

Enough Already
By Viet Dinh and Neal Katyal
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As the grand-jury investigation of the CIA leak nears its originally scheduled expiration date tomorrow, people of all political persuasions should take a moment to reflect on the dangerous grant of power given to Special Counsel Patrick Fitzgerald. In a pair of letters written Dec. 30, 2003, and Feb. 6, 2004, but disclosed last Friday, then-Acting Attorney General James Comey gave Mr. Fitzgerald "all the authority of the Attorney General." While laudable as an act of political courage, Mr. Comey gave Mr. Fitzgerald the sort of power that Kenneth Starr and Laurence Walsh held, in Whitewater and Iran-Contra, respectively. And for that reason, the current investigation will open itself up to predictable charges of structural overzealousness if and when someone is charged. There is a better way to conduct these investigations -- and it is on the books already.

In 1999, after experience with the distorted prosecutorial incentives created by the Independent Counsel Act, the Justice Department sought the act's termination and its replacement with regulations for an outside special prosecutor supervised by the Justice Department. Those regulations are on the books now, but for reasons unknown were not followed.

These regulations require a special prosecutor to come from "outside" the government (Mr. Fitzgerald is a federal prosecutor in Chicago). They give the special counsel day-to-day independence to conduct an investigation, but would have required Mr. Fitzgerald to notify the attorney general, or in this case, because of John Ashcroft's recusal, the acting attorney general, of any major steps before they are taken. That, of course, may have led to Mr. Comey's discomfort with the regulations -- for they gave him the ability to shut an investigation down, perhaps even for nefarious reasons.

But these regulations also require notification to congressional committee leaders of both parties when the attorney general does not permit the special counsel to proceed with any step of the investigation. That publicity checks against the possibility of a coverup.

We now face the spectacle that Mr. Fitzgerald, a respected prosecutor of unquestioned integrity, may face claims of an unwarranted prosecution. That spectacle will come in two acts. Act I has already started, with some pointing out that perjury and obstruction of justice are not appropriate subjects for a prosecution when the initial focus was on the leak of a covert agent's identity. Never mind the hypocrisy that these Republican voices applauded when a Democratic president was investigated for perjury and obstruction by a prosecutor who began by looking into a real-estate deal.

Some, with the self-interested media at their side, are also starting to make the claim that leaks of classified information are routine and not prosecuted. But that claim ignores the fact that the allegations here do not involve a leak by a low-level staffer trying to impress

some journalist; they concern allegations that the senior leadership of the White House was leaking classified material.

The difference is everything: In the low-level staffer case, censure of the employee removes the bad apple and reassures the intelligence community that the White House can be trusted. With a high-level official privy to all sorts of secrets, possessing clearances for compartmentalized information that cuts across so many areas, condoning a leak gravely jeopardizes the information flow to the White House. Nothing could be more damaging than an intelligence community that feels it cannot give information to the White House for fear of leaking sources and methods. That concern, always present, is at its apogee when high-level leaks go unpunished.

Act II, the attack on the overzealous special prosecutor, will unfold if and when charges are brought. Here the critics have an important point -- one recognized by Democrats in the '90s and Republicans in the '80s: Truly independent investigations take on a life of their own. Prosecutors depend on both multiple competing priorities and Justice Department supervision to check and balance their awesome powers. When those constraints are removed, even the best men and women may be tempted to act inappropriately. Now it will be the Democrats' turn to act with amnesia, claiming that all crimes must go punished and that the single-minded structural focus of the prosecutor is irrelevant.

To be successful, Mr. Fitzgerald has to overcome the inherent problems created by the letters appointing him and the politicized hyperamnesia of contemporary Washington. Even if he has the facts, skill and panache to do all of this, future special prosecutors will not. That's why Mr. Fitzgerald should be the last of these independent prosecutors. It is time to end this experiment and house future investigations in the place that they belong.