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# WHEN IMPUNITY AND CORRUPTION EMBRACE: HOW THE PAST BECOMES THE FUTURE IN THE STRUGGLE AGAINST TORTURE AND GENOCIDE

*Elizabeth M. Iglesias\**

## ABSTRACT

*In this article, Professor Elizabeth Iglesias takes up the challenge of overcoming impunity for atrocity crimes as a problem of structural corruption. Beginning with the 2013 trial and conviction of Guatemalan leader Efraín Ríos Montt for crimes against humanity and genocide in the courts of his own country, the article turns to the scandal surrounding United States' President Donald Trump's repeated threats to fire the special counsel investigating allegations that he and his campaign colluded with foreign nationals to steal the 2016 presidential election and the scandal surrounding the nomination and confirmation of Gina Haspel as the first woman to direct the U.S. Central Intelligence Agency. Understanding the structural homologies that create the conditions of possibility for impunity across these very different and seemingly unrelated contexts reveals the critical importance of historical memory and legal theory in the struggle against impunity. Whenever impunity takes hold, it is never just a matter of simple quid pro quo corruption. On the contrary, impunity threatens the rule of law and the stability of republican government precisely because it both constitutes, and depends upon, a corruption of law and legal institutions. Recognizing this kind of corruption requires historical memory. Understanding it requires legal theory.*

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\* Copyright © 2018 Elizabeth M. Iglesias, Professor of Law, University of Miami School of Law. Thanks to Professors Raquel Aldana and Steven Bender for organizing this important conference, to all the conference participants, who made it such a significant event, and to the editorial staff of the UC Davis Journal of International Law and Policy. Thanks also and mostly to my wife, Professor Madeleine M. Plasencia, who knows all the reasons for my thanks.

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## I. INTRODUCTION

The LatCrit South-North Exchange convoked in Antigua, Guatemala on May 18 & 19 of 2018 is my first return to Guatemala since 1989,<sup>1</sup> when I came here as a researcher for the Center for Criminal Justice at Harvard Law School.<sup>2</sup> That was just three years after Guatemala transitioned from decades of military dictatorship to the first civilian administration elected through a formally democratic process since the overthrow of Jacobo Arbenz's government by a CIA backed military coup in 1954.<sup>3</sup> Unfortunately, the political opening that produced the 1986 electoral victory of Christian Democrat, Vinicio Cerezo was four years too late to prevent the genocide that absorbed so much the attention of so many at this LatCrit conference. This was the genocide perpetrated against the Ixil Maya people of Guatemala by the Guatemalan Army under the command of Efraín Ríos Montt. Like many of the heads of state who attained power during the years of coups and countercoups that followed the CIA's covert operation against Arbenz, Ríos Montt seized power by military coup in 1982, and was ousted by military coup in 1983. The 17 months of his rule as *defacto* head of state were the bloodiest of a very bloody war, during which he presided over the killing of 5.5% of the Ixil Maya.<sup>4</sup>

Historical memory is critical to achieving justice because justice is always something that comes after the wrong has been done. If justice comes, it is usually after corruption and impunity have failed to secure their common ground in the destruction of memory. Whether social, institutional

<sup>1</sup> See LatCrit SNX (South-North Exchange) *From Extraction to Emancipation: Development Reimagined, Call for Papers*, 2018 LATCRIT SNX (SOUTH-NORTH EXCHANGE CONFERENCE) (2018), <http://www.latcrit.org/content/south-north-exchange/2018-south-north-exchange/> (last visited Aug 18, 2018). This conference carries forward the important work of Professors Aldana and Bender to promote human rights in Guatemala. See also Raquel E. Aldana & Randall S. Abate, *Banning Metal Mining in Guatemala*, 40 VT. L. REV. 597, 597-671 (2016); Steven W. Bender, *Guatemala Labor as an Extractive Industry: Critiquing the Precarity of the Maquiladora Export Model in the Neoliberal Era*, in FROM EXTRACTION TO EMANCIPATION: DEVELOPMENT REIMAGINED (Raquel Aldana & Steven W. Bender eds., 2018) (discussing the relative harms and benefits of foreign-owned apparel factories in Guatemala).

<sup>2</sup> Elizabeth M. Iglesias, *Guatemala: Beyond Atrocity*, LISALEINE PRODUCTIONS, LLC (2014), <http://lisaleine.com/guatemala-paintings/>, (last visited Sept. 3, 2018).

<sup>3</sup> CENTRAL INTELLIGENCE AGENCY, *Memorandum: CIA's Role in the Overthrow of Arbenz*, (May 12, 1975), [https://www.cia.gov/library/readingroom/docs/DOC\\_0000919933.pdf](https://www.cia.gov/library/readingroom/docs/DOC_0000919933.pdf); CENTRAL INTELLIGENCE AGENCY, *Congress, the CIA, and Guatemala*, (1954), <https://www.cia.gov/library/center-for-the-study-of-intelligence/kent-csi/vol44no5/html/v44i5a03p.htm> (last visited Aug 18, 2018).

<sup>4</sup> Elisabeth Malkin, *Former Leader of Guatemala is Guilty of Genocide Against Mayan Group*, N.Y. TIMES, May 10, 2013, <https://www.nytimes.com/2013/05/11/world/americas/genefrain-rios-montt-of-guatemala-guilty-of-genocide.html>.

or living, memory must be destroyed for corruption to flourish and impunity to prevail, and so corruption and impunity often are found entwined in a mutual embrace. In the dissemination of disinformation which destroys social memory, in the destruction of evidence which destroys institutional memory, in the murder of witnesses which destroys living memory, corruption and impunity combine so that justice may not be done. The trial of Ríos Montt in 2013 came *thirty* years after Tiburcio Utuy was tortured by Guatemalan soldiers under Ríos Montt's command.<sup>5</sup> Thirty years may be but the blink of a star in the lives of states or the course of human events, but justice should be measured in time frames relevant to the lives in being at the time of the wrong.<sup>6</sup> Until Ríos Montt's trial, prosecution for atrocity crimes committed during the 36 years of violence was limited to low level soldiers, police, paramilitary operatives and civil patrols.<sup>7</sup> The first conviction ever of a former head of state for genocide and crimes against humanity in the courts of his own country was a moment made possible by the institutional memory of orders documented and preserved and the living memory of the more than 90 witnesses, who like Tiburcio recounted the crimes they survived to remember.<sup>8</sup> But the nature of a moment is to pass, and this moment passed ten days later when Guatemala's Constitutional Court annulled Ríos Montt's conviction.<sup>9</sup> The Court also re-opened the

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<sup>5</sup> Emi MacLean, *Guatemala Faces Human Rights Complaint over Rios Montt Trial Debacle*, INT'L JUSTICE MONITOR, Nov. 8, 2013, <https://www.ijmonitor.org/2013/11/guatemala-faces-human-rights-complaint-over-rios-montt-trial-debacle/>.

<sup>6</sup> James Painter, *General Efrain Rios Montt: Former Guatemalan dictator who got away with mass murder*, THE INDEPENDENT, Apr. 2, 2018, <https://www.independent.co.uk/news/world/americas/efrain-rios-montt-guatemala-dictator-dead-died-age-genocide-mass-murder-a8284936.html>.

<sup>7</sup> Emi MacLean, *Judging A Dictator: The Trial of Guatemala's Rios Montt*, OPEN SOCIETY JUSTICE INITIATIVE, (2013), <https://www.opensocietyfoundations.org/sites/default/files/judging-dicator-trial-guatemala-rios-montt-11072013.pdf>.

<sup>8</sup> Mary Jo McConahay, *Guatemalan genocide survivors take stand at Rios Montt trial*, NATIONAL CATHOLIC REPORTER, Apr. 8, 2013, <https://www.ncronline.org/news/world/guatemalan-genocide-survivors-take-stand-r-os-montt-trial> (recounting how more than one witness has stated "a belief he or she survived in order to testify 'before the law' for the sake of those who died."); see also Jo-Marie Burt, *Rios Montt Convicted of Genocide and Crimes Against Humanity: The Sentence and Its Aftermath*, INT'L JUSTICE MONITOR, May 13, 2013, [https://www.ijmonitor.org/2013/05/rios-montt-convicted-of-genocide-and-crimes-against-](https://www.ijmonitor.org/2013/05/rios-montt-convicted-of-genocide-and-crimes-against-humanity-the-sentence-and-its-aftermath/)

[humanity-the-sentence-and-its-aftermath/](https://www.ijmonitor.org/2013/05/rios-montt-convicted-of-genocide-and-crimes-against-humanity-the-sentence-and-its-aftermath/) (noting that the court's finding of command responsibility was based

on the testimony of military experts and documentary evidence of "regular reporting requirements (every fifteen days) up the chain of command to the president, evidenced in the annexes of one of the military operational plans entered into evidence in the case.").

<sup>9</sup> Emi MacLean, *Guatemala's Constitutional Court Overturns Rios Montt Conviction and Sends Trial Back to April 19*, INT'L JUSTICE MONITOR, May 21, 2013,

question whether Montt's prosecution was precluded by the general amnesty Mejía Victores had decreed in 1986.<sup>10</sup>

Mejía Victores, the *golpista* who overthrew Montt in 1983, had purported by Decree Law 8-86 to grant permanent amnesty for all political and related common crimes committed between March 1982 and January 1986. Ten days after Montt's conviction for genocide and crimes against humanity, Guatemala's Constitutional Court re-opened the question of amnesty, notwithstanding well-settled Guatemalan and international law precluding impunity for grave violations of international humanitarian and human rights law.<sup>11</sup> Known generally as atrocity crimes, this class of crimes for which amnesty is prohibited are also subject to universal jurisdiction and impose on states, by international convention or custom, an obligation to prosecute or extradite persons accused of genocide, crimes against humanity, torture, grave war crimes, and other gross human rights violations.<sup>12</sup> The moment of justice passed because memory is only one of the elements that justice requires to defeat the potent combination of corruption and impunity.<sup>13</sup>

I would like to address these issues of historical memory and the struggle against impunity and corruption in a context different from Ríos Montt's trial for genocide and crimes against humanity, but perhaps not as different as we would hope. The context that concerns me is my own country and an assemblage of interconnected persons, actions and events that in my opinion constitutes an abiding scandal of structural corruption and engineered impunity. I am not talking about the corruption of a *quid pro quo*

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<https://www.ijmonitor.org/2013/05/constitutional-court-overturns-rios-montt-conviction-and-sends-trial-back-to-april-19/>.

<sup>10</sup> Haydeé Valey, Impunity Watch, *Policy Brief Amnesty: National Reconciliation Law or Decree Law 8-86?*, (Nov. 2014) at 16, [https://www.impunitywatch.org/docs/Amnistia\\_version\\_ingles.pdf](https://www.impunitywatch.org/docs/Amnistia_version_ingles.pdf).

<sup>11</sup> *Id.*; see also MacLean, *supra* note 5 (noting that Decree 133-97, issued in December 1997, repealed all amnesty laws prior to 1996. The National Reconciliation Law, Decree 145-96 provides a general amnesty for political crimes committed during the armed conflict and related common crimes (Articles 2-7), but excludes from any amnesty international crimes including genocide, torture and forced disappearance (Article 8)).

<sup>12</sup> Mugambi Jouet, *Spain's Expanded Universal Jurisdiction to Prosecute Human Rights Abuses in Latin America, China, and Beyond*, 35 GA. J. INT. COMP. LAW 495 (2007).

<sup>13</sup> Jo-Marie Burt, *Historic Verdict in Guatemala's Genocide Case Overturned by Forces of Impunity*, NACLA, June 17, 2013, <https://nacla.org/news/2013/6/17/historic-verdict-guatemala-s-genocide-case-overturned-forces-impunity-0> (recounting the media campaign of paid advertisements "asserting that the genocide charges were fabricated, accusing the different actors involved in the trial of being guerrillas or their stooges, and preaching doom should Ríos Montt be convicted;" calling the trial an "end of the peace accords" that would open a new phase of violence;" issuing threats to "paralyze" the country and bomb threats at government offices including the Constitutional Court; the judges involved were targeted with media campaigns to discredit them and threatened with disciplinary, civil and criminal charges, etc.).

exchange of money for impunity although conflicts of interest are a key element in the story I want to tell. A *quid pro quo* understanding of corruption is much too facile because it fails to acknowledge that money is not the only benefit that accrues from complicity with the interests of the powerfully positioned and direct exchanges are not the only way impunity is secured. Impunity for atrocity crimes is not just a matter of *quid pro quo* corruption, nor is it a problem unique to Guatemala; wherever impunity takes hold, it threatens the rule of law and the stability of free government precisely because it constitutes and depends upon a corruption of law and of legal institutions. To demonstrate these points, I call your attention to a scandal that has been a constant preoccupation of mine since it first emerged as a public spectacle. I am referring to the torture scandal, and what I mean by this is the scandal that began in 2004 when photographs of American soldiers torturing Iraqi prisoners in Abu Ghraib were leaked to the press. The scandal triggered a series of Congressional hearings and prosecutions of very low level soldiers,<sup>14</sup> but even now, 14 years later, none of the architects and principals responsible for the policies that resulted in the torture of Iraqi prisoners at Abu Ghraib have ever been prosecuted, let alone convicted for their role in these atrocities.<sup>15</sup>

In the 14 years since the Abu Ghraib torture photos triggered the first inquiry into a seemingly never-ending scandal, the public has been treated to cycles of news eruptions as fallout from the scandal continues to unfold over time.<sup>16</sup> Various Congressional hearings to determine what had happened generated the initial cycle of media attention when the photos first emerged in 2004.<sup>17</sup> This round of coverage quickly petered out as evidence implicating officials further up the chain of command cooled interest in the

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<sup>14</sup> S. G. MESTROVIC, *TRIALS OF ABU GHRAIB: AN EXPERT WITNESS ACCOUNT OF SHAME AND HONOR* (1 edition ed. 2006); CNN Library, *Iraq Prison Abuse Scandal Fast Facts*, CNN, Mar. 18, 2018, 4:55 PM, <https://www.cnn.com/2013/10/30/world/meast/iraq-prison-abuse-scandal-fast-facts/index.html>.

<sup>15</sup> Karen J. Greenberg, *Abu Ghraib: A Torture Story Without a Hero or an Ending*, THE NATION, Apr. 28, 2014, <https://www.thenation.com/article/abu-ghraib-torture-story-without-hero-or-ending/>; Maha Hilal, *Abu Ghraib: The legacy of torture in the war on terror*, ALJAZEERA, Oct. 1, 2017, <https://www.aljazeera.com/indepth/opinion/abu-ghraib-legacy-torture-war-terror-170928154012053.html>; Reed Brody (Special Counsel with Human Rights Watch), *Getting Away with Torture? | Command Responsibility for the U.S. Abuse of Detainees*, HUMAN RIGHTS WATCH, Apr. 23, 2005, <https://www.hrw.org/report/2005/04/23/getting-away-torture/command-responsibility-us-abuse-detainees>.

<sup>16</sup> Peter Foster, *9/11 judge facing calls to step down over Abu Ghraib trial*, THE TELEGRAPH, June 22, 2012, <https://www.telegraph.co.uk/news/worldnews/al-qaeda/9349718/911-judge-facing-calls-to-step-down-over-Abu-Ghraib-trial.html>.

<sup>17</sup> Samuel L. Brenner, *"I Am A Bit Sickened": Examining Archetypes of Congressional War Crimes Oversight after My Lai and Abu Ghraib*, UNIVERSITY OF MICHIGAN ANN ARBOR, Mar. 2, 2010, [https://works.bepress.com/samuel\\_brenner/3/](https://works.bepress.com/samuel_brenner/3/).

probe among the Republican majority in both Houses.<sup>18</sup> Media coverage erupted again, however, in December of 2007 when CIA Director Michael V. Hayden announced that two years earlier the CIA had destroyed ninety (90) tapes of detainee interrogations involving CIA use of “enhanced interrogation techniques.”<sup>19</sup> Although interest in the CIA’s destruction of tapes eventually receded from the cycle of breaking news to the attention of the professionally concerned,<sup>20</sup> the torture scandal was back in the news after the November elections in 2008 transferred power to Democratic control.<sup>21</sup> That December, the Senate Armed Services Committee released a report finding that Secretary of Defense Rumsfeld’s approval of techniques reverse engineered from the U.S. Military’s Survival, Evasion, Resistance and Escape (SERE) training program was a significant factor in the torture of prisoners at Abu Ghraib and elsewhere.<sup>22</sup> In May of 2009, Congressional inquiry into the responsibility of lawyers in the Office of Legal Counsel triggered another round of media attention, but even with the transfer of power, these inquiries resulted in no domestic prosecutions of either the principals or architects of the Bush Administration’s torture policies.<sup>23</sup>

Recently, the torture scandal has been in the news again. This is in part,

<sup>18</sup> *Id.*; *The Truth About Abu Ghraib*, WASH. POST, July 29, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/07/28/AR2005072801745.html>; *Abu Ghraib: Congressional Investigation*, SOURCEWATCH, May 21, 2008, [https://www.sourcewatch.org/index.php/Abu\\_Ghraib:\\_Congressional\\_Investigation](https://www.sourcewatch.org/index.php/Abu_Ghraib:_Congressional_Investigation).

<sup>19</sup> Dan Eggen & Joby Warrick, *CIA Destroyed Videos Showing Interrogations*, WASH. POST, Dec. 7, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/12/06/AR2007120601828.html>; Matt Apuzzo, *CIA Destroyed Tapes Despite Court Order*, WASH. POST, Dec. 12, 2007, [http://www.washingtonpost.com/wp-dyn/content/article/2007/12/12/AR2007121200213\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2007/12/12/AR2007121200213_pf.html); Nancy Pelosi, *Hearing on Destroyed CIA Tapes – Saltzburg’s Testimony* (C-SPAN), YOUTUBE (Dec. 20, 2007), <https://www.youtube.com/watch?v=1SZs61TWRxo>.

<sup>20</sup> Douglas Cox, *Burn After Viewing: The CIA’s Destruction of the Abu Zubaydah Tapes and the Law of Federal Records*, 5 J. NATL. SECUR. LAW POLICY 131 (2011).

<sup>21</sup> Adam Nagourney, *Obama Wins Election*, N.Y. TIMES, Nov. 4, 2008, <https://www.nytimes.com/2008/11/05/us/politics/05campaign.html>.

<sup>22</sup> David Morgan, *Senate report ties Rumsfeld to Abu Ghraib abuse*, REUTERS, Dec. 11, 2008, <https://www.reuters.com/article/us-usa-abuse/senate-report-ties-rumsfeld-to-abu-ghraib-abuse-idUSTRE4BA7JV20081211>; COMMITTEE ON ARMED SERVICES, U. S. SENATE 110<sup>TH</sup> CONG., REPORT: INQUIRY INTO THE TREATMENT OF DETAINEES IN U.S. CUSTODY (2008) at 263, [https://www.armed-services.senate.gov/imo/media/doc/Detainee-Report-Final\\_April-22-2009.pdf](https://www.armed-services.senate.gov/imo/media/doc/Detainee-Report-Final_April-22-2009.pdf).

<sup>23</sup> *What Went Wrong: Torture and the Office of Legal Counsel in the Bush Administration: Hearing on 111-324 Before the Subcomm. on Administrative Oversight and the Courts of the Comm. on the Judiciary*, 111th Cong. (May 13, 2009), <https://www.gpo.gov/fdsys/pkg/CHRG-111shrg55467/html/CHRG-111shrg55467.htm>; Christopher Weaver, *The Men Behind the Memos*, PROPUBLICA, Jan. 28, 2009, <https://www.propublica.org/article/the-men-behind-the-memos>; David Cole, *Rewarding Impunity*, FOREIGN POLICY, Oct. 18, 2012, <https://foreignpolicy.com/2012/10/18/rewarding-impunity/>.



because, in 2016, candidate Trump ran for office on a platform of bringing back torture “because it works.”<sup>24</sup> Even more recently, it’s because rumors began circulating in March of 2018 that Trump was planning to nominate Gina Haspel to be the first woman to direct the CIA. Trump did in fact nominate Haspel on April 17.<sup>25</sup> On May 9<sup>th</sup>, the Senate Intelligence Committee held its confirmation hearing on her nomination,<sup>26</sup> and just after taking in the conference proceedings on Ríos Montt’s genocide conviction and reversal yesterday, I learned that the Senate had confirmed Haspel earlier yesterday afternoon.<sup>27</sup>

Haspel’s nomination was, and her confirmation is, controversial for two reasons. In 2002, Haspel supervised a CIA black site in Thailand, where detainees were reportedly tortured in ways that “extended far beyond ‘mere’ waterboarding.”<sup>28</sup> She was also involved in the destruction of the tapes of CIA interrogations at the Thailand black site. Specifically, as Chief of Staff to Jose Rodriguez, then director of the CIA’s National Clandestine Service, Haspel drafted the cable effectuating Rodriguez’s order to have the tapes destroyed. More generally, she reportedly was one of the main proponents of destroying the tapes and, according to Rodriguez, understood that he was taking the decision unilaterally and without higher authorization.<sup>29</sup> Haspel’s

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<sup>24</sup> Rebecca Gordon, *Donald Trump Has a Passionate Desire to Bring Back Torture*, THE NATION, Apr. 6, 2017, <https://www.thenation.com/article/donald-trump-has-a-passionate-desire-to-bring-back-torture/>; Adam Serwer, *Can Trump Bring Back Torture?*, THE ATLANTIC, Jan. 26, 2017, <https://www.theatlantic.com/politics/archive/2017/01/trump-torture/514463/>; *Trump’s Draft Executive Order on Detention and Interrogation*, N.Y. TIMES, Jan. 25, 2017, <https://www.nytimes.com/interactive/2017/01/25/us/politics/document-Trump-draft-executive-order-on-detention-and.html>; Charlie Savage, *Trump Poised to Lift Ban on C.I.A. ‘Black Site’ Prisons*, N.Y. TIMES, Jan. 20, 2018, <https://www.nytimes.com/2017/01/25/us/politics/cia-detainee-prisons.html>.

<sup>25</sup> Deb Riechmann, *Trump formally nominates Gina Haspel to be next CIA director*, PBS NEWSHOUR, Apr. 17, 2018, <https://www.pbs.org/newshour/politics/trump-formally-nominates-gina-haspel-to-be-next-cia-director>.

<sup>26</sup> Matthew Rosenberg, Nicholas Fandos & Charlie Savage, *Gina Haspel Vows at Confirmation Hearing That She Would Not Allow Torture by C.I.A.*, N.Y. TIMES, May 9, 2018, <https://www.nytimes.com/2018/05/09/us/politics/gina-haspel-confirmation-hearing-live.html>; *CIA Director Confirmation Hearing*, C-SPAN (May 9, 2018), <https://www.c-span.org/video/?444988-1/gina-haspel-pledges-restart-cia-interrogation-program&live=> (featured video clips from Haspel confirmation hearing).

<sup>27</sup> Jeremy Herb & Daniella Diaz, *Controversial nominee Gina Haspel confirmed as first female CIA director*, CNN, May 17, 2018, <https://www.cnn.com/2018/05/17/politics/gina-haspel-confirmation-vote/index.html>.

<sup>28</sup> Annabelle Timsit, *What Happened at the Thailand ‘Black Site’ Run by Trump’s CIA Pick*, THE ATLANTIC, Mar. 14, 2018, <https://www.theatlantic.com/international/archive/2018/03/gina-haspel-black-site-torture-cia/555539/>; Chris Megerian, *CIA reports detail harsh interrogations when chief Gina Haspel led Thailand black site*, LOS ANGELES TIMES, Aug. 10, 2018, <http://www.latimes.com/politics/la-na-pol-gina-haspel-thailand-20180809-story.html>.

<sup>29</sup> Tim Golden, *Haspel, Spies and Videotapes*, PROPUBLICA, May 9, 2018,

confirmation as Director of the CIA has elevated to a position of extreme power and little accountability, a person who reportedly is willing to believe that torture is legal,<sup>30</sup> that the destruction of evidence is justifiable, and who promises to be guided by her “moral compass,” even as she refuses to opine on the morality or immorality of torture.<sup>31</sup>

But that’s not all that happened yesterday. May 17<sup>th</sup>, 2018 was also the one year “anniversary” of Robert Mueller’s appointment as special counsel to investigate Russian interference in the 2016 presidential campaign.<sup>32</sup> In the space of this year, Trump has triggered several cycles of media frenzy both by threatening to fire Mueller and by denying he made any such threats.<sup>33</sup> Denials notwithstanding, news that Trump was planning to fire Mueller grabbed headlines as early as a month after Mueller’s appointment, when the Washington Post reported in June of 2017 that Mueller was expanding the scope of his investigation to include potential obstruction of justice by Trump in connection with his firing of James Comey as FBI director.<sup>34</sup> Trump reportedly backed down because his White House counsel, Don McGahn, concluded that Trump’s claims about Mueller’s conflicts of interest were inadequate bases for requesting Mueller’s dismissal and threatened to resign if Trump insisted on his demand to fire Mueller.<sup>35</sup> In

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<https://www.propublica.org/article/haspel-spies-and-videotape>; Kevin Gosztola, *Gina Haspel Admits She Was An Advocate For Destroying CIA Torture Tapes*, MINT PRESS NEWS, May 10, 2018, <https://www.mintpressnews.com/gina-haspel-destroyed-cia-torture-tapes/241861/>.

<sup>30</sup> Claire Finkelstein & Stephen N. Xenakis, *Lawyers Told Gina Haspel Torture Was Legal. But It Never Was.*, N.Y. TIMES, June 9, 2018, <https://www.nytimes.com/2018/05/09/opinion/gina-haspel-cia-torture.html>.

<sup>31</sup> Megerian, *supra* note 28.

<sup>32</sup> David Jackson, *Donald Trump and lawyers blast Robert Mueller at Russia investigation one-year anniversary*, USA TODAY, May 17, 2018, <https://www.usatoday.com/story/news/politics/2018/05/17/donald-trump-and-lawyers-blast-robert-mueller-one-year-anniversary/610676002/>; Shannon Pettypiece, *Trump to Use Mueller One-Year Mark to Blast Probe, Giuliani Says*, BLOOMBERG, May 15, 2018, <https://www.bloomberg.com/news/articles/2018-05-15/trump-to-use-mueller-one-year-mark-to-blast-probe-giuliani-says>.

<sup>33</sup> Aaron Blake, *Could lying about trying to fire Mueller put Trump in even more hot water?*, WASH. POST, Jan. 27, 2018, [https://www.washingtonpost.com/news/the-fix/wp/2018/01/27/could-lying-about-attempting-to-fire-mueller-put-trump-in-even-more-hot-water/?noredirect=on&utm\\_term=.2bc1382e26be](https://www.washingtonpost.com/news/the-fix/wp/2018/01/27/could-lying-about-attempting-to-fire-mueller-put-trump-in-even-more-hot-water/?noredirect=on&utm_term=.2bc1382e26be).

<sup>34</sup> Sophie Tatum & Kara Scannell, *Trump denies he called for Mueller’s firing*, CNN, Jan. 26, 2018, <https://www.cnn.com/2018/01/25/politics/donald-trump-robert-mueller/index.html>; Devlin Barrett et al., *Special counsel is investigating Trump for possible obstruction of justice, officials say*, WASH. POST, June 14, 2017, [https://www.washingtonpost.com/world/national-security/special-counsel-is-investigating-trump-for-possible-obstruction-of-justice/2017/06/14/9ce02506-5131-11e7-b064-828ba60fbb98\\_story.html](https://www.washingtonpost.com/world/national-security/special-counsel-is-investigating-trump-for-possible-obstruction-of-justice/2017/06/14/9ce02506-5131-11e7-b064-828ba60fbb98_story.html).

<sup>35</sup> Kristen Walker & Phil Helsel, *Trump wanted to fire Mueller in June but backed down when White House counsel threatened to quit*, NBC NEWS, Jan. 25, 2018, <https://www.nbcnews.com/politics/politics-news/trump-wanted-fire-mueller-june-backed->

August, Trump denied he had ever attempted to fire Mueller. After attacking Mueller's investigation as "a Democrat-created 'fabrication,'" Trump nonetheless insisted that he hadn't given any thought to firing Mueller and turned it on the media: "I've been reading about it from you people. You say, 'Oh, I'm going to dismiss him.' No, I'm not dismissing anybody."<sup>36</sup>

In December 2017, Trump again reportedly tried to fire Mueller believing that Mueller had subpoenaed Deutsche Bank for records of Trump's finances.<sup>37</sup> When later asked about reports that he tried to fire Mueller, Trump told reporters at the Davos Summit on January 26, 2018 that it was "fake news." "Fake news folks, fake news. Typical New York Times," Trump insisted.<sup>38</sup> And then in April, the day after FBI agents raided the office and hotel room of Trump's personal attorney, Michael Cohen, who was then reportedly under investigation *inter alia* for bank fraud, wire fraud and campaign finance violations, Trump was again in the news seething that Deputy Attorney General Rod Rosenstein had signed off on the raid and claiming that he had the power to fire Mueller. In a press briefing about Syria, Trump attacked the raid on Cohen, attacked Mueller's investigation as a "Witch Hunt," and his team as being "just about all Democrats."<sup>39</sup> "Why don't I just fire Mueller?" Trump rhetorically asked, then answered. "Well, I think it's a disgrace what's going on. We'll see what happens. . . Many people have said you should fire him. Again, they found nothing. And in finding nothing, that's a big statement."<sup>40</sup>

That was April of 2018. This is May, and yesterday's news was saturated with speculation about the likely fate of Mueller's investigation given the chorus of Trump supporters proclaiming that a year is long enough and that it is time now for Mueller to "wrap it up."<sup>41</sup> Although spokesman

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down-reports-n841206 (reportedly Trump viewed the following as conflicts of interest justifying dismissal: 1) a dispute over fees at Trump National Golf Club in Virginia when Mueller was FBI director; 2) the fact that Mueller worked at a firm that had previously represented his son in law and 3) the fact that Mueller had been interviewed to return as FBI director the day before he was appointed special counsel on May 17th).

<sup>36</sup> Michael S. Schmidt, *Trump Says He Has Not Considered Firing Mueller, Contradicting Himself*, N.Y. TIMES, Jan. 20, 2018, <https://www.nytimes.com/2017/08/10/us/politics/trump-mueller-considering-fired.html>.

<sup>37</sup> Maggie Haberman & Michael S. Schmidt, *Trump Sought to Fire Mueller in December*, N.Y. TIMES, Apr. 12, 2018, <https://www.nytimes.com/2018/04/10/us/politics/trump-sought-to-fire-mueller-in-december.html>.

<sup>38</sup> Blake, *supra* note 33; Marshall Cohen & Aileen Graef, *8 times since June the White House denied Trump was considering firing Mueller*, CNN, Jan. 26, 2018, <https://www.cnn.com/2018/01/25/politics/robert-mueller-donald-trump/index.html>.

<sup>39</sup> Jeremy Diamond, *Trump slams FBI for raid of his personal attorney's office*, CNN, Apr. 9, 2018, <https://www.cnn.com/2018/04/09/politics/donald-trump-fbi-michael-cohen/index.html>.

<sup>40</sup> *Id.*

<sup>41</sup> Darren Samuelsohn, *Trump team ready to 'pressure' Mueller at probe's one-year*

Rudy Giuliani did not expressly threaten Trump would fire Mueller, Giuliani referred to Trump's team having a "Plan B and C" if Mueller fails to heed the smoke signals.<sup>42</sup>

Mueller is a registered Republican. He was appointed by Deputy Attorney General Rod Rosenstein, who was nominated for that position by none other than Donald Trump himself. Ordinarily, the Attorney General would have been the one to appoint Mueller, but Jeff Sessions had to recuse himself, when it was revealed on March 1, 2017 that Sessions had had two previously undisclosed conversations with Russia's Ambassador to the United States during the 2016 presidential campaign.<sup>43</sup> Although Trump continues to resent Sessions for recusing himself, blames Sessions for Mueller's appointment and opportunistically subjects Sessions to a variety of pressure tactics from open insults, calls for his resignation, and demands that he 'un-recuse' himself,<sup>44</sup> the reason Sessions offered for his recusal is worth noting.

According to Sessions, a Department of Justice regulation, 28 CFR 45.2 required his recusal because it prohibits DOJ employees from participating in criminal investigations or prosecutions if the person has a political or personal relationship with anyone substantially involved in the conduct that

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*mark*, POLITICO, May 16, 2018, <https://politi.co/2wL4Z19>; Liz Peek, *One year after Mueller's free-for-all began the costs are incredibly high and Putin is the only real winner*, FOX NEWS, May 17, 2018, <http://www.foxnews.com/opinion/2018/05/17/one-year-after-muellers-free-for-all-began-costs-are-incredibly-high-and-putin-is-only-real-winner.html>; Elizabeth Landers, *Mike Pence tells Mueller 'it's time to wrap it up'*, CNN, May 10, 2018, <https://www.cnn.com/2018/05/10/politics/mike-pence-robert-mueller-investigation/index.html>; Matt Ford, *How Many Years Will Robert Mueller Need?*, THE NEW REPUBLIC, May 17, 2018, <https://newrepublic.com/article/148451/many-years-will-robert-mueller-need>.

<sup>42</sup> Pettypiece, *supra* note 32. Not all one year reviews of Mueller's probe were hostile. Sara Murray, Evan Perez & Dana Bash, *Hot Pockets, mismatched chairs and a critical mission: Inside year one of the Mueller investigation*, CNN, May 17, 2018, <https://www.cnn.com/2018/05/17/politics/robert-mueller-investigation-one-year-inside/index.html>; Heather Dockray & Marcus Glimmer, *Breaking down Trump's tweets after a whole year of the Mueller investigation*, MASHABLE, May 17, 2018, <https://mashable.com/2018/05/17/robert-mueller-one-year-anniversary-trump-tweets/#LbJ6G5pVLaqy>; Amelia Thomson-DeVeaux, *How Mueller's First Year Compares To Watergate, Iran-Contra And Whitewater*, FIFTYTHREEEIGHT, May 17, 2018, <https://fivethirtyeight.com/features/how-muellers-first-year-compares-to-watergate-iran-contra-and-whitewater/>.

<sup>43</sup> Madeleine Sheehan Perkins & Harrison Jacobs, *Here's how a special prosecutor investigating Trump and Russia would get appointed*, BUSINESS INSIDER, Mar. 3, 2017, <https://www.businessinsider.com/what-is-special-prosecutor-trump-russia-jeff-sessions-congress-2017-2>; Pena Levy, *A timeline of Jeff Sessions' recusal violations*, MOTHER JONES, Jan. 31, 2018, <https://www.motherjones.com/politics/2018/01/a-timeline-of-jeff-sessions-recusal-violations/>.

<sup>44</sup> Mike Murphy, *Trump told Sessions to un-recuse himself in Russia probe: report*, MARKETWATCH, May 29, 2018, <https://www.marketwatch.com/story/trump-told-sessions-to-un-recuse-himself-in-russia-probe-report-2018-05-29>.

is the subject of the investigation or would be directly affected by the outcome.<sup>45</sup> Sessions' claim was that he had recused himself because of his role as an advisor and surrogate for Trump in the 2016 presidential campaign, and *not* because of the uproar triggered by the fact that Sessions had previously denied meeting with Russian officials during the campaign when questioned about it at his confirmation hearing before the Senate Judiciary Committee.<sup>46</sup>

Speculation continues,<sup>47</sup> but whatever the reasons, Sessions' recusal passed the decision whether to appoint a special counsel to Rosenstein, who as Acting Attorney General issued the order for Mueller's appointment on May 17, 2017.<sup>48</sup> The purpose of the appointment was "to ensure a full and thorough investigation of the Russian government's efforts to interfere in the 2016 presidential election."<sup>49</sup> The saga of Russian efforts to throw the U.S. presidency to Trump now morphed into the saga of Mueller's inquiry into that intervention.<sup>50</sup>

So Gina Haspel's confirmation as CIA Director and Robert Mueller's tenuous one-year tenure as special counsel were the two big stories in U.S. news on May 17, 2018, and the question for us today is what these two stories have to do with the genocide conviction of Ríos Montt? What do these stories have to do with Guatemala? What do they have to do with each other? Answering these questions is the way I want to illustrate the significance not only of historical memory, but of legal theory, specifically its significance as a field of battle over concepts and doctrines. This is because in order to see the connections among these seemingly unconnected stories, you really have to go deep into history and deep into legal theory.

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<sup>45</sup> Eliza Relman, *Jeff Sessions explains why he recused himself from Trump campaign-related investigations*, BUSINESS INSIDER, June 13, 2017, <https://www.businessinsider.com/jeff-sessions-on-recusing-himself-trump-investigation-russia-2017-6>.

<sup>46</sup> John Nichols, *Jeff Sessions Keeps Lying to the Senate*, THE NATION, Oct. 18, 2017, <https://www.thenation.com/article/jeff-sessions-keeps-lying-to-the-senate/>.

<sup>47</sup> Jeff Greenfield, *Why Sessions Recused Himself*, POLITICO, Mar. 2, 2017, <https://www.politico.com/magazine/story/2017/03/sessions-recuses-himself-trump-russia-214857>.

<sup>48</sup> OFFICE OF THE DEPUTY ATT'Y GEN., ORDER NO. 3915-2017, APPOINTMENT OF SPECIAL COUNSEL TO INVESTIGATE RUSSIAN INTERFERENCE WITH THE 2016 PRESIDENTIAL ELECTION AND RELATED MATTERS (May 17, 2017), <http://www.documentcloud.org/documents/3726408-Rosenstein-letter-appointing-Mueller-special.html>.

<sup>49</sup> *Id.*

<sup>50</sup> Louis Jacobson & John Kruzell, *Obstruction of justice, presidential immunity, impeachment: What you need to know*, POLITIFACT, May 17, 2017, <https://www.politifact.com/truth-o-meter/article/2017/may/17/obstruction-justice-presidential-immunity-impeachm/>.

## II. OF COLLUDING PRESIDENTS, INDEPENDENT COUNSELS AND ORIGINAL INTENT

I begin with Mueller's investigation. There is so much to say about this investigation that it is important to clarify from the outset that my presentation is not about the investigation per se. It is rather about the legal structure that creates the conditions of vulnerability in which this investigation has had to unfold under the uncertainty of constant threats that Trump may or may not be about to fire Mueller at any given moment. It's about why this structure exists, the history of this structure, what it reveals about the nature of structural corruption and impunity, and some conjectures about alternative possible futures.

The reason Mueller is vulnerable to Trump's threats of dismissal is this: Mueller was appointed, and can be dismissed, by a political appointee in the executive branch who serves entirely at the pleasure of the President, who may or may not be or become a target of Mueller's investigation. More specifically, as Deputy Attorney General, Rosenstein appointed Mueller under the statutory authority of 28 U.S.C. §§ 509, 510, and 515<sup>51</sup> and Department of Justice [hereinafter DOJ] regulation 28 CFR Section 600.4-600.10.<sup>52</sup> The regulation is particularly noteworthy because it establishes the bases and procedures for termination of the special counsel. Specifically it provides in § 600.7 that while the special counsel is not subject to the day-to-day supervision of any official in the DOJ, the special counsel must comply with the rules, regulations, procedures, practices and policies of the Department of Justice and consult with appropriate offices within the Department for guidance regarding these practices. In addition, under §600.7 (b), the Attorney General may request explanations from the special counsel regarding any particular investigative or prosecutorial step, and may decide that such step should *not* be pursued. Although the AG must report and explain such vetoes to Congress, this report is not due until *after* the investigation has been concluded, and there is no appeal from the AG's veto.

Under these provisions, the special counsel is subject to the Justice Department's "Urgent Reports" procedures.<sup>53</sup> This means that Mueller must notify Justice Department leadership, in this case Deputy AG Rosenstein, of any "major developments in significant investigations and litigation," "law

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<sup>51</sup> OFFICE OF THE DEPUTY ATT'Y GEN., *supra* note 48; Marty Lederman, *Mueller Wasn't Appointed Pursuant to the DOJ Regs (and other assorted flaws in the Manafort suit)*, JUST SECURITY, Jan. 4, 2018, <https://www.justsecurity.org/50434/flaws-manafort-suit-including-fundamental-mistaken-assumption-rosenstein-appointed-muller-pursuant-doj-regulations/>.

<sup>52</sup> 28 CFR Part 600 - GENERAL POWERS OF SPECIAL COUNSEL, LEGAL INFO. INST., <https://www.law.cornell.edu/cfr/text/28/part-600> (last visited Aug. 23, 2018); OFFICE OF THE DEPUTY ATT'Y GEN., *supra* note 48.

<sup>53</sup> 1-13.000 - Urgent Reports, UNITED STATES DEP'T OF JUSTICE (updated Apr. 2018), <https://www.justice.gov/usam/usam-1-13000-urgent-reports> (last visited Aug. 26, 2018).

enforcement emergencies,” or events affecting the department that are likely to generate national media or Congressional attention.<sup>54</sup> These reports are due at least three days in advance of the anticipated developments or events. They are designed to give leadership notice and, in this case, give Rosenstein the opportunity to stop Mueller or inform Trump of forthcoming actions like the execution of a search warrant of the offices of Trump’s personal attorney, the indictment of his former campaign manager, and the like. Writing for *Vox* shortly after Mueller’s appointment, Daniel Hemel noted the difficulty of conducting an investigation “when someone so close to your target knows your every move well in advance.”<sup>55</sup> This structure makes the integrity and continuing viability of Mueller’s investigation depend in no small part on Rosenstein’s interest in preserving his professional reputation as a career prosecutor as opposed to a political hack.

Not only can Rosenstein stop Mueller’s intended moves pursuant to the Urgent Reports procedures, he can also fire Mueller. Under the regulations, grounds for removal of a special counsel are misconduct, dereliction of duty, incapacity, conflict of interest, or for other good cause, including violation of Departmental policies. Rosenstein would have to inform Mueller in writing of the specific reason for his or her removal, but under §600.10, the regulations expressly provide that they are not intended to, do not, and may not be relied upon to create any rights.

What this means, in a nutshell, is this. While Trump cannot directly fire Mueller, Trump *can* fire the one person who can fire Mueller. That’s Rod Rosenstein, the Deputy Attorney General. Rosenstein serves at the pleasure of the president, which means that Trump has a potentially very powerful way of stopping Mueller. He can order Rosenstein to fire Mueller, and Rosenstein will understand that if he doesn’t fire Mueller, he himself may be fired by Trump. Now the question whether Trump is going to fire Mueller has been as much a subject of speculation as the question whether Trump is or is not a target of Mueller’s investigation, and it is not at all surprising that the two matters have been repeatedly linked in the drama of threats and denials.<sup>56</sup> This observable linkage is an unsurprising consequence of the inherent structural conflict of interest of an arrangement of power in which a prosecutor is tasked with investigating a situation that may eventually end up implicating his or her “boss,” defined quite practically as the person who has the power to terminate his investigation by the simple expedient of firing him.

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<sup>54</sup> *Id.*

<sup>55</sup> Daniel Hemel, *Free Robert Mueller: here’s how to make his investigation truly independent*, VOX, May 29, 2017, <https://www.vox.com/the-big-idea/2017/5/24/15682544/mueller-comey-independent-investigation-special-counsel>.

<sup>56</sup> Sonam Sheth, *We now know of a second instance in which Trump reportedly wanted Mueller fired*, BUSINESS INSIDER, Apr. 10, 2018, <https://www.businessinsider.com/trump-wanted-mueller-fired-deutsche-bank-subpoena-2018-4>.

The reaction to Mueller's evident vulnerability and Trump's repeated indications that he is willing to go there but for the institutional and procedural obstacles in his path has been a distracting subplot of calls to protect Mueller's investigation, further calls to protect Rosenstein, and protective bills introduced in both the House and Senate, amid adamant disclaimers that the bills are unnecessary and will not be taken up for a vote because the President isn't going to fire the Special Counsel. We could spend time talking about the *Special Counsel Independence Protection Act* introduced by Representative Sheila Jackson in August of 2017.<sup>57</sup> This bill provides that in order to terminate the special counsel, the Attorney General would have to file suit in DC court and prove cause.<sup>58</sup> The *Special Counsel Integrity Act* is another bill introduced in the House in December 2017.<sup>59</sup> A similar bill in the Senate<sup>60</sup> was blocked from vote by Senate Majority Leader Mitch McConnell.<sup>61</sup> In April of 2018, a new bill merging elements of each of the two prior bills was jointly sponsored by Senators Booker, Graham, Coons, and Tillis as the *Special Counsel Independence and Integrity Act*.<sup>62</sup> Under this bill, the special counsel can only be fired by a Justice Department official for good cause in writing. The bill would give the special counsel 10 days to get expedited judicial review. The removal would not take effect and the special counsel's investigation would be preserved while this judicial review takes place. The merged bill advanced in the Senate Committee<sup>63</sup> notwithstanding earlier McConnell no vote on floor,<sup>64</sup> but to date it languishes.

In my view, the drama over these bills is really a distraction because the bills are actually the fallout of a bigger story. This is the story of how we came to find ourselves in a situation in which a special counsel, whose office was established precisely in order to avoid conflicts of interests from

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<sup>57</sup> Special Counsel Independence Protection Act, H.R.3654, 115th Cong. (2018).

<sup>58</sup> For the Senate version of the same bill see also Special Counsel Independence Protection Act, S.1735, 115th Cong. (2018).

<sup>59</sup> Special Counsel Independence and Integrity Act, H.R.5476, 115th Cong. (2018).

<sup>60</sup> Special Counsel Integrity Act, S.1741, 115th Cong. (2017).

<sup>61</sup> Nash Jenkins, *These Bills Would Prevent Donald Trump From Firing Robert Mueller. They're Going Nowhere.* TIME, Jan. 26, 2018, <http://time.com/5120851/trump-mueller-special-counsel-senate-judiciary/>.

<sup>62</sup> Booker, Graham, Coons, Tillis introduce merged legislation, the *Special Counsel Independence and Integrity Act*, Cory Booker | U.S. Senator for New Jersey (Apr. 11, 2018), [https://www.booker.senate.gov/?id=769&p=press\\_release](https://www.booker.senate.gov/?id=769&p=press_release).

<sup>63</sup> Tara Golshan, *The Senate bill to protect Robert Mueller's Russia investigation, explained*, VOX, Apr. 26, 2018, <https://www.vox.com/2018/4/26/17274824/senate-bill-robert-mueller-russia-trump-fire>.

<sup>64</sup> Deirdre Shesgreen, *McConnell: No Senate vote on bill to protect Special Counsel Robert Mueller*, USA TODAY, Apr. 17, 2018, <https://www.usatoday.com/story/news/politics/2018/04/17/mcconnell-no-senate-vote-bill-protect-special-counsel-robert-mueller/526074002/>.



undermining the integrity of federal criminal investigations and prosecutions of persons holding high office, is appointed by a Deputy Attorney General, who received his appointment authority by way of the Attorney General's recusal pursuant to another departmental regulation also designed to prevent conflicts of interests, nonetheless serves at the pleasure of a political appointee, who himself serves at the pleasure of the President, who may or may not be the target of special counsel's investigation. A structure of power more likely to be affected by conflicts of interest is hard to imagine. To the extent the special counsel is subordinate, in this case, to the Deputy Attorney General and the Deputy Attorney General is subordinate to the President, there is a possibility that neither will have the independence necessary to follow the evidence wherever it leads, especially if it leads to the President who holds their jobs on the line. So the question, again, is how this structure came to be. That is the story that I want to tell, and this story is going to circle around a Supreme Court case that is the site of the legal battle I am interested in. The case is *Morrison v. Olson*.<sup>65</sup>

*Morrison v. Olson* was decided in 1988. It took up the constitutionality of the Ethics in Government Act, which was enacted in 1978 in response to what is famously known as Nixon's "Saturday Night Massacre." On Saturday, October 20, 1973, Nixon ordered the Attorney General to fire the special prosecutor, Archibald Cox, who was then demanding that Nixon surrender nine tape recordings of White House conversations relevant to Cox's investigation of Nixon's role in covering up a burglary of the Democratic National Committee headquarters at the Watergate complex.<sup>66</sup> Nixon ordered Cox to drop his investigation. When Cox refused, Nixon ordered Attorney General Elliot Richardson to fire him. When Richardson refused, Nixon accepted Richardson's resignation, turned to the Deputy Attorney General, William French Smith, and ordered Smith to fire Cox. When Smith refused, Nixon accepted his resignation and turned to the Solicitor General, Robert Bork. Bork fired Cox. Although Bork's colleagues have defended his decision to do as Nixon asked,<sup>67</sup> his firing of the special prosecutor triggered massive criticism at the time and shadowed Bork for the rest of his life.<sup>68</sup> For Nixon, Cox's firing fueled support for a credible threat of impeachment that forced him to resign. The point here is that Nixon did exactly what observers today fear Trump may try to do to get rid of Mueller.

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<sup>65</sup> *Morrison v. Olson*, 487 U.S. 654 (1988).

<sup>66</sup> Kenneth B. Noble, *Bork Irked by Emphasis on His Role in Watergate*, N.Y. TIMES, July 2, 1987.

<sup>67</sup> Robert Bork Jr., *Elliot Richardson's testimony Robert Bork's role in the Saturday Night Massacre*, C-SPAN (Sept. 29, 1987), <https://www.c-span.org/video/?c4677380/elliott-richardsons-testimony-robert-borks-role-saturday-night-massacre>.

<sup>68</sup> *On This Day: Senate rejects Robert Bork for the Supreme Court*, NATIONAL CONSTITUTION CENTER, (Oct. 23, 2017), <https://constitutioncenter.org/blog/on-this-day-senate-rejects-robert-bork-for-the-supreme-court>.

Nixon threw the stability of the government into question by firing top leadership at the DOJ and threatening to continue down the chain of command until he reached a subordinate who would carry out his order to fire Special Prosecutor Cox. Bork stopped the so-called massacre, but only by capitulating to the corrupt demands of a corrupt president.

Five years later, Congress enacted the Ethics in Government Act precisely in order to deal with the problem of a corrupt president ordering the dismissal of a special prosecutor appointed to investigate crimes in high office that may implicate the president. What the Ethics in Government Act did is actually very simple. It moved the power of appointment from the Attorney General to a specially constituted Division of the U.S. Court of Appeals for the District of Columbia Circuit. The Special Division was made up of three judges appointed by the Chief Justice of the U.S. Supreme Court. Upon request by the Attorney General, the panel was tasked with appointing an independent counsel and defining the scope of the investigation.

The Office of Independent Counsel established by the Ethics in Government Act was different from the office of special prosecutor held by Cox. Pursuant to the statute, the Independent Counsel was appointed by the Court and could be removed by the Attorney General only for good cause and subject to judicial review, since the Independent Counsel had the right under the statute to appeal his dismissal to the U.S. District Court for the District of Columbia and could be reinstated by the court.<sup>69</sup> The common sense idea informing the statute was that when there is enough credible information of criminal activity to constitute grounds for a criminal investigation of persons in high office with close relationships to the president, persons who may be friends, allies and possibly even agents of the illegal actions of a president, then you need to have a prosecutorial power that cannot be fired at will at the pleasure of the president.<sup>70</sup> The constitutionality of this statute was challenged in *Morrison v. Olson*.

Theodore Olson, the plaintiff in *Morrison*, was Assistant Attorney General for the Office of Legal Counsel [hereinafter "OLC"] during the Reagan Administration. The OLC assists the Attorney General in advising the president and all agencies of the executive branch. OLC legal opinions

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<sup>69</sup> 28 U.S.C. § 596 (2011).

<sup>70</sup> The statute authorized appointment of an independent counsel in cases involving suspected criminal activity of the president, the vice president, a member of the president's cabinet, a high-level executive officer, a high-level Justice Department official, the director or deputy director of the CIA, the commissioner of the Internal Revenue Service, any person with a personal or financial relationship with the attorney general or any other officer in the Department of Justice, or the president's campaign chair or treasurer. See *Independent Counsel - Ethics in Government Act*, LAW LIBRARY AMERICAN LAW AND LEGAL INFORMATION (last visited Aug. 24, 2018), <http://law.jrank.org/pages/7601/Independent-Counsel-Ethics-in-Government-Act.html>.

are generally treated as authoritative statements of the law within the executive branch and have been used as “safe havens” against prosecutions for executive officers purporting to rely on an OLC opinion.<sup>71</sup> The charges against Olson were that Olson had given false and misleading testimony before a House Judiciary committee investigating the E.P.A.’s earlier refusal to produce documents subpoenaed by the House Energy and Commerce Committee.<sup>72</sup> The Energy and Commerce Committee was investigating toxic waste dumps and allegations that Reagan Administration officials were awarding superfund moneys based on partisan considerations rather than environmental ones.<sup>73</sup> Acting on OLC instructions, the E.P.A. administrator invoked executive privilege to withhold the subpoenaed documents.<sup>74</sup> The Administrator was held in contempt and forced to resign and Olson was later called to testify about his role in advising the E.P.A. administrator to withhold documents from Congress.<sup>75</sup> The Justice Department submission requesting appointment of an Independent Counsel reportedly noted several instances during Olson’s testimony where he may have lied to the committee, including his failure to “recall being told that E.P.A. officials were willing to turn over the disputed documents to Congress.”<sup>76</sup>

Olson responded by filing suit to challenge the constitutionality of the Ethics in Government Act, specifically the provisions of the Act establishing

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<sup>71</sup> In 2008, for example, Attorney General Michael Mukasy, testified before the House Judiciary Committee stated that “the Justice Department ... could not investigate or prosecute somebody for acting in reliance on a Justice Department opinion.” See *Oversight Hearing of the Department of Justice: Hearing Before the H. Comm. on the Judiciary*, 110th Cong. (2008).

<sup>72</sup> David Neiwert, *The first Ted Olson scandal*, SALON, May 14, 2001, [https://www.salon.com/2001/05/14/independent\\_counsel/](https://www.salon.com/2001/05/14/independent_counsel/).

<sup>73</sup> *Id.*; see also Mary Thornton, *Gorsuch Being Called To Tell Hill Why She Withheld Data*, WASH. POST, Oct. 27, 1982, [https://www.washingtonpost.com/archive/politics/1982/10/27/gorsuch-being-called-to-tell-hill-why-she-withheld-data/15654ec4-3c0d-4148-9435-7da7af473eab/?noredirect=on&utm\\_term=.d0ea11caf75c](https://www.washingtonpost.com/archive/politics/1982/10/27/gorsuch-being-called-to-tell-hill-why-she-withheld-data/15654ec4-3c0d-4148-9435-7da7af473eab/?noredirect=on&utm_term=.d0ea11caf75c).

<sup>74</sup> Thornton, *supra* note 73.

<sup>75</sup> Philip Shabecoff, *House Charges Head of E.P.A. with Contempt*, N.Y. TIMES, Dec. 17, 1982, <https://www.nytimes.com/1982/12/17/us/house-charges-head-of-epa-with-contempt.html>; see also David Hoffman & Cass Peterson, *Burford Quits as EPA Administrator*, THE WASH. POST, Mar. 10, 1983, [https://www.washingtonpost.com/archive/politics/1983/03/10/burford-quits-as-epa-administrator/49ef0add-f834-4bef-8fd5-35f13d1f2abd/?utm\\_term=.2532914f6d86](https://www.washingtonpost.com/archive/politics/1983/03/10/burford-quits-as-epa-administrator/49ef0add-f834-4bef-8fd5-35f13d1f2abd/?utm_term=.2532914f6d86); see also Philip Shenon & Special To the New York Times, *Special Prosecutor Drops E.P.A. Case Without Indictment*, N.Y. TIMES, Aug. 27, 1988, <https://www.nytimes.com/1988/08/27/us/special-prosecutor-drops-epa-case-without-indictment.html>.

<sup>76</sup> Shenon and Times, *supra* note 75; see also Robert L. Jackson, *Widened Probe of 1983 EPA Scandal Denied*, L.A. TIMES, Apr. 3, 1987, [http://articles.latimes.com/1987-04-03/news/mn-2458\\_1\\_independent-counsel](http://articles.latimes.com/1987-04-03/news/mn-2458_1_independent-counsel).

the procedures for appointment and removal of the independent counsel. Some aspects of the case are highly technical. I am referring here, for example, to the debate whether the section of the Appointments Clause empowering Congress to vest appointment of inferior officers “in the President alone, in the courts of Law, or in the Heads of Department” applies to inter-branch appointments or is limited to intra-branch appointments. This and other technical doctrines at issue in the case deal with matters peculiar to a method of interpretation that focuses on giving effect to the original intent of the Framers as expressed in the words of the Constitutional text and reflected in the records of the Constitutional Convention. These technicalities may not be immediately or particularly relevant to the struggle against corruption and impunity in other countries, but the central question of constitutional interpretation at issue in *Morrison v. Olson* is certainly of broad significance and makes it a *very* interesting case. That is the issue of the separation of powers.

Writing for a majority of the Court, then Chief Justice Rehnquist concluded that the independent counsel statute did not violate the separation of powers either by vesting appointment of the independent counsel in a specially created federal court or by imposing a “good cause” restriction on the Attorney General’s power to remove the Independent Counsel and subjecting such removal to judicial review. According to the Court, Congress could reasonably conclude that investigations of criminal activities by high-ranking officers in the executive branch created conflicts of interests that required Congress to take steps to secure the independence of the prosecutors involved in investigating and prosecuting such cases.<sup>77</sup> Although Congress could not constitutionally allocate *to itself* the power of appointing a prosecutor to investigate and prosecute executive officers, it was entirely reasonable for Congress to conclude that the power of appointing and removing such a prosecutor needed to be vested in a way to protect against conflicts of interest. It was also entirely reasonable for Congress to view the judicial branch as a logical place to assign that power as federal courts have extensive experience appointing federal marshals, interim U.S. Attorneys, and private attorneys to prosecute contempt judgments all of which either are executive branch officers or involve the exercise of executive powers.

In so holding, the Court rejected the argument that Congress lacked the power to impose good cause restrictions on the removal of officers whose functions were “purely executive.” Even conceding that criminal prosecutors exercise “purely executive” powers, the Court reasoned that the determination of which officers may or may not be subject to at will removal by the president did not turn on “rigid categories,” but rather on an analysis of whether the President needed the power of at-will removal in order to fulfill his duty to “take care that the laws be faithfully executed” without

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<sup>77</sup> *Morrison*, 487 U.S. at 677.

Congressional interference. While there are some purely executive officers who must be removable at will by the President if the President is to have effective control of his administration, the President's power to remove officials is not absolute, but depends on the nature of the duties of the officials whose removal is at issue, the kind of tenure Congress provided for the office they hold, and whether the power to remove the officials is essential to the President's proper execution of his Article II powers. In the case of the Independent Counsel, an office established by Congress to prevent conflicts of interests in the executive branch from interfering with the investigation and prosecution of criminal activity by friends and allies of the president or the president himself, the Court decided that the president's duties to take care and faithfully execute the laws did not require at will removal power over the person appointed to that office.

Justice Scalia was the lone dissenter in this case. On the separation of powers question, his position was categorical. Since the power exercised by the independent counsel was "purely executive," the power of appointment and removal of the independent counsel was constitutionally vested in the President, and the Court's decision was nothing short of lawless. For Scalia, "A government of laws means a government of rules. Today's decision on the basic issue of fragmentation of executive power is ungoverned by rule, and hence ungoverned by law."<sup>78</sup> Now there are a number of things that are quite interesting about Scalia's dissent in *Morrison*. The first is the sheer sophistry of it, and I mean "sophistry" in the literal sense, for sophistry is the art of making the real appear unreal and the unreal appear real.<sup>79</sup> Why is this so? Let me quickly sketch out three ways in which the dissent is entirely sophistic.

First, consider that the prologue with which Scalia begins his dissent opens by explaining that the proud boast of Americans that we have "a government of laws and not of men" comes from the Massachusetts Constitution of 1780 which provided for the categorical separation of powers. There is certainly irony in Scalia's history lesson, for while he begins with this foundational principle and assertion of national identity, the outcome of his dissent tends entirely in the direction of consolidating a government of men, not laws—more precisely a government of men whose discretion not to prosecute themselves for their own criminal activity, Scalia will characterize later in the opinion as a "natural advantage of the President"<sup>80</sup> conferred by a Constitution in which the prosecution of every violation of law, "*especially every violation by those in high places. . . is not*

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<sup>78</sup> *Morrison*, 487 U.S. at 733 (Scalia, J., dissenting).

<sup>79</sup> See Plato, Sophist, THE INTERNET CLASSICS ARCHIVE, <http://classics.mit.edu/Plato/sophist.html> (last visited Aug 26, 2018).

<sup>80</sup> *Morrison*, 487 U.S. at 712 (Scalia, J., dissenting).

*an absolutely overriding value.*"<sup>81</sup> Thus, Scalia starts his dissent by purporting to teach us that we must maintain a categorical separation of powers if we are to be true to our national boast of having a government of laws and not men, and ends by defending the legal impunity such a categorical separation would confer upon the executive, assuring us along the way that the enforcement of law against persons in high office is *actually not* an overriding value.

Second, consider Scalia's use of *Federalist Paper 47*, which he cites to establish that the framers of the federal constitution viewed the separation of powers as "the absolutely central guarantee of a just government."<sup>82</sup> Scalia quotes Madison as attesting that no political truth is of greater intrinsic value and concludes that failure to maintain the separation of powers will render our Bill of Rights as worthless as those of "many nations of the world that have adopted, or even improved upon, the mere words of ours." What Scalia neglects to mention is that *Federalist 47* is actually Madison's extended defense of the *intermixture of powers* in the U.S. Constitution. The text Scalia quotes is Madison's concession to the groupthink of his contemporaries, who were then invoking the oracle of Montesquieu to attack the proposed Constitution for its intermixtures of power. In *Federalist 47*, Madison reminds them that none of the constitutions of their 13 states kept the legislative, executive and judicial powers entirely separate and distinct, including the Massachusetts constitution which Scalia invokes as example of a categorical separation. Since Madison specifically raises the intermixture of powers in the Massachusetts constitution as evidence that even constitutions that expressly assert the absolute and categorical separation of powers nonetheless find a partial intermixture necessary and proper, Scalia's references to the Massachusetts constitution and to Madison's argument in *Federalist 47* are both patently misleading.

Scalia also neglects to explain why Madison was so keen to defend the Constitution's intermixtures of power. At the end of *Federalist 47*, Madison explains his reason when he notes that none of the states have made "a competent provision. . . for maintaining in practice the separation delineated on paper."<sup>83</sup> In the next four papers, we learn more. Madison believed that political recurrence to the people to enforce the separation of powers is a recipe for disaster, whether that return is made periodically or in response to a particular crisis. Rather than relying on the people to resolve constitutional crises or correct usurpations of power, Madison argued that the checks on power must be made internal to the operation of government and that

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<sup>81</sup> *Id.* at 732 (Scalia, J., dissenting) (emphasis added).

<sup>82</sup> *Id.* at 697 (Scalia, J., dissenting).

<sup>83</sup> THE FEDERALIST NO. 47 (James Madison), available at [http://avalon.law.yale.edu/18th\\_century/fed47.asp](http://avalon.law.yale.edu/18th_century/fed47.asp).

intermixtures of power are precisely the way to do that.<sup>84</sup> The point is that Madison is completely misrepresented if he is cast as a proponent of the categorical separation of powers, for he quite expressly viewed the separation of powers as depending in practice on the intelligent and strategic intermixture of powers, and would thus in all likelihood be a proponent of the Ethics in Government Act precisely to the extent its intermixtures of power make effective in practice the fundamental axiom informing the separation of powers: that “[n]o man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.”<sup>85</sup>

The last thing I want to note about Scalia’s dissent is the way he makes fairness to the accused the focus of his case for subordinating all prosecutorial power to “the unitary executive.” It’s really quite remarkable. In Scalia’s account, we are asked to imagine a panel of politically partisan judges, “as judges have been known to be,” selecting “a prosecutor antagonistic to the administration, or even to the particular individual,” who then proceeds to abuse the power of prosecutorial discretion. Scalia notes that “There is no remedy for that, not even a political one,” and further observes that “even if it were entirely evident that unfairness was in fact the result—the judges hostile to the administration, the independent counsel an old foe of the President, the staff refugees from the recently defeated administration—*there would be no one accountable to the public to whom the blame could be assigned.*”<sup>86</sup> Thus, the only way to secure fairness to the individual is to permit the concentration of prosecutorial power in the president because that is the only way to ensure that prosecutorial discretion is accountable to the people.

It is remarkable that a reasonable intermixture of power allocating to a court the power to appoint and review the removal of a prosecutor so as to prevent conflicts of interest in the executive branch from undermining the independence of investigations into criminal activities of persons in high executive office is cast as inherently unfair by positing the complete collapse of professional integrity and fairness not only in the independent counsel but in the judges who appointed her. The risk of impunity for the crimes of the powerful is, in this view, offset by the risk of a complete failure of professional ethics among those appointed to investigate, such that only the accountability of the unitary executive to the people can be counted on to save the republic. But, Scalia’s reliance on the people, rather than on institutional checks made internal to the operation of government and *the*

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<sup>84</sup> See THE FEDERALIST NO. 48-51 (James Madison), available at [http://avalon.law.yale.edu/subject\\_menus/fed.asp](http://avalon.law.yale.edu/subject_menus/fed.asp).

<sup>85</sup> THE FEDERALIST NO. 10 (James Madison), available at [http://avalon.law.yale.edu/18th\\_century/fed10.asp](http://avalon.law.yale.edu/18th_century/fed10.asp).

<sup>86</sup> *Morrison*, 487 U.S. at 730-31 (Scalia, J., dissenting) (emphasis in original).

*virtue* of the persons raised to positions of high office and public trust, runs counter to the foundational assumptions informing the republican form of government defended in the *Federalist Papers*, which he so profoundly distorts.

Although the people are sovereign and their consent essential to the government's legitimacy, they are also vulnerable to demagogues and deceit. For this reason, the virtue necessary for self-government is required as much from persons whose qualifications for office include professional training in the obligations of their office, as the people empowered to remove them from office. This understanding is at work in Rehnquist's response to the specter of partisan judges construing their supervisory power over the independent counsel as a "'broadsword and . . . rapier' [enabling] the court to 'control the pace and depth of the independent counsel's activities.'" Rehnquist's response was quite simple: federal courts have *a duty* to construe their own power constitutionally.<sup>87</sup> Rather than reinforcing the ethical standards applicable to federal prosecutors and judges—noting for example that these standards of professionalism and integrity are what justify such constitutional privileges as life tenure for judges—Scalia instead insists that the constitutionality of the independent counsel statute must be construed in contemplation of *a complete failure of virtue* by prosecutor and judges.<sup>88</sup> But Scalia's approach does not cohere with the understanding evidenced by a fair reading of the *Federalist Papers*. No doubt, these papers recount a concerted effort to design a form of government that attempts to counteract the vices of human nature through a carefully engineered system of separation and intermixture of powers, but it is also true that its ultimate success was understood to depend as well *on the virtue* of those raised to positions of trust. Thus Madison concluded his argument in defense of the structure of power in the House, not by referencing the categorical separation of powers, but by referencing the significant role of virtue in the success of republican government:

As there is a degree of depravity in mankind which requires a certain degree of circumspection and distrust, so there are other qualities in human nature which justify a certain portion of esteem and confidence. Republican government presupposes the existence of these qualities in a higher degree than any other form. Were the pictures which have been drawn by the political jealousy of some among us

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<sup>87</sup> *Morrison*, 487 U.S. at 682 (“[I]t is the duty of federal courts to construe a statute to save it from constitutional infirmities”).

<sup>88</sup> *Id.* at 731 (Scalia, J., dissenting) (“[T]he fairness of a process must be adjudged on the basis of what it permits to happen, not what it produced in a particular case.”) Scalia's point is that the structure of the office, as constituted by the Ethics Act, should be declared unconstitutional because it would permit an unethical independent counsel and special division to conspire with impunity in the abuse of power.



faithful likenesses of the human character, the inference would be, that there is not sufficient virtue among men for self-government; and that nothing less than the chains of despotism can restrain them from destroying and devouring one another.<sup>89</sup>

### III. OF HISTORICAL MEMORY, LEGAL THEORY AND CONVERGING PATHS

Assuming you are now persuaded that Scalia's dissent in *Morrison* is all wrong, the question is this: why should we care about Scalia's dissent? After all, the fact that it is a *dissent* means it didn't emerge as controlling law, and Scalia is no longer on the Court, so really, why care? The answer to that question is the part of this story that takes us forward in time. By following the story forward in time we will see how yesterday's news about Gina Haspel's confirmation as director of the CIA and Robert Mueller's tenuous first year as Special Counsel are connected at the crossroads of the two paths that did emerge from the Court's decision in *Morrison*. The first path moves forward in what we can call the world of human events; the second is in the world of legal theory.

#### A. *First Path: The Destruction of the Independent Counsel*

The first path forward is by way of the fact that while the Court's decision in *Morrison* upheld the constitutionality of the Ethics in Government Act, the statute had a sunset provision. Although it was reauthorized several times, a Republican filibuster prevented its reauthorization when it lapsed in December 1992.<sup>90</sup> Then in 1993, the Clinton Administration was rocked by political storms over the death of Clinton's White House Counsel, Vincent Foster, and its possible relationship to Clinton's land dealings. Clinton's Attorney General, Janet Reno, responded by appointing a special prosecutor, Robert Fiske, in January 1994.<sup>91</sup> In the meantime, Clinton publicly embraced the idea of the Office of the Independent Counsel, dismissed criticisms that it was a partisan tool and waste of money, and, in July 1994, signed a reauthorization bill calling the independent counsel "a foundation stone for the trust between the

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<sup>89</sup> THE FEDERALIST, *supra* note 84.

<sup>90</sup> Jim Mokhiber, *A Brief History Of The Independent Counsel Law*, PBS, May 1998, <https://www.pbs.org/wgbh/pages/frontline/shows/counsel/office/history.html>.

<sup>91</sup> David Johnston, *Counsel Granted A Broad Mandate in Clinton Inquiry*, N.Y. TIMES, Jan. 21, 1994, <https://www.nytimes.com/1994/01/21/us/counsel-granted-a-broad-mandate-in-clinton-inquiry.html>.

Government and our citizens.”<sup>92</sup>

After reauthorization, Reno submitted the matter of Fiske’s investigation to the Special Division. The three judge panel appointed by Chief Justice Rehnquist was headed by Appeals Court Judge David Sentelle.<sup>93</sup> The other two judges were John Butzner and Joseph Sneed,<sup>94</sup> but it was basically Sentelle’s show.<sup>95</sup> Prior to his appointment to the Special Division, Sentelle had a notable political career as the Republican Party chair of a county in North Carolina. His political activities earned him the support of N.C. Senator Jesse Helms, who nominated him to the federal bench and pushed for his elevation to the D.C. Court of Appeals. On the bench, Sentelle promptly distinguished himself as being “on the extreme right wing of a decidedly right-wing circuit. . . so far out there that he’s alienated his fellow conservatives.”<sup>96</sup>

Now, despite the fact that Fiske was a Republican, a former U.S. Attorney, and had been given broad authority to conduct a thorough, complete and impartial investigation, Sentelle’s panel removed Fiske, announcing that purpose of the statute was to protect against perceptions of conflict of interests. Fiske presumably was irreparably tainted because Reno had appointed him, and the panel appointed Kenneth Starr to replace Fiske that August.<sup>97</sup> Starr’s appointment was controversial from the beginning, *not because* Starr, like Fiske, was a staunch Republican, but more specifically because Starr had already come out against Clinton in the Paula Jones case, even consulting with her attorneys on the case, *not because* he was particularly sympathetic to her sex harassment complaint, but because he opposed Clinton’s claim to immunity from suit while in office.<sup>98</sup>

Starr’s appointment became even more controversial three weeks later, when it was revealed that Sentelle had met with Jesse Helms and the other North Carolina Senator, Lauch Faircloth, who was widely known as “the member of Congress most eager to get rid of Fiske and to nail Clinton on Whitewater.”<sup>99</sup> The Sentelle panel went on to overlook Starr’s many

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<sup>92</sup> Mokhiber, *supra* note 90.

<sup>93</sup> Greg Goldin, *Meet the judge who gives Ken Starr everything he wants*, MONTEREY CTY. WKLY, Apr. 16, 1998, [http://www.montereycountyweekly.com/news/local\\_news/meet-the-judge-who-gives-ken-starr-everything-he-wants/article\\_d156d867-8067-5185-beea-71abb43a3146.html](http://www.montereycountyweekly.com/news/local_news/meet-the-judge-who-gives-ken-starr-everything-he-wants/article_d156d867-8067-5185-beea-71abb43a3146.html).

<sup>94</sup> Susan Schmidt, *Judges Replace Fiske as Whitewater Counsel*, WASH. POST, Aug. 6, 1994, <https://www.washingtonpost.com/archive/politics/1994/08/06/judges-replace-fiske-as-whitewater-counsel/4ca08c66-62cd-4ef3-a44f-9835399ed0ee/>.

<sup>95</sup> Goldin, *supra* note 93.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> Ruth Marcus, *Starr: Relentless or Reluctant?*, WASH. POST.COM, Jan. 30, 1998, <http://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/counsel013098.htm>.

<sup>99</sup> Goldin, *supra* note 93; *see also* Toni Locy & Marilyn W. Thompson, *Lunch Among*

apparent conflicts of interest as Starr shifted the focus of investigation to allegations of sexual misconduct with White House intern Monica Lewinsky. Starr submitted information to Clinton's Attorney General Reno that Lewinsky might have submitted a false affidavit and suborned perjury in connection with the Paula Jones case. Reno determined it would be a conflict of interest for the DOJ to investigate Starr's claims and, as required by the Ethics Act, petitioned the Special Division to expand the scope of Starr's investigation.<sup>100</sup> Based on Clinton's deposition in the Paula Jones case in January, 1998 and his testimony before the grand jury in Starr's investigation, Starr submitted to the House a report accusing Clinton of graphic sexual misconduct, perjury, obstruction of justice and abuse of power.<sup>101</sup> The House passed Articles of Impeachment in December 1998.<sup>102</sup>

Clinton was ultimately acquitted by the Senate in February 1999,<sup>103</sup> but Starr's conduct of the investigation produced such a lurid spectacle of excess, bias, conflicts of interest and petty partisanship, that the Starr investigation for all practical matters destroyed the Independent Counsel as an institutional vehicle for holding persons in high office accountable under the law.<sup>104</sup> They delegitimized it completely.<sup>105</sup> Practically speaking the result was that the independent counsel statute was never reauthorized, and that's why we find ourselves treated to the spectacle of Trump's repeated threats to fire Mueller. Trump's threats are, in my view, grounded in Starr's abuse of power. To be sure, there are those who will challenge my view by pointing to alleged abuses of the independent counsel in the Iran-Contra

'Old Friends' causes latest Whitewater Ripple, WASH. POST, Oct. 24, 1994, <https://www.washingtonpost.com/archive/politics/1994/08/24/lunch-among-old-friends-causes-latest-whitewater-ripple/6ce8bbc8-8d7e-410a-828e-43837514a197/>; Schmidt, *supra* note 94.

<sup>100</sup> Marcus, *supra* note 98.

<sup>101</sup> Don Van Natta Jr., *Starr Report Is Said to Claim Perjury and Abuse of Power by President in Lewinsky Case*, N.Y. TIMES, Sept. 11, 1998, <https://archive.nytimes.com/www.nytimes.com/library/politics/091198clinton-starr.html>.

<sup>102</sup> Alison Mitchell, *Impeachment: The Overview – Clinton Impeached; He Faces a Senate Trial, 2d in History; Vows to Do Job Till Term's 'Last Hour'*, N.Y. TIMES, Dec. 20, 1998, <https://www.nytimes.com/1998/12/20/us/impeachment-overview-clinton-impeached-he-faces-senate-trial-2d-history-vows-job.html>.

<sup>103</sup> Alison Mitchell, *The President's Acquittal: The Overview; Clinton Acquitted Decisively: No Majority for Either Charge*, N.Y. TIMES, Feb. 13, 1999, <https://www.nytimes.com/1999/02/13/us/president-s-acquittal-overview-clinton-acquitted-decisively-no-majority-for.html>.

<sup>104</sup> Roberto Suro, *Starr Blames His Accusers*, WASH. POST, Apr. 15, 1999, <https://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/starr041599.htm>; Dan Morgan, *U.S. Reverses Position on Counsel Law*, WASH. POST, Mar. 2, 1999, <https://www.washingtonpost.com/wp-srv/politics/special/counsels/stories/counsel030299.htm>.

<sup>105</sup> Roberto Suro, *Power Shifts to Reno Without Special Counsel*, WASH. POST, JUNE 30, 1999, <https://www.washingtonpost.com/wp-srv/politics/special/counsels/stories/counsel063099.htm>.

investigation—a sort of tit for tat retort to supposedly prove that abuse of power is inherent in the structure of such an office, but there is, in my view, a fundamental difference between the conducts at issue in these two situations that rises above partisanship to warrant Walsh’s investigation and condemn Starr’s. That analysis must await another day, but in my opinion, there is no denying that Starr’s abuse of power created, and may have been intended precisely to create, the backlash that nailed the coffin shut on the office of independent counsel, whose effects we experience today as the conditions of Mueller’s institutional vulnerability.

It shouldn’t be a surprise that Kenneth Starr later testified in April of 1999 in favor of allowing the statute to expire.<sup>106</sup> Theodore Olson, the defeated plaintiff in *Morrison v. Olson* and Starr’s longtime friend had enthusiastically endorsed Starr’s appointment to the office whose constitutionality Olson had previously spent over a million dollars attacking.<sup>107</sup> Republican Party partisans had it out for the office of independent counsel ever since the Iran-Contra investigations and had allowed the statute to lapse—until they saw the opportunity to use it against Clinton. Being able to bring down both the office of the independent counsel and the Clinton Administration (with a little help from your friends)<sup>108</sup> is the kind of twofer Ollie North might think was a “neat idea”.<sup>109</sup> And so what Scalia lost as a matter of constitutional jurisprudence, he won as a practical matter, for the fact that the Starr investigation was viewed as an abuse of the power of the independent counsel by a biased prosecutor enabled by a panel

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<sup>106</sup> Roberto Suro & Guy Guliotta, *Starr to Oppose Counsel Statue*, WASH. POST, Apr. 14, 1999, <https://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/starr041499.htm>.

<sup>107</sup> David Lauter, *Fiske’s Successor Is Active GOP Partisan: Special counsel: Only recently Kenneth W. Starr weighed a bid for U.S. Senate. But friends from both parties say he will be fair and impartial.*, L.A. TIMES, Aug. 6, 1994, [http://articles.latimes.com/1994-08-06/news/mn-24148\\_1\\_special-counsel](http://articles.latimes.com/1994-08-06/news/mn-24148_1_special-counsel) (according to Olson, “Ken is an enormously able, extremely conscientious, very very fair individual.”).

<sup>108</sup> *Laurence Silberman: The Right Man or the Right’s Man?*, PEOPLE FOR THE AMERICAN WAY, Feb. 13, 2004, <http://www.pfaw.org/press-releases/laurence-silberman-the-right-man-or-the-rights-man/> (recounting Silberman’s role in upholding Starr’s abuse of prosecutorial power).

<sup>109</sup> *North on the “Neat Idea” of the Diversion*, UNDERSTANDING THE IRAN-CONTRA AFFAIRS, July 8, 1987, [https://www.brown.edu/Research/Understanding\\_the\\_Iran\\_Contra\\_Affair/v-on7.php](https://www.brown.edu/Research/Understanding_the_Iran_Contra_Affair/v-on7.php). During the Iran-Contra hearings, Oliver North stated: I must confess to you that I thought using the Ayatollah’s money to support the Nicaraguan Resistance was a right idea...I don’t think it was wrong. I think it was a neat idea...” Both Silbermann, who ruled against the constitutionality of the Independent Counsel in the lower court proceedings in *Morrison* and for a broad interpretation of the scope of Starr’s authority in the Clinton investigation, and Sentelle, who appointed Starr, at different points took actions adverse to the Independent Counsel’s investigation and prosecution of persons responsible for the Iran-Contra scandal. See Silberman, *supra* note 108.

of partisan judges only served to vindicate Scalia's dissent in *Morrison*.<sup>110</sup> Scalia it was said, had warned us, and now that the warning had come true, maybe he was right about the constitutional imperative of keeping prosecutorial power accountable to a unitary executive.

*B. Second Path: The Unitary Executive and the Torture Memos*

The second path forward from *Morrison* to yesterday's news happened in the world of legal theory. Scalia's opposition to the independent counsel was based on his view that Constitution vests all executive power in the President. The Ethics in Government Act violated Scalia's understanding of "the unitary executive" by vesting a portion of executive power, specifically to prosecute high level officials in the executive branch, in a prosecutor whose appointment and removal was ultimately up to a federal court. Now this theory of "the unitary executive" is a very interesting animal. I suspect most people familiar with references to this "unitary executive" today in 2018 imagine it to be a well-established doctrine of constitutional law grounded in the original intent of the framers. If you do, you may be surprised to learn that the first time reference to the concept or doctrine of a "unitary executive" appears in the Supreme Court is in Scalia's dissent in *Morrison v. Olson*. Search, as I have, for references to the unitary executive in the Supreme Court reports, and up until around the time the torture scandal erupted in 2004, you will find only four appearances. More significantly, you will find that in all four instances, the unitary executive is never in a majority opinion. After its first appearance in Scalia's *Morrison* dissent in 1988, the unitary executive doesn't make its next appearance until Justice Breyer's 1997 concurrence in *Clinton v. Jones*, where it is invoked to qualify the Supreme Court's decision that a sitting president is not immune from federal civil litigation for acts prior and unrelated to the presidency.<sup>111</sup> It appears the following year in *Clinton v. City of New York*, where Breyer again invokes it in objecting to the constitutionality of the Line Item Veto Act,<sup>112</sup> and then not until 2004, when it hijacks Justice Thomas' dissent in *Hamdi v. Rumsfeld*, to advance a vision of executive power rejected by the

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<sup>110</sup> Terry Eastland, *Scalia's Finest Opinion*, THE WKLY. STANDARD, Mar. 11, 2016, <https://www.weeklystandard.com/terry-eastland/scalias-finest-opinion>; John J. LaFalce, *Justice Scalia's Strong Words on the Independent Counsel Act*, CHRISTIAN SCIENCE MONITOR, Feb. 9, 1998, <https://www.csmonitor.com/1998/0209/020998.opin.opin.2.html>; Paul T. Cappuccio, *Scalia Was Right About The Independent Counsel Law*, WALL ST. J., June 29, 1998, <http://www.wsj.com/articles/SB899062794444552500>; Paul Greenberg, *Justice Scalia's Greatest Dissent*, JEWISH WORLD REV., Apr. 8, 2016, <http://www.jewishworldreview.com/cols/greenberg040816.php3>.

<sup>111</sup> *Clinton v. Jones*, 520 U.S. 681, 713 (1997) (Breyer, J., concurring).

<sup>112</sup> *Clinton v. New York*, 524 U.S. 417, 489-90 (1998) (Breyer, J., dissenting).

majority, but chilling in its scope insofar as it would grant the president the unilateral power to detain individuals indefinitely, based on “virtually conclusive factual findings” “free of any ‘judicial second guessing’” that the person is an “enemy combatant.”<sup>113</sup>

Now the really fascinating question is this. How is it that a doctrine that has received so little traction in the Supreme Court, languishing mostly in dissents, and never in the controlling majority since Scalia made its stillborn introduction, has nevertheless enjoyed such a decidedly robust life in the executive branch and, more specifically, in the Office of Legal Counsel? This is so much so that the unitary executive has been called the doctrine behind the presidency of George W. Bush because his Administration used it ubiquitously as grounds to expand profoundly the asserted scope of executive power.<sup>114</sup> While all its uses and abuses have a story to tell, I want to focus on its appearance in one of the OLC memos that mapped the legal theory for the authorization of “enhanced interrogation techniques.” This is the so-called “Bybee Memo” regarding *Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A*<sup>115</sup> which reportedly was relied on by CIA personnel interrogating “High-Value Detainees,”<sup>116</sup> until it was withdrawn in June 2004,<sup>117</sup> replaced in December 2004 by a superseding OLC memorandum,<sup>118</sup> and again disavowed in 2009.<sup>119</sup>

<sup>113</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 581-82 (2004) (Thomas, J., dissenting).

<sup>114</sup> Dahlia Lithwick, *Look for the Sign*, SLATE, June 19, 2007, [http://www.slate.com/articles/news\\_and\\_politics/recycled/2007/06/look\\_for\\_the\\_sign.htm](http://www.slate.com/articles/news_and_politics/recycled/2007/06/look_for_the_sign.htm); Jennifer Van Bergen, *The Unitary Executive: Is The Doctrine Behind the Bush Presidency Consistent with a Democratic State?*, FINDLAW, Jan. 09, 2006, <https://supreme.findlaw.com/legal-commentary/the-unitary-executive-is-the-doctrine-behind-the-bush-presidency-consistent-with-a-democratic-state.html>.

<sup>115</sup> See Memorandum for Alberto R. Gonzales Counsel to the President re: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A, Op. O.L.C. (Office of Legal Counsel, August 2002) [hereinafter Op. O.L.C.] (referencing Report: Investigation into the Office of Legal Counsel’s Memoranda Concerning Issues Relating to the Central Intelligence Agency’s Use of “Enhanced Interrogation Techniques” on Suspected Terrorists, ACLU-RDI 5022 (Dept. of Justice, Office of Professional Responsibility, July 2009) which refers to the cited memorandum as the “Bybee Memo” on pg. 7).

<sup>116</sup> See e.g. CENT. INTEL. AGENCY, BACKGROUND PAPER ON CIA’S COMBINED USE OF INTERROGATION TECHNIQUES (2004) (supplementing Report: Investigation into the Office of Legal Counsel’s Memoranda Concerning Issues Relating to the Central Intelligence Agency’s Use of “Enhanced Interrogation Techniques” on Suspected Terrorists, ACLU-RDI 5022 (Dept. of Justice, Office of Professional Responsibility, July 2009) which references the Bybee Memo being used in some form by the CIA on pg. 133).

<sup>117</sup> See Daniel Klaidman, *Palace Revolt*, NEWSWEEK, Feb. 5, 2006, <https://www.newsweek.com/palace-revolt-11340>.

<sup>118</sup> See Memorandum for James B. Comey Deputy Attorney General Re: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A, Op. O.L.C., 1-2 (Office of Legal Counsel, August 2004).

<sup>119</sup> See Memorandum for the Files Re: Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001, Op. O.L.C. (Office of Legal

18 U.S.C §§ 2340-2340A, known as the “Extraterritorial Torture Statute,” is the federal statute that criminalizes torture committed outside the United States by any public official, e.g. CIA personnel, under color of law against persons within that official’s custody or control.<sup>120</sup> The statute was enacted in 1994 to implement U.S. obligations under the Convention against Torture, which requires state parties to prosecute persons for torture under the principle of universal jurisdiction.<sup>121</sup> After the CIA began detaining and interrogating suspected “unlawful enemy combatants” in Afghanistan and at Guantanamo, it reportedly requested authorization to use techniques proposed by CIA psychologists involved in the U.S. Military’s SERE training program, but expressed concerns that using these techniques would expose CIA interrogators to criminal liability for torture.<sup>122</sup> According to the report of the Office of Professional Responsibility, John Yoo added the section of the Bybee Memo purporting to deny Congress any role in criminalizing torture committed in the course of interrogating enemy combatants pursuant to the President’s Commander-in-Chief powers after Michael Chertoff, then head of the DOJ’s Criminal Division, told him to inform the CIA that the Criminal Division would not issue advance pardons for CIA interrogations that violated the Torture Statute.<sup>123</sup>

The section on the President’s Commander-in-Chief Power appears as Part V and opens with the remarkable claim that “[e]ven if an interrogation method arguably were to violate Section 2340A, the statute would be unconstitutional if it impermissibly encroached on the President’s constitutional power to conduct a military campaign.”<sup>124</sup> The memo asserts that pursuant to the doctrine of “constitutional avoidance,” the OLC will not read into the statute Congressional intent that the statute’s criminal prohibitions apply to interrogations conducted pursuant to the President’s Commander-in-Chief authority.<sup>125</sup> Later, the Bybee Memo goes further and asserts that “the Department of Justice *could not enforce* Section 2340A against federal officials acting pursuant to the President’s constitutional

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Counsel, August 2009) (referencing the Bybee Memo on pg. 4 and stating that it is disavowed on pg. 11).

<sup>120</sup> See Elise Keppler, et al., *First Prosecution in the United States for Torture Committed Abroad: The Trial of Charles ‘Chuckie’ Taylor, Jr.*, 6 WASH. COLL. LAW HUM. RIGHTS BRIEF 18, 18 (2008) (describing 18 U.S.C. §§ 2340-2340A as “extraterritorial Torture Statute”).

<sup>121</sup> *Id.* at 18-9.

<sup>122</sup> See Avidan Y. Cover, *Supervisory Responsibility for the Office of Legal Counsel*, 25 GEO. J. LEG. ETHICS 269, 278 (2012) (discussing SERE training as well as the concern of legality of the techniques).

<sup>123</sup> See Investigation into the Office of Legal Counsel’s Memoranda Concerning Issues Relating to the Central Intelligence Agency’s Use of “Enhanced Interrogation Techniques” on Suspected Terrorists, ACLU-RDI 5022, 49-50 (Dept. of Justice, Office of Professional Responsibility, July 2009).

<sup>124</sup> See Op. O.L.C., *supra* note 115, at 31.

<sup>125</sup> *Id.* at 34-5.

authority to wage a military campaign” even if they found that Congress expressly intended for the prohibition on torture to apply to such interrogations.<sup>126</sup> Much has already been said and done to repudiate this interpretation of the president’s Commander-in-Chief powers, but for us the important point is to ask where this interpretation came from.

In the world of human affairs, if we want to learn who is implicated in or responsible for a crime, we have to “follow the money.” In the world of legal theory, we have to follow the citations. Who does Yoo cite for his argument from “constitutional avoidance” and his claim that the DOJ cannot enforce a federal criminal statute against a federal executive officer acting under presidential authority in violation of that statute? Interestingly enough, in both instances, it’s the same 1984 OLC opinion entitled *Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted A Claim of Executive Privilege*.<sup>127</sup> The 1984 memo asserted that executive branch officials cannot be subject to prosecution for criminal contempt of Congress for asserting executive privilege because such prosecutions would “significantly and immeasurably impair the President’s ability to fulfill his constitutional duties.” Yoo cites this 1984 memo for the proposition that the “constitutional principles” invoked in the 1984 memo, “preclude an application of Section 2340A to punish officials for aiding the President in exercising his exclusive constitutional authorities. *Id.*”<sup>128</sup>

But what is this *Id.*? The 1984 memo has *nothing at all to do* with the President’s Commander-in-Chief powers and can hardly be an *Id.* for the claim that C.I.A. interrogators can’t be prosecuted for torture. On the contrary, if you follow Yoo’s cite, you see that this 1984 memo is none other than the OLC opinion that triggered the confrontation between Congress and the E.P.A. over the E.P.A.’s refusal to comply with a congressional subpoena that ultimately resulted in Theodore Olson’s testimony regarding his rôle in this confrontation being referred to the Independent Counsel. The 1984 opinion Yoo cites did not deal with the president’s Commander-in-Chief powers, but *it did* proffer an expansive view of the DOJ’s plenary and preclusive control over the exercise of federal prosecutorial power. Not only did the 1984 memo assert that “[t]he President, through a United States Attorney, need not, *indeed may not*, prosecute criminally a subordinate for asserting on his behalf a claim of executive privilege[.]”<sup>129</sup> it further asserted that neither the Legislative Branch nor the courts could “require or

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<sup>126</sup> See Op. O.L.C., *supra* note 115, at 36 (italics added).

<sup>127</sup> See Memorandum Opinion for the Attorney General Re: Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege, Op. O.L.C., 134 (Office of Legal Counsel, August 2002) [hereinafter Memorandum Opinion for the Attorney General].

<sup>128</sup> See Op. O.L.C., *supra* note 115, at 35.

<sup>129</sup> See Memorandum Opinion for the Attorney General, *supra* note 127, at 141.



implement the prosecution of such an individual.”<sup>130</sup> Yoo concedes that the 1984 memo treats of “a different context,” but that does not stop him from summing up his argument for CIA immunity from prosecution for torture in words that echo and extend the theory, not of the Commander-in-chief power, but of “the unitary executive.” Yoo puts it this way, “[a]lthough Congress may define federal crimes that the President, through the Take Care Clause, should prosecute, Congress cannot compel the President to prosecute outcomes taken pursuant to the President’s own constitutional authority. If Congress could do so, it could control the President’s authority through the manipulation of federal criminal law.”<sup>131</sup> Interestingly enough, then, the legal theory used to cast CIA immunity from prosecution for torture as a constitutional necessity is nothing but an extension of the theory of the unitary executive articulated in a 1984 memo written by Theodore Olson in order to frustrate a Congressional investigation of alleged shenanigans at Reagan’s E.P.A. So then what happens?

#### IV. WHEN IMPUNITY AND CORRUPTION CONVERGE: HOW THE PAST BECOMES THE FUTURE AGAIN

Well then in November 2008, Obama wins the presidential election, and on his first full day in office, he bans coercive interrogations and orders the closure of remaining CIA black sites, but from the beginning of his first term to the end of his second, President Obama made it very clear that he was more interested in looking “forward as opposed to backwards.”<sup>132</sup> Not surprisingly, his Attorney General, Eric Holder, shared the President’s conviction. Thus, rather than appointing a special prosecutor to investigate CIA treatment of detainees in their custody as the ACLU requested as early as March 2009,<sup>133</sup> on August 24, 2009, A.G. Holder assigned the job to John Durham, who was then in the process of investigating whether any laws were violated by the destruction of CIA interrogation tapes in 2005.<sup>134</sup> In expanding the mandate Durham had received from Bush’s A.G. Mukasey, Holder echoed Obama’s concern that the country look forward rather than

<sup>130</sup> *Id.*

<sup>131</sup> See Op. O.L.C., *supra* note 115, at 36.

<sup>132</sup> See Scott Shane, *Holder Rules Out Prosecutions in C.I.A. Interrogations*, N.Y. TIMES, Aug. 30, 2012, <https://www.nytimes.com/2012/08/31/us/holder-rules-out-prosecutions-in-cia-interrogations.html>.

<sup>133</sup> See Letter from American Civil Liberties Union, to Eric Holder, Att’y Gen., Dep’t of Justice (March 17, 2009), <https://www.aclu.org/news/aclu-asks-justice-department-appoint-independent-prosecutor-investigate-torture>.

<sup>134</sup> *Top prosecutor orders probe into interrogations; Obama shifts onus*, CNN, Aug. 24, 2009, <http://www.cnn.com/2009/POLITICS/08/24/us.terror.interrogations/index.html>; Kevin Whitelaw, *CIA Under Scrutiny as Prosecutor Leads Abuse Inquiry*, NPR, Aug. 24, 2009, <https://www.npr.org/templates/story/story.php?storyId=112166549>.

backward and assured his intended audiences that “[t]he Department of Justice will not prosecute anyone who acted in good faith and within the scope of the legal guidance given by the Office of Legal Counsel regarding the interrogation of detainees.”<sup>135</sup>

To make a long story short, the results of Durham’s investigations were disappointing from the perspective of the struggle against impunity. In 2010, Durham announced he would not bring charges against anyone involved in destroying the CIA tapes,<sup>136</sup> and in 2012, Holder announced that no one would be prosecuted in connection with the deaths of two CIA detainees for lack of “admissible evidence sufficient to obtain and sustain a conviction beyond a reasonable doubt.”<sup>137</sup> In fact, all during Obama’s presidency, as new evidence clarified the scope of the abuses and the identities of principals and architects of the torture program, human rights groups called on the Administration to investigate and prosecute to no avail. For example, when George W. Bush openly admitted to his role in personally approving the waterboarding of three detainees, calls that the matter be referred to Durham for investigation led nowhere.<sup>138</sup>

After the Senate Intelligence Committee released its study of the CIA’s Detention and Interrogation Program on December 9, 2014,<sup>139</sup> human rights groups again appealed to the administration for the appointment of a special prosecutor for torture. Indeed, Human Rights Watch cited information released in the Senate report in its requests to A.G. Holder in December 2014,<sup>140</sup> in a similar request to A.G. Loretta Lynn, on June 8, 2015,<sup>141</sup> and to

<sup>135</sup> *Attorney General Eric Holder Regarding a Preliminary Review into the Interrogation of Certain Detainees*, DEP’T OF JUSTICE, Aug. 24, 2009, <https://www.justice.gov/opa/speech/attorney-general-eric-holder-regarding-preliminary-review-interrogation-certain-detainees>.

<sup>136</sup> Terry Frieden, *No prosecution for destruction of CIA tapes, Justice Department says*, CNN, Nov. 9, 2010, <http://www.cnn.com/2010/US/11/09/cia.interrogation.tapes/index.html>.

<sup>137</sup> Shane, *supra* note 132.

<sup>138</sup> Dan Froomkin, *Bush’s Waterboarding Admission Prompts Calls for Criminal Probe*, HUFFINGTON POST, Nov. 11, 2010, [https://www.huffingtonpost.com/2010/11/11/calls-for-criminal-invest\\_n\\_782354.html](https://www.huffingtonpost.com/2010/11/11/calls-for-criminal-invest_n_782354.html); *Bush Openly Confesses Torture Authorization, No Prosecutions for CIA Tape Destruction: Why We Care and Why Bush Should Worry* | Center for Constitutional Rights, CENTER FOR CONSTITUTIONAL RIGHTS, <https://ccrjustice.org/home/get-involved/tools-resources/inside-ccr/bush-openly-confesses-torture-authorization-no> (last visited Sept. 4, 2018).

<sup>139</sup> Mark Mazzetti, *Panel Faults C.I.A. Over Brutality and Deceit in Terrorism Interrogations*, N.Y. TIMES, Jan. 10, 2018, <https://www.nytimes.com/2014/12/10/world/senate-intelligence-committee-cia-torture-report.html>.

<sup>140</sup> Letter from Anthony Romero, Exec. Dir., American Civil Liberties Union & Kenneth Roth, Exec. Dir., Human Rights Watch to Eric Holder, Att’y General, Dec. 22, 2014, <https://www.hrw.org/news/2014/12/22/letter-attorney-general-holder-requesting-appointment-special-prosecutor-torture> (last visited Sep 3, 2018).

<sup>141</sup> Letter from Kenneth Roth, Exec. Dir., Human Rights Watch to Loretta Lynch, Att’y

President Obama, himself, on June 16, 2016.<sup>142</sup> In all of these requests, HRW noted limitations in Durham's investigation, the availability of new evidence, and the country's obligations to investigate and prosecute torture under international law. On each occasion, requests for appointment of a special prosecutor noted the danger that the mantra of forward, not backwards would provide aid and comfort to impunity. As HRW put it:

[T]he necessity of investigating issues of criminal liability is made more urgent by the fact that many of the individuals who authorized the conduct documented in the Senate torture report are publicly defending the necessity, effectiveness, and legality of that conduct. Against this background, we believe the failure to conduct a comprehensive criminal investigation would contribute to the notion that torture remains a permissible policy option for future administrations; undermine the ability of the United States to advocate for human rights abroad; and compromise Americans' faith in the rule of law at home.<sup>143</sup>

Trump's election in 2016 on a campaign promising to bring back torture and his subsequent nomination of Gina Haspel to direct the CIA<sup>144</sup> perhaps enables us now to come full circle to the problem of structural corruption. When the corruption of a system is so layered by the history of things done and undone that the otherwise quite understandable desire to look forward rather than backward becomes the vehicle of impunity, this is when the past is future again. The Obama Administration refused to prosecute the atrocity crimes of the Bush regime because Obama wanted to look forward rather than backward, and so his Attorney General announced a general immunity for torture conducted within the parameters set forth by the OLC memos.<sup>145</sup> But what if the Office of the Independent Counsel had never been so relentlessly attacked by ideological partisans of the unitary executive? We most likely will never know whether Gina Haspel would have been prosecuted, rather than promoted, and only time will tell whether Mueller's investigation will come to a premature or defective termination that could have been avoided had the protections of the Independent Counsel statute been available. What we do know is that the history of impunity in Guatemala gives us good reason to believe that prosecuting the atrocity

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General, June 8, 2015, <https://www.hrw.org/news/2015/06/08/letter-attorney-general-loretta-lynch-outlining-human-rights-priorities-department> (last visited Sep 3, 2018).

<sup>142</sup> Letter from Kenneth Roth, Exec. Dir., Human Rights Watch to Barack Obama, President, June 16, 2016, <https://www.hrw.org/news/2016/06/16/letter-president-obama-re-cia-torture> (last visited Sep 3, 2018).

<sup>143</sup> Letter from Kenneth Roth to Loretta Lynch, *supra* note 141.

<sup>144</sup> Savage, *supra* note 24; see generally Trump's Draft Executive Order, *supra* note 24.

<sup>145</sup> Attorney General Eric Holder Regarding a Preliminary Review into the Interrogation of Certain Detainees, *supra* note 134.

crimes of those in high places is indeed an absolutely overriding value, notwithstanding Scalia's asserted view to the contrary in *Morrison v. Olson*.<sup>146</sup>

Scalia's dissent in *Morrison* is worth taking issue with, not only because it mischaracterizes original intent, normalizes unethical behavior by prosecutors and judges, and attacks the principle of government under the rule of law, but because of the sophistical manner in which it dissimulates these moves in the guise of securing accountability to the people as the only satisfactory and constitutionally authentic remedy for corruption in high places. And here perhaps we can tie up the final loose ends of my presentation. I have now shown you how Haspel's confirmation and Mueller's travails are connected to each other by way of *an absence*, a lack—the vacuum created by the demise of the office of independent counsel, engineered by partisans of the unitary executive. The final question is what any of this has to do with Guatemala or with the genocide conviction and reversal of Ríos Montt.

Montt's conviction was reversed by the Guatemalan Constitutional Court under heavy pressure from business and military elites<sup>147</sup> on the ostensible grounds that the lower court had improperly dismissed Ríos Montt's amnesty request under the defunct Decree Law 8-86.<sup>148</sup> Certainly, the legitimacy of the amnesty granted to CIA personnel continues to be a matter of concern insofar it features centrally in the continued interest the case raises internationally, most notably with the prosecutor of the International Criminal Court.<sup>149</sup> But I think Guatemala's experience has other lessons to offer regarding the consequences of allowing impunity in high office to take hold of a government.

In one respect, the bigger lesson is in the story of Guatemalan president, Otto Pérez Molina, who was forced to resign the presidency on October 3, 2015 after Guatemalan prosecutors supported by the United Nations International Commission against Impunity in Guatemala [CICIG]<sup>150</sup> revealed his role in a corruption scheme of bribes and kickbacks involving the diversion of millions of dollars from the people to officials at all levels

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<sup>146</sup> See generally *Morrison*, 487 U.S., at 371.

<sup>147</sup> Burt, *supra* note 13.

<sup>148</sup> Valey, *supra* note 10 (providing remarkable account of the reasoning with which a majority of the Constitutional Court overturned the lower court's dismissal of Ríos Montt's amnesty request and the successive judicial recusals that followed the Court's reversal).

<sup>149</sup> Merrit Kennedy, *ICC Prosecutor Calls for Afghanistan War Crimes Investigation*, NPR, Nov. 3, 2017, <https://www.npr.org/sections/thetwo-way/2017/11/03/561842662/icc-prosecutor-calls-for-afghanistan-war-crimes-investigation>; see ICC-02/17, Request for Authorization of an Investigation Pursuant to Article 15, Nov. 20, 2017, [https://www.icc-cpi.int/courtrecords/cr2017\\_06891.pdf](https://www.icc-cpi.int/courtrecords/cr2017_06891.pdf).

<sup>150</sup> See generally COMISIÓN INTERNACIONAL CONTRA LA IMPUNIDAD EN GUATEMALA (CICIG), <https://www.cicig.org/> (last visited Sep 3, 2018).

of government including the president and vice president.<sup>151</sup> Francisco Goldman does an excellent job showing how a culture of impunity can so seize the institutions of a country that it takes five months of mass protests by hundreds of thousands of people to force the members of these institutions one by one to abandon their role in giving cover to a corrupt and criminal presidency.<sup>152</sup> Perhaps the mass uprising by which the Guatemalan people secured the resignation of Pérez Molina in some way vindicates Justice Scalia's vision of a legal system that recurs to the people to secure itself from the corruption of a legally unaccountable unitary executive, but more likely it does not.

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<sup>151</sup> Francisco Goldman, *From President to Prison: Otto Pérez Molina and a Day for Hope in Guatemala*, THE NEW YORKER, Sept. 4, 2015, <https://www.newyorker.com/news/news-desk/from-president-to-prison-otto-perez-molina-and-a-day-for-hope-in-guatemala>.

<sup>152</sup> *Id.*