The American Prosecutor: Independence, Power, and the Threat of Tyranny

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The American Prosecutor: Independence, Power, and the Threat of Tyranny

Angela J. Davis

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The people see the independent counsel as a special case of abuse, but in fact they are observing how federal prosecution routinely operates.... If the public is offended by the behavior of independent counsels, the remedy is not to kill the independent counsel law, but to demand higher standards of fairness from federal prosecutors generally.¹

INTRODUCTION

Kenneth Starr's investigation of President William Jefferson Clinton evoked widespread, severe, and ultimately fatal criticism of the position of the Independent Counsel, a role that was created by the Ethics in Government Act in 1978² and abolished in 1999.³ Legal scholars, ⁴ columnists,⁵ and members of Congress⁶ accused Starr of being unaccountable, politically motivated, and unscrupulous, and denounced the position of Independent Counsel as a failure.⁷ After several hearings that

³. Id. § 599 (providing for expiration of the Independent Counsel Reauthorization Act of 1994 five years after its enactment).
⁷. Kenneth Starr was not the first Independent Counsel to be criticized. Since the Ethics in Government Act was enacted in 1978, twenty independent counsels have been appointed to investigate allegations ranging from drug use to financial improprieties and abuse of power. Many of the investigations have been criticized for their cost, length, and scope. These investigations by independent counsels include: (1) David Barrett's investigation of former Housing and Urban Development (HUD) Secretary Henry Cisneros, (2) Donald Smaltz's investigation of former Secretary of Agriculture Mike Espy, (3) Daniel Pearson's investigation of the late Secretary of Commerce Ron Brown, (4) Ralph Lancaster's investigation of Labor Secretary Alexis Herman, and (5) Lawrence Walsh's investigation of the Iran-Contra Affair. See Jack Maskell, The Independent Counsel Law, 45 JULY FED. L. W. 28, 31 (1998) (providing a list of "Independent Counsel Investigations since 'Iran-Contra'"); see also Joseph S. Hall et al.,
included testimony from academics, practicing attorneys, former independent counsels, and Starr himself, Congress allowed the statute to expire on its scheduled sunset date of June 30, 1999.9

The idea of a distinctive prosecutor wholly independent of the President and other high level executive officers inspired the Independent Counsel statute. Sponsors intended for the Independent Counsel to hold the highest executive branch officials in the land accountable to the rule of law.10 As various independent counsels were appointed over the years, the flaws in the law became apparent. If the Independent Counsel did not answer to the Attorney General or to the President, then to whom was he accountable? With an unlimited budget, no time limitations, and virtually unrestrained power and discretion, would the Independent Counsel become an uncontrollable tyrant? Such criticisms surfaced during several Independent Counsel investigations, including the six and one-half year Iran-Contra investigation by Lawrence Walsh,11 and became widespread during Starr's tenure.

Criticisms of Starr fell into two categories: (1) attacks on the broad powers granted by the Independent Counsel statute, and (2) objections to specific acts of alleged misconduct by Starr. The first category consisted of critiques of the Independent Counsel's lack of accountability, unlimited

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budget, and abuse of discretion. The second category focused on practices, policies, and specific acts undertaken by Starr and his team of prosecutors that many members of the public found shocking, distasteful, or unfair. Such practices included, most famously, the sequestering and interrogation of the President's paramour, Monica Lewinsky, the compelled appearance of Ms. Lewinsky's mother before a federal grand jury, and the arguably vindictive prosecution of a number of individuals who failed to cooperate with Starr's investigation.

What is perhaps most striking about the criticisms in both categories is how fully they apply to the practices and policies of the thousands of federal, state, and local prosecutors who enforce the criminal laws against ordinary individuals. Though less visibly, prosecutors daily exercise practically unlimited discretion and engage in similar, controversial investigative practices. They are directly accountable only to other supervising prosecutors who typically share the same interests and goals. In most cases, the mechanisms that purport to give the general public the ability to hold prosecutors accountable are ineffective and meaningless. Most citizens know very little about the practices and policies of their local prosecutor. Even if the prosecutor is chosen through the electoral process, the election rarely focuses on these issues. The same holds true for federal prosecutors. The appointment process for federal prosecutors allows very little meaningful input by the average citizen, and the public does not learn about the practices and policies federal prosecutors plan to implement after appointment.

Recent scholarship misses the parallels between the Independent Counsel and regular prosecutors. With the exception of Professor Paul Butler, most legal scholars who have criticized the Independent Counsel


13. See infra notes 65-68 and accompanying text (citing cases where prosecutors used questionable techniques).

14. See infra note 258 (discussing the lack of accountability of elected prosecutors).

15. See infra note 252 and accompanying text (discussing the selection process for federal prosecutors).

16. See generally Paul Butler, Starr Is to Clinton as Regular Prosecutors Are to Blacks, 40 B.C. L. REV. 705 (1999) (arguing that Kenneth Starr's investigation of President Clinton is analogous to federal and state prosecutors' treatment of African-American citizens with regard to three issues: selective prosecution, abuse of discretion, and zeal for punishment).
statute and Starr's practices argue that the statute created a prosecutor that functions very differently from ordinary prosecutors. These scholars argue that the current model of the prosecutorial function and most prosecutors operate fairly and reasonably within the executive branch, presumably with effective mechanisms of accountability.\(^{17}\) By juxtaposing the Independent Counsel against ordinary prosecutors, they attempt to show a very different kind of prosecutor with unlimited resources, jurisdiction, discretion, and power.\(^{18}\) These purported distinctions are, at best, insignificant and, at worst, erroneous.\(^{19}\)

Others have asserted that the separation of powers' check differentiates the average prosecutor from the Independent Counsel. In his biting


\(^{18}\) See James P. Fleissner, The Future of the Independent Counsel Statute: Confronting the Dilemma of Allocating the Power of Prosecutorial Discretion, 49 MERCER L. REV. 427, 436 (1998) (noting that critics claim the Independent Counsel is more prone to the temptation to take steps that regular prosecutors would not take because of time, resource, and workload constraints); Joseph S. Hall et al., Independent Counsel Investigations, 36 AM. CRIM. L. REV. 809, 829-33 (1999) (providing proposals to cure several criticisms of Independent Counsel investigations, including one proposal that would make the Office of Independent Counsel permanent, in order to make it function more like a regular prosecutor's office, giving the investigations more perspective, increased accountability, and lower costs); Phillip B. Heymann, Four Unresolved Questions About the Responsibilities of an Independent Counsel, 86 GEO. L.J. 2119, 2120-21 (1998) (comparing the issues and constraints applied to typical prosecutors with the heightened discretion and autonomy enjoyed by the Independent Counsel); Julie O'Sullivan, The Independent Counsel Statute: Bad Law, Bad Policy, 33 AM. CRIM. L. REV. 463, 475 (1996) ("In most cases, DOJ prosecutors, who have a necessarily broader focus and are privy to a store of institutional knowledge and experience, are better positioned to exercise their discretion in a professional and equitable manner, and are accountable if they do not."); Sargentich, supra note 10, at 688-89 (discussing two possibilities for the Independent Counsel statute, including one that would let the statute lapse and return the responsibilities to the Justice Department, where professionalism, the rule of law, and political oversight would provide checks and balances that are lacking under the current statute); cf. LAWRENCE E. WALSH, FIREWALL: THE IRAN-CONTRA CONSPIRACY AND COVER UP 526 (1997) (arguing that there are a number of restraints against abuses of discretion by independent counsels); Samuel Dash, Independent Counsel: No More, No Less a Federal Prosecutor, 86 GEO. L.J. 2077, 2082 (1998) (criticizing the belief that the independent counsels are not accountable and noting that the statute places a heavy scheme of accountability on the Independent Counsel).

\(^{19}\) See infra text accompanying notes 65-132 (suggesting that the conduct of prosecutors is similar to Starr's conduct during the investigation of President Clinton).
criticism of the Independent Counsel, Justice Scalia, for example, described the position as a fourth branch of government, totally self-governing and accountable to no one. Interestingly, but without analysis, his criticism assumes the effectiveness of the current constitutional design in controlling the power of regular prosecutors—three branches of government, the separation of powers, and a system of checks and balances.

The current constitutional design is dysfunctional as a check on prosecutorial power. The mechanisms of control within the Executive Branch and the system of checks and balances for all three branches have failed to operate as James Madison suggested they should—to protect the people from the abuse of power by any one branch, not to protect the branches from each other. Even nascent efforts to control the activities of federal prosecutors miss the mark. For example, Congress recently passed the Citizens Protection Act of 1998, a law that purports to provide an additional measure of accountability for federal prosecutors. This law requires federal prosecutors to adhere to the ethical rules and standards of the states in which they practice. Although the law has not been in existence long enough to measure its effectiveness, its limitations suggest that it will not control prosecutorial power adequately.

A critique of Starr's tenure as the Independent Counsel presents an opportunity for major reform of a flawed prosecutorial system steeped in history and legal precedent, but not logic or reason. A comparison of Starr and regular prosecutors reveals the immense power of the American prosecutor. If Starr exemplifies most prosecutors, then we are all potential targets. Just as Starr wielded unrestrained power over the most powerful man in the world, ordinary prosecutors wield unrestrained power over ordinary individuals every day.

This Article compares the power, practices, and policies of the Independent Counsel with those of ordinary state and federal prosecutors and suggests that the endlessly claimed distinctions turn out to be illusory. Part I charts the principal structural characteristics of both the Independent Counsel and regular prosecutors, with particular focus on prosecutorial discretion and the charging power. Using illustrations from my former experience as a public defender, this Part explains how regular prosecutors engage in the same acts of misconduct as the Independent Counsel and argues that the case law fails to provide remedies to victims of prosecutorial misconduct. Part II sets forth the tension between independence and accountability for the Independent Counsel and regular prosecutors and

21. See generally THE FEDERALIST No. 51 (James Madison) (explaining separation of powers principles).
discusses the inadequacy of current mechanisms of accountability. Part III explains the historical foundation of the American prosecutor and argues that there is no historical or constitutional justification for the current prosecutorial model. Part IV critiques the Citizens Protection Act of 1998, a law that purports to provide additional measures of accountability for federal prosecutors. Because neither the Citizens Protection Act nor the current constitutional design provides an effective control on prosecutorial power, Part IV suggests two reforms that would hold prosecutors accountable to their constituents by providing more public access to prosecutorial policies and practices. Under the first proposal, Public Information Departments in prosecution offices would educate the public about the role, duties, and responsibilities of prosecutors, thus empowering constituents to hold prosecutors accountable. The second proposal calls for the creation of Prosecution Review Boards. These boards would provide unannounced, random reviews in prosecution offices (even in the absence of a complaint) to detect and deter misconduct and arbitrary decision-making.

I. DISCRETION, POWER, AND ABUSE

The Ethics in Government Act of 1978 provided the Independent Counsel with vast power and discretion. An examination of the Act and a comparison of how Kenneth Starr chose to implement it with the behavior of regular prosecutors demonstrates that the power and discretion of the Independent Counsel was virtually indistinguishable from that of ordinary federal and state prosecutors.

A. THE INDEPENDENT COUNSEL: IMPETUS AND RESPONSE

Congress created the position of Independent Counsel as a direct result of the so-called "Midnight Massacre" of October 20, 1973, during which Acting Attorney General Robert Bork fired Watergate Special Prosecutor Archibald Cox on direct orders from President Richard Nixon. Cox had disobeyed Nixon's order to discontinue his efforts to obtain the now infamous White House tapes containing evidence of criminal wrongdoing by Nixon and others. When Senate hearings revealed Nixon's actions to the public, the outrage was so strong and intense that Nixon appointed another special prosecutor, Leon Jaworski, to succeed Cox. After President Nixon resigned, Samuel Dash, then Chief Counsel of the Senate Watergate Committee, advised the committee to create an independent prosecutor position to investigate allegations of criminal wrongdoing by the President, Vice President, and other senior executive branch officials.23

23. See Dash, supra note 1; Ken Gormley, An Original Model of the Independent Counsel Statute, 97 MICH. L. REV. 601, 602-05 (1998) (discussing the historical events leading to the creation of the modern day Independent Counsel).
1. The Ethics in Government Act of 1978

Congress followed Dash's advice when it passed the Ethics in Government Act of 1978. This law created the position of Independent Counsel and authorized the Attorney General to conduct a preliminary investigation to determine whether any person covered by the statute had violated any federal criminal law other than a Class B or C misdemeanor or an infraction. If she had "reasonable grounds to believe that further investigation [was] warranted," she could petition the court for the appointment of an Independent Counsel.

The statute gave the Independent Counsel the same authority, duties, and responsibilities as regular federal prosecutors. She received:

- 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, except that the Attorney General shall exercise direction or control as to those matters that specifically require the Attorney General's personal action under section 2515 of title 18.

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26. Id. § 592(c)(1)(A). Persons covered by the statute include the President and Vice President, any individual working in the Executive Office of the President who is above a certain level of pay, any Assistant Attorney General and any individual working in the Justice Department over a certain level of pay, the Director and Deputy Director of the Central Intelligence Agency, the Commissioner of the Internal Revenue Service, and various other federal employees. Id. § 591(b).
27. Id. § 594(a). The Independent Counsel's authority included:

1. conducting proceedings before grand juries and other investigations;
2. participating in court proceedings and engaging in any litigation, including civil and criminal matters, that the Independent Counsel considers necessary;
3. appealing any decision of a court in any case or proceeding in which the independent counsel participates in an official capacity;
4. reviewing all documentary evidence available from any source;
5. determining whether to contest the assertion of any testimonial privilege;
6. receiving appropriate national security clearances and, if necessary, contesting in court any claim of privilege or attempt to withhold evidence on grounds of national security;
7. making applications to any Federal court for a grant of immunity to any witness or for warrants, subpoenas, or other court orders, and, for purposes of sections 6003, 6004, and 6005 of title 18, exercising the authority vested in a United States attorney or the Attorney General;
8. inspecting, obtaining, or using the original or a copy of any tax return;
9. initiating and conducting prosecutions in any court of competent jurisdiction, framing and signing indictments, filing informations, and handling all aspects of
The Independent Counsel could hire as many lawyers, investigators, and consultants as she deemed necessary and could fix their compensation. She also had the authority to ask the Attorney General to broaden the scope of her investigation to any matters "related to" her prosecutorial jurisdiction. After granting the Independent Counsel this vast power and broad jurisdiction, the statute then declared that she was "separate from and independent of the Department of Justice for purposes of sections 202 through 209 of title 18." Section 594(f) established an ostensible restraint on the Independent Counsel's discretion and power by providing that she "shall, except where not possible, comply with the written or other established policies of the Department of Justice respecting enforcement of the criminal laws." This section, however, provided no meaningful control of the Independent Counsel's authority because the exception devoured the rule, and the rule itself had no teeth. Section 594(f) permitted the Independent Counsel to ignore established Justice Department policies when she determined that it was not possible to follow them. Even if the statute had required the Independent Counsel to follow these policies, her discretion and power would still be without meaningful restraint because the policies themselves

any case, in the name of the United States; and

(10) consulting with the United States attorney for the district in which the violation . . . was alleged to have occurred.

Id.

28. Id. § 594(c).

29. Id. § 594(i); see also 18 U.S.C. §§ 202-209 (1994) (defining Independent Counsel as a "special Government employee" and discussing various procedures affecting such employees). Sections 202-209 include definitions; compensation to members of Congress, officers, and others in matters affecting the government; practices in the U.S. Claims Court or the U.S. Court of Appeals for the Federal Circuit by members of Congress; activities of officers and employees in claims against the government; the exemption of retired officers of the civil armed services; restrictions on former officers, employees, and elected officials of the executive and legislative branches; acts affecting personal financial interests; and the salary of government officials that are payable by the United States only. Id.


31. See United States v. Poindexter, 725 F. Supp. 13, 38 (D.D.C. 1989) (stating that dismissal for failure to follow policies of Department of Justice was not warranted as "[t]he very nature of independent counsel's responsibilities suggest that it may not always be possible for [the Independent Counsel] to follow those policies ... . Moreover, much of defendant's argument rests on alleged departures from guidelines set forth in the U.S. Attorney's Manual—a document that, by its own language, creates no rights in any party." U.S. ATTORNEY'S MANUAL § 1-1.00 (1984)); see also United States v. Blackley, 986 F. Supp. 607, 614 (D.D.C. 1997) (upholding Independent Counsel prosecution even if it might be contrary to the general prosecution policies of the Department of Justice); In re Grand Jury Subpoena Am. Broad. Co., 947 F. Supp. 1314, 1322 n.9 (E.D. Ark. 1996) (citing S. REP. NO. 101-103, at 32 (1993), and explaining that the legislative history supports the contention that "the Committee does not intend that independent counsels comply with Department policies which would undermine their independence or hinder their mission").
are merely advisory, providing general guidelines and allowing the broad exercise of discretion in the performance of prosecutorial duties and responsibilities.\(^{32}\)

Section 596 of the Act offered the only other purported restraint on the Independent Counsel's power. It provided that the Independent Counsel might be removed by "impeachment and conviction," or by the Attorney General "for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such Independent Counsel's duties."\(^{33}\) If the Attorney General sought to remove the Independent Counsel, this section required that she submit a report to the Special Division of the Court and the Judiciary Committees of the House and Senate specifying the alleged facts and grounds for removal.\(^{34}\) No Attorney General has ever exercised this power.

As attorneys general appointed independent counsels in the years following passage of the Act, criticisms emerged. Two words sum up the most frequently voiced condemnation of the Independent Counsel: unchecked power. Such vast, unlimited power was subject to abuse in the hands of a vindictive or unethical prosecutor. Critics of the Independent Counsel's immense power hastily pointed out what they perceived to be vast differences between the checks and balances that control regular prosecutors, on one hand, and the lack of accountability of independent counsels, on the other.\(^{35}\)

2. *Morrison v. Olsen*—Upholding the 1978 Act

The Ethics in Government Act withstood constitutional challenge ten years after its enactment. The House Judiciary Committee accused Theodore Olsen, the Assistant Attorney General for the Justice Department's Office of Legal Counsel (OLC), of giving false testimony


The exception alone shows this to be an empty promise. Even without that, however, one would be hard put to come up with many investigative or prosecutorial "policies" (other than those imposed by the Constitution or by Congress through law) that are absolute. Almost all investigative and prosecutorial decisions including the ultimate decision whether, after a technical violation of the law has been found, prosecution is warranted—involve the balancing of innumerable legal and practical considerations.... In sum, the balancing of various legal, practical, and political considerations, none of which is absolute, is the very essence of prosecutorial discretion.

*Id.; see also* United States v. Busher, 817 F.2d 1409, 1411-12 (9th Cir. 1987) (holding that dismissal of indictment was not warranted where federal prosecutor disregarded Justice Department guidelines for bringing RICO prosecutions).


\(^{34}\) *Id.* § 596(a)(2).

\(^{35}\) See supra notes 17-18 and accompanying text (citing scholarship arguing that the Independent Counsel functions very differently than an ordinary prosecutor).
during a congressional investigation of the Environmental Protection Agency. The Committee requested the appointment of an Independent Counsel to investigate possible wrongdoing by Olsen, Edward C. Schmults, Deputy Attorney General at OLC, and Carol E. Dinkins, Assistant Attorney General for the Land and Natural Resources Division of the Department of Justice. The Special Division (a special court created by the Ethics in Government Act) appointed Alexia Morrison as Independent Counsel. Olsen, Schmults, and Dinkins ultimately moved to quash subpoenas issued by Morrison and challenged the constitutionality of the Ethics in Government Act. The district court denied the motions and upheld the constitutionality of the Act. The Court of Appeals reversed, holding that the Act violated the Appointments Clause of the Constitution, the limitations of Article II, and the principle of separation of powers.

The Supreme Court granted certiorari and reversed the Court of Appeals, upholding the Act's constitutionality. The Court found the Independent Counsel to be an "inferior officer" that could be appointed by a court of law pursuant to the inferior officer clause of the Appointments Clause. The Court rejected Olsen's argument that even if the Independent Counsel is an "inferior officer," the Clause does not permit the appointment of executive officials outside of the Executive Branch. The Court held that such "interbranch" appointments were permissible and found no incongruity in judicial appointments of prosecutorial officers.

The Court also rejected the argument that the Special Division's appointment of the Independent Counsel violated Article III by requiring that special court to exercise executive or administrative duties of a nonjudicial nature. The Court held that this provision maintained the separation of powers between the Judiciary and other branches of government. The Court found no violation of the separation of powers doctrine because the Special Division's powers did not include supervision of the Independent Counsel. Finally, the Court held that the Act's

37. U.S. Const. art. II, § 2, cl. 2.
38. Olsen, 487 U.S. at 671-72. The Court concluded that Morrison was an "inferior officer" because (1) she was subject to removal by a higher executive branch, (2) she was empowered by the Act to perform only certain limited duties, (3) her office was limited in jurisdiction, and (4) her office was limited in tenure. Id.
39. Id. at 673.
40. Id. at 675-76.
41. See generally Ronald J. Krotoszynski, Jr., On the Danger of Wearing Two Hats: Mistretta and Morrison, Revisited, 38 Wm. & Mary L. Rev. 417 (1997) (suggesting that federal judges' appointment of independent counsels may compromise their independence).
42. Olsen, 487 U.S. at 681. "The Court can exercise no or at least virtually no oversight over the [Independent Counsel]." The Future of the Independent Counsel Act: Hearings Before the Senate Comm. on Government Affairs, 106th Cong. 419-73 (Apr. 14, 1999) (testimony of Judge Kenneth
provision restricting the removal of the Independent Counsel by the Attorney General to instances of "good cause" did not interfere with the President's exercise of his constitutionally appointed functions. Rather, it found that this provision was essential to the independence of the office.\textsuperscript{43}


The statute intentionally gave the Independent Counsel substantial discretion and power to investigate and prosecute high-level government officials. This authority, together with the ability to request an expansion of authority to any matters "related to" her jurisdiction, gave the Independent Counsel almost unlimited power. The \textit{Morrison} Court affirmed that power. Independent Counsel Kenneth Starr's investigation of President Clinton crystallized the magnitude of this authority.

Starr's appointment grew out of a call to investigate allegations of fraud by President Clinton, his wife Hillary Rodham Clinton, and other associates in a real estate deal in Arkansas. Prior to President Clinton's election, the Clintons formed the Whitewater Development Corporation during the real estate venture that became the subject of the investigation. The Whitewater investigation ultimately expanded to include matters unrelated to real estate.\textsuperscript{44} Although the House of Representatives impeached President Clinton based on Starr's investigation and recommendation,\textsuperscript{45} the

\textsuperscript{43} Olsen, 487 U.S. at 692-93.

\textsuperscript{44} In addition to the Whitewater matter, Starr eventually investigated allegations of wrongdoing during the Clinton presidency. One matter, called "Travelgate," involved allegations that seven members of the White House Travel Office had been illegally fired. Another expansion of Starr's jurisdiction involved the investigation of the so-called "Filegate" matter, involving allegations that Clinton had illegally collected hundreds of confidential FBI files on prominent Republicans. \textit{See generally} David J. Gottlieb, \textit{A Brief History of the Independent Counsel Law,} 47 U. KAN. L. REV. 572 (1999) (explaining Starr's various investigations). However, Starr's predecessor, Robert Ray, closed both investigations for lack of direct evidence of criminal behavior. \textit{See} Susan Milligan, \textit{No Charges Sought Against Mrs. Clinton in Travelgate Case,} BOSTON GLOBE, June 23, 2000, at A3 (stating that while Independent Counsel Robert Ray asserted that he had collected substantial evidence that Mrs. Clinton played a role in the 1993 firing of White House travel employees, he chose not to bring criminal charges); Richard Cohen, \textit{So Much for Filegate,} WASH. POST, Mar. 28, 2000, at A23 (discussing Independent Counsel Robert Ray's exoneration of Mrs. Clinton from Filegate charges despite earlier predictions of vast improprieties).

\textsuperscript{45} The House of Representatives approved two of the four articles of impeachment presented against President Clinton. Article one alleged that President Clinton "willfully provided perjurious, false, and misleading testimony to the grand jury" in \textit{Jones v. Clinton.} The second article claimed that President Clinton:

 prevented, obstructed, and impeded the administration of justice, and ... engaged personally and through his subordinates and agents, in a course of conduct or scheme designed to delay, impede, cover-up, and conceal the existence of evidence and testimony related to a federal civil rights action brought against him in a duly instituted judicial procedure.
impeachment charges were totally unrelated to the Whitewater matter. Starr sought and received permission from Attorney General Janet Reno to investigate the truthfulness of President Clinton's civil deposition testimony in *Jones v. Clinton.* This new investigation led to the perjury allegations upon which Starr based the impeachment charges. In the end, the Senate found President Clinton not guilty.

Starr managed to move from real estate in Arkansas to sex in the White House to perjury in a civil lawsuit with relative ease. His actions suggested that he was investigating President Clinton rather than specific allegations of criminal activity. This led many of Starr's critics to insist that he was "out to get Clinton" by any means necessary. Many of Starr's decisions appeared to support these claims. For example, Starr prosecuted several individuals who failed to corroborate various allegations of wrongdoing by President Clinton. The statute allowed the Attorney General to expand the Independent Counsel's authority to matters "related to" his jurisdiction. While Attorney General Reno may have interpreted this provision very broadly or erroneously, in the end, Starr was permitted to investigate far and


46. 990 F. Supp. 657 (E.D. Ark. 1998). In 1994, Paula Jones, a former Arkansas state employee, filed suit against President Clinton. The lawsuit alleged sexual harassment, denial of equal protection, intentional infliction of emotional distress, and defamation based on a 1991 incident in which Jones accused then Arkansas Governor Clinton of making an unwanted and crude sexual advance toward her in a Little Rock hotel suite. *Id.; Miller,* supra note 45, at 651-52. In January 1998, a special three-judge panel granted Attorney General Reno's request to expand Starr's investigation into "whether Monica Lewinsky or others suborned perjury, obstructed justice, intimidated witnesses, or otherwise violated federal law other than a Class B or C misdemeanor or infraction in dealing with witnesses, potential witnesses, attorneys or others concerning the civil case *Jones v. Clinton.*" *Id.* at 685-86.

47. Miller, supra note 45, at 734 n.5. On February 12, 1999, the Senate rejected both articles of impeachment and acquitted President Clinton. The perjury article was defeated by a 55-45 vote, and the obstruction article was defeated by a 50-50 vote. *Id.*

48. *Id.* at 683-84.

The OIC's investigation, triggered by privacy-invading surreptitious tape recordings, and including subpoenas for a list of the books Ms. Lewinsky might have been reading, reinforced the perception that the OIC was on a partisan mission to injure President Clinton politically rather than to rid the government of high-level public corruption.

*Id.*

49. During the investigation of the Clintons, Starr was able to secure several major convictions, including that of former Arkansas governor Jim Guy Tucker, the Clintons' former Whitewater business partners, James and Susan McDougal, and former Associate Attorney General Webster L. Hubbell. The Independent Counsel also secured ten guilty pleas from lesser banking figures in Arkansas. Ruth Marcus, *The Prosecutor: Following Leads or Digging Dirt,* Wash. Post, Jan. 30, 1998, at A1.
wide. His ability to investigate and charge individuals in matters totally unrelated to his original assignment illustrates the immense power and discretion of the Independent Counsel.

Justice Scalia discussed the charging power and discretion of prosecutors in his dissent in *Morrison v. Olsen*, quoting Justice Robert Jackson in a speech he made when he was Attorney General under President Franklin Roosevelt:

One of the greatest difficulties of the position of prosecutor is that he must pick his cases, because no prosecutor can even investigate all of the cases in which he receives complaints. If the Department of Justice were to make even a pretense of reaching every probable violation of federal law, ten times its present staff will be inadequate. We know that no local police force can strictly enforce the traffic laws, or it would arrest half the driving population on any given morning. What every prosecutor is practically required to do is to select the cases for prosecution and to select those in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain. If the prosecutor is obliged to choose his case, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him. It is in this realm—in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself.²⁹

Justice Scalia criticized this power in the hands of the Independent Counsel, but failed to recognize its danger when exercised by federal and state prosecutors, maintaining that our system of checks and balances provides adequate controls.³¹ An examination of the executive branch prosecutorial

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³¹. See infra text accompanying notes 231-58 (discussing the dissent in *Morrison*).
model demonstrates that federal and state prosecutors have essentially the same vast charging power as the Independent Counsel and that the mechanisms of accountability are ineffective.

B. STATE AND FEDERAL PROSECUTORS: UNFETTERED DISCRETION

Ordinary prosecutors have the same power and discretion afforded Kenneth Starr through the Ethics in Government Act. The Supreme Court has consistently upheld the broad exercise of prosecutorial discretion—a power that affords prosecutors far-reaching control over the outcome of criminal cases. Prosecutorial discretion and power expanded early in the development of the current system of public prosecution. As early as the 1920s, crime commissions and scholars criticized this power and proposed reforms to promote accountability. The history of the current system of prosecution and early reform efforts are outlined in Part III. This part focuses on the current scope of prosecutorial discretion and how it is abused.

1. The Power to Charge

The charging decision is arguably the most important prosecutorial power and the strongest example of the influence and reach of prosecutorial discretion. Prosecutors decide whether and how to charge an individual. They decide whether to offer a plea to a lesser charge, set the terms of the plea, and assess whether the conditions have been met. In federal and state jurisdictions governed by sentencing guidelines, these decisions often predetermine the outcome of a case since the sentencing judge has little, if any, discretion in determining the length, nature, or severity of the sentence. The defendant certainly has the option of

52. See infra text accompanying notes 65-95 (discussing prosecutorial misconduct).
53. See infra notes 319-28 and accompanying text (discussing early criticisms of prosecutorial discretion and power).
54. See Davis, supra note 12, at 23 (describing the effect of the charging decision on the outcome of a criminal case).
55. See id. at 21-22 (describing the prosecutor's discretion in making the charging decision); Charles P. Bubany & Frank F. Skillern, Taming the Dragon: An Administrative Law for Prosecutorial Decision Making, 13 AM. CRIM. L. REV. 473, 476-77 (1976) (noting the lack of controls for prosecutorial decision-making); James Vorenberg, Narrowing the Discretion of Criminal Justice Officials, 1976 DUKE L.J. 651, 678 (describing the prosecutor's charging decision as the "broadest discretionary power in criminal administration").
56. See Davis, supra note 12, at 25 ("[T]he plea bargaining process is controlled entirely by the prosecutor and decisions are entirely within her discretion."); see also WAYNE R. LAFAYE & JEROLD H. ISRAEL, CRIMINAL Procedure § 20.5(c) (1984) (describing the prosecutor's discretion to refuse plea bargains).
exercising her right to trial and leaving her fate in the hands of the jury or judge, but often she is not willing to run the risk of additional and more serious convictions and more prison time. Consequently, in most jurisdictions, plea bargaining resolves more than ninety percent of all criminal cases. Prosecutors on both the state and federal levels control this process.

In some smaller offices, typically state and county prosecutor offices, the decisions concerning whether to charge and what to charge become routine. Police officers arrest a suspect, recommend a charge, and, if there is probable cause and supporting evidence, the prosecutor formalizes the charges by filing an information or seeking an indictment through the grand jury process. In other offices, prosecutors exercise discretion in a variety of ways. They may decline to bring charges, bring only charges that they believe they can prove, or "inflate" the charges—convincing a grand jury to indict a defendant for more and greater charges than they can establish.

The decision to forego charges may be based on practical considerations such as the triviality of the offense and/or the victim's lack of interest in prosecution. The decision may also be based on considerations of fairness and justice in a particular case. For example, some jurisdictions offer alternative dispositions such as diversion programs for certain less serious offenses. On the other hand, the decision either to forego or bring
charges may be the result of a prosecutor’s bias toward or against a particular defendant or victim.\textsuperscript{63} At any rate, the decision to forego charges is entirely within the discretion of the prosecutor.\textsuperscript{64}

2. Prosecutorial Misconduct: Abuse of Discretion

The many forms of prosecutorial misconduct that occur at numerous stages of the criminal process belie the courts’ presumption of regularity for prosecutors. At the pretrial stage, prosecutors have been accused of intimidating witnesses,\textsuperscript{65} engaging in selective\textsuperscript{66} and vindictive\textsuperscript{67} prosecution,

\begin{itemize}
  \item \textsuperscript{63} See Davis, supra note 12, at 34-38 (describing how unconscious racism may permeate race-neutral prosecutorial decisions).
  \item \textsuperscript{64} See Interstate Commerce Comm’n v. Bhd. of Locomotive Eng’rs, 482 U.S. 270, 283 (1987) (stating that the prosecutor’s refusal to prosecute cannot be subjected to judicial review despite the court’s qualification to review the decision).
  \item \textsuperscript{65} See, e.g., United States v. Schlei, 122 F.3d 944, 991 (11th Cir. 1997) (threatening witness with loss of immunity from prosecution if he testified for defense at trial); United States v. LaFumenta, 54 F.3d 457, 459, 461 (8th Cir. 1995) (threatening one witness with jail time if she spoke to defense counsel or press and promised to dismiss perjury and other felony charges against other key witnesses if their trial testimony helped the government in murder prosecution); United States v. MacGloskey, 682 F.2d 468, 475 (4th Cir. 1982) (warning witness’s attorney that if the witness testified at defendant’s murder trial, she could be reindicted if she incriminated herself during that testimony); United States v. Henricksen, 564 F.2d 197, 198 (5th Cir. 1977) (requiring defendant to refrain from testifying on behalf of codefendant as part of plea bargain); United States v. Morrison, 535 F.2d 223, 226 (3d Cir. 1976) (intimidating defense witness during interview); United States v. Smith, 478 F.2d 976, 979 (D.C. Cir. 1973) (threatening to prosecute defense witness if his testimony contradicted the government’s theory).
  \item \textsuperscript{66} See, e.g., United States v. Armstrong, 517 U.S. 456, 470 (1996) (basing selective prosecution claim on study that showed the government failed to prosecute nonblack defendants for cocaine and crack-related offenses); United States v. Al Jibori, 90 F.3d 22, 23-24 (2d Cir. 1996) (bringing selective prosecution claim to determine whether the only established connection between defendant and known terrorist was the defendant’s regional origin and whether this fact led the government to charge defendant under infrequently used statute for presenting false passport); United States v. Cyprian, 23 F.3d 1189, 1195 (7th Cir. 1994) (alleging that the government singled out defendants because of their Catholic faith); United States v. Redondo-Lemos, 955 F.2d 1296, 1300 (9th Cir. 1992) (alleging that the government offered plea bargains based on gender); United States v. Bayles, 923 F.2d 70, 71 (7th Cir. 1991) (stating that the prosecutor in the district court failed to move for sentence reduction despite defendant’s assistance in another case); United States v. Steele, 461 F.2d 1148, 1150-51 (9th Cir. 1972) (alleging that the government exercised selective prosecution in a case involving defendants’ alleged failure to answer census questions).
  \item \textsuperscript{67} See, e.g., United States v. Holloway, 74 F.3d 249, 251 (11th Cir. 1996) (using defendant’s deposition testimony as basis for criminal charges despite immunity agreement); United States v. Dudden, 65 F.3d 1461, 1466, 1472 (9th Cir. 1995) (indicting defendant in part to encourage her cooperation in another investigation, and breaching informal immunity agreement by using defendant’s immunized statements against her); United States v. Digregorio, 795 F. Supp. 630, 635 (S.D.N.Y. 1992) (coercing defendants into signing statements and cooperating in ongoing investigation by failing to arraign defendants for five months, denying their requests to obtain counsel, and forbidding them from securing counsel after
and abusing the grand jury process. During trial, prosecutorial misconduct may consist of inappropriate opening statements, cross-examination, or closing arguments. Prosecutors frequently violate their obligation to reveal exculpatory information to criminal defendants at various stages of the

68. See, e.g., United States v. Chen, 933 F.2d 793, 796-97 (9th Cir. 1991) (using “perjury trap” whereby the government calls a witness before the grand jury for the primary purpose of obtaining testimony from him in order to prosecute him later for perjury); Barry v. United States, 865 F.2d 1317, 1318-20 (D.C. Cir. 1989) (alleging violations of the grand jury secrecy rule where the U.S. Attorney issued a press release that unlawfully disclosed matters occurring before the federal grand jury that was investigating allegations of corruption in the District of Columbia Government); In re Grand Jury Investigation (Lance), 610 F.2d 202, 216 (5th Cir. 1980) (identifying government attorneys as source of leaks from grand jury proceedings); United States v. Samango, 607 F.2d 877, 884-85 (9th Cir. 1979) (dismissing indictment returned by the federal grand jury because prosecutors deliberately introduced perjured testimony); In re Grand Jury Matters, 593 F. Supp. 103, 107 (D.N.H.) (finding subpoenas invalid when they were used to uncover fee arrangements between attorneys and their clients while clients had cases pending for trial in state court and were under investigation by district court), aff'd, 751 F.2d 13 (1st Cir. 1984).

69. See, e.g., United States v. Benitez-Muaz, 161 F.3d 1163, 1166 (8th Cir. 1999) (holding that the prosecutor's comment in her opening statement that she believed the gun found during defendant's arrest was stolen was improper, although it did not rise to the level of prosecutorial misconduct); United States v. Chirinos, 112 F.3d 1059, 1059-99 (11th Cir. 1997) (concluding that prosecutor's opening remarks concerning evidence were not improper because prosecutor had a reasonable belief that the district court would admit evidence at the time he made such statement); United States v. Gabaldon, 91 F.3d 91, 94-95 (10th Cir. 1996) (holding that the opening statement in burglary and larceny case stating that the government believed witness would testify that he had no doubt in his mind who broke into the home did not create an unfair trial); United States v. Hernandez, 779 F.2d 456, 460 (8th Cir. 1983) (finding that improper remarks by prosecutor about coconspirator's inculpatory prior statements where trial court had not ruled on admissibility of those statements were not sufficiently prejudicial for reversal).

70. See, e.g., United States v. Cabrera, 201 F.3d 1243, 1247-48 (9th Cir. 2000) (cross-examining the defendant and asking whether he had any prior convictions after district court had previously ruled that such questions could not be asked); United States v. Sanchez, 176 F.3d 1214, 1219 (9th Cir. 1999) (forcing defendant to call the U.S. Marshal a liar and impeaching defendant with inadmissible hearsay testimony); United States v. Wilson, 149 F.3d 1298, 1300-01 (11th Cir. 1998) (characterizing defendant as a "major" drug dealer, notwithstanding single count charge, and making improper inquiries about defendant's prior convictions); United States v. Phillips, 914 F.2d 835, 841 (7th Cir. 1990) (switching exhibits to confuse defense witness into impeaching himself); United States v. Schnab, 885 F.2d 503, 513 (2d Cir. 1989) (cross-examining defendant about prior misconduct that resulted in acquittal).

71. See Donnelly v. DeChristoforo, 416 U.S. 637, 647 (1974) (finding that prosecutor's attempt to suggest to the jury that defendant had unsuccessfully sought to plead guilty to lesser charge was not prejudicial); United States v. Francis, 170 F.3d 546, 552 (6th Cir. 1999) (finding that prosecutor's improper argument, together with improper bolstering of witnesses, collectively violated due process); United States v. Smith, 982 F.2d 681, 682-83 (1st Cir. 1993) (holding that closing argument in which prosecutor suggested that it was his personal opinion that justification evidence had been concocted and that defendant was guilty did not warrant new trial). But see United States v. Johnson, 968 F.2d 763, 770 (8th Cir. 1992) (holding that prosecutor's comments in closing argument urging jury to act as "bulwark" against continuation of drug dealing was improper and inflammatory).
Like so many other prosecutorial acts, misconduct often occurs in private and never becomes public. The victim of misconduct may be wholly unaware of its occurrence, especially if it takes place during the pretrial stage. Even when misconduct is discovered and litigated by criminal defendants, it is rarely exposed to the public. Judicial review of such misconduct is extremely limited. Under the harmless error rule, appellate courts affirm convictions if the evidence supports the defendant's guilt, even if she did not receive a fair trial. This rule permits, perhaps even encourages, prosecutors to engage in misconduct during trial with the assurance that so long as the evidence of the defendant's guilt is clear, the conviction will be affirmed.

72. See Brady v. Maryland, 373 U.S. 83, 87-88 (1963), in which the Court stated:

We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution . . . . A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice . . . .


73. See Bruce A. Green, Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?, 8 St. Thomas L. Rev. 69, 70 (1995) (noting that "evidence of prosecutorial misconduct, particularly in federal cases, may be difficult to obtain") (citing Joseph F. Lawless & Kenneth E. North, Prosecutorial Misconduct, Trial, Oct. 1984, at 28).


75. See Rose v. Clark, 478 U.S. 570, 580 (1986) (holding that harmless error standard dictates that court should not set aside conviction if error was harmless beyond a reasonable doubt).

76. See id. at 588-89 ("An automatic application of harmless-error review in case after case, and for error after error, can only encourage prosecutors to subordinate the interest in
The American Bar Association (ABA) Standards on the Prosecution Function state that a prosecutor should only bring charges that she believes she can prove beyond a reasonable doubt. This rule seems to state the obvious. A prosecutor’s decision to bring charges she cannot prove would be unethical and harmful to the defendant. Even if a jury ultimately found the defendant not guilty of these false charges, she would bear the emotional—and perhaps financial—burden of defending against them. Furthermore, the defendant might labor under the shadow of suspicion that often lingers even after charges are dismissed or unproven.

Despite the ABA standards, prosecutors frequently charge more and greater offenses than they can prove beyond a reasonable doubt. This tactic offers the prosecutor more leverage during plea negotiations, causing the defendant to plead guilty to “reduced charges” offered by the prosecutor for fear of being convicted of all of the charges brought in the indictment. Often these “reduced charges” are the most the prosecutor believes she might be able to prove at trial. Sometimes, they are more than she knows she can prove. Indigent defendants with overworked counsel and limited resources often lack the ability to investigate the strength of the government’s charges and may plead guilty out of fear of the unknown.

Many of the most damaging forms of misconduct occur behind closed

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77. STANDARDS FOR CRIMINAL JUSTICE § 3-3.9(a) (3d ed. 1993).

A prosecutor should not institute, or cause to be instituted, or permit the continued pendency of criminal charges when the prosecution knows that the charges are not supported by probable cause. A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction.

Id.


79. The decision to charge or inflate charges may be based on racial bias. A number of statistical studies have demonstrated the practice of prosecutors bringing more serious charges in cases involving white victims than in cases involving black victims. Davis, supra note 12, at 35.


81. Id.

82. The plea bargaining process works quite differently for the wealthy white-collar defendant represented by well-paid counsel. These defense lawyers (frequently former prosecutors themselves) often communicate with prosecutors throughout their decision-making process and have access to more information. Their relationships with prosecutors and access to information often enable them to negotiate more favorable plea arrangements for their clients. See Gerald E. Lynch, Our Administrative System of Criminal Justice, 66 FORDHAM L. REV. 2117, 2125-26 (1998) (describing the plea bargaining process for white-collar defendants and stating that this context represents an “idealized version of the plea bargaining process”).
doors. Inappropriate or unethical charging decisions, intimidating conversations with witnesses, selective and vindictive prosecutions, and grand jury abuse all occur in the privacy of prosecution offices—away from the public and the parties whose cases are affected by the harmful behavior. The courts have shielded many of these behaviors from scrutiny by establishing nearly impossible standards for obtaining the necessary discovery to seek judicial review.

On the rare occasion when prosecutorial misconduct is discovered, courts seldom use their supervisory power to curtail it. In addition to its constitutional power to reverse lower court convictions, the Supreme Court's supervisory authority to oversee the implementation of criminal justice grants the Court powers to regulate lower court procedures. For example, in *McNabb v. United States*, the Court concluded that when determining the admissibility of evidence, it obeys the Constitution, and, under its power of judicial supervision, formulates "additional civilized standards of procedure and evidence." These standards are to be applied in federal criminal prosecutions, in an effort to deter governmental misconduct and preserve judicial integrity. The Court's standards are satisfied by more than simple adherence to due process laws and are derived from considerations of "evidentiary relevance" and justice.

In *United States v. Russell*, however, the Supreme Court drastically curtailed the supervisory power doctrine by reversing a lower court's use of the power in a case involving questionable law enforcement tactics. The Court invoked the separation of powers doctrine as it warned lower courts not to meddle in the business of law enforcement. In a further effort to limit the reach of a federal court's supervisory power, in *United States v. Hasting*, the Court held that judges may not reverse convictions because of prosecutorial misconduct in cases involving harmless error.

Civil lawsuits have proven equally ineffective as remedies for prosecutorial misconduct. The Supreme Court established a broad rule of

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83. *See infra* notes 88-95, 169-80 and accompanying text (discussing standards for judicial review of prosecutorial misconduct).
84. 318 U.S. 332 (1943).
85. *Id.* at 340.
89. *Id.* at 435. *But see* David S. Rudolf & Thomas K. Maher, *Prosecutorial Misconduct Still Subject to Sanctions*, 22 CHAMPION 57, 58 (1998) (discussing cases from the Hawaii Supreme Court involving dismissal of indictments as a sanction for prosecutorial misconduct).
91. *Id.* at 500. In applying the harmless error standard, the court must determine whether, absent the prosecutor's misconduct, it is clear beyond a reasonable doubt that the jury would have returned a guilty verdict. *Id.*
absolute immunity from civil liability for prosecutors in *Imbler v. Pachtman*. This rule immunizes prosecutors from liability for acts "intimately associated with the judicial phase of the criminal process." The Court expressed concern that prosecutors might be deterred from zealously pursuing their law enforcement responsibilities if they faced the possibility of civil liability and suggested that attorney disciplinary authorities address prosecutorial misconduct.

**C. Starr's (Mis)conduct: Common Practices and the Law**

Kenneth Starr's investigation of President Clinton models methods employed by federal and state prosecutors that arguably rise to the level of prosecutorial misconduct. Law enforcement agents and police use many of these investigative tools in the investigation and prosecution of criminal cases against ordinary citizens. Starr's behavior and tactics included the following:

1. Using audio tapes allegedly recorded illegally by Linda Tripp;
2. Questioning Monica Lewinsky and offering her immunity in the absence of her attorney, in violation of Justice Department policies;
3. Abusing the grand jury process by leaking grand jury material to the press and repeatedly calling the same witness before the grand jury after the witness failed to testify consistently with the government's theory;
4. Omitting exculpatory information from his report to Congress;

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94. *Imbler*, 424 U.S. at 426.
96. Maryland prosecutors charged Linda Tripp with illegally taping telephone conversations with Monica Lewinsky. To convict Tripp, prosecutors needed to prove she recorded the calls without Lewinsky's knowledge. The trial court's ruling that Lewinsky's testimony was inadmissible left prosecutors without sufficient evidence to prove their case. Consequently, prosecutors asked the judge to dismiss charges against Tripp. Craig Gordon, *Tripp Charges Dismissed/Prosecutor: No Case Without Lewinsky's Testimony*, NEWSWEEK, May 25, 2000, at A3; Mary Otto, *Maryland Judge Dismisses Tripp Wiretap Case*, WASH. POST, June 1, 2000, at A10.
(5) Investigating and prosecuting individuals who failed to corroborate allegations of wrongdoing by President Clinton. 97

Federal and state prosecutors engage in all of these behaviors, some of them routinely. While courts have condemned some of these practices as illegal prosecutorial misconduct, others remain legal and are practiced regularly by prosecutors. In testimony at the Senate Government Affairs Committee hearings on the Independent Counsel Act, Starr argued that even his most controversial tactics tracked that of average prosecutors:

[I]n this investigation, Senator, we followed DOJ procedures and practices, including the controversial wiring of Linda Tripp. That is exactly what a prosecutor, an investigator, would in fact do to ensure reliability. The Supreme Court of the United States has expressly approved that kind of procedure in the Lopez case. 98

That is part of our custom, practice, and law. And yet that is viewed as being over the top. The subpoenaing of a family member is viewed as over the top. The Justice Department does that. Usually it does so quietly because we don’t have the spotlight, the glare of publicity . . . . I do not apologize for trying to gather the facts consistent with the way FBI agents assigned by Louis Freeh, a very distinguished and able director of the FBI, following their customary procedures. 99

While the law recognizes and approves investigative tools such as wiretapping witnesses and questioning suspects in the absence of counsel, it does not permit every method Starr employed. 100 Abusing the grand jury process, withholding exculpatory information, and engaging in vindictive prosecution or selective prosecution are all forms of prosecutorial misconduct. 101 These illegal acts, however, often prove difficult to uncover, and courts rarely punish or reprimand prosecutors even when the acts of misconduct come to light. 102

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98. Starr presumably was referring to United States v. Lopez, 373 U.S. 427 (1963) (holding that the electronic recording of a conversation between defendant and a federal agent did not violate defendant’s Fourth Amendment right to privacy).

99. The Future of the Independent Counsel: Hearing Before the S. Comm. on Gov’t Aff., 106th Cong. 419-73 (Apr. 14, 1999) (testimony of Judge Kenneth W. Starr) (responding to suggestions from Senator John Edwards that Starr’s discussions with Ms. Lewinsky in the absence of her attorney were in violation of 28 C.F.R. § 77 and that Starr did not have the jurisdiction to wire or give immunity to Linda Tripp).

100. See infra Part I.C.2 (explaining how Starr engaged in illegal acts).


102. See infra notes 169-80 and accompanying text (describing judicial review of grand jury abuse); infra notes 213-30 and accompanying text (describing judicial review of the charging decision).
The following Parts review the questioned Starr tactics in light of the law governing regular prosecutors. The first Part presents legal methods in light of the limits imposed by the law, while the second discusses illegal conduct.

1. Legal (Mis)Conduct: Wiretaps and Interrogation

   a. Wiretaps

Despite the public's unfavorable opinion of Monica Lewinsky, the majority of the American public considered Linda Tripp's recording of her private conversations with Ms. Lewinsky, and Starr's use of the resultant tapes, an unacceptable invasion of privacy. Although much attention focused on Linda Tripp's betrayal of her friend, Starr's participation in this form of investigation generated considerable public outcry.

Wiretapping is a very common investigative tool used by prosecutors and law enforcement officials. The Supreme Court upheld the constitutionality of wiretappings and Congress repeatedly has authorized and facilitated the practice. Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as modified by Title I of the 1986 Electronic Communications Privacy Act, permits the "interception of wire or oral communications." The Act grants the Attorney General, Deputy Attorney General, and other high level prosecutors in the Justice Department the

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103. See Judy Keen & Kevin Johnson, Tripp Testifies for a 4th Day, USA TODAY, July 10, 1993, at 11A (citing poll showing that most Americans were against making tapes); Kathleen Parker, What Are Friends For? Why Did Tripp Tape Conversations with Intem? PEORIA J. STAR, Jan. 26, 1993 at A4 (editorializing that taping conversations was as bad as an adulterous affair).

104. Respondents were asked the following questions and responded in the following manner:

   Question: Linda Tripp gave these tapes to Whitewater Special Prosecutor Kenneth Starr. He obtained permission to put a hidden microphone on Linda Tripp and secretly record Monica Lewinsky discussing her alleged affair with President (Bill) Clinton. Do you think it was appropriate for Starr to do this?

   Response: appropriate, 25%; inappropriate, 66%; not sure, 9%.

   Question: As you may know, Linda Tripp, who is a friend of Ms. (Monica) Lewinsky, secretly taped Ms. Lewinsky discussing her alleged affair with President (Bill) Clinton. Do you think it was appropriate for Linda Tripp to secretly tape Ms. Lewinsky's remarks?

   Response: appropriate, 25%; inappropriate, 66%; not sure, 9%.


106. Id. § 2518.
authority to apply to a federal judge for a wiretap order.\textsuperscript{107} The Act sets forth procedural requirements for obtaining and implementing a wiretap order, but ultimately authorizes prosecutors to engage in the type of wiretapping the public seemed offended by in Starr’s investigation.\textsuperscript{108} Federal prosecutors have obtained and implemented hundreds of thousands of wiretap orders under Title III since the statute’s promulgation.\textsuperscript{109} Many states acted on a congressional invitation to adopt statutes based on the federal model, permitting similar wiretapping on the state level.\textsuperscript{110}

In 1994, Congress facilitated governmental wiretapping by passing the Communications Assistance for Law Enforcement Act (CALEA).\textsuperscript{111} This law orders telecommunications carriers to design their equipment (particularly equipment involving advanced technologies) so that government officials will be able to intercept communications.\textsuperscript{112} The Anti-Terrorism and Effective Death Penalty Act of 1996 expanded the use of roving wiretaps to allow federal agents to tap telephone calls of suspects for up to forty-eight hours without a court order.\textsuperscript{113} Although many lauded these statutes as effective law enforcement tools,\textsuperscript{114} others criticized them for permitting the

\begin{itemize}
  \item \textsuperscript{107} Id. § 2515.
  \item \textsuperscript{108} See id. § 2511(1) (prohibiting nonconsensual wiretapping except through the specific procedures prescribed in § 2518).
  \item \textsuperscript{109} See generally Daniel Chepaitis, Electronic Surveillance, 82 GEO. L.J. 698 (1994) (providing history of Title III and the proper procedures law enforcement officials must follow before and after electronic surveillance); see also Kirsten Scheurer, The Clipper Chip: Cryptography Technology and the Constitution—The Government’s Answer to Encryption “Chips” Away at Constitutional Rights, 21 RUTGERS COMPUTER & TECH. L.J. 263, 288-89 (1996) (discussing the effectiveness of federal wiretaps in prosecuting organized crime, gambling cases, and narcotics cases).
  \item \textsuperscript{112} The law was passed to address concerns that law enforcement would not be able to intercept communications as the technology becomes more sophisticated. For a full discussion of CALEA and its potential effects of the privacy rights of ordinary citizens, see Lillian BeVier, The Communications Assistance for Law Enforcement Act of 1994: A Surprising Sequel to the Break Up of AT&T, 51 STAN. L. REV. 1049 (1999).
  \item \textsuperscript{114} See Scheurer, supra note 109, at 287-91 (discussing the effectiveness of wiretaps); Anjuli Singhal, The Piracy of Privacy? A Fourth Amendment Analysis of Key Escrow Cryptography, 101 DICK. L. REV., Summer 1996, at 189, 193 (“[W]iretapping is the tool most often and most successfully used in combating certain crimes [such as] [o]rganized crime, drug trafficking, terrorism, and governmental fraud and corruption . . . .”); Andrew W. Yung, Regulating the Genie: Effective Wiretaps in the Information Age, 101 DICK. L. REV. 95, 103 (1996) (stating that “[i]n the ten-year period ending in 1992. . . . 22,000 convictions have resulted from court-authorized surveillances,” and arguing that electronic surveillance is an essential law enforcement tool to ensure public safety).
\end{itemize}
invasion of the privacy rights of many innocent citizens.\textsuperscript{115}

The extent to which the general public knows about the widespread use of wiretapping by federal and state prosecutors remains unclear. Another unsettled issue is whether the public would disapprove of the general use of wiretapping. The Lewinsky wiretapping uniquely combined features that made it difficult to pinpoint the exact source of the public's outrage. The public may have disapproved of the alleged illegality of the wiretapping, its use in this type of case, the involvement of a purported confidante, or the wiretapping itself. Nonetheless, the overwhelming public disapproval of the Lewinsky wiretapping\textsuperscript{116} suggests at least some level of disapproval of wiretapping, notwithstanding the official sanction.

\textbf{b. Interrogation}

Starr's interrogation tactics also drew fierce criticism. Linda Tripp, acting as an agent of the government, lured Monica Lewinsky to the Ritz-Carlton where prosecutors and FBI agents confronted her. They questioned Ms. Lewinsky about her relationship with the President and informed her that her failure to cooperate with their investigation might result in criminal charges.\textsuperscript{117} They also discussed the possibility of immunity for Ms. Lewinsky if she chose to cooperate with their investigation.\textsuperscript{118} When Ms. Lewinsky asked

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\textsuperscript{115}. See generally BeVier, \textit{supra} note 112 (discussing CALEA's effects on privacy rights); see also Larry Downes, \textit{Electronic Communications and the Plain View Exception: More "Bad Physics,"} \textit{7 Harv. J.L. \\& Tech.}, Spring 1994, at 239, 273 (detailing the "growing number of environments where effective methods of government surveillance potentially infringe upon the privacy interests of many innocent parties"); Benjamin M. Shieber, \textit{Electronic Surveillance, the Mafia, and Individual Freedom}, 42 \textit{J.L. \\& Soc. Rev.} 1323, 1361 (1982) ("[T]he principal basis for criticism of law enforcement electronic surveillance is not lack of effectiveness or cost, but that it invades individual privacy.").

\textsuperscript{116}. See \textit{supra} notes 103-04 (discussing opinion polls).


\textsuperscript{118}.
to call her lawyer and her mother, the Independent Counsel's staff lawyers discouraged her from doing so. In essence, the prosecutors and agents used incommunicado interrogation and threats to try to compel Ms. Lewinsky to incriminate President Clinton. When this information became public, many expressed outrage. Senator Robert Torricelli chastised Kenneth Starr for authorizing his deputies to interrogate Ms. Lewinsky in the absence of her attorney: "I understand the Justice Department now is looking at the way Ms. Lewinsky was handled, held for eleven hours at the Ritz-Carlton, the question of whether or not she was allowed to have access to her lawyer, threatening her with twenty-seven years in jail, dissuaded from calling her mother . . . ." The senator did not stand alone in his criticism of the interrogation tactics used by Starr's deputies.

On the surface, these tactics seem to implicate *Miranda v. Arizona*, the well-known Supreme Court case that guarantees the right to silence and counsel during custodial interrogation. It is important to recall, however,
that the Court limited *Miranda* protections in subsequent cases, allowing the
government to use statements made in violation of *Miranda* under a variety
of circumstances.\footnote{125} Congress also tried to weaken the impact of *Miranda*
when it passed the Omnibus Crime Control Act of 1968. Section 3501 of this
law permitted the admission of confessions in federal court, even if they
violated *Miranda*, so long as they were "voluntary." Federal prosecutors, who
chose to follow the dictates of *Miranda*, rarely used the law. Over thirty years
after the Court decided *Miranda* and Congress passed § 3501, in *United States
v. Dickerson*,\footnote{126} the U.S. Court of Appeals for the Fourth Circuit held that 18
U.S.C. § 3501 overruled *Miranda*.\footnote{127} The Supreme Court reversed the Fourth
Circuit, holding that *Miranda* announced a constitutional rule that could
not be overturned by an act of Congress.\footnote{128} Even as it reaffirmed *Miranda*,
however, the Court acknowledged that it has "made exceptions from its
rule."\footnote{129}

Law enforcement agents take advantage of the weakening of *Miranda*
when questioning suspects, knowing that a failure to abide strictly by the
*Miranda* rules will not preclude the use of such statements either in court or
in further investigations.\footnote{129} In the ten years before Congress passed the
Citizens Protection Act of 1998,\footnote{130} federal prosecutors regularly questioned
charged suspects when the suspects' attorneys were not present. Such
prosecutors acted in violation of the "no-contact rule," embodied in Rule 4.2
of the ABA Model Rules of Professional Conduct.\footnote{132} This rule prohibits
lawyers from communicating about the subject of the representation with
persons represented by other counsel in a particular case. Federal
prosecutors, nonetheless, questioned represented suspects, interpreting
such behavior as consistent with their ethical obligations.\footnote{133}

conviction and concluding that an undercover police officer posing as a fellow inmate need not
give *Miranda* warnings to an incarcerated suspect before asking questions that could elicit an
*Miranda* warnings during public safety emergencies); Michigan v. Mosley, 423 U.S. 96, 105-07
(1975) (finding that admission of incriminating statements did not violate *Miranda* because
interrogation is not forever barred when defendant invokes his right to silence with regard to
one crime and later decides to talk about a different crime).
\footnote{126} 166 F.3d 667 (4th Cir. 1999).
\footnote{127} Id. at 692.
\footnote{128} Dickerson v. United States, 120 S. Ct. 2326, 2336 (2000).
\footnote{129} Id. at 2335.
\footnote{130} See supra notes 125-26 (discussing the erosion of the *Miranda* protections).
\footnote{131} See infra note 354 and accompanying text (noting that Congress passed the Citizens
Protection Act in 1998).
\footnote{132} "In representing a client, a lawyer shall not communicate about the subject of the
representation with a person the lawyer knows to be represented by another lawyer in the
matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." MODEL RULES OF PROF'L CONDUCT R. 4.2 (Ctr. for Prof'l Resp. 1995).
\footnote{133} See infra note 358 and accompanying text (discussing Model Rules of Professional
Critics decried the conditions under which the prosecutors and agents questioned Ms. Lewinsky, but Ms. Lewinsky's experience pales in comparison to that of most ordinary citizens questioned by prosecutors and law enforcement agents. Ms. Lewinsky endured seventeen hours of interrogation—a time period that does not approach the lengthiest interrogation upheld by the Supreme Court. Threats of prosecution also constitute common tactics by police officers and prosecutors. Courts even have upheld false threats and trickery in questioning suspects. Finally, needless to say, most suspects are questioned in police interrogation rooms and other intimidating locations that fall short of the Ritz-Carlton standard.

Even though most of these practices are legal investigative tactics supported by statutory or judicial authority and widely practiced by federal and state prosecutors, members of the public, media, and Congress criticized the wiretap and interrogation techniques used by Starr and his lawyers. Some of Starr’s criticized tactics—abusing the grand jury, withholding favorable evidence, and abusing the charging power—are illegal forms of prosecutorial misconduct. Federal and state prosecutors regularly engage in these practices, which are seldom discovered or punished. These illegal tactics are discussed in the next Part.

2. Illegal Conduct: Grand Jury Abuse, Withholding Exculpatory Evidence, and Abuse of the Charging Power

   a. Grand Jury Abuse

   The Fifth Amendment to the U.S. Constitution provides that "no person shall be held to answer for a capital, or otherwise infamous crime, Conduct Rule 4.2).

134. See Reck v. Pate, 367 U.S. 433, 436 (1961) (subjecting suspect to six to seven hours of interrogation each day for four days); Fikes v. Alabama, 352 U.S. 191, 194 (1957) (questioning for several hours at a time over a five-day period); Turner v. Pennsylvania, 338 U.S. 62, 63 (1949) (questioning from four to six hours per day for five days); Ashcraft v. Tennessee, 322 U.S. 143, 149 (1944) (detailing thirty-six hours of relay questioning); see also Welsh S. White, What is an Involuntary Confession Now?, 50 RUTGERS L. REV. 2001, 2055 (1998) (noting that the Supreme Court has relaxed restrictions on police interrogations and analyzing the role of the "voluntariness test" in regulating the admissibility of untrustworthy confessions).

135. See United States v. Williams, 205 F.3d 23, 30 (2d Cir. 2000) (holding that the government's threat to prosecute defense witness for perjury if he did not return to the stand to recant his recent testimony did not deprive the defendant of his due process right to compulsory process, even if the government did not notify defense counsel, warn witness of his self-incrimination rights, or properly represent the strength of its evidence of perjury); Johnson v. Washington, 119 F.3d 513, 523 (7th Cir. 1997) (stating that inconsistent testimony of witness did not violate defendant's due process right to a fair trial where the trial court suggested that police coerced the witness's statements).

136. See Green v. Scully, 850 F.2d 894, 904 (2d Cir. 1988) (upholding murder conviction where police lied to suspect about finding his palm prints and blood at the crime scene).
unless on a presentment or indictment of a Grand Jury:  137 An infamous crime is any offense that may result in imprisonment. Although the Fifth Amendment requires indictment by a grand jury in federal cases, the Supreme Court held that this right is not incorporated in the Due Process Clause of the Fourteenth Amendment and thus does not apply to the states.  139 Approximately one-half of the states require grand jury indictment for serious crimes as a matter of state constitutional or statutory law. 149

The purpose of the grand jury is to decide whether there is probable cause to believe the defendant committed the alleged offense. The grand jury makes this determination by hearing the testimony of witnesses. The grand jurors have the right to subpoena and question witnesses, and they sometimes exercise that right. Most grand jurors, however, are ordinary citizens without legal knowledge or skills, so the prosecutor most frequently handles the calling and questioning of witnesses. As a result, prosecutors essentially control the process. Though the use of ordinary citizens as grand jurors should serve as protection for the accused and as a check on the prosecutor’s charging power, this goal is rarely fulfilled because of the prosecutor’s control over the process. In fact, scholars have criticized the grand jury process extensively as a mere tool of the prosecutor. 145

During Starr’s investigation of the President, the American public became aware of two examples of grand jury misconduct: leaks and abuse of the subpoena power.

137. U.S. CONST. amend. V.
138. Ex parte Wilson, 114 U.S. 417, 419 (1885).
140. Id.
141. Id. at 673. For a description of the framers’ conception of the grand jury, see Akhil Reed Amar, The Bill of Rights as a Constitution, 100 YALE L.J. 1131, 1184-85 (1991).
142. See Yale Kamisar et al., Modern Criminal Procedure 702 (1986); William J. Campbell, Eliminate the Grand Jury, 64 J. CRIM. L. & CRIMINOLOGY 174, 178 (1973) (arguing that although grand jurors have the power to subpoena witnesses, they rarely invoke this power).
143. See Andrew D. Leipold, Why Grand Juries Do Not (And Cannot) Protect the Accused, 80 CORNELL L. REV. 260, 315 (1995) (arguing that prosecutors control the subpoena process in grand jury investigations).
144. Saltzburg & Capra, supra note 139; see also Amar, supra note 141, at 1184 (“By focusing public attention on otherwise low-visibility executive decisions, the grand jury could deter executive self-dealing and enhance executive accountability.”).
145. See Robert W. Gordon, Imprudence and Partisanship: Starr’s OIC and the Clinton-Lewinsky Affair, 68 FORDHAM L. REV. 639, 642 (1999) (“In theory, grand juries and judges provide formal restraints on prosecutorial abuses, but in practice these restraints have atrophied. Grand juries are now entirely creatures of the prosecutor’s office.”); Anne Bowen Poulin, Supervision of the Grand Jury: Who Watches the Guardians?, 68 WASH. U. L.Q. 885, 886 (1999) (“In fact, the grand jury has been criticized as having become nothing but a powerful and easily abused weapon of the prosecution.”).
i. Grand Jury Leaks

The Supreme Court provided five reasons for grand jury secrecy:

(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before [the] grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect [the] innocent accused who is exonerated from disclosure of the fact that he has been under investigation and from the expense of standing trial where there was no probability of guilt.\textsuperscript{146}

Federal Rule of Criminal Procedure 6(e) requires that grand jury proceedings be kept confidential.\textsuperscript{147} In addition to Rule 6(e), the Code of Professional Responsibility\textsuperscript{148} and Justice Department regulations\textsuperscript{149} prohibit

\begin{itemize}
  \item \textsuperscript{146} United States v. Procter & Gamble, 356 U.S. 677, 681 n.6 (1958) (quoting United States v. Rose, 215 F.2d 617, 628-29 (3d Cir. 1954)).
  \item \textsuperscript{147} FED. R. CRIM. P. 6(e). In relevant part, the rule reads as follows:
    \begin{enumerate}
    \item \textsuperscript{(e)} Recording and Disclosure of Proceedings.
      \begin{enumerate}
        \item \textsuperscript{(1)} Recording of Proceedings. All proceedings, except when the grand jury is deliberating or voting, shall be recorded stenographically or by an electronic recording device. An unintentional failure of any recording to reproduce all or any portion of a proceeding shall not affect the validity of the prosecution. The recording or reporter's notes or any transcript prepared therefrom shall remain in the custody or control of the attorney for the government unless otherwise ordered by the court in a particular case.
        \item \textsuperscript{(2)} General Rule of Secrecy. A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.
      \end{enumerate}
    \end{enumerate}
  \item \textsuperscript{148} MODEL RULES OF PROF'L CONDUCT R. 3.6 (1997) provides:
    \begin{quote}
      A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.
    \end{quote}
  \item \textsuperscript{149} See generally Edward A. Carr & Allan Van Fleet, Professional Responsibility Law in
prosecutors from disclosing grand jury information.

Despite these rules and regulations, either Starr or an attorney in his prosecution team divulged grand jury information to the press. Not only did this conduct expose Starr to criticism, but it served as the basis for the appointment of a "special master" to review his apparent failure to abide by Justice Department regulations during these investigations. Starr's critics accused him of leaking information deliberately to harm President Clinton, while Starr defended his actions as necessary to keep the public informed and to clarify misperceptions and false information.

Federal and state prosecutors also leak grand jury information to the

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149. U.S. DEP'T OF JUSTICE, DEP'T OF JUSTICE MANUAL § 1-7.530(A) (1996) (prohibiting prosecutors and other Justice Department officials from commenting on ongoing investigations). However, there are exceptions to this regulation, and it, like other Justice Department regulations, is unenforceable in law and only serves as an internal guideline. See Daniel C. Richman, Grand Jury Secrecy: Plugging the Leaks in an Empty Bucket, 36 AM. CRIM. L. REV. 339, 349 (1999) (arguing that while there does not seem to be a problem with "leaks" in ordinary cases, leaks are far more common and remedies for identifying and stopping them are rarely, if ever, effective in high profile cases).

150. See Richman, supra note 149, at 339 (describing Starr's interview with Steven Brill, in which Starr acknowledged that he and his deputy regularly gave "background" interviews to news reporters). See generally Roma W. Theus II, "Leaks" in Federal Grand Jury Proceedings, 10 ST. THOMAS L. REV. 551 (1998) (discussing the negative and positive features of federal grand jury "leaks").

151. See Richard Ben-veniste, Comparisons Can Be Odious, Mr. Starr, NAT'L L.J., Dec. 21, 1998, at A21 ("[T]he aggressive and disproportionate tactics employed by Mr. Starr's office, often in violation of Department of Justice guidelines and bar association standards of professional responsibility, have left the public with the justifiable perception that Mr. Starr is conducting a crusade rather than an investigation . . ."). But see Richman, supra note 149, at 340 (citing sources that defended Starr's behavior).


153. See Naftali Bendavid, Leaks, Rumors Dullt Retdations' Impact, CHL. TRIB., Sept. 27, 1998, at 1 (detailing the most notable leaks allegedly made by Starr); see also Howard Kurtz, Maryland Affidavit Suggests Role of Starr Staff in Tape Leak, WASH. POST, Dec. 15, 1999, at A08 (stating Starr may have organized a leak of a taped conversation between Linda Tripp and Monica Lewinsky); Roberto Suro, Judge Cites 24 Stories in Ordering Leak Prot, WASH. POST, Oct. 31, 1998, at A6 (stating Judge Norma Holloway Johnson linked twenty-four leaks of Monica Lewinsky's grand jury testimony to Starr's office).

press, most frequently in high profile cases. High profile cases, however, do not always involve a celebrity defendant or victim. Cases often become high profile because of the nature of the offense or some other newsworthy aspect of the case. Ordinary citizens may find themselves involved in a highly publicized grand jury investigation as a target, victim, or witness. A prosecutor's decision to leak information to the press can cause considerable—and often irreparable—harm.

Media coverage of the Starr investigation included a vigilant watch at the door of the U.S. courthouse to discover whom the Independent Counsel had subpoenaed to the grand jury. Witness press conferences on the steps of the courthouse after grand jury appearances were commonplace. One of the most covered grand jury witnesses was Marcia Lewis, Monica Lewinsky's mother. Few will forget the sight of Mrs. Lewis, in tears and apparently physically and emotionally debilitated, being escorted from the courthouse by her lawyer. The image drew criticism of Starr's decision to subpoena Mrs. Lewis. In fact, the public seemed shocked and appalled by the idea of a mother being forced to testify against her own daughter. Some were

155. See Alan M. Dershowitz, SEXUAL MCCARTHYISM 172 (1998):

Whether Starr's leaks did or did not violate federal law, what he and his office did is standard operating procedure for prosecutors—both federal and state—around the country. Every day, federal prosecutors—many appointed by President Clinton—leak negative information about ongoing investigations. They do so for a variety of reasons: self-aggrandizement; to put pressure on potential witnesses and defendants; to curry favor with the media; to attempt to influence the jury pool; to generate favorable public opinion for their office. They always justify what they are doing by claiming that there are "legitimate" law enforcement purposes behind their leaks.

Id.; see also Theus, supra note 150, at 552.


Grand jury leaks are a pervasive problem that can cause damage to the reputation of an individual who even the prosecutor later determines is not properly the subject of criminal charges. In other cases, such leaks by law enforcement can cause prosecutors whose investigations have become public to pursue criminal charges in a controversial matter when they might otherwise use their discretion to decline charges.

Id.


inspired to accuse Starr of abusing his power.\(^{159}\)

ii. Abuse of the Subpoena Power

Starr was widely criticized for subpoenaing Monica Lewinsky's mother. However, this practice occurs as a routine matter in ordinary cases. Federal and state prosecutors frequently subpoena mothers and other family members of criminal defendants to testify before the grand jury. The practice is so common in the District of Columbia that attorneys at the Public Defender Service for the District of Columbia ("PDS") routinely advise clients and their families about the practice. Mothers, siblings, and other family members who live with the accused are often subpoenaed to the grand jury, even if they are not witnesses to the alleged offense. The practice offers prosecutors the opportunity to discover whether the accused made any statements about the offense that might be used against him at trial.\(^{160}\) PDS lawyers caution clients against talking about their cases to anyone other than counsel and advise them that communications with family members, other than spouses, are not privileged.\(^{161}\)

Often family members and friends are surprised and frightened when they are subpoenaed, especially when they did not witness any aspect of the alleged offense. When an individual comes to testify before the grand jury, prosecutors bring her into their offices before she appears before the grand jurors. This exercise presumably prepares the individual for the grand jury experience. The office visits present yet another opportunity to question family members about the accused, her friends and associates, statements she may have made, and any other information that they choose to pursue. If the "office visit" produces information helpful to his case—as Starr apparently believed it did during Marcia Lewis's visit—the prosecutor sends the "witness" to testify before the grand jury. If the information proves useless or if the potential witness weakens the prosecutor's case, the prosecutor may excuse the friend or family member from the grand jury appearance.

Using the grand jury subpoena power to obtain discovery or gather evidence for trial amounts to misconduct.\(^{162}\) The subpoena power exists

\(^{159}\) See Editorial, Calling Mother to Testify an Invasion of Privacy, PORTLAND OREGONIAN, Feb. 25, 1998, at E11 (describing matter as a disgusting invasion of privacy between parent and child); Editorial, Pushing the Envelope: Starr's Zeal May Undercut His Public Support, NEWSDAY, Feb. 15, 1998, at B1 (criticizing Starr's decision to subpoena Marcia Lewis to the grand jury).

\(^{160}\) See FED. R. EVID. 801(d)(2) (establishing that a statement of a party-opponent is not hearsay).

\(^{161}\) FED. R. EVID. 501 (advisory committee notes).

solely for the purpose of bringing witnesses or documents to a court or other judicial proceeding. The prosecutor maintains subpoena power in the grand jury only to gather evidence to determine whether a crime has been committed for which an indictment should be issued. Of course, it is appropriate for a prosecutor to subpoena a family member who is known to have information relevant to the grand jury investigation. A prosecutor who issues a subpoena to compel a witness to come to her office for a "fishing expedition" with no intention of eliciting her testimony before the grand jury, however, acts illegally and unethically.

In addition to Starr's cruel tactic of subpoenaing Marcia Lewis, he allegedly misused the subpoena power by calling her to testify repeatedly before the grand jury. This, too, is a common prosecutorial practice. A witness may be called back to the same grand jury repeatedly for a number of legitimate reasons. For example, the testimony may be lengthy, questioning may lead from one subject to another relevant subject, or an uncooperative witness may legitimately change his mind. At the same time, this strategy has the potential for abuse. Successive subpoenas could serve as pressure tactics to compel a witness to "cooperate" with the prosecutor. Such harassment, while difficult to establish, exists.

iii. Judicial Review of Grand Jury Abuse

Courts have been as unsympathetic to claims of prosecutorial misconduct in the grand jury as they have been elsewhere. They have protected prosecutors from liability in cases involving grand jury leaks, even when prosecutors have released false, misleading, or harmful information.

163. Fed. R. Crim. P. 17(a), (c).
165. See 3 U.S. Dep't of Justice, United States Attorneys' Manual § 9-23.211 (2d ed. 2000) (justifying such inquiry only where there are "overriding prosecutorial concerns"); Gerald E. Lynch, Panel Discussion: The Expanding Prosecutorial Role from Trial Counsel to Investigator and Administrator, 26 Fordham Urb. L.J. 679, 684 (1999) (suggesting that some prosecutors would not subpoena a mother to the grand jury to testify against a child, even though they may do so legally).
167. See Lynch, supra note 165, at 684 (citing In re Pantojas, 639 F.2d 822, 824 (1st Cir. 1980)).
168. See Reiss, supra note 162, at 1460 (citing 3 LaFave et al., supra note 59, § 8.8(f)).
169. See generally Aversa v. United States, 99 F.3d 1200 (1st Cir. 1996) (upholding qualified immunity of prosecutor who made misleading and unprofessional statements to the press about grand jury target).
Furthermore, the Supreme Court has curtailed severely the supervisory role of the federal courts in providing remedies for other prosecutorial abuses in the grand jury.170

A few examples illustrate this point. In United States v. Mechanik,171 the Supreme Court held that a violation of Federal Rule of Criminal Procedure 6(d), prohibiting unauthorized persons from being present in the jury room during grand jury proceedings,172 did not warrant dismissal of an indictment because a guilty verdict after trial rendered the error harmless.173 Similarly, in Bank of Nova Scotia v. United States,174 the Supreme Court affirmed the Tenth Circuit’s reinstatement of an indictment despite numerous grand jury violations by the prosecution, including disclosing grand jury information, knowingly presenting misinformation to the grand jury, and mistreating witnesses.175 Due to the grand jury violations, the lower court dismissed the indictment before trial. Unfortunately, the Supreme Court held that the relevant inquiry should have addressed whether the abuse substantially influenced the grand jury’s decision to indict.176 Applying that test, the Court held that the abuses in the case had not affected the grand jury’s decision to indict.177

In Midland Asphalt Corp. v. United States,178 the Supreme Court rejected pretrial appellate review of grand jury abuse. The district court denied the defendant’s motion to dismiss the indictment based on alleged disclosure of grand jury information. The defendant immediately appealed this decision, and the U.S. Court of Appeals for the Second Circuit granted the government’s motion to dismiss the appeal. The Supreme Court affirmed the dismissal, holding that the district court’s decision was not reviewable until after “conviction and imposition of sentence.”179 In Mechanik, Bank of Nova Scotia and Midland Asphalt Corp., the Supreme Court foreclosed significant judicial review of the grand jury’s function as a shield against improper indictment.180

By its very nature, grand jury abuse is difficult to discover. Courts rarely punish such abuse, even when it is discovered. These same issues surface in the examination of another common form of prosecutorial misconduct—

170. For a thorough discussion of this issue and the Supreme Court’s jurisprudence on grand jury abuse, see Poulin, supra note 145, at 888-96.
172. FED. R. CRIM. P. 6(d).
173. Mechanik, 475 U.S. at 72-73.
175. Id. at 253.
176. Id. at 256.
177. Id. at 259-60.
179. Id. at 798.
180. Poulin, supra note 145, at 890.
b. Withholding Exculpatory Evidence: Brady Violations

Kenneth Starr omitted a significant amount of exculpatory evidence from the five-volume, 7793-page report that he submitted to Congress. Starr's report "summarized" the results of his investigation of President Clinton,\(^{181}\) and drew criticism for numerous reasons, including its advocacy for the impeachment of the President.\(^{182}\) Those who criticized the report believed that Starr had a responsibility to investigate and present a balanced summary of the facts.\(^{183}\) A balanced report would have included all the information—favorable and unfavorable—discovered during the investigation.

The obligation of a prosecutor to reveal favorable, exculpatory information about a criminal defendant is not only fair; it is a constitutional requirement.\(^{184}\) In *Brady v. Maryland,*\(^{185}\) the Supreme Court held that a prosecutor's failure to disclose evidence favorable to the defendant violated due process rights when the defendant had requested such information. The Court expanded the rule in *United States v. Agurs,*\(^{186}\) requiring prosecutors to turn over exculpatory information to the defense even in the absence of a request. Professional ethical and disciplinary rules in each state...
and the District of Columbia reiterate and reinforce this duty.\textsuperscript{187} The obligation to reveal \textit{Brady} information is ongoing\textsuperscript{188} and is not excused even if the prosecutor acts in good faith.\textsuperscript{189}

\textit{Brady} violations are among the most common forms of prosecutorial misconduct.\textsuperscript{190} Because the obligation is expansive, continuing, and not limited by the good faith efforts of the prosecutor, great potential for wrongdoing exists. The failure to provide \textit{Brady} information can have dire consequences. In capital cases, \textit{Brady} violations have resulted in the execution of arguably innocent persons.\textsuperscript{191} At the very least, withholding \textit{Brady} information can determine the outcome of a trial.

Ken Armstrong and Maurice Possley, staff writers with the \textit{Chicago Tribune}, conducted a national study of 11,000 cases involving prosecutorial misconduct between the \textit{Brady} decision in 1963 and 1999.\textsuperscript{192} The study revealed widespread, almost routine, violations of the \textit{Brady} doctrine by prosecutors across the country. They discovered that since 1963, courts dismissed homicide convictions against at least 381 defendants because prosecutors either concealed exculpatory information or presented false evidence.\textsuperscript{193} Of the 381 defendants, sixty-seven had been sentenced to death.\textsuperscript{194} Courts eventually freed nearly thirty of these sixty-seven death row

\textsuperscript{187.} But see Rosen, supra note 95, at 730 (arguing that despite widespread \textit{Brady} violations, disciplinary charges and sanctions against prosecutors are rarely brought).

\textsuperscript{188.} See Ghita Harris & Erin Rosenberg, Twenty-Seventh Annual Review of Criminal Procedure, Preliminary Proceedings, Discovery, 86 GEO. L.J. 1461, 1461-62 (1998) (stating that courts have fashioned rules providing for the disclosure of certain types of evidence when necessary to safeguard a defendant's due process rights).

\textsuperscript{189.} Id. at 1466 (citing \textit{Brady v. Maryland}, 373 U.S. 83, 87 (1963)).

\textsuperscript{190.} See Joseph R. Weeks, \textit{No Wrong Without a Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence}, 22 OKLA. CITY U. L. REV. 833, 869 (1997) ("For every one of these cases, we have every reason to suspect that there are many more in which the prosecutor's refusal to disclose the exculpatory evidence was never discovered by the defendant or his attorney."); see also Barbara A. Babcock, \textit{Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel}, 34 STAN. L. REV. 1133, 1142-46 (1982) (explaining \textit{Brady}'s potential for changing the adversary system); Peter J. Henning, \textit{Prosecutorial Misconduct and Constitutional Remedies}, 77 WASH. U. L.Q. 713, 759-71 (1999) (discussing \textit{Brady} violations).

\textsuperscript{191.} \textit{See Brady}, 373 U.S. at 84 (explaining that statements which exculpated Brady from the murder were withheld by the prosecution and did not come to petitioner's notice until after he had been tried, convicted, and sentenced to death, and after his conviction had been affirmed); see generally Hugo Adam Bedau & Michael L. Radelet, \textit{Miscarriages of Justice in Potential Capital Cases}, 40 STAN. L. REV. 21, 56 (1987) (noting hundreds of capital cases, many of which involved the prosecutor suppressing exculpatory evidence, where the defendant was subsequently shown to have been innocent of the offense of which he was convicted); Weeks, supra note 190, at 845-70 (documenting a number of cases in Oklahoma and other jurisdictions where prosecutors withheld exculpatory evidence).

\textsuperscript{192.} Ken Armstrong & Maurice Possley, \textit{The Verdict: Dishonor}, CHI. TRIB., Jan. 10, 1999, at A1 (detailing the authors' method of selecting and reviewing cases).

\textsuperscript{193.} Id.

\textsuperscript{194.} Id.
inmates, including two defendants who were exonerated by DNA tests.\textsuperscript{193} One innocent defendant served twenty-six years before his conviction was reversed.\textsuperscript{196} Armstrong and Possley suggest that this number represents only a fraction of how often such misconduct occurs because the study only considered cases where one individual was convicted of killing another. They also reported that the prosecutors who engaged in the reported misconduct were neither convicted of a crime nor barred from practicing law.\textsuperscript{197}

Another study by Bill Moushey of the \textit{Pittsburgh Post-Gazette} found similar results. In his examination of over 1500 cases\textsuperscript{198} throughout the nation, Moushey discovered that "prosecutors routinely withhold evidence that might help prove a defendant innocent."\textsuperscript{199} He found that prosecutors intentionally withheld evidence in hundreds of cases during the past decade, but that courts overturned verdicts in only the most extreme cases.\textsuperscript{200}

Few defense attorneys have the time, resources, or expertise to conduct massive investigations of prosecution offices. Nor should the discovery of prosecutorial misconduct depend on investigative reporting. Yet \textit{Brady} violations, like most other forms of illegal prosecution behavior, are difficult to discover and remedy. The last form of illegal misconduct—abuse of the charging power—is not an exception to this rule.

c. \textit{Abuse of the Charging Power}

Kenneth Starr faced some of his most intense criticism when he investigated and prosecuted individuals who failed to corroborate allegations against President Clinton. Susan McDougal served an eighteen-month sentence for civil contempt when she refused to testify about criminal wrongdoing by President Clinton.\textsuperscript{201} Webster Hubbell, the former

\begin{itemize}
  \item 195. \textit{Id.}
  \item 196. \textit{Id.}
  \item 197. Armstrong & Possley, supra note 192, at A1.
  \item 200. \textit{Id.}
  \item 201. See Michael Haddigan, Lawyer Says McDougal Feared Being 'Pawn' Against Clinton, \textit{WASH. POST}, Mar. 11, 1999, at A11. Susan McDougal was imprisoned for refusing to answer questions about President Clinton. \textit{Id.} Starr sought her testimony even after she explained that she did not know about any criminal activities of President Clinton. McDougal also claimed that her husband was "an inveterate liar" willing to do anything in exchange for Starr's leniency. See Harvey A. Silvergate & Andrew Good, Starr Teachers, \textit{REASON}, May 1, 1999, at 2633. After going to prison for civil contempt, she still refused to cooperate with Starr. Haddigan, supra, at A11. Starr then prosecuted McDougal for criminal contempt and related charges. \textit{Id.} She was acquitted of obstruction of justice, and the jury failed to reach a verdict on the remaining charges. Paul Duggan, Jury Acquits McDougal of Obstruction, \textit{WASH. POST}, Apr. 13, 1999, at A1. Starr decided not to retry the case. Jerry Seper, Starr Decides Not to Retry Two Women: Steele Jury
Associate Attorney General for President Clinton, also denied knowledge of criminal conduct by the President and was subsequently prosecuted, along with his wife, for tax-related crimes. The case against the Hubbells triggered charges of prosecutorial vindictiveness. Perhaps the starkest example of prosecutorial vindictiveness lies in the prosecution of Julie Hiatt Steele. Ms. Steele had no connections to the Whitewater matter. Starr charged her with obstruction of justice and making false statements to a federal agent when she failed to support allegations of sexual misconduct by President Clinton.

Starr's prosecutions of Susan McDougal, Webster Hubbell, and Julie Hiatt Steele illustrate the potential abuse of the charging power by federal and state prosecutors. Prosecutors frequently wield the big stick of indictment over the heads of potential witnesses if they refuse to "cooperate" in the prosecution of another individual. "Cooperation" appears to be a


202. Mr. Hubbell served twenty-one months in prison after pleading guilty to tax charges stemming from the overbilling of clients at the Rose Law Firm in Little Rock. As part of a plea agreement, Mr. Hubbell agreed to cooperate with the Independent Counsel in his investigation of President Clinton. When Mr. Hubbell's cooperation did not consist of corroboration of wrongdoing by President and Mrs. Clinton, he was repeatedly pressured and eventually prosecuted for additional offenses. Roberto Suro & Bill Miller, Hubbell to Plead Guilty as Starr Wafts Up, WASH. POST, June 29, 1999, at A1. Starr eventually offered Hubbell a plea bargain allowing him to avoid serving additional time in prison. He pled guilty to one felony count of lying to banking regulators about his firm's work for the savings and loan at the center of the Whitewater investigation and one misdemeanor count of income-tax evasion. Jerry Seper, Starr Explains Hubbell Decision Finding Fair Jury Complicated Case, WASH. TIMES, July 1, 1999, at A1. Additionally, the Independent Counsel agreed to refrain from further criminally prosecuting or investigating Hubbell, and Starr also dropped tax charges against Hubbell's wife Suzanna and his two advisers. Id.

203. Julie Hiatt Steele was charged with obstruction of justice when prosecutors accused her of lying to them about President Clinton allegedly groping a woman named Kathleen Willey. Steele claimed Willey asked her to lie about the incident and that prosecutors told her she could avoid criminal charges if she changed her story. Florence Graves, Starr and Willey: The Untold Story, NATION, May 17, 1999, available at 1999 WL 9307055. A mistrial was declared after the jury failed to reach a verdict after eight hours of deliberation. If convicted, Steele could have faced up to thirty-five years in prison. Seper, supra note 201, at A4.

204. See Gordon, supra note 17, at 643 (citing RICHARD A. POSNER, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON 88-89 (1999)).

Prosecution task forces sweep down into the lives of targets and incidental witnesses, pore over their credit and bank records and their phone bills, interrogate their friends and neighbors and parents and children, peer into their sex lives, reading habits and intimate associations, cultivate informants and plant undercover agents in their clubs and workplaces—often looking less for actual evidence than for leverage to extort information or testimony.
euphemism for supporting the government’s theory of a case and assisting
in the prosecution of its target. Like McDougal, Hubbell, and Steele,
witnesses who insist on presenting a different view of the facts may face
prosecution for obstruction of justice, criminal contempt, or some totally
unrelated offense that the prosecutor otherwise never would have brought. 205

This practice occurred regularly in the District of Columbia between
1982 and 1994, and is illustrated by a case involving a juvenile named
Brian. 206 The government charged Brian, a fifteen-year-old boy, with assault
with intent to kill, burglary, and related charges in juvenile court. The case
involved the severe beating of an older man during the course of a burglary.
The government also charged two adult men with this offense. As a juvenile,
Brian faced a maximum punishment of two years in the juvenile correctional
facility upon conviction. 207 The court rules also protected his anonymity 208
and offered the possibility of rehabilitative treatment. 209

At the request of the prosecutor handling the case against the adult co-
defendants, Brian’s attorney in the juvenile case arranged an off-the-record
conversation between Brian and the prosecutor. The prosecutor hoped to
secure Brian’s cooperation in the prosecution of the adult men in exchange
for lenient treatment, including possible dismissal of Brian’s case. During
the meeting, the prosecutor questioned Brian about the events surrounding
the assault and burglary. Brian’s attorney and mother were present during
the meeting. Brian denied that either he or the adult codefendants had
participated in the crimes. The prosecutor expressed his displeasure with
Brian’s denials and pressured him to testify that the adults were involved.
When Brian refused to submit to pressure, the prosecutor threatened to
charge Brian as an adult if he refused to testify against the codefendants.
The prosecutor explained that if Brian were convicted in adult court, he
could receive a life sentence in an adult prison. Brian maintained that he
knew nothing about the offenses.

The prosecutor made good on his threats. The government moved to
dismiss his juvenile case and initiated charges against him as an adult. 210 In

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205. See Michael B. Rappaport, Replacing Independent Counsels with Congressional Investigations, 148 U. Pa. L. Rev. 1595, 1629 (2000) ("Criminal prosecutors ... would be able to secure more cooperation because they have both the stick threatening to prosecute someone who does not cooperate as well as the carrot of providing immunity to someone who does.").

206. The author was a public defender in the District of Columbia during these years and represented the client in this case. The client’s name used in this Article is fictitious.


adult criminal court, Brian's attorney filed a motion to dismiss the indictment for prosecutorial vindictiveness. Brian's mother testified about the prosecutor's behavior at a hearing on the motion. The prosecutor did not present evidence at the hearing and attempted to make representations to refute the allegations from counsel table "as an officer of the court." The prosecutor appeared stunned when the judge refused to accept these representations and insisted on receiving sworn testimony from the prosecutor or other witnesses. When the prosecutor did not present such testimony, the judge granted the motion to dismiss the indictment for prosecutorial vindictiveness.

Courts rarely are as generous to defendants as the judge in Brian's case. Allegations of abuse of the charging power are much less unusual. Because prosecutors make charging decisions in private and have no obligation to provide any rationale for such decisions, defendants rarely have an opportunity to challenge them. When defense attorneys hear stories of prosecutors threatening to charge "uncooperative" witnesses, they lack standing to challenge the behavior because they do not represent the threatened witnesses and no legal relief is available for the potential harm to their clients. Brian's case presented an unusual opportunity to expose and address abuse of the charging power.

The Supreme Court has held that, under certain circumstances, prosecutorial vindictiveness is a violation of the Due Process Clause of the Fourteenth Amendment. Blackledge v. Perry involved a prisoner who was charged and convicted in state district court of a misdemeanor assault with a deadly weapon. In this case, he exercised his right to appeal and to trial de novo in the superior court. In response, the prosecutor sought an indictment for the felony offense of assault with a deadly weapon with intent to kill and inflict serious bodily injury, based on the same conduct. The Supreme Court held that when a prosecutor brings more serious charges after the completion of a trial, the state can overcome the presumption of vindictiveness only if it can show that it was impossible to proceed on the greater charge at the outset.

Eight years later, the Court limited the Blackledge holding to cases in

[T]he Corporation Counsel may file a motion, supported by a statement of facts, requesting transfer of the child for criminal prosecution, if: (1) the child was fifteen or more years of age at the time of the conduct charged, and is alleged to have committed an act which would constitute a felony if committed by an adult.

Id.

211. See Davis, supra note 12, at 13-16, for other examples of abuse of the charging power.

212. If the defense attorney has evidence that a witness has been coerced, the usual method for challenging such behavior is through cross-examination of the witness at the client's trial in an attempt to damage the witness's credibility and undermine his testimony.


214. Id. at 29 n.7.
which the defendant already has exercised his right to a jury trial. In *United States v. Goodwin*, the prosecutor brought more serious charges based on the same behavior after the defendant indicated his intent to proceed with a jury trial. The Court declined to uphold the presumption of vindictiveness in a pretrial setting, stating that prosecutors may uncover additional information justifying felony charges at that stage of the proceedings.

Selective prosecution—where the prosecutor singles out individuals for prosecution in violation of the Equal Protection Clause—raises similar concerns. The Supreme Court has addressed claims of selective prosecution against ordinary prosecutors, but, as with other forms of prosecutorial misconduct, the decisions have not addressed the practice effectively. The Court has set such an exacting standard of proof that it serves to discourage such claims. In *Oyler v. Boles*, the Supreme Court held that selective prosecution violates the Constitution only if race, religion, or some other arbitrary classification motivates the prosecution. The Court made these challenges more difficult in *Wayte v. United States*. Mr. Wayte alleged that the prosecutor had prosecuted him because he had written letters to the President and other government officials informing them of his refusal to register for the draft. In rejecting Wayte’s claim of selective prosecution, the Court indicated that a defendant had the burden of proving both discriminatory impact and discriminatory intent. Finally, in *United States v. Armstrong*, the Court held that to obtain discovery in cases involving alleged race-based selective prosecution, a defendant must produce credible evidence that the government could have prosecuted similarly situated defendants of other races, but did not.

In *Wayte* and *Armstrong*, the Court consistently and clearly affirmed an expansive charging power and hesitated to exercise any meaningful judicial review of prosecutorial power:

> We explained in *Wayte* why courts are “properly hesitant to examine the decision whether to prosecute.” 470 U.S., at 608. Judicial deference to the decisions of these executive officers rests

216. Id. at 381.
219. Id. at 456.
221. The Court relied on its earlier ruling in *Washington v. Davis* that established the requirement that plaintiffs show discriminatory purpose independent of disproportionate impact to prove a violation of the Equal Protection Clause. *Id.* at 608-09 (citing *Washington v. Davis*, 426 U.S. 229 (1976)).
223. Id. at 468-70.
in part on an assessment of the relative competence of prosecutors and courts. "Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake." Id., at 607. It also stems from a concern not to unnecessarily impair the performance of a core executive constitutional function. "Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy." 224

The Court, just as unequivocally, discouraged legal challenges to the charging power:

Our cases delineating the necessary elements to prove a claim of selective prosecution have taken great pains to explain that the standard is a demanding one. These cases afford a "background presumption," cf. United States v. Mezzanatto, 513 U.S. 196, 203 (1995), that the showing necessary to obtain discovery should itself be a significant barrier to the litigation of insubstantial claims. 225

The Court similarly defended prosecutorial discretion in *McCleskey v. Kemp*, 226 a case decided almost ten years before *Armstrong*. 227 *McCleskey* contains even more sweeping language on the virtues of prosecutorial discretion, 228 offering little by way of rationale or analysis.

The Supreme Court's explanation for hesitating to review charging decisions and other prosecutorial functions seems questionable given its willingness to exercise judicial review in a wide variety of cases, none of which necessarily lends itself to "the kind of analysis the courts are competent to undertake." 229 For example, the Court has exercised its power of judicial review of legislative decisions in cases challenging the constitutionality of a wide variety of statutes. 229

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224. Id. at 465 (citing Wayte, 470 U.S. at 598).
225. Id. at 463-64.
227. Id. In *McCleskey*, the Court upheld the constitutionality of Georgia's death penalty system, despite evidence that it was administered in a racially discriminatory manner. Id. at 319.
228. See id. at 311-12 ("Similarly, the capacity of prosecutorial discretion to provide individualized justice is 'firmly entrenched in American law.'") (citing 2 LAFAVE & ISRAEL, supra note 56, § 13.2(a) (1984)).
229. Wayte, 470 U.S. at 607.
The Court’s willingness to review legislative decisions makes its reluctance to assess prosecutorial functions all the more troubling. Legislatures operate in public space. The public has access to the legislative process with the opportunity to critique and comment on the work of its representatives. Arguably, such public exposure makes judicial review less necessary in this forum as a means of holding the legislature accountable. On the other hand, no such open access is available to hold prosecutors accountable. Some of the most important prosecutorial functions—charging and plea bargaining decisions—are made in private. In light of this fact, the Court’s “hands-off” approach is counterintuitive.

Kenneth Starr’s investigation of President Clinton educated the public about the vast discretion and power of the American prosecutor. The public’s negative response to Starr’s legal and illegal practices leads to several conclusions. First, the public’s apparent shock upon learning of these practices suggests that many individuals are unaware of the fact that ordinary federal and state prosecutors routinely practice the same tactics. Second, public disapproval of these tactics in the context of the Clinton investigation suggests at least the possibility of similar disapproval in the cases involving ordinary individuals. Third, in the absence of a high profile case that attracts media scrutiny, the public rarely learns of these questionable tactics. Judicial review of prosecutorial misconduct is limited and ineffective. The following Part will demonstrate the ineffectiveness of other mechanisms that purport to hold prosecutors accountable to the public they serve.

II. INDEPENDENCE AND ACCOUNTABILITY

The breadth of prosecutorial discretion and the prevalence of prosecutorial misconduct demonstrate the importance of effective mechanisms of accountability. Like the Independent Counsel, however, regular prosecutors require a certain level of independence to make their decisions without inappropriate and extraneous political pressures. These conflicting goals—accountability and independence—create a difficult tension.231 So far, independence has prevailed overwhelmingly. Existing

mechanisms that purport to hold prosecutors accountable do not work. This Part discusses the ineffectiveness of each of these mechanisms—the electoral process, budgetary restrictions, and time and jurisdictional limitations.

A. THE FAILURE OF THE ELECTORAL PROCESS

Lack of accountability is Justice Scalia’s strongest criticism of the Independent Counsel in his dissent in *Morrison v. Olsen.* Justice Scalia discusses the tremendous discretion of federal prosecutors at great length, noting that the Ethics in Government Act grants the same vast discretion to the Independent Counsel. Scalia apparently finds no fault with the grant of discretion to either federal prosecutors or the Independent Counsel. He distinguishes the two entities, however, by arguing that prosecutors remain accountable to the people while independent counsels do not:

Under our system of government, the primary check against prosecutorial abuse is a political one. The prosecutors who exercise this awesome discretion are selected and can be removed by a President, whom the people have trusted enough to elect. Moreover, when crimes are not investigated and prosecuted fairly, nonselectively, with a reasonable sense of proportion, the President pays the cost in political damage to his administration. If federal prosecutors “pick people that [they] thin[k] [they] should get, rather than cases that need to be prosecuted,” if they amass many more resources against a particular prominent individual, or against a particular class of political protesters, or against members of a particular political party, than the gravity of the alleged offenses or the record of successful prosecutions seems to warrant, the unfairness will come home to roost in the Oval Office.

Justice Scalia suggests that this political form of accountability has worked in the past, but offers no examples, “leav[ing] it to the reader to recall the examples of this in recent years.”

Justice Scalia’s attempt to distinguish federal prosecutors on the issue of accountability fails in theory and practice. First, he assumes that the average voter is aware of the behavior of an abusive federal prosecutor. Unless a case involves a high profile defendant or otherwise captures the attention of the press, the people have no way of monitoring a prosecutor’s conduct. The most important decisions, with the greatest potential for abuse, are the charging, plea bargaining, and dismissal powers. Prosecutors make all these

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Contribution to the Impeachment Spectacle, 68 FORDHAM L. REV. 897, 902-03 (1999) (discussing the tension between independence and accountability for prosecutors).


233. See supra note 50 and accompanying text (quoting Justice Scalia’s dissent).


235. *Id.* at 729.
decisions away from public view. As the Supreme Court stated, "[a] prosecution contains a myriad of occasions for the exercise of discretion, each of which goes to shape the record in a case, but few of which are part of the record." If a prosecutor consistently abused these powers in cases involving ordinary citizens, the public would have no way of knowing. In high profile cases, the resourcefulness of the press in obtaining the information or the willingness of the prosecutor to reveal her actions often limits what the public learns.

Second, Justice Scalia assumes that voting power will enable the public to voice dissatisfaction with a federal prosecutor. Justice Scalia suggests that if the people are dissatisfied with a federal prosecutor, they will (a) know that the prosecutor was appointed by the President, (b) vote the President out of office, and (c) thereby effectively hold the prosecutor accountable. Even if such direct links could be drawn, it is unlikely that the voting public would oust a popular President because of the actions of a single federal prosecutor. Of course, in the case of a second-term President, the theoretical possibility of this form of accountability does not exist.

Finally, Justice Scalia does not make clear about whom he speaks when he refers to "the people." The President of the United States may only be voted out of office in a national election. Presumably the actions of a single federal prosecutor would affect the constituents in her district, but would not likely garner the attention of the entire nation.

The prosecution of Marion Barry, former Mayor of Washington, D.C., offers an illustration in a particularly stark context. The mayor had long labored under a cloud of suspicion about drug use and philandering. Jay Stephens, the U.S. Attorney for the District of Columbia, worked with federal law enforcement agents to investigate the mayor's behavior. The investigation ultimately resulted in a sting operation in which a woman serving as a government agent lured Barry to a hotel room on the promise of sexual favors. Law enforcement officials videotaped him smoking crack

236. See Davis, supra note 12, at 18 n.15 (explaining that these prosecutorial decisions give the prosecutors more power than any other official in the criminal system).
238. At least one scholar argues that a prosecutor has an obligation to communicate regularly with her constituents through the press. See Scott M. Matheson, Jr., The Prosecutor, the Press, and Free Speech, 58 FORDHAM L. REV. 865, 888 (1990) ("Prosecutors are publicly accountable; their accountability is measured in part through public information about the prosecutor’s office, and about particular cases. Indeed, it is generally accepted that elected prosecutors have an obligation to inform the community about the functioning of their offices.") (citing David H. Hugel, Improving Prosecutor-Media Relations: The Key to Effectively Communicating Your Message to the Public, 20 PROSECUTOR, Summer 1986, at 37, 41).
239. U.S. Presidents may not serve more than two terms. U.S. CONST. amend. XXII, § 1.
cocaine and arrested him on the spot. Television stations broadcast the videotape nationwide and Stephens relied on it as a key piece of evidence in Barry's prosecution for drug possession and related offenses.

Jay Stephens received wide criticism for his prosecution of Mayor Barry. Barry's popularity, especially among the poor and working class residents of the District of Columbia, did not diminish even after his drug usage came to light. The public expressed the view that the prosecution constituted little more than a political vendetta by a Republican prosecutor against a liberal mayor. Attorney General Richard Thornburgh took no steps to stop or control the prosecution, nor did Stephens suffer any reprisals, despite the widespread public outcry over the prosecution. As an appointed official, the electorate of the District of Columbia could not vote Stephens out of office.

Justice Scalia suggested that if a federal prosecutor "amasses many more resources against a particular prominent individual... than the gravity of the alleged offenses... seems to warrant, the unfairness will come home to roost in the Oval Office." This did not hold true in Mayor Barry's prosecution. George H.W. Bush was the president during Barry's prosecution. Bush did lose his re-election bid, but no one attributed his 1992 defeat to the prosecution of Marion Barry. The failure of President Bush and Attorney General Thornburgh to take any action against Jay Stephens suggests that concern about Bush's possible defeat did not serve as a sufficient check on Stephens's behavior.

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242. Barry was charged with fourteen counts of drug possession, conspiracy, and lying about drug activity to a grand jury. After a two-month trial, a federal jury convicted Barry of one count of cocaine possession, acquitted him of another count of possession and deadlocked on the remaining twelve drug and perjury counts. Mike Folsk & Matt Neufeld, Mistrial; Jurors Falter on 12 of 14 Counts, WASH. TIMES, Aug. 11, 1990, at A1, available at LEXIS, News Library.


244. D.C. CODE ANN. § 23-101 (1998). The District of Columbia is unique in its status as a city that is not part of any state government and has no local or state prosecutor. Thus, the U.S. Attorney for the District of Columbia prosecutes local and federal crimes. Had the case been prosecuted by a locally elected prosecutor, there may have been more responsiveness to the public disapproval.


247. One can only speculate about whether the outcome would have been different with an
Viewed from the opposite angle, how would an abusive federal prosecutor be held in check by the knowledge that the President of the United States might be removed from office as a result of her actions? The appointment process alone makes it difficult to conceive how the knowledge of this possibility would deter abusive or inappropriate prosecutorial behavior. The President appoints the Attorney General who oversees the Justice Department and a U.S. Attorney for each of the federal judicial districts. Each U.S. Attorney hires assistant U.S. attorneys for her office, and the Attorney General may appoint additional assistant U.S. attorneys. All U.S. attorneys serve at the pleasure of the sitting President and may face removal if a new President is elected, regardless of their conduct and record as federal prosecutors. The President also retains the power to remove a particular federal prosecutor during his term as President, but would probably do so only in the unlikely possibility that the people become aware of prosecutorial abuses and demand her dismissal.

The selection process for federal prosecutors provides stronger, though not entirely persuasive support for Justice Scalia’s position. Arguably, this process provides at least a theoretical measure of accountability. After the President nominates the Attorney General and the U.S. Attorney for each district, the Senate must confirm the appointments. Members of the public certainly have the right to provide input and comment during the confirmation process by communicating with their senators. If the nominee has prior experience as a prosecutor, her record will provide a basis for evaluation. Of course, the nominee’s record will not reflect the most important prosecutorial functions given the private nature of these functions.

This mechanism of accountability may be only minimally effective. First, the Supreme Court has protected prosecutorial discretion and conduct from legal challenge so thoroughly that its decisions do not deter prosecutors from engaging in arguably abusive or inappropriate behavior. Similarly, a U.S. Attorney or Attorney General may hesitate to terminate a federal prosecutor even if she believes the prosecutor’s conduct merits termination.
so long as the prosecutor has engaged in behavior that the Supreme Court has found constitutional. Second, these mechanisms again assume an informed public. Unless the prosecutor alerts her constituents to policies and invites input, the public may remain uninformed. Prosecutors rarely publicize information on charging and plea bargaining policies on the ground that such openness would threaten law enforcement.\textsuperscript{254}

Accountability measures for state and local prosecutors do not offer much more assurance. Most state and local prosecutors are elected officials.\textsuperscript{255} Arguably, the electoral process is the most democratic system of accountability, the very foundation of our republic.\textsuperscript{256} Like the selection process for federal prosecutors, however, the electoral process for state and local prosecutors is an effective accountability measure only in the unlikely event that the electorate becomes aware of the abuse.\textsuperscript{257} Since state and local prosecutors rarely inform the public of their charging and plea bargaining decisions, the public has no way of holding them accountable for these decisions.\textsuperscript{258}

\textbf{B. ACCOUNTABILITY THROUGH BUDGETARY RESTRICTIONS}

The Ethics in Government Act provided the Independent Counsel with a virtually unlimited budget, permitting him to hire and fix the salaries of as many lawyers and other staff as he deemed necessary.\textsuperscript{259} Independent

\textsuperscript{254} See \textit{supra} notes 12-15 and accompanying text (describing the unlimited nature of prosecutorial discretion).

\textsuperscript{255} At the county and municipal levels, more than ninety-five percent of the chief prosecutors are elected. Robert L. Misner, \textit{Recasting Prosecutorial Discretion}, 86 J. CRIM. L. & CRIMINOLOGY 717, 734 (1996).

\textsuperscript{256} See Davis, \textit{supra} note 12, at 58 (“[T]he people’s ability to hold the prosecutor accountable was quite limited. Nonetheless, the ballot box was seen as the most democratic and effective mechanism for achieving this goal.”) (citing \textsc{Joan E. Jacoby, The American Prosecutor: A Search of Identity} (1980)).

\textsuperscript{257} “The prosecutor is often an elected official without clear accountability to any superior or any institution.” Graham Hughes, \textit{Agreements for Cooperation in Criminal Cases}, 45 VAND. L. REV. 1, 65 (1992) (discussing the problems with cooperation agreements and suggesting standards and supervision for prosecutors).

\textsuperscript{258} See \textsc{Kenneth Culp Davis, Discretionary Justice: A Preliminary Inquiry} 207-08 (1969):

The reality is that nearly all \{the prosecutor’s\} decisions to prosecute or not to prosecute... and nearly all his reasons for decisions are carefully kept secret, so that review by the electorate is nonexistent except for the occasional case that happens to be publicized. The plain fact is that more than nine-tenths of local prosecutors’ decisions are supervised or reviewed by no one.


\textsuperscript{259} Ethics in Government Act, 28 U.S.C. \S 594(c) (1994) (“For the purposes of carrying out the duties of an office of independent counsel, such independent counsel may appoint, fix the compensation, and assign the duties of such employees as such independent counsel
Counsel Kenneth Starr spent at least $52 million investigating the Whitewater and Lewinsky matters, outspending every other Independent Counsel in American history. 260 His successor, Robert W. Ray, completed Starr’s probe in September 2000, bringing the total cost of the investigation to $60 million. 261 Four independent counsels, including Starr, spent over $95.3 million investigating Clinton administration officials between 1994 and 2000. 262 The Government Accounting Office (GAO) reported the expenditures of independent counsels every six months. 263 Although the GAO reports provided a certain level of public scrutiny, no provision required the Independent Counsel to limit or justify his budget. The Independent Counsel’s focus on a single person and his ability to pour unlimited funds into probing every aspect of that person’s life made the potential abuse even more detrimental. 264

Theoretically, budgetary restraints serve as a mechanism of accountability for federal and state prosecutors. These prosecutors work within a prescribed budget and must allocate their resources accordingly. A prosecutor who spent over fifty percent of her budget investigating and prosecuting one individual would have limited resources available to prosecute other crimes. A federal Assistant U.S. Attorney undoubtedly would suffer reprisals from the U.S. Attorney for that district and the electorate would vote a state or local prosecutor out of office if she were unable to prosecute violent or otherwise serious crimes due to misallocation of her

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262. See Naftali Bendavid, White House Probes Near Final Stages; No Charges from ’93 Firings, CHI. TRIB., June 21, 2000, at 1 (listing Robert Ray, Kenneth Starr, Robert Friske, and Donald Smaltz as independent counsels who have investigated Clinton administration officials). These investigations targeted Labor Secretary Alexis M. Herman, Interior Secretary Bruce Babbitt, former Housing Secretary Henry Cisneros, and former Agriculture Secretary Mike Espy. Cisneros pled guilty to a misdemeanor charge of lying to the FBI, and Espy was acquitted of all charges after a jury trial. The Babbitt and Herman investigations cleared the targets of all criminal allegations. David Vise, Independent Counsel Clears Labor Secretary, AUSTIN-AM. STATESMEN, Apr. 6, 2000, at A1.

How frightening it must be to have your own independent counsel and staff appointed, with nothing else to do but to investigate you until investigation is no longer worthwhile—with whether it is worthwhile not depending upon what such judgments usually hinge on, competing responsibilities. And to have that counsel and staff decide, with no basis for comparison, whether what you have done is bad enough, willful enough, and provable enough, to warrant an indictment. How admirable the constitutional system that provides the means to avoid such a distortion. And how unfortunate the judicial decision that has permitted it.

Id.
budget.

Numerous examples exist of federal prosecutors spending extraordinary sums of money investigating certain crimes or particular individuals without apparent limit or control. The prosecution of former Mayor Marion Barry provides one example. Much attention focused on the cost of the prosecution of a single individual on charges that many considered relatively trivial. Estimates of the total cost of the investigation and prosecution ranged from $2 million to $50 million. Even the low estimates seemed particularly extravagant in hindsight since the jury acquitted Barry on all but one misdemeanor offense. Yet the prosecutor was not accountable to the people of the District of Columbia for the allocation and management of his budget. Other expensive prosecutions of single individuals for nonviolent offenses include the prosecutions of

265. See Roscoe C. Howard, Jr., Wearing A Bull's Eye: Observations on the Differences Between Prosecuting for a United States Attorney's Office and an Office of Independent Counsel, 29 STETSON L. REV. 95, 141 (1999) (asserting that U.S. Attorneys have significant discretion and often spend a disproportionate amount of time and money on cases involving celebrities or notorious conduct); Brett Kavanaugh, The President and the Independent Counsel, 86 GEO. L.J. 2133, 2142 n.27 (1998) (describing high profile public corruption cases in which the Justice Department has devoted extraordinary resources).

266. See supra notes 240-42 (describing Barry prosecution).

267. Not everyone thought the charges were trivial. Tracy Thompson & Michael York, U.S. Won't Seek Second Barry Trial, Stephens Says He'll Push for Tougher Sentence, WASH. POST, Sept. 18, 1990, at A1. U.S. Attorney Stephens noted that the jury "in rendering a guilty verdict on one count, has held Mr. Barry responsible for his criminal conduct. He must now accept responsibility for that criminal conduct." Barton Gellman, For the U.S. Attorney, Life Goes On; Stephens Finds Himself Locally Loathed, Federally Respected, WASH. POST, Aug. 14, 1990, at A7. Stephens went on to say that "Mr. Barry was held accountable for abusing the public trust as a public official." Id. See also Linda P. Campbell, Marion Barry Gets 6 Months on Drug Conviction, CHRISTIAN TRIB., Oct. 27, 1990, at 1. Judge Penfield Jackson in handing down Barry's sentence noted that, "his breach of public trust alone warrants an enhanced sentence" and that Barry's mayoral position was "of greatest significance" when he determined the severity of his sentence. Id.

268. Then-Attorney General Richard Thornburgh refused to provide an estimated cost of the investigation. "I don't think we put a pricetag on justice," he said. Michael Isikoff, Thornburgh Denies Justice Department Singles Out Black Officials for Prosecution, WASH. POST, July 12, 1990, at A16. Other law enforcement officials estimate that cost at between $2 million and $3 million. Id. Barry claimed the cost was $50 million. Steve Twomey, Barry's $50 Million Question; Mayor's Claim Would Make His Case the Costliest in Recent History, WASH. POST, Aug. 7, 1990, at B1.

269. Barry was convicted of one misdemeanor charge of cocaine possession, found not guilty of a second charge of cocaine possession, and acquitted of all other charges, including the cocaine offense that was recorded on videotape. Mike Folks & Matt Neufeld, Mistrial: Jurors Falter on 12 of 14 Counts, WASH. TIMES, Aug. 11, 1990, at A1.

270. The budgets for each U.S. Attorney's Office are allocated by the Department of Justice, whose budget is approved by the U.S. Congress. 28 U.S.C. § 548 (1994). Citizens of a particular U.S. Attorney's district would ordinarily express disapproval of budgetary expenditures to their senators or other congressional representatives. Since citizens of the District of Columbia have no voting representation in Congress, one might speculate that the result may have been different in another jurisdiction. However, one is hard pressed to discover examples of citizens expressing disapproval of the budgetary allocations in a particular U.S. Attorney's office.
Representative Dan Rostenkowski, Governor Fife Symington, Congressman Joseph McDade, and John Delorean. Each of these prosecutions involved massive expenditures that came to light because the defendants were public figures. The public would never become aware of similarly large allocations of resources in cases involving ordinary citizens unless the press uncovered and reported such information. Prosecutors have the power to devote extraordinary resources to cases as they see fit without accountability to the taxpayers.

State and local prosecutors exercise similar power and discretion over the expenditure of their budgets, although most state and local prosecutors have budgetary constraints. Their financial resources do not compare to the deep pockets of federal prosecutors. Like federal prosecutors, however, discretionary decisions to allocate extraordinary resources to particular cases are made in private and are subject only to a small possibility that the public may discover the decisions, disapprove, and respond in the electoral process.

C. JURISDICTION AND TIME LIMITATIONS

The Ethics in Government Act provided no time limitations on the investigation of the Independent Counsel and minimal jurisdictional limitations. The Act permitted the Attorney General to broaden the scope of the Independent Counsel’s investigation to include any matters related to

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271. See Kavanaugh, supra note 265, at 2142 n.27 (noting examples of costly cases involving well-known figures).

272. See David L. Cook et al., Criminal Caseload In U.S. District Courts: More Than Meets the Eye, 44 AM. U. L. REV. 1579, 1594-95 (1995) (asserting that increasing federal budgets allow agencies to conduct more investigations and initiate an increasing number of prosecutions).

273. See supra Part IIA (describing the failure of the electoral process mechanism of accountability). The public may or may not approve of such expenditures. The O.J. Simpson prosecution is one example of a local prosecutor devoting immense resources to one case. See Pricey Proceedings: Tallying the Trial Tab, 81 A.B.A J. 34 (1995) (providing a breakdown of the costs in prosecuting the O.J. Simpson criminal trial, according to the Associated Press Human Resources Group, as the following: prosecutorial and investigative expense, $3.6 million; cost of food, security, and shelter for jury, $3 million; sheriff’s department expenses, $2.7 million; superior and municipal court costs, $1.9 million; autopsies, $100,000). The public was undoubtedly aware of this fact due to the extraordinary national and international media coverage. It would be difficult to measure the public reaction to the prosecutor’s allocation of resources to this case in light of the wide divergence of views about the case. See generally KATHERYN K. RUSSELL, THE COLOR OF CRIME 47-68 (1998).

274. See 28 U.S.C. § 599(b)(3) (1994) (establishing the scope of the Independent Counsel’s prosecutorial jurisdiction); id. § 596(a)(1), (b)(1) (noting that independent counsels are to be removed from office only for good cause or when the investigation is complete); Joseph S. Hall et al., Independent Counsel Investigations, 36 AM. CRIM. L. REV. 809, 818-21, 829 (1999) (noting a number of criticisms of the Independent Counsel); Julie O’Sullivan, The Independent Counsel Statute: Bad Law, Bad Policy, 33 AM. CRIM. L. REV. 463, 464 (1996) (criticizing the unlimited time that Independent Counsel investigation is allowed to take). But see Donald Smaltz, Do Independent Counsel Probes Take Too Long?, WALL ST. J., Oct. 20, 1997, at A23 (justifying the length of Independent Counsel investigations).
his prosecutorial jurisdiction. Attorney General Reno's expansion of Kenneth Starr's powers far beyond his original charge of investigating the Whitewater matter provides the starkest example of the limitless nature of the Independent Counsel's jurisdiction. The statute allowed the continuation of an investigation even beyond the official's tenure in office.

Temporal and jurisdictional limitations on the power of federal and local prosecutors do exist. U.S. attorneys serve during the administration of the appointing President and may be removed when a new President is elected. Each U.S. Attorney prosecutes cases in her geographical district and may pursue only federal crimes. Elected state and local prosecutors operate within similar limitations. They are elected for a set term to prosecute violations of the state criminal code.

In light of the broad scope of federal and state criminal laws, the temporal and jurisdictional limitations on federal and local prosecutors serve to define rather than limit their power. They exercise vast discretion within these confines. Furthermore, these boundaries are irrelevant to the issue of accountability.

The lack of effective doctrinal checks on widespread prosecutorial misconduct and the ineffectiveness of structural controls raise questions about how and why prosecutorial power has developed in the United States and why it is accepted without more scrutiny. Is there something unique about the prosecutorial function that justifies its exemption from the well-settled democratic principles upon which this country was founded? Why

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276. See supra notes 46-49 and accompanying text (explaining how the Whitewater investigation quickly grew to encompass unrelated matters).
278. Id. §§ 541(c). With the approval of President Clinton, Janet Reno removed all ninety-three U.S. Attorneys at the beginning of her tenure as Attorney General. See Jerry Seper, Reno Demands Resignations of U.S. Attorneys, WASH. TIMES, Mar. 24, 1993, at A8 (noting that most of the nation's U.S. Attorneys were appointed by Presidents Reagan and Bush and that the call for their resignations was standard partisan politics); Michael York & Donald P. Baker, Washington Area to Lose 2 High Profile Prosecutors; All U.S. Attorneys Told to Tender Resignations, WASH. POST, Mar. 24, 1993, at A1 (depicting the removal of the U.S. Attorneys as routine for a new administration, while others claimed it could create turmoil within the U.S. Attorneys' offices).
279. See, e.g., CAL. CONST. art. V, § 11 (term of four years); MO. CONST. art. V, § 7 (four years); VA. CONST. art. V, § 15 (four years).
have the electoral process and/or our system of checks and balances not worked effectively to control prosecutorial power and abuse? A brief examination of the history of the American prosecutor documents how the current model developed. It fails, however, to provide answers to the more troubling questions about the ineffectiveness of structural checks on prosecutorial power.

III. A FLAW IN THE CONSTITUTIONAL DESIGN

The historical foundation of the American prosecutor does not support or anticipate a design involving immense power and almost unreviewable discretion.\(^{281}\) Ironically, the desire to maintain public accountability and to compel prosecutors to serve the needs of all constituents propelled the current paradigm of the elected public prosecutor. Unfortunately, proponents of this system did not adequately consider the private nature of prosecutorial decisions and the lack of public access to information about how and why prosecutors make decisions. The history and development of the American prosecutor from colonial times to the present provides insight into the reasons why the current system has not achieved public accountability.

A. THE HISTORY OF THE AMERICAN PROSECUTOR

In the early Middle Ages, when no formal system of criminal justice existed in England, the crime victim acted as police, prosecutor, and judge.\(^{282}\) The victim and the victim's family tracked down the alleged criminal, decided on the appropriate punishment, and implemented it themselves.\(^{283}\) Such punishment included physical punishment, restitution, or both.\(^{284}\) The victim of a crime or the victim's family brought all criminal prosecutions in English common law.\(^{285}\) This model reflected the philosophical view that a crime involved a wrong against an individual rather than against society as a whole.\(^{286}\) As the legal system became more complex, individuals and their families hired private barristers to prosecute cases.\(^{287}\) Obviously, this system provided no legal redress for poor and uneducated victims of crime who could neither navigate the legal system nor hire legal

\(^{281}\) See supra Part I.B.2 (discussing the breadth of prosecutorial discretion).
\(^{282}\) See Sir Frederick Pollock & Frederic William Maitland, The History of English Law 476 (2d ed. 1923) ("To pursue the outlaw and knock him on the head as though he were a wild beast is the right and duty of every law abiding man.").
\(^{283}\) Id.
\(^{285}\) Jacoby, supra note 256, at 8.
\(^{286}\) Id.
\(^{287}\) Id.
assistance. The only public prosecutor in English common law was the King's Attorney, whose sole responsibility was to prosecute violations of the King's rights. The victim handled all violations of individual rights privately.

Reformists such as Jeremy Bentham and Sir Robert Peel were instrumental in changing the system of prosecution. They argued that the English private prosecution system promoted abusive practices, such as arrangements between private attorneys and police to secure prosecutions, prosecutions initiated out of personal animosity or vengeance, and abandonment of prosecutions after corrupt financial settlements between the criminal defendant and the private prosecutor. Reform efforts were met with great opposition from those who profited most from the private system—the rich and the legal profession. In 1879, Parliament passed the Prosecutions of Offenses Act, which conferred limited prosecutorial powers on the Director of Public Prosecutions. The Act did not eliminate private prosecutions entirely, but the involvement of the victim in the initiation of English prosecutions decreased significantly due to the development of modern police departments in the late nineteenth and early twentieth centuries.

Criminal prosecutions in colonial America mirrored the early English experience. Before the American Revolution, the crime victim maintained sole responsibility for apprehending and prosecuting the criminal suspect. The victim conducted the investigation and acted as prosecutor if the case went to trial. Alternately, the victim hired a detective and a private lawyer to perform these functions. If convicted, the court frequently ordered the

288. See id. at 3-39 (discussing the origins and development of American prosecution); cf. POLICING & PROSECUTION IN BRITAIN, 1750-1850 (Douglas Hay & Frands Snyder eds., 1989) (containing essays debating the extent to which the system of private prosecutions served the wealthy over the poor). One justification for private prosecutions was that "[s]tate prosecutions were associated with autocratic regimes and abuses of power, while private prosecutions were seen as important safeguards of English freedom." Randall McGovern, New Directions and Old Debates in the History of English Criminal Law, 43 STAN. L. REV. 799, 799 (1991) (reviewing POLICING AND PROSECUTION IN BRITAIN, 1750-1850 (Douglas Hay & Francis Snyder, eds.).

289. JACOBY, supra note 256, at 7.

290. Id.


292. JACOBY, supra note 256, at 9.

293. Id. at 9.

294. Police officers frequently initiate prosecutorial proceedings in simple criminal cases, often presenting the charges, examining witnesses and addressing the magistrates. If the case is particularly complex, the police will hire a solicitor or barrister. The growing trend in modern England is public funding of solicitors' offices within police departments. Cardenas, supra note 291, at 363.

295. Id. at 366.

296. Id. at 367.
Poor criminal defendants paid for their crimes by working for the victim as a servant or having their services sold for the financial benefit of the victim. If the victim did not want these services or was unable to sell them, the law mandated that the victim pay the jailer for maintaining custody of the prisoner.

After the commercial revolution of the eighteenth century, the population in colonial America grew. Large urban areas began to develop, and the crime rate increased. The private mode of prosecution could no longer maintain order in the rapidly growing colonies. Some victims negotiated private settlements with their offenders, resulting in sporadic, unequal applications of the law, as well as abuses similar to those that brought about the reform movement in England.

The colonies began to develop a system of public prosecution to combat the "chaos and inefficiency" of private prosecutions in a rapidly industrializing society. This development occurred not only as a remedy for the problems and abuses of private prosecution, but also as a result of the shift in philosophical view of crime and society. European scholars such as Cesare Beccaria argued that crime should be viewed as a societal problem, not simply as a wrong against an individual victim. Thus, several colonies adopted a system of public prosecution that sought to manage the crime problem in a manner that best served the interests of society as a whole.

In 1643, Virginia became the first colony to appoint a public prosecutor—the Attorney General. Virginia modeled its system on the early English model. Other colonies' systems of public prosecution mirrored those of the native European countries of their early settlers. Either the court or the governor appointed these first public prosecutors. Such prosecutors had little independence or discretion. Their mandate involved consulting with the court or governor before making decisions.

The elected prosecutor emerged during the rise of Jacksonian
democracy in the 1820s, coinciding with the country's move toward a system of popularly elected officials.\textsuperscript{303} Mississippi was the first state to hold public elections for district attorneys. By 1912, almost every state had followed this trend.\textsuperscript{309} Today, only the District of Columbia\textsuperscript{310} and four states—Delaware, New Jersey, Rhode Island, and Connecticut—maintain a system of appointed prosecutors.\textsuperscript{311}

Although popular elections intuitively seemed to operate as a check on prosecutorial power and an effective mechanism of accountability, the popular election of the prosecutor actually established and reinforced his power, independence, and discretion. No longer beholden to the governor or the court, the prosecutor was now accountable to this amorphous body called "the people." Still, since the actions and decisions of the prosecutor were not generally a matter of public record, the people could not actually hold the prosecutor accountable. Nonetheless, the ballot box was seen as the most democratic mechanism of accountability.\textsuperscript{312}

The early system of federal prosecution began with the Judiciary Act of 1789.\textsuperscript{313} This Act created the office of the Attorney General, whose only duties were representing the United States in cases before the Supreme Court and providing legal advice to the President and heads of departments.\textsuperscript{314} The same Act created district attorneys to prosecute suits for the United States in the district courts, but until 1861, the Attorney General did not supervise the district attorneys.\textsuperscript{315} In fact, it appears that no entity supervised these district attorneys from 1789 to 1820, when they were placed

\textsuperscript{308} Jacoby, supra note 256, at 22; Goldstein, supra note 305, at 1287.

\textsuperscript{309} Goldstein, supra note 305, at 1287 (reviewing the emergence of elected prosecutors in states).

\textsuperscript{310} See supra note 244 (explaining that because the District of Columbia is not a state, the U.S. Attorney's Office prosecutes both local and federal crimes).

\textsuperscript{311} See Goldstein, supra note 305, at 1287 (describing the history and current state of elected prosecutors).

\textsuperscript{312} Id. at 1288 (illustrating lessons learned from the electoral process).

\textsuperscript{313} Judiciary Act of 1789, ch. 20, 1 Stat. 73, 92-93.

\textsuperscript{314} "And there shall... be appointed... a meet person learned in the law to act as attorney for the United States... who shall be sworn or affirmed to the faithful execution of his office, whose duty it shall be to prosecute [cases, except in state supreme courts]." Id. at 92. The Act also described the role of the meet person assigned as Attorney General, who shall:

conduct all suits in the Supreme Court in which the United States shall be concerned, and to give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any departments, touching any matters that may concern their departments, and shall receive such compensation for his services as shall by law be provided.

Id. at 93.

\textsuperscript{315} See Lawrence Lessig & Cass R. Sunstein, The President and the Administration, 94 Colum. L. Rev. 1, 16 (1994) (discussing the framers' perception of the executive branch and arguing that they did not support a unitary, hierarchical executive).
under the supervision of the Secretary of the Treasury until 1861.316 There was no clear organizational structure or chain of command, with federal prosecutors either operating independently or receiving instructions from several different federal agencies.317 State officials and private citizens even conducted some federal prosecutions.318

In the 1920s, a number of states formed crime commissions to examine both the status of the criminal justice system and its ability to manage the post-World War I rise in crime.319 Their findings about the role of the prosecutor and the extent of his power and discretion shocked most of these commissions. A report by the National Commission on Law Observance and Enforcement (NCLOE) noted: “In every way the Prosecutor has more power over the administration of justice than the judges, with much less public appreciation of his power. We have been jealous of the power of the trial judge, but careless of the continual growth of the power of the prosecuting attorney.”320 Commissions formed in California, Georgia, Illinois, Minnesota, New York, and Pennsylvania made similar observations about the power of the prosecutor.321

The most well-known crime commission of this era was the Wickersham Commission, a national body “formed to study the status of the criminal justice system.”322 The commission included a number of prominent legal scholars of the day, including Roscoe Pound of the Harvard Law School.323 Like virtually all of the state crime commissions, the Wickersham Commission criticized the role of the prosecutor, particularly the absence of a meaningful check on prosecutorial power and discretion.324 It noted that the popular election of prosecutors provided neither an adequate check on this power nor the best-qualified candidates for the position.325 The Commission also recognized abuses in the plea bargaining power of prosecutors.326 It recommended a number of reforms, including the establishment of a state director of public prosecutions with secure tenure to

316. Id. at 16-17 (describing the transition in supervisory roles accounting for prosecutorial oversight).
317. See id. at 17 n.65 (citing LEONARD D. WHITE, THE JEFFERSONIANS: A STUDY IN ADMINISTRATIVE HISTORY, 1801-1829, at 340 (1951)) (describing the overlapping oversight roles among three federal agencies).
318. See id. at 18-20 (detailing citizen-initiated prosecutions).
319. See JACOBY, supra note 256, at 30 (describing postwar crime and emergent state investigative roles).
320. Id. at 28 (quoting the NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON PROSECUTION 11 (1931)).
321. Id. at 30.
322. Id. at 31.
323. Id.
324. JACOBY, supra note 256, at 31.
325. Id.
326. Id.
control the prosecutorial process in a systemized fashion.\textsuperscript{327} Despite the findings and recommendations of the Wickersham Commission, other commissions, and legal scholars of the 1920s, there has been no significant reform of the prosecutorial process. In fact, today prosecutors retain even more power, independence, and discretion than they did in the early nineteenth century.\textsuperscript{328}

\textbf{B. The Framers' Intent}

Separation of powers and a system of checks and balances were core values of the framers of the Constitution.\textsuperscript{329} The distribution of power among the three branches of government operated to ensure efficient government and to prevent any single branch from exercising arbitrary power.\textsuperscript{330} The prosecutorial function falls within the executive branch of government.\textsuperscript{331} Our system of checks and balances suggests that the judicial and legislative branches have the power to hold prosecutors accountable for abuse of power. For the most part, however, they have not done so on either the federal or state levels.\textsuperscript{332} Thus, the constitutional design has not prevented prosecutors, as members of the executive branch, from exercising "arbitrary power."

Constitutional scholars debate whether the framers even considered prosecutors to be part of the executive branch. This debate is useful in determining the appropriate role of the prosecutor within the constitutional

\begin{footnotesize}
\begin{enumerate}
\item 327. Id.
\item 329. "[T]he colonists transmuted the British system of mixed government based on social classes to a government in which three branches, the legislative, executive, and judicial, would check each other, regardless of the social class from which the officials were drawn." Abner S. Greene, \textit{Checks and Balances in an Era of Presidential Lawmaking}, 61 U. CHI. L. REV. 123, 139-40 (1994) (discussing the framers' overwhelming concern with either branch of government attaining power without sufficient checks).
\item 330. The separation of powers is a means for "[a]mbition . . . to counteract ambition." \textit{The Federalist} No. 51, at 356 (James Madison) (Howard M. Jones ed., 1961).
\begin{quote}
Thus Congress has explicitly authorized the President to appoint, by and with the Senate's advice and consent, 'an Attorney General of the United States . . . [as] the head of the Department of Justice.' The department of Justice was established by Congress in 1870 as 'an executive department of the United States.
\end{quote}
\textit{Id.} (citing 28 U.S.C. §§ 501, 503 (1994)).
\item 332. \textit{See supra} Part II (discussing the inadequacy of current methods of accountability). \textit{But see infra} Part IV.A (discussing the Citizens Protection Act of 1998).
\end{enumerate}
\end{footnotesize}
Professors Lawrence Lessig and Cass Sunstein, for example, assert that neither the text of the Constitution nor the practice of the framers suggests prosecution as an executive function. They claim that the unstructured and disorganized nature of early federal prosecution, including some federal prosecution by state prosecutors and private citizens, demonstrates that the framers did not view prosecutors as exclusively within the executive branch under control of the President. Lessig and Sunstein do not address the issue of how or whether the framers intended to hold prosecutors accountable to the people. They acknowledge that prosecution may have been "an anomaly" and that the framers may have thought the prosecutorial function was "a distinctive one entitled to a unique exemption from the general principle of presidential control over the administration of the laws." Ultimately, Lessig and Sunstein reject this theory and contend that the prosecution anomaly demonstrates "a need for a much more fundamental rethinking of the framers' understanding of what the executive was."

Lessig and Sunstein examine whether modern-day creations such as administrative agencies and the Independent Counsel square with the founders' vision of a unitary executive. In concluding that they may, Lessig and Sunstein apply a "contextualist" method of considering the original intent of the framers in light of the vast governmental changes that have taken place over time. They stress that this approach does not involve changing underlying constitutional values, but determining how best to implement these values in a vastly different world.

Professors Steven Calabresi and Saikrishna Prakash disagree with Lessig...
and Sunstein, arguing that prosecutorial power has always rested within the executive branch, and that prosecutors have always been accountable to the people through the President. Calabresi and Prakash concede that the early prosecutors were not under the direct control of the Attorney General, but assert that the President always maintained the power to exercise authority over federal prosecutors. In support of their view, they cite examples of President George Washington giving direct orders to the federal prosecutor for the Pennsylvania district and indirect commands to federal prosecutors through the Attorney General. They also acknowledge the existence of some federal prosecutions by private citizens, but maintain that this limited exception is not fatal to the general rule.

Application of the "textualist" view of Calabresi and Prakash to modern-day prosecution leads to the same conclusion as the "contextualist" method of Lessig and Sunstein: there is no historical or constitutional support for the de facto independent, unaccountable twenty-first century prosecutor. The Constitution is silent on the point. The evidence suggesting that the prosecutorial function was at times unstructured and unaccountable to the people before and immediately after the ratification of the Constitution does not mandate the conclusion that the framers would endorse the current model of prosecution. In fact, an examination of constitutional values in light of the vast changes in our criminal justice system over time suggests that the current model offends these core principles.

Accountability is a core constitutional value—one that should be preserved despite changes in the constitutional context. The framers viewed a strong, unitary executive as advancing accountability because a fragmented executive branch could more easily escape review. The modern...
prosecution model is fragmented within the executive branch. Crime and criminal law enforcement have expanded immensely since the eighteenth century. Indeed, it is undoubtedly safe to suggest that the framers could not have imagined the numerous state and federal law enforcement agencies and the complex set of criminal laws enacted during the twentieth century. This vast expansion in crime and law enforcement necessarily occasioned a corresponding increase in the size, number, and fragmentation of prosecutorial entities on both the state and federal levels.

The growth of crime in and of itself did not lead inevitably to an expansion of the nature and power of the prosecution function. While more prosecutors were obviously necessary, more prosecutorial discretion and power were not. In fact, the increase in crime, criminal laws, and prosecutors suggest a need for tightening, rather than expanding, prosecutorial power.

Perhaps one could view the prosecutor as the strong unitary executive, rather than as a subordinate of the President or a governor. Such a model would then permit the people to hold the prosecutor directly accountable, especially if elected. This model also fails, not only because of the ineffectiveness of the electoral process as a measure of prosecutorial accountability, but also because of the vast powers of the modern day prosecutors. The prosecutor as a strong, unrestrained executive with vast unchecked discretionary power cannot be squared with the intent of the framers, even and especially in light of changes in the constitutional context.

In sum, neither the history of the development of the American prosecutor nor an examination of the intent of the framers of the

1166 (1992) (describing a theory of the unitary executive that allows the chief executive to maintain control through the power to veto the discretionary decisions of his subordinates). The framers' support for a strong unitary executive must be viewed in light of the limited powers they gave to the executive. Greene, supra note 329, at 125. Those limited powers are worlds apart from the modern prosecutor's broad powers and exercise of vast prosecutorial discretion unchecked by either the courts or the legislature.

347. See supra note 294 (describing police procedure in England); Krent, supra note 334, at 310 (same).

348. See John S. Baker, State Police Powers and the Federalization of Local Crime, 72 TEMP. L. REV. 673 (1999) (discussing how the founders would have been surprised to learn of the extensive and complex role the federal government has undertaken in the area of criminal law).

349. But see Krent, supra note 334, at 311 (citing L.B. Schwarz, Federal Criminal Jurisdiction and Prosecutorial Discretion, 13 LAW & CONTEMP. PROBS. 64, 64-66 (1948), and arguing that the expansion of federal criminal laws calls for greater exercise of prosecutorial discretion).

350. Id.

351. The framers clearly opposed unrestrained executive power, associating it with the tyrannical power of the King. See Lessig & Sunstein, supra note 315, at 13 (citing GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 521 (1969)) (discussing the hierarchy of the federal government).
Constitution justifies the current model of the prosecution function. The U.S. system of checks and balances has proven ineffective in restraining prosecutorial power. The judicial branch has failed to check prosecutorial overreaching, and the legislative branch traditionally has passed laws that increase prosecutorial power.

IV. REFORMING THE SYSTEM

The need to provide better oversight of prosecutors and to curb discretion more effectively has not gone entirely unnoticed. Congress passed a law in 1998 that provided for limited reform. This law does not, however, respond adequately to the problem. This Part proposes two avenues of reform that would more effectively curb prosecutorial discretion without interfering with the prosecutorial function.

A. THE CITIZENS PROTECTION ACT OF 1998

The U.S. Congress passed the Citizens Protection Act of 1998. Although facially the law appears to provide a legislative check on prosecutorial power, a close examination of its history demonstrates its flaws. The law only overrules an internal Justice Department policy that exempted federal prosecutors from state ethical rules. Rather than enacting meaningful reform, the Citizens Protection Act of 1998 merely permits federal prosecutors to return to the status quo before the adoption of the internal policy. The status quo was far from the ideal model of prosecutorial restraint.

Specifically, the law states:

(a) An attorney for the Government shall be subject to the State laws and rules, and local Federal court rules, governing attorneys in

352. See supra notes 340-44 and accompanying text (discussing the change in the role the federal prosecutor has played in criminal law). Professor Abner Greene argues that the principle behind the checks and balances structure conflicts with the norm of accountability. Greene, supra note 329, at 177. That is, the strong unitary executive is the paradigm of accountability because the people will know exactly who to blame if they are dissatisfied. On the other hand, the division of power between the three branches of government epitomizes the checks and balances structure and spreads accountability among many. Professor Greene argues that the framers sacrificed accountability to ensure against the dominance of any one branch. Id. Of course, one could view the division of powers as a form of accountability, with each branch checking overreaching by the others.


each State where such attorney engages in that attorney’s duties, to the same extent and in the same manner as other attorneys in that State.

(b) The Attorney General shall make and amend rules of the Department of Justice to assure compliance with this section.

(c) As used in this section, the term “attorney for the Government” includes any attorney described in section 77.2(a) of part 77 of title 28 of the Code of Federal Regulations and also includes any independent counsel, or employee of such a counsel, appointed under chapter 40.355

The Citizens Protection Act overturned a controversial Justice Department rule promulgated in 1989 by former Attorney General Richard Thornburgh.356 This rule, commonly known as “the Thornburgh memo,” obligated federal prosecutors to follow internal Justice Department rules as opposed to the ethical rules of the state in which they practiced.357 The memo specifically exempted federal prosecutors from Rule 4.2 of the ABA Model Rules of Professional Conduct which states, “[i]n representing a client, a lawyer shall not communicate with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.”358 The organized bar strongly opposed the Thornburgh memo, and in 1990, the ABA House of Delegates passed a formal resolution denouncing it.359 Courts also rejected the rule.360 Attorney General Janet Reno reissued the Thornburgh memo as a proposed rule for public comment in July 1993 and codified it in a series of regulations in 1994.361 This version softened the Justice Department’s original stance, but nonetheless continued to allow

355. Id.
357. Id. at 493; see generally Elkan Abramowitz, Ex Parte Contacts from the Justice Department, N.Y.L.J. at 3 (Mar. 3, 1998) (describing the Thornburgh memo and various cases in which courts rejected the government’s arguments in support of the memo).
contact with represented persons under certain circumstances.  

When Congress finally passed the Citizens Protection Act, it did so not in response to public outcry over prosecutorial misconduct nor even outrage by the criminal defense bar over the Justice Department's defiance of the "no-contact" rule. One powerful citizen brought about this law. Former Congressman Joseph McDade, a Republican from Pennsylvania, faced indictment for bribery and related criminal offenses in federal court in 1992. Ultimately acquitted in 1996, he claimed that prosecutorial misconduct and excess led to the charges. As a result of his personal experience, McDade began a congressional crusade against prosecutorial misconduct and introduced versions of the law in 1996, 1997, and again in 1998, when it finally passed. The law took effect on April 19, 1999, despite strong opposition by the Justice Department.

362. See id. at 39929. Except as provided in this part or as otherwise authorized by law, an attorney for the government may not communicate, or cause another to communicate, with a represented party who the attorney for the government knows is represented by an attorney concerning the subject matter of the representation without the consent of the lawyer representing such party.

Id. The regulation then goes on to describe numerous exceptions permitting communications with represented individuals. Id. at 39929-30. For a discussion of the Justice Department's justifications for this rule, see Rory K. Little, Should Regulate the Ethics of Federal Prosecutors?, 65 FORDHAM L. REV. 355, 369-75 (1996) (discussing the difficulties faced by federal prosecutors with cases in numerous states in light of the nonuniformity of state ethical rules and federal court applications of these rules).

363. See United States v. McDade, No. 92-249, 1992 WL 187036 (E.D. Pa. July 30, 1992) (denying the motion to dismiss). During the pendency of his case, Congressman McDade filed a motion to dismiss the indictment, claiming that the prosecutor had a conflict of interest that amounted to prosecutorial misconduct. Specifically, he claimed that the prosecutor in his case previously had worked for Senator Arlen Specter and that this relationship caused him to ignore similar allegations against Senator Specter and focus on Congressman McDade. Ethical Standards for Federal Prosecutors Act of 1996: Hearing on H.R. 3386 Before the Subcomm. on Courts and Intellectual Prop. of the House Comm. on the Judiciary, 104th Cong. 8-10 (1996) (statement of Rep. McDade).


365. 112 Stat. at 2681-118.

366. The Justice Department's opposition to the law mirrored its justification for the Thornburgh memo and the Reno Rule, namely that the law would "handcuff" federal prosecutors by requiring them to follow contradictory state laws, instead of federal guidelines, especially in multistate investigations. The department also claimed that the law would impede legitimate undercover investigations such as court-authorized electronic surveillance and wiretapping. See Jerry Seper, Justice Wants New Law Changed Says it Will Hinder Prosecutor's Work, WASH. TIMES, Feb. 5, 1999, at A11.
The Act has not existed long enough to determine its effectiveness as a mechanism of accountability, but it is difficult to imagine that it will have any significant effect on the behavior of prosecutors. First, the Act only applies to federal prosecutors. Since state and local prosecutors handle most criminal cases, it will have no effect on most instances of prosecutorial abuse. Second, there is no evidence to suggest that state ethical rules will serve as an effective restraint on prosecutorial misconduct. State and local prosecutors are already governed by the ethical rules and laws of their states. Thus far, these rules have not reined in state prosecutors or restrained federal prosecutors before the Attorney General issued the Thornburgh memo. Third, the private nature of most prosecutorial decisions will limit its effectiveness. Unless unethical prosecutorial behavior is discovered, no action will be taken.

Other potential problems with the Act include the lack of clarity about whether the Act applies to substantive, as well as ethical, state rules. For example, does the Act apply to state laws governing search and seizure or wiretaps? Which state’s wiretap law would apply in a complex federal case involving several states? Would the Supremacy Clause dictate that the federal wiretap law be applied? Clearly there will be much litigation as these questions are raised in the coming years, and the Supreme Court will ultimately have the final word. Current Supreme Court jurisprudence suggests that the Court will continue to defer to prosecutorial discretion.

B. PROPOSALS FOR REFORM

The failure of current mechanisms of prosecutorial accountability can...
be attributed largely to the private nature of most crucial prosecution decisions. With all of their failings, the electoral system and the appointments process might operate more effectively if the public knew more about the policies and practices of the prosecutors who are elected and appointed to execute the laws. For example, if the public knew that the prosecutor had engaged in behavior that the public found unethical or excessive, it could vote her out of office or lobby against her appointment, even if the judiciary fails to provide a remedy. Prosecutors, however, have insisted heretofore upon secrecy in the implementation of their duties and responsibilities.

It is unlikely that either the judiciary or the legislature will expose internal prosecutorial policies or practices in the near future. The Supreme Court's rejection of even modest discovery in selective prosecution cases suggests that the courts will not be forthcoming on this issue. The legislative history of the Citizens Protection Act of 1998 indicates that legislation requiring prosecutors to reveal prosecution policies and/or practices would be difficult to achieve. Prosecutors traditionally have argued that revealing their prosecution policies would hinder law enforcement efforts, and such arguments undoubtedly would be effective in Congress where pro-law enforcement themes play well.

Some degree of transparency in the implementation of prosecution policies would increase public confidence in the criminal justice system and allay unsubstantiated concerns. For example, after Timothy McVeigh and Terry Nichols were convicted for the Oklahoma City bombing, the trial court revealed the total cost of defending Mr. McVeigh and Mr. Nichols. The costs were substantial because both defendants were charged with numerous counts of capital murder under the federal death penalty statute. These costs provoked criticism. Attorney General Reno then

374. See generally Davis, supra note 12, at 18-19 (proposing the implementation and publication of racial impact studies to discover the existence of racial disparities in prosecution offices).


376. See supra notes 217-23 and accompanying text (noting the court's hesitation in examining the decision of whether to prosecute).

377. See Vorenberg, supra note 12, at 1562-64 (explaining that many prosecution offices do not have written policies governing the implementation of their responsibilities); supra note 217 and accompanying text (discussing selective prosecution).

378. See generally MICHAEL TONRY, MALIGN NEGLECT—RACE, CRIME AND PUNISHMENT IN AMERICA (1995) (arguing that politicians dishonestly use the issue of crime for political gain).


380. Id.
revealed that prosecuting the two defendants cost even more, even though no law, rule, or court order required her to do so. This decision helped to educate the public about the criminal justice system and dispel some of the public bias against the provision of an adequate defense in a criminal case. Practices and policies that would similarly inform the public about other aspects of the prosecution function should be implemented.

Two additional measures—one internal and one external—would promote prosecutorial accountability and public confidence in the criminal justice system. The first measure is the adoption of Public Information Departments in all prosecution offices to enhance public knowledge of the prosecutorial function. The second measure is the creation of Prosecution Review Boards to oversee routine prosecution practices and deter misconduct.

1. Public Information Departments

The Public Information Department would provide information to the public about routine prosecution duties and responsibilities. These offices would not provide information about specific cases or any other information that would hinder law enforcement efforts. They would educate the public about how prosecution offices function: their purpose, goals, duties, and responsibilities. For example, the offices would provide general information on the charging decision, the grand jury, and plea bargaining. This information could be provided in brochures, town meetings, and other public forums.

The implementation of Public Information Departments would be consistent with recent prosecution efforts to promote communication with the public about prosecution efforts. For example, community prosecution offices have been implemented in many communities to involve prosecutors with the communities they serve. These offices reside in the neighborhoods that the prosecutors serve. Community prosecution offices seek input from residents about their community goals and how prosecutors might help to promote them. The Public Information Department would reciprocate this effort by providing information to the public. This information would both empower citizens to hold prosecutors accountable and help to promote confidence in the criminal justice system.

381. Andrew Cohen, Bomb Cases Were Worth It, DENVER POST, Nov. 8, 1998, at H2.

382. Pankratz, supra note 379, at B3 (noting that the federal government spent roughly $82.5 million prosecuting Timothy McVeigh and Terry Nichols).


384. Gansler, supra note 383, at 32.
2. Prosecution Review Boards

Congress and state legislatures should pass legislation establishing Prosecution Review Boards. The purpose of these boards would be to review complaints and conduct random reviews of prosecution decisions to deter misconduct and arbitrary decision-making. These boards would differ in several ways from the proposed "Misconduct Review Board" included in an early draft of the Citizens Protection Act of 1998.535

The Misconduct Review Board, originally proposed but ultimately excluded from the final version of the Citizens Protection Act, would have reviewed the rulings of the Attorney General on public complaints of misconduct. The proposal defined ten specific acts of misconduct536 and permitted members of the public to file a complaint with the Attorney General if they believed that any Justice Department attorney had engaged in the proscribed conduct. If the Attorney General made no determination or imposed no penalty for the alleged misconduct, the person who filed the original complaint could resubmit it to the Misconduct Review Board. If the Board found misconduct, it could impose an appropriate penalty, including probation, demotion, dismissal, referral of ethical charges, loss of pension or other retirement benefits, suspension, or referral to a grand jury for possible criminal prosecution.387

The primary distinction of the Prosecution Review Board would be the addition of a random review process. The Prosecution Review Board would not only review specific complaints brought to its attention by the public, but it would conduct random reviews of routine prosecution decisions. These random reviews could be conducted in a variety of ways. One method might involve the Board’s review of a selection of the closed files in a particular prosecution office and an examination of the file entries for each decision. The Board would closely examine charging and plea bargaining decisions and look for compliance with the ABA’s prosecution standards.385

386. The ten specified acts of misconduct were the following:

(1) in the absence of probable cause seek the indictment of any person; (2) fail promptly to release information that would exonerate a person under indictment; (3) intentionally mislead a court as to the guilt of any person; (4) intentionally or knowingly misstate evidence; (5) intentionally or knowingly alter evidence; (6) attempt to influence or color a witness’ testimony; (7) act to frustrate or impede a defendant’s right to discovery; (8) offer or provide sexual activities to any government witness or potential witness; (9) leak or otherwise improperly disseminate information to any person during an investigation; (10) engage in conduct that discredits the Department.

Id. § 201(a).
387. Id. § 201(b).
388. See generally STANDARDS FOR CRIMINAL JUSTICE (3d ed. 1993) (delineating such standards).
These random examinations would encourage prosecutors to give written reasons for their decisions routinely. Board members would be permitted to interview prosecutors, victims, and witnesses to determine if the prosecutors met the established standards.

The Board would file a public report upon completion of the review. The report would not reveal any information about particular cases, but would report specific practices and policies that either violated or complied with the ABA Prosecution Function Standards. The Board could recommend disciplinary action against a particular prosecutor, refer specific prosecutors to state ethical boards, or simply recommend improvements. On the other hand, the Board could file a report commending a prosecution office as a model in the promotion of the fair administration of justice. Public release of all reports would promote accountability.

Unlike the misconduct complaint process, random review is not dependent on the discovery of practices or policies that are currently hidden from public view. It permits affirmative investigations to discover bad practices, and its random nature is more likely to deter arbitrary prosecution decisions. Random review would also serve the purpose of commending first-rate prosecution offices, thereby enhancing public confidence in offices that perform their responsibilities properly.

V. CONCLUSION

It is unclear why the electorate, the judiciary, and legislature have taken such a "hands-off" approach with the American prosecutor. One reason could be the nature of prosecutorial responsibilities. Prosecutors enforce the law against people accused of committing crimes—an unpopular group in a country with one of the most punitive approaches to crime in the world. Because law enforcement is such a high priority in this country and the victims of prosecutorial misconduct are so unpopular, the electorate, legislature, and judiciary may be less concerned with fairness in the prosecutorial process. A more hopeful view is that prosecutors have not been held accountable because so much of their conduct is private and protected from public scrutiny.

Either theory could explain the public outrage over Kenneth Starr and the demise of the Independent Counsel statute. It is possible that the public did not care about the alleged criminal behavior of the President. On the other hand, the behavior of the Independent Counsel was not as private as that of regular prosecutors, and the public may have found his behavior so reprehensible that they sided with a President they may have otherwise been willing to punish. Both theories may have come into play in the demise of the Independent Counsel statute, and both may come into play with regard

389. See MARC MAUER, RACE TO INCARCERATE 19 (1999) (describing the United States as the second leading country in the world in its rate of incarceration).
to the regulation of regular prosecutors.

An informal poll conducted by the Chicago Tribune after the publication of its series on prosecutorial misconduct may offer some guidance. The Tribune posted the following question:

An investigation by the Chicago Tribune found that prosecutor misconduct is commonplace in felony cases brought in Cook County. But Chicago is not alone. Scores of murder convictions have been thrown out around the country because of dishonest prosecutions. What do you think should be done to remedy this situation?

Readers responded as follows:

"[Prosecutors] should be prosecuted for their crimes."

"We need more effective checks and balances on the unfettered discretion about what and whom to charge. We also need a more certain sanction for those prosecutors found guilty of fudging or hiding the evidence."

"The first thing to do is eliminate the immunity that they and our prosecutors, judges, and other bureaucrats do not deserve . . . At a minimum we need to raise the standard of proof in order to execute someone accused of murder . . . Last, but not least, prosecutors need to be prevented from buying testimony from criminals to help prosecute others."

"We need institutional reform."

"Our judicial system as a whole, needs to be overhauled."

These responses may suggest that, even in cases involving serious criminal behavior, the American public ultimately wants the laws to be enforced fairly. The poll also suggests that the lack of public outrage over prosecutorial misconduct may be a result of lack of information about what prosecutors do and how they behave. Ultimately, the public must demand meaningful reform that opens the doors of prosecution offices and holds them accountable to the constituents they serve.