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## The Specially Investigated President

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## ARTICLES

# The Specially Investigated President

CHARLES TIEFER<sup>†</sup>

### I. Introduction

For the past decade a series of long-term investigations by Independent Counsels<sup>1</sup> occurred in parallel with those of special congressional committees.<sup>2</sup> These investigations have resulted in the imposition of a new legal status for the president. This new status re-orientates the long-standing tension that exists between the bounds of presidential power and the president's vulnerability to legal suit.<sup>3</sup> The parallel special inquiries into the subjects of Iran-Contra,

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1. Although the initial investigation of the 1996 campaign finance matter was conducted by a Justice Department task force rather than an Independent Counsel, for pertinent purposes having to do with the independence, visibility, and intensity of the investigation this matter is treated here as a special investigation. As for special investigations in general, See, for example, Julie O'Sullivan, *The Independent Counsel Statute: Bad Law, Bad Policy*, 33 Am Crim L Rev 463 (1996); Stephanie A.J. Dangel, *Is Prosecution a Core Executive Function? Morrison v. Olson and the Framers' Intent*, 99 Yale L J 1069 (1990); Stephen L. Carter, *The Independent Counsel Mess*, 102 Harv L Rev 105 (1988); see also note 117.

2. Randall K. Miller, *Congressional Inquests: Suffocating the Constitutional Prerogative of Executive Privilege*, 81 Minn L Rev 631 (1997); Joel D. Bush, Note, *Congressional-Executive Access Disputes: Legal Standards and Political Settlements*, 9 J L & Pol 719 (1993); Peter M. Shane, *Legal Disagreement and Negotiation in a Government of Laws: The Case of Executive Privilege Claims Against Congress*, 71 Minn L Rev 461 (1987); see also note 133.

3. For recent overviews of the President's roles and powers, see Louis Fisher, *Constitutional Conflicts Between Congress and the President* 77-83 (Kansas 4th ed 1997); Steven G. Calabresi and Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 Cornell L Rev 1045 (1994); Henry P. Monaghan, *The Protective Power of the Presidency*, 93 Colum L Rev 1 (1993).

Whitewater, and the Monica Lewinsky matter, among others, successively bedeviled Presidents Reagan, Bush, and Clinton. For all the marked differences among the investigations by Lawrence Walsh, Kenneth Starr, and the special congressional committees, collectively, these investigations have taken the past three presidents down a new path with deep, fundamental significance for which the existing legal literature lacks an analytic framework.

Under this new system each president has experienced a formal initiation of parallel special investigations that precipitated him into a changed legal status. Having been targeted by a formal accusatory process, each president has traded charges and countercharges with investigators under the full glare of national attention; endured extensive evidence-taking, including personal questioning of a kind that historically was largely unknown to the Presidency; and received significant interim partial condemnations in the form of denunciatory congressional reports and verdicts in Independent Counsel trials of close associates. The whole nation has watched as these parallel special investigations built potential criminal cases against these presidents.

Yet none of these presidents ultimately faced a probability of indictment, trial or impeachment.<sup>4</sup> Using presidential powers to resist the investigations (e.g., by raising objections that, while proper, tend to delay document or testimony production) and, often more importantly, to limit their damage, each president maintained and rebuilt his presidential political status, through innovative and legitimate means. Moreover, through this lengthy parry-and-thrust between the investigations and the presidents, the new system itself evolved, with constitutional precedents, statutory rewrites, and the rise of major legal institutions like the White House Counsel's office. Each president thus experienced a novel cycle of legal and political struggle over the charges without indictment. Each passed through the new status of the specially investigated president.<sup>5</sup>

This Article argues that this new legal status experienced by recent presidents plays out today in a process that has evolved in an unprecedented direction within just a few years. This process reflects a modern version of the age-old constitutional tension regarding the balance between two poles in disputes involving the president: his amenability to legal accusation and prosecution as an individual and his unique power as president to defend the office of the presidency against legal accusation and prosecution. Past legal struggles involving the president<sup>6</sup> presented many elements similar to those recurring in the new system, such as executive privilege,<sup>7</sup> limited presidential

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4. As discussed below, in 1998, the Independent Counsel made preparations to provide, and the House made preparations to receive a report detailing the possible grounds for impeachment of President Clinton. Yet many commentators believe they have done so in the absence of any real probability that the President will be removed.

5. Benjamin Ginsberg and Martin Shefter, *Politics By Other Means: The Declining Importance of Elections in America* 26 (Basic Books 1990); Benjamin Ginsberg and Martin Shefter, *Ethics Probes as Political Weapons*, 11 J L & Pol 497 (1995).

6. Frank M. Tuerkheimer, *The Executive Investigates Itself*, 65 Cal L Rev 597 (1977).

7. See, for example, Mark J. Rozell, *Executive Privilege: The Dilemma of Secrecy and*

amenability to suit,<sup>8</sup> congressional powers of inquiry including witness immunity,<sup>9</sup> and defensive executive powers like pardons or state secrets invocation.<sup>10</sup>

Such struggles take place along an overall polarity. On the one hand, the Constitution keeps the president open to the legally accusatory processes, representing the “rule of law” and does not let him rise “above the law.” This amenability is symbolized by the piercing of executive privilege in *United States v Nixon*.<sup>11</sup> Moreover, the decision in *Morrison v Olson*,<sup>12</sup> upholding the constitutionality of the Independent Counsel statute, decisively crushed the traditional constitutional defense available to the president, namely that his “unitary Executive”<sup>13</sup> power entitled him to control legal investigations unleashed against him. *Morrison* essentially rendered much of the prior debate on this issue outmoded.

Still the separation of powers tension created by special investigations of the president and the defenses available to him has changed, not ended. This tension stems from the fact that while the president as an individual is not

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*Democratic Accountability* (Johns Hopkins 1994); Note, *In the Wake of Whitewater: Executive Privilege and the Institutionalized Conflict Element of Separation of Powers*, 12 J L & Pol 775 (1996); Stephen W. Stathis, *Executive Cooperation: Presidential Recognition of the Investigative Authority of Congress and the Courts*, 3 J L & Pol 183 (1986); Ronald L. Claveloux, *The Conflict Between Executive Privilege and Congressional Oversight: The Gorsuch Controversy*, 1983 Duke L J 1333 (1983); Archibald Cox, *Executive Privilege*, 122 U Pa L Rev 1383 (1974); Robert C. Randolph & Daniel C. Smith, *Executive Privilege and the Congressional Right of Inquiry*, 10 Harv J Legis 621 (1973).

8. Laura Krugman Ray, *From Prerogative to Accountability: The Amenability of the President to Suit*, 80 Ky L J 739, 741-50 (1992).

9. John Van Loben Sels, *From Watergate to Whitewater: Congressional Use Immunity and its Impact on the Independent Counsel*, 83 Georgetown L J 2385 (1995); Ronald F. Wright, *Congressional Use of Immunity Grants After Iran-Contra*, 80 Minn L Rev 407 (1995).

10. Sandra D. Jordan, *Classified Information and Conflicts in Independent Counsel Prosecutions: Balancing the Scales of Justice After Iran-Contra*, 91 Colum L Rev 1651 (1991).

11. *United States v Nixon*, 418 US 683 (1974). For the classic statement that no man, including the President, is above the law, see *United States v Lee*, 106 US 196, 220 (1882).

12. *Morrison v Olson*, 487 US 654 (1988); Charles Tiefer, *The Constitutionality of Independent Officers as Checks on Abuses of Executive Power*, 63 BU L Rev 59 (1983).

13. For a discussion of the continuing debate about the extent of the President’s “unitary Executive” powers to control officers, see, for example, Terry Eastland, *Energy in the Executive: The Case for the Strong Presidency* (Free Press 1992); A. Michael Froomkin, *The Imperial Presidency’s New Vestments*, 88 Nw U L Rev 1346 (1994); Steven G. Calabresi and Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 Harv L Rev 1155 (1992); A. Michael Froomkin, Note, *In Defense of Administrative Agency Autonomy*, 96 Yale L J 787 (1987). For a contrast between “unitary Executive” theory and “modern Presidency” practice, see Michael A. Fitts, *The Paradox of Power in the Modern State: Why a Unitary, Centralized Presidency May Not Exhibit Effective or Legitimate Leadership*, 144 U Pa L Rev 827 (1996).

above the law, the office of the presidency is so vital to the political process, a number of safeguards exist to prevent it from succumbing to the legal accusatory process. The office of the president has been equipped with a number of tools designed to protect *the office* from attack. To articulate the new defenses being used by the president, and to analyze them then, is the challenge. The presidential prong of the separation of powers tension now operates more subtly than the old claims of formal and absolute Executive immunity or control. Now, the reformulated presidential defense position draws more directly upon the primacy of political processes in a democracy.<sup>14</sup> A president can no longer fight back in the name of Executive immunity as the supreme embodiment of sovereignty. Rather it is in the name of the political processes that he actually resolves his fate during the long years of a special investigation. The president still possesses, by virtue of election, a constitutional position strong enough to defend himself and to limit the damage a special investigation and the threats of indictment or impeachment can do to his presidency as much or more through political as through legal means.

Specially investigated presidents and vice presidents have deployed their political ability to blunt, to parry, and to outlast the accusations against them. Vice President George Bush successfully asserted an interim legal-political defense in 1987-88 and again in 1992. The Clinton administration thus far has successfully defended itself against accusations throughout President Clinton's tenure in office. The presidential side of the separation of powers tension not only describes these efforts as effective, it also justifies them normatively. Each defense asserted by these recent presidents serves not the former goal of maintaining the head of state in commanding position, but a new goal. They keep the legally accusatory processes from wholly displacing combative political processes for most, if not the entire time the nation focuses on the investigations in the scandal-centered Washington climate—political processes by which a healthy democracy lives.

Undertaking the challenge of devising an analytic framework for this new presidential status takes on importance for two reasons. Any follower of national news will recognize that this new presidential status seems to have become one of the cynosures of federal legal affairs. Second, for all the criticisms of its slow operation, the system in which the new presidential status plays out appears to be here to stay. If the system continues to operate as it does currently, the balance between the legal accusations and the White House's subsequent political resistance will continue as the main dynamic aspect of the president's relation to the law in our time.

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14. For discussion of how experience under the Independent Counsel statute compares with what occurred before, see Katy J. Harriger, *Independent Justice: The Federal Special Prosecutor in American Politics* (Kansas 1992); Terry Eastland, *Ethics, Politics, and the Independent Counsel: Executive Power, Executive Vice, 1789-1989* (Natl Legal Ctr for Pub Interest 1989); Michael J. McCoy, *The Office of Independent Counsel—A Constitutional Overview*, 28 Washburn L J 150 (1988).

This Article seeks to develop an analytic framework to explain, as a coherent whole, the diverse issues surrounding the current legal state of the presidency and to advance some principles to guide reform of the system. The analytic framework consists essentially of a contrast between two opposing perspectives on the half-dozen or so chief legal elements of the president's new legal status. One perspective corresponds to the traditional position, but today draws on the heightened sensitivity to ethics in current public affairs: the notion that the president must not be a king standing above the law. Under this perspective, the president must have no special immunity, privilege, or control power to block the operation of legally accusatory processes. Instead he must serve as the proper subject of multiple potent investigative efforts by prosecutors and congressional committees.<sup>15</sup> This "President as Investigative Subject" perspective sees presidents as tempted to abuse power with the help of the loyal White House staff and the presidentially appointed Attorney General. As such, strict policing of the legal separation between the president's personal and official capacities must occur, as reinforced by *Clinton v Jones*.<sup>16</sup> White House perjury and obstruction of justice by the proactively self-shielding president and his staff are seen as particularly dangerous problems, necessitating what will be called "secondary investigations."<sup>17</sup>

The opposing viewpoint argues that, in the constitutional interest of the primacy of democratic processes, the president has a political right to manage the impact of the investigations. This viewpoint opposes the lack of accountability inherent in the expansion of investigations by Independent Counsels<sup>18</sup> and by some of the special congressional committees. This second viewpoint calls the White House task, "management of the inquisition" whereby the president, with his official legal arm, the White House Counsel's office coordinating the president's multiple capacities,<sup>19</sup> wields legitimate

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15. Eric M. Freedman, *The Law as King and the King as Law: Is a President Immune from Criminal Prosecution Before Impeachment?*, 20 Hastings Const L Q 7 (1992).

16. *Clinton v Jones*, 117 S Ct 1636 (1997). On remand, see 990 F Supp 657 (ED Ark 1998) (granting summary judgment to defendant, President Clinton). See Bradford E. Biegler, *Presidential Immunity in Civil Actions: An Analysis Based upon Text, History and Blackstone's Commentaries*, 82 Va L Rev 677 (1996); William F. Allen, *President Clinton's Claim of Temporary Immunity: Constitutionalism in the Air*, 11 J L & Pol 555 (1995); Akhil R. Amar and Nel K. Katyal, Commentary, *Executive Privilege and Immunities: The Nixon and Clinton Cases*, 108 Harv L Rev 701 (1995).

17. See, generally, Corey Roush and Rishi Varma, *Obstruction of Justice*, 33 Am Crim L Rev 903, 914 (1996) (no "zealous representation" defense); Lisa C. Harris, *Perjury Defeats Justice*, 42 Wayne L Rev 1755, 1773-74 (1996).

18. Peter M. Ryan, *Counsels, Councils and Lunch: Preventing Abuse of the Power to Appoint Independent Counsels*, 144 U Pa L Rev 2537 (1996); Steven G. Calabresi, *Some Structural Consequences of the Increased Use of Ethics Probes as Political Weapons*, 11 J L & Pol 521 (1995).

19. In this viewpoint, Article II combines in the President several capacities: winner of national election, personal provider of political leadership, and government director of administration. These multiple capacities, being constitutionally anticipated, have eminent legitimacy, and deserve, not hostile reception, but official legal coordination, particularly

powers of resistance and damage limitation.<sup>20</sup> This perspective denounces investigations that inappropriately threaten much more injury to the president's constitutional role than the mere lawsuits barred in *Nixon v Fitzgerald*,<sup>21</sup> and end-run the constraints that have made rare the actual prospect of impeachment trials or indictments of presidents.<sup>22</sup>

From the "management of inquisition" view, the late-stage "secondary investigation" phases embraced by Independent Counsels and special committees pose a particular separation of powers danger. They make presidential self-defense a separate late-ripening offense and prolong the anomalous legal status imposed upon the president for entire presidential terms.<sup>23</sup> This perspective finds its vindication in the survival and even thriving of the White House Counsel's office amidst all recent controversy over its activity and reflects the felt necessity for the president to wield effective defensive power.

Part II of this Article details the past decade of the specially investigated president. It sketches this new status chronologically, from Iran-Contra<sup>24</sup> to

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a White House Counsel capable of dealing with the multiple capacities' common legal interests. Note, *Attorney-Client and Work Product Protection in a Utilitarian World: An Argument for Recomparison*, 108 Harv L Rev 1697, 1708 (1995) (argument for interests to be common enough for nonwaiver of privilege even where not identical).

20. See, generally, Bradley H. Patterson, Jr., *The Ring of Power*, 141-50 (Basic 1988) (description of the White House Counsel); Nelson Lund, *Lawyers and the Defense of the Presidency*, 1995 BYU L Rev 17 (1995); Jeremy Rabkin, *At the President's Side: The Role of the White House Counsel in Constitutional Policy*, 56 L & Contemp Probs 63 (1993).

21. *Nixon v Fitzgerald*, 457 US 731 (1982); Stephen L. Carter, *The Political Aspects of Judicial Power: Some Notes on the Presidential Immunity Decision*, 131 U Pa L Rev 1341 (1983); Aviva A. Orenstein, *Recent Development: Presidential Immunity From Civil Liability: Nixon v. Fitzgerald*, 68 Cornell L Rev 236 (1983); Thomas M. Cunningham, Comment, *Nixon v. Fitzgerald: A Justifiable Separation of Powers Argument for Absolute Presidential Civil Damages Immunity?*, 68 Iowa L Rev 557 (1983); Comment, *Immunity of the President and Other Government Officials*, 96 Harv L Rev 226 (1982).

22. For relevant analyses of the rarely used process for Presidents, see, for example, Michael J. Gerhardt, *The Federal Impeachment Process: A Constitutional and Historical Analysis* (Princeton 1996); Stephen M. Ryan and Catherine Newcombe, *The Power of Independent Counsel Referrals for Impeachment*, 44 Fed Lawyer 30 (March/April 1997); Michael J. Gerhardt, *Rediscovering Nonjusticiability: Judicial Review of Impeachments After Nixon*, 44 Duke L J 231, 269-75 (1994); William H. Rehnquist, *The Impeachment Clause: A Wild Card in the Constitution*, 85 Nw U L Rev 903 (1991); Michael J. Gerhardt, *The Constitutional Limits to Impeachment and Its Alternatives*, 68 Tex L Rev 1 (1989).

23. Peter W. Morgan, *The Undefined Crime of Lying to Congress: Ethics Reform and the Rules of Law*, 86 Nw U L Rev 177 (1992); Todd D. Peterson, *Prosecuting Executive Branch Officials for Contempt of Congress*, 66 NYU L Rev 563 (1991); Stanley M. Brand & Sean Connelly, *Constitutional Confrontations: Preserving a Prompt and Orderly Means by Which Congress May Enforce Investigative Demands Against Executive Branch Officials*, 36 Cath U L Rev 71 (1986).

24. Particular national-level legal controversies reflecting the acts in the Presidential drama included the appointment of an Iran-Contra Independent Counsel, starting almost six years of Iran-Contra investigation of Presidents Reagan and Bush with the special committee hearings and report of 1987-88. Peter M. Shane, *Presidents, Pardons, and*

President Bush's 1992 pardoning of the Iran-Contra defendants<sup>25</sup> through the various Clinton Administration investigations in Clinton's first and second terms.<sup>26</sup> I have had an opportunity to study this sequence of investigations and the evolution of the specially investigated president from the sides of both the investigator and the investigated.<sup>27</sup>

Part III of this Article describes two prevailing analytical perspectives and the new politico-legal status of the specially investigated president as a whole, highlighting the importance of the use of presidential power in his self-defense.

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*Prosecutors: Legal Accountability and the Separation of Powers*, 11 Yale L & Pol Rev 361 (1993).

25. This includes the inquiries and trials of 1990-91 with their videotaped testimony from Presidents Reagan and Bush. See, for example, *United States v Poindexter*, 732 F Supp 135 (DC 1990) (Reagan diary); *United States v Poindexter*, No. 88-0080-01(HHG), 1990 US Dist LEXIS 2881 (DC Mar 21, 1990) (videotaped Reagan deposition); Christopher Walter, Comment, *Legitimacy: The Sacrificial Lamb at the Altar of Executive Privilege*, 78 Ky L J 817 (1989-90)(Reagan evidence); Associated Press, *Bush's Deposition Was Videotaped, Lawyer Says*, NY Times A17 (Jan 3, 1993).

26. Brian C. Kalt, *Pardon Me?: The Constitutional Case Against Presidential Self-Pardons*, 106 Yale L J 779 (1996); see also, Harvey Berkman, *Will the President Pardon His Friends?*, Natl L J A19 (Nov 4, 1996) (speculating on what President Clinton could do regarding Whitewater with the pardon).

27. I have served both as Solicitor and Deputy General Counsel of the House of Representatives and as counsel both for investigating committees and for witnesses in the past decade. As Solicitor and Deputy General Counsel of the House of Representatives from 1984 to 1995, I personally represented the House of Representatives in court on investigation-related litigation, and advised on major investigations. In 1987, I served as Special Deputy Chief Counsel on the House Iran-Contra Committee (see generally, *Report of the Congressional Committees Investigating the Iran-Contra Affair*, S Rep No 216 & H Rep No 433, 100th Cong, 1st Sess (1987)). From 1987 to 1992, I represented House witnesses and subpoenaed entities in the Iran-Contra Independent Counsel inquiry, and advised House committees in the Iraqgate matter.

From 1995 to 1997, I represented various witnesses in the House investigations of the Waco siege, Whitewater/Travelgate, and the 1996 campaign finance/Webb Hubbell inquiry. In 1996, I served as deputy minority counsel on the House Bosniagate Committee (see generally *Final Report of the Select Subcommittee to Investigate the United States Role in Iranian Arms Transfers to Croatia and Bosnia, With Minority Views*, 104th Cong, 2d Sess (Comm Print 1997) ("House Bosniagate Report" and "House Minority Bosniagate Report").

In addition, I have published a series of articles in *Legal Times of Washington* about particular clashes during the investigations. See Charles Tiefer, *Privilege Pushover: Law and Practical Realities Fatally Weakened the President's Ability to Assert an Attorney-Client Privilege in the Senate Whitewater Committee*, Legal Times 24 (Jan 1, 1996); Charles Tiefer, *Contempt of Congress: Turf Battle Ahead*, Legal Times 26 (May 27, 1996); Charles Tiefer, *The Fight's the Thing: Why Congress and Clinton Rush to Battle with Subpoena and Executive Privilege*, Legal Times 25 (Oct 14, 1996). For previous writings drawing on my House service relating to these investigations, see Charles Tiefer, *The Semi-Sovereign Presidency: The Bush Administration's Strategy for Governing Without Congress* (Westview 1994); George W. Van Cleve and Charles Tiefer, *Navigating the Shoals of "Use" Immunity and Secret International Enterprises in Major Congressional Investigations: Lessons of the Iran-Contra Affair*, 55 Mo L Rev 43 (1990).

In Parts IV and V, six distinguishable elements are separated and analyzed from the two opposing viewpoints of president as mere “investigative subject” and president as legitimate “manager of the inquisition.” Part IV deals with the three basic elements of initiation and enlargement of parallel investigations. These three basic elements are: the *initiation* of each new, long-running special investigation of the president;<sup>28</sup> the complex, partly constitutional system that now decides the boundary questions of *enlargement*, especially durational extensions, of the special investigations;<sup>29</sup> and, the significance of the Congress and the Independent Counsels conducting *parallel* investigations.

Part V continues with three advanced elements: the probing of multiple presidential capacities, late-stage secondary investigations, and privileged official representation.<sup>30</sup> Part VI, the conclusion, advances from this analytic framework to explore principles for refining the new system surrounding the specially investigated president. Each of these perspectives can point to the controversy surrounding the legal institutions—the Independent Counsels and the special committees on one side, and the White House Counsel on the other—lauding the continuation of the institutions on its side and criticizing the institutions on the other.<sup>31</sup> From the “President as investigative subject” viewpoint, the investigating institutions draw vindication from *Morrison v Olson*, the re-authorizations of the Independent Counsel statute, and the reestablishment of special congressional investigating committees. From the other viewpoint, the special investigations have run amok, while the White House Counsel’s office has established and legitimated itself as a linchpin in the president’s relation to the law.

The proposed principles follow from recognizing that this remarkable system balancing roughly the legally accusatory and the political processes will not only pose the constitutional and other issues noted in the analysis, but, assuming it is here to stay, will also require certain reforms. I propose that among the most vital of reforms, above everything else stands the desirability of a process for sanctioned, gradual *return* of an Independent Counsel investigation back to the Justice Department—not just a release, partially, of the president from the specially investigated status, but, more important, a release of national political affairs’ preoccupation with the president’s never-ending “trial.” Additionally, these sections propose recognition of the president’s right

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28. Beth Nolan, *Removing Conflicts from the Administration of Justice: Conflict of Interest and Independent Counsels Under the Ethics in Government Act*, 79 Geo L J 1 (1990).

29. *Recent Cases*, 110 Harv L Rev 775, 793 (1997).

30. See generally, Michael K. Forde, *The White House Counsel and Whitewater: Government Lawyers and the Scope of Privileged Communications*, 16 Yale L Rev & Pol Rev 109 (1997); Lori A. Barsdate, *Attorney-Client Privilege for the Government Entity*, 97 Yale L J 1725 (1988).

31. See Douglas S. Onley, *Treading on Sacred Ground: Congress’s Power to Subject White House Advisers to Senate Confirmation*, 37 Wm & Mary L Rev 1183 (1996). Thomas M. Franck, Comment, *The Constitutional and Legal Position of the National Security Adviser and Deputy Adviser*, 74 Am J Int'l L 634 (1980).

to orchestrate a *legitimate defense*, including clarification of the role of the White House Counsel, and of the degree of *budgetary accountability* in the special investigations. Overall, this analysis points to a future of conscious balancing of the legally accusatory and the legitimate political aspects of the specially investigated president.

## II. A Succession of Presidential Investigations

### A. 1987-1992: IRAN-CONTRA THROUGH PASSPORTGATE

#### 1. Parallel Iran-Contra Investigations

From 1984 to 1986, President Reagan's National Security Council ("NSC") oversaw two operations: trading arms for hostages with Iran and securing funding for the Nicaraguan Contras in violations of legal prohibitions enacted by Congress. These operations became entwined, while the NSC kept them secret from Congress by methods that included telling lies about national security.<sup>32</sup> The secrets began unraveling in November 1986, when the highest officials meeting with President Reagan and Vice President Bush sought to organize, during a confused period, various cover-ups. Attorney General Meese, himself personally implicated in the scandal, applied for the appointment of an Independent Counsel. In December 1986, the Special Division appointed Independent Counsel Lawrence Walsh, and in 1987, the incoming Congress established the special House and Senate Iran-Contra Committees.

President Reagan remained under special investigative scrutiny from the scandal's revelation to the end of his term. Since Vice President Bush won election to his own term as president in 1988 with the investigation still continuing, also important was the vice president's own Iran-Contra exposure. He too became a specially investigated president. In 1987-88, Vice President Bush successfully put forth the defense, to both the investigations and the public, that he should escape taint because he had been "out of the loop." C. Boyden Gray, as counsel first to Vice President and then to President Bush, began early helping his clients and their associates stake this defense in the Iran-Contra investigations. They spent years organizing and conducting the defense, with Gray invoking attorney-client privilege in his representation of Bush's staff.<sup>33</sup> In January 1988, Vice President Bush gave the Independent Counsel a videotaped deposition, which remained a secret for five years.<sup>34</sup>

The "out of the loop" position aided the vice president in his 1988 presidential campaign, but did so at a high cost. For years after, gradual revelations

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32. For a summary of Iran-Contra, see Shane, *Presidents, Pardons, and Prosecutors* at 364-68 (cited in note 24).

33. "Having been the vice president's counsel while Bush was involved in Iran-Contra activities, Gray had spearheaded Bush's defense of these activities after he became president." Lawrence E. Walsh, *Firewall: The Iran-Contra Conspiracy and Cover-Up* 452 (Norton 1997).

34. *Bush's Deposition Was Videotaped, Lawyer Says*, NY Times A17 (cited in note 25).

accumulated. Bits and pieces of private records and recollections of the principals were gathered, suggesting Vice President Bush had much more knowledge than he had admitted in 1987-88, both in the Iran or arms-for-hostages side<sup>35</sup> and in the Contra side<sup>36</sup> of the operations. Far greater than the exposure of Vice President Bush and his staff<sup>37</sup> for their primary conduct, however, was his and his staff's secondary exposure to disputes about the veracity of their self-exonerating public statements and testimony in 1987-88.

The congressional Iran-Contra committees held televised hearings in 1987, revealing the depths of the scandal. Yet the hearings also provided a podium for effective presentation by NSC staffer Oliver North. In 1988, the Independent Counsel indicted North and his superior, National Security Adviser John Poindexter, and in separate trials, convicted North then Poindexter, with President Reagan giving videotaped trial testimony for the defense.<sup>38</sup> Afterwards, however, the tide began to turn.<sup>39</sup>

## 2. The "Secondary Investigation" of Iran-Contra and the White House Counsel's Defense

After Poindexter's conviction in 1990, Independent Counsel Walsh and his staff considered, but rejected, the idea of winding up their investigation in a limited time. Instead, they pursued a set of leads that, among other matters, suggested "the cabinet-level members of the National Security Council had known more than they had admitted to Congress [and] the public."<sup>40</sup> In effect, they commenced a secondary investigation—an investigation focused on the extent to which a conspiracy existed consisting of high officials who committed

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35. On the arms-for-hostages side, Vice President Bush had received information regarding missile shipment to Iran in 1985 and 1986, and may well have taken sides within the internal Administration debate to favor going ahead with the arms-for-hostages deal, a position he subsequently denied repeatedly and fervently. Walsh, *Firewall* 448-54 (cited in note 33); Tiefer, *The Semi-Sovereign Presidency* 43 & nn 39-40 (cited in note 27).

36. Bush himself had delivered to a Central American leader one of the quid pro quo's for Contra aid, as described in a stipulation at North's trial. Glen Craney, *Members Request Hill Inquiry on North Trial Documents*, 47 Cong Q Wkly Rep 986 (1989); Glen Craney, *North Ends Six Days on Stand as Lawyers Near Wrap-Up*, 47 Cong Q Wkly Rep 843 (1989).

37. In both aspects, his key personnel, who implemented his justified pride in full knowledge of national security matters, had great knowledge and some involvement in what the NSC staff did, and this too, tended to come out slowly as the Independent Counsel's probe continued.

38. David Johnston, *The Reagan Tapes: Reagan Testifies He Did Not Order Any Illegal Acts*, NY Times A1 (Feb 23, 1990).

39. The congressional Iran-Contra committees had obtained North and Poindexter's testimony under grants of use immunity, and in 1990-91 divided panels of the D.C. Circuit reversed both trial convictions because of those immunity grants. *United States v North*, 910 F2d 843 (DC Cir 1990); *United States v North*, 920 F2d 940 (DC Cir 1990); *United States v Poindexter*, 951 F2d 369 (DC Cir 1991).

40. Walsh, *Firewall* at 462 (cited in note 33).

offenses such as perjury and obstruction of justice at the onset of, and during the investigations by, the special congressional committees and the Independent Counsel. The leads developed by this secondary investigation eventually revealed personal notes, previously withheld, from the Secretaries of State and Defense and their close aides, and convinced investigators to indict former Secretary of Defense Weinberger for false statements and perjury.

However, the slow progress of the "secondary investigation" came at a considerable price. Instead of winding up the investigation, Independent Counsel Walsh pressed on into 1990-92. He had to face "a determined political effort by North's supporters, George Bush's administration, and congressional critics to shut down [the] office."<sup>41</sup> Critics cited the duration of the Walsh inquiry, and its rising cost, which moved beyond \$25 million in September 1990 and eventually reached \$40 million. They highlighted the fact that investigators had produced only a few convictions and most of those were charges that these officials obstructed congressional efforts to investigate the matter. Administration supporters did not deem these charges heinous. Neither the public nor Congress remained interested in the Iran-Contra issue in the drawn-out pace of the legal accusatory process, further lengthened by the effective wielding of tools of delay by the Bush Administration.<sup>42</sup>

As President Bush began approaching his 1992 primary and general re-election campaigns, the media increased its reporting of evidence that Bush's conduct during Iran-Contra pretrial and trial proceedings clashed with the original account he gave in early stages of the special investigation. President Reagan gave an all-day private transcribed interview to an Iran-Contra special prosecutor.<sup>43</sup> Expressions by Republicans critical of Independent Counsel Walsh became intense and personal, much like the later criticisms by Democrats directed at Whitewater Independent Counsel Starr.

A dramatic confrontation occurred once President Bush lost the 1992 election, and the trial of former Secretary Weinberger loomed, in which Bush, as a potential witness, faced intense scrutiny. It came out that Vice President Bush had kept his own set of diary notes during the 1986 period, and that White House Counsel Gray withheld the notes, despite demands for their release, until after the 1992 election. The notes, once revealed, considerably undermined President Bush's position that he had been "out of the loop."<sup>44</sup> There followed a counsel-to-counsel struggle prefiguring the in-fighting between special investigations and the White House Counsels of the Clinton Administration, in which Walsh wanted to question Gray regarding the withholding of the notes, and

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41. *Id* at 463.

42. "[T]he Bush Administration fought hard and at great length to prevent Walsh's acquisition of a good deal of the material he sought to support his investigation." Shane, *Presidents, Pardons, and Prosecutors* at 398 (cited in note 24).

43. David Johnston, *Federal Agents Investigating Loss of Iran Contra Papers*, NY Times A6 (Oct 10, 1992).

44. George Lardner, Jr. and Walter Pincus, *Diary Shows Bush 'Trying to Weather the Storm' on Iran-Contra*, Wash Post A26 (Jan 17, 1993).

Gray refused. In the midst of the controversy, Gray engineered the spectacular pardon on Christmas Eve 1992. In the most dramatic use of that presidential power since President Ford pardoned former President Nixon, all the Iran-Contra defendants were pardoned. This move essentially put Independent Counsel Walsh out of business.<sup>45</sup>

### 3. Iraqgate and Passportgate

Two relatively limited investigations of the Bush Administration after 1991 reflected in other ways the movement towards the new politico-legal system for the specially investigated president. The Iraqgate inquiries after 1991 concerned the positive attitude toward Saddam Hussein by the Bush Administration prior to the invasion of Kuwait<sup>46</sup> and an Administration cover-up.<sup>47</sup> Faced with a congressional request for an Independent Counsel, the Attorney General appointed a former federal judge as a special counsel to look at the alleged inadequate pursuit of Administration wrongdoing in the Banca Nazionale del Lavoro ("BNL") matter. Ultimately the counsel let the Administration off relatively lightly.<sup>48</sup>

As for Passportgate, in the now-familiar pattern, it started with a press firestorm, this time over a pre-election search of then-candidate Clinton's passport file, followed by preliminary criminal investigation.<sup>49</sup> The alleged interest in the results of the file search by aides of President Bush<sup>50</sup> sufficed to necessitate an Independent Counsel appointment.<sup>51</sup> Ultimately, the Passportgate Independent Counsel decided not to charge anyone with a crime.

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45. By the end of the Bush Administration, Gray was carrying out a large fraction of the high-profile activity still occurring in the White House. Phil McCombs, *Counsel's Last Hurrah: The Final, Furious Days of C. Boyden Gray*, Wash Post C1 (Jan 16, 1993).

46. This included the sluggish response to billion-dollar illegal government-backed loans to Iraq by Banca Nazionale del Lavoro's ("BNL") Atlanta branch. Tiefer, *The Semi-Sovereign Presidency* at 89-117 (cited in note 27); John M. Kelly and Janet P. McEntee, *The Independent Counsel Law: Is There Life After Death?*, 8 St John's Legal Commentary 561, notes 109-23 (1993).

47. Congressional hearings revealed alteration of records by high Commerce Department officials after their consultation with the White House Counsel. Tiefer, *The Semi-Sovereign Presidency* at 110-12 (cited in note 27).

48. Kelly and McEntee, *The Independent Counsel Law* at nn 115-19 (cited in note 56).

49. Walter Pincus, *Passport Probe Finds "Potentially Criminal Matters": Inspector General's Discoveries on Clinton File Search Are Referred to Justice Department*, Wash Post A6 (Dec 1, 1992).

50. Walter Pincus, *White House Tied to Passport Search: Aim Was Clinton Letter Tamposi Says*, Wash Post A1 (Nov 16, 1992).

51. Carroll J. Doherty, *Independent Counsel Named to Probe Passport Flap*, 50 Cong Q Wkly Rep 3891 (1992).

## B. THE FIRST CLINTON TERM

### 1. Whitewater

In March of 1992, during the presidential campaign, the *New York Times* published an article linking the Clintons with the Whitewater Development Corporation and the failed Madison Guaranty Savings and Loan. When President Clinton took office in January 1993, he hired Bernard Nussbaum as White House Counsel—the first of five different lawyers to hold the post over five years.<sup>52</sup> Vincent W. Foster, law partner of First Lady Hillary Clinton, became Deputy White House Counsel. Foster committed suicide in July 1993.<sup>53</sup> Press and congressional interest in Clinton's pre-election activities and post-election president-protecting reactions of White House staff grew.<sup>54</sup> In January 1994, Attorney General Reno finally did appoint a special counsel, Robert Fiske, to investigate the Whitewater matter.<sup>55</sup> After the re-authorization of the Independent Counsel statute, the special judicial panel empowered to make appointments decided to have Kenneth Starr, not Fiske, be Independent Counsel.<sup>56</sup> Critics challenged this appointment as partisan.<sup>57</sup> During 1994, the Senate and House Banking Committees held hearings on Whitewater<sup>58</sup> and the Senate Banking Committee issued, in January 1995, a report on Whitewater.<sup>59</sup>

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52. For the succession of five White House Counsels, see Bruce D. Brown, *Ruff Leaves Mark on Troubled Law Shop*, Legal Times 1 (Jan 13, 1997); James A. Barnes, *Changing Lawyers*, 29 Natl L J 284 (Feb 8, 1997); Burt Solomon, *The Perils of a Partisan Counsel*, 28 Natl L J 1114 (May 18, 1996); Marcia Coyle, *Clinton's New Counsel Said to Have Right Instincts*, Natl L J A11 (Aug 22, 1994); Stephen Labaton, *New Role for White House Counsel: De Facto Attorney General*, NY Times A14 (March 9, 1993).

53. For the eventual Senate reports on Foster, see *Investigation of Whitewater Development Corporation And Related Matters*, S Rep No 280, 104th Cong, 2d Sess (1996); *Madison Guaranty S&L and the Whitewater Development Corporation.—Washington, D.C. Phase, Volume I: Inquiry into the Park Police Investigation of the Death of White House Deputy Counsel Vincent W. Foster, Jr.*, S Rep No 433 (Vol 1), 103rd Cong, 2d Sess (1995).

54. Henry J. Reske, *A Job With Ethical Hazards: After White House Counsel Resigns, His Proper Role Debated*, 80 ABA J 43 (May 1994).

55. Jerry Sepler, *Fiske Says He Wants Clintons to Give Testimony Under Oath*, Washington Times A1 (Jan 21, 1994).

56. Andrew Taylor, *Schedule for Hearings Is Unclear As Starr Takes Over Probe*, 52 Cong Q Wkly Rep 2316 (1994).

57. Critics charged that a judge acted partisanly, through interactions with partisan senators, in choosing for Fiske to go, and Starr to come. Abbe D. Lowell, *Starr Flap Shows Need for Reform*, Natl L J A19 (May 13, 1996).

58. *Economic and Finance Action: Legislative Summary—Whitewater*, 53 Cong Q Wkly Rep 3158 (1994). Judge Abner Mikva took over in 1994 as White House Counsel, bringing respect in both legal and congressional quarters.

59. *Madison Guaranty S&L and the Whitewater Development Corporation.—Washington, D.C. Phase*, S Rep No 433 (Vol II), 103rd Cong, 2d Sess (1995); Andrew Taylor, *Senate Republicans on Altman: "An Aggravated Case of Lying,"* 53 Cong Q Wkly Rep 35 (1995).

Once the Republicans won a majority of both the House and the Senate in the 1994 election, Congress gave authority for the Senate Banking Committee to function as a special Senate Whitewater Committee. The Committee held extensive hearings, which included disputes about the White House Counsel's office.<sup>60</sup> In December 1995, the Senate Whitewater Committee sought to enforce its subpoena for notes taken at a joint meeting of White House counsels and the president's private counsels.<sup>61</sup> On a party-line vote, the Senate voted to enforce the subpoena, disputing that attorney-client privilege covered such a meeting. The White House Counsel's office capitulated and eventually provided the notes.<sup>62</sup>

In January 1996, Hillary Clinton's law firm billing records, previously subpoenaed by the Independent Counsel, turned up in the White House's living quarters. Previously, on three separate occasions, the Independent Counsel had settled for the First Lady's answers to interrogatories. This time he required her to submit to grand jury questioning in person, along with the Clintons' private attorney David E. Kendall and a White House counsel.<sup>63</sup> Armed with this new event, the Senate Whitewater Committee obtained an extension of its operations into the election year, a controversial step.<sup>64</sup> In a 1996 Arkansas trial, the defense subpoenaed President Clinton, who gave videotaped trial testimony that played a role in the defendants' acquittal, a major setback to Starr.<sup>65</sup> Political scientists found that the special investigations had undermined the public's opinion of President Clinton in some respects, but without impairing his overall popularity and re-election support.<sup>66</sup>

## 2. Travelgate and Bosniagate

Early in 1993, the White House terminated seven holdover employees of its travel office.<sup>67</sup> When a new majority party took control in the House in 1995,

60. Holly Idelson, *Nussbaum Defends Actions After Foster's Death*, 53 Cong Q Wkly Rep 2419 (1995).

61. *Refusal of William H. Kennedy, III, to Produce Notes Subpoenaed by the Special Committee to Investigate Whitewater Development Corporation and Related Matters*, S Rep No 191, 104th Cong, 1st Sess (1995).

62. Tiefer, *Privilege Pushover*, (cited in note 27).

63. Jerry Sepler, *Hillary to Face Grand Jury: Questioning Will Focus on Rose Records*, Wash Times A1 (Jan 23, 1996).

64. For the Senate committee report seeking the extension, see *Progress of the Investigation Into Whitewater Development Corporation And Related Matters and Recommendation for Future Funding*, S Rep No 204, 104th Cong, 2d Sess (1996).

65. Patricia Manson, *Bankers Acquitted of 4 Felonies; Jury in Whitewater Case Deadlocks on 7 Counts*, Ark Democratic-Gazette 1A (Aug 2, 1996).

66. Marion R. Just, *Candidate Strategies and the Media Campaign*, Gerald M. Pomper, ed, *The Election of 1996: Reports and Interpretations* 84 (Chatham House 1997) ("The acquittal seemed to help the White House face down the press on Whitewater in the weeks before the party conventions."); James W. Ceaser and Andrew E. Busch, *Losing to Win: The 1996 Elections and American Politics* 94-95 (Rowman & Littlefield 1997).

67. The White House press corps, a major user of the travel office, had close ties to the fired employees, and raised the matter into a major issue, which quieted when an

the House Committee on Government Reform and Oversight re-opened the matter.<sup>68</sup> The surfacing in January 1996 of a White House staffer's memo blaming the First Lady inflamed the matter. Independent Counsel Starr received a court order extending his Whitewater jurisdiction to Travelgate, and the House voted to have the Government Reform committee initiate a special investigation of the matter.<sup>69</sup>

In May 1996, after President Clinton first officially claimed executive privilege, the House Committee<sup>70</sup> reported that the White House Counsel was in criminal contempt.<sup>71</sup> While the White House Counsel eventually provided the records, he delayed production until Republicans were preoccupied with their party's national convention; the press gave the documents and the Committee's final Travelgate report<sup>72</sup> little attention—meaning that this inquiry, like the Senate Whitewater one, had continued late in the election year but diminished over time. The Committee did uncover that White House security officers had obtained FBI background files of public figures. This kicked off the so-called "Filegate" scandal.<sup>73</sup> Just as the House Committee automatically extended its jurisdiction to that matter, so too did Independent Counsel Starr seek expansion of his jurisdiction to include the new "Filegate" matter.<sup>74</sup>

With Filegate, in 1994, came the "Bosniagate" matter. While the Administration's public position supported a United Nations embargo on arms shipments to Bosnia, President Clinton approved a diplomatic sign to Croatia that was taken as a signal to allow Iranian arms transshipments to Bosnia. President Clinton did not notify Congress. When the press broke the story in 1995, its reports included allegations by CIA personnel that the State Department had run a covert action in this regard.<sup>75</sup> If true, these allegations would have raised serious legal issues reminiscent of the nonnotification of Congress in Iran-Contra. As a press firestorm of criticism occurred, Senate and House committees followed up with public hearings, unusual on such a classified subject.<sup>76</sup> The

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internally conducted White House review frankly admitted faults and publicly laid the matter out. *White House Travel Office Mgmt Rev* (1993).

68. *White House Travel Office—Day One: Hearing Before the Committee on Government Reform and Oversight*, House of Representatives 104th Cong, 2d Sess (1995).

69. That is, the House gave the Committee authority for its staff to depose witnesses. Susan Baer, *Whitewater Prosecutor to Probe Travel Office*, Balt Sun 1A (March 23, 1996).

70. Susan Baer, *Panel Wants House to Cite Clinton Lawyer for Contempt; Case Involves Travel Office*, Balt Sun 3A (May 10, 1996).

71. Miller, 81 Minn L Rev at 665-69 (cited in note 2).

72. *Investigation of the White House Travel Office Firings and Related Matters*, H R Rep No 849, 104th Cong, 2d Sess (1996); Miller, 81 Minn L Rev at 666-69 (cited in note 2).

73. *Investigation Into the White House and Department of Justice on Security of FBI Background Investigation Files*, H R Rep No 862, 104th Cong, 2d Sess (1996).

74. Id at 70-71.

75. James Risen and Doyle McManus, *US Ok'd Iranian Arms for Bosnia, Officials Say*, LA Times A1 (Apr 5, 1996).

76. *Hearing on US Actions Regarding Iranian Arms Shipments into Bosnia Before the*

House established a special committee to investigate the matter, on which I served as deputy minority counsel.<sup>77</sup>

President Clinton did not formally claim executive privilege during the inquiries.<sup>78</sup> A final twist occurred on the eve of the 1996 election. Two House Committees had conducted relatively ordinary oversight investigations, on drug law enforcement and about Haitian policy.<sup>79</sup> Just before congressional adjournment, both used threats of contempt citations to force President Clinton to invoke executive privilege formally, thereby raising the count of his formal executive privilege claims in his first term from just one, on Travelgate the previous May, to three.<sup>80</sup> Neither inquiry went anywhere afterwards.

### C. THE SECOND CLINTON TERM

A presidential election or re-election is traditionally followed by some period of political "honeymoon" with Congress, but it has not meant much of a break

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*Sen. Sel. Comm. On Intelligence*, 104th Cong, 2d Sess (1996); *Hearing on US Policy in Bosnia Before the House International Relations Comm.*, 104th Cong, 2d Sess (1996).

77. Majority and minority reached different conclusions, with the majority highly critical of the Administration but not definitely charging an unauthorized covert action. The majority's conclusion in this regard spoke of "evidence" of matters "that could be characterized as unauthorized covert action," *Final Report of the Select Subcomm. To Investigate the United States Role in Iranian Arms Transfers to Croatia and Bosnia, "The Iranian Greenlight Subcommittee" with Minority Views*, 104th Cong, 2d Sess 206 (1997), which, in context, differed from an actual conclusion that a covert action occurred.

78. However, the White House did follow traditional policies against providing some White House national security materials to Congress, and this produced some public reports about what were allusions to the informal White House policies on executive privilege. Fisher, *Constitutional Conflicts* at 182-83 (cited in note 3); Tim Weiner, *Congress is Denied Report on Bosnia: Citing Privilege, Clinton Bars Data on Iran Arms Exports*, NY Times A1 (Apr 17, 1996).

79. Tiefer, *Rush to Fight* (cited in note 27). For a strong Congressional response by a committee Chief Counsel urging the significance of the late-1996 subpoenas, see Kevin M. Sabo, *Scandal Retardant: Clinton Grabs for Executive Privilege When Congress Turns Up Heat*, Legal Times 27 (Oct 28, 1996).

80. Sabo, Legal Times at 27. By traditional standards, the House moves made little sense; the House's adjournment meant it would lose the privilege dispute by default, undermining the long-term strength of its compulsory process. As with Bosniagate and Filegate, the House's escalation of the two pre-adjournment subpoena disputes made sense in the context of the new status of the special investigated President, simply to increase the number of times the words "President" and "privilege" were linked. As two political observers noted a few months later:

There seems to be a "—gate" for every occasion, often encouraged by conservatives who would like to persuade the country that Clinton is guilty of sins comparable to those of President Nixon during Watergate. Thus, we have "Travelgate" applied to the clumsy attempt by Clinton operatives four years ago to install key people in the White House travel office. And we have "Filegate" and even "Fostergate"—the latter applied by the conspiracy theorists to the suicide of White House deputy counsel Vincent Foster Jr.

Jack W. Germond and Jules Witcover, *Will the Aura of Scandal Affect 1998?*, 29 Natl L J 38 (April 26, 1997).

in the legal status of the specially investigated president. Just as the Iran-Contra investigation by Independent Counsel Walsh continued unabated after President Bush's 1988 election and through President Bush's 1992 campaign, so too did the Whitewater investigation after President Clinton's 1996 re-election.

### 1. Continued Investigations: The First Lady

During 1997, it became increasingly clear that Independent Counsel Starr's focus had become the First Lady. In particular, he targeted her alleged obstruction of his inquiry through changes of testimony and the mystery of the late production of the billing records.<sup>81</sup> In a significant clash directly involving the two sides' institutional authority, the Whitewater Independent Counsel enforced a subpoena of notes taken at the debriefing of the First Lady by Kendall and by the White House Counsel. The Independent Counsel lost in district court, and won in the Eighth Circuit.<sup>82</sup> With publicity, in 1997 the White House Counsel had the case unsealed and announced that he would seek certiorari. The Solicitor General, after independently considering the issue, supported the White House Counsel. However, the Supreme Court denied certiorari.<sup>83</sup>

### 2. Campaign Finance Investigation

A new set of investigations was launched regarding the 1996 campaign finance matter. As usual, the investigations began with a press firestorm. This time the catalyst was Clinton campaign fund-raising by John Huang, later broadened to other allegations of foreign contributions or of excessive involvement in fund-raising by the White House. The Senate and House authorized special committee investigations of the matter with multimillion dollar funding and partisan subject orientations. In the initiation of these inquiries and their early conduct, partisanship levels were high in both chambers.<sup>84</sup> After the struggle over initiation, the early Senate hearings in summer and fall 1997 came as an anticlimax,<sup>85</sup> though the proposed and actual use of witness immunity revived an issue from Iran-Contra.<sup>86</sup>

At the same time, heated clashes took place over Senate demands for a new

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81. See generally, Naftali Bendavid, *Staff's Jury Problem: Indict the First Lady? The Folks in D.C. or Arkansas May Prove a Hard Sell*, Legal Times 1 (Feb 17, 1997).

82. *In re Grand Jury Subpoena Duces Tecum*, 112 F3d 910 (8th Cir 1997).

83. *Office of the President v Office of Independent Counsel*, 117 S Ct 2482 (1997).

84. Rebecca Carr, *Burton's Deposition Authority Sparks Further Rancor*, 55 Cong Q Wkly Rep 1419 (June 21, 1997); Rebecca Carr, *Resignations Roil House Finance Probe*, 55 Cong Q Wkly Rep 1574 (July 5, 1997); Rebecca Carr, *Fundraising Probe Erupts Into Partisan Warfare*, 55 Cong Q Wkly Rep 1353 (June 14, 1997); Eliza Newlin Carney, *Pitfalls for the Probes*, 29 Natl L J 99 (May 17, 1997).

85. Senate authorization occurred only after prolonged majority party efforts to break a minority party filibuster. Rebecca Carr, *Hearings, Short on Surprises, Cover Familiar Terrain*, 55 Cong Q Wkly Rep 1851 (Aug 2, 1997).

86. Rebecca Carr, *Republicans Find Hearings Off to a Shaky Start: Proposal to Have a Key Witness Testify in Exchange for Immunity, Plus Frustrating Exchanges with Former DNC Official, Blunt GOP Hopes*, 55 Cong Q Wkly Rep 1601 (July 12, 1997).

Independent Counsel. In the spring Attorney General Reno declined to acquiesce to the demands in a high-profile confrontation at a Senate Judiciary Committee hearing.<sup>87</sup> She pointed to the lack of evidence of specific crimes by the president or other statutorily covered officials and to the prosecutorial inquiry taking place in the Criminal Division without White House interference. In the fall, the issue arose again, as Attorney General Reno initiated a preliminary investigation of the vice president's fundraising.<sup>88</sup> The issue recurred yet again in 1998.

### 3. The Monica Lewinsky Matter

In 1998, the sexual harassment suit against the president, *Jones v Clinton*, proceeded through discovery pursuant to the Supreme Court's remand. Ultimately the district court granted summary judgment in favor of the president.<sup>89</sup> During discovery however, Jones' lawyers deposed President Clinton and elicited his denial that he had a sexual relationship with a former White House intern, Monica Lewinsky. His denial matched her affidavit, which contained a similar denial. Independent Counsel Starr pursued allegations that because the president had indeed had such a relationship with Lewinsky, his denial of such a relationship during the deposition was perjury. Starr further alleged that Lewinsky's denial of the affair was secured in part, and was accompanied by, various acts constituting obstruction of justice by the president and others. At Starr's request, Attorney General Janet Reno applied for and obtained an expansion order giving Starr jurisdiction to investigate and pursue these allegations.

Revelations and confrontations resulting from these allegations produced an early 1998 media firestorm. The nation witnessed another series of clashes between the president and the Independent Counsel. The president unsuccessfully invoked executive privilege to protect his consultations regarding the Lewinsky matter with various members of the White House staff.<sup>90</sup> The Independent Counsel signaled that he would report to the House of Representatives, pursuant to statutory provisions, regarding impeachment.<sup>91</sup> House Speaker Newt Gingrich made special preparations for the House to handle such a report.<sup>92</sup> Meanwhile however, President Clinton's efforts to limit the damage succeeded at first in the court of public opinion.<sup>93</sup> President Clinton continued to focus on

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87. Ruth Marcus, *DNC Probe So Far Doesn't Indicate Independent Counsel, Reno Says*, Wash Post A6 (Feb 28, 1997).

88. Rebecca Carr, *Hearings Get Hung Up on Intent as Gore Calls Prove Costly*, 55 Cong Q Wkly Rep 2124 (Sept 13, 1997).

89. Dan Balz, *President's Victory Took Enormous Toll*, Wash Post A1 (Apr 2, 1998).

90. Roberto Suro, *Jordan Was Justification to Widen Starr Probe*, Wash Post A22 (Jan 28, 1998).

91. Paul Bedard and Warren P. Strobel, *Clinton Lawyers Push for Appeal*, Wash Times A16 (May 8, 1998). The other clashes between the President and Independent Counsel Starr included a claim of a "Secret Service privilege." See Stuart Taylor, Jr., *The Secrets of the Secret Service* Natl J, 1998 WL 2089163 (May 2, 1998).

92. David S. Broder and Susan Schmidt, *House Group Would View Starr Evidence*, Wash Post A1 (Mar 19, 1998).

93. The press often took an unfavorable view of the President's efforts. See, for

the performance of his presidential duties within the political sphere. His dedication to "do the work of the President" actually produced an increase in public support for him in the polls. It also resulted in a growing skepticism among the public of Starr's investigation and brought increased calls for Starr to bring his investigations to a close.<sup>94</sup> Clinton drew upon the diminishing support of the public for Independent Counsel Starr and his relentless pursuit of expansive special investigations. Thus, in spite of accounts that Independent Counsel Starr would be sending a report to Congress identifying potential grounds for impeachment, commentators and the press began to argue publicly that the Impeachment Clause did not contemplate matters like the Lewinsky matter and would not reach the allegations being asserted against President Clinton.<sup>95</sup>

Thus, the Lewinsky matter crystallized the evolution of the president's new legal status, even in the face of the first significant impeachment threat to befall the president in the quarter century since Watergate.<sup>96</sup> While the president could not conduct a successful defense by invoking absolute executive powers like executive privilege, he could defend himself and his office by protecting the primacy of political process and its constitutional safeguards for the office of the president over the accusatory process. On the other hand, President Clinton's court defeats on privilege, his being questioned in August 1998 for a grand jury, and his unpopular public apology, undermined his support.

### III. The Analytic Framework: President as Investigation Subject Versus Managing the Inquisition

This Article establishes an analytical framework concerning the balance between the two aspects of the politico-legal process surrounding the legal position of the president, namely, legal accusation and self-defense. At one pole

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example, Jack W. Germond and Jules Witcover, *Obfuscate, Stall and Delay*, Natl J, 1998 WL 2089048 (Mar 29, 1998).

94. Dan Balz and Claudia Dean, *Poll Finds Impatience with Starr; Time Limit on Probe Backed; Most See Motive as Political*, Wash Post A1 (Apr 5, 1998).

95. The Impeachment Clause provides in pertinent part, "The President . . . shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." US Const, Art II, § 4. For example, a crime could be one of great seriousness—killing one's private rival in a duel or covering up a liaison by felonious methods—and still not fall within the meaning of "high Crimes and Misdemeanors" as intended by Framers for whom the term "high Crimes and Misdemeanors" was on par with offenses like treason and bribery that relate specifically to the performance of official duties. Loose standards give Congress excessive opportunity to remove the President that was directly elected by the People. Charles Tiefer, *The Short Arm of the Impeachment Clause: This Constitutional Power Simply Doesn't Reach All Presidential Crimes*, Legal Times 21 (Jun 8, 1998).

For his own reasons, Senate Majority Leader Trent Lott proposed censure for the President rather than impeachment. Peter Baker and Susan Schmidt, *Lott Urges Starr to End Probe Soon; Hill Could Censure Clinton, He Says*, Wash Post A1 (Mar 7, 1998).

96. Elizabeth Drew, *How Can it Be That Impeachment Talk Has Gotten So Cheap?*, Buffalo News G1 (Feb 8, 1998).

of analysis, those advancing the approach of president as investigation subject, one finds support for exposing the president to a broad range of legal accusations and a constrained use of executive powers in the president's defense. At the other end, followers of the approach of managing the inquisition reject arguments that the president should be prevented from utilizing special powers in his self-defense.

#### A. PRESIDENT AS INVESTIGATION SUBJECT

The rationale for the president as investigation subject approach is rooted in the Framers' omission of special immunities for the president, the presidential tendency to abuse power, the limits on Executive Power delineated in the Constitution, and the disallowance of presidential interference with investigation by resort to appointment (or removal) power over the accusers. The absence of comprehensive executive immunity dates back to a time when the courts first established that the president could not shield his subordinates from scrutiny or charges<sup>97</sup> or shield himself from subpoenas.<sup>98</sup> This refusal to grant executive immunity in the nation's early years stemmed from the belief that a president had dangerous tendencies to abuse power.<sup>99</sup> These arguments in favor of limiting executive power had to contend, up to the past quarter-century, with a powerful argument that the president might well enjoy an absolute executive privilege. However, Watergate, with its revelation of the depths of presidential abuse of power and the decision in *United States v Nixon*, decisively undermined the arguments for special presidential immunity and established essentially the opposite.<sup>100</sup>

Presidential efforts to fend off investigation by invoking executive privilege, though historically frequent, have enjoyed only mixed success.<sup>101</sup> *Nixon* set a precedent further undermining future efforts by ruling that the arguments for presidential confidentiality sufficed to have an executive privilege, but only a de-feasible one.<sup>102</sup> Watergate and related revelations about the government

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97. Robert Reinstein, *An Early View of Executive Powers and Privilege: The Trial of Smith and Ogden*, 2 Hastings Const L Q 309 (1975).

98. See Chief Justice Marshall's early ruling in *United States v Burr*, 25 F Cas 187, 191 (CC Dist Va 1807).

99. So great a suspicion did the Framers have of the monarchical tendencies of the head of government that it shows in the Constitution from the impeachment clause to the "faithful execution" clause. For my congressional hearing testimony about the clause, see *Constitutionality of GAO's Bid Protest Function Hearings Before a Subcomm. Of the House Comm. On Government Operations*, 99th Cong, 1st Sess (1985). That testimony regarding the "faithful execution" clause was quoted at length with approval. *Ameron v United States Army Corps of Engineers*, 610 F Supp 750, 755-56 (Dist NJ 1985), aff'd, 909 F2d 979 (3d Cir 1986), cert dismissed, 109 S Ct 297 (1988).

100. *United States v Nixon*, 418 US 683 (1974).

101. See, for example, Note, *In the Wake of Whitewater*, (cited in note 7).

102. Raoul Berger, *Executive Privilege: A Constitutional Myth* (Harvard 1974); K.A. McNeely-Johnson, Comment, *United States v. Nixon, Twenty Years After: The Good, The Bad and the Ugly—An Exploration of Executive Privilege*, 14 NIU L Rev 251, 273-77

strengthened another theme: that loyalty to the president fatally tainted the White House staff and, to some extent, the Attorney General-headed Department of Justice. By exposing the conflict of interest in having the presidentially appointed Attorney General direct investigations of the president and by unveiling problems that arise from a White House staff's shielding the president from normal congressional oversight, Watergate laid the groundwork for a system of Independent Counsels and special congressional investigations.<sup>103</sup> The completed system of special investigations did not come into fruition until Iran-Contra, but then the facts of that scandal, executed by White House staff and implicating Attorney General Meese, reinforced this theme. The lessons of Watergate and Iran-Contra were clear. No longer could the president be allowed to appoint and remove those charged with the responsibility of investigating him.

The Supreme Court's upholding in 1987 of the Independent Counsel statute added yet another key theme to this "President as investigation subject" analysis.<sup>104</sup> Previously, the strongest arguments for the president, and against the expansive legally accusatory mode concerned the president's powers to control federal law enforcement, including enforcement directed at himself. *Morrison v Olson* decisively rejected these arguments. The 1978 Independent Counsel statute's periodic reauthorization and amendment in 1982, 1987,<sup>105</sup> and 1994,<sup>106</sup> embodied and effectuated these themes, as did Congress's reauthorizations of special committees to investigate the president.

## B. MANAGING THE INQUISITION PERSPECTIVE

The strong stand against absolute executive power taken by the High Court compels some to rethink the nature of the opposing legal position. The argument that the president's executive power is so vital that it necessitates control over law enforcement seems insufficient in light of *Morrison*. This position overrelies upon a perspective that the Constitution establishes a system of strict separation of powers. National government instead deserves analysis that considers a flexible system of checks and balances, viewed from a structural and functional

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(1993); see also note 7.

103. For an analysis of how White House aides testify before special congressional investigations of the White House, but not regular congressional oversight hearings, see Louis Fisher, *White House Aides Testifying Before Congress*, 27 *Presidential Studies Q* 139 (1997).

104. *Morrison v Olson*, 487 US 654 (1988).

105. For the 1987 legislative history, see *Independent Counsel Reauthorization Act of 1987: Conference Report*, S Rep No 1123, 100th Cong, 1st Sess (1987); H R Conf Rep No 452, 100th Cong, 1st Sess (1987).

106. The Act was first enacted by Congress in 1978, *Ethics in Government Act*, Pub L No 95-521, 92 Stat 1867, and re-enacted with amendments in *Ethics in Government Act Amendments of 1982*, Pub L No 97-409, 96 Stat 2039 (1982); *Independent Counsel Reauthorization Act of 1987*, Pub L No 100-191, 101 Stat 1293 (1987); *Independent Counsel Reauthorization Act of 1994*, Pub L No 103-270, 108 Stat 732 (1994). It is codified at 28 USC §§ 591-99.

perspective.<sup>107</sup> The real counterweights to arguments for subjecting the president to unlimited legally accusatory processes arise from quite different sources than a formalist argument of what Article II means by “Executive Power” or “Faithful Execution.”

Today the presidential defense derives its strength from the importance the Constitution places on democratic processes. The Constitution and the institutional activity to implement its mandates anticipate that contentions about presidents merge with the public’s larger political disputes.<sup>108</sup> However, by requiring the election of the president and Congress and then insuring that complex interactions among the branches occur on legislation, appropriations, confirmation of nominations, ratification of treaties, and so forth, to set national policy, the Constitution locks the president and Congress into an embrace of shared powers and an anticipation of the next election. This ensures a struggle for greater or lesser presidential influence in the political processes including, naturally, charges and contentions against the president. The struggle for influence occurs between the president and other prominent figures either in the Congress or candidates in the next presidential election.

Part of that struggle over presidential influence consists of the president’s wielding of executive power to block, parry, and outlast criticisms and charges against him. Legally accusatory processes have a role in this system, but under this perspective they occur alongside the political processes which establish the rise and fall of presidential influence. Given that these political processes serve as the nation’s way to make policy, to resolve disputes, and for the sovereign public to govern itself through the political accountability of its elected officials, nonpolitical and nonaccountable figures should not unduly monopolize, substitute, or displace the political processes. In a word, while a president remains subject to the rule of law, the rule of law should apply without supplanting democracy on a long-term basis.<sup>109</sup>

The Constitution supports the argument that a president may legitimately employ official powers in his defense so as to limit the damage from special investigations and to resist them (e.g., by delaying the production of documents or testimony). First, the Constitution vests the elected president with legitimate use of his powers unless, and until, some formal process constrains him. In the

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107. For structural analysis, see Charles L. Black, Jr., *Structure and Relationship in Constitutional Law* (Louisiana State 1969); Kate Stith, *Congress’ Power of the Purse*, 97 Yale L J 1343 (1988); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum L Rev 543 (1954).

108. Because the Constitution rejects a parliamentary system in favor of fixed four-year Presidential terms, it prevents an actual change of status in which a President wholly, or even partially, loses office, the way a prime minister in a parliamentary system loses office from a vote of no confidence.

109. Eastland, *Energy in the Executive* at 95 (cited in note 13) (“The Independent Counsel law is a central piece of a post-Watergate Washington culture that has elevated the pursuit of malfeasance to such a high priority that . . . [s]candal substitutes for, and crowds out, ordinary politics.”)

Framers' time many held the view that a president could not even be indicted until after Congress had impeached and convicted him.<sup>110</sup> This view's strength then reflects the evident absence of what might be called constitutional "interim disabilities" for an investigated president.<sup>111</sup> Moreover, Congress has not attempted to impose any statutory "interim disabilities" for a specially investigated president, apart from the statutory barriers to his paying the high expense of the personal representation necessitated by the investigations.<sup>112</sup>

Second, not only does the investigated president lose none of his official power, but he may also fight to build popular support as a means of resisting the investigations and limiting their damage. Members of what political scientists call the "modern presidency"<sup>113</sup> school have emphasized that the modern president's strongest powers consist of his public support, partially garnered by his formal powers such as veto or appointment, but primarily built up by the entire complex of image-building efforts such as public appearances, press coverage, ceremonial actions, political gestures, advertising, and campaigning. To illustrate this distinction further, note that the vice president has little in the way of official power, and the First Lady has virtually none, but both may become major political powers by dint of the public support they build. The "modern presidency" school locates the source of the specially investigated president's problems, not in the potency of the legal accusatory machinery in itself, but in contemporary factors that render the president vulnerable. These include the prevalence of divided government, the arming of the opposition party with the official power of Congress, a willingness of the opposition to use its accusatory tools to break down the presidency,<sup>114</sup> and the rising influence of media coverage—all compounded by diminishing levels of loyalty to the president within his own party in the modern ticket-splitting era.<sup>115</sup> These factors give rise to and foster the growth of the scandal-building machinery, consisting of the opposition

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110. Freedman, 20 Hastings Const L Q at 18-21 (cited in note 15); Joseph R. Jeffery, Comment, *Temporary Presidential Immunity: Adhering to the Separation of Powers Doctrine and the Will of the Framers for Civil Damages Litigation Involving the President—The Jones v. Clinton Case*, 40 St Louis U L J 833, 840-42 (1996).

111. This issue received particular attention regarding the other branches, where it is well established that indictment, and even conviction, do not remove a Congressman or a federal Judge; only the constitutional processes of expulsion or impeachment can do so. Today, it is argued that the President is different and the nature of the presidency is inconsistent with pre-impeachment indictment.

112. Kathleen Clark, *Paying the Price for Heightened Ethics Scrutiny: Legal Defense Funds and Other Ways That Government Officials Pay Their Lawyers*, 50 Stan L Rev 65, 80-82 (1997).

113. James P. Pfiffner, *The Modern Presidency* (St. Martin's 1994); Samuel Kernell, *Going Public: New Strategies of Presidential Leadership* (Cong Q 2d ed 1993); Richard Rose, *The Postmodern President: The White House Meets the World* (Chatham House 1988); Clinton Rossiter, *The American Presidency* (Time 2d ed 1963).

114. See generally, Gary W. Cox and Samuel Kernell, eds, *The Politics of Divided Government* (Westview 1991).

115. Calabresi, *Some Structural Consequences of the Increased Use of Ethics Probes*, 11 J L & Pol at 521 (cited in note 18).

party in Congress with its investigative tools and its public audience and the immensely influential media. An incipient scandal lets the opposition party and the media force the president into the investigated status.

This line of analysis argues not only that the specially investigated president's chief problem consists of the hemorrhaging of his general political support, but also that the president's chief defense is found in his ability to rebuild such support, particularly after the scandal peaks in public interest. A president may find that once he finds innovative ways to maintain public support, the legal status of being specially investigated, however uncomfortable, has only limited effects on his presidential position.<sup>116</sup> Vice President Bush won the presidency in 1988, and President Clinton won re-election in 1996, notwithstanding the presence in the field of an Independent Counsel.<sup>117</sup>

Third, the president's Article II appointment, removal, and other powers remain important even with congressional and Independent Counsel investigations in operation. The president still chooses his attorney general, with the advice and consent of the Senate, and his White House counsel. Even if he lacks easy access to any absolute executive privilege, his counsel has a number of legitimate issues available with the effect of delaying, if not ultimately withholding, documents and testimony. As discussed below, the machinery of initiation and enlargement of Independent Counsel power still leaves much power to the attorney general. Viewing investigations overall as a legal-political process, White House tools of delay and management of evidence production often serve in blunting, parrying, and outlasting the accusers.

The basic elements of the legal tension regarding the investigated president each warrant separate consideration; namely, initiation, enlargement, and parallel investigations. The following discussion first examines each element under the "President as investigation subject" perspective then under the "White House as manager of the inquisition" perspective.

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116. Vice President Bush won election to the Presidency in 1988 notwithstanding Iran-Contra, his 1992 problems owed less to public perceptions of Iran-Contra than of the economy, and President Clinton won the 1996 election notwithstanding his heavy dose of investigation.

117. Moreover, in particular, the issue regarding the President's multiple capacities, singled out for discussion below, may concern predominantly the political, rather than the accusatory, arena. Presidents cannot fire the Independent Counsel for legal processes that focus on realms they consider not properly subject to law enforcement, such as their conduct of foreign affairs, or their wives' activities. However, they can control the damage politically in those spheres, as by President Bush's successful anti-Iraq policy in 1990-91 and President Clinton's successful reduction of his First Lady's controversial profile following 1994, and that alone suffices to take much of the sting out of the investigations.

#### IV. Elements of the New Legal Status: Initiation, Enlargement, and Parallel Special Investigations

##### A. INITIATION

The Independent Counsel statute establishes a path to initiation of a special investigation of the president. Formally, the decision to initiate turns on a set of statutory criteria that triggers the appointment of an Independent Counsel. So even if an objective prosecutor would not think that the facts in a given case would likely warrant criminal charges, the statute would still govern the initiation decision. However, the statute also provides a discretionary procedure for investigation of noncovered persons<sup>118</sup> and sets a comparatively low threshold for preliminary investigation of a target with a higher threshold for whether, at a fixed period after the start of a preliminary investigation, the attorney general applies for judicial appointment of an Independent Counsel.<sup>119</sup> These initiation decisions lie within the judicially unreviewable decisionmaking power of the attorney general.<sup>120</sup> Sometimes initiation occurs early in a scandal, such as the rapid yielding of Attorney General Meese in December 1986 to the necessity to initiate Independent Counsel Walsh's appointment. At other times, initiation follows a long legal battle, as when Attorney General Reno finally agreed to the appointment of Robert Fiske as a Whitewater special counsel in 1994. Either way, the investigative system places the decision about initiation in the hands of the Attorney General, who, if possible, would prefer, both on institutional and political grounds, not to initiate a special investigation and appoint an Independent Counsel.

###### 1. Initiation from the "President as Investigation Subject" Viewpoint

From this viewpoint forceful arguments exist at many levels that the system should aim at and does, however imperfectly, aim at maintaining the rule of law regarding the president. Initiations of Independent Counsels and special congressional committees to investigate the president reflect the feeling among many that since Watergate, and more recently Iran-Contra, a mechanism combining

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118. The statute lists covered persons in 28 USC § 591(b). Pursuant to § 591(c), the Attorney General may also conduct a preliminary investigation of others if a Justice Department investigation may involve "conflict of interest." See Thomas J. Sater, *Legislative Summary: The Ethics in Government Act of 1978 and Subsequent Reforms: The Effect of Political and Practical Influences on the Creation of Public Policy*, 13 Seton Hall Legis J 243, 248-49 (1990).

119. The statute gives the Attorney General ninety days for a preliminary investigation, requiring the Attorney General to apply for the appointment of an Independent Counsel at that point absent a determination by the Attorney General that there are no reasonable grounds to believe that further investigation or prosecution is warranted. 28 USC § 591(c).

120. Pursuant to 28 USC § 592(f), the Attorney General's decision to apply to the for the appointment of an Independent Counsel is not reviewable "in any court." *Dellums v Smith*, 797 F2d 817, 823 (9th Cir 1986) (no judicial review of Attorney General's decision not to conduct preliminary investigations); *Banzhaf v Smith*, 737 F2d 1167 (DC Cir 1984) (en banc) (per curiam) (same).

substantive standards with defined procedures is needed for making successive decisions on the path of investigating the Chief Executive. The Independent Counsel statute reauthorizations in 1982, 1987, and 1994, reflect a maturation of the judgment regarding both the substantive standards and the defined procedures.<sup>121</sup>

In practice, those charged with carrying out the special investigation reinforce the notion that the president should not be permitted to escape the rule of law. When scandals involving the president or his very closest associates, reach a certain point, the Attorney General has little choice but to let the Justice Department civil service prosecutors supervise and evaluate an investigation conducted by the Federal Bureau of Investigation. These units have both strict procedures and an esprit de corps for carrying out their mission nonpolitically and according to the rule of law. Any sign of presidential tampering or other political interference would set off shrill alarms.

Adherents of the president as Investigation Subject perspective who repudiate the notion that this new legal status in and of itself imposes undue harm on the president received additional support from the Supreme Court recently. In *Clinton v Jones*, the Court rejected the argument that the president suffers undue harm simply because he is forced to defend himself against claims in a civil case. The Court clearly disagrees with the notion that exposure to a special investigation in and of itself unduly burdens the president and his ability to govern. This “President as investigative subject” view scorns the idea that the president should be given any special rights simply because he has become the target of a grand jury investigation. Ordinary citizens who become targets of a grand jury have virtually no special rights by dint of that status. Apart from being advised of that status,<sup>122</sup> they have no right to Miranda warnings and no right to a government-appointed attorney.<sup>123</sup> According to adherents of this view, since presidents are not above the law, initiating them into grand jury “target” status should not vest them with special rights either.

## 2. From the “Managing the Inquisition” Viewpoint

The “Managing the Inquisition” perspective challenges the portrayal of the initiation process as purely a matter of the rule of law. Rather, proponents of this view argue that given the fact that political-legal processes force presidents into the specially investigated status, political and legal resources must be used

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121. The 1982 reauthorization of the Independent Counsel specifically raised the statutory threshold from the unhappy experience of the appointment of Independent Counsels for Carter Administration matters deemed unworthy of the process. Kelly and McIntee, *The Independent Counsel* n 42 (cited in note 48).

122. At most, Justice Department policy provides for advising targets of their status before calling them as grand jury witnesses lest they improvidently waive their right to take the Fifth Amendment, but this policy creates no rights. Kathryn H. Ruemmler and Joseph L Barloon, *Project, Twenty-Fourth Annual Review of Criminal Procedure*, 83 Georgetown L J 839, 854 (1995).

123. *United States v Washington*, 431 US 181, 189 (1977); *United States v Mandujano*, 425 US 564, 570-76 (1976) (plurality).

to fight back and limit the damage. Because the special investigatory process threatens to intrude grossly on the proper workings of the democratic processes, when a president resorts to the array of executive powers at his disposal, both official and political, it is a legitimate response. Since the new investigation machinery initiates too often, absent countervailing political pressure, the mechanism gets overused; not because of some neutral workings of the rule of law, but because of the pressure that the media, public opinion, and political dynamics of Washington bring to bear. Once the media and the opposition party in Congress gain enough ground to generate a Washington "feeding-frenzy",<sup>124</sup> the special investigation system becomes just another tool in the political struggle. Ineluctably, the frenzy will bring about appointment of an Independent Counsel, thereby further preventing the president from utilizing all proper avenues in his political defense.

This view is further bolstered by the lack of controls on the initiation power of the Attorney General. Although the Attorney General may strive for objectivity, she has full discretion to make the decision without worrying about the prospect of judicial review. The Attorney General's decision whether to apply for an Independent Counsel occupies high national visibility. Inevitably, the Attorney General will feel political pressure to move down the path toward launching a special investigation. Thus, making the decision really turns on political rather than "rule of law" considerations.<sup>125</sup> Neither Passportgate nor Travelgate produced a single indictment, even on misdemeanors, of one single lowly presidential associate. As quests for viable charges, they were busts.<sup>126</sup> Asking in retrospect why Attorneys Generals even initiated special investigations on those matters, one finds the president's opponents won, and the president lost, without regard to the objective or the unlikelihood of resulting indictments.

The workings of the political process against the president, unless he resists, apply at the witness level as well as at the Attorney General level. As in all white collar matters, the investigators pressure the target and his associates with the hope that someone will break ranks and produce evidence forthwith,<sup>127</sup> even evidence remote in subject to the investigators' trail. Generally, the target of the investigation and his associates resist, staying close to the trail and not rushing

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124. Suzanne Garment, *Scandal* (Random House 1991); Amy Waldman, *The Real Blood Sport: The Whitewater Scandal Machine*, 28 Wash Mthly 23 (May 1996).

125. This viewpoint would cite, as concrete examples, how the system pressed Attorney General Barr to apply for an Independent Counsel in late 1992 for Passportgate, how it forced Attorney General Reno to turn Travelgate over to Independent Counsel Starr, and how much pressure it brought upon Attorney General Reno to apply for one in 1997 for Vice President Gore regarding campaign finance. Jerry Sepler, *Travelgate Added to Starr's Inquiry: Truth Sought on Hillary's Role*, Wash Times A1 (Mar 23, 1996).

126. Of course there can be a special category of charges worthy of investigation, even worthy of the appointment of an Independent Counsel that produce no charges in the end. However, in retrospect, these matters do not appear so substantial as to fall within that special category of charges.

127. Kenneth Mann, *Defending White-Collar Crime: A Portrait of Attorneys at Work* (Yale 1985).

to volunteer evidence of debatable relevance. When the president is the target, his accusers' arsenal of pressure tactics aimed at the president and his associates, consists of political tools as much as it does of legal ones.<sup>128</sup> As bits and pieces of witness statements or other interesting documents mount in the midst of a media feeding-frenzy climate, this then creates pressure for the Attorney General to turn the matter over to an Independent Counsel, without regard to whether an objective prosecutor would seriously expect indictments to follow.

Moreover, to refute arguments that subjecting presidents to accusatory processes does not have such untoward effects, those posing this counterargument cite *Nixon v Fitzgerald*.<sup>129</sup> The Court in that case offers a rationale for giving the president absolute immunity from civil suits for his actions in office.<sup>130</sup> In this view, “[i]t is time to evaluate the “lessons” of Watergate’s legacies and, in particular, the Independent Counsel mechanism,”<sup>131</sup> a mechanism which gets overused and subjects its targets, such as the president, to “a harsher and potentially inferior brand of justice.”<sup>132</sup>

From this perspective, the president thus must act to limit the damage and to resist during the initiation phase. When he does so it is legitimate action in the name of the democratic process. Thus the president arms himself with a broad array of political tools during the initiation phase: appointment of the Attorney General,<sup>133</sup> relations with the media and the congressional investigations. Given the irresistibility of a “feeding frenzy” once it starts, the president must propiti-

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128. For example, in Travelgate, the tools of pressure by the accusers consisted of pressure by the media and Congressional opposition parties upon White House staff to submit wave after wave of broad yet detailed accounts and broad yet comprehensive document productions, in each phase increasing the threats to lower figures unless they would implicate the First Lady, and using each fragment of testimony or document for publicity that further increases the pressure.

129. *Nixon v Fitzgerald*, 457 US 731 (1982). For an argument that President Clinton should have secured temporary immunity from the Paula Jones case, see Joseph R. Jeffery, Comment, *Temporary Presidential Immunity: Adhering to the Separation of Powers Doctrine and the Will of the Framers for Civil Damages Litigation Involving the President—The Jones v. Clinton Case*, 40 St Louis U L J 833 (1996).

130. For analyses that the President did not deserve protection from civil suit, see R. Brent Walton, *We're No Angels: Paula Corbin Jones v. William Jefferson Clinton*, 71 Tul L Rev 897 (1997); Laurier W. Beaupre, *Birth of a Third Immunity? President Bill Clinton Secures Temporary Immunity from Trial*, 36 BC L Rev 725 (1995).

131. O'Sullivan, 33 Am Crim L Rev at 463 (cited in note 1).

132. Id at 464. See Thomas S. Martin and David E. Zerhuser, *Independent Counsel—Checks and Balances*, 58 Geo Wash L Rev 536 (1990); Laura L. Cox, *Political Accountability and the Independent Counsel: A Sheep in Wolf's Clothing?*, 57 U Cin L Rev 1471 (1989).

133. It could be argued that President Reagan's choice of Attorney General Meese, President Bush's choice of Attorney General Barr, and President Clinton's choice in 1997 to retain Attorney General Reno, all reflected Presidential political calculations regarding their greater investigative vulnerabilities if they appointed someone else.

ate, but not surrender to, these events.<sup>134</sup> Walking that line successfully helps avoid initiation of an Independent Counsel.

#### B. ENLARGEMENTS, INCLUDING DURATIONAL EXTENSIONS

The rise of machinery for special investigation of the president raises the even more complex question of whether or not to permit the expansion of the investigations beyond their original scope in content and in duration. Independent Counsels receive a basic jurisdictional mandate, but that mandate may well have built-in limitations. Special congressional committees generally have a durational limit. Part of what defines the boundary between the legally accusatory and the political processes is the way in which enlargement of special investigations occur. Each enlargement increases the area or duration of legally accusatory processes, and shrinks the remainder period of the president's term for the regular political process.

Studying the machinery Independent Counsels use to enlarge a special investigation offers a trip to both the constitutional and statutory frontier. The constitutional boundaries of initiation has been at least preliminarily surveyed by the Supreme Court in *Morrison v Olson*, but the practice of using enlargement machinery is a more recent phenomenon and presents novel constitutional and statutory questions. When Congress amended the Independent Counsel statute,<sup>135</sup> it drew a vital distinction. Requests to expand an Independent Counsel's

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134. This may include sophisticated coordination by the White House Counsel of communications, which deals with the press, and Congressional liaison, which deals with Congress. All through 1997 the White House walked the line between surrendering to the Senate and House special investigating committee on campaign finance, and having privilege fights with them. In Iran-Contra and in Whitewater, neither Vice President Bush in 1987-88 nor President Clinton in 1995-96 resorted to formal executive privilege claims, but both let their White House Counsel assert attorney-client privilege. A purely legal analysis would reflect that such claims have less strength than full executive privilege claims. However, Vice President Bush and President Clinton, recognizing that the process is political rather than legal, would have correctly chosen in election years to raise a lesser privilege with a greater political acceptability, and thereby to win strategically even if the privilege claim lacked the same power tactically.

135. Under the original mechanism of the 1978 statute, the Special Division, in the *Olson* investigation, had let Attorney General Meese block Independent Counsel Alexia Morrison from getting a referral of what she considered vital jurisdiction. For the blocking of the referral, see *In re Olson*, 818 F2d 34 (1987); *Morrison* 487 U.S. at 668. As to the matter more generally, Theodore Olson, Assistant Attorney General for the Office of Legal Counsel, had played a questionable part in blocking House inquiries regarding an EPA scandal in 1982-83. An extensive House Judiciary Committee report of 1985, prepared by House Judiciary Committee senior counsel Johnathan Cuneo and James Schweitzer, indicated Olson might have criminal culpability along with two other Justice Department officials. Attorney General Meese applied to the Special Division for an Independent Counsel solely with respect to Olson, despite the agreement of the Department's own Public Integrity Section with the House report that all three officials should be included. After a period of investigating, Independent Counsel Morrison asked the Attorney General to refer the allegations against Schmults and Dinkins to her as "related matters." General

jurisdiction call for the Attorney General's discretionary approval. In contrast, mere referrals involve persons or subjects related to the original Independent Counsel jurisdiction. Either the Attorney General can direct this or the Independent Counsel can seek it by application to the court.<sup>136</sup> This means a judicial role in defining the boundary in contested "referral" decisions between the special investigations, with the residue left to the political process.

In upholding the statute against Article III challenges regarding the duties that it places on the Special Division, in *Morrison*, the Supreme Court raised the enlargement machinery and its disputes to the constitutional level. The Court warned, "[W]e do not think that Congress may give the Division unlimited discretion to determine the Independent Counsel's jurisdiction."<sup>137</sup> Accordingly, the Special Division, in the *Espy* matter, interpreted *Morrison* to offer a more restrictive view of referral, that "a matter referred by this court, rather than by the Attorney General, has to meet an apparently higher standard of being 'demonstrably related.'"<sup>138</sup>

These complex, partly constitutional principles governing referrals to Independent Counsels set the stage for a subtle interplay between Attorney General, Independent Counsel, and Special Division. In a classic observation the D.C. Circuit said that "the precise allocation of responsibility . . . cannot be chiseled in stone at the commencement of the special prosecutor's tenure" and "the scope of a special prosecutor's investigatory jurisdiction can be both wide in perimeter and fuzzy at the borders."<sup>139</sup> If the Attorney General makes a referral, the courts deem her discretion unreviewable and apparently even, based on what *Morrison* said of Article III, nonjusticiable;<sup>140</sup> but if she opposes a referral and the Independent Counsel seeks it, then, as Congress intended in changing the statute after the *Olson* matter, the courts can pass upon it.<sup>141</sup>

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Meese refused. She then asked the Special Division for a referral order. See *Morrison*, 487 US at 665-67.

136. Expansion of Independent Counsel jurisdiction occurs pursuant to 28 USC § 593(c). Referral of other matters to an Independent Counsel occur pursuant to 28 USC § 594(e).

137. *Morrison*, 487 US at 679.

138. *In re Espy*, 80 F3d 501, 507 (DC Cir 1996).

139. *United States v Wilson*, 26 F3d 142, 148 (DC Cir 1994), cert denied, 115 S Ct 1430 (1995).

140. *United States v Tucker*, 78 F3d 1313, 1318 (8th Cir 1996).

141. For an example of the effect of this system, the charter for Independent Counsel Starr concerned Whitewater, but not the subsequent scandals of Travelgate and Filegate; by enlargement of the Independent Counsel's jurisdiction, President Clinton found himself under Independent Counsel investigation regarding Travelgate and Filegate, quite without regard to whether these, on their own, would have warranted putting him in that legal status. Susan Baer, *Whitewater Prosecutor to Prove Travel Office; 3-Judge Panel to Let Starr Look at Firings in White House Agency*, Balt Sun 1A (March 23, 1996); Jerry Sepler, *Travelgate Added to Starr's Inquiry; Truth Sought on Hillary's Role*, Wash Times A1 (Mar 23, 1996).

### 1. "President as Investigation Subject" Perspective

From the perspective of the president as an appropriate subject of independent investigations, the legal machinery in place for decision-making on extensions appropriately regulates what might be called the ups and downs of the president's legal status. Independent Counsel Walsh presented a sound case in support of his request for a broad jurisdictional mandate and received it. He knew how powerful political figures could frustrate investigations that lacked sufficient jurisdictional authority.<sup>142</sup> However, even with his legal acumen, Walsh could not wrest control over Iran-Contra matters classified as state secrets. The Attorney General retained sole ultimate powers regarding declassification of state secrets, and did not share them with an Independent Counsel, even where matters fell within his jurisdiction. The inability of Independent Counsel Walsh to secure the Attorney General's cooperation on state secrets seriously stymied the prosecution of a key Iran-Contra figure whose conviction might have helped advance the inquiry.<sup>143</sup> After 1995, Independent Counsel Starr followed the Whitewater trail to explore emergent scandals of Travelgate, Filegate, and the Lewinsky matter. In this perspective, while extensions of the original investigation subjected the president to added or intensified years of an investigated status, better than either no inquiry into the new scandal, or creation of multiple independent inquiries for the various accusations.

### 2. "Managing the Inquisition" Perspective

For supporters of a perspective more sympathetic with the president's position, enlargement poses a major problem—the significant ease with which the Independent Counsels can redefine and expand investigations and escape jurisdictional limits. Such excessive ease alters the specially investigated president's legal status, as it subjects him, not to a focused and limited investigation, but to one without any limits at all. The Independent Counsel possesses powers that can easily be used to intimidate witnesses, forcing them to testify as she wishes, not as their own consciences dictate. Threats of oppressive investigation for perjury or the piling-on of charges for any unrelated and otherwise minor wrongdoing unearthed in a witness's past serve as prime examples of such tactics.<sup>144</sup> Independent Counsel Starr's controversial use of these tactics in the

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142. Walsh, *Firewall* at 26-27 (cited in note 33).

143. Matthew N. Kaplan, *Who Will Guard the Guardians? Independent Counsel, State Secrets, and Judicial Review*, 18 Nova L Rev 1787, 1791-93 (1994); See also Jordan, 91 Colum L Rev 1651 (cited in note 10).

144. Unlike an investigating prosecutor of, say, organized crime or labor racketeers, an Independent Counsel wields these powers against the unhardened targets who may have associated only with others in public life, and thus feel with acute sensitivity these powerful prosecutorial threats. It magnifies the Independent Counsel's power that she can get her jurisdiction extended in directions that bring this power to bear upon vulnerable individuals with witness potential in virtually any trail she cares to follow. For example, the Eighth Circuit's decision to allow Independent Counsel Starr to extend his jurisdiction to charge private individuals with no direct linkage to the President or the President's

Lewinsky investigation has shown that hardening of public views toward the Independent Counsel's prior work means that the Counsel's expansion make the Counsel, not the new inquiry, the issue.

At the same time the complex constitutional law regarding the expansion and referral rules for the Independent Counsel suggests a possible route for solving the single biggest fault of the current system. The current system lacks a mechanism for a president who has endured prolonged investigation without being indicted to obtain some return of the investigation to the Justice Department as a formal marker of a reduction in his specially investigated status. The same type of mechanisms and principles as in the expansion/referral context could apply to a new system for returning to the Justice Department, without injury to the rule of law, an Independent Counsel investigation that met the test for initiation but then continues for years without progress toward formal charges.

### C. PARALLEL INVESTIGATIONS

A vibrant aspect of the specially investigated president's status consists of the parallel investigations that take place alongside an Independent Counsel investigation and are operated by special congressional committees. Traditionally, standing congressional committees, not special ones, conduct oversight investigations of the Administration. These ordinary investigations can sometimes escalate into major battles that become a major part of the process that may be called the contemporary presidential-congressional privilege dispute.<sup>145</sup> These battles feature clashes between the possessors of congressional powers of investigation and those possessing presidential powers of resistance, including claims of executive privilege.

By adopting a resolution to create a special committee or to specially empower an already existing committee to initiate an investigation, either house of Congress can step up the pressure beyond the basic standing committee system.<sup>146</sup> The Senate did during Watergate<sup>147</sup> and both chambers did this for

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alleged offenses has received strong criticism. *Recent Cases*, 110 Harv L Rev 775 (cited in note 29).

145. Various levels of formality in claims of Executive privilege meet with Congressional threats of criminal contempt or other legal enforcement processes. Both sides intermingle legal contentions and the laying of foundation for possible adjudication, with appeals to the public and other political moves. The law of this process evolves for years without major judicial precedents, through other legal markers such as Executive Branch procedures and opinions, Congressional procedures and opinions, vindicated privilege claims or vindicated investigative demands, and negotiated settlements. For an insightful description of the complex current system, see Neal Devins, *Congressional-Executive Information Access Disputes: A Modest Proposal—Do Nothing*, 48 Admin L Rev 109 (1996). For further information, see the sources cited in note 3.

146. The chamber confers on a special committee, or on a specially empowered standing committee, extra funding, these days at the million-dollar level, and special investigative jurisdiction and authority, notably the power to summon witnesses for staff-conducted depositions. See John C. Grabow, *The Law and Practice of Congressional Investigations*,

Iran-Contra, Whitewater, and the 1996 campaign finance investigations. These special investigations of the president proceed in parallel with potential or actually initiated Independent Counsel investigations and have a potent effect. They provide a public forum in which special investigators and the president's counsel and supporters indirectly do battle. This in turn has a major effect on the president's position. Legal accusations against the president are tried in the court of public opinion with testimony of witnesses, the release of documents to the media, and airing of charges and responses by Members of Congress playing various roles.

Legal scholars writing about congressional investigations focus on use immunity, executive privilege, and witnesses' rights.<sup>148</sup> As important as these are, the complex, contemporary relationship between the parallel special congressional and prosecutorial inquiries of the president are even more so. Ordinarily, the subject of a prosecutorial investigation goes through that process without having to endure public proceedings unless and until indicted. In these investigations, witnesses make allegations only behind the closed doors of the grand jury room, not during open hearings. Parallel special congressional inquiries impact the president's legal status differently. Congressional investigations thrust the president into a nationally televised hearing where some of the same evidence being heard by a grand jury, is heard in public. The fact that the president suffers damage politically or that he resists and limits that damage is as much a result of his status as a Congressionally investigated president as it is a result of the work prosecutors do.<sup>149</sup>

More subtle impacts of parallel investigations on the president's legal status can be seen as well. The course of evidence-gathering in the special congressional investigations can influence the course of the Independent Counsel's investigation. Congressional committees extract sworn testimony, in person, from presidential associates and in writing from the president and vice president. By doing so, Congressional committees criminalize subject areas in which no primary offenses may previously have been committed, but where presidents and their loyal associates want to testify without embarrassing the White House. The Congressional committees in Iran-Contra<sup>150</sup> and Whitewater<sup>151</sup> accomplished

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85-86 (1988) (deposition authority).

147. For a scholar and participant's account of the Senate Watergate investigation discussing its historic antecedents, see Samuel Dash, *Congress' Spotlight on the Oval Office: The Senate Watergate Hearings*, 18 Nova L Rev 1719, 1725-28 (1994).

148. See, for example, Project, *An Overview of Congressional Investigation of the Executive: Procedures, Devices, and Limitations of Congressional Investigative Power*, 1 Syracuse J Legis & Pol 1 (1995); Christopher F. Corr and Gregory J. Spak, *The Congressional Subpoena: Power, Limitations and Witness Protection*, 6 BYU J Pub L 37 (1992).

149. Witnesses close to the President can be used to publicly hurt him, or to attempt to hurt him, in those hearings, like John Dean in Watergate, Bud McFarlane in Iran-contra, or Webster Hubbell in Whitewater. However, sometimes his effectively self-defending staff and associates can help him fight the accusatory forces against him, as Bush's associates did in the 1987 Congressional inquiry and Clinton's arguably did in the Travelgate hearings of 1995-96 or the campaign finance hearings of 1997.

150. Once Secretary of Defense Weinberger testified in 1987 before the Iran-contra

this. Moreover, successful congressional evidence-gathering undermines the president's negotiating position with an Independent Counsel when he demands jurisdictional enlargement and seeks personal evidence from the president.<sup>152</sup>

### 1. The "President as Investigation Subject" Perspective

The "President as investigation subject" perspective emphasizes separation between the parallel investigations. As the Supreme Court emphasized in *Morrison v Olson*<sup>153</sup> the Independent Counsel mechanism may shift control away from the president, but it does not shift that control to Congress. The Attorney General makes the request for an Independent Counsel and the Special Division makes the appointment, neither formally obeying the parallel congressional committees.

Moreover, the distinct focus of the special congressional inquiries may serve a purpose that allows the Independent Counsel to confine herself to pure issues of the rule of law. It was the work of congressional members, not that of the Independent Counsel which provided an early view of the facts and the process for the public during Iran-Contra. It was congressional leaders who decided in 1987 that Iran-Contra warranted condemnation of President Reagan's mistakes but not the initiation of impeachment proceedings. Independent Counsels may be more isolated from public pressure to wrap up an investigation as well. For example, public pressure did not force Independent Counsels Walsh and Starr to end their investigations prematurely. However, congressional special committees did succumb to public pressure to bring their inquiry to a close.<sup>154</sup> Further-

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Congressional inquiry, he was indictable and, ultimately, indicted, for his testimony, even though in 1984-86 he had been less actively supportive of the Presidential missteps of Iran-Contra than North and North's superiors.

151. In Whitewater, once Presidential staff had to testify in detail under oath before Congress about such matters as their handling of files after Vincent Foster's suicide, they faced risks regarding investigation of the truthfulness of that testimony, even if their underlying conduct at the time of the matters in question gave much less reason for charges.

152. With Vice President Bush's staff questioned by the Iran-contra committees, he could hardly refuse the Independent Counsel a 1988 deposition, and he looked the worse for his 1992 withholding of relevant diary entries and refusal of a more in-depth deposition. With Congressional committees in early 1996 trumpeting fresh Travelgate charges against the First Lady, she could hardly refuse the Independent Counsel a personal appearance before the grand jury, and with the House special committee making national headlines in late 1996 over "Filegate," the Attorney General was pressed to give the Independent Counsel jurisdiction over that new subject.

153. When the Supreme Court upheld the Independent Counsel statute on its face, it twice summarized its previous separation of powers jurisprudence that by Congress's having, in general, an Independent Counsel statute "does not involve an attempt by Congress to increase its own powers at the expense of the Executive Branch." *Morrison*, 487 US at 694; id at 686 ("Unlike both *Bowsher* and *Myers*, this case does not involve an attempt by Congress itself to gain a role. . . .").

154. In 1995-96, the House Banking Committee under Chairman Jim Leach chose to rein in its Whitewater inquiry comparatively early, avoiding intrusion into the election, while those committees that did not so control themselves, the Senate Banking Committee

more, Independent Counsels may operate without any continuing complicating presence of Congress. The congressional Iran-Contra committees started and finished their work in 1987 and did not overlap with Independent Counsel Walsh's five-year-long trials and investigations.<sup>155</sup>

Some of the congressional committees' struggles with the White House over evidence arguably turn on legal rather than purely political factors. The Senate Whitewater Committee's demand for the notes of a meeting among White House counsel and the president's private lawyers in 1995 produced one of the chief privilege fights of the first Clinton term. The committee won. Travelgate produced another major battle.<sup>156</sup> These disputes fit within the legal-political tradition of the contemporary presidential-congressional privilege dispute. Under this "president as investigation subject" view, that process is legitimate<sup>157</sup> and its operation does not undermine the rule of law for the president.

## 2. The "Managing the Inquisition" Perspective

While the "President as investigation subject" viewpoint contends that the investigations operate separately and that parallel congressional inquiries do not taint the process, the "managing the inquisition" perspective responds by noting the high degree of partisanship that so often characterizes parallel congressional investigations. The partisan nature of the inquiries, especially in recent years, provides a legitimate reason for the president to utilize tools of resistance. Traditionally, partisanship manifested itself to a certain extent in the congressional investigatory process, but was at least somewhat muted then.<sup>158</sup> Support-

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under Chairman Alphonse D'Amato and the House Government Reform and Oversight Committee, found public and media interest flagging by late 1996.

155. The single chief "interaction" between special congressional committees and the Independent Counsel in Iran-Contra consisted of a step that proved beneficial to the Presidential defense, namely, the obtaining of immunized testimony from North. North's popularity undermined the President's accusers, his immunization complicated and delayed the progress of the Independent Counsel, and as the D.C. Circuit construed use immunity, he ultimately won a reversal of the Independent Counsel's chief accomplishment, namely, his conviction.

156. The House inquiry on Travelgate's May 1996 contempt citation of the White House Counsel led to another of the chief privilege fights of the first Clinton term, with President Clinton formally claiming executive privilege but, in a few months, dropping the claim and providing the documents.

157. Devins, 48 Admin L Rev at 114 (cited in note 145).

158. The President's party traditionally did not support high-profile special investigations of the President nearly as enthusiastically as the opposition party pushed for them. However, as late as 1987, partisan issues generally got resolved quietly, by negotiation, and with a degree of fencing off the investigations from the regular political processes. For example, the House and Senate each resolved their partisan differences over the Iran-contra authorizing resolutions, with the opposition party to the President getting the broad scope and funding they desired, and the President's party getting deadlines of August 1, 1987 for the Senate inquiry and October 30, 1987 for the House inquiry. Those deadlines got criticism at the time, and afterwards by Independent Counsel Walsh, as inevitably compressing the inquiry and limiting the depth of the probe. 1986 Cong Q Almanac 432-33; 1987 Cong Q Almanac 62. For all its strong cost in terms of investigative effectiveness, such

ers of the managing the inquisition perspective suggest that at some point, the invocation of the initiation machinery comes so quickly and becomes so partisan that it runs afoul of the separation of powers principle.<sup>159</sup>

A further tenet of this perspective is that the key unwritten limitation on partisanship has been eroding. An unwritten political rule exists that looks down upon inquiries that extend into election campaign periods. Here, again, the presidential defense hearkens back, not to the “executive power” argument that became somewhat outmoded with *Morrison*, but to notions of democracy embedded in the Constitution. The Constitution itself establishes a time-cycle of congressional and presidential elections. Even as late as the congressional Iran-Contra investigation in 1987, Congress respected the unwritten rule that questioned the duration of investigations if extended into the next election.<sup>160</sup> Prosecutors also had to be wary of acting too close to elections.

Today, that unwritten rule, along with the distraction of the democratic process has all but disappeared. Independent Counsel Walsh’s indictment of Secretary Weinberger on the eve of the 1992 election enraged presidential supporters.<sup>161</sup> House committee investigations issued subpoenas to force presidential claims of privilege on the very last days of congressional session in the presidential election year of 1996.<sup>162</sup> The Senate Whitewater investigation of 1995, and the counterpart House investigation, both sought, and obtained, fresh authority at the beginning of 1996.<sup>163</sup>

In 1997, the Senate agreed, in order to resolve a filibuster, not to let its investigation of the campaign finance matter extend into the election year of 1998. However, House Republicans, not subject to any such filibuster, brokered no such limits. They instead announced an intention to continue in 1998. Chairman Dan Burton was one such House Republican. In the spring of congressional election year 1998, he released transcripts of Webster Hubbell’s (a friend of the president’s, target of the Whitewater probe and former partner in Hillary Clinton’s law firm) private telephone conversations to the media. Many accused

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deadlines upheld the tradition of keeping the accusatory process of the special investigation some distance from the political campaign process, by ending such investigations before the start of the election year.

159. See Tiefer, *Turf Battles*, (cited in note 27); Patterson, *Ring of Power*, (cited in note 20).

160. Warren Richey, *Credibility of Latest Probe Hinges on Senate’s Ability to Keep It Short*, Christian Sci Monitor 7 (Feb 12, 1997) (quoting this Article’s author among others). To respect this unwritten but important protection for the investigated President, the Congressional Iran-Contra committees held to a tough schedule that drove them rapidly to an outcome. Walsh, *Firewall* at 32, 127 (cited in note 33). The Iran-Contra hearings ended after just a few months, with the Committee’s final report coming out only a few months later, in 1987, a year before the 1988 election.

161. Walsh, *Firewall* at 427 (cited in note 33).

162. Two House committees, on the eve of adjournment, used subpoenas to force the President into claims of executive privilege, but did not pursue the matters.

163. They succeeded in obtaining this authority because at that time, the press made a new storm over two matters concerning the First Lady, renewing, temporarily, her vulnerability and the political strength of the investigators.

him of editing transcripts unfairly so as to disadvantage the president. The Burton committee held Attorney General Reno in contempt just months before the 1998 election in connection with the campaign finance investigations. These extensions of investigation activity into the period of election campaigning push the legally accusatory realm deeply into the heart of the realm previously left to democratic processes.

Thus, a president facing the task of fighting against a partisan political process in Congress has a right to defend himself by using tools of his own. One of the strongest arguments that the president's use of his powers to resist is indeed legitimate—not in the name of some Executive immunity from prosecutorial investigation, but in the name of the president's ability to protect his office's interests in the legislative arena—stems from the political and legal reality parallel investigations create. A president makes this argument with particular strength in the face of an openly partisan congressional investigating chairmen, like Senator Alphonse D'Amato and Representative Burton.

A comparison of arguments presented to the Supreme Court illustrates this point. In 1997, the White House, supported by the Solicitor General, petitioned the Supreme Court for certiorari regarding the attorney notes of interviews with the First Lady. As both the White House and the Solicitor General<sup>164</sup> framed the "Questions Presented,"<sup>165</sup> each put forth as a principal argument that the White House sought to protect its preparation for legislative hearings.<sup>166</sup> This mirrored the opinions below.<sup>167</sup>

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164. In so doing, the Solicitor General sought a middle position between the White House and the Independent Counsel, since each articulated traditional executive branch interests. The Solicitor General's brief explains:

See Restatement [(Third) of the Law Governing Lawyers, Proposed Final Draft No. 1 (approved May 28, 1996)], sec 136 cmt. h (litigation "includes a proceeding such as . . . an investigative legislative hearing"). The Attorney General and the Office of Legal Counsel have consistently taken the position that work product (like attorney-client communication) is protected in this [legislative] setting. See Letter from the Attorney General to the President 2 (May 23, 1996) (citing Response to Congressional Requests for Information Regarding Decisions Made Under Independent Counsel Statute, 10 Op. O.L.C. 68, 78 & n.17 (1986); 1982 OLC Opinion, 6 Op. O.L.C. at 490 n.17, 494 & n.24).

Brief Amicus Curiae for the United States, Acting Through the Attorney General, Supporting Certiorari, *Office of the President v Office of Independent Counsel*, 117 S Ct 2482 (1997)].

165. Petition for a Writ of Certiorari, *Office of the President v Office of Independent Counsel*, 117 S Ct 2482 (1997), at 1 ("Whether work performed by attorneys for an entity of the federal government . . . in preparation for legislative hearings investigating the operations of the entity, is protected . . . ."); Brief Amicus Curiae for the United States, Acting Through the Attorney General, Supporting Certiorari, *Office of the President v Office of Independent Counsel*, 117 S Ct 2482 (1997), at 1 ("Whether the Office of the President may decline to produce documents . . . because they were prepared by its attorneys in connection with grand jury proceedings and legislative proceedings.").

166. The Independent Counsel fought against this framing of the "Questions Presented," omitting mention of legislative hearings. Brief for the Federal Respondent in Opposition, *Office of the President v Office of Independent Counsel*, 117 S Ct 2482 (1997).

167. For example, the Eighth Circuit's 1996 decision on attorney-client privilege for

The presidential argument—that the pendency of partisan congressional investigations justifies privileged White House Counsel representation—applies *a fortiori* to other presidential tools of resistance. Citing the need to resist Congress, the Bush Administration’s White House Counsel mobilized tools from vetoes and signing statements to foreign affairs powers and nominations to office so as to advance President Bush’s justifications regarding his Iran-Contra activities.<sup>168</sup> President Clinton mobilized his powers in 1995-96 to win the struggle with Congress over the government shutdown, arguably thereby turning the corner as well regarding the rebuilding of his political strength and, thus, his ability to resist and to outlast the investigations.<sup>169</sup> Presidential efforts to round up votes on a Washington grand jury against a subpoena by direct appeals to party solidarity would look bad; presidential efforts to round up votes in Congress against a subpoena by pointing out the partisanship of the chair would not.

## V. Multiple Roles, Secondary Investigations, and Privileged Representation

The rapid evolution of the specially investigated president has exposed a number of advanced aspects surrounding the legally accusatory and the political processes: the president’s multiple roles, “secondary investigations,” and White House Counsel privileged representation. They too deserve consideration under the two analytical perspectives developed in this Article.

### A. THE PRESIDENT’S MULTIPLE ROLES

The president must maintain multiple roles throughout his tenure in office. As a government official, he exercises official governmental powers in an official capacity. As an individual, he seeks election in his personal capacity and, in that personal capacity, uses political strengths and combats political weaknesses. Before the last decade the president’s multiple roles aroused less legal concern. On the one hand, there was a clear distinction in presidential capacities. In *Nixon v Fitzgerald*, the Court accorded the president absolute immunity from liability for

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White House Counsel notes of First Lady interviews considered one of the best arguments in favor of giving the President and his staff official privileged White House Counsel representation: “the ongoing Whitewater-related investigations by [agencies] and Congress as factors creating a common interest,” *In re Grand Jury Subpoena Duces Tecum*, 112 F3d at 922, among the persons under investigation, specifically, the First Lady, and the White House as a governmental office. The majority opinion downplayed this factor, saying blandly that “the multiplicity of investigating authorities only complicates the lives of these attorneys.” Id. The dissent had the better argument, noting that the White House Counsel had to make, and actually had made, the decisions about providing evidence to congressional committees. Id at 935 (dissenting opinion).

168. Tiefer, *The Semi-Sovereign Presidency* at 36-50 (cited in note 27).

169. Just, *Candidate Strategies* at 83-84 (cited in note 66); see generally Elizabeth Drew, *Showdown: The Struggle Between the Gingrich Congress and the Clinton White House* (Simon & Schuster 1996).

actions taken in an official capacity.<sup>170</sup> As the Court in *Jones v Clinton* itself observed, once in office, presidents rarely face lawsuits concerning their pre-election activity. Presidents' actions in their personal capacity before election or even while in office, from philandering to money-making, at one time drew little congressional or legal scrutiny.<sup>171</sup> Congressional oversight, and the occasional scandal, concerned official actions or corruption relating directly to those actions. During the Reagan and Bush years, the debate surrounding separation or coordination of multiple capacities began to take shape. Investigations initiated during this period began to examine, to a limited extent, the nonofficial conduct of presidents and his associates and supporters.<sup>172</sup>

Where the Iran-Contra investigations, in the targets' views, criminalized matters belonging to a realm of foreign affairs previously not subjected to such tactics, the Clinton Administration scandals involved a vastly greater criminalization of matters belonging to another realm, also previously not subjected to such tactics. Whitewater concerned, in the first instance, the Clintons' activity preceding his Presidency.<sup>173</sup> The Supreme Court distinguished *Fitzgerald* in *Clinton v Jones* and declined to give the president even a stay for "litigation of questions that relate entirely to the unofficial conduct of the individual who happens to be the president."<sup>174</sup> Part of the evolution in the past decade regarding the president's specially investigated status and the president's relation to the law, has concerned the tension over whether his multiple capacities warrant the strict policing urged by one viewpoint or the tolerant legal coordination urged by the other.

### 1. The "President as Investigation Subject" Viewpoint

Adherents of the "President as investigation subject" viewpoint suggest that separation of powers justifications exist for investigations to police the sharp lines between the president's various roles. Separation of powers arguments often encompass distinct functional and formal lines.<sup>175</sup> Keeping separate the official

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170. *Nixon v Fitzgerald*, 457 US 731 (1982).

171. A notable exception was during the Watergate-induced decline of President Nixon, who suffered scrutiny of his tax returns and of government largesse in the form of improvements to his non-Washington residences at San Clemente and Key Biscayne.

172. For example, the Iran-Contra investigations looked at fundraising for the Contras undertaken by the White House on its political, not its official side, precisely because Congress had forbidden the government on its official side to expend funds in support of the contras. The Passportgate inquiry concerned an effort by Bush Administration officials, on the eve of the 1992 election, to use Clinton passport materials in the campaign. Conversely, President Bush and his White House Counsel used political powers indirectly against the thrust of the Iran-Contra investigations, using vetoes and signing statements to project a view about the propriety of his Iran-Contra role under scrutiny.

173. Independent Counsel Starr has conducted his investigations and trials predominantly in Arkansas regarding pre-1992 matters rather than in Washington regarding President Clinton's official actions.

174. *Clinton v Jones*, 117 S Ct 1636, 1648 (1997).

175. As to the former, *Clinton v Jones* rooted the denial of damages immunity or a stay of litigation in suits against the President in his nonofficial capacity in the "functional

and personal capacities of the president prevents the functionally inappropriate use of the legal powers and prerequisites of office for personal protection.

As to the formal argument, the Framers devoted care in some parts of the Constitution to distinguishing the narrow protections for elected officials in their personal capacities, such as the Arrest Clause, from the broader protections for elected officials in some official capacities, such as the Speech or Debate Clause. Denying broad protections to elected officials in personal capacities avoids the problem of unpopular undermining of the principle of equality before the law that would result from creating two different legal classes of individuals, the mere commoners of the public, and the exalted lords of officialdom. Instead, by withholding privileges from government officials, even the president in his personal capacity is just like everyone else before the law. Thus, officials receive immunity only temporarily and to a limited extent, just as they receive the temporary and limited use of government property and the assistance of other government officers, without any elevation of their individual property holdings or rights to governmental assistance.

A perspective sympathetic to the Independent Counsels and the special congressional committees might describe, in this regard, a particular accomplishment of the new system for the specially investigated president. Those from the president as investigation subject school would consider presidents as always threatening to abuse their official status so as to lift their private capacity “above the law.”<sup>176</sup> During Iran-Contra, passage of the Boland Amendments forbid the expenditure of funds in aid of the Contras; it required special policing to keep President Reagan, Vice President Bush, and their aides from taking steps in aid of the Contras ostensibly in their private capacity—such as by soliciting private benefactors and foreign rulers to give such aid—but actually using official powers. Similarly, in Whitewater and Travelgate, special policing was needed to keep President Clinton from taking steps to use official powers to help personal friends and protect against exposure of past problems. The White House role in 1996 campaign fundraising and the president’s alleged rewarding of Monica Lewinsky in return for her affidavit denying that she engaged in an affair with President Clinton serve as specific examples.

## 2. The “Managing the Inquisition” Perspective

From the perspective sympathetic to the president and his White House Counsel, the Constitution builds in the president’s multiple roles, justifying official support and coordination rather than strict policing. Here again, the presidential defense leaves behind the outmoded pre-Morrison theories of absolute or formal Executive power or privilege. Rather, Article II anticipates

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approach. . . . extend[ing] only to acts in performance of particular functions of his office.” Id at 1644.

176. Throughout the decade, in this view, a common theme has been the necessity of strict policing to keep Presidents from using overly loyal White House aides to help them with nonofficial efforts, at cost to the ideal that Presidents, when not acting officially, enjoy no special powers or perquisites.

that the president will not only have a role atop the administrative structure, but will also have a prominent role as a political leader. The Constitution makes him the winner of office by national election, assigns him numerous interactive political duties with the Congress, and affords the "modern Presidency" in particular its numerous opportunities for national political leadership. Because the Constitution expects the president to serve not only as an official, but as a political leader, in an era like today's where great legal complexity exists in all these roles, it builds in the necessity of legal coordination between his official and political sides. To the extent the problems of the two capacities grow in legal complexity with the rise of ever-more-complex ethics laws and regulations, the coordination of the president's multiple capacities becomes a major, official, legal task.

The First Lady's status illustrates this distinction. Nothing in the basic theory of "Executive power" helps that much in understanding the theory of the president's defense of Hillary Clinton when, starting in 1995, she became the specially investigated First Lady. Independent Counsel and special congressional investigating committees alike targeted this First Lady. Because the president did not have any pre-*Morrison v Olson* power to protect even himself by invoking absolute executive privilege or control over the investigators, he had no such power to protect her. Formally, first ladies have at most the status of de facto senior White House aide, -though the First Lady is not herself an officer.<sup>177</sup> Citing an abundance of historical precedent, the D.C. Circuit<sup>178</sup> held that the legal status of First Lady Hillary Clinton matches that of a high White House aide to the president. Accordingly, she has "de facto officer or employee status."<sup>179</sup>

In contrast, viewed through the "modern presidency"<sup>180</sup> school of political science, the First Lady's importance, and the grounding of presidential defense of her, become clearer. Just as the president's own political power consists largely not of formal Article II authority and powers, but of the public support made possible by the democratic processes established in the Constitution, so the First Lady can become important, even without formal authority, by her role in those democratic processes.<sup>181</sup> President Clinton's First Lady, in particular, had a

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177. Neither the Constitution, nor a statute, prescribes an office for the First Lady. She does not stand for public election nor receive Senate confirmation. The President does not commission her as an officer, nor does she draw a Treasury paycheck.

178. See *Ass'n of American Physicians and Surgeons v Clinton*, 997 F2d 898 (DC Cir 1993).

179. Id at 904. She performs functions as advisor and personal representative of the President similar to those of a senior Presidential aide, and she receives the official support, notably facilities and paid assistants for which Congress has knowingly voted the appropriations, to do so.

180. See note 113.

181. For historical background, see Carl Sferazza Anthony, *First Ladies: The Saga of the Presidents' Wives and Their Power, 1789-1961* (William Morrow 1990); Betty Boyd Caroli, *First Ladies* (Oxford 1987).

large role in the 1992, 1994, and 1996 campaigns and accompanying political processes that the political scientists are still analyzing.<sup>182</sup>

Given the First Lady's significant role in political affairs, the "managing the inquisition" viewpoint would assert the White House's right to use its powers to resist special investigations of her activities by raising proper objections, and to limit their damage. According to this view, the First Lady should and does oppose the substitution of purely accusatory processes against her for the democratic processes of open political debate about her.<sup>183</sup> For First Lady Hilary Clinton, although she lost some legal battles, one might say that she won the war, as she contributed significantly to the re-election of President Clinton.<sup>184</sup>

#### B. LATE-STAGE INVESTIGATIONS OF SECONDARY ALLEGATIONS AND A PRESIDENT'S AGGRESSIVE DEFENSE

This element flows from a distinction between "secondary" and "primary" investigations. In essence, investigations start from "primary" accusations predating the start of the investigations. Partly the "primary" accusations concern alleged underlying substantive offenses, such as the defrauding of the government by the participants in the arms-for hostages deal in Iran-Contra, or the savings-and-loan fraud in Whitewater. Also, presidents and those close to them draw scrutiny for what they do predating the major investigations in the way of alleged cover-ups.<sup>185</sup>

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182. See Anthony Mughan and Barry C. Burden, *Hillary Clinton and the President's Reelection* (paper delivered at the September 1997 meeting of the American Political Science Association); Karen O'Connor, Bernadette Nye, and Laura Van Assendelft, *Wives in the White House: The Political Influence of First Ladies*, 26 Presidential Studies Q 835 (1996).

183. Among the powers of resistance by proper objection, she gave evidence before the Independent Counsel's grand jury in person, but to congressional inquiries only in writing, which was a kind of privilege somewhat like that traditionally enjoyed by senior White House staff; the White House Counsel's office took on a role in defending the First Lady, including coordinating the representation of her and of her staff with their respective private counsels; she objected to the Independent Counsel obtaining notes of her meetings with White House Counsel. She herself shifted her public role to mobilize public support, changing from the controversy-engendering tasks of 1993-94 to more publicly acceptable tasks in 1995-96.

184. Both journalistic and political science accounts describe her success in rebuilding her image during 1996 as a factor in re-election; in particular, she played a role in the continuation in 1996 of the gender gap favoring her husband over his opposition in the vote. See Ceasar and Busch, *Losing to Win* at 160 (cited in note 66); Mughan and Burden, *Hillary Clinton and the President's Reelection* (cited in note 182); O'Connor, Nye and Van Assendelft, *Wives in the White House*, 26 Presidential Studies Q 835 (cited in note 182).

185. Examples include the Nixon White House's immediate cover-up of the Watergate burglary or the Reagan NSC's immediate cover-up before Attorney General Meese's press conference revealing the diversion. It could be argued that the Watergate trials represented a late-stage examination of "secondary" allegations, particularly insofar as they charged

Traditionally, these “primary” subjects of accusation sufficed as subjects of inquiry. Now, however, frequently the specially investigated presidents find themselves facing late-stage investigations of charges alleging that the president has tried to block the progress of the investigation itself. That is, the Independent Counsels and major congressional committees investigating the president in the past decade feed not only on the charges that brought about the investigations, but they pursue a second course as well: charges of obstruction, perjury, false statements, and contempt regarding the treatment of original investigations themselves. The late-stage Iran-Contra inquiry brought the indictment of former Secretary of Defense Weinberger in 1992 for allegedly lying to the Iran-Contra committees in 1987 and to the Independent Counsel in 1990 when asked for his notes concerning the affair. The late-stage Whitewater Independent Counsel inquiry conducted an intense investigation, beginning in 1995, of whether the First Lady had lied or otherwise blocked its efforts.

These late-stage “secondary” inquiries reveal the development of a separate, intense cockpit on each side of the presidential investigations. Those advancing the special investigations contend that they face, in the White House, an investigative target with a unique set of powers and with plenty of incentives to subvert the investigation and thus temptations to obstruct the investigation illegally. The White House and those defending the president contend that they must find a way to endure a seemingly self-prolonging inquisition. The issue contrasts with that of initiation or extension because it has not required any formal step of expansion for an Independent Counsel or a congressional Committee to probe whether it has been allegedly obstructed. Rather, the probe need only cross an unwritten line of ceasing to credit the president and his associates with good faith in their responses to probes.<sup>186</sup>

### 1. The “President as Investigation Subject” Perspective

The rising incidence of late-stage investigations of “secondary” allegations arises from institutional tendencies built into system of the separation of powers and the role of the president and his executive branch staff. From Watergate and Iran-Contra to Whitewater and the 1996 campaign finance matter, the fact that the White House is insulated creates special incentives and powers to evade accountability. A White House staff loyal to the president strives to present him favorably to the public. Using all available resources and powers, staff members thus create pressure to cross the line between legal spin and illegal cover-up.

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Nixon’s aides with perjury before the Senate Watergate hearings in 1973. However, the limited role of such a truly secondary inquiry in Watergate differs from the pattern in Iran-Contra and Whitewater.

186. Just as prosecutors by and large do not respond to the acquittals of defendants who have taken the stand by opening up perjury investigations, even though they doubt the defendants testified truthfully, so probes of the President before 1987 by and large did not routinely follow up their completion of their prime business by opening up investigations of whether the President and his associates had lied to them, even if they doubted the witnesses’ complete candor. Now, routinely, they do.

Moreover, executive privilege in its formal and, more important, its informal aspects creates actual powers for cover-up unique to the White House. In this viewpoint, proponents note the absence, inspired by respect for the president's special place in the separation of powers, of routine congressional oversight of the White House, of any White House inspector general or routine General Accounting Office examinations, and White House exemption from legislated civil service restrictions or the Freedom of Information Act. Similarly, the unique position the president has insulates the White House from the scrutiny mechanisms that police the executive departments and agencies. From the Watergate hush money to Oliver North's shredders, White House staffs have grown accustomed to exploiting this insulation. They find they must act extralegally to maintain this insulation, thus creating the need for the new machinery used in presidential investigations to focus upon alleged secondary offenses such as obstruction and perjury.

Presidents today have reasons not to use their formal powers to resist such probes, besides the limits found in the Constitution.<sup>187</sup> In light of the negative public response that frequently follows formal invocation of executive privilege today, presidents have become reluctant to use this particular power of formal resistance.<sup>188</sup> After *Morrison v Olson*, presidents cannot remove Independent Counsels, absent a willingness to pay the political price such a move will cost among voters. The view of those supporting these investigations in their current form is then that presidents and their staffs will yield to the pressure and work to frustrate these secondary probes, but will decide against using open and formal powers of resistance, by resorting to illegal obstruction to the new investigative machinery. The Independent Counsel statute itself anticipates this, by expressly providing that the jurisdictional charters of Independent Counsels include authority to investigate covering-up.<sup>189</sup> Only late-stage investigations of the White House's suspicious responses can prevent the investigated president from escaping responsibility for exceeding his proper limits as investigation subject.

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187. The Constitution expressly imposes one limit on late-stage Presidential resistance: the President "shall have the Power to grant . . . Pardons . . . except in Cases of Impeachment." United States Const, Art II, § 2, cl 1; Kalt, *Pardon Me?* at 779-80 (cited in note 26).

188. Formal executive privilege claims in congressional investigations must follow a procedure laid down by a 1982 Justice Department memorandum. This involves highly public claims of privilege cleared with the Attorney General. Against congressional inquiries, President Reagan only formally claimed executive privilege twice, President Bush once, and President Clinton only once until the last month of the 1995-96 Congress (when House inquiries forced privilege claims on two occasions). President Clinton's willingness to invoke executive privilege after the Lewinsky matter, in the first half of 1998, broke this pattern of reluctance to a certain extent.

189. 28 USC § 594(a)(6). Allegedly criminal withholding of (and perjury regarding) Secretary Weinberger's or President Bush's Iran-Contra notes, or allegedly criminal withholding of (and perjury regarding) the First Lady's billing records, thus merely illustrate concretely what the statute anticipates.

## 2. The “Managing the Inquisition” Perspective

From the other perspective, the secondary accusations fueling Independent Counsel Starr’s scrutiny of the First Lady after 1995, or the Iran-Contra secondary accusations after 1990 fueling the late-stage inquiries regarding President Bush, reflect something quite different than the tendency of the specially investigated president and his associates to seek illegal means in combatting the investigations. Rather, the prevalence of these oppressive secondary investigations reflects the unbalanced position of the investigations themselves within the separation of powers. The rationale for congressional investigative authority traditionally drew its justification from the need to obtain information for legislative and oversight use, not to investigate prior investigations. On the Independent Counsel side, although there were major differences between the post-1990 and the post-1995 periods of late-stage investigation, the two periods yielded similar public controversies regarding Independent Counsels.

Ordinarily, federal prosecutors are subjected to some degree of public accountability.<sup>190</sup> Presentially nominated, Senate-confirmed Assistant Attorneys General and United States Attorneys are scrutinized and limited, through congressional and presidential oversight.<sup>191</sup> The new Independent Counsels, however, being buffered both from the Attorney General and from Congress, did not have such public accountability. Moreover, the investigated president is not in a political position to take advantage of formal constitutional authority granted to the office of the president during public political disputation with an Independent Counsel.<sup>192</sup> Hence, late-stage Independent Counsel inquiries, for all their great powers, large budgets, and lengthy duration, lack the political checks and balances that exist for regular federal prosecutors.

For primary allegations the system for special investigation of the president includes some counterbalancing checks. Initial allegations must engender enough public concern to justify the congressional authorization of special investigation committees, and to persuade Attorneys General to take probes away from the Criminal Division and cede them to Independent Counsels.<sup>193</sup> However, the

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190. When regular federal prosecutors took controversial actions or inactions, both the Attorney General and the Congress thus have channels for reform, as when the controversies of the early 1990s regarding the Justice Department’s environmental crimes section resulted in reorganization of that section. See Staff of the Subcomm On Oversight and Investigations of the House Comm On Energy and Commerce, 103d Cong, 2d Sess, *Damaging Disarray: Organizational Breakdown and Reform in the Justice Department’s Environmental Crimes Program* (Comm Print 103-T 1994).

191. Proposals to make the Justice Department independent of such political checks have been floated but rejected.

192. This was apparently established in perpetuity by memory of the Watergate “Saturday Night Massacre.”

193. This analysis takes the liberty of considering an Attorney General deciding whether to request the appointment of an Independent Counsel to consider not only whether the allegations meet the statutory standard, but also the level of public concern about the allegations. Different Attorneys General may be more or less sensitive at different times to such public concern.

secondary allegations necessarily arise after, and possibly a long time after the initial investigations begin. Late-stage inquiries do not require initiation or extension approval. Thus no public sifting of the charges can occur.

Moreover, the loose scale of the parallel and continuing investigations creates expansive opportunities for secondary allegations. Congressional committees and Independent Counsels may each issue sweeping dragnet subpoenas for documents, followed by grand jury, congressional deposition, and investigator questionings of epic proportions. Then, at late stages, each or both may then re-canvass previous ground, only this time gearing the dragnet document subpoenas and requests toward the attainment of information regarding responses obtained in earlier rounds of the investigation. As noted earlier, in the past, only an unwritten sense of proportion has restrained prosecutors who lose cases regarding primary offenses from then investigating the defense witnesses for perjury.<sup>194</sup> Those traditional unwritten restraints do not operate to hold back contemporary investigations and prevent the assertion of secondary allegations against the president.

These factors give late-stage secondary inquiries much impact on the investigated president. First, they can more than double the president's exposure. Innocence of the primary charges does not suffice for success.<sup>195</sup> More important, now that the investigated president and his staff have seen this repeating pattern, the prospect of the late-stage affects, often for the worse, their conduct during the earlier stage.<sup>196</sup> The investigated president and his staff must document their earlier-stage compliance for proof at the later stage. They must keep records of their responses to questions by the press, Congress, and the Independent Counsel, so as to reduce their late-stage exposure to charges of varying responses that arise during the cycles of intensive and extensive re-ploughing by the same or different investigations at long intervals of similar ground. This long-running investigation management effort must continue even while the president and his staff carry out their regular functions. Parallel late-stage secondary investigations

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194. Some may question just how strong those traditional restraints are, particularly as to matters in the official or political spheres. Such famous and successful perjury and trial-tampering cases as Alger Hiss's and Jimmy Hoffa's reflect the uncertain operation of those restraints.

195. President Bush could argue in 1992-93 that fraudulent parts of Iran-contra had largely not involved him; Secretary Weinberger could even point to his personal strenuous opposition to the arms-for-hostages deal. Both had to answer for how they had behaved after, not just before, the investigations commenced. Similarly, by 1995, the President could argue that the Independent Counsel had not developed any case against him regarding the primary Whitewater charges. Yet, he and especially his First Lady had to answer for how she had behaved after, not just before, the investigations commenced.

196. Some could argue that it keeps the White House more honest to have Independent Counsels and Congressional committees around, investigating prior charges. However, the "manager of inquisition" viewpoint would argue that parallel, continuing, extensive investigations virtually force the investigated institution to develop giant management systems. These systems clog a White House that needs flexibility to focus on current issues, not the long-running recycling of old charges.

create an entire climate of unending scrutiny without closure or movement for the specially investigated president. The White House may not be able to hire, or to retain gifted staff who lack a taste for eternal siege.

Here, again, it remains to be seen whether the legal tension will find expression in constitutional controversy. The courts have recognized, and opposed, tendencies of legislative committees to intrude into the Executive sphere and to punish resistance there.<sup>197</sup> In the 1950s and 1960s, the D.C. federal courts developed the "Icardi-Cross" doctrine<sup>198</sup> to discard the late-stage type of perjury cases that arise when congressional committees recalled witnesses, not to obtain their information, but to punish them. The D.C. Circuit also threw out parts of Independent Counsel Walsh's charges.<sup>199</sup> More simply, presidents can simply exploit the defense, for political purposes, that secondary investigations reflect an absence of anything new, and when the press agrees with this defense, the secondary investigations run out of steam.

### C. PRIVILEGED OFFICIAL REPRESENTATION

Targets of investigation very much need privileged representation.<sup>200</sup> Traditionally, presidents did not anticipate regularly obtaining such representation from the White House Counsel's office. The office itself had only a fitful existence prior to the Nixon Presidency.<sup>201</sup> Presidents Ford, Carter, and Reagan in his early years, depended on the office only a little more. Iran-Contra changed that. C. Boyden Gray, as counsel first to Vice President and then to President Bush, spent years organizing and conducting the latter's defense in the Iran-Contra investigations.<sup>202</sup>

President Clinton's various White House counsels found themselves cast in a large, unwanted role in the scandals of his administration. These started in 1993 with the great suspicions generated by the suicide of Vincent Foster, Deputy White House Counsel. In 1994, President Clinton threw his first White House Counsel overboard.<sup>203</sup> In 1995-96, congressional committees used pro-

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197. See generally *Barenblatt v United States*, 360 US 109, 112 (1959); *Marshall v Gordon*, 243 US 521 (1917).

198. *United States v Icardi*, 140 F Supp 383 (D DC 1956); *United States v Cross*, 170 F Supp 303 (D DC 1959).

199. It reversed the conviction of National Security Adviser Poindexter by deciding it had to narrowly construe what "corruptly" obstructing an investigation meant, with a strong discussion about the separation of powers. *United States v Poindexter*, 951 F2d 369 (DC Cir 1991).

200. See, for example, J. Richard Ratcliffe, *Representing Witnesses Before a Grand Jury—A Prosecutor's Perspective*, 43 RI Bar J 19 (April 1995); Pamela Bucy, *White Collar Crime and the Role of Defense Counsel*, 50 Ala Lawyer 226 (1989).

201. For the history, see Rabkin, 56 L & Contemp Probs 63 (cited in note 20).

202. Walsh, *Firewall* at 452 (cited in note 33).

203. Marianne Lavelle, *Nussbaum: I Did What Any Lawyer Would've Done*, Natl L J A11 (Aug 21, 1995).

ceedings against White House counsels to bring their investigations to the nation's attention.

In 1997, the Eighth Circuit upheld Independent Counsel Starr's subpoena for White House Counsel notes of interviews with the First Lady, with the Supreme Court denying certiorari amidst national attention. This crystallized the central issue of the White House Counsel's role, namely, whether she can provide privileged representation to the president and the White House staff, particularly in joint sessions attended by their personal counsel as well as White House lawyers. Partly this involves general evidentiary and ethics law for federal government lawyers. Thus far, the courts<sup>204</sup> and the Office of Legal Counsel have upheld attorney-client privilege for federal government lawyers<sup>205</sup> just as for corporate lawyers.<sup>206</sup> Commentators have discussed the controversial question of prosecutorial subpoenas directed at defense attorneys.<sup>207</sup> Commentators have also analyzed the important, related ethics questions regarding just who is the client of the government attorney.<sup>208</sup> In part, based upon these issues, the Eighth Circuit decided not to find the White House Counsel had an attorney-client privilege extending to probes by federal prosecutors.<sup>209</sup> However, the generalized non-White House aspects were only part of the dispute. The clash about privileged representation by the White House Counsel illustrates perhaps the most all-encompassing complexity of the specially investigated president status.

### 1. The "President as Investigation Subject" Perspective

The "President as investigation subject" perspective rejects the notion that the White House Counsel can give the president representation protected by an absolute attorney-client privilege.<sup>210</sup> It derives this partly from evidentiary law, but more fundamentally, from a vision of the separation of powers incorporated in *United States v Nixon* and *Morrison v Olson*. *Nixon* and *Morrison* gave

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204. Michael J. Davidson, *Yes, Virginia, There is a Federal Agency Attorney-Client Privilege*, 41 Fed Bar N & J 1 (Feb 7, 1994); Keller, *The Applicability and Scope of the Attorney-Client Privilege in the Executive Branch of the Federal Government*, 62 BU L Rev at 1003.

205. See, for example, *Memorandum for the Attorney General re: Confidentiality of the Attorney General's Communications Counseling the President*, 6 Op O L C 481, 495 (1982).

206. *Upjohn v United States*, 449 US 383 (1981). For a recent study, see Alison M. Hill, *A Problem of Privilege: In-House Counsel and the Attorney-Client Privilege in the United States and the European Community*, 27 Case W Reserve J Intl L 145 (1995).

207. See, for example, John E. Davis, *Law Office Searches: The Assault on Confidentiality And the Adversary System*, 33 Am Crim L Rev 1251 (1996); Robert C. Bonner, *A Balanced Perspective on Attorney Subpoenas*, 36 Emory L J 803 (1987); Thomas K. Foster, *Grand Jury Subpoenas of a Target's Attorney: The Need for a Preliminary Showing*, 20 Ga L Rev 747 (1986).

208. See note 30.

209. *In re Grand Jury Subpoena Duces Tecum*, 112 F3d 910 (8th Cir 1997).

210. The issue is well presented in Ronald D. Rotunda, *Lips Unlocked: Attorney-Client Privilege and the Government Lawyer*, Legal Times 21 (June 30, 1997).

trump weight in the separation of powers to the law enforcement imperative, sufficient to outweigh the interests of the president in confidential advice or in control of inferior prosecutorial officers. Moreover, the Independent Counsel can point to a long-standing statute requiring government attorneys to report evidence of crime to the Attorney General.<sup>211</sup> Seemingly, this statute itself precludes the formation of privileged relationships.<sup>212</sup>

As for the other investigations of the president, of course the same law enforcement imperatives do not apply.<sup>213</sup> Nevertheless, one congressional probe successfully extracted the Kennedy notes in 1995, following a Senate vote on party lines against the president.<sup>214</sup> Another congressional probe secured the White House Counsel records on Travelgate in 1996, following a claim of executive privilege by the president and a committee vote on party lines to report the White House Counsel in contempt.<sup>215</sup> Congressional probes can argue that governmental counsel cannot possess absolute attorney-client privilege vis-à-vis Congress.<sup>216</sup>

## 2. The “Managing the Inquisition” Perspective

The White House Counsel has asserted its attorney-client privilege during special investigations from Iran-Contra and beyond.<sup>217</sup> It has done so consistently with the Justice Department’s position on the matter for the government as a whole.<sup>218</sup> As such, the office has not accepted the Eighth Circuit decision

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211. 28 USC § 535(b).

212. Conscientious government attorneys like the White House Counsel, knowing this statute, presumably should put government officer clients, even the President, on notice not to expect counsel to keep confidential what a private counsel would in such a situation.

213. Decisions regarding executive privilege vis-à-vis Independent Counsel subpoenas carefully explain that they do not address executive privilege vis-à-vis Congressional subpoenas. *In re Sealed Case*, 116 F3d 550, 573-74 (DC Cir 1997).

214. *Refusal of William H. Kennedy, III, to Produce Notes Subpoenaed by the Special Committee to Investigate Whitewater Development Corporation and Related Matters*, S Rep No 191, 104th Cong, 1st Sess (1995) (cited in note 71).

215. Miller, 81 Minn L Rev at 665-69 (cited in note 2).

216. Since the government, including the Congress, is the client of the government attorney, the congressional committee argues that the government attorney cannot claim privilege against the Congress, any more than corporate counsel can claim privilege when information is demanded by the corporation’s owners.

217. C. Boyden Gray “asserted on behalf of President Bush attorney-client privilege to many of the questions asked involving conversations between Gray and other members of the [Office of Vice President] staff.” Brief for Appellee The White House, *In re Grand Jury Subpoena Duces Tecum* 38 n 17 (Jan 31, 1997) (quoting *Final Report of the Independent Counsel for Iran/Contra Matters* 479 n 65 (1993)).

218. When the White House, through its own lawyers, sought certiorari regarding the Eighth Circuit decision, the Solicitor General filed a brief in support on behalf of the United States, explaining the availability of attorney-client privilege, even in a federal prosecutorial investigation. Brief Amicus Curiae for the United States, Acting Through the Attorney General, Supporting Certiorari, *Office of the President v Office of Independent Counsel*, 117 S Ct 2482 (1997); Joan Biskupic & Pierre Thomas, *Confidentiality Urged for White House Notes*, Wash Post A3 (June 7, 1997).

on the Hillary Clinton notes as a general rejection that the White House Counsel can provide privileged representation.<sup>219</sup> From the “White House Counsel as manager” viewpoint, maintaining a White House Counsel role in legal representation of the president, with the accompanying tools including privileged communications, properly serves some vital interests of the government.<sup>220</sup> The legal tradition that government counsels do have privileged communication with their official clients draws support from the opinions of the Office of Legal Counsel and of the Solicitor General, who filed a brief in support of the White House when the certiorari petition was pending.<sup>221</sup>

Separation of powers teaches that counsel for the constitutional, elected institutions of government have vital functions in managing those institutions’ when they become the target of an investigation.<sup>222</sup> The White House Counsel has a host of institutional legal responsibilities owed to the specially investigated president. Executive privilege claims, the most glamorous example of legal issues, need not be present. The Counsel’s office negotiates with the multiple investigations the issues of investigative scope and the meshing of document retention or nonretention arrangements with the White House’s complex rules governing document maintenance. Faced with parallel, wide-ranging, and lengthy investigations, the White House Counsel’s office makes arrangements for searching, retrieving, and handling information to avoid repetitive distraction of White House officials and seeks to avoid side-disputes over delayed production or inadvertent nonproduction. As the White House Counsel works out arrangements with each of the parallel investigations, questions of waiver and priority arise regarding the others.<sup>223</sup> Finally, responses to press inquiries pose complex

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219. Commentators do not take the Supreme Court’s denial of certiorari as implicit approbation of the Eighth Circuit’s broad rationale. Rather, the Court may have felt, in the immediate aftermath of the unanimous decision against President Clinton in Paula Jones’ suit, that for the time being, privilege claims by this President had worn out their welcome. Stuart Taylor, *Crying Wolf at the High Court*, Legal Times 23 (June 30, 1997). For further disagreement with the Eighth Circuit, see Marcia Coyle, *Privilege Ruling Could Touch All Gov’t Attorneys*, Natl L J A1 (May 19, 1997).

220. Stuart Taylor, Jr., *The President and the Privilege*, Legal Times 27 (May 12, 1997); Stephen Gillers, *Hillary Clinton Loses Her Rights*, NY Times D15 (May 4, 1997).

221. Horrible hypotheticals and the crime-reporting statute all may simply support limitations on privileged communication. Private sector attorneys have their own limitations upon privilege not found in the government, like the privilege’s cessation in fee payment and malpractice disputes. Limitations and exceptions do not disprove that privilege exists.

222. For example, by express statutory provision, the office of Senate Legal Counsel enjoys attorney-client privilege with its Senatorial clients. The office of General Counsel of the House of Representatives has the same privilege. Both the Senate and House have powerful institutional traditions regarding the conditions of yielding of documents and testimony to prosecutors, requiring fully functioning legal offices to handle. Looking at the Constitution’s complex application today in criminal investigation of Senators and Representatives, with questions ranging from Speech or Debate immunity to the justiciability of political questions, it is hard to imagine the proper management of prosecutorial investigations of those institutions, without institutional legal offices possessing tools including privileged communication.

223. It must arrange sequences of responses to investigations; the arrival of evidence at

problems, both because of the public reaction to the media disclosures, and to the subsequent use by the prosecutorial and congressional investigations of what the White House says to the press.

Combining what President Clinton's counsels have done, with what President Bush's counsel did for him through 1992, allows a discussion of White House Counsel activity more focused on the controversial aspects. President Bush's counsel employed an array of powerful legal tools in an aggressive defense. After years of coordinating witnesses, the counsel orchestrated the mass pardon of Iran-Contra defendants.<sup>224</sup> All this does not make such representation noncontroversial; the mass pardon, in particular, disappointed many.<sup>225</sup> Yet, in retrospect, that White House Counsel escaped being charged with any illegal or even distinctly unethical course of action. President Bush, like President Clinton, demonstrated strength in asserting his self-defense, including the use of aggressive official representation, to keep the legally accusatory processes from displacing the workings of democracy.

As on other points, this too will present important constitutional questions in the future. There is every reason to expect that congressional or prosecutorial subpoenas for White House Counsel notes will continue to meet privilege assertions.<sup>226</sup> In fact, the White House Counsel's office may well draw on the recent case law to show that the scope of executive privilege reaches beyond the president, down to other White House officials.<sup>227</sup> So, this fight will continue.

#### V. Conclusion: Principles for Reform

The political-legal system described in this article for investigating the president has developed around the prospect of a presidential trial in court or in the Senate that has never yet occurred. With Watergate as the great model, through the combination of special congressional investigation and an Independent Counsel, the investigatory system has been developed in theory, to deal with a president who reaches the stage of indictment or impeachment. Meanwhile, the actual operation of the system for the past decade, and quite likely for the future, deals with the actual reality that most of these specially investigated presidents spend much of their term in a multiyear investigative process, without ever having to meet an ultimate prospect of indictment or impeachment. Instead, his specially investigated status registers a large aspect of federal public affairs taken

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one investigation first, rather than another, can generate controversy.

224. By examining documents and monitoring what all witnesses said, President Bush's counsel could help him, and his staff, avoid any contradictions in their own statements.

225. Walsh, *Firewall* at 496-97 (cited in note 33).

226. A fight over this issue with the House committee investigating the 1996 campaign matter loomed in May 1997 but was compromised. Susan Schmidt, *References to 'Privilege' Complicate White House-Hill Subpoena Dispute*, Wash Post A6 (May 1, 1997); Susan Schmidt, *Administration Won't Comply with House Panel's Subpoenas*, Wash Post A4 (April 29, 1997); Guy Gugliotta and Susan Schmidt, *GOP May Seek Contempt Action Over Subpoenas to White House*, Wash Post A4 (Apr 30, 1997).

227. *In re Sealed Case*, 116 F3d 550, 567-74.

away from the democratic processes and turned over to legally accusatory ones, with investigators working to expand and extend in duration that zone of accusation, and with the president working to rebuild his support and return national affairs to the political processes.

The status of the specially investigated president starts with a firestorm of press and congressional criticism, pressuring the Attorney General toward the initiation of an Independent Counsel to parallel the congressional inquiries. For an initial period, possibly the first year or more after the investigations start, the current procedure when compared with later periods is relatively acceptable. As clashes occur over charges about the primary conduct of the president, and over whether evidence is being provided, the president's status rises and falls. Even at this time, side-distractions occur in disputes over the president's right to conduct a defense using, in part, the White House Counsel's office. This of course was hardly imagined a few years ago. No process exists for the president to obtain closure. Public support for the president cannot take the straightforward path of urging such closure. As this period drags on without the president's ever being formally indicted or impeached, let alone tried, it becomes increasingly evident that the domination of legal accusation takes a heavy toll on public affairs.<sup>228</sup> The ill effects of the long drawn-out investigations of all three of the last presidents lie across the history of the past decade like the wreckage of a giant airplane crash.

This section of the Article seeks to advance some principles to guide the refinement of the new system surrounding the specially investigated president. These guiding principles follow from a recognition that the new system most commonly faces, and therefore has its greatest impact on national life because of, not the unusual situation that it indicts or impeaches the president, but the standard situation for years on end of the specially investigated president. The status rests on one special office as the central institution of investigation, the Independent Counsel, and another as the central institution of defense, the White House Counsel. Thus, the constitutionally special nature of those offices becomes a major part of the system. Discontent with what Independent Counsels Walsh<sup>229</sup> and Starr<sup>230</sup> did to successive administrations has generated waves of criticism, including suggestions either to repeal, or to revise, the Independent Counsel statute.<sup>231</sup> Accordingly, I propose the consideration of three principles

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228. Instead, the lawyers on both sides find themselves being drawn down into personal attacks. Naturally enough, as the expenditures of the investigations mount into the tens of millions of dollars, criticism mounts of the investigations' budgets, just as criticism develops of the how the President's legal defense is being funded.

229. Claudia MacLachlan, *The End of Independent Counsels?*, Natl L J 35 (July 20, 1992). For the legislative history, see *Independent Counsel Reauthorization Act of 1993*, H Rep No 224, 103d Cong, 1st Sess (1993); *Independent Counsel Reauthorization Act of 1993*: S Rep No 101, 103d Cong, 1st Sess (1993); *Independent Counsel Reauthorization Act of 1994*; *Conference Report*, H R Rep No 511, 103d Cong, 2d Sess (1994).

230. See Naftali Bendavid, *Independent Counsel Face New Scrutiny: A Bipartisan Push Would Rein in Special Prosecutors*, Legal Times 1 (Jan 13, 1997); Stuart Taylor, Jr., *Repeal the Independent Counsel Law*, Legal Times 25 (May 20, 1996).

231. At the same time, the White House Counsel has taken some intense criticism, too,

to guide the new system: (1) opportunity for *return* to match the existing processes of initiation and extension; (2) *budgetary accountability* of the investigations and; (3) recognition of presidential *legitimate defense*, including the role of the White House Counsel and funding of legal defense.

#### A. RETURN

Without ways to test the validity of the charges and to resolve the issues, the president's shadowed status drags on for lack of any other decisive mechanism. Both Independent Counsels Walsh and Starr pressed their inquiries, far longer than most of the public wanted, which kept the sitting president under a cloud. With a lesser target this would just pose a fairness problem. With the president or those closest to him as the target, this has posed a major problem for the separation of powers. In the tension between those who support subjecting the president to the rule of law and those who advocate instead leaving political disputes to the political process, the period after the first year of the investigations takes out of the political realm where it belongs, an unduly and increasingly large part of the energy of national affairs and diverts it into this legally accusatory sphere. Like an excessive diet of negative campaign ads, an old, but unending special investigation of the president simply poisons public life. In contrast to political debate, special investigations do not result in compromise and resolution of public concerns. Neither the president nor his opposition make progress toward the goal of effectuating public policy. Furthermore, media coverage focuses on an investigation's thematic, spin or "horse-race" qualities; coverage may even fail to enlighten the public as to the substantive issues of the investigation. The effect of this coverage is increased cynicism and alienation among the electorate.<sup>232</sup> In an ideal world simple solutions might deal with this problem, but so far no workable ones have been crafted.<sup>233</sup>

For initiation of the investigations, and for extension of them, the system already has, as described above, elaborate political-legal processes. Surely they could work better; perhaps they need major reforms, but at least they exist. No

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as discussed previously. Yet, neither institution has been abolished, or even radically altered; so if they are here to stay, principles of reform are needed.

232. For a discussion of these negative effects in the late media coverage of Presidential investigations in the election year, see Matthew Robert Kerbel, *The Media: Viewing the Campaign Through a Strategic Haze*, Michael Nelson, ed., *The Elections of 1996* 94-97 (Cong Q 1997).

233. First, the selection mechanism for the Independent Counsel and for the chairs of congressional committees might appoint each time someone with the sensitivity to set herself a deadline, and sensibly keep it. Sometimes that does happen, but the system has no guarantees nor even incentives for this to happen. Second, either the general charters for the investigations —the Independent Counsel statute and the congressional rules—or the particular charter for each particular investigation, could set a deadline, a kind of Speedy Trial Act or 48-hour arraignment deadline just for Presidents. However, there is no way to know in advance how long investigations will take to make progress, and a fixed advance deadline might well straitjacket what turned out to become the most promising investigations.

political-legal process exists to deal with the chief problem of the propensity for special investigations to drag on, seemingly without end. The traditional means for ending an investigation, other than its voluntary self-termination—allowing the Attorney General to remove the Independent Counsel—destroys the very independence of the inquiry. Instead, what is needed is a process somewhat like the current initiation and enlargement processes that give the Attorney General a major role, but do so only in the full glare of public scrutiny, where she is checked by the Independent Counsel and Congress. Ideally, an Independent Counsel would take office, unlike now, understanding that she had a limited period with an absolutely free hand to produce results. She should view the Attorney General not as permanently handing the matter off, but as taking a temporarily diminished role that can, and should be restored in stages as time passes. There might be statutory provisions for interim consultations and cooperation between the counsel and the Department of Justice. Under this scheme, the Counsel should anticipate in the long term, a gradual return of the investigation to the Justice Department for completion. Thus both the Independent Counsel and the Attorney General would have the proper incentives to insure an orderly transition. Furthermore, the Independent Counsel would retain to the end the ability to render certain core decisions about the president. Most notably, the Independent Counsel would be enabled to impact how the president eventually emerges from the status of being specially investigated.

The mechanics of such a regime would require changes to the Independent Counsel law. A new section of the statute could establish a procedure for applications, no sooner than a year after appointment of an Independent Counsel, for court orders returning part or all of the Independent Counsel's jurisdiction to the Department of Justice. The Attorney General could seek an order by application, alone or jointly with the Independent Counsel, but strong mechanisms would be built into the law discouraging an Attorney General from seeking one alone rather than negotiating out a joint arrangement with the Independent Counsel. For example, if the Attorney General sought an order unilaterally, the statute could provide that only part of the Independent Counsel's jurisdiction could be returned, leaving the remainder intact until the submission of a successor application no sooner than a year later.<sup>234</sup> A unilateral application would lay over in Congress for 60 days; the order returning jurisdiction could not take effect until after another 120 days for the Independent Counsel to complete further work, including a public interim report that would also lie before Congress.

Finally, such a unilateral order would necessarily include provisions for judicial supervision of how the Justice Department would carry out the returned jurisdiction, insuring, among other points, protected continuity for the line personnel hired by the Independent Counsel. In effect, the Attorney General who

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234. A hard problem occurs when the Independent Counsel disputes that any part of the investigation can be taken away without impairing her indivisible inquiry. Perhaps a longer period could elapse and then the entirety of an “indivisible” inquiry would return.

misused her power of unilateral application would face a public firestorm and frustrate her original goal, since the Independent Counsel operation would continue for a long time following a unilateral application. In contrast, an Independent Counsel who unreasonably refused to reach a joint agreement with the Attorney General would have to face the dismantling of her entire operation ratified by visible public support for the Attorney General's measures, and lose the chance to charter the terms of return. In an investigation of the president neither moving toward indictment nor swift termination, presumably the Attorney General, and the Independent Counsel, would each find it preferable to negotiate so as to fashion a mutually agreeable timetable providing for a court-supervised return of jurisdiction to the Justice Department.

The effect of such a provision on the Independent Counsel, and on the whole system of investigation, would be to adjust, delicately, the balance between principles in tension—the division in authority over the president between the legally accusatory processes and the political ones. Independent Counsels and, in a different way, special congressional investigative committees now take their mandates without a clear signal from the system as a whole sufficient to warn investigators that the special inquiry will end at some definite point and to provide them with notice that they should plan an exit strategy from day one.<sup>235</sup>

Structuring the return of Independent Counsel jurisdiction to the Justice Department so that this return occurs in stages, by elaborate processes, and with a large role for the Attorney General, aims to establish a constitutionally acceptable way to balance the forces currently out of kilter. Constitutionally, the problem goes back to *Morrison v Olson*. Justice Rehnquist's opinion upheld the Independent Counsel statute only so long as the key steps of appointing an Independent Counsel, and of expanding Independent Counsel jurisdiction, occurred only upon application of the Attorney General, with the judicial role in these steps confined to incidental, not elaborately controlling, determinations.<sup>236</sup> *Morrison* would not allow the judiciary a role in which it effectively decided the questions, political and prosecutorial in nature, of whether an investigation had been given enough time to produce major results in the form of charges against the president. A statutory schedule plus a public process between prosecutors, the Attorney General and the Independent Counsel, can do that.

It may be too much to hope that Congress would similarly reform itself, but discussing such reform may be helpful. Congress needs to restore the presumption that investigations of the president will be completed in a fair period of time

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235. Of course, investigative counsel might fear losing some effectiveness from not having guaranteed open-ended duration. However, the fact that their investigations would not terminate, but just return to the Criminal Division under safeguards, would not relax the pressure on witnesses and targets so very much. And, this is a price that simply has to be paid rather than have democratic processes eclipsed indefinitely by an unproductive investigation.

236. *Morrison*, 487 US at 679, 685.

in advance of the next election. The inevitable heightened partisanship of an investigation close in time to an election means the accusatory process and the political process poison each other by their simultaneous incompatible workings. One possible means to prevent this poisoning would be to adopt a “blackout period” rule, that absent some special approval, the Senate and House’s authorizations for investigations of the president would lapse perhaps nine months before national elections.<sup>237</sup>

The thrust of this article is that the president’s status of being specially investigated should come to an end in some process that pits the opposing forces against each other in the forum of public opinion. A specially investigated president’s status should not last for an indefinite period of time. It should end in a way that balances the progress of legal accusation against the political processes, much like the processes of initiation and expansion.

#### B. BUDGETARY ACCOUNTABILITY

In addition to having unlimited duration, Independent Counsels also have had unlimited budgets. The longer special investigations last, the more controversial their continuation becomes, and the higher figures become, much reported in the media, of how much Independent Counsels and congressional committees have spent. Critics of these special investigations frequently juxtapose the limited results produced with the increasingly large sums expended. In the absence of a more direct process, such as the one outlined above, for return of investigations to the Justice Department, sniping personally at Independent Counsels for their spending has become an unpleasant habit, as have the practice of taking ethical potshots at them. A better solution would combine a congressional forum for budgetary accountability, just like the appropriations hearings on the Justice Department and Judiciary appropriations, with some form of peer group or professional analysis.

After all, if the law can be altered to force Independent Counsels to operate within a process that regulates the duration of a special investigation more strictly, surely it can be changed to create a process that reasonably oversees their budgets. The effective Independent Counsel will have explanations to present regarding his budget, such as the heavy costs during Iran-Contra of secure facilities for work on classified subjects, which included the cost of giving the defendants’ counsels similar access; and the costs for Whitewater investiga-

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237. A compromise form of this rule would simply give the minority party in each chamber greater ability, if it has public support, to obtain the termination of investigations of the President during, say, the first six months of an election year (with that as a “flexible” blackout period), and the final months before the election being a mandatory blackout period. In the Senate, a motion to terminate an investigation could be in order, an nondebatable, once a month during the motion to terminate an investigation during the flexible blackout period a privileged question. Preventing, in this way, the filibustering in the Senate of such motions, and the keeping off the floor agenda in the House of such motions, would suffice to let the minority party test whether diminishing public support for a too-long investigation can produce its termination during that flexible period.

tions of maintaining offices both in Arkansas and in Washington. Just as Congress has voted to support swollen budgets since 1995 for its own special investigating committees, it may willingly pay what the Independent Counsels ask to spend in their investigation. And, the quality of exchanges in oversight appropriation hearings varies greatly. However, at least the president's own party<sup>238</sup> would have the opportunity, to require the Independent Counsel to justify his budget in a public forum.

Describing the principle of budgetary accountability for an Independent Counsel is easier to propound than it is to develop mechanisms for creating and implementing a policy that reflects it. For now, a comparatively moderate approach would mandate that the House and Senate appropriations subcommittees on the State-Justice-Commerce Appropriation each hold an annual hearing on the Independent Counsel appropriation and to receive testimony from the Independent Counsel and from some independent sources.<sup>239</sup> Hopefully, such public scrutiny and professional commentary would make Independent Counsels consider themselves budgetarily accountable. If that fails to do it, a more stringent mechanism might be developed.<sup>240</sup> A reputable Independent Counsel would shrink from taking professional criticism from several different types of respected peers, by a visible public alignment with appropriators motivated by partisan concerns.

### C. LEGITIMATE PRESIDENTIAL DEFENSE

Just as the Independent Counsel has a constitutionally singular pattern of appointment, so does the White House Counsel. The Constitution provides that the president and Congress together share the powers over White House offices and information-control rules in a peculiar way. In the past century, a complex area of separation of powers law has evolved, with few judicial precedents to light the way, regarding the highly important expansion of the roles and responsibilities of staff in White House offices.

Following the New Deal, the new problems facing the presidency, from the expansion of federal domestic roles in the Great Depression to the expansion of federal international roles in the Cold War, fueled an expansion of White House staff,<sup>241</sup> in the key areas of staff handling budgetary affairs<sup>242</sup> and national

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238. Budget oversight in the form of Congressional review by the majority party may often be more friendly than hostile. In a divided government, the majority party in Congress can think of few better investments than spending on investigating the President.

239. Attorneys, Independent Counsels, and state prosecutors, chosen in advance of any particular Independent Counsel exercise primarily on their experience at setting just such budgets for their own operations.

240. Independent Counsels might fall under a regime where, after their first 1½ years of full independence, they become budgetarily part of the Justice Department, with their expenditures coming out of the Criminal Division's budget. Appropriators could overrule the Criminal Division and earmark extra sums for the Independent Counsel, but the Congress would have some reluctance to do so where the Criminal Division's position accorded with that of bipartisan professional commentary.

241. Hitherto, Presidents conducted their work with minimal nondepartmental help until

security.<sup>243</sup> Historically, the White House Counsel's office grew to handle the increasing complexity of ethical and legal restrictions operating on the White House.<sup>244</sup>

Presidents and Congress made the following choices regarding the White House staffs. To make some of the offices accountable, Congress retains various tools including the capacity to attain full-strength adjustment and to temper and win executive concessions. For a full-strength adjustment Congress could, and did, provide by statute that appointment of the head of a White House office occur subject to Senate confirmation, signifying congressional oversight as well.<sup>245</sup> In contrast, Congress has tolerated White House control over the appointment of a number of other powerful White House positions, such as the position of National Security Adviser, and did not require Senate confirmation or regular congressional oversight.<sup>246</sup>

Congress had to decide whether the value of subjecting the office to outside accountability outweighed the potential impairment of a confidential relationship with the president given anticipation of having to report to Congress. While it did not require Senate confirmation of staff in White House offices, through a combination of intensive investigations like Iran-Contra and by extracting

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President Franklin Roosevelt ushered in the modern era of the expanded White House.

242. Where the President gave budget direction, as late as 1970, through the Treasury Department headed by Senate-confirmed officers, subsequently that budget direction occurred through the key office in the Executive Office of the President of the Director of the Office of Management and Budget ("OMB").

243. Where the President gave national security direction, through World War II, through the State and War Departments headed by Senate-confirmed officers, thereafter he coordinated national security through a White House office, the National Security Council, with a staff headed by the National Security Adviser.

244. Rabkin, 56 L & Contemp Probs 63 (cited in note 20).

245. Notably, the Congress did this to the Director of the Office of Management and Budget, and the deputy director, in the 1970s. This signified that thereafter the OMB Director, in contrast to other Presidential advisers, appeared before Congress regularly to testify. Legally, and symbolically, the OMB Director thereby became accountable to outside bodies. As OMB took the major supervisory power over agency rulemaking of the "regulatory review" function, Congress similarly provided for Senate confirmation, and hence accountability through Congressional testimony, for a key officer within OMB, the Director of the Office of Information and Regulatory Affairs. Douglas S. Onley, *Treading on Sacred Ground: Congress's Power to Subject White House Advisers to Senate Confirmation*, 37 Wm & Mary L Rev 1183 (1996).

246. In the National Security Act of 1947, it created the National Security Council, saying nothing about the post supervising the NSC staff that came to be known as the National Security Adviser, and thereby leaving it to sole Presidential choice. A 1970s Congressional proposal for Senate confirmation of the National Security Adviser did not go through, even in light of the controversial roles of two famous holders of that office, Henry Kissinger and Zbigniew Brzezinski. Then, when National Security Adviser John Poindexter, and NSC aide Oliver North, turned up at the Iran-Contra scandal's center, the Iran-Contra congressional investigations thoroughly investigated the NSC. Again, Congress turned away from laying a statutory arm on the National Security Adviser. Franck, *The Constitutional and Legal Position of the National Security Adviser and Deputy Adviser*, 74 Am J Intl L at 634 (cited in note 31).

concessions from the Executive branch regarding operation and authority over White House offices, Congress could, and did temper the workings of the White House Counsel.<sup>247</sup> In effect, what Congress, and Independent Counsel Starr, did to the White House Counsel by investigations starting in 1993 had a roughly similar effect. While they left the selection of the White House Counsel squarely within the appointment power of the president, without any restriction on removal or delegation of responsibilities, Congress however did require White House counsels to testify and to provide documents on an ad hoc basis. This included the ultimate, and clearly excessive, measure of an expansion of Independent Counsel jurisdiction to cover frivolous charges of perjury by a White House Counsel.<sup>248</sup> By the time of onset of the 1996 campaign finance matter, the White House Counsel's office showed willingness to ferret out, and disclose publicly, the truth even about painful presidential episodes.<sup>249</sup>

Frequent presidential-congressional interaction resulting from the separation of powers also produces conflict surrounding issues of information control, primarily control over White House documents.<sup>250</sup> Distinctions in the Freedom of Information Act serve as one of the first illustrations of such interaction.<sup>251</sup> After Watergate, Congress responded to the need for further regulation of White House documents by supplementing the Federal Records Act of 1943<sup>252</sup> with the Presidential Records and Materials Preservation Act.<sup>253</sup> The Supreme Court

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247. For example, anticipating congressional Iran-Contra investigations, President Reagan issued National Security Decision Directive 266 to constrain the NSC staff's role in operations. After controversies regarding regulatory review, President Reagan provided for some windows on business interference, through OMB, with rule-making. When President Bush set up a Council on Competitiveness, or "Quayle Council," in the White House with vague and expansive powers over agency rule-making, Congress challenged the arrangements by investigations and proposed appropriation limitations.

248. George Lardner, Jr., *Court Expands Starr's Mandate: Counsel Authorized to Probe Whether Nussbaum Lied to House*, Wash Post A26 (Oct 26, 1996).

249. Jane Sherburne, special counsel to the President who provided responses for press inquiries on sensitive topics, pushed to find out, and to disclose, the facts of President Clinton's meeting with the Asian donor James Riady of the Lippo Group. Sharon La Franiere, *Clinton Aides at Odds Last Fall Over Riady Sessions: Sherburne Pressed for Disclosure of Donor's White House Meetings While Lindsey Resisted*, Wash Post A22 (June 8, 1997).

250. Sandara E. Richetti, Comment, *Congressional Power Vis À Vis the President and Presidential Papers*, 32 Duquesne L Rev 773 (1994).

251. In brief, Congress drew distinctions in the Freedom of Information Act as to which of the various offices within the Executive Office of the President were, or were not, subject to that act, including duties both of records maintenance and provision to the public of nonexempt documents. Several offices, even though not headed by Senate-confirmed officers, must follow the FOIA, though the White House Counsel, as part of the inner White House Office, does not. *National Security Archive v Archivist of the United States*, 909 F2d 541, 545 (DC Cir 1990).

252. 44 USC §§ 2100-2118, 2501-2506, 2901-2909, 3301-3324. This act does not create a private right of action for private plaintiffs. *Kissinger v Reporters Committee For Freedom of the Press*, 445 US 136, 148-50 (1980).

253. This Act, Pub L No 93-526, 88 Stat 1695 (1974) (codified as amended at 44 USC

upheld the law against former President Nixon's challenge.<sup>254</sup> In the significant *Armstrong* opinions spanning the Bush<sup>255</sup> and Clinton<sup>256</sup> administrations, the D.C. Circuit construed these laws to protect even White House electronic mail against routine nonretention.<sup>257</sup>

This separate line of authority granted White House documents suggests the existence of an appropriate compromise that might be developed as a response to the past decade of controversy regarding the White House Counsel's office. Congress might continue to accept the status quo and permit the president's legal management arm to maintain its current appointment, removal, and delegation status. If so, the gradual recognition of the legitimacy of the role the office plays in providing the president with privileged representation, subject to the balancing limitations, should follow. On the other hand, instead Congress could create another office, that of "White House Clerk," who would be responsible for White House records. Much like a corporation that hires an officer to receive subpoenas, to send through the corporation the document search requests, and to provide the documents to the outside, the White House would have a clerk perform these duties. Of course, the White House Clerk would take legal direction from the White House Counsel, but the Clerk could give testimony to Congress or to an Independent Counsel about document-handling without the White House Counsel thereby becoming the witness rather than the counsel. This further bureaucratization of the White House, while unnecessary in eras past, seems a necessary and limited concession that will serve as a buffer for the new system of regular special investigations of the president.

Additionally, to the extent that the president, and his staff, need private counsel, it is far better that the government have a mechanism for legitimately funding those expenses.<sup>258</sup>

#### D. THE LAST ANALYSIS

The principles suggested here would move the new politico-legal system in the direction of at least placing the specially investigated president in a position to take a well-marked, high road as he progresses along throughout the investigation. After the president has suffered under the "specially investigated"

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§ 2111), protects White House records, even when Congress does not regularly conduct oversight or the public does not get regular FOIA access, from either the President or his aides taking them away or destroying them. Carl Bretscher, *The President and Judicial Review Under the Records Acts*, 60 Geo Wash L Rev 1477, 1481-87 (1992).

254. The act was upheld in *Nixon v GSA*, 433 US 425 (1977).

255. *Armstrong v Bush*, 924 F2d 282 (DC Cir 1991).

256. *Armstrong v Executive Office of the President*, 1 F3d 1274 (DC Cir 1993).

257. Catherine F. Sheehan, *Opening the Government's Electronic Mail: Public Access to National Security Council Records*, 35 BC L Rev 1145 (1994).

258. See, for example, Sunil H. Mansukhani, *Whitewater: Government Officials Padding in a River of Red Ink*, 32 Crim L Bulletin 99 (1996); Johnny Carter, *To Provide for the Legal Defense: Legal Defense Funds and Federal Ethics Law*, 74 Tex L Rev 147 (1995); Stuart Taylor, *Brother, Can You Spare Some Fees?*, Legal Times 23 (Mar 18, 1996).

status for a substantial period of time, the investigations should be limited. In the absence of principled limits, the Independent Counsel or congressional committee may expand the investigations' legally accusatory process both to usurp the rightful place of democratic processes in national life, and to push the president to assert less desirable, more controversial tools in his defense. He may make personal countercharges attacking the ethics of Independent Counsels or utilize the presidential power to pardon. The notion of providing for a mechanism enabling the return of investigations to the Justice Department draws on the necessity for an end-stage process as a compatible counterpart for the existing politico-legal processes of initiation and enlargement of parallel investigations at the beginning and mid-stages. The system has developed viable politico-legal processes for initiation and start up, but not for completion.<sup>259</sup> In its current form, the system generates and feeds an intolerable tension. Once the first year or so has passed without formal charges, the tension builds between the agonizingly slow pace at which Independent Counsels complete their investigations and the intense democratic pressure of a sovereign national population pressing for return to the full primacy of the political processes centered upon the president.

The answer may be a statutory adjustment of the Independent Counsel end-stage, parallel to initiation and enlargement, namely, a legitimate, public, time-driven mechanism with roles for the Independent Counsel, the Attorney General, Congress, and the courts. This would guide, gradually, the investigations back to where they started, namely, letting the Justice Department handle the lengthy end-stage accusatory work apart from core decisions regarding charging of the president himself. As for the other principles, they would bring the institutions of the new system in line with their role, and counter the current tendency for diversionary personal attacks on both side's lawyers.

The larger question that remains concerns the continuing development of the president's position and powers in a system where he is both an individual subject to the law and a holder of our nation's highest office enabled to utilize numerous executive powers under law. In 1789, the Presidency started as an experiment: a head of state vaguely akin to the British King or Prime Minister, but neither above the law nor the head of a parliamentary majority. Today, the Presidency continues as a work in progress. To fit the temper of the times—divided government, strong media, emphasis on ethics and scandal—a system has developed that places the president in a peculiar situation. He experiences the extraordinary pressure of special investigations, yet he still strives to function in the political process—enough to defend himself, to maintain his popularity, to affect action in Congress, and to have a chance at winning re-election. This is an elusive new stage in the age-old balance between the application of the rule of law to presidents, and the defensive capabilities they have because of their fluid, but always unique, constitutional status. The presidents, the media,

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259. The elaborate constitutional and other law for indictments or bills of impeachment of the President do virtually nothing about how the current system operates since those have not actually served as end-stages for recent specially investigated Presidents.

and the public seem to understand this elusive new stage and its implications. Our task as legal analysts is to catch up with them.