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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 develop here three general points 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 necessarily 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 response to the question of which is optimal. Third, a better way to approach the constitutional design question may be to anticipate 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.

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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 resonate in both new democracies and in polities undergoing constitutional reform after periods of misrule. Even for established constitutional democracies, these questions might usefully be considered as a way to prime our intuitions about subconstitutional design choices. At a minimum, they might clarify the range of normative considerations that should inform judgments about extant institutions: To what extent do they successfully respond to the problems they are meant to solve? And what externalities do they engender?

My aim here is to illuminate the choices 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, an issue of constitutional design in the abstract rather than an inquiry into specifically U.S. constitutional law, for two reasons. First, the question of whether there is an optimal response to apex criminality is in practice a general one. It is a mistake to think that the United States has some kind of monopoly on shoddy leaders or the best institutional devices to deal with them. 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 edge; and in Brazil, the National 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 inexplicable kowtowing to Russian autocrats, tides of foreign emoluments, silenced adult film actresses, or 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 colored by partisan and institutional bias, or have tended to become inconclusively mired in the murk of conflicting original public understandings, historical glosses, and institutional self-dealing. Consider just one question to illustrate this. Article II identifies the possibility of impeachment for presidents and other

senior officials.¹ But the Constitution's text does not state that impeachment is the *only* means of removing a senior elected or appointed official. So are alternative paths possible? At best, the scholarly answer to the question of whether impeachment leaves space for alternative mechanisms has been a "tentative 'no.'"² But is this answer trustworthy? Even a casual glance at the literature reveals the dominance of lawyerly voices from within the executive branch.³ Such voices can hardly be taken to be neutral arbiters of a question that bears directly on the authority and tenure of their bosses. More independent analysts, indeed, reach rather different outcomes.⁴ Whatever the correct answer, the debate as a whole has not generated clarity or light.

In any event, I read the American debate on how to deal with apex criminality as too narrowly focused on rather ineffable questions of whether one should draw a negative inference from the specific text of Article II, or whether to construe a historical practice dominated by self-interested, partisan actors as conclusive of 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, and pursued in much current scholarship, 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.

In what follows, I offer instead three general points by reasoning from first principles of institutional design. These points are best understood as hypotheses rather than firm conclusions about how to deal with apex criminality. By working from explicit, logical premises, and by clearly laying 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. I hope to instead develop a more general sense of how constitutional design might 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, Commentary, *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).

The first claim developed below is a bit counterintuitive: A rational constitutional designer might decide to remain silent on questions of apex criminality. The core intuition here is that most instances in which apex criminality imposes truly massive costs cannot be mitigated by formal constitutional rules. My second claim is that the basic choice facing constitutional designers is one 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.⁵ It should be the pursuit of that bespoke project, I think, that should guide our constitutional designer more than any simple notion of optimal 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 mid-2018, the creation and working of a special counsel to investigate the Trump campaign and the Trump White House⁶ had sparked a lively, if predictably bimodal, debate about the merits of different modes of accountability. Careful analysts have recognized the inevitable interaction of legal and political channels.⁷ Less nuanced voices seemed to reject, almost wholesale, any formalized process except for impeachment outside of very rare scenarios (which, in any event, would depend on information that would be very unlikely to come to public attention without a formalized process).⁸ The question of institutional choice

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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* 110–12 (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" that humans pursue beyond and instead of the pursuit of aggregate happiness. *Id.* at 112. Following Williams, I think it is more sensible here to think about what kind of "project" a constitution entails than to think about how to maximize, say, national welfare.
 6. See 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/2017/05/17/302c1774-3b49-11e7-8854-21f359183e8c_story.html [<https://perma.cc/7AMH-BW6M>].
 7. See, e.g., Bob Bauer, Opinion, *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, Opinion, *When Politics Is Criminalized*, N.Y. TIMES (Nov. 28, 2017), <http://www.nytimes.com/2017/11/28/opinion/politics-investigations-trump-russia.html>.

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-tailored constitutional response to apex criminality, that moment has long passed. There is no plausible way that an optimal institutional structure could be adopted in the midst of *l'affaire russe*. In consequence, the question in the U.S. context is how best to muddle along with our antediluvian constitutional text. Even if the latter did speak clearly, there is no reason to think that it distills any particular 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 sadly telling that even this rather modest hope is probably unrealistic.

I. THE PROBLEM OF APEX CRIMINALITY

My central aim here is to think through whether a wise constitutional designer would opt for legal or political instruments to deal with apex criminality. This quandary of procedural choice, however, is closely 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 do not think this definitional move is in fact necessary. I start by explaining why.

If one were to judge by the American debates, the 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.⁹ One possible inference 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.

In my view, there are reasons to think that substance need not precede process. There is, on the one hand, 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

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 Note, *The Scope of the Power to Impeach*, 84 YALE L.J. 1316, 1326 (1975).

associated with the Legal Process school.¹⁰ A Legal Process scholar might point out that it makes sense to start with institutional choice, because doing so brackets the hardest normative questions. She would suggest that by attending to a domain of relatively abstract, technocratic choices first, consensus is more likely to be achieved. Further, she might note, it makes sense to start by asking what instruments one has at hand, so that one can make a judgment about what kinds of criminality can and should be addressed.

Even if one is skeptical of the Legal Process appeal to apolitical, technocratic neutrality, there is a second, and I think better, argument for attending to institutional choice rather than substance. Contra the Legal Process assumption, 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. At least from a constitutional designer's perspective, it might not warrant attention simply because it is so easy to solve through ordinary politics.

Start with the general part of the criminal law. Few, I hope, would happily 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 sexual assault.¹¹ 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.

Perhaps the best argument that might be mustered against this judgment about the scope of appropriate 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 prevent individuals from entrenching themselves in power.¹² In other jurisdictions, where there are no meaningful

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

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 faces impeachment for resisting his policies. Felipe Villamor, *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>.

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->

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.¹³ These are nontrivial concerns, but it is hardly clear they warrant doing away with criminal prohibitions for high-level officials. Indeed, one might have the contrary worry that if elective office was packaged with a license to violate serious criminal laws, that fact alone might lead to officials declining to leave office at the end of their terms. Given these countervailing risks, I will simply assume 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 therefore apply to apex officials' conduct.

Beyond serious felonies, there is also a class of criminal offenses for which the possession and the 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.¹⁴ 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 action taken under official authority is *ipso facto* legal.¹⁵ The argument might be that the very definition of her powers is without bounds, so she is entitled to take official actions for any reason, including a bad reason, without repercussions. Recent deployments of the "unitary president" logic in the United States sometimes have that flavor to them.

It is tough to see why such arguments should have much normative traction. Why should it be lawful for a head of state to take bribes or cultivate foreign emoluments, given that the social harm posed by such bribes is at its

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 Krmaric, *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 [<https://perma.cc/7W33-VMGL>]. I am not convinced this distinction is a tenable one. For example, imagine a president who concededly uses a "constitutional authority" (for example, 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.

acme when a head of state is involved? Why should their official actions, when taken with culpable motives, be immune from scrutiny or punishment? It is positively bizarre to suggest that officials lack bad motives, or that those bad motives have not had harmful effects on good government.

One might also appeal to the possibility of retrospective voting as a cure for this sort of behavior for elected officials, which does not exist for lower-ranked officials. But it requires rather heroic assumptions to reach the conclusion that an elected official willing to bribe or abuse her powers would not also do her utmost to obfuscate her culpability. We should instead expect her to throw the shadow of blame on her political opponents, and to deploy dark instruments (including bribery of her own) to anchor her popular legitimacy. Absent an “unbundled”¹⁶ 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 may be simple enough that there is no need to spend much time analyzing it.

II. 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 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. This would 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 either relatively stable institutions emerge or that ad hoc responses to allegations rise and fall depending on transient local political conjunctures. While my focus here is on democratic constitutionalism, it is worth noting that silence in an authoritarian

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 exercis[e] combined functions in topically limited domains”).

constitution might reasonably be read differently as a signal of de facto or de jure immunity from ordinary criminal laws for apex figures.¹⁷

Lest the prospect of an ad hoc solution seems implausible, we might take a fresh look at the 1787 text of the U.S. Constitution. As I have already noted, that text mentions impeachment without offering a precise or lucid account of its substantive bounds, let alone of whether it implicitly precludes the possibility of a parallel criminal prosecution.¹⁸ 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.¹⁹ To be sure, the U.S. Department of Justice concluded in 1973, and then reaffirmed in 2000, that “neither the text nor the history of the Constitution” settles the question of whether there is a singular right way to investigate and punish criminal acts by a sitting president.²⁰ But, again, to what extent should conclusions of executive branch lawyers be seen as being free of the executive branch’s institutional interests? I am skeptical that their inquiry, as styled, has a simple right answer. It is always possible to 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 constitutional 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 correct answer. That is a claim better suited to the seminary than the law school.

Better, I think, to acknowledge that textual oversight and ambiguity yield no magic bullet, but reveal a long historical wobbling between congressional investigation, impeachment, independent counsel, and special counsel. With this in view, it is possible to see that the U.S. Constitution effectively left open the question of how and when apex officials can be punished 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

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 Joseph 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 rich complexities of the Constitution’s text on impeachment, 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. Memorandum Opinion for the Attorney Gen., *A Sitting President’s Amenability to Indictment and Criminal Prosecution*, 24 OPINIONS OFF. LEGAL COUNSEL 222, 236 (2000).

constitutional silence and ad hoc resolution has to date not been disastrous for the United States (even if 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 to the question of how they are addressed. A constitutional designer might reasonably 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 decide it is better to leave the criminality well enough alone. Avoiding an unintentional catalysis of catastrophic outcomes is, I have argued elsewhere, an entirely plausible touchstone of constitutional design.²¹ 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 spent on the task of resolving the immediate pressing problems that motivated a constitution's adoption, rather than on a distant and abstract possibility of future defalcations.

The point can be made more forcefully still: 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.²² Would it endanger *La République française* if, for example, Penelope Fillon had indeed been overpaid as a parliamentary assistant? What really is the importance of at least some of President Trump's various and sundry mooted criminalities and petty illegalities? Would it matter now if he had conspired to violate the Logan Act,²³ or had obstructed justice in violation of federal law by, among other things, firing the director of the FBI? The president has already been discernably candid in welcoming Russian interference and in affirmatively embracing the self-dealing (and perhaps "corrupt[]"²⁴) reasons for firing James Comey, and yet political life seems to tick on in its usual way. Institutions of criminal justice seem neither paralyzed nor irrevocably corrupted by that sight. A cynic might say that when a nation's political culture

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

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

23. 18 U.S.C. § 953 (2012).

24. 18 U.S.C. § 1512(b) (2012).

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 significant. It may instead be but one of a host of more pressing concerns, and certainly not one that plainly warrants a constitutional response.

This somewhat jaundiced view of political life might seek succor from the thought that lies and rotten deals 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, and Machiavelli, goes.²⁵ Private vices do not always cash 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 conflicts between competing moral values.²⁶

But are not 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 American 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.²⁷ 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. Because such crimes are commonly executed by political and legal institutions acting with hearty popular support, mechanisms for the redress of mundane criminality will crack and splinter before yielding results, 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.

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 occasional crime, iterated often enough, becomes an epidemic that can threaten the public's trust in the state and its

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 C.A.J. Coady, *The Problem of Dirty Hands*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta et al. eds., rev. ed. 2014) (2009), <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).

27. For a brilliant synopsis of this point, see JONATHAN GLOVER, *HUMANITY: A MORAL HISTORY OF THE TWENTIETH CENTURY* 1–10 (2001).

sense of institutional legitimacy.²⁸ Although the antique U.S. Constitution is unclear as to the appropriate response to apex criminality, more recent constitutions typically adopt ombudsmen, anticorruption agencies, or other bespoke devices to mitigate the risk that high-level officials misbehave. Today, data from the Comparative Constitutions Project suggest the modal constitution now has four such independent bodies of one form or another denominated as ombudsmen or the like.²⁹ 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.³⁰ 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, nor foreclose the existence of superior institutional alternatives.

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

28. 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).

29. See TOM GINSBURG & AZIZ Z. HUQ, *HOW TO SAVE A CONSTITUTIONAL DEMOCRACY* (forthcoming Oct. 2018).

30. S. AFR. CONST., ch. 9, 1996.

political power.³¹ We might worry, as Adam Samaha has explained in an insightful essay, about “[a]pppearance driving reality.”³²

A worry that apex lawbreaking 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.”³³ 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.”³⁴ 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.” This assumes that there will be legal rather than political mechanisms of apex accountability. At the time Dicey wrote, though, 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 Dicey to be making an argument about the qualities of regularity, parity, evenhandedness, and *singularity* of forum through which the criminal law is enforced. I also read him to recommend that such accountability be rendered by quintessentially legal rather than political means.

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

31. 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) (“[P]olitical leaders are said to derive support and legitimacy by distributing patronage . . .”).

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

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

34. See *id.*

III. 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 well? And how can they fail? 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. Then, I will explain what I do think is worth attending to 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 how to design mechanisms to address apex criminality is found in law-and-economics-inflected scholarship, which generally focuses on the maximization of social welfare. But it need not have this focus. Like other kinds of consequentialism, welfarism does need not to be operationalized through a command to maximize some metric. It might also be pursued, among other strategies, for example, through a “maximin” strategy that is organized around the idea that we should focus on mitigating the potential “bad” states of the world as much as possible. And welfare need not be the sole element of human relations being valued.

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 not all that helpful here, or perhaps more generally in respect to constitutional design.³⁵ 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 and stable measure of social welfare in hand, a constitutional designer must assign probabilities to political risk that, even in retrospect, can seem wildly unlikely.

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

(Did you anticipate in 2015 a Trump presidency allegedly propelled to power by a social media-based Russian conspiracy? What is the risk, now that 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.

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 problem³⁶—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. Estimating the extent of any demonstration effect from apex criminality, moreover, will often be very difficult.

If the basic currency of the cost-benefit calculation is elusive, a constitutional designer must settle on something more effable. Among the potential objects of attention in constitutional design is the question of how institutional responses to apex criminality will affect the quality of democratic political interaction. 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 can 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 James Madison onward, it has been thought that an important entailment of a political institution’s design is the manner in which it nudges and tweaks the preferences of official actors.³⁷ 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 dispositions, incentives, and preferences

36. See *supra* text accompanying notes 25–26 (discussing Walzer’s analysis of the so-called dirty-hands problem in political life).

37. 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).

brought to bear by senior political actors. Call this question one of political culture.

Precisely what kind of national political culture is desirable—and, as important, what kind should be sworn off—presents rather subtle questions that are not necessarily amenable to the econometrician's weights and measures. Should political life be characterized by sharp, and even angry, contestation? Or is it better served by the restraining friction of formal conventions and expectations of mannered interaction? This is not a question with an obvious answer. Normative judgment matters more than empirical 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 from the pre-Socratics onward. 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 might be unhealthily distorted by mechanisms to address apex criminality. These concern the risk of litigiousness in deliberative politics, and the potential 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, but it also incorporates the assumption that members of the polity disagree sharply enough about how the public good is defined and pursued such that good-faith deliberation is needed as an alternative to more violent confrontation.³⁸

Institutionalized responses to apex criminality might derail beneficial democratic deliberation in one of two ways. First, there is 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

38. 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).

decision to treat serious policy disagreements as a potential justification for punishment might escalate the stakes of political disagreement. When a serious policy dispute can be taken as evidence of constitutional infidelity, there is an incentive for a leader's political opponents to aggressively interpret disagreements as grounds for removal. At the extreme, if any policy dispute can catalyze the end of a political career, there is a risk that incumbents will use extraconstitutional means to short-circuit policy debate. Even short of that 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 ensue 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 farfetched. Indeed, a concern about the transformation of policy debates into removal-oriented disputes 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.³⁹ 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 United States as a concern about the "criminalization of political differences,"⁴⁰ 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. This is a concern about 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.⁴¹ This argument hinges on the possibility that the initial sorting rule for an accountability device 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 here of the positions of President Clinton's and President Trump's defenders.) Scandal, on this view, is merely "a tool of political

39. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 550 (Max Farrand ed., 1911).

40. Dershowitz, *supra* note 8.

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

combat,” rather than “part of a vibrant movement to reconstruct institutions.”⁴² 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) be examples of false positives that have a distortive effect on the quality of democratic debate. (Notice that the same cannot remotely be said of the question of whether hidden coordination occurred between a presidential campaign and a foreign sovereign in exchange for shifts in foreign policy, or whether that sovereign has some sort of hidden influence on an apex national leader).

Concerns about litigiousness in deliberative politics, however, do not mechanically translate into a recommendation for institutional choice. On their face, they hinge on the potential for changes to behavior in political institutions, rather than in prosecutors’ offices 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 forcefully articulated against legal instruments of accountability perceived as running amok; that is, the excessive operation of legal institutions of accountability may distort democratic deliberation.⁴³ 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.⁴⁴

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

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

43. 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”).

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

or, as a second best, by an “august . . . representative . . . and . . . accountable deliberative body.”⁴⁵ Purely 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 on legislators’ perceptions of political success than presidents; it hence makes them more vulnerable to the vicissitudes of policy failure or success.⁴⁶ 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 different reason. The elaborate and increasingly nonmajoritarian 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 a strictly 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 those institutions 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

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

46. WALTER BAGEHOT, *THE ENGLISH CONSTITUTION* 56–57 (Miles Taylor ed., Oxford Univ. Press 2001) (1897) (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 Minority*, CONST. SPEAKING (Jan. 9, 2018), <https://constitutionallyspeaking.co.za/constitutional-court-impeachment-judgment-what-was-the-disagreement-between-the-majority-and-minority> [<https://perma.cc/NY5L-L6E7>].

patronage. Under this system, as the Brazilian autocrat Getulio Vargas pithily put it, “[f]or my friends, everything; for my enemies, the law.”⁴⁷

A subtler argument from politicization would hinge on the immense discretionary authority 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.⁴⁸ Given that opacity, public trust in the bona fides of prosecutors must rest on an alternative signal of the prosecutor’s credible commitment to the neutral and fair-minded use of state power.⁴⁹ For example, some commentators have flagged certain ethical rules that embody “the prosecutor’s special ethical position as a servant of the public trust.”⁵⁰ To the extent that prosecutors have ways to signal their credibility and fidelity to rule-of-law values, though, 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,”⁵¹ 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.⁵² 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

47. Guillermo O’Donnell, *The Quality of Democracy: Why the Rule of Law Matters*, 15 J. DEM. 32, 40 (2004).

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

49. 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 Sch. of Law, Pub. L. Working Paper No. 2880538, 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2880538 [<https://perma.cc/X2BT-E35B>]. Langer and Sklansky usefully flag several ways in which the relationship between prosecutors and democracy can be configured.

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

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

52. 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://perma.cc/W3H8-AK7G>].

concerns about biased enforcement, given the powerful privacy interests possessed by suspects who are not prosecuted. Trivial, and causally inconsequential, details will be blown up and taken as damning evidence of conspiracy. Public trust in prosecutors, and perhaps in 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 her planning. She might observe that all of these concerns hinge in some measure on the prospect of 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 on the correct 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 either incentive or disposition. There is an impressive body of scholarship casting doubt on their use in this regard.⁵³ 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 on 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

53. See Fontana & Huq, *supra* note 37, at 21–27 (summarizing and citing the relevant literature).

unavoidable and permanent possibility, especially if the political cost of violating a law is otherwise weak.⁵⁴ In the U.S. system, for example, Congress can always use the threat of defunding or the repealing of a prosecutorial entity's organic statute to influence the trajectory of investigations into official conduct. Because Congress cannot credibly promise 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 rather than more sensitive to variance in political winds. But experience suggests that this relative autonomy can exist on either side of the legislative/executive divide. For example, it may be that the 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 Federal Reserve in fact operates in a way that suggests close dependence upon Congress.⁵⁵ Hence, 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 insisting on separation at the branch level resists the premise that accountability is a single task that can be neatly aligned with one or the other branch of government. Notice 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 actors.⁵⁶ 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

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

55. 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).

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

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,⁵⁷ even as Congress has generally been loath to impeach.⁵⁸ 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 legislative investigation.⁵⁹ 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 the U.S.-style separation of functions among distinct branches is a contingent constitutional design choice, and an increasingly unpopular one at that.⁶⁰ 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 commission of inquiry, an intermittent institution most often revived in the wake of public crises for which legislators wish to avoid blame.⁶¹ Yet once up and running, these bodies appear to operate with a high degree of independence from direct political control. This occurs despite the fact that they remain technically within parliamentary control.⁶² 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

57. See Douglas L. Kriner & Eric Schickler, *Investigating the President: Committee Probes and Presidential Approval, 1953–2006*, 76 J. POL. 521, 532 (2014); see also ERIC SCHICKLER & DOUGLAS L. KRINER, *INVESTIGATING THE PRESIDENT: CONGRESSIONAL CHECKS ON PRESIDENTIAL POWER* 1–2 (2016) (describing Harry Truman's role in wartime congressional investigations).

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

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

60. GINSBURG & HUO, *supra* note 29 (presenting data on the declining influence of the separation of powers model).

61. 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).

62. 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).

still capable of exercising independent judgment in the pursuit of an investigation into apex criminality.

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 can happen in many ways, and need not be done at the branch level.

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 discrete government branches is either necessary or sufficient to that end.

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 a participant will “resist[] the temptation to . . . further his own aims by subverting the formalities it imposes.”⁶³ 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 also 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 democracy might be, this implies 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.

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