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Special Counsels: Where They Came From, How They've Changed, Where They're Headed

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Introduction

The power to investigate and prosecute federal crimes belongs to the Executive Branch. This creates a simple but significant problem: when the target of a federal investigation is a senior Executive Branch official—perhaps even the President—the public will naturally wonder whether prosecutors are being as thorough and fair-minded as they would be in a case concerning an ordinary citizen. Will they downplay evidence or decline to bring charges for fear of demotion or firing? Will the White House or Attorney General pressure them to close a line of inquiry or avoid questioning a certain witness? These are the kinds of questions that can erode faith in the rule of law.

For almost a century, the answer has been the special counsel: an independent or semi-independent prosecutor who is tasked with handling a specific sensitive matter. Special counsels date back to the early republic, but they were not always viewed as ways to ensure prosecutorial independence. At first, they were simply outside hires brought on to supplement the meager federal workforce. The first glimpses of their modern character appeared in 1875 during the Whiskey Ring conspiracy, which implicated one of President Grant's top aides. And the first truly independent special counsels were appointed to investigate the notorious Teapot Dome affair of the 1920s. But it was not until the late twentieth century, after Watergate, that the role was institutionalized, with codified rules that defined special counsels' duties and stipulated when they could be appointed and removed.

Special counsels faced considerable criticism almost as soon as they became a fixture of the federal legal landscape. In the immediate aftermath of Watergate, Congress's main concern was protecting special counsels from presidential interference. The result was a statute that critics charged made special counsels too easy to appoint, too difficult to fire, and too zealous in pursuing their cases. When Congress let the law lapse in 1999, it was replaced by Justice Department regulations. These were designed to strike a better balance between independence and accountability. But a series of high-profile special counsel appointments during the administrations of Donald Trump and Joe Biden have provoked fresh doubts about the utility of independent prosecutors in an era of extreme partisanship and widespread public suspicion of institutions.

Special counsels now face an additional challenge: legal uncertainty. One federal judge has ruled that the appointment of special counsels from outside the Department of Justice exceeds the attorney general's authority. And the Supreme Court's recent holding that wide swaths of presidential conduct are immune from criminal liability raises doubts about one of special counsels' primary historical functions: to investigate potential violations of the law by the president. These issues cast a shadow over the viability of special counsels as a tool for investigating and prosecuting misconduct at the highest level of the executive branch.

Special counsels thus face an uncertain future. In the short term, at least, the legal questions and political controversy that surround them make it likely that they will be used more sparingly than in recent years. And there are other tools that Attorneys General can use to handle sensitive investigations, each with different strengths and weaknesses. What is not in doubt, however, is the persistence of the problem that special counsels were called upon to solve: how to responsibly enforce the law against the branch of government tasked with law enforcement.

History

Origins: Evolving Toward Independence¹

Before the Civil War, federal law enforcement was haphazard, decentralized, and thinly staffed. The Judiciary Act of 1789 had created the offices of the Attorney General and the United States Attorneys, but it did not provide them with any assistants, a reflection of the relatively few federal criminal laws then on the books. The Department of Justice wasn't established until 1870.

As a result, in the early years of the republic, the Attorney General and U.S. Attorneys often hired private attorneys to help them fulfill their duties. These ad hoc appointees were often called special counsels, but, aside from being appointed for a specific purpose, they bore little resemblance to their modern-day counterparts. Significant examples of these workforce-augmenting special counsels occurred during the Buchanan Administration, when a special counsel was hired to help the U.S. Attorney in San Francisco litigating a series of complex land disputes, and during the administration of Andrew Johnson, when Attorney General James Speed hired three private attorneys as "associates" to assist the U.S. Attorney in the Eastern District of Virginia in prosecuting Jefferson Davis, the former president of the Confederacy.

1. This section draws from the following sources: Andrew Coan, *Prosecuting the President: How Special Counsels Hold Presidents Accountable and Protect the Rule of Law* (2019); Josh Blackman, "A Historical Record of Special Counsels Before Watergate," 65 *South Texas Law Review* 145 (2026); Richard White, *The Republic for Which It Stands: The United States During Reconstruction and the Gilded Age, 1865-1896* (2017).

The first hints of what special counsels would become appeared during the administration of Ulysses S. Grant. The occasion was the Whiskey Ring, a group of federal revenue agents who conspired to exempt whiskey producers from taxation; the producers then shared their tax savings with the officials as a kickback. Among the recipients of these illicit funds was Orville Babcock, Grant's private secretary. In 1875, Attorney General Edwards Pierrepont appointed John B. Henderson as a special assistant to David Dyer, the U.S. Attorney in St. Louis, who was leading the investigation into the Whiskey Ring. Grant directed his subordinates that "[n]o personal consideration should stand in the way of performing a public duty."

Unfortunately, Grant didn't heed his own instruction. Unduly fond of Babcock, he ordered Pierrepont to fire Henderson after the prosecutor implicated Babcock before the grand jury. And while Grant permitted Pierrepont to select a replacement for Henderson, the president submitted written testimony supporting Babcock at his trial, an executive intervention that undermined the prosecution's case. Dozens of Whiskey Ring conspirators were convicted, but Babcock went free, despite voluminous evidence against him. In Babcock's case, at least, the Executive Branch proved unable to impartially investigate one of its own.

The first truly independent counsels were appointed in the twentieth century to investigate the Teapot Dome scandal, in which Albert Fall, Secretary of the Interior in the Cabinet of President Warren Harding, sold oil leases on federal lands in exchange for massive bribes. Harding died in August of 1923, when the scandal's full scope had yet to be uncovered by congressional probes. Once the scale of corruption was evident, Harding's successor, Calvin Coolidge, responded to the enormous public pressure to act by announcing in January 1924 that he was prepared to appoint a special counsel to investigate the affair.² Congress promptly passed a joint resolution that directed Coolidge to appoint, with the Senate's advice and consent, a "special counsel who shall have charge and control of the prosecution ... anything in the statutes touching the powers of the Attorney General or the Department of Justice to the contrary notwithstanding."³ It was the first time special counsels were given the full powers of a U.S. Attorney, and the first time they were expressly placed outside the Justice Department's normal chain of command.

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2. "The President's Statement," *The New York Times* (Jan. 27, 1924).

3. S.J. Res. 54, 68th Cong., 43 Stat. 5 (1924).

The two special counsels that Coolidge chose (including future Supreme Court Justice Owen Roberts) achieved some important victories, including the cancellation of the corruptly granted oil leases. But of eight criminal cases that they brought, they secured only two convictions, most notably that of Secretary Fall. Many others involved in the scandal went free or escaped investigation altogether. Moreover, their work was hampered by significant delays; Fall was indicted in 1924, but not convicted until 1929, and he served less than a year in prison. In its reliance on independent special counsels with plenary powers—and in its long duration and equivocal results—the investigation of Teapot Dome was a harbinger of things to come.

Watergate: The Turning Point

Watergate was the catalyst for institutionalizing the use of special counsels. At the time of the scandal surrounding President Nixon's ties to the 1972 break-in of the Democratic National Committee headquarters, no statutes or regulations specifically protected the independence of special counsels. Instead, amid growing public concern over Nixon's conduct, Attorney General nominee Elliot Richardson pledged during his Senate confirmation hearings to appoint a special Watergate prosecutor and to respect the prosecutor's independence.⁴

Upon taking office in June 1973, Richardson named Archibald Cox as the Watergate special prosecutor pursuant to his authority as attorney general.⁵ That October, after an ongoing dispute over the President's refusal to comply with a subpoena for recordings of Oval Office conversations, Nixon ordered Richardson to fire Cox. Citing his pledge to respect Cox's independence, Richardson resigned rather than comply, as did Deputy Attorney General William French Smith, in what became known as the Saturday Night Massacre.

Although the highest remaining Justice Department official, Solicitor General Robert Bork, ultimately fired Cox to defuse a further standoff with the White House, public outcry and the threat of impeachment forced Nixon to agree to the appointment of a new special prosecutor. Bork appointed Leon Jaworski as Cox's successor, granting him even more independence than Cox. The order naming Jaworski as special prosecutor stated that "[t]he Attorney General will not countermand or interfere with the Special Prosecutor's decisions or actions" and that Jaworski could not be removed except for "extraordinary improprieties" and only after the President had first secured the agreement of leaders in both chambers of Congress.⁶

4. [Nomination of Elliot L. Richardson, of Massachusetts, to be Attorney General](#): Hearing Before the Senate Committee on the Judiciary, 93d Congress 4-7, 18-20 (1973).

5. [Establishing the Office of Watergate Special Prosecution Force](#), 38 Fed. Reg. 14,688 (June 4, 1973) (citing 28 U.S.C. §§ 509, 510 and 5 U.S.C. § 301).

6. [Establishing the Office of Watergate Special Prosecution Force](#), 38 Fed. Reg. 30,739 (Nov. 7, 1973)

Armed with these protections, Jaworski pursued the subpoenas of Oval Office recordings all the way to the Supreme Court, which unanimously upheld Jaworski's authority to seek the tapes.⁷ Among them was the so-called "smoking gun" tape that proved Nixon's participation in the coverup of the Watergate burglary. The ensuing uproar led to congressional hearings and an impeachment inquiry. Nixon's political support collapsed, and he resigned rather than face impeachment. He was pardoned by his successor, Gerald Ford, forestalling any further criminal investigation of his actions, but the Watergate special prosecution force continued to operate independently until 1977, securing 48 convictions or guilty pleas.

Independent Counsels under the Ethics in Government Act: the High Tide of Independence (1978–1999)

Nixon's attempts to end the Watergate investigation persuaded Congress that special counsels needed statutory protections from political interference.⁸ The result was Title VI of the Ethics in Government Act of 1978, which provided for the appointment of an "independent counsel" to investigate high-level executive branch other officials for suspected violations of federal law.

The law created a two-step process for appointing an independent counsel: within 90 days of receiving information about alleged wrongdoing, the attorney general was required to conduct an initial investigation. If that inquiry led the attorney general to conclude that further investigation or prosecution was warranted, he was required to apply for the appointment of an independent counsel to a special three-judge division of the U.S. Court of Appeals for the D.C. Circuit, which decided whether to make the appointment and was responsible for selecting the person to serve as independent counsel. Once appointed, an independent counsel could be removed only by impeachment or by the attorney general "for good cause, physical or mental disability..., or any other condition that substantially impairs the performance of such independent counsel's duties."⁹

The two most prominent independent counsel investigations achieved ambiguous results while generating considerable partisan controversy. Lawrence Walsh's investigation into the Iran-Contra affair during the Reagan Administration lasted six years, cost \$47 million, and resulted in eleven guilty pleas or convictions. But two of the important convictions were overturned on appeal because of

7. *United States v. Nixon*, 418 U.S. 683 (1974).

8. E.g., [Provision for Special Prosecutor](#); Hearing Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 95th Cong. 2 (1976) (Statement of Sen. Ribicoff) ("Our committee has been concerned with how we presently handle investigations and prosecutions of possible criminal activity by high level Federal Government officials. The serious deficiencies of our present system of handling these cases were highlighted by Watergate.")

9. [28 U.S.C. 596\(a\)\(1\)](#) (repealed 1999).

congressional grants of immunity, and the most high-profile indictment—that of Defense Secretary Caspar Weinberger—was wiped away by a presidential pardon. Kenneth Starr’s investigation into an Arkansas real estate venture involving Bill and Hillary Clinton expanded to become an inquiry into whether President Clinton had lied under oath about an extramarital affair with a White House intern, leading to Clinton’s impeachment.

The controversy around these investigations reflected the country’s growing partisan divide. But they also contained more substantive critiques, foremost among them that the Ethics in Government Act had granted independent counsel too much independence, leading to unchecked prosecutors pursuing investigations beyond reasonable limits. As then-Attorney General Janet Reno told a Senate Committee in 1999:

In trying to ensure independence, the statute creates a new category of prosecutors who have no practical limits on their time or budgets. They have no competing public duties, and no need to make difficult decisions about how to allocate scarce resources. They are not required to take into account the overall prosecutorial interests or traditions of the Department of Justice (they are bound only to comply with the written and other established policies of the Department of Justice to the extent not inconsistent with the purposes of the statute). An independent counsel typically is charged with investigating one person—and so all of his or her energy, ingenuity, and resources are pointed in one direction. Add to this the fact that an Independent Counsel may labor in the public spotlight and under the watchful eye of history. An independent counsel will be judged, not on the basis of a broad track record, but on one case alone. If the Counsel uncovers nothing, or fails to secure an indictment and conviction, some may conclude that he or she has wasted both time and money.¹⁰

Critics also questioned the law’s requirement that independent counsels produce final reports of their investigations. In the Iran-Contra and Clinton cases, this mandate resulted in weighty tomes containing extensive descriptions of high-ranking officials engaging in non-criminal but embarrassing, unethical, or unsavory conduct. To many observers, these reports inappropriately transformed the prosecutor’s role from enforcing the law to making political judgments. Critics contended that instead of publicly documenting only those actions relevant to proving criminal conduct beyond a reasonable doubt, independent counsels, feeling pressure to justify their actions at length, became grand inquisitors with the power to tarnish the reputation of legally innocent people.

10. “Statement of Janet Reno, Attorney General, Before the Committee on Governmental Affairs, United States Senate, Concerning the Independent Counsel Act,” U.S. Department of Justice (March 17, 1999).

The independent counsel statute also faced a significant constitutional challenge in 1988. In *Morrison v. Olson*, the target of an independent counsel investigation argued, among other things, that because the statute limited the Attorney General’s power to remove a counsel, the law violated the separation of powers. The Court disagreed in a 7-1 decision, but in dissent, Justice Scalia argued that by denying the president and his subordinates full power to appoint and remove independent counsels, Congress had impermissibly encroached on the executive power. In the decades that followed, Justice Scalia’s view became deeply influential, and later Supreme Court decisions have weakened *Morrison*’s premise that executive power can be vested in officials outside the president’s plenary control.¹¹ Today’s Supreme Court, which has embraced the unitary executive theory, almost certainly would expressly adopt Scalia’s position if the same question arose today.¹²

For a combination of these reasons, when Title VI was due for reauthorization in 1999, those urging Congress to let the law expire included Attorney General Reno, the American Bar Association, and even Kenneth Starr, who was still serving as independent counsel at the time.¹³ Congress did not renew the law.

Special Counsels: In Search of an Elusive Balance (1999–Present)

After Title VI’s lapse, the Justice Department promulgated its own regulations governing the use of special counsels—regulations that are still in force today. According to the promulgation statement, the new rules sought “to strike a balance between independence and accountability in certain sensitive investigations,” although the Department conceded “that there is no perfect solution to the problem.”¹⁴

The regulations provide that the attorney general may appoint special counsels in cases involving a conflict of interest “or other extraordinary circumstances” that make having a special counsel “in the public interest.”¹⁵ The special counsel is removable only for good cause, and he is “not subject to the day-to-day supervision of any official” in DOJ.¹⁶ The attorney general can override any investigative or prosecutorial step, however, if it is “so inappropriate or unwarranted under established Departmental practices that it should not be pursued.”¹⁷ The special counsel is directed to provide

11. *E.g.*, *Trump v. Slaughter*, 146 S. Ct. 2283 (2026).

12. *Morrison v. Olson*, 487 U.S. 654 (1988); see also Erwin Chemerinsky, “*Morrison v. Olson* and the Triumph of the Unitary Executive Theory,” SCOTUSblog (Dec. 3, 2025).

13. “*Starr opposes Independent Counsel Act*,” CNN (April 14, 1999).

14. *Office of Special Counsel*, 64 Fed. Reg. 37,038 (July 9, 1999).

15. 28 C.F.R. § 600.1.

16. 28 C.F.R. § 600.7.

17. *Id.*

the attorney general with a confidential report of his prosecution or declination decisions at the end of his work.¹⁸ The regulations thus sought to remedy the criticisms of the independent counsel regime by having the attorney general make the appointment, bringing the appointed counsel under greater Justice Department supervision, and making the final special counsel report confidential.

The new special counsel regime attracted little attention until 2017, when Deputy Attorney General Rod Rosenstein (acting as attorney general) appointed Robert S. Mueller III as special counsel to investigate Russian interference into the 2016 presidential election, including the existence of any links between Russia and Donald Trump's campaign. Mueller was the first of five special counsels appointed in the six years between 2017 and 2023. In this period, Presidents from both political parties were subject to investigation by special counsels:

President Trump by Mueller and Jack Smith, and President Biden by Robert Hur. President Biden's son Hunter was also investigated.

Like the Iran-Contra and Whitewater investigations, these investigations stoked partisan vitriol while yielding controversial results. Mueller declined to exonerate President Trump for obstruction of justice but also refrained from bringing charges against him, citing the Justice Department's longstanding position that a sitting president cannot be prosecuted. Hunter Biden was convicted on one charge and pleaded guilty

to another, but his father pardoned him in the final days of his presidency. Hur declined to charge President Biden, but his final report contained several statements questioning Biden's mental acuity. Smith's investigation led to two indictments of Trump, one for mishandling classified documents, and one for conspiring to overturn the lawful results of the 2020 election.¹⁹ These were the first criminal charges brought against a former president, but after Trump was reelected to the presidency in 2024, Smith dropped the cases.

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18. 28 C.F.R. § 600.8(c).

19. In addition to Mueller and Smith, the other special counsel investigations were: John Durham's inquiry into the origins of the FBI investigation of the Trump campaign's ties to Russia (results: three indictments, one guilty plea for making a false statement, and two acquittals); David Weiss's investigation of Hunter Biden for tax crimes (conviction on gun charges, guilty plea on tax charges, pardon from President Biden); and Robert Hur's investigation of President Biden's handling of classified documents (closure of investigation without charges; comments in Hur's report about Biden's age and memory were controversial).

This mixed record prompted a new round of criticisms. Harvard law professor Jack Goldsmith, who served as an assistant attorney general in the George W. Bush administration, concluded that it was “time to kill the special counsel institution.” Goldsmith argued that special counsels, like their predecessors under the Ethics in Government Act, were still too independent, leading to prosecutorial overreach that undermined the stated purpose of a special counsel: to assure the public of an investigation’s impartiality and integrity. Former U.S. attorney Chuck Rosenberg agreed with Goldsmith that special counsels did little to assuage the public, and he further argued that their overuse was creating a corrosive impression that the Justice Department’s career staff could not handle sensitive investigations—a point that Elliot Richardson had made back in 1995.²⁰

Public polling supports these critiques: it appears that Americans’ views of special counsels, like their views on so many other aspects of public life, are now divided along partisan lines.²¹

A Changing Legal Landscape

After a half-century of prominence, special counsels seem likely to recede from public view, at least in the immediate future. Certainly, it is unlikely that special counsels will be appointed by attorneys general serving under the current administration, which has repeatedly flouted the post-Watergate norm of an independent Justice Department. If an administration is not concerned about insulating DOJ from the perception of political influence, it will see little value in special counsels.

But the election of a future administration that restores Justice Department independence may not automatically herald a revival of special counsels. A combination of partisan division, public mistrust, and inconclusive investigations has led prominent observers like Goldsmith and Rosenberg to question whether special counsels in fact serve their intended purpose of instilling public confidence—an elusive goal in an overheated partisan climate marked by misinformation and low institutional legitimacy.

There is another reason that we are likely entering a period of special counsel dormancy: two recent court decisions that may limit who can serve as a special counsel and what conduct they can investigate.

20. Jack Goldsmith, “[Jack Smith and Robert Hur Are the Latest Examples of a Failed Institution](#),” *The New York Times* (March 12, 2024); Chuck Rosenberg, “[An ‘Extraordinary’ Problem](#),” *Lawfare* (Sept. 20, 2023); Elliot Richardson, “[Special Counsels, Petty Cases](#),” *The New York Times* (June 5, 1995) (“Whenever the Attorney General refers the results of a preliminary investigation to a special court, a message is sent: ‘The person whose actions require investigation is so influential and the Justice Department’s independence is so suspect that the public would be justified in considering us unable to conduct a complete and impartial investigation in the matter.’”).

21. E.g., “[Americans divided on whether President Biden received special treatment in classified documents report](#),” Ipsos, (Feb. 13, 2024), Linley Sanders and Jonathan J. Cooper, “[Americans are divided along party lines over Trump’s actions in election cases, AP-NORC poll shows](#),” Associated Press (Aug. 16, 2024).

The first decision was issued by Judge Aileen Cannon, the federal district court jurist who handled the litigation surrounding Jack Smith's indictment of President Trump for improperly retaining classified materials after the end of his first term in the White House. In a decision issued in 2024, Judge Cannon dismissed Smith's indictment. Although her opinion described the reason for dismissal as an Appointments Clause violation, the crux of her decision was in fact statutory: in her reading, none of the statutes that Attorney General Merrick Garland cited in his order appointing Smith authorized the appointment of someone from outside the Justice Department to serve as special counsel. And although the Supreme Court had written in its 1974 decision in *United States v. Nixon* that the statutes in question legitimated the appointment of the Watergate special prosecutor, Judge Cannon concluded that its statement was non-binding dictum. In her view, the law requires a special counsel to be appointed from inside the Justice Department, a requirement that arguably undercuts one of the traditional sources of special counsel legitimacy: their status as eminent lawyers brought in from outside the government.

Smith appealed Judge Cannon's decision to the Eleventh Circuit, but Trump's reelection led to the dismissal of the appeal before it was adjudicated, leaving Cannon's decision in place. The target of a future special counsel investigation would undoubtedly raise an identical statutory challenge, marshaling Judge Cannon's decision in support. Litigating that case would cost a special counsel valuable time and resources. And although several other federal courts, including the U.S. Court of Appeals for the District of Columbia, have previously rejected identical claims, the issue would not be settled if and unless it reached the Supreme Court.

The second decision came from the Supreme Court. In *Trump v. United States*, which arose from the indictment of then-former-President Trump on charges of conspiring to overturn the 2020 election results and obstructing the January 6 certification proceeding in Congress. The Court held that presidents are immune from criminal prosecution for all actions taken pursuant to their core constitutional powers and at least presumptively immune for any other official acts. The exact scope of immunity is unclear, but because of *Trump*, presidential actions that once would have been cause for appointing a special counsel will now be immune from prosecution.

Two recent court decisions may limit who can serve as a special counsel and what conduct they can investigate.

More broadly, the Supreme Court has recently adopted a strong view of the unitary executive theory, which posits that Article II of the Constitution gives the president near-total control of the executive branch. The Court recently applied this theory to give the president unchecked authority to dismiss principal officers in the executive branch. The appointment of an independent prosecutor who wields executive power and enjoys protection against dismissal except for good cause may appear to this Court to be a constitutional anomaly, even if the appointment is controlled by the attorney general.

Alternatives

Special counsels nevertheless are not extinct. They remain a tool that a future Attorney General may wish to use for a politically sensitive investigation. They may be especially well suited to handle cases where the Justice Department itself may be the source of a potential conflict of interest. For instance, one of the first special counsels appointed under the contemporary regulations was former senator John Danforth, whom Attorney General Reno tasked with investigating the Department's handling of the FBI-ATF siege of the Branch Davidian compound in Waco, Texas.

But in light of the political and legal headwinds facing special counsels, future Attorneys General are likely to consider other ways to handle politically sensitive investigations. At least three alternatives are readily available:

Normal Justice Department Procedures

Since the lapse of the Ethics in Government Act, no statute requires an Attorney General to appoint a special counsel. They are therefore free to let the case be handled by whichever U.S. Attorney's office or prosecuting component at Justice Department headquarters would normally pursue the case.

Prominent voices—including, as discussed above, Chuck Rosenberg and Elliot Richardson—have called for more sensitive cases to be handled through regular channels, arguing that it will bolster the American people's faith in the Justice Department's ability to handle difficult, high-profile cases. They observe that the Justice Department doesn't always assign sensitive investigations to special counsels. To cite just one notable example, in 1973, the U.S. Attorney's Office for the District of Maryland investigated Vice President Spiro Agnew for tax fraud and corruption, resulting in a plea of no contest immediately after Agnew's resignation.

Keeping a case within “normal channels,” however, does not address one of the key reasons that the special counsel mechanism rose to prominence: it does not create either the reality or perception of independence from political control. Of course, the use of special counsels have largely failed to persuade the public of an investigation’s independence, as well, and keeping the case in the Department’s normal channels preserves the accountability of the attorney general for high-profile and sensitive matters. And to the extent that the Department reclaims its traditional independence from the White House, having a Senate-confirmed Attorney General take responsibility for a case may help restore confidence in the Department’s integrity and commitment to equal justice under the law.

Specially Appointed Task Force

At various points in its history, the Justice Department has appointed specially created task forces to conduct complex, high-profile investigations. They are especially appropriate for complex investigations requiring certain technical expertise; the Enron Task Force, for example, recruited FBI agents and attorneys with accounting and banking experience that allowed them to untangle the energy giant’s abstruse financial records. Task forces are not eligible for the same potentially unlimited funding as special counsels, but in practice they have been well-resourced from the Department’s regular operating budget.

But task forces may be less useful for politically sensitive investigations. Unlike special counsels, they are not designed to be insulated from Department leadership and they do not operate under regulatory or other formal procedures designed to communicate independence. And their very name can suggest a determination to secure an indictment at all costs. Members of the public who believe the target is culpable will be disappointed by a lack of indictments, whereas citizens with the opposite view (not to mention the targets) are likely to accuse the Department of being out to “get” the target. Such was the case with Attorney General Robert Kennedy’s task force for investigating corruption in the Teamsters Union, which became known as the “Get Hoffa Squad,” a reference to Teamsters boss Jimmy Hoffa.²²

22. See Victor S. Navasky, *Kennedy Justice*, 403–405 (1971).

Ad hoc assignment to U.S. Attorney's Office

A third option is the ad hoc assignment of a case to a specific U.S. Attorney's office that is in the relevant venue or is granted nationwide authority. In the past, the Department has assigned sensitive cases to U.S. Attorney offices headed by an official with an established reputation for credibility. Such was the case with the investigation of the leak of the identity of CIA officer Valerie Plame, which was assigned to Patrick Fitzgerald, the U.S. Attorney for the Northern District of Illinois.²³ The Department has also asked U.S. Attorneys from previous administrations of the opposite party to stay on to continue an investigation; the Biden Administration took this approach with David Weiss, the U.S. Attorney in Delaware who began investigating President Biden's son Hunter during President Trump's first term.

U.S. Attorneys' offices offer many advantages, and may be a useful compromise between appointing a special counsel and keeping a case in normal channels when a case is deemed too or too complex for regular handling. U.S. Attorneys' offices are headed by presidentially nominated, Senate-confirmed officials, making them accountable to the president and the attorney general, but Department norms and their distance from Washington, D.C. also give them a wide degree of independence. As with keeping a case in normal channels, assigning the case to a trusted U.S. Attorney's office may tend to bolster the Department's credibility and alleviate some of the attention and expectation that attends the appointment of a special counsel. And such an assignment is free from the legal challenges a special counsel is bound to face.

There are downsides, of course. Career staff may feel undermined if the attorney general takes a case away from one U.S. Attorney's office (or a Main Justice litigating component) and hands it to another. And in especially complex cases, even the largest and most expert U.S. Attorney's offices may need additional staff and funding. While these can be secured through detailed employees, special assignments, or additional hiring, doing so will likely require navigating bureaucratic hurdles.

23. Fitzgerald was also given the title "special counsel," but he continued to serve as U.S. Attorney, and the Acting Attorney General stated that Fitzgerald's authority was plenary and not limited by the special counsel regulations. See [Letter from Deputy Attorney James Comey to Patrick Fitzgerald](#), U.S. Attorney for the Northern District of Illinois, U.S. Department of Justice (Feb. 6, 2004).

Conclusion

Special counsels have a long and eventful history in federal law enforcement. No period of that history has been more eventful than the last half century, during which special counsels were the lead actors in legal dramas that dominated the front pages and generated their own vocabulary of snappy monikers: Watergate, Iran-Contra, Whitewater. And in the last decade, special counsels appointed under Justice Department regulations designed to foster confidence have instead become embroiled in political controversy and partisan distrust in their efforts to investigate sitting and former presidents.

Because of this recent history, special counsels are likely to be used less frequently in the near future. But the problem they have evolved to address—the problem of assuring the public that high officials are not above the law—is not going away. The Justice Department will continue facing the challenge of demonstrating that it can credibly and responsibly investigate cases where it may be perceived as having a conflict of interest, including cases that involve criminal allegations against Executive Branch officials. This has never been an easy task, and at our moment of deep division and mistrust, it is only growing more difficult.

