulation may be no more than a placebo. In sharp contrast, the Ethics Act would restrict substantially and effectively the President’s control over prosecutorial activity directed at members of Congress. More important, only the latter provides “practical security” for the legislature.

Brian A. Cromer**

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184 See supra notes 11-50 and accompanying text.
185 See supra notes 55-107 and accompanying text.
186 THE FEDERALIST No. 48, at 308 (J. Madison).
187 Id.

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