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# **All or Nothing, or Maybe Cooperation: Attorney General Power, Conduct, and Judgment in Relation to the Work of an Independent Counsel**

**by John Q. Barrett\***

## **I. INTRODUCTION: KENNETH STARR'S MONIKER**

The question of what to call Ken Starr is not merely a provocation to commentators across the opinion spectrum. It relates to a serious legal argument that was made in 1997 litigation involving Starr and his office. It also relates to a larger, more complicated issue under the current independent counsel law:<sup>1</sup> the allocation of power and authority between independent counsel, who are temporary prosecutors operating within jurisdictional limits, and the Attorney General of the United States, who continues during independent counsel investigations to serve as the nation's chief law enforcement officer and to head the United

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1. 28 U.S.C. §§ 591-599 (1993 & Supp. 1997).

States Department of Justice, which is a central institution of the permanent United States government.

The legal argument regarding Starr was a very small part of one piece of finished litigation relating to the investigations and prosecutions that Starr—who is the “Whitewater” independent counsel, although his jurisdiction embraces many more subjects and allegations than Bill and Hillary Clinton, Jim and Susan McDougal, and their 1970s real estate investment<sup>2</sup>—has been conducting since his appointment in August 1994. In June 1996 a federal grand jury sitting in the Eastern District of Arkansas directed a subpoena duces tecum to the White House.<sup>3</sup> The subpoena required production of notes of interviews and meetings that First Lady Hillary Rodham Clinton had with White House officials on a range of Whitewater-related topics. The White House responded to the subpoena by giving Starr a “privilege log.”<sup>4</sup> It identified nine sets of notes that were responsive to the subpoena and stated that the White House refused to produce the notes based on various claims of legal privilege.<sup>5</sup>

In August 1996 Starr filed a sealed motion asking the United States District Court for the Eastern District of Arkansas to compel the White House to produce two of the nine sets of notes that had been subpoenaed.<sup>6</sup> Each set of notes had been created by a White House lawyer, not a private lawyer.<sup>7</sup>

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2. See, e.g., Order, *In re* Madison Guaranty Savings & Loan Ass'n, Div. No. 94-1, at 1-2 (D.C. Cir. Spec. Div. Jan. 16, 1998) (expanding Starr's jurisdiction to include, among other things, jurisdiction to investigate “whether Monica Lewinsky or others suborned perjury, obstructed justice, intimidated witnesses, or otherwise violated federal law other than a Class B or C misdemeanor or infraction in dealing with witnesses, potential witnesses, attorneys or others concerning the civil case *Jones v. Clinton*”).

3. See *In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 913 (8th Cir. 1997).

4. *Id.* at 913-14.

5. *Id.* at 914.

6. *Id.*

7. *Id.* The first set of notes was created during a meeting in the White House residence on July 11, 1995. According to the White House privilege log, the meeting concerned Hillary Clinton's activities following the 1993 death of Deputy White House Counsel Vincent W. Foster, Jr. The meeting was attended by three people: Mrs. Clinton; the lead attorney from the private law firm that President and Mrs. Clinton retained to represent them in Whitewater matters; and the White House lawyer who created the notes. The second set of notes was created on January 26, 1996 at meetings during and immediately following Mrs. Clinton's testimony before a federal grand jury that Starr and his staff were working with in Washington, D.C. These meetings were attended at various times by up to five people: Mrs. Clinton; her lead private attorney; a second partner in the law firm representing the Clintons; the then White House Counsel; and the White House lawyer who created the notes.

Starr, litigating on behalf of the grand jury, won the ensuing legal battle to obtain the White House lawyers' notes, but it took him a full year to do so.<sup>8</sup> The grand jury issued the subpoena in June 1996. In April 1997 the United States Court of Appeals for the Eighth Circuit ruled in Starr's favor.<sup>9</sup> In a ringing but sealed majority opinion, the court rejected the claim that there is a government attorney-client privilege that can frustrate lawful federal criminal investigations, such as the investigation by the Arkansas grand jury.<sup>10</sup> Although the White House sought Supreme Court review of this ruling (unsealing the matter in the process and thus bringing it to widespread public attention), the Court denied the White House's petition seeking a writ of certiorari.<sup>11</sup>

The foregoing leads to the issue of Starr's moniker. In both the district court and the Eighth Circuit, the litigation over the two sets of White House attorney notes that were responsive to the subpoena was captioned "In re" a grand jury matter.<sup>12</sup> This caption is in accord with the convention for government motions of this type and appeals from denials thereof. When the matter moved to the Supreme Court, however, the private attorneys retained by the Department of Justice to represent the White House filed their petition for a writ of certiorari with the case caption, "Office of the President v. Office of Independent Counsel."<sup>13</sup> What they were calling Starr, in other words, was conspicuously not "the United States."

Like many federal prosecutors before him, Starr and his client, the United States Government, had been "dissed" in court pleadings by the adversary being investigated. Surprisingly, however, in the brief filed in opposition to the White House petition, Starr responded to his

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8. *Id.* at 913. The litigation began in August 1996. In November 1996 the district court ruled in favor of the White House. *Id.* at 914. The court held that the subpoenaed notes were protected by attorney-client privilege and as attorney work product. *Id.* Starr appealed, still under seal, to the United States Court of Appeals for the Eighth Circuit. *Id.*

9. *Id.* at 925-26.

10. *Id.* at 924.

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

12. See *In re Grand Jury Subpoena Duces Tecum to the White House*, No. GJ-96-3, slip op. (E.D. Ark. Nov. 26, 1996), *rev'd and remanded*, 112 F.3d 910, 926 (8th Cir. 1997).

13. 112 F.3d 910, *cert. denied*, Office of the President v. Office of Independent Counsel, 117 S. Ct. 2482 (1997).

adversary's rhetorical jab.<sup>14</sup> Starr devoted the last two pages of his brief to what he described as

a procedural point: The current caption of this case is directly contrary to the independent counsel statute . . . and to this Court's consistent practice.

The issue also plays itself out in the cauldron of trials. Opposing counsel at times prefer to label prosecutors as "the independent counsel" and to state or imply that the prosecutors do not represent the United States.

The caption of this case, by referring to the "Office of Independent Counsel," directly contradicts [the independent counsel law]. It is the law, not convention, which establishes that this Office, within its jurisdiction, possesses the full "authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice [and] the Attorney General" and is responsible for handling "all aspects of any case, in the name of the United States . . ." Neither the governing statute nor this Court's practice admits of an exception when the other party before the Court is a separate entity within the Executive Branch. As to that issue, moreover, there is controlling precedent: *United States v. Nixon*.<sup>15</sup>

Although Starr's written demand to be referred to in case captions as "the United States" rather than "the Office of Independent Counsel" may seem petty and even a little bit prissy,<sup>16</sup> consider the next development in the case. Following the filing of Starr's brief in opposition, the Department of Justice filed its own brief urging the Court to grant the White House's petition for review.<sup>17</sup> In this matter, which pitted an

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14. In this regard Starr was tracking to a degree, perhaps without knowing it, Independent Counsel Lawrence Walsh's approach in 1989 Supreme Court litigation with the Department of Justice over procedures for handling classified information in a criminal trial. See HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 34 (1990) (noting that "Walsh's papers filed at the Supreme Court were captioned not '*United States v. Oliver North*,' but '*Dick Thornburgh, Attorney General v. Lawrence Walsh, Independent Counsel*'") (italics in original).

15. Brief for the Federal Respondent in Opposition at 28-30, *Office of the President v. Office of Independent Counsel*, 117 S. Ct. 2482 (1997) (No. 96-1783) (quoting 28 U.S.C. § 594(a)) (footnote omitted).

16. Cf. Daniel Klaidman, *DOJ's Bumpy Ride*, *LEGAL TIMES*, Dec. 22 & 29, 1997, at 8 (awarding Starr 1997's "Don't You Have Anything Better to Do?" Award for "insisting that his office be identified as 'The United States' in his brief in a Whitewater-related case before the Supreme Court"). His adversaries ignored Starr's "procedural point" in their subsequent filing. See Reply Brief for the Petitioner, *Office of the President v. Office of Independent Counsel*, 117 S. Ct. 2482 (1997) (No. 96-1783).

17. See Brief Amicus Curiae for the United States, Acting Through the Attorney General, Supporting Certiorari, *Office of the President v. Office of Independent Counsel*, 117 S. Ct. 2482 (1997) (No. 96-1783).

independent counsel against the White House and drew the Department of Justice in on the side of the latter, the Department called itself, of course, "the United States."<sup>18</sup>

This short-lived tussle over the nameplate that reads "the United States" gave voice, if only for a moment, to a deep and fundamental tension that has run through the experience of many independent counsel. An independent counsel is, by law, appointed to stand in the place of the Attorney General and is given, with some exceptions, many of the Attorney General's legal powers.<sup>19</sup> Starr was, in other words, correct: legally, the independent counsel is "the United States," just as regular federal prosecutors, up to the level of the Attorney General, are "the United States" in non-independent counsel cases.

As an independent counsel goes forward to investigate and, if necessary, prosecute criminal cases, however, the regular, permanent United States—the executive branch of the national government—is all around. It includes the Attorney General and the Department of Justice that she commands, including its components and personnel.<sup>20</sup> From an independent counsel's perspective, the rub is that this regular United States government continues to command many of the powers, resources, and personnel that an independent counsel needs to work promptly and successfully.

This Article considers the allocation of power under the independent counsel law between the Attorney General along with the Department of Justice and the independent counsel whose appointment the Attorney General has triggered. Although the law explicitly transfers much of an Attorney General's lawful power to an independent counsel, it does not go far enough in reallocating that power. Thus, it leaves a fundamental gap between what the current statute purports independent counsel to be and what it actually empowers independent counsel to accomplish. Part II of this Article reviews the current legal provisions, including the allocations to independent counsel of powers that ordinarily would belong to the Attorney General and the Department of Justice. Part III considers some instances in which the powers that the law or custom reserves to the Attorney General have been exercised to complicate or

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18. *See id.* at 1-2 (stating "Interest of the United States").

19. 28 U.S.C. § 594 (1993 & Supp. 1997).

20. The regular United States government that surrounds an independent counsel also includes Congress and the federal courts. Because independent counsel are appointed to perform executive branch functions at the request of and serve under the ultimate authority of an executive branch official, the issue that I am considering is largely intra-executive branch. For a discussion of independent counsel interactions with legislative and judicial actors, see KATY J. HARRIGER, *INDEPENDENT JUSTICE: THE FEDERAL SPECIAL PROSECUTOR IN AMERICAN POLITICS* 149-53 & 156-61 (1992).

impede the work of independent counsel. Part IV proposes statutory modifications that would allocate further power to independent counsel. Part V considers some of the challenges that would arise and the political consequences that might flow from these proposed statutory modifications.

I conclude in Part VI that an empowered independent counsel might have better working interactions with an Attorney General and the Department of Justice, facilitating quicker and more satisfying outcomes to independent counsel investigations. In the alternative, even if empowering independent counsel vis-à-vis the Attorney General would result in more visible and frequent political showdowns—between Attorneys General and independent counsel or between Presidents and independent counsel—this too could be healthy for our larger governmental processes.

## II. THE PRESENT ALLOCATION OF POWER BETWEEN THE ATTORNEY GENERAL AND AN INDEPENDENT COUNSEL

The independent counsel law contains explicit and quite detailed provisions regarding the allocation of power between the Attorney General, who ordinarily is responsible for federal law enforcement, and an independent counsel, who is appointed at the Attorney General's request to investigate matters within a court-ordered area of jurisdiction.<sup>21</sup> These provisions give much of the Attorney General's investigative and prosecutorial authority to the independent counsel.<sup>22</sup> In return the law places some obligations on the independent counsel with regard to the Department of Justice.<sup>23</sup> The independent counsel law also explicitly provides that certain specified powers and responsibilities will remain exclusive to the Attorney General notwithstanding the appointment of an independent counsel. Finally, there are issues of investigative, prosecutorial, and managerial authority that the independent counsel law does not explicitly address.

### A. *What Goes Over: The Statute's Reallocations of Power from the Attorney General to an Independent Counsel*

Section 594 of the Independent Counsel Statute is the primary provision that transfers powers ordinarily belonging to the Attorney General and the Department of Justice. It provides the following:

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21. See 28 U.S.C. §§ 591-99.

22. *Id.* § 594.

23. *Id.*

Notwithstanding any other provision of law, an independent counsel . . . shall have, with respect to all matters in [his or her] prosecutorial jurisdiction . . . , full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice . . . .<sup>24</sup>

Another provision in the statute clarifies that this power and authority are exclusive to the independent counsel.<sup>25</sup> Once an independent counsel has been given a defined jurisdiction, the Attorney General and the Department of Justice, including all of its officers and employees, are required to cease investigations and proceedings regarding that matter.<sup>26</sup>

The independent counsel law specifies that an independent counsel's exclusive "investigative and prosecutorial functions and powers"<sup>27</sup> include the following:

- \* consulting with the United States Attorney for the district where the alleged violation of law that led to the appointment of the independent counsel occurred;<sup>28</sup>

- \* conducting grand jury investigations and other (unspecified) investigations;<sup>29</sup>

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24. *Id.* § 594(a). The only stated exception to this provision is that the Attorney General must continue to exercise direction or control over matters that specifically require her personal action under 18 U.S.C. § 2516, which governs applications to intercept oral and wire communications. *See id.* § 594(a).

25. *Id.* § 594(i).

26. *See id.* § 597(a). *Cf. id.* § 594(e) (recognizing the Attorney General's authority to refer, on her own initiative, a matter to an existing independent counsel that relates to his prosecutorial jurisdiction). The only exceptions to this cease-and-desist directive are circumstances when the independent counsel has either requested the Department's assistance with his work or stated in writing that the Department may continue investigations or proceedings on its own. *See id.* § 597(a).

The statute does not address whether the Department may continue to exercise in proximity to an independent counsel's defined area of jurisdiction its traditional noninvestigative and nonprosecutive functions. These include providing legal advice and representation to components and employees throughout the executive branch. *See infra* Parts II.D. and III.A.

27. 28 U.S.C. § 594(a).

28. *Id.* § 594(a)(10). The statute also directs the Department to provide whatever assistance and information an independent counsel requests to carry out his functions. *See id.* § 594(d)(1). Therefore, the provision regarding United States Attorneys seems unnecessary.

29. *Id.* § 594(a)(1).



- \* reviewing all the documentary evidence that is available from any source;<sup>30</sup>
- \* receiving "appropriate" national security clearances;<sup>31</sup>
- \* inspecting, obtaining, and using, consistent with applicable statutes, original tax returns or copies of tax returns;<sup>32</sup>
- \* applying for warrants, subpoenas, and other court orders;<sup>33</sup>
- \* determining whether to contest the assertion of any testimonial privilege;<sup>34</sup>
- \* contesting in court (including in *in camera* proceedings) any claim of privilege or attempt to withhold evidence on national security grounds;<sup>35</sup>
- \* applying in any federal court for an order granting use immunity to any witness;<sup>36</sup>
- \* filing informations;<sup>37</sup>
- \* framing and signing indictments;<sup>38</sup>
- \* initiating and conducting prosecutions in any court of competent jurisdiction;<sup>39</sup>
- \* litigating any civil or criminal matters that the independent counsel "considers necessary";<sup>40</sup>

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30. *Id.* § 594(a)(4).

31. *Id.* § 594(a)(6).

32. *Id.* § 594(a)(8).

33. *Id.* § 594(a)(7).

34. *Id.* § 594(a)(5).

35. *Id.* § 594(a)(6).

36. *Id.* § 594(a)(7). An independent counsel may also authorize an administrative agency to give use immunity to any person who is refusing, based upon the privilege against self-incrimination, to testify or to give information to the agency. *See id.* (authorizing independent counsel to exercise the authority that 18 U.S.C. § 6004 vests in the Attorney General). An independent counsel may also cause a United States District Court to defer issuing for up to twenty days an order that has been requested by a duly authorized member of Congress or a committee of Congress to grant use immunity to any person. *See id.* (authorizing independent counsel to exercise the authority that 18 U.S.C. § 6005 vests in the Attorney General).

37. 28 U.S.C. § 594(a)(9).

38. *Id.*

39. *Id.* An independent counsel also has "full authority" within his area of prosecutorial jurisdiction to "dismiss matters . . . without conducting an investigation or at any subsequent time before prosecution, if to do so would be consistent with the written or other established policies of the Department of Justice" regarding criminal law enforcement. *Id.* § 594(g).

40. *Id.* § 594(a)(2).

\* appealing court decisions in any case or proceeding in which the independent counsel has participated in his or her official capacity;<sup>41</sup> and

\* “handling all aspects of any case, in the name of the United States.”<sup>42</sup>

In addition to these provisions, which transfer much of the Department of Justice’s ordinary investigative and prosecutorial authority and power to an independent counsel, the law directs the Department to provide any assistance that the independent counsel may request.<sup>43</sup> This assistance may take the form of information.<sup>44</sup> It also may include the Department’s human resources.<sup>45</sup> Taken literally, the law permits independent counsel to draft Department of Justice bodies, and it directs the Department to deliver them. The law also directs the Department to “pay all costs” relating to operation of an independent counsel’s office.<sup>46</sup>

#### *B. Paying for What Goes Over: The Independent Counsel’s Duty to Follow Department of Justice Policies*

Although the independent counsel law transfers substantial power and authority from the Department of Justice to the independent counsel within his area of jurisdiction, the law also creates explicit duties that independent counsel comply with Department policies.

The law directs independent counsel to observe “the written or other established policies of the Department of Justice respecting enforcement of the criminal laws.”<sup>47</sup> Because knowledge of Department policies is an obvious prerequisite to compliance, the law directs independent counsel to “consult” with the Department about its criminal law enforcement policies.<sup>48</sup> The law also directs independent counsel to comply with the Department’s procedures and guidelines for handling

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41. *Id.* § 594(a)(3).

42. *Id.* § 594(a)(9).

43. *Id.* § 594(d)(1).

44. *See id.* (“[A]ssistance . . . may include access to any records, files, or other materials relevant to matters within such independent counsel’s prosecutorial jurisdiction . . .”).

45. *See id.* (“[A]ssistance . . . may include . . . the use of the resources and personnel necessary to perform [the] independent counsel’s duties. At the request of an independent counsel, prosecutors, administrative personnel, and other employees of the Department of Justice may be detailed to the staff of the independent counsel.”).

46. *Id.* § 594(d)(2).

47. *Id.* § 594(f)(1).

48. *Id.* § 594(f)(1).

and using classified information.<sup>49</sup> An independent counsel must also consult with the Department<sup>50</sup> and comply with its expenditure certification policies.<sup>51</sup>

The only basis upon which an independent counsel may decline to consult with the Department or decide not to follow its criminal law enforcement or expenditure policies is when doing so "would be inconsistent with the purposes" of the independent counsel law.<sup>52</sup> The statute defines no exception to the independent counsel's duty to comply with Department classified information guidelines and procedures.

*C. What Stays Behind: The Statute's Reservations of Power to the Department of Justice and the Attorney General*

Although the statute gives much power and authority to independent counsel and imposes corresponding duties on them to communicate with the Department and to obey its policies in the ordinary course of events, the law also leaves specified powers in the Department of Justice.

Notwithstanding the statutory provisions that give independent counsel the powers to conduct criminal prosecutions, to litigate any civil or criminal matters they consider necessary, to appeal court decisions in their cases and proceedings, to obtain any requested assistance from the Department of Justice, and to handle all aspects of cases "in the name of the United States,"<sup>53</sup> the law does explicitly reserve one litigation function to the Department. The statute preserves the ability of the Department of Justice to appear in independent counsel litigation by permitting it to appear as *amicus curiae* on legal issues.<sup>54</sup> The law states that its provisions "shall [not] prevent the Attorney General or the Solicitor General from making a presentation as *amicus curiae* to any court as to issues of law raised by any [independent counsel] case or proceeding" or any appeal therefrom.<sup>55</sup>

The independent counsel law also gives the Attorney General the power to remove an independent counsel from office. This removal

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49. *Id.* § 594(f)(2).

50. *Id.*

51. *Id.* § 594(l)(1)(C).

52. *Id.* § 594(f)(1).

53. *Id.* § 594(a)(1), (2), (3), (9).

54. *Id.* § 597(b).

55. *Id.* The Department of Justice made use of this provision in June 1997 when it filed a brief in the Supreme Court supporting the White House petition for a writ of certiorari in the litigation with Independent Counsel Starr over the grand jury subpoena for notes created by White House attorneys. See Brief *Amicus Curiae* for the United States, Acting Through the Attorney General, Supporting Certiorari, Office of the President v. Office of Independent Counsel, 117 S. Ct. 2482 (1997) (No. 98-1783).

power is defined with great specificity. The statute provides that the removal of an independent counsel will be valid only if it is the personal action of the Attorney General.<sup>56</sup> Also, removal must be based on "good cause, physical or mental disability" of the independent counsel, or "any other condition that substantially impairs the [independent counsel's] performance" of his duties.<sup>57</sup> The law also permits the Attorney General at any time to ask the appointing court to terminate an independent counsel's office on the grounds that his investigation and resulting prosecutions have been "completed or so substantially completed" that it is appropriate for the Department of Justice to finish the work.<sup>58</sup>

*D. Powers That Are Not Expressly Transferred from the Attorney General to an Independent Counsel*

To summarize the foregoing, within the confines of an independent counsel's investigative and prosecutorial jurisdiction, the independent counsel law allocates virtually all power and authority from the Attorney General and the Department of Justice to an independent counsel. The law makes this reallocation through general provisions that define an independent counsel's power and authority and through the numerous provisions that detail specific acts that an independent counsel may take. The law does not, however, address what happens in an independent counsel case to each type of power that the Department traditionally exercises. The law also does not contain an omnibus provision that transfers all Department authority and power that is not explicitly reserved for the Attorney General. It is therefore not surprising that the observation of independent counsel interactions with Attorneys General and the Department of Justice in various independent counsel investigations suggests that some powers may be up for grabs. This section identifies three examples of traditional Department of Justice powers that Attorneys General have claimed, either explicitly or implicitly through conduct, remain with them and in the Department notwithstanding the appointment of an independent counsel and the provisions of the independent counsel law.

One traditional Department function that the independent counsel law does not address explicitly is the Department providing legal advice, and

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56. 28 U.S.C. § 596(a)(1).

57. *Id.*

58. *Id.* § 596(b)(2). Even without a request from the Attorney General, the appointing court may on its own motion terminate an independent counsel's office on this same basis. *Id.* Also, the statute suggests that an independent counsel could be removed from office through impeachment by the House and conviction by the Senate. *See id.* § 596(a)(1).

even legal representation by Department attorneys, to entities and officials throughout the executive branch. In non-independent counsel cases, the Department regularly functions as counsel to Cabinet and regulatory agencies and their employees.<sup>59</sup> In certain civil proceedings, the Department also provides its attorneys to represent fellow government employees who have been sued or called to testify individually as non-party witnesses.<sup>60</sup> The common characteristic of these settings is, of course, that the litigation, investigation, or proceeding at issue is *not* being brought by the United States (that is, the Department). The independent counsel law, which gives a private attorney the power to investigate and litigate as the government within his defined area of jurisdiction, thus creates settings for legal activity that differ fundamentally from those where the Department typically provides legal advice and representation to other parts of the executive branch. Independent counsel nonetheless have found that, in proximity to their jurisdictional areas of responsibility and even directly in litigation against them, the Department of Justice continues to provide its traditional legal advice and representation even though it means that it is now lining up against "the United States."<sup>61</sup>

A second traditional function that Attorneys General have claimed to retain even after appointment of an independent counsel is the power to decide what classified information may be used in open court to permit the prosecution of a criminal case. In a non-independent counsel case, the Attorney General has the power to place the Department's interest in criminal law enforcement over an intelligence agency's interest in continual protection of its classified information from public disclosure.<sup>62</sup> Thanks to the provisions for pretrial evidentiary rulings contained in the Classified Information Procedures Act,<sup>63</sup> the Attorney General can make this determination to proceed with a criminal prosecution based upon advance knowledge of the costs it will entail for national security. If an intelligence agency chooses to contest an Attorney General's decision to proceed with a case at the cost of causing particular classified information to be disclosed publicly, its only recourse is to appeal to the President, who can order the Attorney General to desist. Although the independent counsel law all but explicitly reallocates this authority from the Attorney General to an

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59. *See id.* §§ 511-513 (1993); 28 C.F.R. § 0.5(c) (1998).

60. *See* 28 U.S.C. §§ 543, 547 (1993).

61. *See infra* Part III.A.

62. *See* Classified Information Procedures Act, 18 U.S.C. app. §§ 3-16 (1985 & Supp. 1998).

63. *Id.* § 6.

independent counsel within his prosecutorial jurisdiction,<sup>64</sup> Independent Counsel Walsh found during his Iran-Contra prosecutions that Attorneys General continue to seek to exercise this traditional Department of Justice powers.<sup>65</sup>

A final traditional function that Attorneys General have claimed to retain is the power to decide whether and how the authority and the personnel of the Department of Justice's Office of the Solicitor General will be deployed in appellate litigation. The independent counsel law provides that the independent counsel may litigate in the name of the United States<sup>66</sup> and utilize Department of Justice personnel at his discretion.<sup>67</sup> However, when notable court cases have arisen, independent counsel have found that Attorneys General and Solicitors General continue to claim and exercise independent discretion to determine whether to support the independent counsel's legal position in a trial or appellate court or before the United States Supreme Court.<sup>68</sup>

### III. ATTORNEYS GENERAL EXERCISING POWER IN THE JURISDICTIONAL AREAS OF INDEPENDENT COUNSEL

This Part discusses examples of Attorneys General employing these traditional powers in areas of investigative and prosecutorial jurisdiction that have been given to independent counsel by court order. In identifying these examples, I am not suggesting that the Attorneys General deliberately flouted the independent counsel law. Each of these instances concerns a traditional Department of Justice prerogative that the independent counsel law does not unambiguously transfer from the Attorney General to the independent counsel. I am suggesting that Attorneys General have not rushed to identify restrictions on their powers that are implicit in the independent counsel concept and statutory scheme. Also, independent counsel have not been aggressive about claiming or protecting for themselves exclusive control over these functions. The result has been a series of Department of Justice actions that have complicated, if not undercut, the work of independent counsel.

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64. See *Morrison v. Olson*, 487 U.S. 654, 708 (1988) (Scalia, J., dissenting).

65. See *infra* Part III.B.

66. 28 U.S.C. § 594(a)(9).

67. *Id.* § 594(d)(1).

68. See *infra* Part III.C.

### A. *Legal Advice and Representation*

The Department of Justice calls itself "the largest law firm in the Nation."<sup>69</sup> Among its fundamental purposes, it exists to provide legal advice to the rest of the government.<sup>70</sup> Department lawyers regularly counsel the managers and other employees, including attorneys, who run the executive branch departments and myriad other entities, on all manner of legal and policy issues.<sup>71</sup> Department lawyers also defend these entities in litigation brought against them (i.e., in lawsuits against the United States), and also in the legal proceedings that these entities initiate. Department lawyers also provide legal representation to or, alternatively, the funds to pay for private attorneys to represent individual executive branch employees when they are involved in litigation or other proceedings that are connected to or arise out of their work on behalf of the United States.<sup>72</sup>

To date, the Department of Justice and its personnel have not ceased to give legal advice and even representation to executive branch departments, entities, and personnel when independent counsel have been appointed to investigate persons and alleged criminal misconduct in the same governmental office or policymaking locale. Instead, as a few examples illustrate, the Department has continued to perform its traditional legal advising and representational functions regarding executive branch personnel who are, along with their departments and

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69. See Department of Justice web site, <<http://www.usdoj.gov>>; Cf. Ross L. Malone, Jr., *The Department of Justice: The World's Largest Law Office*, 39 A.B.A.J. 382 (1953).

70. See generally NANCY V. BAKER, *CONFLICTING LOYALTIES: LAW AND POLITICS IN THE ATTORNEY GENERAL'S OFFICE, 1789-1990*, 4-18 (1992).

71. See generally 28 U.S.C. § 511 (1994) (directing the Attorney General to give "his [sic] advice and opinion on questions of law when required by the President"); 2 UNITED STATES ATTORNEY'S MANUAL § 1-2.101(c) (Aspen Law & Business ed., 1990-1 Supp. at 1-15) (stating the Attorney General's authority to "[f]urnish advice and opinions, formal and informal, on legal matters to the President and the Cabinet and to the heads of the executive departments and agencies of the Government, as provided by law"); 28 U.S.C. § 512 (1994) ("The head of an executive department may require the opinion of the Attorney General on questions of law arising in the administration of his department."); 28 U.S.C. § 513 (1994) (directing Secretaries of Army, Navy and Air Force, in the absence of some more specific statute giving responsibility to some other officer, to send any question of law that arises in the administration of their respective Departments "to the Attorney General for disposition"); 28 C.F.R. § 0.25(a) (1997) (assigning the Department's Office of Legal Counsel to "render[] informal opinions and legal advice to the various agencies of the Government").

72. See generally 28 U.S.C. § 514 (1994); Daniel Klaidman, *The High Cost of Turning Back Whitewater's Tide; Cash Strapped Officials Cope With Daunting Legal Bills*, LEGAL TIMES, Mar. 14, 1994, at 1 col. 2 (reporting that federal regulations permit reimbursement for legal fees incurred by officials who are called to testify on Capitol Hill).

agencies, in the midst of dealing with an independent counsel investigation:

\* During Independent Counsel Donald Smaltz's investigation of former Secretary of Agriculture Mike Espy, the Department paid for private legal counsel to defend a White House claim of executive privilege in grand jury litigation with the independent counsel.<sup>73</sup>

\* During Independent Counsel Starr's Whitewater investigation, the Department financed the private legal counsel who defended the White House's unsuccessful claim of attorney-client privilege in grand jury litigation with the independent counsel.<sup>74</sup>

\* The Department agreed to reimburse some White House employees for the costs of private attorneys who assisted them in providing testimony before Congressional Committees whose inquiries paralleled other aspects of Starr's investigations.<sup>75</sup>

\* During Starr's more recent investigation of Monica Lewinsky and others who were involved in Paula Jones's civil suit against President Clinton, the Department paid for private attorneys to defend the President's reported invocations of executive privilege.<sup>76</sup>

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73. See James Rowley, *Not Just Whitewater: White House Fighting Espy Counsel Over Papers*, ASSOCIATED PRESS REP., May 15, 1997, 1997 WL 4866389 (reporting that "Attorney General Janet Reno authorized the White House to hire a private law firm to handle the grand jury litigation"). See generally *In re Sealed Case*, 116 F.3d 550, 555 (D.C. Cir. 1997) (identifying the private counsel who represented the White House in this litigation against Independent Counsel Smaltz).

74. See Frank J. Murray, *Reno Opposes Starr Bid for Notes, Affirms "Privilege" Claim By Clinton*, WASH. TIMES, June 7, 1997, at A1 (reporting that private counsel were representing the Office of the President in litigation against Independent Counsel Starr and noting that that "development means that three parties represented by lawyers paid by the Department [of Justice] are in one case claiming to represent interests of the United States"); see also Sandra Torry, *The Court Took Notes, and Some Attorneys Take Exception*, WASH. POST, May 12, 1997, at F7 (reporting that the private attorneys representing the White House were charging the government only a "special bargain rate" of "\$54 an hour for the lawyers' time").

75. See Michael Kirkland, *UPI Focus: DOJ Not Involved in Executive Privilege*, UPI WIRE SERV. REP., Feb. 19, 1998 (reporting the Department of Justice's announcement "that it has approved thousands of dollars in outside attorney fees incurred when lawyers represented the White House during investigations of the White House travel office firings and receipt of FBI file summaries on Republicans"); Karen Gullo, *U.S. Paying Bills of Clinton Aides*, CHATTANOOGA TIMES, Apr. 25, 1997, at A9 (reporting similar reimbursement payments during the previous year).

76. See Marcia Coyle & Harvey Berkman, *Executive Privilege Finds a Champion*, NAT'L L.J., Apr. 6, 1998, at 1 (profiling attorney W. Neil Eggleston); Cf. Letter from Independent Counsel Kenneth W. Starr to Attorney General Janet Reno, Apr. 16, 1998, at 2 (mentioning "the positions the Department has taken on the various [claims of] testimonial privileges that are hindering our investigation").



\* During the same phase of Starr's investigative activity, Department attorneys first consulted with, and later represented in litigation, the Department of the Treasury and United States Secret Service officials who claimed a privilege not to testify about their observations, if any, of President Clinton and Ms. Lewinsky.<sup>77</sup>

These examples are only a glimpse of the many instances in which Department of Justice personnel communicated with and provided advice or other support to entities and persons who were of central investigative interest to independent counsel who had been assigned to investigate, on behalf of the United States government, alleged criminal activity. These examples illustrate how customary Department legal advice and representation can create situations of direct conflict between it and an independent counsel. At the extreme, the Department's legal advising can thwart the very work that an independent counsel was appointed to carry out.

None of this Department of Justice activity is, on its face, inconsistent with the Independent Counsel Statute, federal criminal law, or any other legal authority. Although independent counsel receive, fully and exclusively upon their appointments, the government's powers to investigate and, if crime is found, to prosecute, the Department of Justice activities just described are neither investigative nor prosecutorial. They are legal advising, which is among the other, more nuanced legal services that the Department properly provides every day to its "clients." The government's need, along with the needs of the nation and the citizenry, for the Department to provide such services through expert personnel who can draw upon its institutional knowledge and history typically is not affected very much, if at all, by the appointment of an independent counsel. What the independent counsel law leaves unaddressed, however, is who is and who should be responsible for assessing those broader needs when they arise in proximity to, or in direct response to, an independent counsel's work. By default, and according to the ordinary processes of government, that task of assessment has fallen in independent counsel cases where it falls in non-independent counsel cases: to the Department of Justice.

The problem with the current state of affairs, at least from the perspective of an independent counsel who has been assigned to conduct an investigation, is that the Department's continuing ability to give legal

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77. See Robert Suro, *Justice Department to Fight Starr on Forcing Secret Service to Talk*, WASH. POST, Apr. 15, 1998, at A7; Phil Kuntz & Brian Duffy, *Justice Agency, Urged by Secret Service, to Fight Starr's Bid to Get Clinton Bodyguards to Testify*, WALL ST. J., Feb. 25, 1998, at A24.

advice and to provide legal representation to entities and persons who are involved in some way in an independent counsel investigation may complicate, and in some instances it may even impede, the investigation. The presence and support of Department attorneys, or of Department-financed private attorneys, also may communicate to current or former government employees who are having to deal with an independent counsel that he is not really the government, that his demands are not really the lawful demands of federal law enforcement, and other messages that undercut his legitimacy as a federal investigator and prosecutor.

Executive branch entities and employees are not wrong, in an independent counsel investigation, to do exactly what they usually do when legal issues arise in their regular courses of conducting government business—turn to the Department and seek its legal advice and, if necessary, its representation. It would send a significantly different message than current practices do, however, if the independent counsel law or an Attorney General directive unambiguously required Department personnel to respond to such requests for legal assistance by saying “Before I do anything in this area, let me see what the independent counsel wants me to do with this.”

#### *B. Controlling Classified Information*

The Iran-Contra investigation was replete with classified information. The investigation concerned two major covert foreign policies—trading arms to Iran in exchange for the freedom of United States citizens taken hostage in Lebanon, and supplying a war against the Sandinista government of Nicaragua—and focused on virtually every national security and intelligence component of the executive branch. To prove Iran-Contra crimes, Independent Counsel Walsh needed to use in open court proceedings classified information that otherwise would not have seen the light of day for decades, if ever.<sup>78</sup>

In ordinary criminal investigations and prosecutions that touch upon classified information, the Attorney General has legal authority to balance law enforcement interests in making a particular criminal case against more generalized national security considerations. When the Attorney General determines that law enforcement must come first, she may use the classified information needed to make the criminal case unless directed otherwise by the President.<sup>79</sup>

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78. See generally PETER KORNBLUH & MALCOLM BYRNE, *THE IRAN-CONTRA SCANDAL: THE DECLASSIFIED HISTORY* (1993) (National Security Archive document reader).

79. See generally Sandra D. Jordan, *Classified Information and Conflicts in Independent Counsel Prosecutions: Balancing the Scales of Justice After Iran-Contra*, 91 COLUM. L. REV.

Although the independent counsel law does not address this power explicitly, it seems to reallocate implicitly to independent counsel the Attorney General's traditional powers over classified information. The law provides that, as a baseline power, independent counsel are entitled to receive "appropriate national security clearances."<sup>80</sup> Above that baseline, the statute also spells out an independent counsel's ultimate authority to get, and thus arguably his authority to use, classified information. The law says that if someone attempts by general withholding or by claiming a national security privilege to keep an independent counsel from obtaining the classified information sought, the independent counsel may go to court to enforce the legal right to obtain the information.<sup>81</sup> Justice Scalia asserted in 1988, in a little-noticed passage of his much-noted lone dissent from the Supreme Court decision upholding the constitutionality of the independent counsel law, that this authorization gives an independent counsel *more* power to reject intelligence agency concerns than the Attorney General possesses in non-independent counsel cases.<sup>82</sup>

In the Iran-Contra cases, however, this implicit transfer of power ran into political reality. The Attorney General asserted ultimate control over classified information. In two instances, Attorney General

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1651, 1657-63 (1991); Ronald K. Noble, *The Independent Counsel Versus the Attorney General in a Classified Information Procedures Act-Independent Counsel Statute Case*, 33 B.C. L. REV. 539, 550-56 (1992).

80. 28 U.S.C. § 594(a)(6). This is a specification of an independent counsel's more general powers to obtain any testimony and to review any document.

81. *See id.*

82. Justice Scalia wrote the following about an independent counsel's statutory power to litigate against national security privilege claims:

Another preeminently political decision is whether getting a conviction in a particular case is worth the disclosure of national security information that would be necessary. The Justice Department and our intelligence agencies are often in disagreement on this point, and the Justice Department does not always win. The present [Independent Counsel] Act even goes so far as specifically to take the resolution of that dispute away from the President and give it to the independent counsel.

*Morrison v. Olson*, 487 U.S. 654, 708 (1988) (Scalia, J., dissenting) (citations omitted); *but see Appeal of United States (By the Attorney General)*, 887 F.2d 465, 471 & n.6 (4th Cir. 1989) ("The Act plainly does not affect the Attorney General's authority to protect information important to national security by filing a[n] . . . affidavit . . . . [Section 594(a)(6) only] contemplates the situation where the Executive Branch seeks to withhold from independent counsel evidence arguably relevant to the prosecution on grounds of national security . . . .").

Although Justice Scalia's reading of section 594(a)(6) may be technically correct, his narrow focus on this provision in isolation of course ignored the larger reality of the Attorney General's general power under the act to terminate an independent counsel's appointment. *See infra* Part V.B.

Thornburgh filed affidavits based upon the power he ordinarily would have under the Classified Information Procedures Act and ordered that specific items of classified information could not be used in public trials. In Oliver North's prosecution, the trial court responded to the Attorney General's affidavit by dismissing the two lead counts of the indictment.<sup>83</sup> In the prosecution of CIA officer Joseph Fernandez, the trial court responded to the Attorney General's affidavit by dismissing the entire indictment.<sup>84</sup> Although Independent Counsel Walsh could have sued to establish his statutory authority over classified information, he declined to do so at various junctures for various reasons.<sup>85</sup> The practical result was that once Walsh failed to persuade the Attorney General that the particular interests of law enforcement in these cases were more weighty than the national security concerns of the intelligence community, the prosecutorial powers of an independent counsel effectively were limited by a decision of an attorney general.<sup>86</sup> This is at odds with the fundamental purpose and the general provisions of the independent counsel law itself.

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83. See generally LAWRENCE E. WALSH, FINAL REPORT OF THE INDEPENDENT COUNSEL FOR IRAN/CONTRA MATTERS 109-10 (1993); LAWRENCE E. WALSH, FIREWALL: THE IRAN-CONTRA CONSPIRACY AND COVER-UP 180 (1997).

84. See *United States v. Fernandez*, 913 F.2d 148, 149 (4th Cir. 1990); WALSH, FIREWALL, *supra* note 83, at 218-19.

85. In *North*, Walsh agreed to accept Attorney General Thornburgh's filing of the affidavit barring use of classified information and thus the dismissal of counts one and two of the indictment in return for the Attorney General's commitment that he would permit the twelve remaining counts to be tried. In *Fernandez*, Walsh decided to appeal from the district court's pretrial relevancy determinations regarding classified information and its dismissal of the entire case rather than litigate against the Attorney General's assertion of power. See *Fernandez*, 913 F.2d at 150. At the Symposium on the Independent Counsel Statute, Walsh said that "I never asked Congress to consider giving [the classified information power] to an independent counsel because I did not think a transient should be making decisions about national security where he has no deep background in that area. And it seems to me that there are areas where the interpretation of the law should be in the hands of those who are permanently stewards of it, rather than in a transient." Symposium, *A Roundtable Discussion on the Independent Counsel Statute*, 49 MERCER L. REV. 453, 483 (1998).

86. The Attorney General also sought to stay jury selection in *North* and *Fernandez* in efforts to force Walsh to take pretrial appeals from the trial courts' classified information rulings. Although the Department of Justice briefly obtained a stay of the *North* trial, see WALSH, FINAL REPORT, *supra* note 83, at 111, two courts of appeals ultimately rejected the Attorney General's claim of authority to take interlocutory classified information appeals in cases being prosecuted for the United States by independent counsel. See *id.* (describing unpublished decision of the United States Court of Appeals for the District of Columbia Circuit that "the attorney general had no standing to appeal"); *Appeal of United States (By the Attorney General)*, 887 F.2d 465 (4th Cir. 1989).

### C. *Withholding Solicitor General Support in Litigation*

Although the Independent Counsel Statute explicitly directs the Department of Justice to provide whatever personnel and assistance an independent counsel may request, no independent counsel has sought to exercise this power in the form of ordering the Solicitor General to handle or to support the independent counsel's litigation position. Independent counsel have asked for Solicitor General or other litigation support, but Attorneys General have not uniformly granted these requests.<sup>87</sup>

Independent Counsel Walsh's experiences in Iran-Contra illustrate this failure to command or obtain the Department's support and expertise in appellate litigation. In 1987 Lieutenant Colonel Oliver North and Vice Admiral John Poindexter, two of the central Iran-Contra operatives who previously had invoked their Fifth Amendment privileges against self-incrimination,<sup>88</sup> were compelled by court order to testify before the Congressional Select Committees that were investigating Iran-Contra. North and Poindexter received use immunity from the court in return for their compelled testimony.<sup>89</sup>

When Walsh's office subsequently obtained criminal indictments against them, North and Poindexter aggressively litigated claims that the government had made prohibited use of the immunized testimony through the indicting grand jury, the prosecutors, and their trial evidence. The trial courts ultimately found no merit to these claims. North and Poindexter were convicted by juries and sentenced.<sup>90</sup> However, the immunized testimony argument was successful on appeal.<sup>91</sup> In each case Walsh then petitioned for Supreme Court

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87. When Independent Counsel Gerald Gallinghouse, for example, had to defend the constitutionality of his appointment in litigation brought by his named subject, former Carter reelection campaign chairman Timothy Kraft, Attorney General Benjamin Civiletti denied Gallinghouse's request for legal representation by the Department and also his request for funds to hire private counsel. See HARRIGER, *supra* note 20, at 145.

The Department of Justice has, at independent counsel request, filed amicus briefs supporting the independent counsel's position in a number of matters. For example, in Independent Counsel Starr's first criminal prosecution of then Arkansas Governor Jim Guy Tucker, the Department filed an amicus brief supporting Starr's position on the "relatedness" of Tucker's conduct to matters within Starr's primary areas of jurisdiction. See Amicus Curiae Brief of the United States Department of Justice, *United States v. Tucker* (8th Cir.) (No. 95-3268) (filed Oct. 12, 1995).

88. See U.S. CONST. amend. V.

89. See *United States v. Poindexter*, 698 F. Supp. 300, 302 (D.C. Cir. 1988).

90. See *United States v. Poindexter*, 951 F.2d 369 (D.C. Cir. 1991); *United States v. North*, 910 F.2d 843 (D.C. Cir. 1990).

91. *Id.*

review. Career prosecutors in the Department of Justice viewed the appellate opinions as unprecedented and so sweeping that they threatened the Department's institutional interests in preserving the conceptual distinction between use immunity and transactional immunity. Although Walsh, through special counsel, negotiated with the Solicitor General to obtain the Department's support for his petitions seeking Supreme Court review,<sup>92</sup> the Department ultimately decided to sit those cases out. The Supreme Court declined to hear either case.<sup>93</sup> North and Poindexter were legally victorious. They arguably defeated a litigation adversary that was less of "the United States" than the law means for an independent counsel to command.<sup>94</sup>

A related point is the filing of amicus briefs. In litigation that independent counsel were conducting on behalf of the United States, Attorneys General filed amicus briefs taking legal positions that opposed the positions advocated by independent counsel. Unlike the exercise of traditional Department of Justice powers, these amicus brief filings are explicitly authorized by the independent counsel law.<sup>95</sup> This authorization suggests that Congress and the President, in enacting the law, probably did not contemplate that independent counsel would otherwise direct appellate litigation practices of the Solicitor General's office. It is hard to imagine how the law could be interpreted to allow both independent counsel and the Attorney General, each and separately, to direct the Solicitor General or any other appellate specialist within the Department to represent opposing legal positions in the same matter. My point is a broader and simpler one. The independent counsel law, by authorizing the Attorney General and the Solicitor General to file amicus briefs, may undercut the independent counsel's litigation

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92. Walsh's special lead counsel in each appeal to the Supreme Court was Andrew Frey of Mayer, Brown & Platt, formerly a senior career attorney in the Office of the Solicitor General. The Solicitor General who declined to support Walsh and Frey was former Judge Kenneth W. Starr. In 1997 Frey was the private lead attorney who was hired with Department of Justice approval to represent the White House in litigation against Independent Counsel Starr over the grand jury subpoena for White House attorneys' notes. Ironically, but not surprisingly, when the White House sought Supreme Court review of the court of appeals order enforcing the subpoena, the Acting Solicitor General (the Department) filed an amicus brief supporting Frey (the White House) against Starr (the independent counsel).

93. *United States v. North*, 500 U.S. 941 (1991); *United States v. Poindexter*, 506 U.S. 1021 (1992).

94. Cf. WALSH, FIREWALL, *supra* note 83, at 282 ("Having lacked the Solicitor General's support, I had entertained only a slim hope that the Supreme Court would review the [*North*] case.").

95. 28 U.S.C. § 597(b).

prospects and his broader credibility with both the courts and the general public.

Two examples demonstrate the amicus brief problem. In Iran-Contra, the Department of Justice, without first consulting Independent Counsel Walsh or giving any advance notice to his office, filed an amicus brief shortly before Oliver North's trial.<sup>96</sup> The brief supported North's pretrial motion to dismiss the lead count of the indictment against him, which was the allegation of an overarching Iran-Contra operational conspiracy. Walsh's office had to prepare and file a quick response to the Department's brief from the blind side. Although Judge Gerhard A. Gesell, the trial judge, promptly found the Department's amicus brief and North's motion to be legally baseless and sustained the validity of the charge,<sup>97</sup> the amicus brief still had effect. It contributed to a public relations campaign against the propriety of the conspiracy charge. It also set up Attorney General Thornburgh's decision a few weeks later to withhold the classified information that would have permitted the conspiracy to be tried. This decision ultimately forced Walsh to scuttle the conspiracy charges brought against each of the first five Iran-Contra defendants.

The Department of Justice also has filed at least one known amicus brief opposing Independent Counsel Starr in pre-1998 Whitewater litigation. In 1996 and 1997, Independent Counsel Starr's efforts to enforce the grand jury subpoena for White House attorney notes of meetings with the First Lady culminated in the White House's unsuccessful petition for Supreme Court review.<sup>98</sup> Starr's office reportedly negotiated with the Department of Justice, seeking—as opposed to ordering—its support. The Department instead filed an amicus brief supporting the White House's petition.<sup>99</sup> Although at least six Supreme Court Justices were not persuaded,<sup>100</sup> the Department's brief contributed to negative reporting and public perception of the merits of Starr's ongoing work.

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Each of these examples—the Department of Justice providing legal advice and representation to other government components and

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96. See WALSH, FIREWALL, *supra* note 83, at 173.

97. See *United States v. North*, 708 F. Supp. 372, 373 (D.C. Cir. 1988).

98. See *Office of the President v. Office of Independent Counsel*, 117 S. Ct. 2482 (1997) (denying petition for writ of certiorari).

99. See Brief Amicus Curiae for the United States, Acting Through the Attorney General, Supporting Certiorari, *Office of the President v. Office of Independent Counsel*, 117 S. Ct. 2482 (1997) (No. 96-1783).

100. See 117 S. Ct. 2482.

employees; the Department controlling classified information; and the Department withholding Solicitor General support in litigation—illustrates how the Department and independent counsel come into actual conflict. It is important to note, however—both to give Attorneys General the benefit of the doubt, and as matters of likely fact—that the Attorneys General and other senior Department personnel who directed such activities almost surely did so based on their principled views of the legitimate, ongoing legal interests of the permanent United States government.

The Attorney General and the Department of Justice are assigned, as a permanent matter, to safeguard the nation's legal interests, which cover a myriad of situations and concerns beyond criminal law enforcement. An independent counsel, by contrast, is assigned only to investigate and, if necessary, to prosecute criminal activity in a defined area of jurisdiction. The Independent Counsel Statute responds to the danger that political or personal connections to the alleged violators could cause an Attorney General to care too little about law enforcement in particular cases. But it also creates a danger that an independent counsel, caring too much or only about his particular cases, may disregard the broader legal interests that the Attorney General ordinarily would represent.

#### IV. ENHANCING, OR JUST RECOGNIZING, INDEPENDENT COUNSEL AUTHORITY OVER THE DEPARTMENT OF JUSTICE

Recognizing the legitimate interests of both Attorneys General and independent counsel, it is nevertheless clear that the power and effectiveness of independent counsel can be diminished by Attorneys General. Even without explicit legal authorization, Attorneys General have directed the Department of Justice to continue to exercise in independent counsel cases some of the prosecutorial and other prerogatives that it would possess in ordinary federal cases. The result is independent counsel who are, beneath the trappings of their title and the munificence of their resources, much less powerful than the Department of Justice would be had it not been required, based on the statute's conflict of interest principles, to relinquish these investigations in the first place. And this reality is problematic to the extent that we believe in the policy judgment of the statute itself: in certain circumstances, the Department of Justice should be *replaced* by an independent investigator. The solution to this problem would be to empower independent counsel vis-à-vis the Attorney General.

The cleanest way to empower independent counsel would be through statutory amendments that make their enhanced powers explicit. For example, the independent counsel law could be changed to state that the



Attorney General's and the Department of Justice's powers under the Classified Information Procedures Act belong to independent counsel acting within their prosecutorial jurisdictions. The law could also bar the Attorney General, the Solicitor General, and the Department from making presentations as *amicus curiae* in independent counsel cases, proceedings, and appeals, unless the independent counsel requested their participation. These changes would not be possible, of course, without the support of Congress and the President. Unsuccessful attempts to strengthen the independent counsel law in this fashion would also, by negative implication, support views that the current version of the law does not already give this power to independent counsel and, more importantly, it would embody a clear political judgment that the law should not transfer such power to an independent counsel.

Another path to the same empowerment end, but one that is more direct and immediate, is for an independent counsel to read the current statute literally. A literal reading would be in line with the law's broad and stated purpose of replacing the Attorney General and the Department of Justice with an independent investigator and prosecutor in certain conflict of interest cases. An independent counsel could assert to an Attorney General—ideally in private and early in the independent counsel's tenure, when the issues are still somewhat theoretical—the view that the appointment of independent counsel brought with it the *full* prosecutorial power and independence that is explicit in the statute's general provisions. This independent counsel could, in a case with national security implications, decide after consulting with and receiving input from relevant national security experts whether classified information should be used to further law enforcement objectives. He could tell the Attorney General that Department of Justice personnel up to and including the Office of the Solicitor General will be the independent counsel's to deploy, with care and with wisdom informed by their expert legal input, in litigation when he represents the United States. In short, independent counsel could seek to enlist the Department and perhaps even the Attorney General while making clear that the alternative to cooperation is the legal mandate—the law's requirement—that the Attorney General and the Department of Justice stay out of the independent counsel's way.

In all likelihood, however, this empowered (or at least emboldened) independent counsel and the disempowered (or at least disconcerted) Attorney General would be heading for a showdown.

## V. PREDICTING THE CONSEQUENCES OF EMPOWERING INDEPENDENT COUNSEL

The experience of any independent counsel investigation, like the experience of an ordinary state or federal criminal investigation, will be defined in large part by its precise facts. These include the identities of the investigation's subjects and targets, the nature of the allegations that are investigated, the investigative methods that are employed, the kinds of evidence that develop, and the ultimate outcomes, including any indictments, trials, convictions, appeals, and other litigations that ensue. Whatever the factual context, however, an independent counsel who takes the statutory scheme literally or reads it expansively is likely to provoke a range of reactions from the Attorney General and the executive branch.

### A. *The Attorney General's Interactions with an Empowered Independent Counsel*

To any Attorney General, the existence of the independent counsel law, with its requirement that the Attorney General ask a special court to appoint a lawyer outside the structure of the Department of Justice to do what otherwise would be its work, is, in part, an insult. The independent counsel law was first enacted (and subsequently re-enacted on three occasions) because of the general belief, at least in Congress, that Attorneys General and the Department of Justice could not always be trusted to conduct these criminal investigations with integrity and credibility. The statute embodies public mistrust in the Office of the Attorney General, the offices of other Department of Justice political appointees, and the positions of the career prosecutors and law enforcement agents who actually conduct federal criminal investigations.<sup>101</sup> Thus, any individual of integrity and professionalism who happens to occupy one of those statutorily mistrusted positions has some basis to feel, if only at a subconscious level, irked at this "you can't be trusted" message. An actual independent counsel, who comes to his federal law enforcement assignment as the embodiment of this mistrust, is the personification of the insult. All of this, we may assume, makes a typical Attorney General reluctant to pull the trigger that will make that independent counsel happen. If the independent counsel were understood to come to the job fully empowered and having assumed the full range of power and legal authority that the Attorney General

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101. See HARRIGER, *supra* note 20, at 144.

ordinarily would possess, any natural reluctance to pull the trigger would be all the greater.

Greater reluctance could be, at least to the extent that it stops short of ceasing to follow the law, a salutary development. Some decisions by Attorneys General to request an independent counsel appointment have been criticized for being too reflexive, or for overstating conflict of interest concerns that led to various independent counsel appointments.<sup>102</sup> Attorneys General themselves have, as investigations were ongoing, criticized independent counsel for investigating and prosecuting activities that were within or at least related to the jurisdictions they received from the court based upon Attorney General requests.<sup>103</sup> If any of these criticisms are valid, a clearer Attorney General-level understanding that an independent counsel appointment disables the Department of Justice from almost any related activity could be educational and sobering. In some contexts it might lead Attorneys General to make fewer discretionary as opposed to mandatory requests for independent counsel appointments. From the perspective of critics and skeptics regarding the value of independent counsel investigations, this deterrence is desirable.

Some independent counsel appointments are, of course, virtually required. When an Attorney General receives credible allegations of criminal conduct by a person who is covered by the statute and those allegations cannot be fully investigated within the statute's time limit for preliminary investigations, the Attorney General is required to ask the court to appoint an independent counsel. In these instances the hope would be that an Attorney General who understood and adjusted

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102. See, e.g., Julie O'Sullivan, *The Independent Counsel Statute: Bad Law, Bad Policy*, 33 AM. CRIM. L. REV. 463, 479 (1996).

103. See, e.g., Sam Vincent Meddis, *Barr Rips into Iran-Contra Cases; Prosecutions Called "Unfair,"* USA TODAY, Dec. 17, 1992, at A2 (reporting Attorney General William Barr's claims in an interview he gave following a federal jury verdict convicting former CIA official Clair George of lying to Congress, that

[p]eople in this Iran-contra matter have been prosecuted for the kind of conduct that would not have been considered criminal or prosecutable by the Department of Justice, applying standards that we have applied for decades to every citizen . . . . I'm concerned about a number . . . of the prosecutive theories that were trotted out on Clair George . . . . It didn't appear to me [that George's character, past record and the seriousness of the offense] were given much weight . . . .)

*Id.* at A2; James Rowley, *Prosecutors: Attorney General Could be Prejudicing Weinberger Jurors*, ASSOCIATED PRESS, Dec. 18, 1992, available on 1992 WL 5330379 (reporting the lead prosecutor's statement in court the next day: "I would have thought that the attorney general of the United States . . . would be concerned about the effect he might have as the nation's top law enforcement officer . . . on a jury selected 2 1/2 weeks after he gave an extensive interview.") (ellipses in original).

to the Department's relative powerlessness vis-à-vis that independent counsel within his area of jurisdiction might respond to the inevitable by making genuine efforts to communicate with, and thus to engage constructively, the independent counsel during the course of his work. The scope and quality of this relationship would be in the discretion of the independent counsel. Some independent counsel will never "hit it off" with some Attorneys General because of who they are (for example, a close colleague of the independent counsel's subject), because of what and where they have been both professionally and personally, and because of other facts that may be unique to an investigation. But other independent counsel may try to develop a pattern of contacts and a level of trust in Attorneys General, especially if it becomes better understood that the independent counsel has the upper or only hand with regard to the conduct of his investigation.

*B. Presidential Reactions to an Empowered Independent Counsel*

From the perspective of an independent counsel, his freedom from Department of Justice interference and his working relationship with the Attorney General are a major, but not the only, important aspect of his interactions with the permanent institutions of the United States government. Presidential and White House attitudes and conduct can affect the independent counsel's work either directly or through contacts with those who are affected by the independent counsel investigation. An understanding in the White House that an independent counsel is, at the expense of the Attorney General and the Department of Justice, fully empowered in his investigative sphere will produce greater hostility to the idea of independent counsel and to the work of any independent counsel who is appointed to investigate executive branch personnel.

Presidential and White House mistrust will focus in the first instance on the Attorney General. At least since the Independent Counsel Statute was re-enacted in 1994, White House ire has been the standard response whenever Attorney General Reno has triggered the court appointment of an independent counsel.<sup>104</sup> If it becomes understood (merely through theoretical discussions or concretely through independent counsel assertions of power that go unchallenged by Attorneys General or that are upheld by the courts) that an independent counsel fully supplants the traditional Department of Justice role and functions

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104. See generally Peter Baker & John F. Harris, *Clinton Asks Reno to Stay as Attorney General*, WASH. POST, Dec. 13, 1996, at A1 ("Clinton waited more than five weeks after his re-election to guarantee Reno's job security, a drawn-out ordeal many in Washington interpreted as a sign of his unhappiness with her decision to seek four [sic] independent counsel investigations into his administration during her tenure.").

as they relate to his investigative work—if the White House comes to believe, in other words, that the independent counsel “gorilla” weighs the proverbial eight hundred pounds—White House mistrust of Attorneys General may grow. “Why did you do this to us?” will become, with more anguish, “Why did you do *this* to us?”

Greater separation of the Attorney General from the White House may be desirable from the perspective of those who think that “White House” political concerns have come to play too great a role in defining the work of Attorneys General and the Department of Justice. However, it will be a negative development to the extent that it causes executive branch personnel, who fear that their action could lead to an independent counsel appointment, not to inform the Department of Justice about, or to cooperate with investigations into, possible crimes by colleagues. It also could generally harm the pattern of contacts and the quality of communication between the White House and the Department of Justice, which are essential to the executive branch’s orderly conduct of its public business.

Less significant, but still predictable, would be the effect of independent counsel “empowerment” on presidential and White House attitudes toward the independent counsel himself. Although some Presidents and other executive branch personnel in the past requested the appointments of independent counsel to investigate them,<sup>105</sup> these “requests” were formalities that acquiesced in and tried to shape to the requesters’ benefits the politics and the public perceptions of matters that were already controversial. No one, it seems fair to say, has genuinely desired

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105. See, e.g., Ronald J. Ostrow & Robert L. Jackson, *Deaver Calls for Inquiry by Independent Counsel; Conflict-of-Interest Charge Prompts Move by Ex-Reagan Aide*, L.A. TIMES, Apr. 29, 1986, at 1 (noting that Michael “Deaver’s tactic of calling for an investigation himself parallels that used by [Edwin] Meese [in 1984] and former Labor Secretary Raymond J. Donovan when pressure was building for independent counsel to investigate their financial dealings”); Marcus Stern, *Meese Asks Full Inquiry; Calls for Special Prosecutor in Bid to Refute Allegations*, SAN DIEGO UNION & TRIB., Mar. 23, 1984, at A1 (reporting Attorney General-designate Meese’s request for appointment of an independent counsel and the Department of Justice’s commencement, prior to the Meese request, of an investigation into his failure to report a \$15,000 loan on his required federal financial disclosure forms); *Donovan Denies Allegations, Calls for Special Prosecutor*, DOW JONES NEWS SERV., Dec. 22, 1981; cf. Jeffrey H. Birnbaum, *Clinton Seeks Special Counsel on Whitewater; President is Backing Down in an Effort to Protect the Rest of His Agenda*, WALL ST. J., Jan. 13, 1994, at A3 (reporting President Clinton’s request, in the period between the 1987 Independent Counsel Statute’s expiration and its re-enactment later in 1994, that Attorney General Reno appoint a special prosecutor within the Department of Justice to investigate Whitewater allegations against the President); JAMES B. STEWART, BLOOD SPORT: THE PRESIDENT AND HIS ADVERSARIES 368-76 (1996) (chronicling the deliberations leading up to President Clinton’s January 1994 decision to ask the Attorney General to appoint a Whitewater special prosecutor).

or grown to like his or her personal independent counsel. To these White House eyes, an empowered independent counsel will look worse than one that can be constrained in various ways by the Department of Justice, even though these eyes already see the status quo independent counsel as more than bad enough.

If tension and mistrust regarding an empowered independent counsel do come to a head during an investigation,<sup>106</sup> it will be through the safety valve that is explicitly provided in the statute itself: the Attorney General's power to fire an independent counsel. The law provides that an independent counsel may be removed from office for "good cause."<sup>107</sup> The law does not define what constitutes "good cause,"<sup>108</sup> and in the more than twenty independent counsel investigations to date, no Attorney General has addressed the scope of, much less exercised, this power.<sup>109</sup> No independent counsel, however, has claimed or attempted to exercise aggressively the full range of legal authority that arguably is granted under the current statute. If one did, and particularly if one did so in the context of investigating the President himself, that independent counsel could face dismissal.

### C. *The Value of Pushing Showdowns Up into the Light*

An independent counsel who exercises the full range of power and authority that the law provides now or in a future iteration may not automatically face dismissal. This independent counsel thus may obtain indictments and criminal convictions or acquittals in the ordinary course of his work, and he may have significant investigative findings to report to the appointing court at the natural conclusion of that work. In the alternative, the outcome, at least in the presidential-level investigations that are closest to the core scenario that led to enactment of the independent counsel law, may be that the independent counsel is fired by the Attorney General for conduct she regards as good cause for

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106. Opposition to the notion of empowered independent counsel also could come to a head in the political process. Congress and the President could enact amendments that would narrow the powers that the independent counsel law currently allocates to these special investigators and prosecutors. Congress also could choose not to reenact the statute when it reaches its five-year sunset provision in June 1999. Congress and the President also could reenact it at that time in narrower form.

107. 28 U.S.C. § 596(a)(1). The Attorney General may also remove an independent counsel for "physical or mental disability" or for "any other condition that substantially impairs the performance of such independent counsel's duties." *Id.*

108. *Id.* Among the many interesting questions regarding this provision that remain entirely open is whether a direct presidential order to fire an independent counsel constitutes good cause for an Attorney General to do so.

109. See generally O'Sullivan, *supra* note 102, at 495.

dismissal. A truly independent counsel may, in other words, provoke a showdown with the Attorney General, a showdown that the Attorney General is legally empowered to win.<sup>110</sup>

Although an Attorney General-independent counsel showdown is not to be desired, it would produce general benefits. At the most basic level, it would inform the public that the matters at issue between these two experienced, professional law enforcement officials were of great moment.

A showdown would also signal the political branches. It would tell the executive and legislative branches that a fundamental moment of crisis has been reached much more clearly than the back-and-forth of litigation, turf, power, judgment, public relations, and privilege invocation disputes between independent counsel and the regular executive branch currently do. For Congress, in cases involving the conduct of senior government officials, this moment of crisis—the dismissal of the independent counsel and the resulting absence of an independent counsel to deal with the alleged official misconduct under investigation—will mean the need to decide whether to proceed with the constitutionally-prescribed remedy of impeachment and conviction based on all the legal and political considerations that necessarily are part of the decision. For those who remain skeptical of the constitutionality of the independent counsel law, this path of an independent counsel investigation aborted by his own dismissal travels from Article II (the Attorney General's power over criminal prosecution, a core executive function), through the dubious terrain of an independent counsel, and back to Article I (the congressional power to impeach and convict).<sup>111</sup> For those whose concerns about independent counsel are not constitutional but pragmatic, the dismissed independent counsel will at least have been less expensive and long-lived than he could have been.

## VI. CONCLUSION: FROM WHENCE WE CAME (YES, WATERGATE)

In many respects the Independent Counsel Statute is the result of a post-Watergate legislative effort to ensure that what President Nixon did to Archibald Cox and the Watergate Special Prosecution Force in October 1973—not a massacre, but an unsuccessful *attempted* massacre—can never happen again. The statute is an ongoing effort to ensure

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110. The statute does give a dismissed independent counsel standing to challenge that action in court, *see* 28 U.S.C. § 596(a)(3), but an Attorney General who explained the grounds for dismissal as the independent counsel's "failure to follow Department of Justice policy" might well prevail. It also is far from clear that a court could constitutionally reinstate an independent counsel who had been fired by an Attorney General.

111. U.S. CONST. art. I & II.

the presence of a prosecutor who will be both in power and ultimately in public credibility akin to Professor Cox in his service from May through October 1973.

What we have learned from almost twenty years of experience with independent counsel appointed under the various versions of the statute is that the permanent government can get in the way of this effort. Statutory silence, statutory ambiguity, seemingly minor statutory exceptions, and restraint by independent counsel have combined to permit Attorneys General and the Department of Justice to undercut in myriad and unexpected ways the investigative and prosecutorial force of an independent counsel.<sup>112</sup> Experience shows us that the statute, notwithstanding its clear concept and its sweeping transfer of power, has not succeeded in transferring the Attorney General's full prosecutorial power to the independent counsel who supposedly has been assigned to take the Attorney General's place in a particular high-level prosecution in the interests of promoting public trust in law enforcement.

What the statute, or at least today's restrained interpretations of it, may be overlooking is the full lesson of the Watergate experience. In that situation, the special prosecutor system worked well not simply because independent persons from outside the Nixon Administration were brought in to investigate and were given the general powers they needed to do the job. It worked because Attorneys General stayed out of the special prosecutors' way and refrained from interfering with the investigations and litigation.<sup>113</sup>

Attorney General restraint regarding, and, to go further, Attorney General communication with and trust in an outsider who has supplanted the Attorney General's institutional role as federal investigator and prosecutor, are matters of character and judgment. From the very beginning of the spring 1973 Senate hearings on Elliot Richardson's nomination to be Attorney General,<sup>114</sup> the power and independence of the Watergate special prosecutor were defined by Richardson's personal commitment to ensuring the special prosecutor's power and independence. In a sense, Congress and President Carter attempted through the

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112. The original nomenclature of the statute—"special prosecutor"—communicates the point: an independent counsel clearly is special, but he cannot fully be the *prosecutor* that the statute envisions so long as the Attorney General continues to exercise various powers that can complicate, if not frustrate, his efforts to prosecute.

113. Saturday, October 20, 1973, was, of course, the most notable exception to this general record of restraint.

114. *Nomination of Elliot L. Richardson to be Attorney General: Hearings Before the Senate Judiciary Comm.*, 93d Cong. 1-287 (1973).



original Ethics in Government Act of 1978<sup>115</sup> to enact a system that would produce a special prosecutor like Archibald Cox. What they may not have understood as clearly, however, was that the other element of the successful Watergate formula was Attorney General Richardson.<sup>116</sup> An empowered independent counsel could be a return to the Cox-Richardson model if the law is so understood in the Office of the Attorney General. Independent counsel would then succeed or fail, behaving professionally or irresponsibly, on their own. This is where the independent counsel law meant to be from its inception.

Empowering independent counsel along the lines of the Cox-Richardson model also would risk triggering, in the highest level cases, a Nixon-Bork-Cox-type ending: a showdown between a President, acting through

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115. Pub. L. 95-521, 92 Stat. 1824 (1978) (codified in scattered sections of 2 U.S.C., 5 U.S.C. app. 4, 28 U.S.C.).

116. Professor Cox wrote later that during 1973 he and Richardson "enjoyed an easy informal relationship, each confident of the basic integrity of the other, even when his place in the Cabinet and mine as Special Prosecutor came into opposition." ARCHIBALD COX, *THE COURT AND THE CONSTITUTION* 17 (1987); *accord id.* at 3 (describing Richardson as "a man of great experience and unimpeachable integrity.").

Cox's biographer also recounts in vivid detail the bond of trust and pattern of confidential communication that Cox and Richardson shared during the Watergate investigation. See KEN GORMLEY, *ARCHIBALD COX: CONSCIENCE OF A NATION* 237-38 (1997) (describing Richardson and Cox's discussions regarding the scope of his jurisdiction as Watergate special prosecutor); *id.* at 294 (describing Richardson's stated neutrality in disputes between Cox and President Nixon); *id.* at 295 ("Richardson nevertheless engaged in loose, informal chats and power brokering with his old labor law professor . . ."); *id.* at 296 ("Richardson would tell the president's lawyers, 'Well, Cox isn't a demon. He is a good man. Why don't you call him up and talk to him about it?'); *id.* at 297 ("Each time a complaint or worry reached the attorney general's office from the White House, Elliott would call Archie or invite him over to the Justice Department and lay out the matter forthrightly. Cox observed several things: Richardson never hid the ball; he seemed to trust Cox; but at the same time, the attorney general remained consistently loyal to the president's position."); *id.* at 313 ("Cox saw his former student a good bit during [October 1973]."); *id.* at 318-20 (describing "their old-fashioned approach and all of its 'corny' notions of trust."); *id.* at 377 (describing Cox's 1993 reflections on "how different things might have been if someone other than Elliot Richardson was attorney general, someone whom I could not deal with on an absolute level of trust. I'm not sure things would have worked out the same at all.>").

Richardson's accounts of his relationship with Cox are in full agreement. See generally Elliot Richardson, *Foreword* to *id.* at ix-xii; ELLIOT RICHARDSON, *THE CREATIVE BALANCE: GOVERNMENT, POLITICS AND THE INDIVIDUAL IN AMERICA'S THIRD CENTURY* 35-47 (1976); cf. ELLIOT RICHARDSON, *REFLECTIONS OF A RADICAL MODERATE* 17 (1996) (recounting his 1973 advice to Nixon White House Counsel Fred Buzhardt: "You ought . . . to tell Archie Cox to send over a truck and load it up with all the material he and his staff could possible want.' In that event, if anything damaging was found, Nixon could issue a public apology and couple it with a convincing expression of penitence. The American public, I thought, would be more than likely to forgive and forget.>").

his Attorney General's power to dismiss, and an independent counsel. If that happens, the political process will need to determine who was right and who did wrong. Watergate itself demonstrates that the political process can assess and respond appropriately—all the way to voting articles of impeachment if need be—to an improper executive branch effort to terminate an independent counsel's investigation.

In the meantime, to facilitate the ordinary governmental processes of the United States, we should recognize, and not with despair, that our current statutory arrangement may already make independent counsel fully *the* United States.

