

# INDEPENDENT COUNSEL AND VIGOROUS INVESTIGATION AND PROSECUTION

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## I

### INTRODUCTION

While the debate about the merits of the Independent Counsel has proceeded fiercely for over twenty years, there is one point about which participants on both sides of the controversy agree: The Independent Counsel is uniquely likely to investigate and prosecute high-level wrongdoing vigorously. For the supporters of the office, this is its primary merit: Because she is not appointed by or answerable to the President or the Attorney General, the Independent Counsel will be able to pursue potential criminality fearlessly. For the critics of the office, this is its fatal weakness: Named by unelected judges, virtually unremovable, lavishly funded, solely focused on one matter, the Independent Counsel will continue to investigate after any other government lawyer would have stopped and will prosecute when any other government lawyer would have concluded that prosecution was inappropriate.<sup>1</sup>

The purpose of this essay is to complicate this conventional wisdom by examining the two completed investigations into allegations of presidential wrongdoing: Watergate, in which the lead government attorney was a Special Prosecutor named by the Attorney General, rather than an Independent Counsel, and Iran-Contra, in which the lead government attorney was an Independ-

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1. For recent examples of the debate, see KATY J. HARRIGER, INDEPENDENT JUSTICE: THE FEDERAL SPECIAL PROSECUTOR IN AMERICAN POLITICS 199-217 (1992); Symposium, *The Independent Counsel Act: From Watergate to Whitewater and Beyond*, 86 GEO. L.J. 2011 (1998); Symposium, *The Independent Counsel Process: Is It Broken and How Should It Be Fixed?*, 54 WASHINGTON & LEE L. REV. 1515 (1997) [hereinafter *The Independent Counsel Process*]; Richard B. Schmitt, *Former Prosecutors Defend Starr Tactics*, WALL ST. J., Feb. 13, 1998, at B2; Lawrence E. Walsh, *Kenneth Starr and the Independent Counsel Act*, N.Y. REV. BOOKS, Mar. 5, 1998, at 4-6. The classic critique of the Independent Counsel statute as promoting overzealousness is Justice Scalia's dissent in *Morrison v. Olson*, 487 U.S. 654, 728-31 (1988).

ent Counsel appointed pursuant to the Ethics in Government Act<sup>2</sup> (the statute that creates the Office of Independent Counsel). My perspective here is partly academic and partly personal; I served as an Associate Counsel in the Office of Independent Counsel, Iran-Contra. I will argue that these two case studies suggest that an Independent Counsel will not always be more aggressive than a Special Prosecutor and that a Special Prosecutor is better positioned than an Independent Counsel to litigate certain critical issues.

My purpose here is a limited one. I am not examining the broad question of whether the Office of Independent Counsel is a good idea, or whether Independent Counsel should only pursue charges of presidential wrongdoing (as opposed to wrongdoing involving other executive branch officials). Nor am I resolving the question whether, on the whole, Independent Counsel are likely to be more aggressive than Special Prosecutors. I am, instead, trying to approach the question of whether Independent Counsel are likely to be aggressive from a new angle. We have had three major prosecutorial investigations into charges of presidential wrongdoing—the ongoing Whitewater investigation, Iran-Contra, and Watergate. There is a tendency among commentators and academics to generalize on the basis of these investigations without recognizing that there is, at least potentially, a large element of happenstance when the numbers of cases is so small. It is not necessarily true, for example, that traits possessed by both Lawrence Walsh and Kenneth Starr will be possessed by all, or even most, Independent Counsel. What this essay attempts to do is to use Watergate and Iran-Contra as case studies that provide the basis for closer analysis of the type of person who is likely to be named Independent Counsel or Special Prosecutor, the specific lawyering decisions that Independent Counsel and Special Prosecutors make, and the ways in which the President can affect or fight those decisions.

Part II of this essay briefly summarizes the history of Special Prosecutors and the passage of the Ethics in Government Act. Part III uses the examples of Watergate and Iran-Contra to discuss the attributes that a President is likely to seek in a Special Prosecutor and the attributes that the special court (the panel of judges, constituted by the Chief Justice, that selects Independent Counsel under the Ethics in Government Act) is likely to want in an Independent Counsel. Part IV then similarly draws on Watergate and Iran-Contra to discuss the specific types of conflicts that are likely to pit the prosecutor (whether Independent Counsel or Special Prosecutor) against the President. Part V presents my conclusions.

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2. Pub. L. No. 95-521, tit. VI, 92 Stat. 1824, 1867-73 (1978) (codified as amended at 28 U.S.C. §§ 591-599 (1994)).

## II

## A BRIEF HISTORY OF SPECIAL PROSECUTORS AND THE PASSAGE OF THE ETHICS IN GOVERNMENT ACT

When Archibald Cox was named Watergate Special Prosecutor, the appointment was without precedent. No sitting President had previously been subject to a federal criminal investigation, and the Constitution creates no special official charged with the responsibility for such an investigation should the need arise.<sup>3</sup> The principal pre-Watergate example of a presidentially appointed investigator examining high-level wrongdoing was Teapot Dome. As a result of congressional pressure, President Coolidge named two special counsel, one from each party, to investigate the scandal. Coolidge was not, however, implicated in Teapot Dome, although the underlying events had occurred during his vice presidency.<sup>4</sup> The most prominent Special Prosecutor before Watergate was, in fact, a state, not federal, official. In 1935, Democratic Governor Herbert Lehman displaced the Tammany Hall District Attorney and charged Republican Thomas Dewey, a former Assistant United States Attorney then in private practice, with the responsibility for investigating and prosecuting municipal corruption; Dewey's successful investigation ultimately launched his political career.<sup>5</sup>

Political pressure forced the naming of a Watergate Special Prosecutor. When on April 30, 1973, President Nixon announced the resignation of aides John Dean, John Ehrlichman, and Bob Haldeman and Attorney General Richard Kleindienst, he named Elliot Richardson as his nominee to replace Kleindienst, adding, "If he should consider it appropriate, [Richardson] has the authority to name a special supervising prosecutor for matters arising out of the case."<sup>6</sup> Nixon's conception of the post was a limited one. "This is not to prosecute the case," he had told Haldeman privately, but for "[a]... special prosecutor to look at the indictments, to see that the indictments run to everyone they need to run to."<sup>7</sup> Congress, however, demanded more. The Senate and House both passed bipartisan resolutions calling for the naming of a Special Prosecutor who would have guarantees of independence and would be subject to Senate confirmation.<sup>8</sup> Even more significantly, members of the Senate Judiciary Committee made it clear that Richardson would not be confirmed unless he committed himself to the naming of a Special Prosecutor insulated from White House oversight. Richardson ultimately agreed. He promised to

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3. See RICHARD BEN-VENISTE & GEORGE FRAMPTON, JR., *STONEWALL: THE REAL STORY OF THE WATERGATE PROSECUTION* 18-19 (1977).

4. See *id.* at 18-19, 19 n.\*.

5. See *id.* at 20. For further discussion of precedent for the Watergate Special Prosecutor, see HARRIGER, *supra* note 1, at 13-16; Peter W. Rodino, Jr., *The Case for the Independent Counsel*, 19 SETON HALL LEGIS. J. 5, 6-7 (1994).

6. JAMES DOYLE, *NOT ABOVE THE LAW: THE BATTLES OF WATERGATE PROSECUTORS COX AND JAWORSKI* 37 (1977) (quoting Nixon press conference).

7. *Id.* (quoting White House tape of January 15, 1973).

8. See BEN-VENISTE & FRAMPTON, *supra* note 3, at 15.

provide the Judiciary Committee with the name of the Special Prosecutor prior to the completion of the hearings on his own nomination. Under further pressure, he issued a proposed charter for the office, under which the Attorney General agreed not to remove the Special Prosecutor “except for extraordinary improprieties.”<sup>9</sup> After his first four candidates for the position turned him down, he offered the job of Special Prosecutor to Cox. Cox and Richardson made a joint appearance before the Judiciary Committee at which Cox said that the only power Richardson had over him was “to give me hell if I don’t do my job.”<sup>10</sup> Richardson and Cox were then confirmed, and Richardson formally issued the charter for the Special Prosecutor’s office as a federal regulation.<sup>11</sup>

On October 20, 1973, Cox was fired. The previous week the United States Court of Appeals had ruled in favor of the Special Prosecutor’s office in the Watergate tapes case. The White House had proposed a compromise under which transcripts of the tapes, reviewed for accuracy by Senator John Stennis, would be provided to the Special Prosecutor. Cox refused. President Nixon then directed Attorney General Richardson to fire Cox. Richardson resigned instead. The scenario was repeated with Deputy Attorney General William Ruckelshaus before Solicitor General Robert Bork, third in the Justice Department hierarchy, agreed to fire the Special Prosecutor. After firing Cox, Bork also abolished the Office of Watergate Special Prosecutor.<sup>12</sup>

The Nixon Administration never recovered from the public outcry against the “Saturday Night Massacre.” Nixon turned over the tapes that he had previously sought to withhold. He also announced that a new Special Prosecutor would be appointed, and Bork named Leon Jaworski to the post. Ultimately, of course, Nixon resigned. A longer-term response to the Saturday Night Massacre was the passage in 1978 of the Ethics in Government Act, which established a mechanism by which a three judge panel would appoint an Independent Counsel.<sup>13</sup> The eventual switch in terms—from Special Prosecutor to Independent Counsel—was a conscious one. It reflected the belief that the Independent Counsel’s job was not simply that of a prosecutor; it was equally the Independent Counsel’s job to determine when no prosecution was appropriate.<sup>14</sup> The Act, which contained a sunset provision, has been reenacted three times (with a lapse in coverage prior to its most recent reenactment).

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9. *Id.* at 17 (quoting Richardson’s May 17, 1973, proposed charter defining the authority of the White House Special Prosecutor).

10. *Id.* (quoting Cox).

11. *See id.* at 18.

12. For a description of the relevant events, see BEN-VENISTE & FRAMPTON, *supra* note 3, at 123-43; DOYLE, *supra* note 6, at 186-202.

13. On the link between the Saturday Night Massacre and the creation of the Office of Independent Counsel, see Rodino, *supra* note 5, at 10-12. The Ethics in Government Act, as originally enacted, used the term “Special Prosecutor” (and thus did not follow the terminology used in this essay). The term “Independent Counsel” was only adopted when the statute was amended in 1983. *See* Pub. L. No. 97-409 § 2, 96 Stat. 2039, 2039 (1983).

14. *See* Beth Nolan, *Removing Conflicts from the Administration of Justice: Conflicts of Interest and Independent Counsels Under the Ethics in Government Act*, 79 GEO. L.J. 1, 18 (1990). In fact, Nolan notes that no prosecutions occurred in the first eight years of the Act. *See id.* at 18 n.69.

## III

## SELECTION OF SPECIAL PROSECUTORS AND INDEPENDENT COUNSEL

Supporters of the Ethics in Government Act contend that a Special Prosecutor appointed by the President is unlikely to search out wrongdoing aggressively because the President will not select for the post an individual likely to be aggressive.<sup>15</sup> Critics of the Act argue that the special court, operating without any check, is likely to select as an Independent Counsel someone hostile to the President; moreover, the person selected, regardless of whether or not she is initially hostile to the President, is likely to act more aggressively than a regular federal prosecutor or a Special Prosecutor in order to justify the expense and time of her inquiry. Thus, both sides share the assumption that an Independent Counsel is likely to be more aggressive than a Special Prosecutor.<sup>16</sup>

The selection process is, however, more complicated than recognized. In this regard, it is helpful to start with the point that there are two plausible models for what the person conducting the investigation—whether an Independent Counsel or Special Prosecutor—should be like. Under one model, the person heading the investigation is, very simply, a prosecutor. Her mission is the same as that of a prosecutor in any situation, the only difference being that the matter under investigation is particularly important. She is, in other words, a participant in an adversarial system, subject only to the ethical and legal constraints imposed on a prosecutor and, again subject to those constraints, her goal is simply effective investigation and prosecution of wrongdoing. Under the other model, the person heading the investigation is, as the name indicates, an Independent Counsel, and more judge-like. The investigation is conducted in a way that reflects burdens of fair-dealing higher than those a prosecutor, as a participant in an adversarial system, typically assumes.<sup>17</sup> That person brings cases only when the evidence of wrongdoing is unquestionable and conviction

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15. In Watergate, as indicated above, Attorney General Richardson and Acting Attorney General Bork named the Special Prosecutors. The discussion that follows nonetheless generally speaks of Presidents naming Special Prosecutors; it reflects the assumption that, even if the office of the Special Prosecutor is structured in such a way that formal appointment power lies with the Attorney General, ultimate authority will be in the President. For the constitutional clause governing appointments, see U.S. CONST. art II, § 2, which provides that the President, with advice and consent of the Senate, may vest the appointment of inferior officers in the President alone, in the courts of law, or in the heads of departments. In *Morrison v. Olson*, the Court found the Independent Counsel to be an inferior officer. See 487 U.S. 654, 672 (1988).

16. See sources cited *supra* note 1.

17. To offer a concrete example of what I mean: Cox, over the objection of staff prosecutors, directed that witness interviews be written up, even though the law did not require such memorialization and even though those write-ups would be turned over to the defense in any cases brought by the office. Prosecutors in the office argued that these write-ups would aid the defense. Since there were likely to be inconsistencies between what witnesses eventually testified to and what witnesses had first told prosecutors, defense attorneys would be able to cross-examine them about their inconsistent statements, thus undermining the credibility of their trial testimony. Ben-Veniste and Frampton write: "Cox was not persuaded by the tactical arguments. He decided that the unusual responsibilities placed on the office required any internal record of the thoroughness of its investigations that would stand up to later scrutiny." BEN-VENISTE & FRAMPTON, *supra* note 3, at 37.

virtually certain. At least at the level of semantic choice, the decision of the drafters of the Ethics in Government Act, as it was revised in 1983, to use the title "Independent Counsel" reflects an embrace of the "judge" model.

The "prosecutor" model and the "judge" model, in turn, lead to different ideas of whom should head up the investigation. The "prosecutor" model suggests that the lead government attorney should be someone with significant prosecutorial experience. Moreover, because the prosecutor model puts a premium on complete, aggressive investigation, the ideal selection to head the investigation is someone from the opposing political party. The paradigm example of "prosecutor" is the person who those calling for a Special Prosecutor during Watergate had in mind as the model for what they wanted, Thomas Dewey. When named Special Prosecutor, Dewey had already achieved renown as a prosecutor and, as a Republican, he did not have ties to Democratic Tammany Hall, the subject of his investigation.<sup>18</sup> In contrast, under the "judge" model, the best candidate to lead the investigation is someone with, as the name suggests, judicial experience or some other marker for fairness and probity. The prosecution model suggests that the lead attorney should be from the opposition party, because that increases the likelihood of aggressive investigation; the judge model suggests that the lead investigator should be someone without any political stake in the matter.

All of this bears on the Independent Counsel/Special Prosecutor debate because Watergate and Iran-Contra suggest, counterintuitively, that, under some circumstances, an embattled President (or his Attorney General) is likely to select someone to head the investigation against him who fits more into the prosecutor than judge model, while the special court can potentially select an Independent Counsel who fits the judge model.

During Watergate, in order to convince a skeptical public and Congress that it was turning the investigation over to someone who would pursue it fully, the Nixon Administration picked as Special Prosecutors individuals prominently associated with Nixon's leading political opponents. In addition to his affiliation with Harvard, hardly considered a bastion of Nixon support, Cox had been an advisor to then-Senator John Kennedy when he was on the Labor Committee, had served the Kennedy Administration as Solicitor General, and had been rumored to be a candidate for the Supreme Court during that Administration.<sup>19</sup> Jaworski, an experienced trial attorney and former President of the American Bar Association, was a Democrat who had been an advisor to Lyndon Johnson.<sup>20</sup> Jaworski observed:

I would never have been appointed Special Prosecutor but for the fact that the public would not have allowed the selection of someone biased in Nixon's favor. I was not the ideal selection from Nixon's standpoint, but someone like me had to be chosen—even at the cost of giving the new Special Prosecutor more independence than Ar-

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18. *See id.* at 20-21.

19. *See* DOYLE, *supra* note 6, at 42-44.

20. *See* BEN-VENISTE & FRAMPTON, *supra* note 3, at 190; LEON JAWORSKI, *THE RIGHT AND THE POWER: THE PROSECUTION OF WATERGATE 4* (1976).

chibald Cox had, thereby providing assurance that another “Saturday Night Massacre” would not occur.

Obviously, the Nixon Administration was not selecting Special Prosecutors whom it anticipated would be unrelentingly hostile to it. Cox and Richardson had pre-existing ties—Richardson had been a student of Cox’s at Harvard Law School, and Cox and Richardson had subsequently been “distant friend[s].”<sup>22</sup> Jaworski may have been selected out of the belief that his relationship with Johnson made him respectful of presidential power, that he was a conservative in national security matters who would defer to White House claims in this area, or in the (erroneous) belief that he was a friend of John Connally’s.<sup>23</sup> But the critical point is that, in order to make the investigation credible and to offset the fact that the Administration was doing the selection, the Nixon Administration had to nominate individuals whose backgrounds signaled to the public and to Congress that they would conduct aggressive investigations.

In contrast, Lawrence Walsh’s background fit much more into the judge model than the prosecutor model. A Republican, he was thus from the President’s own party, although his most important ties had been with the moderate wing of the party—with Dewey, under whom he had worked as a prosecutor and whom he had served as counsel when the latter was governor, and with President Eisenhower, who had appointed him to the bench and whom he had served as Deputy Attorney General. While he had been a prosecutor, his prosecutorial service had been in the 1930s, decades past. In addition to his judgeship and his other government service in state and national Republican administrations, he had been a leading civil litigator in New York City and President of the American Bar Association.<sup>24</sup> If there had been no Ethics in Government Act and if President Ronald Reagan had decided to name an Iran-Contra Special Prosecutor, one suspects that he could not have named Walsh to the post for political reasons. Walsh’s political affiliation and background—in contrast to those of Cox and Jaworski—might well not have satisfied Congress or the public that he would conduct a sufficiently aggressive investigation. Precisely those traits, however, presumably made him attractive to the special court. His judicial background and his intermediate political affiliation (not of the opposition party, but not tied to the President politically) likely suggested that he would conduct a thorough inquiry, but one marked by fairness and balance.

Several caveats should be added to the argument at this point. The President will not always have strong incentives to name an aggressive Special Prosecutor. In Watergate, President Nixon had such incentives because the opposition party controlled Congress. As a result, Democrats could block ex-

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21. JAWORSKI, *supra* note 20, at 276-77.

22. DOYLE, *supra* note 6, at 43.

23. *See id.* at 234-35; *see also* JAWORSKI, *supra* note 20, at 264 (“Connally and I had never been close friends.”).

24. *See* LAWRENCE E. WALSH, FIREWALL: THE IRAN-CONTRA CONSPIRACY AND COVER-UP 27, 146, 338 (1997).

ecutive branch actions (such as Richardson's appointment as Attorney General) as a way of ensuring that an aggressive Special Prosecutor was named. Similarly, Democratic control of Congress made impeachment a more realistic possibility, which again gave the President an incentive to name an aggressive Special Prosecutor as a way of forestalling pressure for impeachment. There are other situations in which a President will also have incentives to name an aggressive Special Prosecutor. A President seeking reelection has reason to want such a person to fill the post, since only someone whose background guarantees that she will pursue every lead will have the credibility to clear the President's name. (It should be added, however, that a countervailing concern will enter into the presidential calculus: He will not want to name someone whose investigation will undermine the President's reelection effort.) Moreover, a President concerned with his place in history might, at least in theory, select an aggressive Special Prosecutor in order to remove the taint from his reputation. But incentives of these types will not always be present.

There is also no reason to believe that the special court will, in any given instance, be influenced by the judge model, as opposed to the prosecutor model, in selecting an Independent Counsel. The judges on the special court are not subject to political constraints in the way the President is. He faces the loss of position—either through electoral defeat or impeachment—if he errs in his selection of a Special Prosecutor, and this affects whom he picks. In contrast, the judges on the special court will remain judges, regardless of whom they select as Independent Counsel. They thus are free to select, in accordance with their personal views, either a judge-type or a prosecutor-type Independent Counsel. Indeed, they can even move beyond the two models—selecting someone evidently biased either in favor of or in opposition to the President. The President's choices are limited by politics, but the special court's choices are limited simply by its members' sense of who would be the best selection.

Finally, the special court may conceivably misjudge its selection. Thus, Walsh's critics would argue that, notwithstanding his background, he conducted an overly aggressive investigation.<sup>25</sup> Nixon also appears to have misjudged Cox and Jaworski, but it seems that the President is more likely than the special court to assess the prosecutor accurately, simply because the President has a greater interest in accurate assessment.

Notwithstanding these caveats, Watergate and Iran-Contra highlight a complexity in the selection process. In some situations, the President has an incentive to name an aggressive prosecutor, while the special court may pick a "judge-like" Independent Counsel. As a result, it is simplistic to assume that the Special Prosecutor selection process will consistently lead to the selection of someone less aggressive than the Independent Counsel selection process would have produced. Rather, at least where the charges against him are treated by the public as serious and where the opposition party is in control of Congress, the President will likely pick someone whose reputation and back-

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25. See Walsh, *supra* note 1, at 4 (discussing criticisms of his investigation).

ground will signal to the public that she will conduct an aggressive investigation; at the same time, Watergate suggests that, while the President will name someone perceived as aggressive, he, for reasons of self-interest, will not want someone more aggressive than is needed to satisfy the public. In contrast, the special court's selection can be anywhere across a broader spectrum.

#### IV

#### LITIGATION

Critics of the Ethics in Government Act worry about the lack of constraint on Independent Counsel. According to this argument, Independent Counsel, having been named by unelected officials, receiving endless funds, and being effectively unremovable, operate without check.<sup>26</sup> While these concerns are real, Watergate and Iran-Contra suggest the other side of the story. Special Prosecutors have certain advantages over Independent Counsel in litigating against Presidents.

Presidents name Special Prosecutors. They can also fire them.<sup>27</sup> But, as the previous section showed in its discussion of Watergate, there can be practical limits on the President's exercise of these powers. President Nixon was forced to name lawyers whom he unquestionably would have preferred not to name, and the costs of firing Cox were enormous. Nonetheless, despite these constraints the Special Prosecutor can be seen as, to quote Watergate staffer James Doyle, the "President's man" because the President selected him or her.<sup>28</sup>

The tension here—the fact that the Special Prosecutor is a presidential appointee who will typically not be, to quote Jaworski's understatement, "the ideal selection from [the President's] standpoint"<sup>29</sup>—is an important one because it affects litigation between Presidents and Independent Counsel or Special Prosecutors. While Whitewater affords the most recent example, a look at Iran-Contra and Watergate also illustrates that there is a range of forms such litigation can take. The President can refuse to provide certain evidence voluntarily. The White House tapes in Watergate are the leading example.<sup>30</sup> The Executive Branch can intervene or be drawn into the criminal cases brought by Independent Counsel or Special Prosecutor. For example, the Justice Department filed an *amicus curiae* brief in the Independent Counsel's prosecution of

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26. The most compelling statement of this position is Justice Scalia's dissent in *Morrison v. Olson*, 487 U.S. 654, 728-32 (1988).

27. It should be added, however, that Judge Gesell decided that Cox's firing was illegal; the Justice Department did not appeal. See *Nader v. Bork*, 366 F. Supp. 104, 110 (D.D.C. 1973); DOYLE, *supra* note 6, at 228 n.\*. While the Independent Counsel can be removed by the Attorney General, removal can only be for good cause; more important, the Independent Counsel is not appointed by an executive branch official. Thus, the relationship between the Independent Counsel and the President is very different from that of the Special Prosecutor and the President.

28. See DOYLE, *supra* note 6, at 247 ("[T]he editorials and comments in the press stated baldly what was bothering all the doubters: How could Jaworski expect to succeed when he was the President's man?").

29. JAWORSKI, *supra* note 20, at 277.

30. See *id.* at 191-204 (discussing accounts of the Supreme Court litigation).

Oliver North supporting North's unsuccessful challenge to the legal sufficiency of the conspiracy charge in that case.<sup>31</sup> Another example from Iran-Contra concerns classified information. Under the Classified Information Procedures Act ("CIPA"),<sup>32</sup> the Attorney General is responsible for deciding whether information can be declassified for use at a criminal trial.<sup>33</sup> In the prosecution of Oliver North, the Attorney General refused to declassify information that the Independent Counsel had informed him was necessary to try North on the central charges against him—that he had conspired to defraud the United States by providing covert support for the Contras and by diverting funds from the Iran arms sale and that the diversion was a theft of government funds. As a result of that decision, the trial court dismissed these counts of the North indictment.<sup>34</sup> The President can also pardon people whom the Independent Counsel or Special Prosecutor may have convicted or may be investigating or prosecuting—as Gerald Ford did when he pardoned Richard Nixon,<sup>35</sup> or as George Bush did when he pardoned Caspar Weinberger, Robert McFarlane, Elliott Abrams, and three other Iran-Contra defendants.<sup>36</sup> Finally, an Independent Counsel or a Special Prosecutor could conceivably indict the President (though there is extensive debate about the constitutionality of such an indictment).<sup>37</sup>

In these conflicts, the President will be seeking to convince a judicial body and to win public support. In both regards, a President challenging an Independent Counsel will have a potential argument that a President challenging a Special Prosecutor will not plausibly have (or will have only in a very limited

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31. See 1 LAWRENCE WALSH, FINAL REPORT OF THE INDEPENDENT COUNSEL FOR IRAN/CONTRA MATTERS 55 (1993) [hereinafter FINAL REPORT]. For the decision rejecting North's challenge, see *United States v. North*, 708 F. Supp. 375, 376 (D.D.C. 1988).

32. Pub. L. No. 96-456, 94 Stat. 2025 (1980) (codified as amended at 18 U.S.C. app. III §§ 1-16 (1994)).

33. CIPA vests the Attorney General (or a designated Deputy or Assistant Attorney General) with power to prevent the release of classified information. See *id.* §§ 6(a), 14. The Ethics in Government Act does not include this power among those specified as transferred to Independent Counsel. See 28 U.S.C. § 594 (1994). The Iran-Contra Independent Counsel took the position that he thus lacked power to declassify information or to contest the Attorney General's determinations. See SECOND INTERIM REPORT TO CONGRESS BY INDEPENDENT COUNSEL FOR IRAN/CONTRA MATTERS 15-16 [hereinafter SECOND INTERIM REPORT], reprinted in 2 FINAL REPORT, *supra* note 31, at 527-28 (1989).

34. See 1 FINAL REPORT, *supra* note 31, at 55, 110; SECOND INTERIM REPORT, *supra* note 33, at 20-23, reprinted in 2 FINAL REPORT, *supra* note 31, at 532-35. The dismissal was on the Independent Counsel's motion. See 1 FINAL REPORT, *supra* note 31, at 110. Even more dramatically, the Attorney General in the Independent Counsel's prosecution of Joseph Fernandez filed an affidavit under § 6(e) of CIPA barring disclosure of evidence. The trial court subsequently dismissed the entire case (over the Independent Counsel's objection) and the Court of Appeals affirmed that dismissal. See *United States v. Fernandez*, 887 F.2d 465 (4th Cir. 1989); 1 FINAL REPORT, *supra* note 31, at 292-93.

35. On the Nixon pardon, see BEN-VENISTE & FRAMPTON, *supra* note 3, at 291-315.

36. See FOURTH INTERIM REPORT TO CONGRESS BY LAWRENCE E. WALSH, INDEPENDENT COUNSEL FOR IRAN/CONTRA MATTERS 2 (1993) [hereinafter FOURTH INTERIM REPORT], reprinted in 2 FINAL REPORT, *supra* note 31, at 586.

37. See *The Independent Counsel Process*, *supra* note 1, at 1597 (statement of Terry Eastland) (suggesting that Ethics in Government Act permits indictment of a sitting President but that such an indictment would be unconstitutional); cf. JAWORSKI, *supra* note 20, at 100 (suggesting that a sitting President could constitutionally be indicted for murder, but not for obstruction of justice, particularly when the Congress was considering impeachment on that ground).

way): The President will be able to argue that the Independent Counsel's decision is fundamentally unfair and reflects critically flawed judgment. For example, in issuing his pardons, President Bush's central argument was that Independent Counsel had been engaged in "the criminalization of policy differences."<sup>38</sup> The Justice Department under President Reagan had similarly challenged the conspiracy charge brought against North as embodying a theory that "potentially criminalize[d] any political dispute."<sup>39</sup> But a President challenging a Special Prosecutor is challenging someone whom the President appointed and whom the President can fire, and this can make the fundamental fairness argument difficult, if not impossible, to make convincingly. The President will have a tough time contending that the "President's man" is driven by personal or political concerns making him hostile to the President. Watergate Assistant Special Prosecutors Richard Ben-Veniste and George Frampton offer evidence for this point when they explain why President Nixon complied with the newly named Leon Jaworski's aggressive demands for tapes: "The President, obviously, was not in a position to claim that Jaworski was 'out to get him' only a month after he had appointed him. That would have been suicidal."<sup>40</sup>

In sum, the President and the attorney heading the investigation of the President—whether Special Prosecutor or Independent Counsel—are likely to become adversaries in some litigation context. But, the President, both by naming the Special Prosecutor and by not firing him, is a kind of guarantor of the Special Prosecutor's judgment and competence. This undermines any attack the President might launch against her. The inability to field such an attack can have important consequences. Very dramatically, it meant that Nixon decided that he had to comply with Jaworski's request for tapes.

At the same time, Special Prosecutors are better able than Independent Counsel to litigate certain important claims concerning the exercise of executive branch power. Specifically, a court is more likely to treat a Special Prosecutor as an appropriate representative of the Executive Branch. My argument here is, admittedly, speculative, but I will offer two examples from Iran-Contra to show what I mean. The two examples spring from the two critical defeats suffered by the Office of Independent Counsel, Iran-Contra.

The first has already been alluded to: Because of a decision by the Bush Administration not to declassify certain information, Walsh was forced to drop the central charges against Oliver North and John Poindexter: conspiracy to defraud the United States and theft of government property.<sup>41</sup> Walsh was thus

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38. FOURTH INTERIM REPORT, *supra* note 36, at 82, *reprinted in* 2 FINAL REPORT, *supra* note 31, at 666 (quoting President Bush).

39. Memorandum of Law of the United States Filed by the Dep't of Justice as *amicus curiae* with Respect to the Independent Counsel's Opposition to the Defendant's Motion to Dismiss or Limit Count One, *United States v. North*, Crim No. 88-0080-02-GAG, at 4 (D.D.C. Nov. 18, 1988), *quoted in* FOURTH INTERIM REPORT, *supra* note 36, at 83, *reprinted in* 2 FINAL REPORT, *supra* note 31, at 193.

40. BEN-VENISTE & FRAMPTON, *supra* note 3, at 193.

41. North and Poindexter were eventually tried on narrower conspiracy charges. See FINAL REPORT, *supra* note 31, at 230-41 (reprinting conspiracy count of revised North indictment, setting forth conspiracy to defraud the United States, the Department of the Treasury, and the IRS); see *id.* at

never able to bring to trial his fundamental claims concerning the criminality of Iran-Contra. The North and Poindexter trials became trials that focused on the periphery, rather than the core, of Iran-Contra; in other words, they became concerned with the legality of the means to the initially charged conspiracy, rather than with that conspiracy itself. The prosecution's limited success in the North trial—North was convicted on only three of the twelve felony charges against him<sup>42</sup>—may have been a product of this focus: The prosecution's case would have been a more compelling one if it had been able to prove that the false statements and obstruction with which North was charged were part of an effort to hide underlying activity (the diversion of proceeds from the sale of arms to Iran to the Contras and the Contra resupply effort as a whole) that was in itself, according to the prosecution, criminal. (At the same time, the dismissal of the charges was not the full explanation of the result in *North*, since Poindexter was convicted on all the charges presented to the jury.<sup>43</sup>) Even more fundamental, because these charges were dismissed, no jury ever considered whether the core activities in Iran-Contra—the diversion of proceeds from the Iran arms sale and covert support for the Contras—were criminal. Thus, to the extent that the job of the Independent Counsel is to produce final determinations of what, if any, activities under investigation were criminal, the dismissal of these charges prevented the basic questions raised by Iran-Contra from being resolved. (While the trial court judge had made a pre-trial ruling that the conspiracy and theft charges stated a crime,<sup>44</sup> such a ruling is not a jury verdict.)

Critically, Walsh never argued that, as part of the powers of the Attorney General transferred to him as Independent Counsel, he had received the power possessed by the Attorney General, under CIPA, to declassify information. Indeed, Walsh acknowledged that he lacked the power to declassify.<sup>45</sup> As a result, when the Attorney General elected not to declassify the information necessary for the trial of these two counts against North to proceed, Walsh had no options: the counts had to be dismissed.<sup>46</sup>

In fact, had Walsh made the argument in court that he had the power to declassify, I strongly suspect he would have lost. At the level of doctrine, his position would have been a weak one. Given the standard view that classification

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244-64 (reprinting the conspiracy count of revised Poindexter indictment, setting forth conspiracy to violate certain federal criminal statutes).

42. See *United States v. North*, 910 F.2d 843, 851 (D.C. Cir.) (per curiam) (reversing conviction), *modified*, 920 F.2d 940 (D.C. Cir. 1990) (per curiam).

43. See *United States v. Poindexter*, 951 F.2d 369, 371 (D.C. Cir. 1991) (reversing conviction).

44. See *United States v. North*, 708 F. Supp. 375 (D.D.C. 1988).

45. See SECOND INTERIM REPORT, *supra* note 33, at 15-16, *reprinted in* 2 FINAL REPORT, *supra* note 31, at 527-28.

46. For a helpful discussion by a former Associate Counsel, Iran-Contra, of the tension between CIPA and the Ethics in Government Act and an argument for statutory modification, see 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).

matters are in the control of the executive,<sup>47</sup> a court would have been unlikely to find, at least in the absence of a clear congressional statement, that this was a power transferred to the Independent Counsel under the Ethics in Government Act. A court would likely also have believed a range of policy concerns militated against giving Walsh this power. In the ordinary case, an Attorney General has conflicting interests to consider—her interest in prosecuting weighed against the executive's interest in preserving secrets—and it is precisely because she can appreciate both sides of the balance that, under the Classified Information Procedures Act, she is given the power to determine when a case should go forward, even though classified information is thereby exposed; for the same reason, she is given the power to decide when the case should be stopped to protect classified information, even though a guilty person goes free. The Independent Counsel's institutional interests lie simply in prosecuting the guilty. As a result, the Independent Counsel would likely be found to be an inappropriate person to balance the competing interests of national security and law enforcement. Of course, a similar argument could be made with respect to an Attorney General in an Independent Counsel case, that she does not have an interest in prosecuting (and that that is why we have Independent Counsel). But concerns about the Independent Counsel selection process would likely become decisive at this point. A court is likely to believe that there is no reason to think that an Independent Counsel will be someone with any sensitivity to security concerns, while the nomination and confirmation process required for an Attorney General to assume office provides assurance that the nation's chief law enforcement officer is someone committed to upholding the law.<sup>48</sup>

Although my belief is just speculation, I think that if there had been a Special Prosecutor, rather than an Independent Counsel, in Iran-Contra, she might well have been able to argue successfully that she should have the power to declassify. Doctrinally, such a result would have involved less of a stretch than in an Independent Counsel case: It would be easier for a court to transfer executive branch functions to someone named by the President or Attorney General. On policy grounds, such a result would also have been easier to reach. The fact that the President or Attorney General selected the Special Prosecutor places the Executive Branch's stamp of approval on that person and makes the Special Prosecutor seem an appropriate repository of functions normally executed by the Attorney General. The President or Attorney General has validated the Special Prosecutor as an individual of judgment, while neither the Attorney General nor the President has validated the Independent Counsel's judgment.

The CIPA controversy is not idiosyncratic. Let me use as my second example the other major defeat suffered by the Iran-Contra Independent Counsel: the Court of Appeals' decision to reverse North and Poindexter's convictions. These convictions were overturned because it was found that witnesses used by

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47. See *Department of the Navy v. Egan*, 484 U.S. 518, 529-30 (1988).

48. Although not complete assurance, as former Attorney General John Mitchell's Watergate conviction suggests. See *United States v. Haldeman*, 559 F.2d 31 (D.C. Cir. 1976) (per curiam).

the prosecution at trial knew what Poindexter and North had testified about before Congress (under grants of immunity), that the witnesses' trial testimony had been colored by that knowledge, and that North's and Poindexter's convictions were thereby obtained in violation of the Fifth Amendment's self-incrimination clause.<sup>49</sup>

While Walsh pressed many arguments at the trial and appellate level in order to avoid this result, there is one that he did not press: He never argued that congressional grants of immunity (such as the grants that North and Poindexter had received) should be read more narrowly than prosecutorial grants of immunity. The question of whether congressional grants of immunity should be treated as having the same scope as prosecutorial grants of immunity was at the time, and is currently, one on which the Supreme Court has not spoken. As a result, the following argument might have been made: The current self-incrimination clause case law is analytically confused. In particular, while the premise that the prosecutor can make no use of immunized testimony is well-established, it lacks a coherent justification. Respect for precedent may mean that that premise should not be displaced when the entity granting immunity is the entity with which the Court's jurisprudence is concerned: the prosecution. But this holding should not be extended to the congressional context. Extension of that holding to Congress would mean that Congress would be able to block prosecutions of those with whom it sympathized by simply having them testify pursuant to immunity. By giving Congress the power to save individual wrongdoers from criminal sanction, a broad reading of the self-incrimination clause would violate fundamental separation of powers principles because the Constitution gives to the President alone the power to pardon individual wrongdoers.<sup>50</sup> Thus, it is more sensible to read the self-incrimination clause as simply barring introduction of the congressionally immunized testimony at a subsequent trial of the individual.<sup>51</sup>

Had the Court of Appeals accepted this argument, the result in North and Poindexter would have been different. Because the Independent Counsel had

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49. See *United States v. Poindexter*, 951 F.2d 369 (D.C. Cir. 1991); *United States v. North*, 910 F.2d 843 (D.C. Cir.) (per curiam), *modified*, 920 F.2d 940 (D.C. Cir. 1990) (per curiam). The Court of Appeals did not direct the dismissal of the charges against North. Rather, it reversed the conviction and sent the case to the District Court. The government there bore the burden of showing that any "witness exposed to immunized testimony has not shaped his or her testimony in light of the exposure." *North*, 920 F.2d at 943. Following a hearing involving testimony by former National Security Adviser Robert McFarlane about his exposure to North's congressional testimony, Independent Counsel Walsh moved to dismiss the case because he could not satisfy the test that had been established by the Court of Appeals. See John W. Mashek, *Charges Against North Dismissed: Prosecutor Can't Meet Requirement*, BOSTON GLOBE, Sept. 17, 1991, at 1.

50. See U.S. CONST. art. II, § 2.

51. For an argument that the self-incrimination clause should be read only to bar introduction of immunized testimony at a subsequent trial of the person who gave that testimony, see Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 858 (1995). Professors Amar and Lettow, however, advance a reading of the clause that would apply to all situations. See *id.* The approach that I sketch out here argues, less ambitiously, that, for separation of powers reasons, congressional grants of immunity should be construed narrowly, regardless of how prosecutorial grants are construed.

not introduced North's and Poindexter's congressional testimony at their trial, their convictions would have been upheld.

I doubt, however, that the appellate court would have adopted this line of reasoning if Walsh had pressed it. At the same time, I think the result might have been different had the argument been made by my hypothetical Iran-Contra Special Prosecutor. Because it is concerned with promoting executive branch power, the argument that I have sketched here would have very different persuasive power, depending on whether it came from a Special Prosecutor or from an Independent Counsel.

A court would be likely to look skeptically at an Independent Counsel who sought to portray herself as a champion of the Executive Branch. As previously discussed, the Independent Counsel's institutional interest is simply with her own investigation, rather than with the full run of prosecutions brought by the government, and she is not selected by an executive branch official. This background undermines her effectiveness in arguing for a broad reading of executive branch power at the expense of congressional power; I think a court would be likely to view such an argument as being result-oriented, rather than attentive to broader, recurring institutional concerns. With a Special Prosecutor, the result is harder to predict. Like the Independent Counsel, her interest would not be with the full run of cases. At the same time, she is selected by an executive branch official, and I think this would likely color the reaction her arguments would receive. A court would be more likely to take seriously her claim that the Executive Branch has an important interest that warrants reading congressional grants of immunity to confer only a limited form of immunity.

*United States v. Nixon*<sup>52</sup> also supports my point. In rejecting the President's claim that the fight over the Watergate tapes was an intra-branch dispute that the President alone could resolve, the Court stressed the Special Prosecutor's possession, by delegation, of executive branch powers. The regulations creating the Office of Special Prosecutor, Chief Justice Burger wrote, "give[] the Special Prosecutor explicit power to contest the invocation of executive privilege in the process of seeking evidence deemed relevant to the performance of these specially delegated duties."<sup>53</sup> The Court had to consider the Special Prosecutor's claims because his office had been created by the President to vindicate certain executive branch interests.

I do not mean to press the point too far. The Independent Counsel, like the Special Prosecutor, exercises executive branch functions, and unless *Morrison v. Olson*<sup>54</sup> were to be overturned, a court would not deny the Independent Counsel's ability to exercise such functions. But, because of the nature of their respective selection processes, Independent Counsel and Special Prosecutors bear different relationships to the President, and this fact is likely to color the way in which courts consider novel legal arguments advanced by either a Spe-

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52. 418 U.S. 683 (1974).

53. *Id.* at 694-95.

54. 487 U.S. 654 (1988) (upholding constitutionality of Ethics in Government Act).

cial Prosecutor or an Independent Counsel. The Special Prosecutor's claims to possess executive branch powers or to represent executive branch institutional interests have a better chance of prevailing. The difference can be critical to the success of the investigation, as the examples I have discussed suggest. As a result, as a litigator, the Special Prosecutor enjoys an important advantage over the Independent Counsel.

## V

### CONCLUSION

This essay has drawn on the examples of Watergate and Iran-Contra in order to offer a new perspective on Independent Counsel and their ability to investigate and prosecute high-level wrongdoing. The current consensus is that an Independent Counsel, appointed by judges of the special court pursuant to the Ethics in Government Act, is likely to investigate and prosecute crimes more vigorously than a presidentially appointed Special Prosecutor. The debate over the Independent Counsel is simply over whether this is a good or bad thing. There are, however, important factors that have not been recognized. First, particularly when the other party controls Congress, the President has incentives to name as Special Prosecutor someone who will conduct a vigorous investigation; only someone with a reputation and background that suggest that she will proceed aggressively will be able to clear the President's name. In contrast, the judges of the special court may conceivably follow the "judge" model and select someone whose reputation and background are more suggestive of a balanced inquiry. Thus, it is not clear that, as a general matter, the Independent Counsel mechanism is more likely than the Special Prosecutor mechanism to produce an aggressive attorney as the head of the inquiry. Second, the fact that the Special Prosecutor is a presidential appointee constrains the President's ability to oppose forcefully the decisions of the Special Prosecutor that he disagrees with. Finally, as a litigator, the Special Prosecutor enjoys an important advantage over an Independent Counsel because, when the law is unclear, a court is likely to look more favorably on the former's claim to exercise executive branch powers or to advance executive branch interests. As a result of these three factors, the calculus that must be employed to determine whether the Ethics in Government Act leads to more vigorous and successful prosecution in the full run of cases is more complex than participants in the debate over Independent Counsel have realized.