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Special Division Agonistes

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SPECIAL DIVISION AGONISTES

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I. AMONG THE CASUALTIES . . .

When the independent counsel law sank earlier this year, the casualties included a special "division" of the United States Court of Appeals for the District of Columbia Circuit.[1] This division was the special court that Congress had, by statute, created "for the purpose of appointing independent counsels."[2] The now-expired 1994 independent counsel statute had, like its three predecessors, directed the Chief Justice of the United States to appoint three judges from the Supreme Court and/or the federal Courts of Appeals to serve on the special court for two-year terms.[3] This independent counsel court, which was located for administrative purposes in the United States Court of Appeals for

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1. 28 U.S.C. § 49(a) (1994). Although the independent counsel law expired on June 30, 1999, *see* 28 U.S.C. § 599 (1994), independent counsel who were in office on that date and the independent counsel law itself, including its provisions relating to the special division of the Court of Appeals, "continue in effect with respect to then pending matters before an independent counsel . . . until that independent counsel determines such matters have been completed." *Id.*

2. 28 U.S.C. § 49(a) (1994). Throughout this article, my descriptions of and all references and citations to the independent counsel law refer to the Independent Counsel Reauthorization Act that President Clinton signed into law on June 30, 1994. Its predecessor versions, which were enacted in 1978, 1982 and 1987, each differed in various ways that do not affect my general argument. For a description of some of the amendments that changed the independent counsel laws from one version to the next between 1978 and 1994, see Katy J. Harriger, *The History of the Independent Counsel Provisions: How the Past Informs the Current Debate*, 49 MERCER L. REV. 489, 505-14 (1998).

3. *See* 28 U.S.C. § 49(d) (1994). The law required the Chief Justice to pick one of the three judges from the United States Court of Appeals for the District of Columbia Circuit and prohibited him from picking more than one judge from any court. *Id.* The law directed the Chief Justice, as he assigned judges to this special court, to give priority "to senior circuit judges and retired justices." 28 U.S.C. § 49(c) (1994). Although Chief Justices Burger and Rehnquist assigned numerous Senior Circuit Judges to this court, neither assigned a Supreme Court Justice to serve.

the District of Columbia Circuit,[4] came to be known colloquially as the "Special Division."[5]

Under the independent counsel law, these judges were assigned as a panel to perform a range of responsibilities that were collateral to their regular work as members of Article III courts. The law directed the Special Division to receive notification from the Attorney General that she would not be requesting appointment of independent counsel in particular matters whenever the Department of Justice had conducted a preliminary investigation and found "no reasonable grounds to believe that further investigation [was] warranted."[6] The statute also designated the Special Division to receive all Attorney General requests to appoint independent counsel in specific matters[7] and, in such instances, it required the Special Division to appoint someone to serve as the particular independent counsel.[8] The Special Division also was to receive and to act upon any Attorney General's request to expand the jurisdiction of an existing independent counsel.[9] The statute also authorized the Special Division to receive and act upon a direct request from any independent counsel to refer to him or her a matter that related to his or her existing investigative jurisdiction.[10] The Special Division also would receive periodic budget information from independent counsel[11] and determine, at prescribed intervals, whether each independent counsel's work was so substantially completed that he or she should be discharged.[12] The independent counsel law also directed the Special Division to receive under seal the required final report of each independent counsel.[13] The law authorized the Special Division to distribute relevant portions of such a report to the persons it named, to receive any comments they chose to submit and to determine, in the end, whether the report and such comments should be

4. *See* 28 U.S.C. § 49(a) (1994) (directing the Clerk of the United States Court of Appeals for the District of Columbia Circuit, beginning with the 1987 version of the statute, to "serve as the clerk of such division" and to "provide such services as are needed by such division"); *see also* Bruce D. Brown, *Help Wanted*, LEGAL TIMES, Feb. 3, 1997, at 6 (noting D.C. Circuit Judge David B. Sentelle's employment of a special assistant to handle the volume of work relating to his responsibilities as the Presiding Judge of this court).

5. As Judge Gerhard A. Gesell once noted, the Special Division's official title is "cumbersome[]." United States v. North, 708 F. Supp. 387, 388 n.1 (D.D.C. 1988).

6. *See* 28 U.S.C. § 592(b)(1) (1994).

7. *See* 28 U.S.C. §§ 592(c)-(d) (1994).

8. *See* 28 U.S.C. §§ 593(b)(1)-(3) (1994).

9. *See* 28 U.S.C. § 593(c)(1) (1994).

10. *See* 28 U.S.C. § 594(e) (1994).

11. *See* 28 U.S.C. § 594(h)(1)(A) (1994).

12. *See* 28 U.S.C. § 596(b)(2) (1994). These provisions, which had no counterparts in the 1978, 1982 or 1987 independent counsel statutes, have been upheld against constitutional challenges. *See, e.g.*, United States v. McDougal, 906 F. Supp. 494 (E.D. Ark. 1995).

13. *See* 28 U.S.C. § 594(h)(1)(B) (1994).

released publicly.[14] The statute also charged the Special Division with receiving and adjudicating requests from subjects of independent counsel investigations for reimbursement of attorneys' fees and other costs that they would not have incurred "but for" the existence of the independent counsel statute.[15]

Since its inception, the independent counsel law has embodied the idea of directing a special court to play these roles as part of the general reaction to Watergate. In essence, Congress and President Carter, who signed the first independent counsel act into law, created the Special Division following Watergate to play three general but vital roles that previously had been performed by Executive Branch officials and institutions. One role for the judges of the Special Division to play would be to appoint, in the next case where there was good reason to conduct a criminal investigation of a president or his close associates, an excellent, experienced, independent attorney who would have all the power and jurisdiction necessary to conduct the investigation. In this respect, the Special Division would replace the serendipity that had led Attorney General-designate Elliot Richardson to pledge to the Senate—as the condition that obtained its confirmation of him to the Attorney General office that President Nixon politically needed Richardson to attain in May 1973—that he would appoint and broadly empower Archibald Cox to investigate Watergate-related matters and persons including the President himself.

The second role for the judges of the Special Division would be to protect an independent counsel from the retaliatory powers of a president or any Executive Branch official who would be bound to follow the president's orders. In this respect, the Special Division would replace the extraordinary explosion of negative public reaction that followed President Nixon's firing of Cox, which led to the reinstatement of his Watergate Special Prosecution Force staff and the President's appointment of a fully empowered successor special prosecutor, Leon Jaworski.

The third role for the judges of the Special Division would be to see an independent counsel through his or her work administratively, to the point of releasing publicly the counsel's final, comprehensive report. In this respect, the Special Division would replace the *ad hoc* processes that had marked the conclusion of the Watergate investigations and trials.

These were the romantic, post-Watergate ideas behind the Special Division mechanism of the independent counsel statute. Sadly, after twenty years of experience, we now know that the Special Division structure has not fulfilled these hopes. The Special Division has been able to perform much of its first role. It has, in more than twenty separate matters since 1978, generally succeeded in appointing independent counsel who had much of the power and independence they needed to conduct their respective investigations. (The quality of some of the Special Division's independent counsel appointees is a

14. *See* 28 U.S.C. § 594(h)(2) (1994).

15. *See* 28 U.S.C. § 593(f) (1994).

separate and obviously a much debated topic.) The Special Division's ability to protect independent counsel proved to be much less clear. Indeed, while there are only a few known instances where the Special Division even tried to facilitate, much less where it succeeded in facilitating, an independent counsel's work, there were instances where the Special Division, or at least some of its members, seemed to be at odds with, and even critical of, "its" independent counsel. Indeed, in both the Iran/Contra and Whitewater matters, the tension that was apparent on occasion between one or more judges of the Special Division and the independent counsel it had appointed became the publicly visible substance of how the Special Division handled administrative issues relating to those investigations.

These Special Division performance problems are not, however, the sum of our experience. In addition to the Special Division's very mixed record in fulfilling its hoped-for statutory roles, the Special Division concept backfired as the judges themselves became, over time, fairly or unfairly, subjects of controversy. The Special Division itself thus contributed, by its actions or simply as it became a focus of debate, to the criticism that came to surround the independent counsel law in the abstract and almost every independent counsel (of course some independent counsel more than others!) in his or her work. The Special Division mechanism came to hurt the public impression of the independence and fairness of independent counsel. This diminished public confidence in the vigor, independence and fairness of independent counsel investigations of high government officials, which was the *raison d'être* for vesting the power to appoint independent counsel in a court of law rather than in the Executive Branch. In addition, the Special Division component of the independent counsel law also contributed to negative and harmful perceptions about the independence and abilities of federal judges generally because the personnel of the Special Division were, in their "day jobs," federal judges serving on Article III courts.

This article traces some of the history of the Special Division and the turns in the road that brought us to this lamentable point. I argue that, with regard to this particular piece of the independent counsel law, twenty years of experience suggest that we should not mourn the passing of the Special Division as we knew it. For the future, in writing any statute that again vests in a court of law the power to appoint someone with the power and independence to investigate a president or any of his intimates, the challenge will be to structure a more limited, mechanical and thus realistic—and likely a less controversy-generating—role for any federal judge who is called to perform this collateral duty.

II. THE ARC OF THE SPECIAL DIVISION

A. Romance

The independent counsel statute originated, of course, in the "Saturday Night Massacre" of October 20, 1973. The attempted "massacre" illustrated to millions of outraged Americans that commencing and conducting criminal investigations of the highest officials of the Executive Branch can fail if they retain supervisory power over the inquiry. Indeed, an investigation of the President of the United States is particularly likely to fail because, as a constitutional matter, he always will retain ultimate supervisory power over the investigation.

In that maelstrom of late 1973, as President Nixon "massacred" Watergate Special Prosecutor Archibald Cox and the Attorney General who had appointed him, and as Nixon attempted, ultimately without success, to shut down Cox's investigative staff, one branch of government was the shining beacon: the federal judiciary. Although the heroes of 1973 included Attorney General Elliot Richardson, Deputy Attorney General William Ruckelshaus, Special Prosecutor Cox and the Watergate prosecutors, the figure of law-and-order who actually remained standing and was much admired during that crisis was Chief Judge John J. Sirica of the United States District Court for the District of Columbia. It was Judge Sirica who had issued the order directing President Nixon to comply with the grand jury subpoena for specified White House tapes and thus precipitated Nixon's firing of Cox.[16] In addition to Chief Judge Sirica, it was the *en banc* United States Court of Appeals for the District of Columbia Circuit that had affirmed Judge Sirica's order,[17] leading directly to the "massacre."[18] Soon after the "massacre," when the White House tapes were produced and White House counsel revealed to the court and, through it, to the grand jury that some tapes were missing and others had been mysteriously damaged, it was Chief Judge Sirica who ordered the inquiry that ultimately determined that tapes had been altered deliberately.[19]

In response to the "massacre," Congress began within weeks to consider a raft of legislative proposals that tried to replace what had proven vulnerable to President Nixon with what had been widely admired in Chief Judge Sirica and his judicial brethren: their power, their independence, and their specific ability to empower an aggressive, concededly appropriate criminal investigation of a sitting President.[20] After five years of legislative debate over various proposals, an

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16. *See In re* Grand Jury Subpoena Duces Tecum, 360 F. Supp. 1 (D.D.C. 1973) (Sirica, C.J.).

17. *See* Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973) (*en banc*) (*per curiam*).

18. *See generally* BOB WOODWARD & CARL BERNSTEIN, THE FINAL DAYS 62-72 (1976); KEN GORMLEY, ARCHIBALD COX: CONSCIENCE OF A NATION 309, 313-14 (1997).

19. *See generally* David Beckwith, *Judge John J. Sirica: Standing Firm for the Primacy of Law*, TIME, Jan. 7, 1974, at 12 (cover story in issue naming Judge Sirica *Time Magazine*'s "Man of the Year").

20. One example is the "Independent Special Prosecutor Act of 1973," which was a Senate

Ethics in Government Act became law in 1978. This new statute created a Special Division that was to be the institutionalized equivalent of what Chief Judge Sirica had been in 1973 and 1974. The statute directed the Chief Justice of the United States to appoint three senior federal judges who would, in any future case where an Attorney General determined that the possibility of criminal conduct by a senior official needed investigation, find the right independent counsel to do the job, give him or her the necessary jurisdiction and authority, and, as the investigation went forward, protect that counsel's independence and power.

B. Accomplishments

Beginning in 1978, Chief Justice Warren E. Burger discharged his statutory responsibility under the independent counsel law by appointing the first three Circuit Judges to serve as the Special Division.[21] The Table that follows this article lists the distinguished judges who have, by Chief Justice appointment, served on the Special Division, their respective terms of service, and the independent counsel matters that occurred during those terms.[22]

The first Presiding Judge of the Special Division, Senior Circuit Judge Roger Robb of the United States Court of Appeals for the District of Columbia Circuit, served in this capacity from 1978 through 1985.[23] Although the Special Division appointed four independent counsel to conduct various investigations of senior officials during this period,[24] no counsel sought to prosecute any subject of his

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proposal to vest the power to appoint a special prosecutor for the Watergate Grand Jury investigation in the United States District Court for the District of Columbia, exercised through a three-judge panel, no member of which could sit on matters involving the special prosecutor. S. REP. NO. 93-59 (1973). *See also The Special Prosecutor Act of 1976*, H.R. 14476, 94th Cong. (1976) (providing for D.C. Circuit review of Attorney General decisions to self-disqualify and to appoint a "Temporary Special Prosecutor" within a new Department of Justice Division of Government Crimes, and for direct Court appointment of Temporary Special Prosecutors); *The Special Prosecutor Act of 1977*, H.R. 2835, 95th Cong. (1977) (providing for D.C. Circuit appointment and removal of a "Temporary Special Prosecutor"); *The Public Officials Integrity Act of 1977*, S. 555, 95th Cong. (1977) (providing for D.C. Circuit appointment and Attorney General removal of a "Temporary Special Prosecutor"); *see generally* Thomas W. Merrill, *Beyond the Independent Counsel: Evaluating the Options*, 43 ST. LOUIS U. L.J. 1047, 1048 (1999); Ken Gormley, *An Original Model of the Independent Counsel Statute*, 97 MICH. L. REV. 601, 678-84 (1998).

21. *See* Table I, "The Judges of the Special Division and their Independent Counsel Appointees, 1978-1999," *infra* pages 44-47.

22. *See* Table I, *infra* pages 44-47.

23. *See Judge Roger Robb of U.S. Appeals Court Dies*, N.Y. TIMES, Dec. 21, 1985, at 21 (noting Judge Robb's service on the Special Division from 1978 until his death).

24. *See* Table I, *infra* page 44. These early appointees, and also many of the later independent counsel, generally were experienced former prosecutors, former senior government officials, persons without perceived ideological commitments, and/or attorneys in private practice without ambitions

investigation. Given this absence of criminal cases, it is not surprising that the earliest days of the Special Division were relatively quiet and, for the most part, non-controversial.[25] The Special Division did, however, facilitate the Bronx, New York prosecution of one Cabinet officer, Secretary of Labor Raymond J. Donovan. During this period, the Special Division authorized deliveries to the Bronx District Attorney of federal grand jury information that had been generated by the work of Independent Counsel Leon Silverman. These court actions occurred under seal and were not disclosed at the time.[26]

C. Complications

The second Presiding Judge of the Special Division, Senior Judge George E. MacKinnon of the D.C. Circuit, served for a similar, but ultimately a much more tumultuous, period (1985-1992).[27] In early 1986, the Special Division received, for the first time, virtually simultaneous Attorney General requests to appoint independent counsel. The requests pertained to two matters that, although separate, were highly visible, politically-charged and involved former top officials of the Reagan Administration. A massive committee report that House Democrats sent to Attorney General Meese triggered one request, which resulted in the court's appointment of Independent Counsel Alexia Morrison to investigate former Assistant Attorney General Theodore B. Olson.[28] The other

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for further careers in appointed or elected office. *See generally* John Q. Barrett, *Independent Counsel Law Improvements for the Next Five Years*, 51 ADMIN. L. REV. 631, 646, 647 (1999).

25. *See generally* George Lardner Jr., *Secret Court Guides High-Level Inquiries; Panel Oversees Key Papers in Donovan Case*, WASH. POST, Apr. 16, 1986, at A19 (describing the Special Division as "a little-known Washington institution set up eight years ago"). One Special Division matter that did attract some attention during this period was its unsealing and adjudication of Edwin Meese's request for reimbursement of attorneys' fees he had incurred as the subject of the 1984 investigation by Independent Counsel Jacob Stein. *See* Stuart Taylor, Jr., *Court Ends Secrecy on Meese's Request for Funds*, N.Y. TIMES, Jan. 25, 1985, at A17.

26. It was later reported that Bronx prosecutors had, in 1982 and 1984, sought and obtained from the Special Division "copies of federal grand jury testimony and other sealed evidence compiled by special prosecutor Leon Silverman in his 1982 investigation of alleged ties between Donovan and members of organized crime." Lardner, *supra* note 25. After a Bronx grand jury indicted Donovan in 1984, his attorneys asked the Special Division to "retrieve" the Silverman grand jury records, but it declined to do so. *Id.* Donovan ultimately was acquitted on all counts after a lengthy trial. *See* Selwyn Raab, *Donovan Cleared of Fraud Charges By Jury in Bronx*, N.Y. TIMES, May 26, 1987, at A1.

27. *See* NINA TOTENBERG, JUDGE GEORGE MACKINNON IS REMEMBERED IN WASHINGTON, D.C. (Nat'l Pub. Radio, May 5, 1995) (*available in* LEXIS) (describing and broadcasting excerpts from a final interview with Judge MacKinnon, shortly before his death, about "the appointment he was most proud of, the appointment of Lawrence Walsh as Iran/Contra special prosecutor").

28. For background information regarding this independent counsel appointment, *see In re*

request triggered the Special Division's appointment of Independent Counsel Whitney North Seymour, Jr. to investigate former senior White House adviser Michael K. Deaver.

As these momentous investigations moved forward, one to a constitutional confrontation over the independent counsel law itself and the other to its first criminal trial and conviction, the Special Division was seen for the first time as a participant in matters that were not topics of national consensus, unlike the judicial decisions of Watergate. The Special Division, for example, tacked back and forth, showing its indecision and misgivings in public, before it reaffirmed its earlier decision[29] to permit the Bronx District Attorney to use federal grand jury information in the state court trial of Raymond Donovan.[30] The Special

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Sealed Case, 838 F.2d 476, 478-80 (D.C. Cir. 1988), and Morrison v. Olson, 487 U.S. 654, 665-67 (1988).

29. *See supra* note 26.

30. A press report after-the-fact described the odd proceedings about this matter that began in February 1986:

> In a routine motion . . . Bronx prosecutors asked the special court to "authenticate" the [federal grand jury] documents so they could be admitted into evidence at [Donovan's] trial. . . .
>
> The panel, now headed by [Senior Circuit Judge MacKinnon], treated the motion as if it were a request for a fresh disclosure. In a three-page ruling underlined "Confidential," it gave prosecutors [thirty days] to answer more than 350 questions. Why is each of the 70 items needed to avoid "a miscarriage of justice"? How does the need for disclosure of each exceed "the need for continuous secrecy"? Just how is each item to be used at trial? As substantive evidence? To impeach a witness? Refresh a recollection? Test credibility?
>
> All this and more was concluded with a sternly worded "no disclosure" edict. . . .

Lardner, *supra* note 25. In May 1986, the Special Division heard oral arguments on this matter in a session that was closed to the public. *See* George Lardner, Jr., *Special Court Considers Donovan Trial Evidence; Ethics Act Materials May Be Withheld*, WASH. POST, June 1, 1986, at A19. Two media litigants, the *Washington Post* and the *New York Daily News*, then intervened in this matter and sought access to the Special Division's records. *See* George Lardner, Jr., *Post, N.Y. Daily News Seek Lifting of Blackout in Donovan Dispute; Secrecy Involves Proceedings on the Evidence*, WASH. POST, June 18, 1986, at A6. The Special Division denied this motion and, in an extraordinary development, it also summarily ordered the newspaper litigants not to report on its denial of their motion. *See* George Lardner, Jr. & Eleanor Randolph, *Gag Order on 2 Newspapers in Donovan Case Is Lifted*, WASH. POST, July 4, 1986, at A1. Within days, but only after the newspapers had appealed to the Supreme Court, the Special Division lifted its "gag on the gag" order. *See In re* Donovan, 801 F.2d 409 (D.C. Cir. Spec. Div. 1986) (*per curiam*). A month later, the Special Division authorized the Bronx District Attorney to use at Donovan's trial all of the federal grand jury information that the Special Division originally had provided to the District Attorney. *See* George Lardner, Jr., *Special Court Authorizes Use of Donovan Evidence; Records Called Critical to N.Y. Prosecution*, WASH. POST, Aug. 6, 1986, at A6. As the *Washington Post* reported with a certain smugness, this final ruling "represent[ed] a complete

Division also, in late 1986, granted Independent Counsel Seymour's request to expand his investigative jurisdiction to persons other than Michael Deaver.[31] By the end of 1986, Attorney General Meese's request also compelled the Special Division to appoint an independent counsel in what Judge MacKinnon recognized at the time as "the most important case" that had been referred to the Special Division in its eight year existence: the Iran/Contra investigation.[32]

D. Suspicions

The role of the Special Division became controversial, and the ill-advised nature of the statute assigning selected responsibilities to federal judges became even clearer, during the late 1980's.

During 1987-1988, the Special Division survived what was in part a judicial referendum on its early years of operation. On January 22, 1988, a divided panel of the Court of Appeals for the District of Columbia Circuit declared the independent counsel statute unconstitutional.[33] Among the many constitutional infirmities that the panel majority perceived in the statute was its allocation of non-Article III powers to an Article III court.[34] The majority described a member of the Special Division conferring *ex parte* with an independent counsel.[35] The court also listed instances where the Special Division had issued orders affecting an independent counsel's conduct of a federal criminal investigation, outside the context of a case or controversy and without providing notice to interested parties or holding a hearing.[36] The Special Division had become, as the Circuit Court understood its history, the supervisor of each independent counsel, unconstitutionally exercising power that the Constitution allocated to a unitary Executive.[37]

The Supreme Court, of course, disagreed fundamentally with this view. On June 29, 1988, in *Morrison v. Olson*, the Court, by a decisive 7-1 margin, upheld the constitutionality of the independent counsel law.[38] With respect to the Special

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turnabout from initial orders and tentative observations by the three-judge panel at proceedings over the [preceding] four months." *Id.* The Special Division divided 2-1 in reaching this judgment, which marked the first time that it displayed any panel division to the public. *See id.* (describing Judge Mansfield's dissenting opinion).

31. *See* Howard Kurtz, *Special Counsel Expands Probe Beyond Deaver*, WASH. POST, Dec. 17, 1986, at A1.

32. *See* Philip Shenon, *Candidates for Prosecutor Reported*, N.Y. TIMES, Dec. 12, 1986, at A15 (reporting an interview with Judge MacKinnon).

33. *See In re* Sealed Case, 838 F.2d 476 (D.C. Cir. 1988).

34. *See id.* at 511-17.

35. *See id.* at 514.

36. *See id.*

37. *See, e.g., id.* at 502 ("In truth, ... the Special Court has more of a supervisory role over the independent counsel than does the Attorney General . . .").

38. *See Morrison*, 487 U.S. 654.

Division, the Court majority brushed past the track record issues that had been raised by the appellate court. The Court found them troubling, true,[39] but it noted that these instances of Special Division conduct were not "before [the Court] as such."[40] Instead, Chief Justice Rehnquist—who of course had appointed the incumbent Judges of the Special Division— authored the majority opinion that read the statute as allocating to them only narrow, somewhat passive, or largely administrative, and thus constitutionally unproblematic, duties.[41] Looking to the future conduct of Special Division judges, however, the Chief Justice concluded his analysis with a caution to them that was less than subtle:

> The propriety of the Special Division's actions in these instances is not before us as such, but we nonetheless think it appropriate to point out not only that there is no authorization for such actions in the Act itself, but that the Division's exercise of unauthorized powers risks the transgression of the constitutional limitations of Article III that we have just discussed.[42]

These rhetorical patches, however, did not hold for long. A major fault line opened during the first Iran/Contra criminal trial, which occurred a little more than a year after the *Morrison* decision. Marine Lieutenant Colonel Oliver L. North, by then a hero to many people for his public performance as an immunized witness before the Congressional Iran/Contra Select Committees in 1987, was being prosecuted the next year by Independent Counsel Lawrence E. Walsh. The first occasion for controversy, although it was a small tear that may have been noticed at the time only by the litigants who received it, was a *sua sponte* Order issued by the Special Division.[43] The three judges acted, at their own initiative, to help Walsh defeat one of North's many pretrial motions to dismiss the criminal charges against him.[44] *Morrison* notwithstanding, the Special Division was back—unrequested—taking the side of an independent counsel in highly adversarial proceedings.[45]

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39. *See generally id.* at 684-85 & n.22.

40. *Id.* at 684.

41. *See id.* at 681.

42. *Id.* at 684-85.

43. *See* Order Supplementing Record, *In re* North, Div. No. 86-6 (D.C. Cir. Spec. Div. Oct. 24, 1988) (*per curiam*) (unpublished Order on file with author).

44. The Special Division explained that it had taken "judicial notice" of motions, filed by North in the District Court, that challenged the legality of the charges against him that related to the Nicaraguan Contras. *Id.* at 1 & n.1. North's motions had argued, among other things, that because Attorney General Meese's request to the Special Division for an independent counsel appointment did not specify support for the Contras that originated outside of arms sales to Iran, the Special Division's conferral of such jurisdiction to Independent Counsel Walsh was illegal. As part of refuting this claim by North, the Special Division attached a Meese press statement to its Order. *See id.*

45. Judge Gesell, to whom the *North* case had been specially assigned, did not rely on the Special Division's belated "Order Supplementing Record" when he denied North's motion. *North*,

Another Special Division "system" actor—Chief Justice Rehnquist himself—took individual action in the *North* case that attracted notice and criticism. In February 1989, on the eve of North's trial, the Chief Justice granted a stay motion by the United States Department of Justice, a non-party intervenor.[46] The Department had moved—without success in the trial court and the court of appeals, and then in the Supreme Court—to stay North's criminal trial because of professed concerns about the trial court's classified information procedures. There is no factual basis to believe that the Chief Justice was doing anything other than properly performing his "day job" as a member of the Court when he adjudicated and granted the Department's emergency motion. His judicial action nonetheless put him into the arena of independent counsel prosecuting, in the context of the most white hot independent counsel case to that date and on the side of a non-party advocate (the Department of Justice) that, at that moment, wanted the Independent Counsel not to commence the trial. In this context, not surprisingly, the Chief Justice's stay order created some public confusion and even suspicion that he was a partisan on the merits of the Independent Counsel's criminal prosecution of Oliver North.

More, and obviously related, suspicions about the impartiality of federal judges arose following the United States Court of Appeals for the District of Columbia Circuit's summer 1990 decision to vacate North's convictions.[47] The Court of Appeals split along so called "political" lines both at the panel level[48] and, to a less visible degree, when it decided Walsh's petition for panel rehearing[49] and

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708 F. Supp. at 387 (denying North's motion, among others, and not mentioning the Special Division's order).

46. *See* Thornburgh v. Walsh, No. A-643, 1989 U.S. LEXIS 591 (Feb. 12, 1989) (Rehnquist, C.J.) (staying the North trial pending the full Court's consideration of the Attorney General's motion for stay pending appeal), *vacated*, 57 U.S.L.W. 3545, 1989 U.S. LEXIS 593 (Feb. 16, 1989) (Rehnquist, C.J.).

47. *See* United States v. North, 910 F.2d 843 (D.C. Cir. 1990)(*per curiam*), *amended*, 920 F.2d 940 (D.C. Cir. 1990)(*per curiam*), *cert. denied*, 500 U.S. 941 (1991).

48. Circuit Judges David B. Sentelle and Laurence H. Silberman, who each had been nominated to the court by President Reagan, voted to vacate North's convictions and filed an opinion *per curiam*. *See North*, 910 F.2d at 851-913. Chief Judge Patricia Wald, one of President Carter's nominees, dissented from the panel judgment and filed an opinion dissenting from most of the majority opinion. *See id.* at 913-32 (Wald, C.J., dissenting as to Parts I, II, and III(B)(2)). Judge Silberman also filed an opinion expressing disagreement with distinct aspects of the majority opinion that rejected some of North's claims of reversible error. *See id.* at 932-60 (Silberman, J., concurring dubitante as to Part IV, and dissenting as to Parts III(B)(1), IV, V, and VII).

49. On Walsh's petition for panel rehearing, the court unanimously withdrew a factually inaccurate section of the original majority opinion. *See* United States v. North, 920 F.2d 940, 941 (D.C. Cir. 1990) (*per curiam*). Judges Sentelle and Silberman also filed a separate opinion, *per curiam*, explaining their decision to grant the petition in part, deny it in part and modify the original majority opinion accordingly. *See id.* at 941-51 (*per curiam*). Judge Wald filed a new opinion dissenting from these judgments. *See id.* at 951-59 (Wald, J., dissenting as to Parts I, II, & III).

considered his suggestion for rehearing *en banc*.[50] This pattern, which cannot be demonstrated to mean anything at all,[51] unfortunately gave partisans on all sides of specific Iran/Contra and /or general independent counsel law issues a basis to believe that the judging in independent counsel cases in District of Columbia federal courts, the seat of the Special Division itself, might be as political as it would have been simply to leave criminal law decision making regarding senior executive branch officials in the Department of Justice and subject to the threat of Presidential influence.

The appearances and suspicions got worse. One of the Judges who had participated in deciding the *North* appeal was D.C. Circuit Judge David B. Sentelle. In July 1990, Judge Sentelle voted with the bare majorities that vacated North's convictions and to deny Walsh's petition for rehearing.[52] A year or so later, in November 1991, Judge Sentelle was half of a second panel decision that decided, again by a bare majority, to undo the criminal convictions of Vice Admiral John M. Poindexter that the office of Iran/Contra Independent Counsel Walsh had obtained.[53] As in the *North* case, the *Poindexter* panel regrettably split along "political" lines.[54] And no sooner were the *North* and *Poindexter* cases

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50. *See id.* at 959 (*per curiam*) (denying suggestion for rehearing *en banc*). At the time of this decision (November 27, 1990), there were twelve Judges in active service on the Court of Appeals. President Carter had nominated four, President Reagan had nominated five, and President Bush had nominated three of the judges. Of the four Carter nominees, two (Judge Abner J. Mikva and Judge Harry T. Edwards) did not participate in deciding the matter; one (Chief Judge Wald) voted to grant the suggestion for rehearing *en banc* without limitation; and one (Judge Ruth Bader Ginsburg) voted to grant the suggestion with respect to one issue only. *See id.* Of the eight Reagan or Bush nominees (Judges Silberman, James L. Buckley, Stephen F. Williams, Douglas H. Ginsburg, Sentelle, Clarence Thomas, Karen LeCraft Henderson and A. Raymond Randolph), there is no record that any of the judges voted to grant the suggestion. Pursuant to the court's rules, Walsh's suggestion for rehearing *en banc* was denied because a majority (*i.e.*, seven) of the Judges did not vote in favor of the suggestion. *Id.*

51. Judge Patricia Wald explained in a recent interview how it is unfair in fact and detrimental to the judiciary's reputation for independence "to tag judges based on the party of the president that appointed them." *Wald Looks Back as She Prepares to Move On*, LEGAL TIMES, Sept. 20, 1999, at 9; *see also The Future of the Independent Counsel Act: Hearings Before the Senate Comm. on Governmental* Affairs, 106th Cong. 500 (1999) (testimony of Judge Peter Fay):

> Labels are very dangerous. I was appointed by two Republican Presidents, one to the District Court, one to the Court of Appeals. I had more Democratic support than I ever had Republican support. . . . I have been a federal judge now for 29 years. I can assure, you I have no politics. I mean, I am about as apolitical, I guess, as a creature could become. And the longer you're a judge, you are just totally removed from it.

Id.

52. *See supra* notes 48-50 and accompanying text.

53. *See* United States v. Poindexter, 951 F.2d 369 (D.C. Cir. 1991), *cert. denied*, 506 U.S. 1021 (1992).

54. Circuit Judges Douglas Ginsburg and Sentelle, who each had been nominated to the

beyond the D.C. Circuit than—indeed, the *Poindexter* case was literally pending in the Supreme Court on Walsh's petition for a writ of *certiorari* in October 1992 when—Chief Justice Rehnquist, for no explained or apparent reason, designated Judge Sentelle to replace Judge MacKinnon as the Presiding Judge of the Special Division.[55] Although it may simply be the case that Judge MacKinnon declined reappointment to this position, triggering the statutory requirement that the Chief Justice appoint a successor judge from the D.C. Circuit,[56] MacKinnon privately described his replacement as involuntary.[57] Commentators began to suspect that Judge Sentelle had passed some kind of an audition by his decisions in the *North* and *Poindexter* cases.[58] Judge Sentelle thus was suspect to some observers even as he assumed the role of Presiding Judge of the Special Division, and this

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court by President Reagan, voted to reverse Poindexter's convictions. *See Poindexter*, 951 F.2d at 369. Judge Ginsburg wrote the opinion explaining their judgment. *See id.* at 371-88. Chief Judge Mikva, who was one of President Carter's nominees, dissented from the majority's judgment and filed a dissenting opinion. *See id.* at 388-92.

55. *See* Designation of a United States Judge to the Division of the United States Court of Appeals for the District of Columbia Circuit for the Appointment of Independent Counsel (Nov. 5, 1992) (signed order of Chief Justice Rehnquist designating "Honorable David B. Sentelle" to serve "for the life of the savings clause contained in 28 U.S.C. § 599, but not exceeding the statutory two-year term provided by 28 U.S.C. § 49(a), which will expire on October 26, 1994") (copy on file with author). This Designation, which appears to be a modified form document that could be used to designate any D.C. Circuit Judge to the Special Division, noted that it followed a "Letter dated 10/26/92." *Id.* The Supreme Court denied Walsh's petition for a writ of *certiorari* in the *Poindexter* case six weeks later. *See* 506 U.S. 1021.

56. Two years later, and shortly after the Special Division had made its controversial appointment of Independent Counsel Kenneth W. Starr, a short press item on this topic appeared in the weekly legal newspaper of Washington, D.C. The item explained that, notwithstanding the statutory preference for a senior circuit judge, Chief Justice Rehnquist had to appoint an active circuit judge to preside over the Special Division in October 1992 because, after Judge MacKinnon stepped down, there was no other senior appellate judge in the Circuit. *See Inadmissible, Sentelle's Situation*, LEGAL TIMES, Aug. 15, 1994, at 3.

57. *See* LAWRENCE E. WALSH, FIREWALL: THE IRAN-CONTRA CONSPIRACY AND COVER-UP 477 (1997) (describing his November 16, 1992, conversation with Judge MacKinnon).

58. *See, e.g.*, Lawrence M. Solan, *Fault Lies Not Only In Starr But In Law*, NAT'L L.J., Apr. 20, 1998, at A19.

> When Judge Sentelle was appointed to the Special Division in 1992, he was not yet 50 years old and had been sitting on the court of appeals only since 1987. Mr. Clinton had just defeated President Bush in the election, and Independent Counsel Lawrence Walsh was prosecuting members of the Reagan administration, which had, only a few years earlier, appointed Mr. Sentelle first to the district court and then to the court of appeals.

Id. See also Richard Harwood, *Crudities, Ironies & Black Humor*, WASH. POST, Aug. 13, 1994, at A17 (claiming, in a column criticizing the Special Division's August 1994 appointment of Kenneth W. Starr to be independent counsel, that "Sentelle wrote the majority opinion overturning the conviction for Iran-contra crimes of Oliver North").

perception only compounded the preexisting suspicions regarding the Chief Justice himself.[59]

Other odd developments called the Special Division's loyalties and capabilities into question during the final days of Iran/Contra. In 1992, for instance, the Special Division broke with its eight-year tradition of not accepting sealed pleadings from subjects of independent counsel investigations who were, pursuant to a provision in the statute,[60] seeking reimbursement for their attorneys' fees.[61] It accepted, *ex parte* and under seal, a fee reimbursement petition from at least one of Walsh's subjects.[62] The Special Division also began, even before it had received the comments of persons named in Walsh's Final Report or decided whether to release it publicly, to render decisions in late 1993 that awarded such fees.[63] Given the Special Division's relative unfamiliarity with Walsh's investigations and the length and factual complexity of the Final Report that he had submitted under seal for the Special Division's review and handling, it was perhaps understandable that some of the court's opinions explaining these early fee awards were riddled with errors.[64] What was harder to comprehend as

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59. *See supra* note 56; *see also* Solan, *supra* note 58, at A19 (arguing that, because it created an "appearance of conflicting loyalties," it was "inconsistent with the spirit of the [independent counsel] statute for Chief Justice William H. Rehnquist to appoint Judge Sentelle to the Special Division in the first place and then to reappoint him and the two other members again and again").

60. *See* 28 U.S.C. § 593(f) (1987). The first of the independent counsel statutes to contain this attorney fee reimbursement provision was the 1987 statute. *See* Pub. L. 100-191.

61. *See* Taylor, *supra* note 25, at A17 (reporting the Special Division's decision to unseal the pleadings relating to Edwin Meese's 1984 request for attorney fee reimbursement).

62. Counsel for former Secretary of State George P. Shultz filed, under seal, their petition seeking fee reimbursement shortly before the 1987 independent counsel law expired on December 15, 1992, but neither they nor the Special Division notified Walsh or served him with a copy. Walsh's office later learned of the filing from the Department of Justice. *See* 28 U.S.C. § 593(f)(1)-(2) (1987) (directing the Special Division to notify the Attorney General of any request for attorneys' fees and authorizing it to request her written evaluation of any request). Walsh then asked Shultz's attorneys for a copy of their filing, which they, after some reflection, agreed to provide in early 1993. In August 1993, Walsh submitted his Final Report, which described the Shultz investigation in detail, to the Special Division. On December 7, 1993, it granted Shultz's petition. *See In re* North (Shultz Fee Application), 8 F.3d 847 (D.C. Cir. Spec. Div. 1993) (*per curiam*).

63. *See, e.g., In re* North (Dutton Fee Application), 11 F.3d 1075 (D.C. Cir. Spec. Div. 1993) (*per curiam*) (decided November 30, 1993) (awarding $39,946.14); *In re* North (Shultz Fee Application), 8 F.3d at 847 (decided December 7, 1993) (awarding $281,397.69). In the first of these cases, the Special Division did describe itself as "having in hand all that we deem necessary to make an educated determination. . . ." *In re* North (Dutton), 11 F.3d at 1077.

64. In the *Shultz* case, for instance, the Special Division based its decision that Shultz incurred attorneys' fees that he would not have incurred "but for" the independent counsel law, which is the statutory predicate to be eligible for fee reimbursement, on a series of flat statements. The Special Division opined: (1) "an appointed Attorney General would normally not have treated [actions allegedly constituting a conspiracy to violate the Boland Amendments] as having criminal consequences," 8 F.3d at 851; (2) that "much of [Walsh's] investigation [of Shultz] involved

judicial behavior was the Special Division's flat refusal to reconsider, much less to correct, its inaccurate opinions even after Walsh responded to some fee award decisions by asking the court to reconsider and pointing it to the relevant factual information it seemed to have missed.[65] The Special Division also began, in this period, to write with obvious sarcasm and derision as it described Walsh's work.[66] To the attentive audience, the message of these actions was unmistakable: the Special Division had switched sides. Although the Attorney General had not sought to terminate Walsh's appointment for cause and the Special Division had not exercised its statutory power to terminate his work, the (new) Special Division had joined the opponents and critics of the (old) Special Division's Independent Counsel.

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circumvention of the Boland Amendments. . .," *id.*; and (3) that Attorney General Meese had conducted a preliminary investigation prior to Walsh's 1986 appointment of "events involving [Shultz's] conduct" and did not recommend his criminal investigation, which meant that "it [wa]s not reasonable to expect that a professional prosecutor, as opposed to an independent counsel under the Act, would have been making subjects out of persons theretofore treated as witnesses four and one-half years after the commencement of an investigation, absent some circumstances far more extraordinary than any displayed to us here." *Id.*

The Special Division was, in fact, triply wrong. Without belaboring the details: (1) the Department of Justice was in the midst of conducting a number of criminal investigations of so-called "Boland Amendment violations" and related Neutrality Act violations when Walsh was appointed, and it even attempted formally to refer these to Walsh for his evaluation because they fell within his jurisdiction; (2) none of these Walsh investigations, which were concluded by 1988, focused on Shultz; and (3) the brief Department of Justice investigation that led to Meese's December 1, 1986, request for an independent counsel (*i.e.*, Walsh) obviously had nothing to do with Shultz's inaccurate testimony and statements to Congress and others, which first occurred later that month and continued over the next two years, regarding his knowledge of arms shipments to Iran, nor did they concern his connection to his aides' subsequent failures to produce relevant notes that were requested and refuted Shultz's testimony. For the facts on all of this, *see* 1 LAWRENCE E. WALSH, FINAL REPORT OF THE INDEPENDENT COUNSEL FOR IRAN/CONTRA MATTERS 550-51 (Aug. 4, 1993) (describing activities of the United States Attorney's Office in Miami in spring 1986 that included investigating "unauthorized use of Government funds" to support the Nicaraguan Contras); *id.* at 325-73 ("Chapter 24: The Investigation of State Department Officials: Shultz, Hill and Platt"). I raise the Shultz investigation here, which I did work on, very reluctantly. My point is not to highlight Secretary Shultz's specific conduct as an Iran/Contra witness, which was not criminal; nor to overlook his very long and distinguished careers in public service, private business and academia; nor to begrudge his attorneys (who represented him admirably and effectively) their fee award. My point is to highlight the Special Division's apparently deliberate disregard for facts in its resolution of this matter.

65. In the *Shultz* matter, the Special Division denied, without issuing an opinion, Walsh's motion seeking reconsideration of the fee award.

66. *See, e.g.*, *In re* North (Shultz Fee Application), 8 F.3d at 849 ("We will not rehash in detail the much storied Walsh investigation."); *cf. In re* Madison Guar. Sav. & Loan Ass'n, 187 F.3d 652, 654 (D.C. Cir. Spec. Div. 1999) (Cudahy, J., dissenting) (noting "the aggressive performance of this Division in *In re* North (Walsh Show Cause Order), 10 F.3d 831 (D.C. Cir. 1993)").

This "Special Division versus Independent Counsel" dynamic continued in the final phases of Walsh's work. In late 1993, after Walsh had filed his required Final Report under seal in the Special Division and it had, pursuant to the statute, distributed portions of the report to persons who were named therein, the Special Division accepted *ex parte*, sealed motions to suppress the Report's publication.[67] The Special Division also seemed to entertain briefly, but ultimately denied, a motion to terminate Walsh's appointment while litigation about the possible release of his Final Report was raging under seal.[68] In a final shot at "its" Independent Counsel, the Special Division, in an opinion that Judge Sentelle conspicuously issued in his name,[69] made a series of inaccurate statements that seemed designed to suggest that Walsh had flouted the rules of grand jury secrecy.[70] The Special Division also, after it had released Walsh's

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67. *See In re* North (Omnibus Order), 16 F.3d 1234, 1235 (D.C. Cir. Spec. Div. 1994) (*per curiam*) (referring to multiple "motions" to this effect but not identifying the movants); *see also In re* North (Emergency Motion of Soc'y of Pro'l Journalists, et al.), 21 F.3d 434, 434-35 (D.C. Cir. Spec. Div. 1994) (*per curiam*) (identifying former President Reagan as having filed such a motion).

68. *See In re* North (Walsh Show Cause Order), 10 F.3d 831 (D.C. Cir. Spec. Div. 1993) (*per curiam*). This litigation began when counsel to former President Reagan, who had received the full text of Walsh's Final Report from the Special Division under seal for purposes of providing their comments, suggested to the Special Division that it terminate Walsh's appointment pursuant to 28 U.S.C. § 594(h)(2). *See id.* at 832. In response, the Special Division directed Walsh to show cause why the Special Division should not order his office terminated except for performance of ministerial functions that would be involved in preparing appendices to the Final Report. *See id.* After receiving a response from Walsh that indicated his general agreement with both the Special Division and the Reagan attorneys, the court entered an order that confirmed the limited nature of Walsh's remaining duties. *Id.* The Special Division also stated, however, "in what is probably an excess of caution, [that] we wish to make it plain by this opinion that we do not contemplate the scope [of Walsh's remaining duties] as being inclusive of . . . authority" to respond to comments of persons named in the Final Report by making revisions or additions to the Report he had filed in August 1993. *Id.* at 834. Judge Butzner dissented from this aspect of his colleagues' opinion, which he described as a "prior restraint" not authorized by the independent counsel statute. *Id.* at 835 (Butzner, J., concurring in part and dissenting in part).

69. *See In re* North (Omnibus Order), 16 F.3d at 1235 ("Opinion for the Special Division filed by Circuit Judge Sentelle"). By contrast, the court issued most Special Division opinions *per curiam*.

70. Judge Sentelle stated flatly, for instance, that Walsh had contended "that Rule 6(e) does not apply to Independent Counsels at all." *Id.* at 1242. This statement was a false description of Walsh's sealed submission to the Court. Judge Sentelle also wrote that the grand jury information in Walsh's Final Report was like "leaven in a loaf of bread" and could not be redacted. *Id.* at 1242. This too was false. *See* WALSH, *supra* note 64 (footnoting, throughout the Report, each piece of grand jury information to the particular grand jury transcript from which it was quoted or derived, making it possible to redact the information with ease). Judge Sentelle also claimed that Walsh "in his four interim reports to Congress included most, if not all, of the 6(e) material now disclosed in the Final Report." *In re* North (Omnibus Order), 16 F.3d at 1244. This was a whopper. *See* 2 LAWRENCE E. WALSH, FINAL REPORT OF THE INDEPENDENT COUNSEL FOR IRAN/CONTRA MATTERS 489-721 (publishing the full text of each of Walsh's four statutorily authorized interim

Report along with the responses of the persons named in it, gave litigants five days to withdraw any sealed pleadings they had filed *ex parte* in the Special Division.[71] Notwithstanding the December 1992 expiration of the 1987 independent counsel law, the grandfathered Special Division thus contributed to the politically polarized climate that had come to surround Walsh, his investigative work, the independent counsel statute itself, the Special Division as a feature of the law, and as its roost, the federal judiciary from which it sprang.

E. Demise

The reenactment of the statute in June 1994 brought us the latest controversies that we know too well. Judge Sentelle continued to serve at that time as the Special Division's Presiding Judge, a position he still holds today.[72] Within weeks of the law's return, the Special Division acted upon Attorney General Reno's request that it appoint a "Whitewater" independent counsel. It did so by rejecting her recommendation that it continue the assignment of Robert B. Fiske, Jr., the independent Whitewater investigator who had been working with his own staff within the Department of Justice since January 1994.

Instead of appointing Fiske, the Special Division reportedly tried to find another lawyer of high stature who would take the job and did not have the baggage of previously having been chosen to investigate President Clinton by his own Attorney General. After former Senator Warren B. Rudman reportedly turned the job (or at least a job feeler) down,[73] the Special Division appointed

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reports, none of which contained a scrap of grand jury information). In fact, as Judge Sentelle disclosed deep within the opinion, *the Special Division* had taken the Final Report that Walsh had given to it under seal, with grand jury information clearly identified, in August 1993 and given it without restriction (perhaps without considering the implications of doing so) to persons who were named therein. *See In re* North (Omnibus Order), 16 F.3d at 1244. These recipients of course shared the Report with, or described it to, others, resulting in a series of media stories that contained fragmentary, semi-accurate descriptions of the Walsh Final Report while it was still under court seal. *See id.* at 1240-41, 1244-45.

71. *See In re* North (Emergency Motion of Soc'y of Prof.'l Journalists, et al.), 21 F.3d at 435-36. After the five-day period, the Special Division opened its now redacted docket and unsealed all motions and related papers it had received pertaining to the release of Walsh's Final Report. *See id.* at 434. While there is no way for an outsider to know whether *ex parte* pleadings were considered by the Special Division and then withdrawn without a trace during the five-day period, it is striking and suggestive that the final public record contains no submission of any kind by the named and very aggressively represented subject of Walsh's appointment, Lt. Col. Oliver L. North.

72. *Cf.* William Safire, *See-Nothing Congress*, N.Y. TIMES, June 23, 1994, at A23 (quoting Judge Sentelle's explanation that although the 1987 independent counsel law had expired in December 1992, the Special Division was "ongoing[,] . . . grandfathered by the need to supervise previously appointed Independent Counsel").

73. *See* Jerry Seper, *Starr says he'll build on work by Fiske; 'Many' aides may stay on job*, WASH. TIMES, Aug. 11, 1994, at A3 (reporting that "Congressional sources said Mr. Starr . . . was one of

Judge Sentelle's former D.C. Circuit colleague and President Bush's former Solicitor General in the Department of Justice, Kenneth W. Starr. The Starr appointment was criticized strongly and immediately by persons who tended to be Democrats and/or allied with or generally supportive of President Clinton and saw Starr as a political partisan, not an "independent" counsel.[74] The criticism grew dramatically, and it expanded to encompass the Special Division itself, when it became known that Judge Sentelle had lunch with his old friends from their shared home state of North Carolina, Senators Jesse Helms and Lauch Faircloth, who were vocal critics of Mr. Fiske and/or his Whitewater investigations,[75] shortly before the Special Division effectively replaced Fiske with Starr.[76] The appearance problems grew worse when Judge Sentelle's wife was hired six months later to work as a receptionist in Senator Faircloth's Capitol Hill office.[77] Citizens soon filed ethics complaints against Judge Sentelle based on these events.[78] Perhaps in response to these issues and criticisms, the Judges of the

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two men under consideration for the independent counsel position. The court, according to these sources, also talked with former Sen. Warren Rudman, New Hampshire Republican, who left office in 1992").

74. *See, e.g.*, Ruth Marcus & Rebecca Fowler, *Starr Urged To Decline Counsel Post; Clinton's Lawyer Criticizes Appointee's Stance on Jones Suit*, WASH. POST, Aug. 8, 1994, at A1 (reporting the comments of Robert S. Bennett, President Clinton's personal defense lawyer in the civil suit that Paula Jones had filed against him); Sen. Howard Metzenbaum, *Bad Application of the Independent Counsel Law*, WASH. POST, Sept. 8, 1994, at A18 (letter to the editor) (calling Starr "a highly partisan Republican"). Over time, others have echoed these criticisms by defense attorneys and politicians. *See, e.g.*, Richard Harwood, *supra* note 58 (calling Starr "an ardent Republican"); Susan Low Bloch, *Cleaning Up the Legal Debris Left in the Wake of Whitewater*, 43 ST. LOUIS U. L.J. 779, 782-83 (1999) (calling Justice Scalia "incredibly prophetic" for speculating in his 1988 *Morrison v. Olson* dissenting opinion about the danger of a Special Division being politically partisan and picking an independent counsel who was antagonistic to his or her named subject and his or her administration).

75. *See, e.g.*, Howard Schneider, *Senate Banking Panel Turns to Foster Death; No New Evidence Emerges in Testimony*, WASH. POST, July 30, 1994, at A7 (quoting Senator Faircloth's assertion, during a hearing regarding the death of White House Deputy Counsel Vincent Foster, that "[t]he cover-up continues"; Fiske had concluded in June 1994 that Foster committed suicide); *see generally* Howard Schneider & Ruth Marcus, *White House Supports Starr; Despite Misgivings, Aides Express Acceptance*, WASH. POST, Aug. 9, 1994, at A1 (describing "conservative" criticisms of Fiske).

76. *See, e.g.*, Marilyn W. Thompson, *Most of Fiske's Whitewater Legal Staff Won't Serve Under Starr*, WASH. POST, Aug. 31, 1994, at A4; *see generally* Peter M. Ryan, *Counsels, Councils and Lunch: Preventing Abuse of the Power to Appoint Independent Counsels*, 144 U. PA. L. REV. 2537 (1996).

77. *See* Associated Press report, *Senator Hires Wife of Judge Who Ousted 1st Whitewater Counsel*, CHIC. TRIB., Aug. 1, 1995, at 4; *see also Co-Dependent Counsels*, THE NATION, Jan. 5, 1998, at 3.

78. *See* Toni Locy, *Citizen Complaint Filed Over Starr Appointment; Judge's Role Questioned in Whitewater Case*, WASH. POST, Sept. 3, 1994, at A4. These complaints were rejected by reviewing judges. *See* Matter of a Charge of Judicial Misconduct or Disability, 141 F.3d 333 (D.C. Cir. 1998) (Edwards, C.J.); Matter of a Charge of Judicial Misconduct or Disability, 39 F.3d 374 (D.C. Cir. 1994) (Edwards, C.J.); *see also In re* Charge of Judicial Misconduct or Disability, 170 F.3d 1152 (D.C. Cir. 1999) (Edwards, C.J.) (dismissing complaint that an unnamed Judge of the United States Court

Special Division for the first time began to explain publicly their statutory duties and the nature of their work.[79]

In 1998 and 1999, the "end game" for the Special Division included events that raised more questions and issues. In July 1998, the Special Division issued an order, under seal and in an *ex parte* proceeding, granting Independent Counsel Starr, in the event he determined that he was required to act pursuant to the mandatory "impeachment reporting" provision of the independent counsel law, generic permission to transmit secret grand jury information to the Members of the United States House of Representatives.[80] Without such court permission, the Members would not have been authorized to receive this information under the grand jury secrecy rule of Federal Rule of Criminal Procedure 6(e)(2).[81] This judicial permission—which Starr arguably should have sought from Chief Judge Norma Holloway Johnson of the United States District Court of the District of Columbia, who was handling other grand jury-related motions and litigations arising from Starr's work at the time, rather than the Special Division[82]—was not

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of Appeals for the District of Columbia Circuit had engaged in misconduct by participating, as a Judge of the Special Division, in matters pertaining to the conduct of his former colleague Kenneth W. Starr); *see infra* notes 83-89 and accompanying text for further information regarding this Special Division matter, which was commenced by the Landmark Legal Foundation.

79. *See* Remarks of Special Division Judges David B. Sentelle and John D. Butzner, appearing as Panel Two – Appointment of Independent Counsel, in *The Independent Counsel Process: Is It Broken and How Should It Be Fixed?, A Five-Panel Program Presented at the Opening Session of the Proceeding of the 67th Judicial Conference of the Fourth Circuit*, June 27, 1997, 54 WASH. & LEE L. REV. 1515, 1536-45 (1997).

80. *See* Order, *In re* Madison Guar. Sav. & Loan Ass'n, Div. No. 94-1 (D.C. Cir. Spec. Div. July 7, 1998) (*per curiam*) (filed under seal), reprinted in Starr Referral Appendices part 1, Tab B, at 10.

81. *See* FED. R. CRIM. P. 6(e)(2) (directing that an attorney for the government, such as Independent Counsel Starr, "shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules"). Although the mandatory impeachment reporting provision of the independent counsel law is silent regarding how it relates to the rules of federal grand jury secrecy, which predate its enactment and generally prevent federal prosecutors from providing grand jury information to Members of Congress, *see* 28 U.S.C. § 595(c) (1994), the statute can be read to create a reporting duty that encompasses grand jury secrets. On that reading, an independent counsel would not need to obtain any court's permission before including grand jury secrets in a referral of potential impeachment information to the House of Representatives. By seeking court permission to include grand jury information in his 1998 report to the House regarding President Clinton and Monica Lewinsky, Starr implicitly read Rule 6(e) broadly and, in this respect, the independent counsel act more narrowly.

82. *Cf.* 28 U.S.C. § 594(k)(3)(B)(1994) (directing that, after an independent counsel has complied with the statutory requirement to transfer all office records to the Archivist of the United States, the Archivist "shall" disclose any grand jury records therein to the Department of Justice "only by order of *the court of jurisdiction* under rule 6(e) of the Federal Rules of Criminal Procedure") (emphasis added); *but cf. In re* Sealed Motion, 880 F.2d 1367,1373-76 & n.13 (D.C. Cir. Spec. Div. 1989) (*per curiam*) (holding that, at the end of an independent counsel investigation where the Special

tied by the Special Division to any particular showing Starr had made or limited in time. It was, instead, a blank check with no expiration date. The Special Division told Starr that he was free to give any grand jury information to the House of Representatives so long as it was part of a referral of possible impeachment information. As the world well knows, Starr used this "check" generously when he made his Clinton impeachment referral to the House just two months later. The episode contributed to the impression that, in the highly contentious and political atmosphere that surrounded Starr's investigation of President Clinton, Monica Lewinsky and others, the Judges of the Special Division were on Starr's side.

A second late controversy arose in early 1999 when the Landmark Legal Foundation, a litigation and advocacy organization that has tended to support Republicans (with the notable exceptions of Independent Counsel Walsh and Department of Justice special counsel Fiske) and to oppose every policy and official of the Clinton Administration,[83] petitioned the Special Division to prohibit the Department of Justice from pursuing its announced plans to investigate the conduct of Starr and his staff.[84] According to Landmark lawyers, they were simply asking the Special Division to "exercis[e] its own traditional and statutory powers to ensure the integrity of the independent counsel investigative process."[85] The Special Division did not pause to evaluate Landmark's standing to seek Special Division action or its own authority to take any particular action. Instead, the Special Division promptly and without explanation ordered both Starr and the Department of Justice to submit briefs addressing the Department's power to investigate an independent counsel and, related to it, the Special Division's authority to issue a writ of prohibition against the Department investigating the Independent Counsel.[86] This briefing order was interpreted immediately as an effort by the Special Division to get the Department to back off from its threats to take action against Starr.[87] After receiving such criticism,

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Division is very familiar with the "massive record," it is better suited than is the grand jury-empaneling court to balance a grand jury witness's need for the transcript of his grand jury testimony against the need for continued grand jury secrecy, and that the Special Division thus may grant such a witness's motion for the transcript of his grand jury testimony).

83. *See generally Landmark Legal Foundation Official Website,* (visited Nov. 1, 1999) <http://www.landmarklegal.org>.

84. *See In re* Charge of Judicial Misconduct or Disability, 170 F.3d at 1153-54 (describing the course of these proceedings).

85. Richard P. Hutchison & Mark R. Levin, *No Job For An Attorney General,* WASH. TIMES, Mar. 10, 1999, at A17. It is not known whether Landmark had any contact with Starr or his staff before filing this motion.

86. *See* Roberto Suro, *Judges Get Involved In Probe Of Starr; Reno Investigation Could Be Halted,* WASH. POST, Feb. 24, 1999, at A1 (describing the Special Division's "one-sentence order").

87. *See, e.g., The Special Division Speaks,* WASH. POST, Mar. 20, 1999, at A18 (stating, in an editorial, that the Special Division's order had "raised eyebrows," and that it "seemed odd and raised the question of whether the court meant to exceed its authority by intervening").

followed by briefs from the Department and Starr that agreed (although for different reasons) that the Special Division should not act,[88] it was the institution that blinked. The Special Division ultimately decided that Landmark lacked standing and, more fundamentally, that the Special Division had no legal authority under the independent counsel law to prevent the Department from investigating Starr's possible misconduct.[89] The Special Division did not admit that its briefing order had been mistaken, however, perhaps because it still did not truly understand how any perceived judicial intervention on Starr's behalf was, in the climate of early 1999, destined to be perceived immediately as a political, rather than a judicial, act.

A final Special Division-related controversy, which in fact occurred after the independent counsel law had expired on June 30, 1999, was the Special Division's August 1999 decision not to remove Independent Counsel Starr from office.[90] This decision, for the first time since 1994, split the Special Division panel. The majority, comprised of Judges Sentelle and Peter T. Fay, apparently based their decision that Starr's work was not so substantially completed that it could be turned over to the Department of Justice on a casual conversation between Sentelle and Starr.[91] Starr reportedly told Judge Sentelle that he was still investigating and, when Judge Sentelle reported that statement to his Special Division colleagues, that apparently was enough of a basis for Judges Sentelle and Fay to conclude that Starr's employment should continue. These Judges explicitly refused to seek any additional information from Independent Counsel Starr, which provoked a bitter dissent from Circuit Judge Richard Cudahy.[92]

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88. *See* Robert L. Jackson, *Reno Defends Investigation of Starr Probe*, L.A. TIMES, Mar. 9, 1999, at A14 (describing the Department's brief criticizing the Special Division's intervention into its review of misconduct allegations against Independent Counsel Starr); *Mr. Starr and Ms. Reno*, WASH. POST, Mar. 10, 1999, at A22 (describing, in an editorial, the Department of Justice and Office of Independent Counsel Starr briefs).

89. *See In re* Madison Guar. Sav. & Loan Ass'n, 173 F.3d 866 (D.C. Cir. Spec. Div. 1999) (*per curiam*) (filed March 18, 1999).

90. *See In re* Madison Guar. Sav. & Loan Ass'n, 187 F.3d 652 (D.C. Cir. Spec. Div. 1999) (*per curiam*).

91. *See id.* at 653 ("the Division has inquired of the independent counsel and received his assurance that his work is ongoing"); *id.* at 654 (Cudahy, J., dissenting) ("The only word which is available to me of the Independent Counsel's possible investigative prospects are very general representations that such prospects may exist, conveyed in an informal 'contact' between the Independent Counsel and the Presiding Judge of this Division.").

92. *See id.* at 653-54. Judge Cudahy wrote the following:

> Despite the very high esteem in which I hold the Presiding Judge [Sentelle], I do not believe that vague intimations informally conveyed are an adequate basis for our official action. I strongly believe that the Division needs more information – of the specific kind identified in the statute – in order to make its decision [whether to terminate Independent Counsel Starr's appointment]. In any event, based on what I know (or do not know) now, there is a strong

Judge Cudahy's opinion went beyond that procedural dispute, however, and stated his belief in flatly political terms that the Senate's acquittal of President Clinton justified the termination of Independent Counsel Starr.[93] Starr correctly responded, in a press release, that Judge Cudahy had overlooked the areas of his jurisdiction and continuing activity that had nothing to do with Monica Lewinsky or any matter that was part of President Clinton's impeachment.[94]

III. IS THERE A FUTURE FOR PROSECUTORIAL "APPOINTMENT . . . IN THE COURTS OF LAW"?[95]

In Watergate, Chief Judge John Sirica and other federal judges were among the heroes who helped to "make the system work."[96] In the tumult of 1973 and

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case for termination, and it would be very difficult to persuade me otherwise.

Id. at 654.

The respective testimony of Judges Sentelle and Cudahy to a Senate Committee only months earlier presaged this dispute. On April 14, 1999, the three Special Division judges (Judges Sentelle, Fay and Cudahy) testified before the Senate Committee on Governmental Affairs. In response to questions, Judge Cudahy testified that the Special Division could, in his view, "play an important role . . . in determining when investigations ought to come to an end." *The Future of the Independent Counsel Act: Hearings Before the Senate Comm. on Governmental Affairs*, 106th Cong. 474 (1999). Judge Sentelle noted that he "might disagree with [his] colleague, Judge Cudahy, and say that since we are not a supervisor, I do not think we are well suited to make that determination absent a proceeding initiated either by the I[ndependent] C[ounsel], the Attorney General or someone who is the subject of the investigation." *Id.* at 477. Judge Sentelle also stated that the Special Division had historically carried out its statutory responsibility under 28 U.S.C. § 596(b)(2) to determine periodically whether an independent counsel's work was substantially completed simply by "inquir[ing] of the Independent Counsel for response on that." *Id.* at 495. Judge Fay stated his agreement that "[w]e really have to rely on what the Independent Counsel tells us. . . ." *Id.* at 496. Judge Cudahy closed the colloquy on this topic by expressing his hope that the Special Division "can approach these things on an informal basis, some kind of a middle ground with Independent Counsel as to the question of termination, rather than just resorting to formal procedures." *Id.* at 497.

93. *See In re* Madison Guar. Sav. & Loan Ass'n, 187 F.3d at 654.

94. *See* Statement issued by Independent Counsel Kenneth W. Starr, *Office of the Independent Counsel Web Site*, (visited Nov. 5, 1999) <http://www.oicstarr.com>.

95. U.S. CONST., art. II, § 2 ("the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, . . . in the Courts of Law").

96. "The system worked" is a phrase that vastly oversimplifies the story of "Watergate," which was not a single, easily resolved event and was not handled simply by a "system" of governmental structures. The phrase also is a construct of hindsight, because it starts with history's knowledge of who turned out to be the bad guys of Watergate. *Cf.* JIMMY BRESLIN, HOW THE GOOD GUYS FINALLY WON: NOTES FROM AN IMPEACHMENT SUMMER (1975). Although proponents of independent counsel legislation following Watergate might be seen as dissenters from the perspective that the phrase depicts—on this view, their support for new statutory mechanisms following Watergate indicates their understanding that "it" turned out as it did based on unique facts, individual personalities and a fair amount of luck—I use the phrase here because the framers

1974, these judges, acting as judges through the lawful processes of the federal courts, helped the Watergate Special Prosecutors succeed in their investigations of President Nixon[97] and their prosecutions of his co-conspirators and others.[98]

Following Watergate, Congress and the Carter Administration tried to craft an independent counsel statute with institutional mechanisms that would be, when it next was needed, comparably effective. The 1978 independent counsel law specifically provided for a new role for some of the Article III successors to the judicial heroes of Watergate. A special court, comprised of three senior federal judges who would be picked specially by the Chief Justice of the United States, would appoint the persons who would serve as independent counsel in the cases—the next Watergates—where such appointments were required. These judges, comprising a Special Division of the United States Court of Appeals for the District of Columbia Circuit, also would define each independent counsel's area(s) of jurisdiction and attend to various administrative matters arising during an independent counsel's work. The Special Division thus would provide a judicial imprimatur and a level of ongoing protection to independent counsel as they went forward with investigations and prosecutions of senior Executive Branch officials and their associates.

The saga of the Special Division over the past twenty years reveals that this well-intended legislative effort to craft substantive statutory roles for federal judges in the independent counsel process did not work. In the early days of the independent counsel law, the Special Division tried to perform the statutory roles of supervising and protecting independent counsel. This moved the Special Division out of the law's shadows and made it a topic of constitutional and

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of the independent counsel law clearly sought to codify for the future a system comprised of the things, including the constructive roles played by federal judges, that they had seen work in Watergate.

97. *See, e.g.*, United States v. Nixon, 418 U.S. 683 (1974); *see also supra* notes 16-19 and accompanying text. The judges also transmitted from a Watergate grand jury to the House Judiciary Committee a "roadmap" describing the grand jury's evidence against Nixon. *See In re* Report & Recommendation of June 5, 1972 Grand Jury Concerning Transmission of Evidence to the House of Representatives, 370 F. Supp. 1219 (D.D.C. 1974) (Sirica, C.J.), *aff'd sub nom.* Haldeman v. Sirica, 501 F.2d 714 (D.C. Cir. 1974); *see also* STANLEY I. KUTLER, THE WARS OF WATERGATE THE LAST CRISIS OF RICHARD NIXON 461-63, 465-66 (1990); RICHARD BEN-VENISTE & GEORGE FRAMPTON, JR., STONEWALL: THE REAL STORY OF THE WATERGATE PROSECUTION 242-50, 264-65 (1977); JAMES DOYLE, NOT ABOVE THE LAW: THE BATTLES OF WATERGATE PROSECUTORS COX AND JAWORSKI, A BEHIND-THE-SCENES ACCOUNT 284-86, 290-91, 310 (1977). The Committee's votes to impeach the President were part of the collapsing political and public support that led to his resignation from office. *See generally* JOHN OSBORNE, THE LAST NIXON WATCH (1975).

98. *See generally* JOHN J. SIRICA, TO SET THE RECORD STRAIGHT: THE BREAK-IN, THE TAPES, THE CONSPIRATORS, THE PARDON (1979); LEON JAWORSKI, THE RIGHT AND THE POWER: THE PROSECUTION OF WATERGATE 280-92 (1976) ("Appendix a: Status Report of Cases"); WATERGATE SPECIAL PROSECUTION FORCE REPORT (Oct. 1975).

political controversy. Following the Supreme Court's decision in *Morrison v. Olson*,[99] which made it clear that Special Division "supervision" of an independent counsel's investigative and prosecutorial work raised grave constitutional issues, the Special Division became somewhat less involved in the ongoing work of independent counsel. The Special Division still did get involved episodically, however, apparently depending on its substantive views of a particular independent counsel and the precise issue that he or she was confronting. In various moments, the Special Division appeared to be working aggressively on behalf of an independent counsel's investigations and prosecutions (the Judge MacKinnon-led court supporting Lawrence Walsh), then to be undercutting an independent counsel's work (the Judge Sentelle-led court maligning Walsh), then to be defending another independent counsel who was investigating a President of the opposite political party (the Sentelle-led court appointing Independent Counsel Kenneth Starr to investigate "Whitewater" and then supporting his work in various contexts), and then itself to be fracturing as it assessed the merit and propriety of an independent counsel's conduct (Judge Cudahy dissenting from his colleagues' handling of their review in 1999 of whether Starr should be continued in office or terminated). Questions also arose about why the Chief Justice picked particular judges to serve on the Special Division, embroiling him in questions about partisan politics in the judiciary. Overall, the Special Division's role seemed not to contribute to the independence or credibility of independent counsel as they carried out their responsibilities. The Special Division's activities did, by contrast, prompt questions and cynicism about the credibility and independence of its own members, and about federal judges generally. Ironically, perceptions regarding the Special Division thus impaired the public confidence in government that the independent counsel statute was supposed to enhance.

Is there a better way to proceed? One quick response is that we have already found one. We now are in a transition to living without an independent counsel law.[100] As this experiment moves ahead, there will be no Special Division,[101] and thus no controversy will emanate from or swirl around federal judges appointing and interacting with prosecutors of high Executive Branch officials. At some point, however, if Attorney General-supervised investigations of these officials lose enough credibility in the eyes of Congress and the general public, our current

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99. 487 U.S. 654 (1988).

100. The law expired on June 30, 1999. *See* 28 U.S.C. § 599 (1994) (providing that the Independent Counsel Reauthorization Act of 1994 "shall cease to be effective five years after [its] date of enactment," which was June 30, 1994). It does, however, "continue in effect with respect to then pending matters before an Independent Counsel that in the judgment of such Counsel require such continuation until that Independent Counsel determines such matters have been completed." *Id.*

101. The Special Division will cease to exist when the last of the extant independent counsel completes his or her work. *Cf. supra* note 72.

hiatus from court-appointed independent counsel may be ended by renewal of the independent counsel law. History suggests that this kind of climate shift is likely. If it comes, the new consensus will be one that has grown out of dissatisfaction with prosecutions and investigations under direct Department of Justice supervision. This new view is thus likely to favor greater *judicial* supervision of these investigations, just as public and legislative opinion did following the Saturday Night Massacre of October 1973, and in enacting the independent counsel statutes that began in 1978.

Whenever the time does come to consider new independent counsel legislation, the challenge will be to define processes to appoint and empower good independent counsel without involving federal judges too much in controversy-attracting roles and responsibilities outside their regular domain under Article III. A more modest independent counsel law could employ federal judges only as independent counsel-pickers. This kind of law could make the judges such one-time players by explicitly eliminating the work-reviewing, jurisdiction-expanding, report-receiving, fee-awarding, and other functions that have kept the existing Special Division entwined in each independent counsel's work. Such a statute also could make the judicial task of picking someone to serve as independent counsel much more mechanical and less discretionary. The law could require a panel of judges to make their independent counsel selection from a pre-approved list generated by another Branch of government.[102] It could also direct the judges to confer on that appointee exactly and only the investigative and prosecutorial jurisdiction that the Attorney General had asked the court to confer. The law also could define a process that would rotate responsibility for serving on this court randomly among senior Circuit Judges, eliminating the Chief Justice's participation in this process and thus conserving his time and credibility for his own Article III judging. A future statute also would limit its imposition on the appointing judges and on the judiciary generally if it raised the threshold for mandatory independent counsel appointments.[103]

A future statute that defined this reduced role for the federal judges who appoint independent counsel would preserve the valuable fact and appearance of *not* having a President or his Attorney General select the person who would review serious allegations that the President or one of his intimates violated federal criminal law. In this limited respect, the law would trade on and, in terms of the independence and credibility of an independent counsel, it would hope to benefit from, the imprimatur and the independence of federal judges. It would not, however, spend the capital and risk the credibility of federal judges by

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102. The law could direct the judges to obtain this list from the Attorney General, the President, Congress or any number of combinations therefrom.

103. For fuller descriptions of some proposals along the lines described in the preceding paragraph of text, see *The Future of the Independent Counsel Act, Hearings Before the Committee on Governmental Affairs, United States Senate*, 106th Cong. 283-90 (1999) (testimony John Q. Barrett), and Barrett, *supra* note 24, at 643-50.

making the independent counsel a person who the judges had identified and recruited solely on their own. It also would not place the judges and the judiciary at further risk by involving them at all with independent counsel after they had been appointed. This kind of law would make it clearer than its predecessor statutes did that an independent counsel, who performs Executive Branch functions of criminal investigation and prosecution, is subject only to the ultimate supervision of the President, the Attorney General or any other Executive Branch official who is given, by statute, the power to remove the independent counsel.[104]

After all the tinkering and improving is done, however, any independent counsel statute or the absence of one will still be a "system" that works only as well as the people who comprise that system choose to conduct themselves. We cannot identify today who they will be or imagine the particular controversial matters in which they will be protagonists. What we can know, based on the experiences of Watergate, Iran/Contra and Whitewater, is that the next independent counsel-worthy case also will be, under any investigative system, a national nightmare.[105] This case will involve, challenge and perhaps even bedevil the government officials who become subjects of the investigation, the Attorney General who decides that the investigation should be assigned outside of ordinary Department of Justice channels, the independent counsel or special prosecutor who gets assigned to the matter, the federal judges who are assigned to the resulting cases (or to perform non-Article III functions such as picking the prosecutor), and the members of the public who will watch all of this unfold within their government.

In planning for this future, we should learn from our experience with the Special Division component of the independent counsel law. We should remember that judging is, like any other aspect of governing, a very human

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104. *Cf.* 28 U.S.C. § 596(a)(1) (1994) ("An independent counsel . . . may be removed from office, other than by impeachment and conviction, only by the personal action of the Attorney General and only for good cause, physical or mental disability (if not prohibited by law protecting persons from discrimination on the basis of such a disability), or any other condition that substantially impairs the performance of such independent counsel's duties.").

105. Judge Laurence Silberman—himself a veteran, as Deputy Attorney General, of Watergate and its immediate aftermath—made this prescient observation for himself and Judge Stephen Williams in 1988, when Kenneth Starr was their judicial colleague and Monica Lewinsky was only fourteen years old:

> The Watergate crisis is, of course, the [independent counsel] statute's genesis and it is in order to spare the country a repetition of that "long national nightmare" that the statute has been enacted. That justification assumes, wrongly we think, that prosecuting Presidents can somehow be made relatively painless. We do not see how such an eventuality can, no matter what structural techniques are employed, be other than a national nightmare.

In re Sealed Case, 838 F.2d 476, 506 (D.C. Cir.), *rev'd sub nom.* Morrison v. Olson, 487 U.S. 654 (1988).

enterprise. We should do what we can to craft systems that preserve institutional strengths, minimize costs and risks, and avoid temptations to real or apparent partiality.

Table I:
The Judges of the Special Division and their Independent Counsel Appointees, 1978-1999

Judicial Term[a]	Presiding Judge	Judge	Judge
10/26/1978 –10/26/1980	Chief Justice Designee #1: Judge Roger Robb (D.C. Circuit) Independent Counsel Appointed:[b] Arthur H. Christy Gerald J. Gallinghouse	Chief Justice Designee #2: Judge J. Edward Lumbard (2d Circuit) *In re* Hamilton Jordan *In re* Timothy Kraft	Chief Justice Designee #3: Judge Lewis R. Morgan (5th Circuit; 11th Circuit) 11/29/1979 – 5/28/1980[c] 9/9/1980 – 3/1981
10/26/1980 –10/26/1982	Judge Robb Independent Counsel continuing in office: Gerald J. Gallinghouse Independent Counsel Appointed: Leon Silverman	Judge Lumbard *In re* Raymond Donovan (I)	Judge Morgan 12/29/1981 – 9/1982
10/26/1982 –10/26/1984	Judge Robb Independent Counsel continuing in office: None Independent Counsel Appointed: Jacob A. Stein	Judge Lumbard *In re* Edwin Meese III (I)	Judge Morgan 4/2/1984 – 9/20/1984[d]
10/26/1984 –10/26/1986	Judge Robb[e] Independent Counsel continuing in office: None Independent Counsel Appointed: Leon Silverman	Chief Justice Designee #4: Judge Walter R. Mansfield (2d Circuit) *In re* Raymond Donovan (II)	Judge Morgan 6/11/1985 - 11/30/1988

	Chief Justice Designee #5: Judge George E. MacKinnon[f] (D.C. Circuit) Independent Counsel continuing in office: Leon Silverman Independent Counsel Appointed: James C. McKay Alexia Morrison Whitney N. Seymour, Jr.	Judge Mansfield *In re* Theodore B. Olson *In re* Theodore B. Olson *In re* Michael Deaver	Judge Morgan 4/23/1986 – 5/28/86[g] 5/29/1986[h] – 3/14/1989 5/29/1986 – 8/16/1989
10/26/1986 –10/26/1988	Judge MacKinnon Independent Counsel continuing in office: Leon Silverman Alexia Morrison Whitney N. Seymour, Jr. Independent Counsel Appointed: Lawrence E. Walsh Carl Rauh[i]	Judge Mansfield[j] *In re* Oliver L. North *In re* W. Lawrence Wallace	Judge Morgan 12/19/1986 – 1/18/1994[k] 12/29/1986 – 3/30/1987[l]
	Judge MacKinnon Independent Counsel continuing in office: Leon Silverman Alexia Morrison Whitney N. Seymour, Jr. Lawrence E. Walsh Carl Rauh Independent Counsel Appointed: James C. McKay James Harper[m]	Chief Justice Designee #6: Judge Wilbur F. Pell[n] (7th Circuit) *In re* Franklyn Nofziger & *In re* Edwin Meese III (II) *In re* W. Lawrence Wallace	Judge Morgan 2/2/1987 – 7/5/1988[o] 8/17/1987 – 12/17/1987[p]
10/26/1988 –10/26/1990	Judge MacKinnon Independent Counsel continuing in office: Leon Silverman Alexia Morrison Whitney N. Seymour, Jr. Lawrence E. Walsh Independent Counsel Appointed: Dan K. Webb[q] Arlin M. Adams	Judge Pell *In re* James W. Cicconi *In re* Samuel R. Pierce, Jr.	Chief Justice Designee #7: Judge John D. Butzner (4th Circuit) 5/1989 – 8/1989 3/1/1990 – 7/3/1995[r]

10/26/1990 –10/26/1992	Judge MacKinnon Independent Counsel continuing in office: Lawrence E. Walsh Arlin M. Adams Independent Counsel Appointed Donald T. Bucklin[a]	Judge Pell [sealed and not reported]	Judge Butzner 4/1991 – 4/1992
10/26/1992 –10/26/1994	Chief Justice Designee #8: Judge David B. Sentelle (D.C. Circuit) Independent Counsel continuing in office: Lawrence E. Walsh Arlin M. Adams Independent Counsel Appointed: Joseph E. diGenova	Chief Justice Designee #9: Judge Joseph T. Sneed (9th Circuit) *In re* Janet G. Mullins	Judge Butzner 12/14/1992 – 1/1/1996[t]
10/26/1994 –10/26/1996	Judge Sentelle Independent Counsel continuing in office: Arlin M. Adams Joseph E. diGenova Independent Counsel Appointed: Kenneth W. Starr Donald C. Smaltz David M. Barrett Larry D. Thompson[u] Daniel S. Pearson Michael F. Zeldin[v]	Chief Justice Designee #10: Judge Peter T. Fay (11th Circuit) *In re* Madison Guaranty S&L *In re* Alphonso Mike Espy *In re* Henry G. Cisneros *In re* Samuel R. Pierce, Jr. *In re* Ronald H. Brown *In re* Janet G. Mullins	Judge Butzner 8/5/1994 – 10/18/1999[w] 9/9/1994 – present 5/24/1995 – present 7/3/1995 – 10/27/1998[x] 7/6/1995 – 11/14/1996[y] 1/1996 – 6/1996
10/26/1996 –10/26/1998	Judge Sentelle Independent Counsel continuing in office: Kenneth W. Starr Donald C. Smaltz David M. Barrett Larry D. Thompson Daniel S. Pearson Michael F. Zeldin Independent Counsel Appointed: Curtis E. von Kann	Judge Fay *In re* Eli Segal	Judge Butzner 11/27/1996 –12/19/1997[z]

10/26/1998 –10/26/2000	Judge Sentelle Independent Counsel continuing in office: Kenneth W. Starr Donald C. Smaltz David M. Barrett Larry D. Thompson Independent Counsel Appointed:	Judge Fay	Chief Justice Designee #11: Judge Richard D. Cudahy (7th Circuit)
	Carol Elder Bruce	*In re* Bruce Edward Babbitt	3/19/1998 – present
	Ralph I. Lancaster, Jr.	*In re* Alexis M. Herman	5/26/1998 – present
	Robert W. Ray[m]	*In re* Madison Guaranty S&L	10/18/1999 – present

a. Unless otherwise noted, the Chief Justice of the United States designated and assigned each judge who has served on the Special Division to a term beginning on October 26 of an even-numbered year and expiring on October 26 in the next even-numbered year.

b. The information in this Table regarding Independent Counsel appointments builds upon the very helpful and comprehensive data that Professor Kathleen Clark assembled in 1997. *See* Kathleen Clark, *Paying the Price for Heightened Ethics Scrutiny: Legal Defense Funds and Other Ways That Government Officials Pay Their Lawyers*, 50 Stanford L. Rev. 65, 127-29 (1997) (Table I, "Targets, Dates, and Costs of Independent Counsel Investigations"). The information in this Table also been checked against the publicly-available information in the Clerk's Office at the United States Court of Appeals for the District of Columbia Circuit.

c. Christy filed his Final Report on this date. *See* Arthur H. Christy, *Trials and Tribulations of the First Special Prosecutor Under the Ethics in Government Act of 1978*, 86 Georgetown L.J. 2287, 2288 & n.3 (1998).

d. Stein's Final Report was released publicly on this date.

e. Judge Robb apparently served until his death on December 19, 1985. *See* J.Y. Smith, *Court of Appeals Judge Roger Robb Dies at 78; Named to Bench in 1969*, Wash. Post, Dec. 21, 1985, at D10.

f. Following Judge Robb's death, Chief Justice Burger designated Judge MacKinnon to serve as Presiding Judge of the Special Division.

g. McKay resigned due to a possible conflict of interest. *See* Mary Thornton, *Independent Counsel Quits to Avoid Conflict; Deputy Will Pursue Case of Withheld EPA Documents*, Wash. Post, May 30, 1986, at A17 (quoting McKay's statement, which was released by the Special Division, that he was resigning because "the appearance of a conflict of interest conceivably may exist because of advice given by another member of my firm [Covington & Burling] in an area which might be considered to have a relationship to this investigation").

h. Morrison, who had served as McKay's deputy, was appointed to replace him following his resignation. *Id.*

i. Although Rauh's appointment remains under court seal, both his identity and the named subject of his investigation have been reportedly publicly. *See, e.g.*, Aaron Freiwald, *Judge Lobbied Counsel to Remain on Probe*, Legal Times, Apr. 20, 1987, at 2.

j. Judge Mansfield served until his death on January 7, 1987. *See* Dennis Hevesi, *Walter R. Mansfield, Federal Judge, Is Dead at 75*, N.Y. Times, Jan. 8, 1987, at B12.

k. Walsh's Final Report was released publicly on this date.

l. Rauh and his staff resigned when the Department of Justice announced its interpretation that federal conflict of interest laws barred an independent counsel and his or her private law firm colleagues from representing clients before the Department. *See* Aaron Freiwald, *supra* note i (describing a March 25, 1987, letter to this effect that Independent Counsel Rauh received from Assistant Attorney General Charles Cooper). The Department subsequently abandoned this retroactive legal interpretation. *See* Aaron Freiwald, *New Prosecutor Takes Over Wallace Probe*, Legal Times, Dec. 7, 1987, at 4.

m. Harper was appointed to succeed Rauh following his resignation. Although Harper's appointment remains under court seal, both his identity and the named subject of his investigation have been reported publicly. *See, e.g.*, Ruth Marcus, *Justice Official Won't be Charged in Tax Case*, Wash. POST, Dec. 19, 1987, at A3; Freiwald, *supra* note i.

n. Following Judge Mansfield's death, Chief Justice Rehnquist designated Judge Pell to serve as a Judge of the Special Division.

o. McKay's Final Report was filed with the Special Division on this date.

p. Harper filed his Final Report on this day. *See* Marcus, *supra* note m.

q. Although Webb's appointment remains under court seal, both his identity and the named subject of his investigation have been reported publicly. *See, e.g.*, George Lardner, Jr., *Bush Aide is Cleared of Ethics Allegations*, Wash. Post, Sept. 6, 1989, at A8.

r. Adams resigned on this date.

s. Although Bucklin's appointment remains under court seal, his service as an independent counsel has been reported publicly. *See* Press Release of Senator Fred Thompson, *Thompson Names Tipps, Bucklin to New Investigation Posts*, Apr. 10, 1997 (available on LEXIS) (reporting that "[i]n 1991 he [Bucklin] served as an Independent Counsel pursuant to the Ethics in Government Act"); *see also* Robert Schmidt, *Where the Starr Report Will Be Stored*, Legal Times, Aug. 17, 1998, at 10 ("Like Starr, Bucklin has also been an independent counsel. Although Bucklin was appointed in 1991 and worked into 1992, the target of his investigation has remained sealed by the special appeals panel that oversees independent counsel.").

t. DiGenova resigned on this date. His Final Report had been released publicly on November 30, 1995.

u. Thompson was appointed to succeed Adams at the time of his resignation.
v. Zeldin was appointed to succeed diGenova, who had resigned following the public release of his Final Report. *See supra* note t.
w. Starr resigned on this date.
x. The combined Final Report of Independent Counsel Adams and Thompson was filed on this date.
y. Pearson's Final Report was filed on this date.
z. Von Kann's Final Report was filed on this date.
aa. Ray was appointed to succeed Starr at the time of his resignation.