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LEGAL OR POLITICAL CHECKS ON APEX CRIMINALITY:  
AN ESSAY ON CONSTITUTIONAL DESIGN

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ABSTRACT

*How should constitutional designers address the problem of apex criminality, or criminal actions by those elected or appointed to high positions in a national government? I offer three general observations about this difficult question of constitutional design. First, it is not at all clear that a constitutional designer ought to expend effort on creating accountability mechanisms to address apex criminality. Second, if a designer does choose to address the question, she must opt between two highly imperfect options—a ‘legal’ mechanism embedded in a nonpartisan body such as a prosecutor’s office, or a ‘political’ mechanism, which runs through an elected body such as a legislature. There is no simple answer to the question of which is optimal. Third, a better way to approach the constitutional design question may be in terms of the kinds of political culture that will likely unfold under a new constitution. Even if a designer cannot easily optimize some single metric of national welfare, she can make an intelligent judgment about the character of political life she hopes to inspire.*

## INTRODUCTION

How should a constitutional designer address the risk of criminal acts by elected or appointed figures at the very apex of government? Is there an optimal means by which allegations of what might be called *apex criminality* can be investigated and sanctioned? Or instead, is it more sensible for a constitutional designer to say nothing about the problem at all? These questions are resonant ones in both new democracies and in polities undergoing constitutional reform after periods of misrule. Even for established constitutional democracies, these questions might usefully be posed as a way to prime intuitions about subconstitutional design choices. At a minimum, they might high clarify the kind of considerations that should inform judgments about extant institutions.

My aim here is to show illuminate the dilemmas that a constitutional designer must work through in deciding whether and how to address apex criminality. I want to frame the question as a general one, a matter of constitutional design in the abstract rather than an inquiry into U.S. constitutional law, for two reasons. First, the question of whether there is an optimal response to apex criminality is a general one, and it is a mistake to think that the United States has some kind of monopoly on shoddy leaders or institutional devices to deal with shoddy leaders. In 2017 alone, a policing scandal engulfed the Fine Gael Deputy Prime Minister in Eire; in France, a tax avoidance and corruption imbroglio undermined the center-right presidential candidate's polling lead; and in Brazil, Congress started impeachment proceedings for alleged financial improprieties against its second president in a year. And this is not even to mention the questions swirling around the White House related to foreign emoluments, adult film actresses, and mysterious videotapes of cavorting Slavic sex workers. Apex criminality is a pervasive problem that demands a general answer.

Second, the U.S. Constitution is surprisingly opaque as to how apex criminality should be addressed. The resulting debates have been extended, colored by partisan and institutional bias, tend to be inconclusively mired in the murk of conflicting original public

understandings, historical glosses, and institutional self-dealing. Article II thus identifies the possibility of impeachment for presidents and other senior officials.<sup>1</sup> But the text does not state that impeachment is the *only* means of removing a senior elected or appointed official. At best, the historical answer to the question whether impeachment leaves space for alternative mechanisms has been a “tentative no.”<sup>2</sup> But is this answer trustworthy? Even a casual glance at the literature reveals the dominance of lawyerly voices from within the executive branch.<sup>3</sup> Such voices can hardly be taken to be neutral arbiters of a question that bears directly on the authority of their boss. More independent analysts reach rather different outcomes.<sup>4</sup> In any event, I read the American debate on how to deal with apex criminality as too narrowly focused on a rather ineffable question of whether one should draw a negative inference from the text of Article II, or whether to construe a historical practice dominated by self-interested, partisan actors as conclusive as to constitutional meaning. It is not hard to spin creative readings of materials from the Founding period to reach sharply divergent results. I rather doubt, though, that any claim about what the Constitution really ‘means’ can help us understand how institutions will in fact behave, especially given the marked shift in political-party dynamics in Congress between 1789 and 2018. In short, the kind of inquiries stimulated by the U.S. constitutional materials get us no closer, in my view, to an understanding of how appropriately to deal with the hard and enduring problem of how to address apex criminality.

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1. See U.S. Const. art. II, § 4 (“The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”).

2. Ken Gormley, *Impeachment and the Independent Counsel: A Dysfunctional Union*, 51 STAN. L. REV. 309, 315 (1999).

3. See, e.g., *id.* (citing numerous executive branch lawyers).

4. Julie R. O’Sullivan, *The Interaction Between Impeachment and the Independent Counsel Statute*, 86 GEO. L.J. 2193, 2227-28 (1998) (distinguishing between impeachment and criminal prosecution, and concluding that the former does not preclude the latter).

In what follows, I offer instead three general conclusions by reasoning from first principles of institutional design. These conclusions are best understood as hypotheses rather than firm conclusions about how to deal with apex criminality. By working from clear, logical premises, and by being clear about the empirical predicates of each step of the argument, I hope to avoid reliance on the controversial jurisprudential and normative grounds that infest the U.S. debate, and instead develop a more general sense of how constitutional design might address apex criminality.

The first claim developed below is a bit counterintuitive. It is that a rational constitutional designer might decide to remain silent on questions of apex criminality. The core intuition here is that most of the times that apex criminality imposes truly massive costs, it cannot be mitigated by formal constitutional rules. My second claim is that the basic choice facing constitutional designers is between ‘legal’ mechanisms, which involve apolitical expert bodies such as prosecutors’ offices, ‘political’ mechanisms, which run through elected bodies such as legislatures, or some mix of the two. Neither the corner solutions nor any mix of both legal and political mechanisms, however, is obviously optimal. There are risks all around. Finally, I suggest that a constitutional designer can usefully be guided by asking what kind of political culture, or “project,” she wishes to seed through her constitutional design.<sup>5</sup> It should be the pursuit of that bespoke project, I think, that should guide our constitutional designer more than any simple notion of optional design.

This means that, at least in the compass of this paper, I offer no judgment about ‘what is to be done’ about President Trump. As of early 2018, the creation and working of a special counsel to

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5. I borrow the term “project” from the great philosopher Bernard Williams. J.C.C. SMART & BERNARD WILLIAMS, UTILITARIANISM: FOR & AGAINST 112 (1993). In the passage that I have in mind, Williams criticizes the implicit psychology of utilitarianism by pointing out its inability to account for the “vast range of projects, or ... commitments” that humans pursue beyond and instead of the pursuit of aggregate happiness. *Id.* Following Williams, I think it is more sensible here to think about what kind of “project” a constitutional entails than to think about how to maximize, say, national welfare.

investigate the Trump campaign and the Trump White House<sup>6</sup> had sparked a lively if predictably bimodal debate about the merits of different modes of accountability. Careful analysts recognized the inevitable interaction of legal and political channels.<sup>7</sup> Less nuanced voices seemed to reject, almost wholesale, any formalized process except for impeachment outside of very rare scenarios (which, in any event, would be unlikely to come to public attention without a formalized process).<sup>8</sup> The question of institutional choice raised by these debates, however, is not the one that I aim to pursue here directly. If there was a moment at which the U.S. could have adopted a well-measured constitutional response to apex criminality, that moment has long passed. There is no plausible way that in the midst of *l'affaire russe* an optimal institutional structure could be adopted. In consequence, the question in the U.S. context is how best to muddle along with our antediluvian constitutional text, which (even if it did speak clearly) distilled no rare wisdom to illuminate the current situation. Probably the best that can be hoped for in the current U.S. context is a modicum of commitment to democratic norms, and a smidgeon of shame about overt criminality, on the part of key congressional and executive leaders. It is telling that even this rather modest hope is probably unrealistic.

#### THE PROBLEM OF APEX CRIMINALITY

My central aim here is to think through which a wise constitutional designer would opt for legal or political instruments to deal with apex criminality. This quandary of procedural choice,

6. Devlin Barrett et al., *Deputy Attorney General Appoints Special Counsel to Oversee Probe of Russian Interference in Election*, WASH. POST (May 18, 2017), <https://www.washingtonpost.com/world/national-security/deputy-attorney-general-appoints-special-counsel-to-oversee-probe-of-russian-interference-in-election/>

7. See, e.g., Bob Bauer, *Why Team Trump Needs to Lay Off the Mueller Probe*, N.Y. TIMES (Dec. 11, 2017), <http://www.nytimes.com/2017/12/11/opinion/trump-mueller-probe.html> (discussing the reliance of congressional inquiries on the evidentiary production of investigations within the Justice Department).

8. See Alan M. Dershowitz, *When Politics is Criminalized*, N.Y. TIMES (Nov. 28, 2017), <http://www.nytimes.com/2017/11/28/opinion/politics-investigations-trump-russia.html>.

however, is necessarily entangled with questions about the *substance* of criminal regulation that covers high-level elected officials. That is, one might want to start by defining what counts as apex criminality before explaining how it is to be investigated or prosecuted. But I don't think that's necessarily so. I hence start by explaining why I think this question of substantive law is relatively straightforward, and hence can be bracketed if we want to isolate and think through the truly difficult questions of constitutional design.

If one were to judge by the American debates, this relegation of substantive law would hardly seem obvious. In that context, there is an active debate on whether it is just some subset of presidential "high" crimes that warrants investigation and punishment, and whether there is a different and distinct class of "maladministration" that does not.<sup>9</sup> One possible inference from that debate is that any judgment about the processes used for addressing apex criminality must start with a view about the exact nature and scope of the acts to be regulated. If accountability mechanisms will inevitably operate in different ways depending on the breadth of their mandate, then surely substance and institutional choice are necessarily entangled.

But there are a couple of reasons to think that substance need not precede process. For one thing, there is a deep-seated tendency in American legal thought to focus upon second-order questions of institutional choice ('who decides') in lieu of first-order questions of how primary conduct should be regulated ('what should be decided'). This approach is most commonly associated with the legal process school.<sup>10</sup> A legal process scholar might point out that it makes sense to start with institutional choice because doing so

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9. See, e.g., Josh Chafetz, *Impeachment and Assassination*, 95 MINN. L. REV. 347, 349–51 (2010) (offering as a criterion for impeachment a class of "assassinable offenses"). On the English practice of impeachment for maladministration, see But there were others for misconduct unrelated to the performance of official duties and for various acts of maladministration. Note, *The Scope of the Power to Impeach*, 84 YALE L.J. 1316, 1326 (1975).

10. See William N. Eskridge, Jr. & Philip P. Frickey, *The Making of The Legal Process*, 107 HARV. L. REV. 2031, 2044–45 (1994) (introducing the institutional focus of the Legal Process school).

brackets hard normative questions. She would suggest that by attending to a domain of relatively abstract, technocratic choices, consensus is more likely to be achieved. Further, she might note, it makes sense starting by asking what one instruments one has to hand, so that one can make a judgment about what kinds of criminality can and should be addressed.

I am skeptical of the legal process appeal to apolitical, technocratic neutrality. Nevertheless, I think it makes sense to focus on institutional choice rather than substantive law because I suspect that the question of what primary conduct by an apex official falls outside criminal bounds is more tractable and less contentious than it might first appear. Start with the general part of the criminal law. Few, I think, would openly endorse an elected head of government or head of state who, say, openly and notoriously committed murder on New York's Fifth Avenue, or for that matter larceny, manslaughter, or (I hope) sexual assault.<sup>11</sup> Elective office should not be a ticket for gross criminality, and it would seem to be common ground that such serious felonies ought to be punishable even when committed by senior elected or appointed actors. One might hew to this view even if one thought that it was best to defer prosecution until a person is no longer in office. Perhaps the best argument that might be mustered against this view of the scope of liability turns on the risk that an elected official will respond to the risk of prosecution by declining to leave office at all. In some jurisdictions, for example, elected leaders use their political authority to undo term limits that are intended to

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11. But consider here the case of President Rodrigo Duterte of the Philippines, who has proudly proclaimed that he had “personally pulled the trigger and killed three people as mayor of Davao City.” Russell Goldman, *‘I Cannot Lie,’ Rodrigo Duterte Says, Confirming He Did Kill People as Mayor*, N.Y. TIMES (Dec. 16, 2016), <https://www.nytimes.com/2016/12/16/world/asia/philippines-rodrigo-duterte-confirms-killings-davao.html>. Consider also that, as of this writing, it is not Duterte, but the Chief Justice of the Philippine Supreme Court, who has resisted his policies, who faces impeachment. Felipe Vilamor, *She Stood Up to Duterte. Now She Faces Impeachment*, N.Y. TIMES (Mar. 2, 2018), <https://www.nytimes.com/2018/03/02/world/asia/philippines-chief-justice-duterte.html>.

prevent individuals from entrenching themselves in power.<sup>12</sup> In other jurisdictions, where there are no meaningful elections, there is some evidence to suggest that leaders are less likely to depart peacefully when they reasonably expect to be prosecuted in an international court after the fact.<sup>13</sup> But let us posit for now that there is no substantial risk of entrenchment beyond term limits for fear of future prosecution: Much of the familiar criminal law of serious felonies, absent that risk, should plainly apply to apex officials' conduct.

Beyond serious felonies, there is also a class of criminal offenses for which the possession and misuse of official power are a *sine qua non*. Bribery, insofar as it involves the solicitation or receipt of unlawful gratuities, is an example of an offense that (in one form) can only be committed by an official.<sup>14</sup> It is possible to imagine an argument that a high-level official, such as a president, is inherently exempt from such regulation on the ground that whether is done with official authority is *ipso facto* legal.<sup>15</sup> The argument might be that the very definition of their her powers is without bounds, so she is entitled to take official actions for any

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12. See, e.g., Jina Moore, *Uganda Lifts an Age Limit, Paving the Way for a President for Life*, N.Y. TIMES (Dec. 20, 2017), <http://www.nytimes.com/2017/12/20/world/africa/uganda-president-museveni-age-limit.html>. For an empirical study of presidential efforts to evade term limits, see Tom Ginsburg et al., *On the Evasion of Executive Term Limits*, 52 WM. & MARY L. REV. 1807 (2011).

13. For evidence that the creation of the International Criminal Court has dampened the willingness of certain national leaders to relinquish power, see Daniel Krempner, *Should I Stay or Should I Go? Leaders, Exile, and the Dilemmas of International Justice*, 62 AM. J. POL. SCI. 499 (2018).

14. 18 U.S.C. § 201(b)(2) (2012) (bribery of public officials).

15. This seems to be Alan Dershowitz's position, although he describes the receipt of bribes as beyond the president's authority. Isaac Chotiner, *An Argument with Alan Dershowitz*, SLATE (Dec. 4, 2017), [http://www.slate.com/articles/news\\_and\\_politics/interrogation/2017/12/an\\_interview\\_with\\_alan\\_dershowitz\\_on\\_trump\\_and\\_the\\_mueller\\_investigation.html](http://www.slate.com/articles/news_and_politics/interrogation/2017/12/an_interview_with_alan_dershowitz_on_trump_and_the_mueller_investigation.html). I am not convinced this distinction is a tenable one. For example, imagine a president who concededly uses a "constitutional authority" (e.g., the power to instruct his subordinates) as a quid pro quo for sexual favors from a subordinate. That person, on Dershowitz's definition is immune from penalty—a result that seems quite unappealing to me.

reason, including a bad reasons, without repercussions. Recent deployments of the “unitary president” logic in the U.S. sometimes have that flavor to them.

But it is tough to see why those arguments would have much normative traction. Why should it be lawful for a head of state to take bribes or cultivate foreign emoluments? Why should their official actions, when taken with culpable motives, be immune from scrutiny or punishment? Bracketing for a second the problem of improper investigations, there is per se no reason to endow officials by dint of their hierarchical authority with a categorical exemption from the criminal laws tailored to prevent the misuse of official powers by dint of their hierarchical authority. One might appeal to the possibility of retrospective voting as a cure for this sort of behavior, which doesn’t exist for lower-ranked officials. But it requires rather heroic assumptions to conclude that an elected official willing to bribe or abuse her powers would not also do their her utmost to obfuscate her culpability. We should instead expect her to throw the shadow of blame on her political opponents, and deploy dark instruments (including bribery of her own) to anchor her popular legitimacy. Absent an “unbundled”<sup>16</sup> franchise in which voters can express judgments about discrete governmental functions, it is therefore quite hard to see the allure of an exclusive reliance on retrospective voting as a cure for bribery or similar kinds of self-dealing.

In short, I think it is reasonably clear that apex officials should be amenable to punishment for serious felonies and crimes such as bribery, which involve the abuse of official power. The definition of apex criminality’s substance, that is, may be simple enough that there is no need to expend much time analyzing it.

#### HOW SHOULD CONSTITUTIONS ADDRESS APEX CRIMINALITY?

It would be too quick to move from this point to the further, separate conclusion that a constitutional designer should address

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16. Jacob E. Gersen, *Unbundled Powers*, 96 VA. L. REV. 301, 304 (2010) (characterizing “the “unbundled powers alternative” as one in which “[m]ultiple branches exercising combined functions in topically limited domains”).

the question of apex criminality in her text. Instead, and perhaps surprisingly, it might well be sensible for our designer to refrain from including any particular procedural solution in the text, and leave the matter open to subsequent deliberation and resolution through the ordinary processes of politics. Where a constitution is democratic in orientation, this might mean that relatively stable institutions emerge. Or it might allow ad hoc responses to allegations to depend on transient local political conjunctures. While my focus here is on democratic constitutionalism, it is worth noting that silence in an authoritarian constitution might reasonably be taken to signal de facto or de jure immunity from ordinary criminal laws for apex figures.<sup>17</sup>

Lest the prospect of ad hocery seem implausible, we might look again at the 1787 text of the U.S. Constitution. As I have already noted, its text mentions impeachment without offering a precise or lucid account of its substantive bounds, let alone whether it implicitly precludes the possibility of a parallel criminal prosecution.<sup>18</sup> Nor does the text define the criminal immunities of senior executive branch officials in the same way that it delineates the analog immunity of national legislators in the Speech and Debate Clause.<sup>19</sup> To be sure, the Department of Justice concluded in 1973, and then reaffirmed in 2000, that “neither the text nor the history of the Constitution” settle the question of whether there is a singular right way to investigate and punish criminal acts by a sitting president.<sup>20</sup> But to what extent should be conclusions of executive branch lawyers be seen as being free of the institutional interests of the executive branch itself? It is always possible to

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17. But not necessarily. Even tyrants need to coordinate teams of subordinates, in part by making credible commitments, which might be supported by accountability mechanisms. For a terrific illustration of this point using Stalin’s subordinates as a case study, see SHEILA FITZPATRICK, *ON STALIN’S TEAM: THE YEARS OF LIVING DANGEROUSLY IN SOVIET POLITICS* 1-14 (2015).

18. For an effort to gloss the text that illustrates the rich complexities that entails, see CHARLES L. BLACK, JR., *IMPEACHMENT: A HANDBOOK* 25–52 (1974) (analyzing scope of impeachment under Article II).

19. U.S. CONST. art. I, § 6, cl. 1.

20. OFFICE OF LEGAL COUNSEL, *A Sitting President’s Amenability to Indictment and Criminal Prosecution*, 24 *OP. O.L.C.* 222, 236 (2000).

plumb the archives, the antiquarian dictionaries, and the Kuiper Belt of analogic reasoning and intertextual inference to conclude that there is, in fact, a definitive answer to be had in the text. But this sort of enterprise seems to me to rest on the heroic but implausible assumption that the relevant legal materials, if held at just the right angle in just the right autumnal light, will refract out one right answer. Better, I think, to acknowledge that textual oversight and ambiguity have alchemized not a magic bullet, but a long historical wobbling between Congressional investigation, impeachment, independent counsel, and special counsel. On this view, the U.S. Constitution effectively left open the question of how and when apex officials could be punished in some fashion for their serious criminal acts. Subsequent generations have filled in that gap with a variety of interpretations, and it is a mistake to think that any one answer to the question is ‘right’ or ‘final.’ One might further think that the combination of constitutional silence and ad hocery has to date not been a disaster for the United States (although it is exceedingly difficult to see how the history can be seen as exemplary, or a model for others to emulate).

Even if allegations of high-level criminality are ubiquitous, and even if some fraction are credible, that still does not mean the constitutional text must have a firm and clear answer. A reasonable constitutional designer might conclude that she has bigger fish to fry. If she is sufficiently uncertain about the likely downstream negative consequences of any given accountability mechanism, she may well decide it is better to leave well enough alone. Avoiding an unintentional catalysis of catastrophic outcomes is, I’ve argued elsewhere, an entirely plausible touchstone of constitutional design.<sup>21</sup> Constitutional creation, moreover, often requires a delicate braiding of extant vested interests with an impulse toward transformation, a task that leaves little room for the consideration of uncertain, contingent future travails. Our designer might reasonably think her time and efforts are better expended on the task of resolving the immediate pressing

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21. See Aziz Z. Huq, *Hippocratic Constitutional Design*, in *ASSESSING CONSTITUTIONAL PERFORMANCE* 39 (Tom Ginsburg & Aziz Z. Huq eds., 2016).

problems that motivated a constitution's adoption, rather than a distant and abstract possibility of future defalcations.

The point can be made more forcefully yet: Our reasonable constitutional designer might say to herself that apex criminality is not a catastrophic outcome, and perhaps not even a very important one. Drawing on recent experience, she might observe that discrete instances of high-level criminality may be “relatively trivial” and as such may not impose significant social costs.<sup>22</sup> Would it endanger *La République française* if, for example, Penelope Fillon had indeed been overpaid as a parliamentary assistant? What really is the important President Trump's various and sundry mooted criminalities? Would it matter now if he had conspired to violate the Logan Act,<sup>23</sup> or had obstructed justice in violation of federal law by, among other things, firing the director of the FBI? The President has already been refreshingly candid in welcoming Russian interference and in affirmatively embracing the self-dealing (and perhaps “corrupt[.]”<sup>24</sup>) reasons for firing James Comey, and yet political life seems to tick on in its usual way. A cynic might say that when a nation's political culture is already endemically characterized by lies, culpable omissions, or gross negligence with respect to the factual predicates of one's claims, then even candidly confessed apex criminality will not be terribly important. It may instead be but one of a host of more pressing concerns, and certainly not one that necessarily warrants a constitutional response.

This somewhat jaundiced view of political life might seek succor from the thought that lies and rotten deal are not merely incidental to democratic political life. They are one of its necessary components. “No one succeeds in politics without getting his hands dirty,” or so the conventional wisdom since Sartre, Weber, or perhaps Machiavelli, goes.<sup>25</sup> Private vices do not always cash

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22. Cass R. Sunstein, *Bad Incentives and Bad Institutions*, 86 GEO. L.J. 2267, 2270–71 (1998).

23. 18 U.S.C. § 953.

24. 18 U.S.C. § 1512(b).

25. Michael Walzer, *Political Action: The Problem of Dirty Hands*, 2 PHIL. & PUB. AFF. 160, 164 (1973). For a useful genealogy of this idea, see

out into infirmities of state. Instead, as Michael Walzer has suggested, they are a necessary part of the daily fabric of political life in a world characterized by morally fraught and unavoidable compromises.<sup>26</sup> If some degree of falling away from moral and legal standards is an inevitable part of political life, then perhaps the costs of even gross criminality are not sufficiently great to warrant the installation of constitutional checks.

But aren't the consequences of apex criminality sufficiently bad to justify some kind of constitutional prophylaxis? One could point to the hecatombs flowing from state violence in the twentieth and early twenty-first century, and demand apex accountability devices to forestall their repetition. But great crimes are more often committed through the state than against the state. From the Japanese internment to the Red Scare, most serious incursions on human wellbeing have been executed by the state as state policy with the enthusiastic support of much of the populace. The mechanisms for the redress of apex criminality will rarely be well-fitted to the task of parrying or responding to mass atrocity done for reasons of state. Such crimes are commonly executed by political and legal institutions acting most often with hearty popular support. Mechanisms for the redress of mundane criminality will crack and splinter before such democratic pressure, providing no prophylactic at all. A separate debate must therefore be had about how such horrors are to be held at bay, or redressed after the terrible fact. To the extent that debate is relevant here, it is indirectly: A safeguard against atrocity on a mass scale is the preservation of ordinary politics as a means for channeling and resolving the inevitable daily conflicts of a nation-scaled collectivity.

All that said, even if there is no compulsion to address apex criminality, it cannot be said that the endeavor is frivolous or slight. Scale matters to official criminality's significance: the

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C.A.J. Coady, *The Problem of Dirty Hands*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta, ed.) (2014)  
<https://plato.stanford.edu/archives/spr2014/entries/dirty-hands/>.

26. Walzer, *supra* note 25, at 165 (giving the example of a "candidate [who] must make a deal with a dishonest ward boss" in order to secure office).

occasional crime, iterated often enough, becomes an epidemic that can threaten the public's trust in the state and its sense of institutional legitimacy.<sup>27</sup> Although the antique U.S. Constitution is unclear as to the appropriate response to apex criminality, more recent constitutions typically adopt ombudsmen, anti-corruption agencies, or other bespoke devices to mitigate that risk that high-level officials misbehave. Today, data from the Comparative Constitutions Project suggests that the modal constitution now has four such independent bodies of one form or another denominated as ombudsmen or the like.<sup>28</sup> For example Chapter IX of South Africa's Constitution provides a set of state institutions supporting constitutional democracy, including the Public Protector (a sort of ombudsman); a Human Rights Commission to promote and protect human rights; a Commission for the Promotion and Protection of Cultural, Religious, and Linguistic Communities; a Commission for Gender Equality; an Auditor-General; and an Independent Electoral Commission.<sup>29</sup> That the dominant trend in constitution-writing today is toward legal rather than political responses to apex criminality, though, should not foreclose further inquiry. The mere existence of such bodies does not imply their sound operation, or deny the existence of superior institutional alternatives.

An argument in favor of addressing apex criminality in the constitutional text might proceed along the following lines. The important consequences of apex criminality does not necessary adhere in the grubby particulars of one person's offense. We do not, and should not, intrinsically care about President's Trump's financial or sexual misadventures, and more than we should have cared about President's Clinton's. But like pebbles cast across placid waters, discrete instances of apex malfeasance, and the public's responses to them, may have consequences that are more

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27. For case studies of democracy unraveled by endemic corruption, see generally JOSHUA KURLANTZICK, *DEMOCRACY IN RETREAT: THE REVOLT OF THE MIDDLE CLASS AND THE WORLDWIDE DECLINE OF REPRESENTATIVE GOVERNMENT* 101-16 (2013).

28. TOM GINSBURG & AZIZ HUQ, *HOW TO SAVE YOUR CONSTITUTIONAL DEMOCRACY* (forthcoming 2018).

29. S. Afr. Const., 1996, ch. 9.

systemic, and hence of greater interest to a constitutional designer than their immediate profile would have suggested. One possibility is a sort of “demonstration effect” in which high-level figures model the operative bases of allegiance and reward through their misconduct, providing a model for subordinates and those seeking a share of resources or political power.<sup>30</sup> We might worry, as Adam Samaha has explained in a brilliant essay, about “[a]pppearance driving reality.”<sup>31</sup>

A worry that apex lawmaking will be taken as *exemplary* in this fashion, rather than *exceptional*, might explain the enduring appeal of A.V. Dicey’s seminal formulation of the “rule of law.” One of the several definitions that Dicey offered requires “the equal subjection of all classes to the ordinary law of the land administered by the Ordinary Law Courts,” and excludes categorically the possibility of any “exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of ordinary tribunals.”<sup>32</sup> This is a requirement that officials not only be responsible before the same law as citizens, it is a demand that they be responsible in a particular way. Dicey’s test for the rule of law assumes that the relevant institutions will be “tribunals,” i.e., that there will be legal rather than political mechanisms of apex accountability. To be sure, at the time Dicey wrote, the highest court in the United Kingdom was drawn from the ranks of the House of Lords. Rather than a claim about necessary institutional separations, I read to Dicey to be making a claim about the qualities of regularity, parity, and even-handedness in the choice of forums through which the

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30. In economics, the “demonstration effect” involves a rather more beneficent intergenerational mimicry of donative transfers to ancestors. See Andreea Mitrut & François-Charles Wolff, *A Causal Test of the Demonstration Effect Theory*, 103 ECON. LETTERS 52, 52–53 (2009). For a useful study of the role that corruption of this sort plays in modern African democracies, see Alexander Beresford, *Power, Patronage, and Gatekeeper Politics in South Africa*, 114 AFR. AFF. 226, 226–27 (2015) (“Political leaders are said to derive support and legitimacy by distributing patronage.”).

31. Adam M. Samaha, *Regulation for the Sake of Appearance*, 125 HARV. L. REV. 1563, 1577 (2012).

32. A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 120 (1885 (Liberty Fund ed. 1982))

criminal law is enforced. But it is quite striking that his definition of the rule of law not only compels the plenary accountability of apex officials before the criminal law; it also demands that such accountability be rendered by quintessentially *legal* rather than *political* implements.

A reasonable constitutional designer, then, is under no compulsion to address apex criminality in her text. Recent constitutional design experience, though, suggests that many other constitutional designers see some reason to do so (although there is not much scholarship on how the resulting institutional choices have worked out), and it is possible to discern powerful reasons for doing so rooted in a very foundational understanding of the rule of law. The balance of evidence, in my view, thus makes it plausible, albeit not necessary, to address apex criminality in the text of a constitution.

A. *Apex Accountability and the Forms of Democratic Political Life*

Another difficult predicate question, though, awaits: What exactly do we mean when we ask for a “superior” system of apex accountability? That is, what exactly should the design of accountability institutions strive to do? The question implies some totting up of costs and benefits—but it is hardly clear from the question’s face that we know what counts as a cost, and what counts as a benefit. For reasons developed below, I think it would be a mistake to analyze this design choice in strictly welfarist terms. Instead, I think it is more useful to think about apex accountability institutions in terms of the kind of democratic political life or political culture one wants to foster. To develop this point, I will first explain why familiar welfarist criteria are unhelpful, and then will explain what I do think worth attending by explaining how a constitutional designer might strive to elicit a certain kind of domestic political life, or, stated otherwise, a distinctive constitutional *project*.

One starting point for thinking about the question of how to design mechanisms to address apex criminality is to be found in law-and-economics-inflected scholarship. It generally focuses on

the maximization of social welfare given the costs and benefits of various regulatory devices. But it need not take this form. Like other kinds of consequentialism, welfarism need not be operationalized through a command to maximize some metric. It might also be pursued, among other strategies, through a ‘maximim’ strategy that is organized around the idea that we should focus on mitigating as much as possible the potential ‘bad’ states of the world.

But while it seems right to me to direct inquiry toward the expected state of the world once a particular constitutional design is adopted, a simple welfarist framing is all that helpful here, or perhaps more generally in respect to constitutional design.<sup>33</sup> A first difficulty arises in the deep, perhaps insurmountable problems of writing down a social welfare function for a complex society characterized by large variation in background entitlements and innate capabilities. A second problem arises in thinking how constitutional design can be deduced from that social welfare function. Constitutions are instruments to manage political, military, and social risk. Even with a decent measure of social welfare in hand, a constitutional designer must assign probabilities to political risk that, even in retrospect, can seem wildly unlikely. (Did you anticipate in 2015 a Trump presidency allegedly propelled to power by a social-media-based Russian conspiracy? What is the risk, now he is in office, that Trump will decline to recognize the legitimacy of an election result that does not run in his favor?). Without applying an extremely demanding discount rate, it is hard to see how welfarism can plausibly be applied to questions of complex constitutional design in general. There is no reason to think that the risk of apex criminality is difficulty. Given the potential for pervasive low-level criminality—i.e., Walzer’s dirty hands problem<sup>34</sup>—it may be very hard to know *ex ante* how likely that apex criminality will be a serious problem, or precisely what kind of problem it will be in the medium or long term.

If the basic currency of the cost-benefit calculation is elusive, a constitutional designer might settle on something more effable.

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33. Or so I have argued elsewhere. Huq, *supra* note 21, at 43-52.

34. See *supra* text accompanying notes 25 and 26.

One potential object of her attention are the consequences of the institutional responses to apex criminality to the quality of democratic political interaction that her constitution will likely induce. As the burden of accountability shifts from one institutional foot to another, the forms through which political contestation flows will change. This in turn will nudge the incentives, dispositions, and preferences of officials whose careers and daily working lives are embedded in constitutionally shaped institutions. In this fashion, institutional choices embedded in a constitution have a dynamic effect on the quality of democratic political culture.

This is not a terribly new point, at least when pitched in the abstract. There are countless ways in which our schools, workplaces, social clubs, and religious associations shape preferences and beliefs. From Madison onward, it has been thought that an important entailment of political institutions' design is the manner in which they nudge and tweak the preferences of official actors.<sup>35</sup> To put this in more metaphorical terms, the choice about how elective and bureaucratic structures respond to high-level criminality matters to the character of the national democratic *project*. It changes the downstream quality of political life woven by the back-and-forth between persons, institutions, and conventions. In particular, a constitutional design might be concerned about the aggregate of dispositions, incentives, and preferences brought to bear by senior political actors. Call this a *political culture*.

Precisely what kind of national political culture is desirable—and, as important, what kinds should be sworn off—presents rather subtle questions that are not necessarily amenable to an econometrician's weights and measures. Should political life be characterized by sharp, and even angry, contestation? Or it is better served by the restraining friction of conventions and expectations of mannered interaction? This is not a question with an obvious answer. Normative judgment matters more than empirical

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35. For a recent recapitulation and a tentative defense of the Madisonian account of official psychology, see David Fontana & Aziz Z. Huq, *Institutional Loyalties in Constitutional Law*, 85 U. CHI. L. REV.1 (2018).

measurement. Indeed, the nature and proper character of political life, and the necessary virtues or dispositions for its successful prosecution, have been perpetual sources of disagreement within political philosophy, with starkly different accounts of politics being offered as early as the pre-Socratics. Thankfully, we can hold in abeyance the most fractious of those disputes in favor of a more localized inquiry into the character of a healthy *democratic* political culture. By considering the ways in which institutional checks on apex criminality would shape that rather more distinctive political project, we can start to grasp the considerations that animate the institutional choice at stake here.

I think there are two main ways in which political culture—again, the aggregate of dispositions, incentives, and preferences brought to bear by senior political actors—might be unhealthily distorted by apex-criminality accountability. These are a concern for *litigiousness in deliberative politics*, and a concern for *politicization in rule-of-law institutions*. The first concern, litigiousness, pertains to the quality of deliberative politics conducted by elected officials in both the legislative and executive branch. It starts from the premise that, all else being equal, those bodies are characterized by a high degree of serious, principled deliberation about questions that matter to the polity, and that such deliberation yields considered judgments in the form of laws and regulations that advance the public interest. Not only is this premise consistent with the immanent possibility of sharp disagreement, it also incorporates the assumption that members of the polity disagree sharply enough about how the public good is defined and pursued that good-faith deliberation is needed as an alternative to more violent confrontation.<sup>36</sup>

Institutionalized responses to apex criminality might derail beneficial democratic deliberation in one of two ways. First, there is perhaps a risk that the *policy* disagreements that are endemic to a polity will be treated as points of *legal* infidelity. Rather than domesticating the polity's endogenous conflict, the law's decision

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36. On the conflict channeling function of constitutions, see Tom Ginsburg & Aziz Huq, *What Can Constitutions Do?: The Afghan Case*, 25 J. DEM. 116, 122–26 (2014).

to treat policy disagreements as a justification for punishment might escalate the stakes of political disagreement. A policy dispute might be taken as evidence of constitutional infidelity. At the extreme, an unraveling of institutional order is at least conceivable. For if any policy dispute can catalyze the end of a political career, there is a risk that incumbents will use extra-constitutional means to short-circuit policy debate. Even short of that extreme outcome, the temptation to treat policy divides as matters of potential criminal liability might lead political elites to frame partisan divides as more extreme, and more moralized matters. Their cues might induce more general divergence in popular views. Destabilizing popular polarization will ensure if politics is not a matter of reasonable disagreements with reasonable co-citizens, but a demand to compromise with felons.

Concerns of this ilk are hardly far-fetched. Indeed, a concern about the transformation of policy debates into removal-oriented litigation might explain James Madison's objection, raised during the Philadelphia Convention debates, to George Mason's proposal to allow impeachment for "maladministration" as well as high crimes and misdemeanors.<sup>37</sup> Madison might well have been concerned that Mason's proposal would have transformed too many policy debates into impeachment battles. He might have been concerned, that is, about the transformation of policy into legal debates. The same concern is articulated today in the U.S. context as a concern about the "criminalization of political differences,"<sup>38</sup> a complaint about a putatively extreme manifestation of a more diffuse culture of litigiousness and extreme partisanship.

A second, subtler form of this concern is that institutional design will influence the agenda for political choice, with substantive questions of national policy being crowded out by "scandals that are often imaginary and that, even if real, usually do not deserve the prominence" they end up receiving.<sup>39</sup> This

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37. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 550 (Max Farrand ed., 1911).

38. Dershowitz, *supra* note 8.

39. Sunstein, *supra* note 22, at 2268.

argument hinges on the possibility that the initial sorting rule for an accountability devices generates more false positives than true positives, but that partisan opponents of an accused figure have the incentive and means to leverage false positives in ways that hinder effective deliberative government. (Think of the positions of President Clinton's and President Trump's defenders). Scandal, on this view, is merely "a tool of political combat," rather than "part of a vibrant movement to reconstruct institutions."<sup>40</sup> Fighting about whether or not fellatio is oral sex, or whether a marginal increase in a hotel room rate is an "emolument," might (depending on one's priors about sexual intercourse or the morality of gift-giving) are examples of false positives that have a distortive effect on the quality of democratic debate.

Concerns about litigiousness in deliberative politics, however, do not mechanically translate into a recommendation for an institutional choice. On their face, they hinge on the potential for changes to behavior in political institutions, rather than in prosecutor's chambers or grand jury rooms. This would suggest that deliberative institutions should be insulated from accountability processes in some fashion. But the same arguments can and have been articulated forcefully against legal instruments of accountability perceived as running amok: That is, the excessive operation of legal institutions of accountability may distort democratic deliberation.<sup>41</sup> This might point toward the creation of political checks on legal mechanisms of accountability, which is a sort of mixed strategy. Alternatively, and to my mind most persuasively, one might infer a need for stricter acoustic separation of accountability processes through internalized norms of professional probity and bureaucratic regularity regardless of their location.<sup>42</sup>

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40. JULIAN E. ZELIZER, *ON CAPITOL HILL: THE STRUGGLE TO REFORM CONGRESS AND ITS CONSEQUENCES, 1948–2000*, at 178 (2004).

41. See Sunstein, *supra* note 22, at 2268 (criticizing the Independent Counsel Act on the ground that it "damage[d] processes of democratic deliberation by deflecting attention from serious issues involving the effects of policy on human lives").

42. See David A. Strauss, *The Independent Counsel Statute: What Went Wrong?*, 51 ADMIN. L. REV. 651, 653 (1999) (arguing that "you need

On the other side of the ledger is a concern about politicization in rule-of-law institutions. Again, this argument has several strands. Most simply, it presses on the principle that so long as a person has been elected to high office, it is centrally the responsibility of the electorate to decide whether she should be ejected from that office. Because accountability decisions necessarily implicate the possibility that a person will complete an elective term of office, they are necessarily political. As such, these decisions should be made by the electorate or, as a second best, by an “august . . . representative . . . and . . . accountable deliberative body.”<sup>43</sup> Legal mechanisms of accountability, on this view, are a democratic malapropism.

This argument, while alluring to American ears, rings hollow in constitutional contexts with nonelective mechanisms for enabling the transfer of power, such as the parliamentary vote of no-confidence. The latter renders prime ministers far more dependent than presidents are on legislators’ perceptions of political success; it hence makes them more vulnerable to the vicissitudes of policy failure or success.<sup>44</sup> No confidence protocols suggest that removal mechanisms can be infused with democratic considerations without being directly popular in character. In the United States, complaints about the nondemocratic character of a presidential indictment on democratic grounds ring hollow for a

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something--some institutional structure--to hold government officials in line. In the case of prosecutors, that check cannot come from the courts, except in extraordinary instances. The limits have to be imposed on a much more workaday level, by a supervisor or a colleague”).

43. Akhil Reed Amar & Brian C. Kalt, *The Presidential Privilege Against Prosecution*, 2 NEXUS 11, 20 (1997).

44. WALTER BAGEHOT, *THE ENGLISH CONSTITUTION* 56-57 (Miles Taylor, ed., 2001) (describing operation of vote of no confidence in the English context). The South African Supreme Court, in a fascinating case, had cause to construe the impeachment provisions of the South African Constitution, and held that the parliament had to find that one of the factual bases for removal existed before the removal of then-President Jacob Zuma. Pierre de Vos, *Constitutional Court Impeachment Judgment: What Was the Disagreement Between the Majority and the Dissent?*, CONSTITUTIONALLY SPEAKING (Jan. 9, 2018), <https://constitutionallyspeaking.co.za/constitutional-court-impeachment-judgment-what-was-the-disagreement-between-the-majority-and-minority/>.

different reason. The elaborate and increasingly non-majoritarian alchemy of the Electoral College means presidents cannot always claim a simple democratic pedigree in the first instance. And if their selection is not purely democratic in character, it is hard to see why removal should not also deviate from the democratic norm.

An alternative objection to the use of legal rather than political instruments focuses on the illicit injection of basal political considerations into rule-of-law institutions, such as the prosecutor or the grand jury, so as to render the latter ineffectual or illegitimate. Even in the absence of partisan motives—the argument would go—the power to take down high elected officials may well prove too alluring a career-making move to be resisted by most prosecutors. Anticipating this risk, elected officials will perceive a powerful need to seize control of legal implements of accountability. The resulting rush to capture the instruments of prosecution will then tend to place great pressure upon putatively apolitical institutions. The result in extremis is a set of prosecutorial instruments that in effect function as tools of political patronage. Under this system, as the Brazilian autocrat Gertulio Vargas pithily put it, “[f]or my friends, everything; for my enemies, the law.”<sup>45</sup>

A subtler argument from politicization would hinge on the immense discretionary authorities prosecutors often have. In the American system, as in most other jurisdictions, few instruments exist for piercing general invocations of discretionary authority to evaluate the motives of prosecutors in particular cases.<sup>46</sup> Given that opacity, public trust in the bona fides of prosecutors must rest on an alternative signal of the prosecutor’s credible commitment to neutral use of state power.<sup>47</sup> For example, some commentators

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45. Guillermo O’Donnell, *Why the Rule of Law Matters*, 15 J. DEM. 32, 40 (2004).

46. See Aziz Z. Huq, *What is Discriminatory Intent?*, 103 CORNELL L. REV.-- (forthcoming 2018) (manuscript at 52).

47. For a general discussion of the relation of prosecutors to democratic government, see Máximo Langer & David Alan Sklansky, *Prosecutors and Democracy—Themes and Counterthemes (Epilogue)* (UCLA Sch. of Law, Pub. L. Research Paper No. 16-58, Stanford Pub. L. Working

have flagged certain ethical rules that embody “the prosecutor’s special ethical position as a servant of the public trust.”<sup>48</sup> To the extent that prosecutors have ways to signal their credibility and fidelity to rule-of-law values, through, it may be difficult for them to effectively convey these messages when they are tasked with investigating apex criminality. If “the mass media build[s] from every ethically questionable molehill a mountainous betrayal of public trust,”<sup>49</sup> for instance, prosecutors will have a hard time explaining why they decline to prosecute. For fervent supporters of a president, conversely, any decision to proceed with a prosecution may be ipso facto treated as evidence of the “deep state” at work.<sup>50</sup> As a result of these dynamics, I suspect that decisions to investigate or prosecute apex criminality, as well as decisions not to do so, will inevitably be construed as partisan in character. At the very least, it will often be very difficult to prove to the public that any given decision to prosecute (or to decline prosecution) was free of partisan influences. Prosecutors generally will not be able to disclose sufficient information about like cases to assuage concerns about biased enforcement given the powerful privacy interests possessed by suspects who are not prosecuted. Public trust in prosecutors, and perhaps the criminal justice system more generally, may well wane.

The force of these worries is an empirical matter, and I make no claim about their magnitude here. A constitutional designer, often with the same dearth of objective data, must decide how serious each one of these concerns is and tack accordingly in

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Paper No. 2880538, 2016),

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2880538](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2880538). Langer and Sklansky usefully flag several ways in which the relationship between prosecutors and democracy can be configured. *See id.*

48. Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CAL. L. REV. 1471, 1497 (1993). I am skeptical public knowledge of ethical rules is robust enough for them to serve this trust-building function.

49. Stephen L. Carter, *The Independent Counsel Mess*, 102 HARV. L. REV. 105, 136 (1988).

50. Aaron Blake, *Why Trump’s attacks on Mueller Just Might Work*, WASH. POST (Mar. 19, 2018), [https://www.washingtonpost.com/news/the-fix/wp/2018/03/19/why-trumps-attacks-on-mueller-just-might-work/?noredirect=on&utm\\_term=.9cfef3ec8e70](https://www.washingtonpost.com/news/the-fix/wp/2018/03/19/why-trumps-attacks-on-mueller-just-might-work/?noredirect=on&utm_term=.9cfef3ec8e70).

her planning. She might observe that all of these concerns hinge in some measure on concerns about spillovers between discrete legal and political functions. That is, she may understand the problem as one of *motivational contamination*. A logical solution to this concern is to establish high walls between the different branches of government, and then to situate accountability mechanisms in the right side of the fence.

But, even assuming this is the right diagnosis, it is worth asking whether branch-level fences are the only way to avoid having too much (criminal) law in politics, or a surfeit of politics in law? This question is a large one that may have no general answer, and I want to make one relatively modest point in concluding: I want specifically to resist the inference that the right institutional design is necessarily one that cuts sharply between the legal and political *at the branch level*. This is so for three reasons of varying strength.

A first reason focuses on the strength of institutional membranes generally as solutions to deficiencies of incentive or disposition. There is an impressive body of scholarship casting aspiration on this possibility.<sup>51</sup> Here, one might press against branch-level solutions by pointing out that both legal and political instruments of accountability ultimately have political foundations. The effective operation of either depends on the willingness of pivotal political actors to support accountability given its political costs. Leon Jaworsky's appointment, Bill Clinton's acquittal, and the ensuing dissolution of the independent counsel's statutory authorization—all of these were decisions that hinged how key political actors perceived the political costs of accountability. Yet these three cases plainly fall on different sides of the legal/political line. These political foundations of apex accountability explain why concerns about litigiousness in deliberative politics can arise whether accountability is grounded in a legal or a political home. Such political foundations also render the politicization of rule-of-law institutions an unavoidable and permanent possibility, especially if the political cost of violating a law is otherwise

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51. See Fontana & Huq, *supra* note 35, at 21-27 (summarizing and citing the relevant literature).

weak.<sup>52</sup> In the U.S. system, for example, Congress can always use the threat of defunding or the repeal of a prosecutorial entity's organic statute to influence the trajectory of investigations into official conduct. Because Congress cannot credibly commit not to do so through any legal means, its commitment to abstain from interference via fiscal mischief necessarily rests on political grounds.

Although I am sympathetic to the idea that mere institutional specification does little to change extant partisan incentives, I would be careful not to press this leveling logic too far. Not all institutional formations are equally vulnerable to political influences. It is possible to craft institutions that are less sensitive rather than more sensitive to variance in political winds. Experience suggests that this relative autonomy, moreover, can exist on either side of the legislative/executive divide. Hence, it may be that Congressional Budget Office in practice is less 'political,' in the sense of being responsive to short-term political volatility, than the putatively independent Federal Reserve. As Sarah Binder and Mark Spindel have recently documented, the central bank in fact operates in close dependence upon Congress.<sup>53</sup> That is, autonomy from transient politics may be feasible, but it is not simply a matter of placing institutions in the right branch.

A second reason for resisting absolute separation resists the premise that accountability is a single task that can be neatly aligned with one or the other branch of government. Notice instead that there are two separate tasks entailed in accountability for apex criminality. The first is *epistemic*, and involves the investigation of allegations. The second is *evaluative*, and entails a determination of what consequences should flow from an investigation's factual findings. At first blush, the criterion of comparative institutional specialization might suggest a bifurcation of these tasks between professional investigators and political

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52. As suggested in Frederick Schauer, *The Political Risks (If Any) of Breaking the Law*, 4 J. LEGAL ANALYSIS 83, 91 (2012).

53. See SARAH BINDER & MARK SPINDEL, *THE MYTH OF INDEPENDENCE: HOW CONGRESS GOVERNS THE FEDERAL RESERVE* 2-3 (2017) (discussing "interdependence" of the Federal Reserve and Congress).

actors.<sup>54</sup> For instance, investigation might be the obligation of professional prosecutors, whereas legislators would evaluate and assign punishment by creating *ex ante* schedules of penalties.

But I think we should be cautious in assuming the validity of such claims. We should be more open to the possibility that competence is endogenous to constitutional design choices. As a historical matter, congressional investigations of executive malfeasance (which is a broader category than criminality) have been frequent and effective in damaging presidents' public standing,<sup>55</sup> even as Congress has generally been loath to impeach.<sup>56</sup> This historical pattern suggests that there is nothing inevitable about prosecutorial comparative advantage in epistemic matters. The analysis is further complicated by secular trends such as increasing partisan polarization within Congress and a decaying rate of investigation.<sup>57</sup> One can reasonably take the view that the appropriate response to the progressive deterioration of legislative capacities for investigation and judgment is not accommodation. Rather, in a Thayerian spirit, the best response might be to excise completely the moral hazard created by a prosecutorial backstop, leaving Congress with sole responsibility for both acquiring information and putting it to normative use.

Finally, it is worth recalling that U.S. style separation of functions among distinct branches is a contingent constitutional design choice, and an increasingly unpopular one at that.<sup>58</sup> Many other polities work tolerably well without that particular kind of institutional separation. In the United Kingdom, for example, an important instrument of accountability is the parliamentary

54. Cf. Bauer, *supra* note 7 (suggesting that Congress relies on professional investigators, such as those employed by a special counsel).

55. See Douglas L. Kriner & Eric Schickler, *Investigating the President: Committee Probes and Presidential Approval, 1953–2006*, 76 J. POL. 521, 532 (2014).

56. See CASS R. SUNSTEIN, *IMPEACHMENT: A CITIZEN'S GUIDE* 108–13 (2017) (listing all impeachments by the House).

57. Kriner & Schickler, *supra* note 55, at 524–25 fig.1 (documenting the decaying rate of investigation).

58. GINSBURG & HUQ, *supra* note 28 (presenting data on the declining influence of the separation of powers model).

commission of inquiry, an intermittent institution most often revived in the wake of public crises for which legislators wish to avoid blame.<sup>59</sup> Yet once up and running, these bodies appear to operate with a high degree of independence from direct political control. This is despite the fact that they remain technically within parliamentary control.<sup>60</sup> This model suggests that it is possible to create institutions, even ones that are intermittent in character, that are legislative in terms of their institutional home, but that are still capable of exercising independent judgment in the pursuit of an investigation.

All this is to say that the dispositional and motivational firewalling of accountability mechanisms from political life so as to prevent both the diffusion of litigiousness and the political capture of rule-of-law institutions. Walls to prevent signal bleed from accountability demands may be useful, in short, but they need not operate at the level of the branch.

#### CONCLUSION

My aim in this short piece has been to map out some considerations that most usefully inform the design of accountability mechanisms for apex criminality. Having set forth some needful caveats as to whether it is really worth the candle of constitutionalizing apex accountability devices, I have suggested that the principal costs of such mechanisms sound in the ways they can distort political culture. This conduces to separation as a remedy, although I have cautioned against assuming that using the division of power into government branches is either necessary or sufficient to that end.

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59. See Raanan Sulitzeanu-Kenan, *Reflection in the Shadow of Blame: When Do Politicians Appoint Commissions of Inquiry?*, 40 BRIT. J. POL. SCI. 613, 614 (2010) (determining blame-avoidance to be a motivation for the creation of such bodies).

60. See Adam Burgess, *The Changing Character of Public Inquiries in the (Risk) Regulatory State*, 6 BRIT. POL. 3, 6–8 (2011) (describing commissions as operating relatively independently from parliamentary forces).

Instead, it may well be more useful to recognize that institutions that preserve the quality of political life are themselves grounded largely on shared understandings and dispositions. It depends on participants in a political system having “the judgment to discern which issues are political” from questions of law, and “respect for the structures and procedures that frame the political enterprise” such that he will “resist[] the temptation to . . . further his own aims by subverting the formalities it imposes.”<sup>61</sup> Political culture—the network of dispositions and incentives that form the wellsprings of political action—hence may rest on institutions, but the health of those institutions is a function not just of savvy design but a persisting commitment to the exercise of good judgment and a resistance to the temptations to “subvert[]” whatever forms have been set forth. However mediated and strengthened by institutional design it might be, the robustness of democratic institutions under the rule of law cannot be disentangled from the character and motivations of those elected or appointed to high office.

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61. Jeremy Waldron, *Arendt's Constitutional Politics*, in *THE CAMBRIDGE COMPANION TO HANNAH ARENDT* 201, 202 (Dana Villa ed., 2000).