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# The Politics of the Clinton Impeachment and the Death of the Independent Counsel Statute: Toward Depoliticization

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# THE POLITICS OF THE CLINTON IMPEACHMENT AND THE DEATH OF THE INDEPENDENT COUNSEL STATUTE: TOWARD DEPOLITICIZATION

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Marjorie Cohn \*

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## I. INTRODUCTION

Impeachment was written into the Constitution by men mindful of its immensely political nature. Alexander Hamilton, in *Federalist* No 65, labeled impeachments "POLITICAL, as they relate chiefly to injuries done immediately to the society itself."<sup>1</sup> He knew the prosecution of impeachments would arouse deep partisanship for and against the accused.<sup>2</sup> Hamilton's words were prescient.

This essay analyzes the highly partisan nature of the Clinton impeachment enabled by the independent counsel statute. Part II traces the history of the Andrew Johnson impeachment, for later contrast with Clinton's case. In Part III, the legacy of Watergate and the resultant genesis of the independent counsel statute – the Ethics in Government Act – provide a backdrop for the Clinton impeachment. Part

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<sup>1</sup> THE FEDERALIST NO. 65, at 396 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>2</sup> "The prosecution of [impeachments] . . . will seldom fail to agitate the passions of the whole community, and to divide it into parties more or less friendly to the accused." *Id.*

IV chronicles Kenneth Starr's appointment as "independent counsel," and Part V portrays his crusade against Bill Clinton. Henry Hyde's leadership in the impeachment and the Senate trial are detailed in Part VI. Part VII describes the death of the independent counsel statute as a result of the Clinton debacle. Finally, Part VIII and the Conclusion provide suggestions to depoliticize the investigations of high government officials.

## II. THE ANDREW JOHNSON IMPEACHMENT

Although Andrew Johnson was a Jacksonian Democrat, he strongly supported the Union when secession became a major issue on the national agenda.<sup>3</sup> He had, however, the same racist attitudes held by most Democrats. A slave owner himself, Johnson vetoed legislation to aid the newly freed slaves and helped Confederate states rejoin the Union even though they did not guarantee equal rights for the former slaves.<sup>4</sup> Because he was perceived as lenient toward the South, Johnson incurred the enmity of Congress. The primary impeachment accusation against him was violation of the Tenure in Office Act. It prohibited a president from removing a federal officer – including a cabinet member – without the consent of Congress. Johnson unilaterally fired Secretary of War Edwin Stanton, the sole remaining Radical – and a perceived spy – in Johnson's administration. The law, since held unconstitutional, had been enacted to protect Stanton.<sup>5</sup> This violation is now widely perceived as having been an excuse to go after Johnson.<sup>6</sup> Ultimately, Andrew Johnson was acquitted.

## III. THE LEGACY OF WATERGATE

The impeachments of Presidents Andrew Johnson and William Jefferson Clinton were both motivated by virulent partisanship. The issues underlying the Clinton case, however, were based on much less weighty matters than the President's policies on Reconstruction. By the time Clinton became president, Watergate had left an indelible mark on the country. Kenneth Starr, the prosecutor who pursued Clinton with uncommon zeal, was selected by – and beholden to – conservative Republicans. Bill Clinton's personal weaknesses gave Starr the ammunition to set in motion a long and painful chapter in the history of American politics.

What began as an apparent garden-variety burglary ultimately became the

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<sup>3</sup> See Marjorie Cohn, *Open-and-Shut: Senate Impeachment Deliberations Must Be Public*, 51 HASTINGS L.J. 365, 382 (2000).

<sup>4</sup> See *id.*

<sup>5</sup> See *id.*; *Myers v. U.S.*, 272 U.S. 52 (1926).

<sup>6</sup> See Cohn, *supra* note 3, at 383-84. For a more detailed background of the Johnson impeachment, see *id.* at 380-85.

greatest presidential scandal since the Johnson impeachment. The Vietnam War, which generated unprecedented opposition among the American people, had caused them to view their government more critically. U.S. involvement in Vietnam had no sooner ended when Americans found themselves transfixed before their television sets during the summer of 1974, as the Watergate saga unfolded. Watergate enhanced the accountability Americans demand from their political leaders. In its wake, the media and the public now scrutinize the personal behavior of presidents and politicians in a radically different manner.<sup>7</sup>

A few months before the 1972 presidential election, five burglars carrying photographic and eavesdropping equipment broke into the Democratic National Committee headquarters at the Watergate office-apartment-hotel complex in Washington, D.C.<sup>8</sup> Richard Milhous Nixon was re-elected President by the greatest electoral landslide in U.S. history.<sup>9</sup> Even so, a thorough expose by Carl Bernstein and Bob Woodward of the *Washington Post*, as well as congressional investigators and special prosecutors, revealed Nixon's complicity in a massive conspiracy to cover up the politically motivated break-in.<sup>10</sup>

The pressure of public opinion eventually forced Congress to act against Richard Nixon.<sup>11</sup> The House Judiciary Committee voted to recommend to the House of Representatives three articles of impeachment.<sup>12</sup> Nixon resigned to avoid facing the charges.<sup>13</sup>

At Nixon's behest, Special Prosecutor Archibald Cox had been fired after he pushed to subpoena the "smoking gun" tapes where Nixon admitted his stewardship in the cover-up. The battle over these tapes became the linchpin of the Nixon impeachment case.<sup>14</sup> Cox's firing – known as the Saturday Night Massacre –

<sup>7</sup> See BOB WOODWARD, *SHADOW – FIVE PRESIDENTS AND THE LEGACY OF WATERGATE* (1999) [hereinafter WOODWARD, SHADOW].

<sup>8</sup> See CARL BERNSTEIN & BOB WOODWARD, *ALL THE PRESIDENT'S MEN* 1-2 (1994). They included James W. McCord, Jr., security coordinator for the Committee to Re-Elect the President (CREEP). Also indicted later for conspiracy was G. Gordon Liddy, counsel for the CREEP Finance Committee. Both McCord and Liddy were convicted in January 1975. See *id.* at 238-40; *Watergate: Chronology of a Crisis*, CONGRESSIONAL QUARTERLY 4, 40 (1974).

<sup>9</sup> See Haynes Johnson, *10 Years Later, Watergate's Wake Lingers*, WASH. POST, Aug. 8, 1984.

<sup>10</sup> See BERNSTEIN & WOODWARD, *supra* note 8; Katy J. Harriger, *The History of the Independent Counsel Provisions: How the Past Informs the Current Debate*, 49 MERCER L. REV. 489, 493-494 (1998) [hereinafter Harriger, *History of Independent Counsel*].

<sup>11</sup> See Barry Sussman, *Judicious 'Judgment'*, WASH. POST, Jul. 27, 1984, at B6; W.S. Moorhead, *Watergate: The Quiz*, WASH. POST, Aug. 6, 1989, at B5; Harriger, *History of Independent Counsel*, *supra* note 10, at 495 & n. 24.

<sup>12</sup> 120 CONG. REC. D557, D562 (1974). The articles charged Nixon with obstruction of justice, abuse of power and contempt of Congress. All Democrats and most Republicans voted to recommend impeachment.

<sup>13</sup> Gerald Ford, who became president upon Nixon's resignation, immediately granted Nixon a full pardon. See Johnson, *supra* note 9.

<sup>14</sup> The turning point came when the Supreme Court denied Nixon's claim of absolute executive privilege and ordered him to turn over the tapes. See *U.S. v. Nixon*, 418 U.S. 683 (1974).

provided the impetus for Congress to create the mechanism for an independent, judicially appointed prosecutor.<sup>15</sup> “The massacre led to the wide-spread belief that executive control of the special prosecutor clearly could, and in this case quite dramatically did, interfere with the independence of an investigation.”<sup>16</sup> It is generally accepted that the Nixon case was not the product of partisan Congressional politics, but rather a strong case on its merits.<sup>17</sup>

The Watergate scandal gave birth to the Ethics in Government Act (the Act), whose progeny empowered Kenneth Starr twenty years later to probe every aspect of Bill Clinton’s sex life. Three years after Richard Nixon resigned in infamy, President Jimmy Carter called for Congress to pass a law authorizing the appointment of a special prosecutor to investigate and prosecute unlawful acts by high government officials.<sup>18</sup> Samuel Dash, a professor at Georgetown University Law Center, and North Carolina Democratic Senator Sam J. Ervin, Jr., who chaired the Senate Watergate Committee, had pushed for the new law since the Saturday Night Massacre.<sup>19</sup>

Illinois Congressman Henry Hyde, one of the only Republicans to survive the “post-Watergate disaster,”<sup>20</sup> spoke in favor of the bill, which passed both houses of Congress in 1978.<sup>21</sup> It empowered the attorney general (AG) to conduct a preliminary 90-day investigation when serious allegations arose involving a high government official. The AG could drop the investigation if s/he found no basis for it; but if the AG found some merit to the charges, s/he must apply to a new three-judge panel of federal court judges who would appoint a special prosecutor to investigate, prosecute, and issue a report. President Carter, who signed Senate Bill 555 on October 26, 1978, declared, “I believe that this act will help to restore confidence in the integrity of our government.”<sup>22</sup>

In 1994, the Act was reauthorized by Congress.<sup>23</sup> Ironically, when

<sup>15</sup> See Harriger, *History of Independent Counsel*, *supra* note 10, at 493, 495.

<sup>16</sup> *Id.* at 496.

<sup>17</sup> See, e.g., Sussman, *supra* note 11, at B6. Republican House Judiciary Committee member Cadwell Butler (R-Va.) said, “The presentation of the evidence was, I thought, quite objective.” Butler felt, “if we [didn’t] impeach under these circumstances, then there is something wrong with the process.” *Id.* Paul S. Sarbanes (D-Md.), also a member who voted to impeach, said the committee had reached a bipartisan agreement in the Nixon case. See Spencer S. Hsu, *Area Legislators Shed Light on Their Impeachment Votes; Weighing Emotions; Politics in a Struggle to Pass Judgment*, WASH. POST, Feb. 28, 1999, at V8.

<sup>18</sup> See Ethics Message Text, CONGRESSIONAL QUARTERLY WEEKLY 865-66 (May 7, 1977) (text of Pres. Carter’s May 3, 1977 speech to Congress). For background on the development of this law, see Ken Gormley, *An Original Model of the Independent Counsel Statute*, 97 MICH. L. REV. 601 (1998).

<sup>19</sup> See WOODWARD, SHADOW, *supra* note 7, at 62.

<sup>20</sup> See *id.* at 66.

<sup>21</sup> See 124 CONG. REC. 36,463 (1978) (remarks of Hyde); 124 CONG. REC. 34,526 (1978) (Senate vote on conference report); 124 CONG. REC. 36,469 (1978) (House vote on conference report).

<sup>22</sup> See 14 WEEKLY COMP. PRESS DOC. 1854-56 (Oct. 26, 1978); Fred Barbash, Ass. Press, *President Signs for U.S. Workers Disclosure Bill*, WASH. POST, Oct. 27, 1978, at A1.

<sup>23</sup> Since originally enacted in 1978, the statute had been reauthorized twice (28 U.S.C. §592, et seq.

President Clinton signed the Independent Counsel Reauthorization Act, he said:

I am pleased to sign into law the reauthorization of the Independent Counsel Act. This law, originally passed in 1978, is a foundation stone for the trust between the Government and our citizens. It ensures that no matter what party controls the Congress or the executive branch, an independent, nonpartisan process will be in place to guarantee the integrity of public officials and ensure that no one is above the law. Regrettably, this statute was permitted to lapse when its reauthorization became mired in a partisan dispute in the Congress. Opponents called it a tool of partisan attack against Republican presidents and a waste of taxpayer funds. It was neither. In fact, the independent counsel statute has been in the past and is today a force for government integrity and public confidence.<sup>24</sup>

President Clinton could not foresee that this statute would be used by the Republicans to pursue him in an unparalleled manner.

#### IV. THE POLITICAL APPOINTMENT OF AN "INDEPENDENT COUNSEL"

On July 20, 1993, Deputy White House Counsel Vincent Foster was found dead in a park in Virginia, an apparent suicide. Two days later, White House Counsel Bernard Nussbaum removed Whitewater files from Foster's office. Bill Clinton's business partner in the Arkansas Whitewater Development Corporation, James B. McDougal, owned the failed Madison Guaranty Savings and Loan in Little Rock, Arkansas. Suspicion arose that money may have flowed from Madison Guaranty to both Whitewater and Clinton's gubernatorial campaign in 1985.<sup>25</sup>

In the face of mounting pressure from Republicans in Congress, Clinton directed Attorney General Janet Reno to name an independent counsel to investigate Whitewater.<sup>26</sup> On January 20, 1994, Reno appointed New York lawyer Robert B. Fiske Jr., a moderate Republican who had served as U.S. Attorney during the Carter administration, as special counsel to conduct a criminal investigation of Whitewater.<sup>27</sup>

The following month, at a press conference sponsored by the Conservative Political Action Conference, Paula Jones announced that Clinton made unwanted

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(1983); 28 U.S.C. §591, et. seq. (1987)), and the Supreme Court had upheld its constitutionality. See *Morrison v. Olson*, 487 U.S. 654 (1988). For discussion of the debates on reauthorization, see Harriger, *History of Independent Counsel*, *supra* note 10, at 505-14.

<sup>24</sup> See Independent Counsel Reauthorization Act of 1994, Pub. L. No. 103-270 (statement by President of the United States, June 30, 1994).

<sup>25</sup> See WOODWARD, SHADOW, *supra* note 7, at 232-33.

<sup>26</sup> See Susan Schmidt, *Judges Replace Fiske as Whitewater Counsel; Ex-Solicitor General Starr to Take Over Probe*, WASH. POST, Aug. 6, 1994, at A1.

<sup>27</sup> See WOODWARD, SHADOW, *supra* note 7, at 240-42.

sexual advances toward her on May 8, 1991. In May of 1994, Jones filed a sexual harassment lawsuit against Clinton.<sup>28</sup>

Fiske issued a report in June, concluding Foster's death was a suicide unrelated to Whitewater, while declining to file criminal charges relating to contacts between the White House and Treasury Department involving Madison Guaranty.<sup>29</sup> After Congress re-authorized and Clinton signed the Independent Counsel Reauthorization Act,<sup>30</sup> a panel of three federal appeals court judges declined to re-appoint Fiske under the new law "because the Act contemplates an apparent as well as an actual independence on the part of the Counsel." The panel cited Fiske's "perceived" conflict of interest because his original appointment had come from [Attorney General Reno who was part of] the Clinton administration.<sup>31</sup>

In the months leading up to the dismissal of Fiske, Republicans such as Senate Minority Leader Robert J. Dole (R-Kan.) and Senators Lauch Faircloth (R-N.C.) and Alfonse M. D'Amato (R-N.Y.) complained about Fiske's handling of the Whitewater investigation.<sup>32</sup> Many Republicans were critical of Fiske for asking the Democratic congressional leadership to substantially narrow the scope of the Whitewater hearings.<sup>33</sup> They also refused to accept his conclusion about Vincent Foster's death.<sup>34</sup> But Rusty Hardin, one of Fiske's senior staff attorneys, said, "Anybody who thinks Fiske was not a totally independent prosecutor is just flat-out

<sup>28</sup> See *Jones v. Clinton*, No. LR-C-94-290 (E.D. Ark.); see also Dan Balz, *Washington's Extraordinary Week; How the Events Unfolded, From Jones to Lewinsky*, WASH. POST, Jan. 25, 1998, at A1.

<sup>29</sup> See Sara Fritz, *New Whitewater Prosecutor/Panel Replaces Fiske with Former Bush Aide*, L.A. TIMES, Aug. 6, 1994, at 1; Schmidt, *supra* note 26; Viveca Novak, *New Whitewater Counsel Heightens Risk*, WALL ST. J. EUR., Aug. 8, 1994, at 2.

<sup>30</sup> The independent counsel statute, adopted in 1978 as a result of the Watergate affair, lapsed in 1992 due to Republican opposition to its renewal. See Harriger, *History of Independent Counsel*, *supra* note 10, at 498-514; see News Services, *Top Whitewater prosecutor replaced - Clinton administration stunned as former Bush official succeeds Fiske*, STAR TRIB. (Mpls.-St. Paul), Aug. 6, 1994, at 1A. Re-authorized in 1994 after Clinton helped persuade congressional Republicans that the statute might help the party out of power (see Harriger, *History of Independent Counsel*, *supra* note 10, at 512), it provided:

Notwithstanding any other provision of law, an independent counsel appointed under this chapter shall have, with respect to all matters in such independent counsel's prosecutorial jurisdiction established under this chapter, full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice, except that the Attorney General shall exercise direction or control as to those matters that specifically require the authorization by the Attorney General's personal action under section 2516 of title 18 [which requires authorization by the Attorney General for certain electronic surveillance].

28 U.S.C. § 594(a) (1994). After the Attorney General requested an independent counsel, the Special Division of the United States Court of Appeals appointed the independent counsel. 28 U.S.C. § 593(b)(1) (1994).

<sup>31</sup> Order Appointing Independent Counsel, In re: Madison Guaranty Savings and Loan Association, Div. No. 94-1 (Aug. 1994).

<sup>32</sup> See Schmidt, *supra* note 26.

<sup>33</sup> See News Services, *supra* note 30; Novak, *supra* note 29.

<sup>34</sup> See Harriger, *History of Independent Counsel*, *supra* note 10, at 516.

wrong.”<sup>35</sup>

Kenneth Winston Starr was selected by the three-judge panel in August 1994 to replace Robert Fiske as independent counsel. Starr’s law firm, Kirkland & Ellis, had given legal advice about *Jones v. Clinton* to Jones lawyer Gilbert K. Davis.<sup>36</sup> Starr had also publicly challenged Clinton’s claim to immunity from the Paula Jones lawsuit while the President was in office. In fact, Starr had considered filing an *amicus curiae* brief on behalf of Jones for the anti-Clinton Independent Women’s Forum on the same issue. Further, he had served as U.S. Attorney in the Bush Administration. As a result of his clearly strong political connections to the Republican party and anti-Clinton supporters, his appointment to succeed Fiske came as somewhat of a surprise to observers.<sup>37</sup> But an analysis of the politics of the judges who selected Starr explains this apparent anomaly.

To illustrate, Chief Justice William Rehnquist, a conservative Republican, appointed the three-judge panel.<sup>38</sup> The presiding judge, David B. Sentelle, of the U.S. Circuit Court of Appeals for the D.C. Circuit, was a Reagan appointee and a staunch conservative.<sup>39</sup> Additionally, a group of conservative congressional Republicans and anti-Clintonite Floyd Brown wrote to the three judges, opposing Fiske’s appointment.<sup>40</sup>

The judges chose Starr to succeed Fiske after a luncheon attended by Sentelle and Republican Senators Jesse Helms and Lauch Faircloth, all three of whom were supporters of the tobacco industry.<sup>41</sup> During Starr’s tenure as independent counsel, he continued to represent tobacco giant Brown & Williamson, fending off a threat from the White House.<sup>42</sup> Richard Cohen, of the *Washington Post*, observed, “Starr has turned an office that has a tradition of nonpartisanship into what seems an adjunct of the GOP attempt to either get Clinton or so weaken him that the next president will be a Republican. The independent counsel has

<sup>35</sup> See Schmidt, *supra* note 26.

<sup>36</sup> See Robert E. Hinerfeld, *Illicit Lawyering – Starr’s Removal for Lack of Candor Could Speed Up Trial*, L.A. DAILY J., Feb. 2, 1999, at 6. Hinerfeld served as associate independent counsel from January 1993 to March 1995.

<sup>37</sup> See *id.*; Schmidt, *supra* note 26; News Services, *supra* note 30.

<sup>38</sup> See Novak, *supra* note 29.

<sup>39</sup> See Schmidt, *supra* note 26. Sentelle had a relationship with Senator Faircloth, a fierce Clinton opponent, and Sentelle’s wife worked in Faircloth’s office. See Lloyd N. Cutler, *A Roundtable Discussion on the Independent Counsel Statute*, 49 MERCER L. REV. 457, 477 (1998). The other two on the panel were San Francisco Judge Joseph T. Sneed, named to the Ninth U.S. Circuit Court of Appeals by Nixon, and John D. Butzner Jr. of Richmond, Virginia, appointed by Lyndon B. Johnson. See Schmidt, *supra* note 26.

<sup>40</sup> See Novak, *supra* note 29; Ruth Marcus & Rebecca Fowler, *Starr Urged to Decline Counsel Post; Clinton’s Lawyer Criticizes Appointee’s Stance on Jones Suit*, WASH. POST, Aug. 8, 1994, at A1.

<sup>41</sup> See Richard Lacayo & Adam Cohen, *Inside Starr and His Operation – Is This Texas minister’s son cleaning up the corridors of power or waging partisan war on the President?* TIME MAG., Feb. 9, 1998, at 42; Robert Scheer, *The Grand Inquisitor Gets Out the Cuffs*, L.A. TIMES, Feb. 2, 1999, at B7.

<sup>42</sup> See Albert R. Hunt, *Politics & People: A Falling Starr*, WALL ST. J., June 19, 1997, at A19; Lacayo & Cohen, *supra* note 41.



continued to contribute money to Republican causes, speak at GOP events and conduct himself as if he were running for office."<sup>43</sup>

After nearly three years of investigation, Starr still did not have the evidence to charge the President or Mrs. Clinton with any criminal activity.<sup>44</sup> In February 1997, thinking his job was done, Starr accepted an offer to serve as dean of Pepperdine University Law School in California.<sup>45</sup> His new job would be bankrolled in part by billionaire and Clinton detractor Richard Mellon Scaife.<sup>46</sup> Republicans were outraged.<sup>47</sup> Conservative Senator Arlen Specter (R-Pa.) sent Starr an angry letter stating: "Your departure will have a very serious, if not devastating, effect on the investigation."<sup>48</sup> Starr capitulated, citing Specter's letter.

Following his futile attempt to resign as Independent Counsel, Starr was more determined than ever to make a criminal case against the Clintons. Starr authorized his prosecutors to delve into every aspect of the Clintons' past.<sup>49</sup> Monica Lewinsky gave Starr just what he needed.

#### V. STARR'S WAR

Three months after the appointment of Kenneth Starr as independent counsel, the Republicans gained control of Congress. In July of 1995, 21-year-old Monica Lewinsky came to work at the White House as an intern.<sup>50</sup> Linda Tripp had been hired in 1990 by the Bush White House in a low-level administrative position and stayed on in the Clinton Administration as executive assistant to White House Counsel Bernard Nussbaum. The month after Lewinsky began her internship, Tripp, then working at the Pentagon, was called to testify on Whitewater before the Senate. Tripp had worked for Vincent Foster and was one of the last people to see him alive.<sup>51</sup>

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<sup>43</sup> Richard Cohen, *Pepperdine Beckons, Mr. Starr*, WASH. POST, May 15, 1997, at A23.

<sup>44</sup> See Susan Schmidt, *Some Starr Allies Say Departure Means No Clinton Charges*, WASH. POST, Feb. 19, 1997, at A7.

<sup>45</sup> See Susan Schmidt, *Starr Will Leave Whitewater Post; Prosecutor Becomes Law School Dean in August*, WASH. POST, Feb. 18, 1997, at A1.

<sup>46</sup> See Lacayo & Cohen, *supra* note 41; Cohen, *supra* note 43.

<sup>47</sup> See Robert S. Bennett, *We Should Sink the Partisan Ship; Politics Is Poisoning The Search for Wrongdoing*, WASH. POST, Mar. 16, 1997, at C1; Schmidt, *Some Starr Allies*, *supra* note 44; Cohen, *supra* note 43; Susan Schmidt, *Starr Will Stay With Probe; Whitewater Independent Counsel Reverses Decision to Quit*, WASH. POST, Feb. 22, 1997, at A1.

<sup>48</sup> See WOODWARD, SHADOW, *supra* note 7, at 351.

<sup>49</sup> See *id.* at 353.

<sup>50</sup> THE STARR REPORT – THE OFFICIAL REPORT OF THE INDEPENDENT COUNSEL'S INVESTIGATION OF THE PRESIDENT 15 (Forum 1998).

<sup>51</sup> See Balz, *supra* note 28; Edwin Chen & Marc Lacey, *Clinton Under Fire – Pentagon Aide No Stranger to Controversy Presidency: Woman who recorded talks with White House intern made previous claim about Clinton and was key figure in Foster investigation*, L.A. TIMES, Jan. 22, 1998, at A14.

A few months after Lewinsky started working in the White House, she and the President began having a sexual relationship which, according to Lewinsky, lasted over a year.<sup>52</sup> This relationship and Clinton's attempts to hide it finally provided Republicans the canon fodder to go after him in a partisan attack reminiscent of the Johnson impeachment.

Lewinsky was later transferred to the Pentagon at which time she began confiding in Linda Tripp about her relationship with Clinton.<sup>53</sup> Tripp began secretly taping her conversations with Lewinsky at the suggestion of Tripp's literary agent, Lucianne Goldberg, a self-described Clinton hater.<sup>54</sup>

The tapes revealed details of Lewinsky's relationship with Clinton.<sup>55</sup> In November 1996, Clinton was reelected president, and the Supreme Court ruled unanimously in May of 1997 that he was subject to the Jones lawsuit even though he was still in office.<sup>56</sup> In January 1998, Lewinsky signed an affidavit swearing she had not had a sexual relationship with the president.<sup>57</sup>

Five days later, Linda Tripp gave the tapes to people in Kenneth Starr's office. Starr requested expansion of the scope of his investigative authority.<sup>58</sup>

On January 16, 1998, Attorney General Janet Reno obtained permission<sup>59</sup> from the three-judge panel that oversaw the independent counsel to expand Starr's Whitewater investigation to include possible subornation of perjury, obstruction of

<sup>52</sup> See Balz, *supra* note 28. Lewinsky testified she and Clinton had 10 sexual encounters, beginning on November 15, 1995, and ending on March 29, 1997. STARR REPORT, *supra* note 50, at 15, 49, 91. Clinton told the grand jury he had "inappropriate intimate contact" with Lewinsky in early 1996 (once she was no longer an intern) and once in early 1997. STARR REPORT, *supra* note 50, at 47.

<sup>53</sup> See STARR REPORT, *supra* note 50, at 59, 72, 74-75; Balz, *supra* note 28.

<sup>54</sup> See Marc Lacey & Alan C. Miller, *Tripp's Motives Scrutinized Probe: She is said to have proposed the 'sting' of Monica Lewinsky, has anti-Clinton ties*, L.A. TIMES, Jan. 29, 1998, at A1. Goldberg helped Tripp find a lawyer, James A. Moody, to help with more secret tapings. Moody handled a lawsuit by the Landmark Legal Foundation against the Internal Revenue Service for alleged harassment of Republican organizations by the Clinton administration. Moody and Starr are both members of the Federalist Society, a Washington organization of conservative and libertarian lawyers. *Id.*

<sup>55</sup> Lewinsky told Tripp that in anticipation of being subpoenaed in the Paula Jones case, she had consulted Clinton's friend, attorney Vernon Jordan, who arranged counsel for Lewinsky and helped her locate a new job. STARR REPORT, *supra* note 50, at 129-130.

<sup>56</sup> See *Clinton v. Jones*, 520 U.S. 681 (1997). Astonishingly, and in retrospect, wrongly, the unanimous Court predicted that proceeding with the lawsuit would not detract from Clinton's presidential responsibilities. The case distracted him, and the country, from important national issues such as health care and social security for more than a year.

<sup>57</sup> STARR REPORT, *supra* note 50, at 15, 136.

<sup>58</sup> See Balz, *supra* note 28. The original mandate from the three-judge panel had instructed Starr to investigate possible violations of federal criminal law involving President William Jefferson Clinton's, Hillary Rodham Clinton's or James B. McDougal's relationships with Madison Guaranty Savings and Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc. Order Appointing Independent Counsel, *supra* note 31.

<sup>59</sup> Janet Reno's request to expand Starr's jurisdiction asked that he be granted power, "to further investigate and determine whether prosecution is warranted." See Notification to the Court of the Initiation of a Preliminary Investigation and Application to the Court for the Expansion of the Jurisdiction of an Independent Counsel, *In re Monica Lewinsky* (D.C. Cir. Indep. Counsel Div. Jan. 16, 1998).

justice, intimidation of witnesses, or other violations of federal law, by Monica Lewinsky or others in the Paula Jones case.<sup>60</sup>

Perhaps the most fateful fallout from the Watergate scandal was Clinton's appointment of Janet Reno as attorney general. After seeing Nixon's trusted AG, John Mitchell, end up in prison as a result of Watergate, Clinton was more cautious. He selected an AG who was not intensely loyal to him, and he dealt with her at arm's length. Reno capitulated too quickly to Starr's request to expand his investigation to the Lewinsky affair.<sup>61</sup>

Judge Susan Webber Wright ruled that evidence concerning Monica Lewinsky might be relevant to the Jones lawsuit but was not "essential to the core issues in [the Jones] case," and some of that evidence "might even be inadmissible."<sup>62</sup> Judge Wright granted Clinton's motion for summary judgment in the Jones case on April 1, 1998.<sup>63</sup>

Nevertheless, for a year after his jurisdiction had been extended to the Lewinsky matter,<sup>64</sup> Independent Counsel Kenneth W. Starr embarked on a tenacious crusade against Bill Clinton. His guiding statute was the Referral Clause of the independent counsel act, which provided that "[a]n independent counsel shall advise the House of Representatives of any *substantial and credible information* which such independent counsel receives, in carrying out the independent counsel's responsibilities under this chapter, *that may constitute grounds for an impeachment.*"<sup>65</sup>

Starr and the Jones lawyers set what some referred to as a "perjury trap" for Clinton by arranging for Tripp to lure Lewinsky to the Ritz-Carlton Hotel, where she was detained by Starr's investigators.<sup>66</sup> Tripp then briefed Jones's

<sup>60</sup> See Order, In re Madison Guaranty Savings & Loan Association, No. 94-1 (D.C. Cir. Indep. Counsel Div. Jan. 16, 1998).

<sup>61</sup> Bob Woodward, commenting on *Hardball with Chris Matthews*, CNBC television broadcast, June 26, 1999. Reno likely agreed to seek greater authority for Starr in light of Fiske's highly political dismissal.

<sup>62</sup> STARR REPORT, *supra* note 50, at 27, 29.

<sup>63</sup> See *Jones v. Clinton*, 990 F. Supp. 657, 679 (E.D. Ark. 1998). While Jones's appeal of the grant of the summary judgment motion was pending in the Eighth U. S. Circuit Court of Appeals, Clinton settled with her for \$850,000. Peter Baker, *Clinton payment ends Jones suit. Nearly half comes from own funds*, WASH. POST, Jan. 13, 1999, at A1.

<sup>64</sup> Starr's ongoing investigation, which had already lasted four years at a cost to taxpayers of \$4 million, had not borne fruit in implicating the Clintons in criminal activity. See Edwin Chen, Janet Hook & Marc Lacey, *The Starr Report – Report Draws Mixed Reaction in Congress Politics: Many voice disgust at details. But Democrats defend the president, saying they see no justification for his impeachment*, L.A. TIMES, Sep. 12, 1998, at A14. Starr had been investigating Hillary Clinton's Rose Law Firm's representation of Madison Guaranty Savings & Loan Association, events related to the firings in the White House Travel Office and events related to the use of FBI files. STARR REPORT, *supra* note 50, at 35.

<sup>65</sup> 28 U.S.C. §595(c) (1994) (emphasis added).

<sup>66</sup> See Bob Woodward & Peter Baker, *Behind Calm Air, President Hides Rage Over Starr; Associates Say Clinton Feels Victimized by Probe*, WASH. POST, Mar. 1, 1998, at A1; Judy Pasternak, *The Senate Verdict – Fear, Search for Justice Guided Tripp Interview: On 'Today' Show, Ex-White House Aide Speaks of Perceived Death Threats Involving Clinton and a Desire to Fulfill 'My Patriotic Duty'*, L.A. TIMES, Feb. 13, 1999, at A24; Jim Hoagland, *A Foreign Policy Blunder*, WASH. POST, Dec. 17, 1998, at A27; Susan

lawyers about the relationship between Lewinsky and Clinton, in order to set him up for deposition questioning.<sup>67</sup> At the deposition, Clinton denied having a sexual relationship, a sexual affair, or sexual relations with Lewinsky.<sup>68</sup> The Jones lawyers maintained it was Clinton's choice whether or not to tell the truth.<sup>69</sup> Starr subpoenaed Clinton to testify before the grand jury, an unprecedented tactic.<sup>70</sup> When Clinton learned Starr had Lewinsky's dress with a semen stain purportedly matching Clinton's DNA, the President agreed to testify.

In spite of the caution urged by attorneys in Starr's own office, including Brett Kavanaugh and Starr's ethics adviser, Sam Dash,<sup>71</sup> Starr filed a secret request with the three-judge panel that oversaw independent counsels asking for approval to disclose secret grand jury material in his Referral to Congress.<sup>72</sup> Kavanaugh felt the Referral contained too much explicit sexual material and thought Starr was acting like an advocate. He advised Starr to simply send Congress the evidence he had gathered without an argument. After all, special prosecutor Leon Jaworski<sup>73</sup> had merely presented the facts to Judge John Sirica, who forwarded it to the House Judiciary Committee investigating Watergate. Starr insisted that section 595(c) did not exist during Watergate and said, "I have an obligation."<sup>74</sup>

On September 9, 1998, Kenneth Starr submitted his Referral to Congress pursuant to 28 U.S.C. §595(c).<sup>75</sup> Democrats picked up five House seats in the

Schmidt, *Tripp Says She Wants To Set Record Straight; Claims of Manipulating Lewinsky Rebutted*, WASH. POST, June 30, 1998, at A1. Jones's lawyers denied they set a perjury trap for the President.

<sup>67</sup> See Woodward & Baker, *supra* note 66.; Pasternak, *supra* note 66.

<sup>68</sup> STARR REPORT, *supra* note 50, at 46. Clinton was provided a narrow definition of "sexual relations" at the deposition. He has consistently maintained that he just received oral sex from Lewinsky and only sexual intercourse constitutes "sexual relations."

<sup>69</sup> See Woodward & Baker, *supra* note 66.

<sup>70</sup> See Ken Gormley, *Impeachment and the Independent Counsel: A Dysfunctional Union*, 51 STAN. L. REV. 309, 311-312 (1999).

<sup>71</sup> Samuel Dash, Professor at Georgetown University Law Center, had been chief counsel to the Senate Watergate Committee.

<sup>72</sup> See WOODWARD, SHADOW, *supra* note 7, at 417-18.

<sup>73</sup> Ironically, Jaworski was called a special "prosecutor," whereas Starr was statutorily known as an "independent counsel." The Supreme Court has held that a prosecutor's duty is not merely to seek a conviction but to ensure that justice is done. See *Berger v. U.S.*, 295 U.S. 78, 88 (1935).

<sup>74</sup> WOODWARD, SHADOW, *supra* note 7, at 418.

<sup>75</sup> Starr alleged the following acts "may constitute grounds for an impeachment": [President Clinton] lied under oath at a civil deposition while he was a defendant in a sexual harassment lawsuit; lied under oath to a grand jury; attempted to influence the testimony of a potential witness who had direct knowledge of facts that would reveal the falsity of his deposition testimony; attempted to obstruct justice by facilitating a witness's plan to refuse to comply with a subpoena; attempted to obstruct justice by encouraging a witness to file an affidavit that the President knew would be false, and then by making use of that false affidavit at his own deposition; lied to potential grand jury witnesses, knowing that they would repeat those lies before the grand jury; and engaged in a pattern of conduct that was inconsistent with his constitutional duty to faithfully execute the laws.

November congressional election and polls showed nearly two-thirds of voters did not want Clinton impeached.<sup>76</sup>

The House Judiciary Committee's impeachment hearings began with a marathon 12-hour appearance by Starr, who defended his Referral.<sup>77</sup> His ethics adviser, Sam Dash, was so outraged that Starr was acting as an "aggressive advocate," Dash resigned, saying, "By your willingness to serve in this improper role you have seriously harmed the public confidence in the independence and objectivity of your office."<sup>78</sup> He maintained the Constitution granted the impeachment power solely to the House of Representatives, not the independent counsel.<sup>79</sup> Dash accused Starr of "unlawfully" intruding into impeachment and "abuse of your office."<sup>80</sup>

But while attacking Clinton for the Lewinsky affair, Starr also cleared him of criminal activity in connection with the firing of White House travel office employees in 1993 ("Travelgate") and the improper collection of FBI files ("Filegate").<sup>81</sup> Starr's allegations were all about sex and lying about sex. Clinton's behavior that lay at the heart of this impeachment case had nothing to do with the actual conduct of his presidential office. Like the Johnson impeachment, the Clinton saga was perceived by many as a partisan witch-hunt, albeit concerning much less significant presidential behavior.

#### VI. HENRY HYDE LEADS THE PARTISAN CHARGE

Congressman Henry Hyde, chairman of the House Judiciary Committee, took the gauntlet from Starr and ran with it. When Starr testified before the committee, Hyde and his Republican colleagues gave Starr a standing ovation.<sup>82</sup> Hyde had repeatedly said partisan politics should not be used to overturn the results of a national election.<sup>83</sup> He maintained he would not be part of a witch-hunt.<sup>84</sup>

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STARR REPORT, *supra* note 50, at 16, 26.

<sup>76</sup> See Nancy E. Roman, *Clinton is acquitted on both counts; 10 Republicans join rout of the GOP – 'It's over,' lawmakers say with some relief*, WASH. TIMES, Feb. 13, 1999, at A1.

<sup>77</sup> See Susan Schmidt & Ruth Marcus, *Starr's Ethics Adviser Quits Over Testimony; Dash Charges Counsel Abused Office*, WASH. POST, Nov. 21, 1998, at A1.

<sup>78</sup> See *id.*

<sup>79</sup> See *id.*

<sup>80</sup> See *id.*; see also WOODWARD, SHADOW, *supra* note 7, at 481.

<sup>81</sup> Federal News Service, *Impeachment Hearings - Starr is Questioned by Abbe D. Lowell and David E. Kendall*, WASH. POST, Nov. 20, 1998, at A36.

<sup>82</sup> See Anthony Lewis, *The Rule of Law*, N.Y. TIMES, Feb. 2, 1999, at A19.

<sup>83</sup> See Marc Lacey, *Washington Quiet Before Impeachment Crescendo Politics: With lawmakers away, atmosphere is calm as hearings loom. But investigators are hard at work, one says*, L.A. TIMES, Oct. 29, 1998, at A18.

<sup>84</sup> See *id.*

“Politics must be checked at the door, party affiliation must become secondary and America’s future must become our only concern,” he declared in September 1998.<sup>85</sup>

Ironically, it was Republican politics, raw partisanship – notably of Henry Hyde – that drove the attack against President Clinton.<sup>86</sup> Hyde’s mantra was “The Rule of Law,” in spite of his own savings and loan scandal which cost taxpayers \$67 million in bailout funds and his own adulterous affair when he was Bill Clinton’s age.<sup>87</sup> Hyde embarked on a campaign to ensure that Starr’s War would succeed in ousting Bill Clinton.<sup>88</sup>

With Hyde at the helm, the House Judiciary Committee voted – virtually along party lines – for four articles of impeachment against President Clinton: perjury in the Jones deposition, perjury in his grand jury testimony, obstruction of justice in the Jones case, and perjury regarding his responses to written questions propounded by the committee.<sup>89</sup> In turn, the House of Representatives, largely along party lines, reported two articles of impeachment to the Senate: perjury before the grand jury and obstruction of justice.<sup>90</sup> Clinton’s popularity rose in the polls.<sup>91</sup>

<sup>85</sup> *See id.*

<sup>86</sup> *See generally* Robert Scheer, *Abortion Fight Drives Hyde’s Prosecution – Clinton’s firm stand on this one issue fuels the engine of the impeachment train*, L.A. TIMES, Dec. 15, 1998, at B7.

<sup>87</sup> *See id.* This was the same Henry Hyde who was one of Oliver North’s staunchest defenders during the congressional investigation of the Iran-Contra scandal; he said then one should not “label every untruth and every deception an outrage.” Hyde had denounced the Iran-Contra investigation as a “disconcerting and distasteful whiff of moralism and institutional self-righteousness” and “a witch hunt.” *Id.* But Clinton had touched Hyde’s rawest nerve – abortion. Abortion had been the issue dearest to Hyde’s heart since 1976, his first year in the House. It was then he attached to an appropriations bill the Hyde Amendment, which banned federal funding for abortions. Although Republican presidents had continued to support it, Bill Clinton’s 1992 election resulted in a watering down of the absolutist language of the amendment. Now the gag rule regarding abortion counseling was suspended. *See* 42 U.S.C. §300, 58 Fed. Reg. 7455 (1993). Federal funds could be used for abortions that resulted from rape and incest. *See* Scheer, *supra* note 86. In 1994, when the Republicans gained control of the House, Hyde maintained, “Rape is horrible. The only thing worse than rape is abortion. That’s killing.” Scheer, *supra* note 86.

<sup>88</sup> *See* Scheer, *supra* note 86.

<sup>89</sup> *See* 144 CONG. REC. D1217 (daily ed. Dec. 19, 1998). Before the committee vote, a CNN/USA Today/Gallup poll revealed two-to-one opposition to Clinton’s conviction. *See The Hotline*, 10 AMER. POLIT. NETWORK 34, Jan. 12, 1999.

<sup>90</sup> *See* 144 CONG. REC. D1217, D1218 (daily ed. Dec. 19, 1998); 144 CONG. REC. H12040-42 (1998). One article charged Clinton “willfully provided perjurious, false and misleading testimony to the grand jury” about his relationship with Monica Lewinsky, his efforts to influence the testimony of witnesses and gifts he and Lewinsky exchanged. The other article alleged Clinton “prevented, obstructed, and impeded the administration of justice, and to that end engaged personally, and through his subordinates and agents, in a course of conduct or scheme designed to delay, impede, cover up and conceal the existence of evidence and testimony.”

<sup>91</sup> *See Impeachment Chronology*, SUN. TEL. WORCESTER (Mass.), Feb. 14, 1999, at A2 [hereinafter *Chronology*]. It was not only Republican politics that infected this impeachment proceeding. The day before the House had been slated to debate the articles of impeachment, President Clinton ordered military strikes against Iraq. *See* Reuters, ‘We Had to Act, and Act Now,’ L.A. TIMES, Dec. 17, 1998, at A54 (text of President Clinton’s statement on U.S.-British bombing of Iraq). Many, such as Senate Majority Leader Trent Lott, questioned whether the bombing was timed to postpone or frustrate the impending drive to oust Clinton

While the House of Representatives has the constitutional power to impeach, the trial upon the articles of impeachment takes place in the Senate. And whereas only a simple majority is required to impeach, conviction and removal from office require the support of two-thirds of the senators present.<sup>92</sup> These differences are consistent with the contrasting roles played by the two houses of Congress – the House as prosecutor brings the charges, and the Senate, which functions in a judicial role, should employ a much higher standard to “.... convict, since an affirmative vote results in removal from office.”<sup>93</sup>

Clinton’s five-week Senate impeachment trial began on January 7, 1999.<sup>94</sup> Georgia Republican Senator Strom Thurmond swore in Chief Justice William H. Rehnquist as presiding officer, who in turn administered the oath to the 100 senators who would judge Bill Clinton.<sup>95</sup> The Republican House managers were led by Henry Hyde.<sup>96</sup> The lion’s share of the trial was consumed with arguments by the managers and lawyers. Brief excerpts of videotaped depositions of Monica Lewinsky, Vernon Jordan, and Sydney Blumenthal were shown.<sup>97</sup>

The managers focused on allegedly false and perjurious statements made by Clinton about his sexual relationship [or lack thereof] with Monica Lewinsky and his efforts to cover them up.<sup>98</sup> Clinton’s defense team drew fine legal distinctions about the requirements for perjury and the very narrow definition of “sexual relations” provided to Clinton at the Jones deposition.<sup>99</sup> His lawyers also stressed Lewinsky’s grand jury testimony wherein she stated, “No one ever asked me to lie,” and “I was never promised a job for my silence.”<sup>100</sup> They argued Clinton’s conduct did not rise to the level of high crimes or misdemeanors required

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from office. Others, such as Bob Woodward, felt Clinton had been so weakened by the Lewinsky scandal, he could not stand up to the Pentagon officials who were pressuring him to invade Iraq. *See also*, Hoagland, *supra* note 66; WOODWARD, SHADOW, *supra* note 7, at 493-94. Some cited *Wag the Dog*, a recently-released fictional film depicting a U.S. president who created a fake war to divert attention from an impending sex scandal that threatened his presidency. The House delayed debate on the articles of impeachment for one day in deference to the bombing of Iraq. *See* WOODWARD, SHADOW, *supra* note 7, at 493-94. In any event, the fact that the President’s sex life mushroomed into a major political force affecting American foreign policy, particularly the decision to carry out the most significant bombing campaign of the Clinton presidency until the invasion of Yugoslavia, was perhaps the most tragic aspect of this national nightmare.

<sup>92</sup> U.S. CONST., art. I, §2, cl. 2 and §3, cl. 6.

<sup>93</sup> *See generally* CHARLES L. BLACK, JR., *IMPEACHMENT: A HANDBOOK* 5-17 (1998) (standard of proof not clearly defined so each senator must employ his or her own standard).

<sup>94</sup> *See Chronology, supra* note 91.

<sup>95</sup> *See id.*

<sup>96</sup> *See id.* (13 members of the House Judiciary Committee functioned as “managers,” who prosecuted the case against Clinton before the Senate).

<sup>97</sup> *See id.* (Sydney Blumenthal was a White House aide who had implied Lewinsky was a “stalker”).

<sup>98</sup> *See* 145 CONG. REC. S63, 64 (1999).

<sup>99</sup> *See id.* at S61, 62, 63.

<sup>100</sup> *See id.* at S62.

to remove a president from office.<sup>101</sup>

On February 12, 1999, after closed-door deliberations,<sup>102</sup> the Senate acquitted William Jefferson Clinton of both articles of impeachment. All 45 Democratic senators voted for acquittal on both counts.<sup>103</sup> Ten Republicans voted “not guilty” on the perjury article and five Republicans voted for acquittal on the obstruction of justice article.<sup>104</sup> Bill Clinton, like Andrew Johnson, was not convicted.<sup>105</sup> But Clinton’s acquittal, unlike Johnson’s, was preceded by a long and painful period of national scrutiny of his sex life, made possible by the independent counsel statute.

## VII. DEATH KNELL FOR THE INDEPENDENT COUNSEL STATUTE

Kenneth Starr spent \$7.2 million in the six months leading up to and including President Clinton’s impeachment trial.<sup>106</sup> His five-year investigation of Bill and Hillary Clinton and their associates cost \$47 million.<sup>107</sup> In the twenty-one years since the Ethics in Government Act was enacted, \$160 million has been spent by the 20 independent counsel who have investigated high government officials.<sup>108</sup>

The Ethics in Government Act of 1978,<sup>109</sup> passed as a reaction to President Richard Nixon’s unilateral firing of special prosecutor Archibald Cox,<sup>110</sup> was reenacted in 1982,<sup>111</sup> 1987<sup>112</sup> and 1994.<sup>113</sup> By its terms, the Act’s sunset provision specified it would expire five years after the date of its enactment, which was June

<sup>101</sup> See *id.* at S61.

<sup>102</sup> See *id.* at S1458, 1459; see also Cohn, *supra* note 3, at 366.

<sup>103</sup> The vote on the perjury article was 45 guilty, 55 not guilty. On the obstruction of justice article, the vote was 50 guilty, 50 not guilty. 145 CONG. REC. at S1458, 1459. Both articles failed to muster the two-thirds majority needed to convict.

<sup>104</sup> See *id.*

<sup>105</sup> See *id.*

<sup>106</sup> Karen Gullo, *Starr Spent \$7M During Impeachment*, ASSOCIATED PRESS, Oct. 1, 1999.

<sup>107</sup> See *id.*

<sup>108</sup> Brigitte Dusseau, *After 21 Years, U.S. Law that Brought Prosecutor Starr to Power Lapses*, AGENCE FRANCE-PRESS, June 30, 1999. Independent Counsel Lawrence Walsh spent \$48.5 million during his six-year investigation of the Iran-Contra affair. Members of President Ronald Reagan’s administration were charged with planning arms-for-hostages deals with Iran, where the proceeds from arms sales to Iran would fund the Nicaraguan Contras in their insurrection against the Sandinista government in Nicaragua. Associated Press, *Tab for Starr Investigations Hits Near-Record \$47 Million*, Oct. 2, 1999.

<sup>109</sup> Pub. L. No. 95-521, 92 Stat. 1824.

<sup>110</sup> See *supra* text in Part III.

<sup>111</sup> See Ethics in Government Act Amendments of 1982, Pub. L. No. 97-409, 96 Stat. 2039.

<sup>112</sup> See Independent Counsel Reauthorization Act of 1987, Pub. L. No. 100-191, 101 Stat. 1293.

<sup>113</sup> See Independent Counsel Reauthorization Act of 1994, Pub. L. No. 103-270, 108 Stat. 732 (codified at 28 U.S.C. §§591-599 (1994)).



30, 1999, unless again renewed by Congress.<sup>114</sup> This time Congress allowed the independent counsel statute to die.<sup>115</sup> What changed between 1994 and 1999?

Those five years saw the costly investigation, impeachment, and trial of William Jefferson Clinton. The backlash against the independent counsel statute following the Clinton trial was overwhelming. It came from the White House, Attorney General Janet Reno and the American Bar Association, which represents 400,000 attorneys.<sup>116</sup> Kenneth Starr himself opposed reenactment of the statute, saying that it “tries to cram a fourth branch of government into our three-branch system.”<sup>117</sup> Most of Congress agreed, and the Act perished on the vine.<sup>118</sup>

With the demise of the independent counsel statute, the pendulum had swung back. By failing to renew the Act, Congress implicitly returned the investigation of high government officials to pre-Watergate policies. Once again, the power to appoint an independent counsel would vest in the executive branch. To that end, the Department of Justice drafted a set of regulations to guide future investigations.<sup>119</sup>

The attorney general – not a three-judge panel – now has the authority to appoint<sup>120</sup> and remove<sup>121</sup> special counsels who investigate top government officials. She exercises power over indictments and other prosecutorial actions<sup>122</sup> and the special counsel remains accountable to the attorney general.<sup>123</sup> “Any investigative or prosecutorial step” she deems “inappropriate or unwarranted” can be blocked by the attorney general.<sup>124</sup>

### VIII. DEPOLITICIZE THE INVESTIGATION OF HIGH GOVERNMENT OFFICIALS

Some senators were alarmed by the return of power over independent counsels to the attorney general. Pennsylvania’s Republican Senator Arlen Specter remarked, “Congress can’t sit still for having a special counsel under the yoke of

<sup>114</sup> See 28 U.S.C. at §599.

<sup>115</sup> See Robert Suro, *As Special Counsel Law Expires, Power Will Shift to Reno*, WASH. POST, June 30, 1999, at A6.

<sup>116</sup> See Dusseau, *supra* note 108.

<sup>117</sup> *Id.*

<sup>118</sup> See Suro, *supra* note 115.

<sup>119</sup> 28 C.F.R. § 600 (1999).

<sup>120</sup> See *id.* § 600.1.

<sup>121</sup> See *id.* § 600.7(d).

<sup>122</sup> *Id.* § 600.7(b).

<sup>123</sup> See *id.*

<sup>124</sup> See *id.*

the Attorney General.”<sup>125</sup> Specter was one of four senators, two Democrats and two Republicans,<sup>126</sup> to propose the Independent Counsel Reform Act of 1999,<sup>127</sup> aimed at reigning in the independent counsel’s investigative powers and requiring greater accountability. Thus far, it has received little support in the Senate.<sup>128</sup>

This Senate Bill 1297 suggests several salient changes from the Act under which Kenneth Starr operated. The bill provides the standard for the attorney general’s application to the court for appointment of an independent counsel requires “substantial”<sup>129</sup> rather than “reasonable”<sup>130</sup> grounds to believe further investigation of the official is warranted. This provision raises the bar for a showing by the attorney general that an independent counsel is necessary.

Senate Bill 1297 specifies appointment of the independent counsel shall be made from a list of five candidates recommended by the chief judge of each Federal circuit,<sup>131</sup> whereas the 1994 Act contained no such provision. This addition makes it more likely the independent counsel will be chosen from a broader slate of candidates than that which included Kenneth Starr, whose selection was made by a conservative panel of judges.<sup>132</sup>

The bill eliminates the former authority of the court, upon request of the attorney general, to expand the prosecutorial jurisdiction of the independent counsel.<sup>133</sup> This omission is a reaction against the broad expansion of Kenneth Starr’s jurisdiction to the Monica Lewinsky matter,<sup>134</sup> widely perceived as overreaching.

Senate Bill 1297 eliminates the Referral Clause, which had provided, “An independent counsel shall advise the House of Representatives of any substantial and credible information which such independent counsel receives, in carrying out the independent counsel’s responsibilities under this chapter, that may constitute grounds for an impeachment.”<sup>135</sup> The Referral Clause has been criticized by scholars such as Duquesne University Law Professor Ken Gormley, because it undermines the function of the grand jury and intrudes upon Congress’

<sup>125</sup> See Congress Daily/A.M., *Lieberman, Specter Fight New Special Counsel Rules*, GOV’T. OPERATIONS, June 30, 1999.

<sup>126</sup> Senators Joseph Lieberman (D-Conn.), Arlen Specter (R-Pa.), Carl Levin (D-Mich.) and Susan Collins (R-Maine) proposed the new bill.

<sup>127</sup> S. 1297, 106th Cong. (1999).

<sup>128</sup> Congress Daily/A.M., *supra* note 125.

<sup>129</sup> S. 1297 § 592.

<sup>130</sup> 28 U.S.C. § 592 (1994).

<sup>131</sup> See S. 1297 § 593.

<sup>132</sup> See *supra* text in Part IV.

<sup>133</sup> See S. 1297 § 593; 28 U.S.C. § 593 (1994).

<sup>134</sup> See Order, *In re Madison Guaranty Savings & Loan Association*, *supra* note 31.

<sup>135</sup> 28 U.S.C. § 595 (1994).

constitutional role in conducting impeachments, leading to separation of powers problems.<sup>136</sup> The Constitution grants the impeachment power exclusively to Congress.<sup>137</sup>

Perhaps a permanent special counsel could be appointed by Congress in a bipartisan procedure, to investigate and advise Congress about misconduct by high government officials. Since neither the executive nor the judiciary would be involved, there would be no infringement on Congress's constitutionally delegated impeachment authority. In the 1970s, proposals to create a permanent special prosecutor were roundly defeated.<sup>138</sup> The appointment power, under those proposals, however, would have resided in the judiciary<sup>139</sup> or the executive.<sup>140</sup> The primary criticism of the concept of a permanent special counsel arose from the fear that he or she would feel compelled to bring frequent impeachments in order to justify his or her *raison d'être*.<sup>141</sup> The special counsel created by the Ethics in Government Act was originally intended to act only in rare circumstances of official misconduct, such as the Teapot Dome Scandal and the Watergate affair.<sup>142</sup> Whether a special permanent counsel was to be appointed by the judiciary, the executive or the legislative branch, it would likely be criticized on the same grounds.<sup>143</sup>

<sup>136</sup> See Gormley, *supra* note 70, at 351-352; see also Julie R. O'Sullivan, *The Interaction Between Impeachment and the Independent Counsel Statute*, 86 GEO. L.J. 2193, 2196 (1998).

<sup>137</sup> See U.S. CONST. art. I, §2, cl.2 and art. I, §3, cl.6.

<sup>138</sup> See Gormley, *supra* note 18, at 617-23.

<sup>139</sup> A recommendation in Senator Sam Ervin's 1974 Watergate Committee report led to Senate Bill 495, which would have created a permanent special prosecutor in the Office of Public Attorney controlled by a panel composed of three judges retired from the U.S. Court of Appeals. See S. REP. NO. 94-823, at 159 (1976).

<sup>140</sup> A later version of Senate Bill 495, proposed by the Gerald Ford White House, provided for appointment of a special permanent prosecutor by the President with advice and consent of the Senate. See WATERGATE REFORMS: COMMUNICATION FROM THE PRESIDENT OF THE UNITED STATES, TRANSMITTING PROPOSED SUBSTITUTE LANGUAGE TO CORRECT CONSTITUTIONAL AND PRACTICAL PROBLEMS CONTAINED IN S. 495, H.R. DOC. NO. 94-550 (1976).

<sup>141</sup> See Gormley, *supra* note 138, at 627 ("The special prosecutor law was never meant to ordain a permanent inquisitor (or inquisitors), sniffing into alleged scandal on a regular basis while setting up a fixed post-office box.").

<sup>142</sup> See *id.*

<sup>143</sup> Professor Gormley decries the practice of the office of the temporary independent counsel during the past 20 years, which, he maintains,

has managed to become everything that the framers of the [Ethics in Government] law initially intended that it should not become. While at least many of the key draftsmen envisioned a special prosecutor cropping up rarely – perhaps every generation or two – the statute has collapsed into a horribly overused (and costly) law, with investigations triggered almost effortlessly by either political party pushing easily manipulated buttons. While the statute was built to confine the special prosecutor's jurisdiction to a narrow piece of turf, and thus minimize separation of powers worries, the law has devolved in such a way that an independent counsel can virtually write his or her own jurisdictional ticket.

Senate Bill 1297 adds a presumption that the duties of the independent counsel will terminate after two years, with provision for one-year renewals for good cause shown.<sup>144</sup> This requirement would serve as a check on unlimited and partisan investigations such as that of Starr, encourage efficient utilization of resources by the independent counsel, and enhance the integrity of the process.<sup>145</sup>

Finally, the bill adds the requirement that the three-judge panel be designated and assigned by the Chief Justice through a *lottery* system.<sup>146</sup> The three-judge panel that appointed the independent counsel was created to provide a check against absolute power and the politicization of the process.<sup>147</sup> However, Chief Justice Rehnquist's selection of a panel primarily composed of right-wing conservatives resulted in the dismissal of Robert Fiske and replacement with Kenneth Starr, who pursued President Clinton with excessive partisan zeal.<sup>148</sup> The lottery system would tend to avoid this in the future.

Senate Bill 1297's proposed modification of the independent counsel statute is a step in the right direction. The original impetus for the Ethics in Government Act was a reaction against President Nixon's unilateral firing of special prosecutor Archibald Cox, who had the goods on Nixon.<sup>149</sup> It aimed to promote public trust and confidence in government, by providing some measure of independence for those who investigated high government officials.<sup>150</sup> The Act sought to enhance public confidence and create checks and balances within the federal government to respond to abuses of power.<sup>151</sup>

Ironically, the Act has had the opposite effect of diminishing public confidence in the independence of justice at the federal level.<sup>152</sup> Kenneth Starr's campaign against Bill Clinton crystallized public realization that the process had

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*Id.* at 630-31. In fact, according to Professor Gormley, "it is fair to state . . . that if a statute had been drafted in the 1970s resembling the independent counsel law as currently implemented, it would have been viewed as more shocking and abhorrent than any other proposal on the table, including the permanent special prosecutor provisions of S. 495 that were so overwhelmingly rejected." *Id.* at 632.

<sup>144</sup> See S. 1297 § 596.

<sup>145</sup> See Julian A. Cook, *Mend It Or End It? What To Do With The Independent Counsel Statute*, 22 HARV. J.L. & PUB. POL. 279, 336, 337 (1998).

<sup>146</sup> The bill proposes an amendment to 28 U.S.C. § 49.

<sup>147</sup> See Norman J. Ornstein, *Doing Congress's Dirty Work*, 86 GEO. L. J. 2179, 2192 (1998).

<sup>148</sup> See *supra* text in Parts IV and V.

<sup>149</sup> See *supra* text in Part III.

<sup>150</sup> See Cass R. Sunstein, *Bad Incentives and Bad Institutions*, 86 GEO. L.J. 2267, 2271 (1998).

<sup>151</sup> When the statute's renewal was being considered in 1987, Senator Carl Levin commented that it "restores public confidence in our criminal justice system(.) . . and it furthers the Framers' goal of instilling appropriate checks and balances within the federal government." Senator Carl Levin with Elise J. Bean, *A Symposium on Special Prosecutions and the Role of the Independent Counsel: The Independent Counsel Statute: A Matter of Public Confidence and Constitutional Balance*, 16 HOFSTRA L. REV. 11, 22 (1987).

<sup>152</sup> See generally John Anderson, *Fifteen Months and Counting: The Clock is Running Out on the Independent Counsel Law*, THE AMERICAN LAWYER, Apr. 1998, at 58. See also Joseph E. Haviland, *What Will the Future Hold for the Independent Counsel Statute?* 37 DUQ. L. REV. 313 (1999).

become deeply politicized. Cass R. Sunstein called it a “dismal failure.”<sup>153</sup> Norman J. Ornstein observed:

Deep-seated policy differences and the struggle for partisan supremacy have mutated into regular personal attacks. Attacks have increasingly turned into criminal investigations. Genuine questions about transgressions of norms or law have been channeled into prosecutions aimed as much at punishing transgressors for their ideological apostasy or arrogance as bringing legal justice to bear.<sup>154</sup>

Julie Rose O’Sullivan, professor at Georgetown University Law Center, who served on the staffs of Robert Fiske and Kenneth Starr, is confident that career prosecutors within the Justice Department are, for the most part, competent to prosecute criminal allegations against government officials.<sup>155</sup> She feels the Act gave independent counsel “an excess of time, means and incentive to pursue a far greater number of people, over a wider investigatory landscape, with less justification, and at greater human, financial and institutional cost than is reasonably necessary to promote the reality, or appearance, of evenhanded justice.”<sup>156</sup> If indeed the independent counsel act is reincarnated, it should provide for a mechanism by which the counsel would be accountable for funds spent pursuing his or her investigations.

Scholar Katy H. Harriger, associate professor of politics at Wake Forest University, supports the expiration of the Act and advocates the return of the appointment power to the executive.<sup>157</sup> Harriger would have the attorney general seek an independent investigation only when she determines an actual conflict or the substantial appearance of a conflict of interest exists.<sup>158</sup> This, Harriger argues, would make both the independent counsel and the executive accountable for counsel’s actions.<sup>159</sup> Harriger criticizes Janet Reno’s exercise of discretion under the Act, saying it “ought to lead us to examine the costs of channeling too narrowly the Attorney General’s discretion.”<sup>160</sup>

Many critics argue that Reno was too quick to succumb to partisan

<sup>153</sup> Sunstein, *supra* note 150, at 2281.

<sup>154</sup> Ornstein, *supra* note 147, at 2188-89.

<sup>155</sup> See Anderson, *supra* note 152, at 15.

<sup>156</sup> See *id.*

<sup>157</sup> See Katy J. Harriger, *Damned if She Does and Damned if She Doesn't: The Attorney General and the Independent Counsel Statute*, 86 GEO. L. J. 2097, 2115 (1998) [hereinafter Harriger, *Damned if She Does*]; Katy J. Harriger, *Can the Independent Counsel Statute Be Saved?* 62 LAW & CONTEMP. PROBS. 131, 141-42 (1999) [hereinafter Harriger, *Independent Counsel Statute*].

<sup>158</sup> See Harriger, *Damned if She Does*, *supra* note 157, at 2115.

<sup>159</sup> See Harriger, *Independent Counsel Statute*, *supra* note 157, at 141-42.

<sup>160</sup> See Harriger, *Damned if She Does*, *supra* note 157, at 2114.

pressure to expand the Whitewater investigation to the Monica Lewinsky matter. In her regulations promulgated upon the expiration of the independent counsel act, Reno maintains the *Conduct and Accountability* provision, which suggests that close consultation between the independent counsel and the Department of Justice, “will allow a wide range of independent decisionmaking by the Special Counsel, while at the same time it will help to guard against a Special Counsel becoming too insulated and narrow in his or her view of the matter under investigation.”<sup>161</sup>

#### IX. CONCLUSION

U.S. Supreme Court Justice Antonin Scalia, when disagreeing with the majority in *Morrison v. Olson*,<sup>162</sup> that the independent counsel did not violate the separation of powers doctrine, quoted Justice Robert Jackson, then attorney general under President Franklin D. Roosevelt, who warned of the abuses of prosecutorial power. Justice Jackson stated:

If the prosecutor is obliged to choose his case, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than cases that need to be prosecuted. . . . It is in this realm – in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself.<sup>163</sup>

The independent counsel statute was originally enacted as an antidote to the abuse of executive power. Since Watergate, the level of public scrutiny visited upon high government officials has intensified.<sup>164</sup> Unfortunately, it reached a crescendo in the Clinton case, which occupied the national agenda for more than a year. As a result of public perception that the Republican majority had overstepped its bounds in the appointment and zealous crusade of Kenneth Starr, the independent counsel act was allowed to expire without renewal.

If the Act is reenacted, it must contain safeguards to ensure, as much as possible, that the independent counsel is truly “independent.” The appointment

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<sup>161</sup> CONDUCT & ACCOUNTABILITY, 28 C.F.R. § 600.7 (1999).

<sup>162</sup> 487 U.S. 654, 714-15 (1988).

<sup>163</sup> See Robert Jackson, *The Federal Prosecutor*, Address to the Second Annual Conference of United States Attorneys, Apr. 1, 1940, quoted in *Morrison v. Olson*, 487 U.S. 654, 728-29 (1988), Scalia, J., dissenting.

<sup>164</sup> See *supra* text in Part III.

power of the three-judge panel is key. Had the Chief Justice appointed the three judges by lottery, as suggested by Senate Bill 1297, instead of choosing a panel chiefly comprised of Clinton detractors, the investigation may have been pursued in a less partisan manner. Likewise, without the Referral Power, Kenneth Starr would not have had the authority to present Congress with a litany of sexually inflammatory charges against the President. Finally, Senate Bill 1297's provision which suggests eliminating the jurisdiction of the court to expand the jurisdiction of the independent counsel, even when requested by the attorney general, may well have prevented Starr from pursuing his quest to delve into Clinton's private sexual matters.

An alternative approach which would obviate any separation of powers problems would be the bipartisan congressional appointment of a special counsel, accountable directly to Congress, for the investigation of high governmental officials.<sup>165</sup>

The third option would maintain the status quo by leaving the appointment power in the hands of the attorney general. Appointed by the President, however, the attorney general is vulnerable to criticism for decisions, albeit impartial ones, that go against the party in power.

It is incumbent upon Congress to ensure that the Clinton fiasco never repeats itself. Mindful of Hamilton's admonition that impeachments are by their very nature POLITICAL, Congress must depoliticize them to the maximum possible extent.

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*But see* text accompanying notes 138-43.