What Is the Best Model for Investigating Presidential Wrongdoing, Today?

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What is the Best Model for Investigating Presidential Wrongdoing, Today?

Bruce Ledewitz*

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The roundtable discussion, Special Counsel Investigations and Legal Ethics, of which this essay is a component, could hardly have raised a more urgent issue for American public life in our time. On May 17, 2017, only four months into the presidency of Donald Trump, and shortly after President Trump's dismissal of F.B.I. Director James Comey created a crisis of confidence in the ability of

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the Justice Department to investigate, fully and fairly, alleged collusion between the Trump campaign and Russian officials prior to the 2016 election, the Justice Department appointed Robert Mueller III as Special Counsel to conduct the investigation.\footnote{See generally Rebecca R. Ruiz & Mark Landler, Robert Mueller, Former F.B.I. Director, Is Named Special Counsel for Russia Investigation, N.Y. TIMES (May 17, 2017), https://www.nytimes.com/2017/05/17/us/politics/robert-mueller-special-counsel-russia-investigation.html.}

This action did not alleviate the political crisis, which has continued in various manifestations to the time I am writing this essay in Spring 2019. Although in public statements at the time, President Trump evinced no criticism of Mueller’s appointment—he insisted that a thorough investigation would show that no collusion occurred and urged that the matter be speedily concluded—\footnote{Id.}—the President grew increasingly critical of the Mueller investigation as time passed. On August 1, 2018, for example, President Trump, through a tweet on Twitter, urged Attorney General Jeff Sessions, who had recused himself from overseeing the Russia investigation, to “stop this Rigged Witch Hunt right now.”\footnote{Julie Hirschfeld Davis et al., Trump Tells Sessions to ‘Stop This Rigged Witch Hunt Right Now’, N.Y. TIMES (Aug. 1, 2018), https://www.nytimes.com/2018/08/01/us/politics/trump-sessions-russia-investigation.html (quoting Donald J. Trump (@realDONALDTRUMP), TWITTER (Aug. 1, 2018, 6:24 AM), https://twitter.com/realdonaldtrump/status/102464945640525826).}

It is not my purpose in this paper to recount all the political vicissitudes of the Mueller investigation. Nor is it my purpose to conclude anything at all about possible wrongdoing by President Trump. Instead, my goal is to evaluate the different approaches that might be taken with regard to investigating alleged wrongdoing by a President. Which of the various models we can realistically imagine is best for that purpose? My effort can be viewed as an update of, and further engagement with, a similar investigation by Thomas W. Merrill in 1999, on the occasion of the then-loom ing expiration of the Independent Counsel Act.\footnote{Thomas W. Merrill, Beyond the Independent Counsel: Evaluating the Options, 43 ST. LOUIS U. L.J. 1047 (1999).} How has today’s toxic political environment impacted the question that he addressed?

Of course, wrongdoing by high Executive Branch officials other than the President occurs, but my focus is on investigation of a President, both because that is the current pressing issue, and because that is the perennial pressing issue. Investigations of a President will also involve other potential targets, but they are considered here only in the context of the quest for truth about possible presidential wrongdoing.
The question of which approach is best invites, in turn, two considerations before any analysis can be attempted. First, what are the realistically possible models of investigating a President?

We can determine potential models of investigation by looking at the actual events concerning presidential wrongdoing in American history. Although there have been numerous scandals that reflected upon, and perhaps implicated, Presidents—from scandals in the administration of President Ulysses S. Grant to the Teapot Dome Scandal in 1921 during the administration of Warren Harding5—I will concentrate in this essay on more recent presidential scandals. My focus is upon the structural lessons to be learned from the three most recent and well-known investigations—Watergate, Whitewater and its later transformations, and the current Russia collusion investigation.6

Part I of the essay describes five models of investigation that were utilized in various forms during these episodes. Those five models are: (1) statutorily independent investigation—the Independent Counsel Model; (2) administratively independent investigation—the Special Counsel Model; (3) ad hoc investigation—the Ad Hoc Special Prosecutor Model; (4) ordinary criminal investigation—the U.S. Attorney Model; and (5) congressional investigation—the Legislative Branch Model. All of these models have been utilized to greater or lesser extents in the three most recent and well-known investigations.

In addition to these approaches, variations of a sixth model that has been proposed, but never implemented, in investigation of a President will be considered. We can call this model the Permanent Executive Branch Office Model because it involves the creation or utilization of permanent structures within the Executive Branch.7

The second consideration that is raised by the title of this essay is, what does “best” mean in a context of an investigation of presidential wrongdoing? I take that matter up in Part II, which concludes that the most important role for such investigation is to allow the people, through their representatives in Congress, to decide


6. I mostly leave out, because it did not focus originally on the actions of the President, Independent Counsel Larry Walsh’s seven-year investigation of the Iran-contra affair.

7. One model I leave out entirely is the Civil Damages Action Model, which was upheld in Clinton v. Jones, 520 U.S. 681 (1997). That model only applies to so-called private acts of wrongdoing by a President, which in practice means acts performed prior to a person becoming President. See id. Once in office, the President is shielded from damage actions by an absolute immunity for any official action. See Nixon v. Fitzgerald, 457 U.S. 721, 749 (1982).
whether wrongdoing by a President warrants impeachment and removal. The standard for the "best" model of investigation is, therefore, the one that most ably promotes this public consideration.

Looking at investigation from the perspective of the formation of a national consensus about removal differs considerably from the tone of most discussions of the Independent Counsel Act when it was allowed to lapse in 1999. At that time, discussion centered around partisan abuses that many felt had taken place under the Act, balanced against the need for real independence in determining the facts of potential presidential wrongdoing. The abuses led most observers to favor nonrenewal. Nevertheless, it was taken for granted that facts could be fairly and accurately determined, and that, if they were, Congress and the people would accept the facts and act on them.

That assumption may not have been warranted even in 1999. Today, however, in an era of alternative facts and the death of truth, actual public acceptance of facts found becomes the most important consideration. There is a tension in this highly partisan age between determining the relevant facts, on the one hand, and doing so in a way that can lead to formation of a national consensus about presidential removal, on the other. Simply put, today, an investigation that is viewed as controlled by a President's political enemies, however competently executed, will not enable the people to make the necessary judgment about whether a President should be removed from office. No national consensus would be possible out of such a process. To be acceptable, a model of investigation must be one that could potentially convince many of a President's own supporters that the President has engaged in serious wrongdoing.

With these considerations in mind, Part III proceeds to judge which of the six models is best and concludes that none of the models is actually the best choice—the one that best balances the need for accurate fact-finding with the need for political acceptance of the

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9. See, e.g., id. at 64-68.
11. Thus, ABA President Philip S. Anderson testified before the House Judiciary Committee that the defects of the Act "include[d] its failure to assure accountability of the independent counsel; the possibility that an independent prosecutor may investigate and sometimes prosecute matters that are trivial or innocuous; the danger that open-ended investigations will waste taxpayer money; and the creation of conflicting responsibilities for independent counsels." Rhonda McMillion, Good Idea Gone Bad, A.B.A. J., May 1999, at 81. These concerns are with a kind of partisan harassment, not a concern that facts accurately found would not be accepted.
facts found. Therefore, in Part IV, I set forth a hybrid model that I hope combines the needed political acceptance with some assurance of accuracy and independence.

In a highly toxic political environment, one in which politics no longer seems to work because Americans find it difficult to trust each other, it may be fanciful to imagine that any mechanism of investigating a President can transcend America's political divisions. Nevertheless, those of us who are committed to constitutional democracy cannot afford to give in to despair. We must continue to work to make constitutional democracy possible again. Finding a workable model for investigation of presidential wrongdoing is one necessary aspect of any potential democratic renaissance.

I. THE MODELS OF INVESTIGATING PRESIDENTIAL WRONGDOING

In considering these models, I will paint with a broad brush. There are important potential differences in the details of each model that the reader can easily imagine, but which are beyond my purposes here. My goal is to broadly consider the following basic, differing approaches.

A. The Independent Counsel Model

This model is the most familiar and the easiest to describe. Its well-known exemplar is the Independent Counsel Act\(^\text{12}\) that was enacted in 1978, was amended at various points, and was allowed to lapse in 1999.\(^\text{13}\) This model potentially offers a high level of independence from Executive Branch oversight, combined with effective criminal investigative expertise. The Act was limited to investigation of serious federal crimes by a certain class of high government officials.\(^\text{14}\) It aimed at criminal prosecution, with a final report submitted to the judicial panel of appointment "setting forth fully and completely a description of the work of the independent counsel, including the disposition of all cases brought."\(^\text{15}\) Conversely, the annual report to Congress was concerned only with oversight of the progress of any investigations and prosecutions that an Independent Counsel was engaged in, to ensure that the

\(\text{14. 28 U.S.C. § 591(a)-(c).}\)
\(\text{15. Id. § 594(b)(1)(B).}\)
expenditures for the Independent Counsel were justified.\textsuperscript{16} Clearly, despite this language, the Independent Counsel did evolve into an aid to Congress' impeachment and removal deliberations.\textsuperscript{17}

The amendments to the Act over the years reflected differing concerns with wrongdoing in the Executive Branch. The Act was amended to prevent the investigation of relatively minor crimes, but to include the investigation of wrongdoing arising out of the investigation itself, such as perjury and obstruction of justice, and to permit requests that the original subject of investigation be changed or enlarged.\textsuperscript{18}

These changes were certainly important in historical context, but they did not alter the fundamental nature of the office. The Independent Counsel remained a temporary, inferior officer, appointed by a panel of federal judges at the request of the Attorney General, and was removable only for good cause.\textsuperscript{19} These attributes meant that the President would usually have a role in the decision whether to seek the appointment of an Independent Counsel, but would have no role at all in naming the person and only a restricted role in removal. This ensured a genuinely independent investigation.

The constitutional permissibility of such independent criminal investigation was upheld by the Supreme Court in \textit{Morrison v. Olson},\textsuperscript{20} against a powerful dissent by Justice Antonin Scalia.\textsuperscript{21} In Scalia's view, a purely executive function, such as criminal investigation, had to be "fully within the supervision and control of the President."\textsuperscript{22} While the \textit{Morrison} case did not involve allegations of wrongdoing by a President, Justice Scalia was plainly assuming the same conclusion would apply to an investigation of the President.\textsuperscript{23}

Notwithstanding Justice Scalia's dissent, however, \textit{Morrison} specifically upheld the Act's limits on presidential control.\textsuperscript{24} Therefore, the \textit{Independent Counsel Model} constitutes the furthest reach of

\begin{itemize}
\item 16. Id. § 595(a)(2).
\item 19. 28 U.S.C. § 596(a)(1).
\item 21. Id. at 697 (Scalia, J., dissenting).
\item 22. Id. at 708.
\item 23. See id. at 713. He referred not only to the President's ability to protect "his staff" but also "to protect himself." Id.
\item 24. Id. at 685-84.
\end{itemize}
constitutionally acceptable independent investigation within the Executive Branch.\textsuperscript{25}

\textbf{B. The Special Counsel Model}\textsuperscript{26}

Robert Mueller was appointed Special Counsel for the United States Department of Justice by Acting Attorney General Rod Rosenstein pursuant to statutory and regulatory authorization that describes the authority of the Special Counsel as that of existing U.S. Attorneys.\textsuperscript{27} Department regulations specify that “[t]he Attorney General, or . . . the Acting Attorney General, will appoint a Special Counsel” when the Attorney General, or Acting Attorney General, determines that:

(a) That investigation or prosecution of that person or matter by a United States Attorney’s Office or litigating Division of the Department of Justice would present a conflict of interest for the Department or other extraordinary circumstances; and

(b) That under the circumstances, it would be in the public interest to appoint an outside Special Counsel to assume responsibility for the matter.\textsuperscript{28}

Although the regulations governing appointment of a Special Counsel are in some ways parallel to those of the Independent Counsel Act, there are notable differences that render the Special Counsel much less independent. In both, the decision of the Attorney General to begin the process of appointment of outside counsel, or not, is essentially unreviewable, but the standard under which one is called for was much more specific under the Act than it is...

\textsuperscript{25} The decision to permit the Independent Counsel Act to expire may be thought to be after-the-fact affirmation of Justice Scalia’s constitutional concerns. See L. Durnell Weeden, \textit{A Post-Impeachment Indictment of the Independent Counsel Statute}, 28 N. KY. L. REV. 536, 552 (2001).

\textsuperscript{26} The appointment of a Special Counsel is to be distinguished from the staff of the United States Office of Special Counsel, which safeguards the civil service system from abuse. See Rebecca L. Dobins, \textit{Amending the Whistleblower Protection Act: Will Federal Employees Finally Speak Without Fear}, 13 FED. CIR. B. J. 117, 119 (2003).


\textsuperscript{28} 28 C.F.R. § 600.1 (2019).
under the current regulations.\textsuperscript{29} Also, once the process of appointment is initiated, the President, through the Attorney General, presumably will have some influence in the choice of the Special Counsel. The President could at least expect that a political enemy would not be named. Conversely, the Executive Branch had no role in the selection of the individual who would serve as Independent Counsel under the Act.\textsuperscript{30}

Importantly, once appointed, the Independent Counsel had complete discretion to conduct the investigation.\textsuperscript{31} But the discretion of a Special Counsel, although hedged by safeguards, is subject to the oversight of the Attorney General.\textsuperscript{32}

Both the Independent Counsel and a Special Counsel may only be removed for good cause,\textsuperscript{33} but since the Attorney General may, in an extreme instance, direct that a particular prosecutorial step not be taken,\textsuperscript{34} failure of the Special Counsel to obey such a lawful order would presumably constitute good cause for removal. Therefore, a Special Counsel can theoretically be removed for a decision concerning the manner in which an investigation proceeds. Plus, the Independent Counsel could obtain judicial review of any for-cause removal,\textsuperscript{35} whereas, without such a specification, there is reason to doubt that any judicial review would occur in the instance of

\textsuperscript{29} 28 U.S.C. § 591(a) (1994) provides as follows: “The Attorney General shall conduct a preliminary investigation in accordance with section 592 whenever the Attorney General receives information sufficient to constitute grounds to investigate whether any person described in subsection (b) may have violated any Federal criminal law other than a violation classified as a Class B or C misdemeanor or an infraction.” Section 592(c) provides that the Attorney General “shall apply” for the appointment of an independent counsel if “there are reasonable grounds to believe that further investigation is warranted.” \textit{Id.} § 592(c)(1)(A) (1994). In contrast, 28 C.F.R. § 600.1(b) provides: “That under the circumstances, it would be in the public interest to appoint an outside Special Counsel to assume responsibility for the matter.”

\textsuperscript{30} The judicial panel named the Independent Counsel. 28 U.S.C. § 593(b) (1994).

\textsuperscript{31} See \textit{id.} at § 594(a) (1994) (listing oversight responsibilities of the Attorney General).

\textsuperscript{32} 28 C.F.R. § 600.7(b) (2019) provides: “The Special Counsel shall not be subject to the day-to-day supervision of any official of the Department. However, the Attorney General may request that the Special Counsel provide an explanation for any investigatory or prosecutorial step, and may after review conclude that the action is so inappropriate or unwarranted under established Departmental practices that it should not be pursued. In conducting that review, the Attorney General will give great weight to the views of the Special Counsel. If the Attorney General concludes that a proposed action by a Special Counsel should not be pursued, the Attorney General shall notify Congress as specified in § 600.9(a)(3).”

\textsuperscript{33} For the Special Counsel, see \textit{id.} § 600.7(d): “The Attorney General may remove a Special Counsel for misconduct, dereliction of duty, incapacity, conflict of interest, or for other good cause, including violation of Departmental policies.” For the Independent Counsel, see 28 U.S.C. § 596(a)(1) (1994).

\textsuperscript{34} 28 C.F.R. § 600.7(b).

\textsuperscript{35} 28 U.S.C. § 596(a)(3).
removal of a Special Counsel. Without congressional direction, good cause removal might well be considered a political question. 36

In terms of subject matter, the advantage of the flexibility of the standard of appointment of a Special Counsel is that the matter to be investigated need not even name the crimes alleged to be committed or the persons to be investigated. Thus, the letter appointing Robert Mueller gave as justification for the appointment, the need for a full and thorough investigation of the “Russian government’s efforts to interfere in the 2016 presidential election,” and specified the subjects to be investigated as “any links and/or coordination between the Russian government and individuals associated with the campaign of President Donald Trump.” 37

Like the Independent Counsel Model, the Special Counsel Model concerns itself primarily with criminal prosecution. The current regulations do not even refer to reports to Congress at the conclusion of the work of the Special Counsel. 38 Thus, the letter appointing Robert Mueller authorized prosecution, but not a final report to Congress and the public. 39

C. The Ad Hoc Special Prosecutor Model

In the Watergate scandal, public pressure “forced the Attorney General to appoint two independent prosecutors ([Archibald] Cox and [Ron] Jaworski) without a statutory mandate.” 40 While technically accurate, this formulation by Professor Merrill might suggest that the ad hoc Special Prosecutor served at the will of the Attorney General to conduct the investigation as the Attorney General directed. However, it was later held that the regulation that Attorney General Elliot Richardson adopted appointing the Special Prosecutor 41 had the full force and effect of law until lawfully revoked. 42 For this reason, the firing of Archibald Cox in the famous Saturday

38. 28 C.F.R. § 600.8(c) (2019) provides that the Special Counsel “shall provide the Attorney General with a confidential report,” and § 600.9(c) allows, but does not require, “public release” of reports by the Attorney General.
39. See Rod Rosenstein’s Letter, supra note 37.
40. Merrill, supra note 4, at 1078.
Night Massacre by Acting Attorney General Robert Bork was held to have been unlawful. Therefore, the historical instance of the Watergate Special Prosecutor does not turn out to differ importantly from the Special Counsel Model above. In both instances, the outside counsel was a creature of administrative regulations once those regulations were formally adopted.

In contrast to that historical instance, the Ad Hoc Special Prosecutor Model I am imagining is closer to the one that Judge Gesell suggested would have been the case had no regulations been adopted and the Special Prosecutor had just been appointed: "Had no such limitations been issued, the Attorney General would have had the authority to fire Mr. Cox at any time and for any reason." In other words, without any formal regulations, the firing of Cox would have been lawful. This context would render the Ad Hoc Special Prosecutor Model much less independent of presidential control than the previous two models.

In terms of the formalities of removal, the actual power was lodged in the Attorney General or Acting Attorney General, rather than in the President. That is why President Nixon had to dismiss officials in the Justice Department in order to effect Cox's removal in the Saturday Night Massacre, which gave the public the chance to react to the firing. That gap between the President and removal of the special prosecutor, which is also the case in the prior two models, allows President Trump to delegitimate the Mueller investigation without having to take the political responsibility of actually acting. I will come back to this issue below.

As for subject matter and jurisdiction, these are left flexible in the Special Prosecutor Model. The appointment regulation for Archibald Cox gave authority to the Special Prosecutor to investigate and prosecute crimes arising out of the Watergate burglary and the 1972 presidential election and "allegations involving the

43. Id.
44. Id.
45. See Office of Watergate Special Prosecution Force, 38 Fed. Reg. 14688, providing that the special prosecutor does not name the Attorney General as the authority for removal, but since the Attorney General was the appointing authority, the authority was treated as lodged in the Attorney General.
President, members of the White House staff, or Presidential appointees.”

D. The Permanent Executive Branch Office Model

One model of Executive Branch investigation of presidential wrongdoing that has been suggested, but not tried, is the creation of permanent bodies with this responsibility within the Executive Branch. Professor Merrill calls this the “Civil Service Option” to emphasize the protections from removal that employees of such an office could enjoy. A permanent office dedicated to investigating wrongdoing by high government officials would presumably develop enormous expertise and independence in such proceedings. Of course, as will be discussed below, this model strains even the flexible separation-of-powers analysis in *Morrison*, because it thoroughly and intentionally insulates the office from presidential oversight and would likely be found unconstitutional.

A related suggestion that does not raise that kind of constitutional objection is one that Professor Merrill refers to as the “Inspector General Option.” This approach would utilize the Inspectors General in the Executive Branch, who already conduct investigations of inefficiency or illegality in government agencies, and who already have a kind of built-in tenure, such that they are not always removed with changes in the party that controls the government.

Both of these suggestions have the advantage of creating permanent institutions and thus possibly minimizing the political nature of investigations of presidential wrongdoing. These kinds of offices, however they might be structured, do not instantly bring the kind of counter-productive political pressure that any talk of creating a new body, or newly appointing an individual, inevitably sparks when presidential wrongdoing is being discussed as a potential matter for investigation.

E. The U.S. Attorney Model

Another permanent entity that could operate in the context of investigation of presidential wrongdoing, but one outside the Washington locus of the above models, is the Office of the U.S. Attorney. The current Special Counsel regulations provide alternatives should the Attorney General determine that a Special Counsel
should not be appointed.\textsuperscript{50} One of these alternatives is that the matter should be handled by “the appropriate component” of the Justice Department.\textsuperscript{51} I assume that the appropriate component would often be the local U.S. Attorney.

Essentially, this model of regular law enforcement within a general investigation of a President is currently being utilized by Mr. Mueller, who has referred numerous matters to the U.S. Attorney for the Southern District of New York for possible prosecution.\textsuperscript{52} Some of those matters seem to relate to Mueller’s investigation of Russia collusion, while others do not.\textsuperscript{53}

But the model would normally unfold somewhat differently. A matter implicating a President need not emerge from a context involving national security, defense, or any other obvious high government matter. For example, after the New York Times published a lengthy account of past tax and accounting practices of the Trump family, the New York State Department of Taxation and Finance announced that it would open what amounts to an ordinary tax fraud investigation.\textsuperscript{54}

For that matter, just as the Watergate scandal originally began as an investigation into a minor crime unrelated to the President—”a bungled burglary”\textsuperscript{55}—a U.S. Attorney’s Office might stumble onto presidential wrongdoing through an investigation that did not appear, at the outset, to involve high government officials at all. In such an instance, a U.S. Attorney might pursue such an investigation against progressively more highly placed government officials until discovering evidence that implicated a President in wrongdoing. At that point, presumably the matter would be brought to the attention of Justice Department officials in Washington for further action.

Proceedings of this nature, unlike the previous three models, would not necessarily attract much public attention, especially in

\begin{flushleft}
\textsuperscript{50} 28 C.F.R. § 600.2 (2019) (Alternatives available to the Attorney General).
\textsuperscript{51}  Id.
\textsuperscript{53}  See id.
\end{flushleft}
the beginning. That might render such an investigation highly effective. On the other hand, resources at such a local level would be limited, and the investigation itself would not be organized to maximize the chances of implicating the President. That outcome would probably be the last thing any U.S. Attorney would welcome.

F. The Legislative Branch Model

This final model is one that will inevitably function should serious presidential wrongdoing be uncovered. Obviously, there would be Legislative Branch investigation if the House of Representatives pursued impeachment of a President. But, even short of that, any serious allegations of wrongdoing in the government would inevitably bring some form of congressional investigation. In fact, it might be that a preliminary congressional investigation of more or less ordinary government malfeasance sets in motion further investigation that uncovers presidential wrongdoing.

There are too many possible forms of this model to do much more than just list this option. Presumably, the major part of an investigation of presidential wrongdoing would have already been finished by some body before impeachment would be considered. Once facts were found that might warrant impeachment of a President, further investigation would be expected to be conducted through a Special Congressional Committee, or Joint Committee.

But there is another, more exotic, possibility. Congress does have the option of creating and funding an investigatory office within the Legislative Branch for allegations of serious government wrongdoing. That approach would be capable of yielding both an independent, and presumably highly professional, investigation. Such an office would function similarly to the Permanent Executive Branch Office Model above, but, since the investigators would be located within the Legislative Branch, there would be no constitutional issues involving necessary presidential oversight.

56. The House Judiciary Committee would play the primary role in the initiation of impeachment proceedings, see Jonathan K. Geldert, Presidential Advisors and Their Most Unpresidential Activities: Why Executive Privilege Cannot Shield White House Information in the U.S. Attorney Firings Controversy, 49 B.C. L. REV. 823, 855 n.265 (2008), but there are no specific requirements as to how the Committee must perform its investigation.

II. WHAT DOES "BEST" MEAN IN THE CONTEXT OF INVESTIGATING PRESIDENTIAL WRONGDOING?

First, any investigatory model must be constitutional. At the moment, Morrison's highly flexible approach—referred to in the Constitutional Law textbook I use as "functionalism" as opposed to the dissent's "formalism"—provides the relevant constitutional standard. According to Chief Justice Rehnquist's majority opinion, a President must have sufficient oversight of any investigation and prosecution of government officials—a process that everyone agrees must, at least in terms of prosecution, be considered execution of the laws—that the President may be said to be able take care that the laws are being faithfully executed.

In the context of the Independent Counsel Act at issue in Morrison, the Court held that this broad standard was satisfied because the initiation of the process was held firmly by an official over whom the President exercised complete policy control. An Attorney General who sought the appointment of an Independent Counsel over the President's objection could lawfully be fired for doing so. In addition, the standard of removal of the Independent Counsel only for good cause was a standard that had previously been held to satisfy the necessary level of presidential oversight in a variety of quasi-judicial and quasi-legislative contexts. This is the standard under which independent agencies routinely function. It is true that a President had no say in the actual selection of the Independent Counsel, but that was a function of the Appointments Clause itself, which specifically permits inferior officers to be appointed by Article III Judges.

The conclusion that an Independent Counsel is an inferior officer, as opposed to an officer who must be nominated by the President

59. Morrison v. Olson, 487 U.S. 654, 696 (1988) (“Notwithstanding the fact that the counsel is to some degree ‘independent’ and free from executive supervision to a greater extent than other federal prosecutors, in our view these features of the Act give the Executive Branch sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties.”).
60. Not everyone would agree with that assertion, but it is at least one major approach to what it means for the Attorney General to serve at the will of the President. See Bruce A. Green & Rebecca Roiphe, Can the President Control the Department of Justice?, 70 ALA. L. REV. 1, 33-34 (2018).
63. See U.S. CONST. art. II, § 2, cl. 2.
and confirmed by the Senate, might be considered debatable. This holding was contested in Justice Scalia’s dissent, but, despite criticism, has not been overturned.

Under the Morrison standard, most of the models discussed above are plainly constitutional. The one exception might be the Permanent Executive Branch Office Model, because, at least in its civil service manifestation, appointment and removal would be strongly protected from presidential influence, probably beyond even the constitutional permissiveness of Morrison.

There is a real possibility that the flexible Morrison standard will be abandoned by the new, more conservative majority currently constituted on the Supreme Court. In such an eventuality, which cannot be reliably predicted one way or the other, the major changes would be that the removal of any investigator within the Executive Branch would have to be at the will of the officer who appointed her and, if that officer were not the President, that officer would in turn have to be removable at will by the President. I will not set this kind of change as a limiting factor in this essay, but the reader should keep in mind that an investigation genuinely independent of the President would be impossible under such a new standard, as indeed Justice Scalia argued it should be in his Morrison dissent.

The requirement of constitutionality also means that certain quite serviceable models of investigating presidential wrongdoing are simply not available within the American constitutional system. For example, in Columbia, the Supreme Court has authority to act if alleged presidential wrongdoing is criminal. That model

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64. Though Justice Scalia did dispute the conclusion that the independent counsel was an inferior officer. Morrison, 487 U.S. at 715-23 (Scalia, J., dissenting).
67. Justice Scalia’s opinion for the Court in Edmond v. United States, holding that civilian Judges of the Coast Guard Court of Criminal Appeals are inferior officers, surely presages a more formal approach to oversight issues, but expressly distinguished, rather than overruling or even criticizing, Morrison’s holding that the Independent Counsel was an inferior officer. Edmond v. United States, 520 U.S. 651, 661 (1997).
69. See 487 U.S. at 708 (Scalia, J., dissenting).
70. See Pablo Echeverri, Accountability of Public Officials and Separation of Powers in the United States, France, and Colombia (manuscript on file with the author); CONSTITUCIÓN POLÍTICA DE COLOMBIA, art. 174, 175.
would satisfy much of the concerns expressed below about the necessary nonpartisan nature of any presidential investigation in the American context, but this approach is simply not possible here.

Similarly, in terms of removal, a two-thirds vote in the Senate is, of course, an absolute requirement. No other body can perform a presidential removal and no other body can review either such a removal or the refusal by the Senate to remove the President. Again, we can think of other possibilities that might work very well, but this institutional arrangement sets the basic limits under which the topic of American presidential wrongdoing must be addressed.

It may seem counter-intuitive to the reader, but in my view the requirement of a Senate two-thirds vote is actually healthy in our rent, partisan democracy today. Without it, one political party would be tempted to remove a President without a national consensus. Because of the two-thirds requirement, that undemocratic possibility is not an option.

This reality of a required super-majority in the Senate sets in relief the other, and more important, requirement of what makes a model of presidential investigation “best.” Not only must it be constitutional, it must be one that will permit the formation of a national consensus that a President who has been found to have engaged in wrongdoing must be removed from office. The model must be one that even the President’s supporters, or at least many of them, can come to accept as rendering a fair judgment on the matter of presidential wrongdoing.

No one has ever denied that the most important goal of any investigation of presidential wrongdoing is that it allows impeachment and removal of a dangerous and/or criminal leader. Whether a President can be criminally prosecuted has been debated but, in practice, the American experience shows that criminal prosecution of a sitting President is not a real option. Thus, President Nixon was named only an unindicted co-conspirator and President Clinton was never charged with perjury. In these two most recent instances of alleged presidential wrongdoing brought to light, it was simply understood and accepted that impeachment and removal were the only possible remedies for the actions of the President.

73. For perspectives, see Susan Low Bloch, Can We Indict a Sitting President?, 2 NEXUS 7 (1997).
74. For consideration of the difficulty of prosecuting a sitting President that these two instances demonstrate, see John Gilbeaut, Why Bill Clinton Won’t Face a Criminal Trial, A.B.A. J., April 1999, at 32.
Therefore, removal of a President by the Senate remains the last line of defense that our democracy has against potential tyranny. The crucial role of the Senate in this regard was confirmed by the Supreme Court in the Judge Walter Nixon removal case. The Court confirmed the potential for “chaos” if a Senate removal of a President could be challenged in court. There must be finality in any judgment that the Senate makes.

The difficulty of obtaining a two-thirds vote for removal of a President, because of today’s hyper-partisanship, shifts the balance in evaluating models of investigation of presidential wrongdoing against the importance of exoneration of a President falsely accused. Creating the conditions under which removal is a real possibility becomes the overwhelming goal. One would therefore choose a model that would ensure that supporters of a President could accept its verdict against a President, even though the model would fail to convince opponents of a President that the President was innocent of charges that had been found unsubstantiated.

Almost twenty years ago, Professor Merrill agreed implicitly that any system of investigating a President must be one that permits the House and the Senate to act. However, at that earlier time, Professor Merrill emphasized accurate fact-finding as the most important attribute of any investigatory system. His evident assumption was that if only the facts could be ferreted out, Congress would act appropriately. That assumption inevitably places a high value on preventing presidential interference with any investigation.

This assumption proved warranted during the Watergate investigation. It became clear to President Nixon that if wrongdoing on his part were shown, enough Republicans in the Senate would vote

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75. *Nixon*, 506 U.S. at 238.
76. *Id.* at 236 (quoting *Nixon v. United States*, 938 F.2d 239, 246 (D.C. Cir. 1991)).
77. See Merrill, *supra* note 4, at 1050 (“The first reason for having an independent investigator is to lay the groundwork for possible impeachment of the President.”).
78. Professor Merrill was quite explicit about this: “The ultimate standard or criterion should be how well each option would perform in practice. This in turn is largely a function of how often each option would ‘get it right,’ meaning how often it would avoid both false negatives—failing to detect and prosecute serious executive branch misconduct—and false positives—investigating or prosecuting officials who are innocent or whose conduct does not warrant criminal investigation or prosecution.” *Id.* at 1065-66.
against him to ensure his removal from office.\textsuperscript{79} Perhaps that assumption was even warranted in 1999, when Professor Merrill wrote his article.\textsuperscript{80}

But, such an assumption is plainly not warranted today. President Trump was exaggerating when he claimed during the presidential campaign that “I could stand in the middle of Fifth Avenue and shoot somebody and I wouldn’t lose any voters,”\textsuperscript{81} but only mildly so. We live in an era in which there is such skepticism about truth and truthfulness\textsuperscript{82} that it will be difficult to convince supporters of a President that any finding of wrongdoing is accurate and is not the product of a political vendetta.

My judgment about this problem of reaching a national consensus about presidential wrongdoing is not aimed particularly at supporters of President Trump. I expect the same level of partisan support for any democratic President elected in the foreseeable future. Indeed, even in the 1990s, President Clinton received a high level of support in facing a charge that some of his supporters now admit was more serious than they were willing to acknowledge at the time.\textsuperscript{83}

The foregoing considerations suggest to me that the best model of investigation of presidential wrongdoing will combine some aspects of the following five features. First, the standards calling for the initiation of an investigation should be as specific and mandatory as possible. Otherwise, it would be too easy for a President, or the President’s allies, to block the initiation of an investigation before the public realizes that there are serious potential issues of presidential wrongdoing. Unfortunately, the need for specificity

\begin{itemize}
\item \textsuperscript{80} By the 1990’s, partisanship was increasing. President Bill Clinton’s first budget in 1993 received not a single Republican vote. See Bruce Ledewitz, \textit{What Has Gone Wrong and What Can We Do About It?}, 54 TULSA L. REV. 247, 248 (2019) (book review). Nevertheless, Presidential wrongdoing might still have elicited a bipartisan response in 1999.
\item \textsuperscript{81} Trump: “I Could Stand in the Middle of Fifth Avenue and Shoot Somebody and I Wouldn’t Lose Any Voters”, REAL CLEAR POL. (Jan. 23, 2016), https://www.realclearpolitics.com/video/2016/01/23/trump_i_could_stand_in_the_middle_of_fifth_avenue_andShoot_somebody_and_i_wouldn_t_lose_any_voters.html.
will limit the flexibility referred to above in the naming of Robert Mueller.\textsuperscript{84} There must be a balance.

Second, the appointing authority should be aligned politically with the President. Any investigation of a President by a presumed political enemy would be a non-starter among the President’s supporters in the current partisan environment.

Third, once initiated, the investigation should be totally free of supervision by any official in the Executive Branch. Presidential wrongdoing cannot be detected and proved unless the investigation is completely unfettered.

But, fourth, in part because the investigation will have no effective oversight, the removal power should belong to the President alone and must be completely discretionary. This will not only satisfy any future constitutional standard of necessary presidential oversight, it will also preclude the bizarre situation in which a President criticizes an investigation as unfair, thus undermining the ultimate acceptance of its findings, but refuses to take effective steps to halt it.\textsuperscript{85}

Finally, the goal of any investigation should be a report to Congress and the people of the United States concerning the criminal liability, or other wrongdoing, of the President. Any criminal prosecution of others should be authorized, but only as a means to that end. Because no major criminal prosecution needs to be prepared, a reasonable time limit for the investigation can be set. The longer the investigation goes on, the more it will seem to supporters of the President that there is no serious wrongdoing, but that minor matters are being blown out of proportion.

Having set forth these five considerations, let me now apply them to the previously noted models. Given these considerations, no model works perfectly.

\textsuperscript{84} See supra notes 27-30 and accompanying text.
\textsuperscript{85} This was occurring before the removal of Jeff Sessions as Attorney General. Tellingly, President Trump has cut back his criticisms of the Mueller investigation since then. On Tuesday, February 19, 2019, a Justice Department spokesperson reiterated that President Trump has not asked Acting Attorney General Matthew Whitaker to interfere with the Mueller investigation. Mark Mazzetti et al., \textit{Intimidation, Pressure and Humiliation: Inside Trump’s Two-Year War on the Investigations Encircling Him}, N.Y. TIMES (Feb. 19, 2019), https://www.nytimes.com/2019/02/19/us/politics/trump-investigations.html. Now that his allies can fire Mr. Mueller, President Trump cannot really just criticize from the sidelines. See infra note 104.
III. EVALUATING THE MODELS OF INVESTIGATING PRESIDENTIAL WRONGDOING

A. The Independent Counsel Model

The original Independent Counsel Act delineated both standards and timing requirements for an Attorney General to decide whether to seek appointment of an Independent Counsel and a reporting requirement for whatever the Attorney General’s decision may be.\(^{86}\) It is true that there was to be no judicial review of a decision not to request the appointment, but the Act was as specific and as mandatory as may be possible. In addition, the conduct of the investigation, once the Independent Counsel was appointed, was to be carried out without further oversight by the Attorney General, except, as in the authorization of wiretaps, where such involvement was legally necessary.\(^{87}\) Thus, the Independent Counsel Model satisfies the first and third factors reasonably well.

However, this extreme specificity sacrificed flexibility. Thus, the Independent Counsel Act was a model of investigating crimes by certain Executive Branch officials. Something else is needed to investigate presidential wrongdoing that might lead to impeachment and removal.

In addition, the Independent Counsel Model is not well suited to today’s needs in terms of the second and fourth factors. The Independent Counsel was to be selected by a panel of federal judges. This led to an intensely partisan battle by the panel over the appointment of Kenneth Starr, who was considered a highly partisan figure, especially compared to Robert Fiske, a Republican previously named Special Counsel by Attorney General Reno.\(^{88}\) Today, even the hint that an Independent Counsel was appointed by a President’s political enemies would be sufficient to undermine confidence in any investigation that was conducted, whatever its results.

The preclusion of removal except for a determination of “good cause” by the Attorney General,\(^{89}\) while ensuring that an investigation is independent of presidential interference, also means that a President could, and likely would, complain publicly that an inves-

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\(^{87}\) Id. § 594 (1994); 18 U.S.C. § 2516 (2019).


tigation was being conducted unfairly or had simply reached inaccurate conclusions. A President could plausibly claim that the law did not permit him to remove the Independent Counsel. Such presidential actions would probably convince many of the President’s supporters that the President should not be removed from office, which would in turn easily prevent a two-thirds vote for removal in the Senate. Although the Independent Counsel Act might have the benefit of convincing many of the President’s critics that a President should not be removed, should the investigation prove negative as to presidential wrongdoing, it would not achieve the most necessary goal of investigating presidential misconduct. It would not lead to removal where presidential wrongdoing was found.

B. The Special Counsel Model

Surprisingly, the Special Counsel Model turns out in some ways to be the worst of all worlds. As currently set forth, the regulations give the Attorney General entirely too much discretion in appointing, or not appointing, a Special Counsel. While the language of the appointment is mandatory, the standards of conflict of interest or extraordinary circumstances, combined with the public good, are entirely arbitrary. Nor is any structured decision-making required.

In addition, the existing regulations do not entirely foreclose Attorney General interference with a Special Counsel’s investigation. In these ways, the Special Counsel Model as currently structured both creates too little independence for the investigation and does not ensure that any investigation will even commence.

Plus, the existing limit of removal to good cause found by the Attorney General creates the same issues as it does for the Independent Counsel above. The President lacks full personal authority to remove the Special Counsel.

The advantage of the Special Counsel Model is that the Attorney General names the individual who conducts the investigation. This would insulate, to some extent, any presidential complaint that an investigation was being conducted unfairly in order to benefit the President’s enemies. Another advantage is that the model

90. See supra note 29 and accompanying text.
91. See id.
92. See id.
allows a more expansive conception of what and whom is to be investigated, as the terms of appointment of Robert Mueller, discussed above,\textsuperscript{93} show.

C. The Ad Hoc Special Prosecutor Model

This model also has the advantage that the actual appointment of the person who will conduct the investigation of the President remains in the hands of the President’s political allies. But it has the disadvantage that the absence of preexisting regulations or statutes means that the initiation of appointment is entirely at the Attorney General’s discretion. Also, there might be investigatory oversight by the Attorney General, depending on the terms of the appointment.\textsuperscript{94} In addition, as in the case of the appointment of Archibald Cox, removal might be limited to good cause.\textsuperscript{95} Thus, most of the factors set forth above are not satisfied in this model.

Basically, this model is by far the most flexible, and always remains an option in any future crisis of alleged presidential wrongdoing. This model could easily be used in order to aid Congress in an impeachment investigation, for example. Because of its discretionary elements, however, it should not be relied upon as the only model for investigation of presidential wrongdoing.

D. The Permanent Executive Branch Office Model

The advantage of the Civil Service or Inspector General approaches is that an office of this type could be structured to investigate all manner of wrongdoing anywhere in the government. It would not necessarily be restricted to criminal wrongdoing and need not be limited to investigating high government officials. If such an office did not conduct the actual prosecution, the \textit{Morrison} standard would certainly permit removal only for good cause. Such an office would be well-suited to report to Congress and the people. On the other hand, as the Russia collusion investigation shows, the allegations of presidential wrongdoing might not be limited to the President’s actual conduct of government.\textsuperscript{96}

While this model could thus be structured to be both constitutional and effective, it would clearly fail in a political sense. A per-

\textsuperscript{93} See supra note 37 and accompanying text.
\textsuperscript{94} See supra notes 40-43 and accompanying text.
\textsuperscript{95} This was the effect of the ruling with regard to the firing. See \textit{id}.
\textsuperscript{96} The initiation of that investigation, of course, concerned the election of 2016, rather than the conduct of the government once President Trump was elected. See supra note 37.
manent office of this kind is precisely the kind of “deep state” activity that is regularly denounced by supporters of President Trump.\textsuperscript{97} Even aside from the current political rhetoric, it is hard to envision the American people accepting that such an important role in removing a President would be played by unknown and unseen federal bureaucrats.

In terms of the five features listed above, the standards of such an office would presumably be specified, the investigation would be free of Executive Branch supervision, and reports could be furnished to Congress. However, the investigators would not be named by allies of the President and there would be no real possibility of removal by the President. Any conclusions by such an office would never convince the President’s supporters in the public or in the Senate.

\textbf{E. The U.S. Attorney Model}

This model is actually the most intriguing possibility, but it is hard to see how it could be institutionalized. A U.S. Attorney is nominated by the President, confirmed by the Senate and removable at will by the President.\textsuperscript{98} Therefore, any investigation by a U.S. Attorney of wrongdoing in the government has instant political credibility. If such an officer stumbled upon serious wrongdoing by a President through some ordinary criminal investigation, any resulting report would be taken very seriously by the President’s allies in Congress and, presumably, by the President’s supporters among the public as well.

In addition, there would not be any likelihood of interference with such an investigation, because in its early stages, no one, including the U.S. Attorney, would know that the investigation might turn up wrongdoing by the President. Of course, at some point, that possibility would become obvious and it would require enormous political courage by a U.S. Attorney to continue the investigation, notwithstanding the possible political fallout. In my experience, however, we do have U.S. Attorneys of high integrity.

But the model’s advantages also demonstrate its impracticality institutionally. Simply put, it would be a happenstance if presidential wrongdoing fell into the lap of a U.S. Attorney in this way. In a sense, the model is always available as long as there are honest


women and men in the Justice Department, but it cannot be regarded as a reliable answer to the issue of investigating presidential wrongdoing.

F. The Legislative Branch Model

If, as argued here, consideration of impeachment and removal, and not criminal prosecution, is the goal of any investigation of presidential wrongdoing, then the Legislative Branch Model is the obvious choice for the investigation. This, after all, is where impeachment and removal happen.99

The problem is both institutional and political. Institutionally, Congress is not particularly good at investigating wrongdoing. At least preliminarily, professional investigators in the Executive Branch are far superior. Congress can effectively present the results of such investigations to the public, but Congress is not a good detective. Of course, this disadvantage could be mitigated by the creation of a permanent investigatory office within the Legislative Branch, as suggested above.100 America has never proceeded in this formal way of inter-branch checking, but it could be done.

Politically, on the other hand, such an investigation could never be effective. If the President’s party controls Congress, the investigation will not be allowed to begin, permanent investigatory office or not. A high level of proof of presidential wrongdoing developed through one of the other models would be necessary before the President’s party would initiate impeachment proceedings, even preliminarily.

And, of course, if the other party controls Congress, there is zero possibility that the President’s supporters in the public, or in Congress, would ever support or vote to remove the President based on the congressional investigation. Congressional involvement must happen eventually, if impeachment and removal are to be possibilities, but cannot be the major, and certainly not the only, focus.

IV. A Hybrid Model of Investigating Presidential Wrongdoing

In retrospect, the appointment of Robert Mueller and subsequent developments in his investigation have gone fairly well in terms of

99. U.S. Const., art. I, § 2 cl. 5 (impeachment power of the House); § 3, cl. 6 (power to try impeachments in the Senate).
100. See supra note 57 and accompanying text.
the goals and structure of an investigation of presidential wrongdoing. Mueller is a registered Republican, not conceivably considered an enemy of President Trump when he was appointed.\(^1\) He was given a broad subject to investigate and has been allowed broad discretion in conducting the investigation.\(^2\)

Nevertheless, the Mueller investigation has been undermined to such an extent that it seems unlikely that even a finding of obvious presidential wrongdoing would lead to a vote of removal in the Senate. The Mueller investigation has been undermined by several factors—some simply bad luck, others structural, and others in the way the investigation has gone forward.

The bad luck involved two matters. First, Mueller was not appointed by the Attorney General, a political ally of the President, but by an Acting Attorney General who had no independent credibility with the supporters of the President.\(^3\) Second, one of the investigators on Mueller’s staff, since removed, was exposed as a political opponent of the President.\(^4\) In the current environment, it does not take much to convincingly characterize an investigation of a President as political, as far as the President’s supporters are concerned.\(^5\)

The structural issue is that, because President Trump does not himself have removal authority over Mueller, he has been able to “call” for Mueller’s removal, without having to take the political heat for actually acting.\(^6\) This relentless drumbeat of criticism has already rendered the investigation incapable of performing its

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\(^1\) For a flavor of reaction at the time of the appointment, see Joseph D. Lyons, *Is Robert Mueller a Democrat or Republican? His Appointment Was Lauded by Both Parties*, BUSTLE (May 18, 2017), https://www.bustle.com/p/is-robert-mueller-a-democrat-republican-his-appointment-was-lauded-by-both-parties-58693.

\(^2\) Indeed, it was just this lack of interference that President Trump increasingly criticized. See supra notes 1-3 and accompanying text.


\(^6\) See supra note 85 and accompanying text.
most important role of potentially creating a national consensus that President Trump should be removed if wrongdoing is shown.  

But, partly, this weakness in the investigation is the result of how it has been conducted. Simply put, the investigation has gone on too long. A time limit for a report should have been set at the time of the appointment.

With these lessons in mind, and considering the evaluations of the models above, it is possible to imagine a hybrid model with a combination of the best attributes of each.

What is needed is a new statute requiring an Attorney General to appoint an Independent Counsel to investigate credible allegations of wrongdoing by the President, or associates of the President, that forbids any oversight of the resulting investigation, that gives to the President an unfettered removal power and that results, in addition to incidental criminal prosecutions of others, in a report to Congress and the people about the alleged presidential wrongdoing within a specified period—certainly no more than a year.

Under this hybrid model, the investigation could be relied upon to commence and not to be viewed as controlled by the enemies of the President, at least at the outset. Yet, as the investigation unfolded, any criticism by the President of the conduct of the Independent Counsel would be met with the response that the President need only remove the Independent Counsel and should do so if warranted. Of course, such a removal would subject the President to grave suspicion and might prove politically unpalatable. This would eventually force a President to drop the subject.

One can at least imagine that, under this structure, a report to Congress of serious presidential wrongdoing might have a chance of receiving a nonpartisan reception. Of course, the downside of


108. The effect of a direct presidential removal power is shown by the winding down of the story of removing Deputy Attorney General Rod Rosenstein, who had appointed, and could have removed, Mueller. Recently, President Trump considered removing Rosenstein, but ultimately decided not to do so and the story ceased to be news. The President could not go on criticizing Rosenstein simply because he could remove him if he had wanted to do so. The same would be true if the President himself could remove Mueller. In that event, tweets like the one at the beginning of this essay would eventually cease because the President himself would have the power to stop the investigation. On November 7, 2018, Trump transferred oversight of the Mueller investigation to acting US Attorney General Matthew Whitaker. Kathryn Krawczyk, Rod Rosenstein is No Longer in Charge of the Mueller Probe, WEEK (Nov. 7, 2018), https://theweek.com/speedreads/606484/rod-rosenstein-no-longer-charge-mueller-probe.
that advantage is that any report from such an Independent Coun-
sel exonerating the President would be sure to be discounted by the
President’s political opponents as the product of an overly biased
and friendly investigating structure. But, as stated above, ferreting
out wrongdoing by a President, and removing such a President, is
more important to the future of American democracy than is exon-
erating a President who has been wrongly accused.

IV. CONCLUSION

In a sense, this essay is a thought experiment imaging a scenario
in which Americans might come together, fairly and rationally, to
decide a crucial political issue in a spirit of consensus. It imagines
an American political landscape that works. It will face two objec-
tions. One is that the investigatory model it proposes would fail to
actually work to discover presidential wrongdoing because it is
heavily structured in the President’s favor. The reader will have to
judge whether that criticism is warranted. Admittedly, construct-
ing a model with a presidential bias was my intention from the be-
ginning.

The second objection will be that the underlying goal of creating
the possibility of a national consensus that a President has commit-
ted wrongdoing worthy of impeachment and removal is no longer
possible in this partisan, post-truth age. That conclusion I simply
cannot accept because it would mean the end of the American ex-
periment in constitutional self-government. I have faith in Amer-
ica. Therefore, if my effort to construct a model of investigating
presidential wrongdoing is flawed, what is needed is a more imagi-
native and insightful effort in the same vein. Failure is not an op-
tion.