THE WHITE HOUSE
WASHINGTON

95 JUL 6 P6:00

# OFFICE OF THE STAFF SECRETARY

## Fax Transmittal Sheet

**TO:** Secretary Riley

**Fax Number:** 401 2098 **Phone Number:** 401 6143

**FROM:** Todd Stern

**SUBJECT:** POTUS note

**DATE:** 7/6/95

**NUMBER OF PAGES (including cover sheet):** 4

**MESSAGE:**

"I like 1 and 3
3 looks better,
1 makes the point
arguably
more consistent w/Georgetown
University speech
BC"

If all pages are not received, please call 202/456-2702

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THE WHITE HOUSE

WASHINGTON

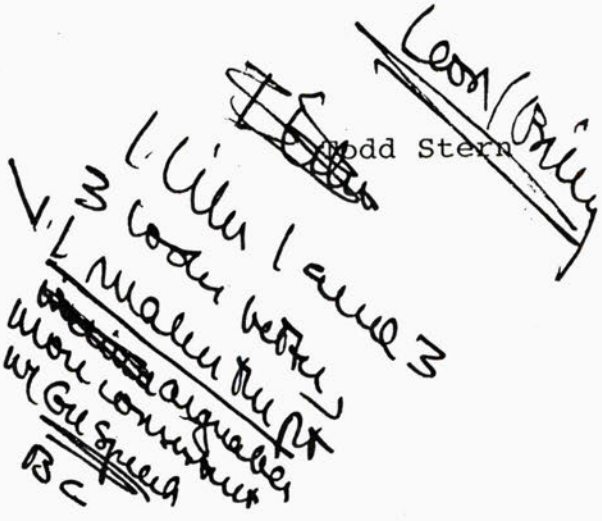
THE PRESIDENT HAS SEEN

July 5, 1995 7-6-95

MR. PRESIDENT:

This memo on the July 12th address was going to be discussed at Leon's scheduling meeting tomorrow, but I understand from Billy that you wanted to see it tonight.

Todd Stern



THE PRESIDENT HAS SEEN
7-6-95

THE WHITE HOUSE

WASHINGTON

July 3, 1995 95 JUL 3 P6:06

MEMORANDUM FOR THE PRESIDENT

FROM: SECRETARY RICHARD W. RILEY
MELANNE VERVEER
STEPHEN NEUWIRTH
JEREMY BEN-AMI
JULIA MOFFETT

SUBJECT: VENUE FOR JULY 12 PRESIDENTIAL ADDRESS ON RELIGION AND RELIGIOUS LIBERTY

On July 12, you are scheduled to give a major address setting forth your vision of the role of religion and religious liberty in the United States; expressing your understanding of the frustration many Americans feel about apparent constraints placed on religious expression in our schools and other public forums; explaining that many Americans may not understand the extent to which the First Amendment actually does permit religious expression in our schools; and setting forth your opposition to altering the First Amendment, which has served as the basis for liberty, freedom of expression and protection of diversity in this nation for over 200 years.

In connection with the address, you will also be able to issue a directive to the Secretary of Education and the Attorney General to disseminate information to school districts, administrators, teachers, parents and students about the extent to which the First Amendment and the Equal Access Act (and the Religious Freedom Restoration Act) permit religious expression in schools. The Education Department could make information available by the first day of the coming school year.

As you recently discussed with the Vice President, Secretary Riley and others in the Oval Office, this address will provide an opportunity for you to establish leadership on these issues and preempt Republican plans to introduce proposed amendment language in the near future (most likely, we have been informed, during July).

## VENUE OPTIONS FOR JULY 12 ADDRESS

### 1) JAMES MADISON HIGH SCHOOL, VIENNA, VIRGINIA

**Pros:** Opportunity to focus attention on religious expression in schools, an issue people understand and care about; name and location associated with religious liberty; supports emphasis on Republican efforts to bring back school prayer; many school administrators, teachers, parents and students are unaware of the extent to which the First Amendment permits religious expression in schools; natural link to guidance that the Secretary of Education will disseminate pursuant to Presidential directive; school is in summer session beginning July 6; **this school has a substantial comparative religion course and an innovative course entitled "Combating Intolerance";** no travel required (within 50 miles).

**Cons:** Too much focus on schools, rather than religious freedom and expression generally; not a majestic site; President has visited schools on other occasions; no appropriate outdoor location, need to use auditorium (seats 500).

### 2) JEFFERSON READING ROOM, LIBRARY OF CONGRESS (not preferred)

**Pros:** Named for Thomas Jefferson; no travel required.

**Cons:** Using Congressional facility for major Presidential event; circular room with reading tables; indoors; although 300 guests possible, would likely require pool press only.

### 3) MONTPELIER (James Madison's home, in Virginia near Monticello)

**Pros:** Unparalleled symbolic importance; Madison was the central figure in adoption of the First Amendment and the Virginia religious liberty statute; Madison's vision was similar to President Clinton's; Madison is the champion of religious liberty for people across the political spectrum; opportunity to introduce Madison as a central figure in this debate; beautiful outdoor setting for 300 people; new and interesting site for reporters to visit; choice of site reflects importance of the speech.

**Cons:** Travel; Madison less known than Jefferson; less majestic than Monticello; no link to schools.

### 4) MONTICELLO

**Pros:** Americans identify Jefferson with religious liberty; the press and the public will know that this is an important speech directed at all Americans; this is a majestic setting appropriate for this speech; Jefferson's grave stone mentions the Virginia religious liberty statute; recalls start of the Clinton Presidency.

**Cons:** Requires travel; Jefferson, unlike Madison, considered by some to have held anti-religious views; could be viewed as political, in light of Clinton Inaugural.

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THE PRESIDENT HAS SEEN
7/6/95

# FAA's footdragging on fire retardants endangers lives

**OUR VIEW** **Upgraded and new planes are supposed to contain flame-resistant materials. But there's no deadline. Why?**

In everyday life, seconds rarely make a life-and-death difference. In a burning aircraft, they can and do.

The Federal Aviation Administration readily acknowledges this. Yet reporting by USA TODAY's Taylor Buckley finds that in one critical area, the agency is reluctant to force airlines to make the changes that could improve the chances of fliers trapped in burning planes.

In the 1980s, the FAA's own tests proved that post-crash fires do not spread as quickly if cabin sidewalls, ceilings, overhead bins and partitions are made from materials that not only are self-extinguishing but that also limit heat and smoke. According to the FAA, use of such materials could buy crash survivors a precious 17 extra seconds to escape fire, smoke and toxic gases — a big chunk of the 60-90 seconds experts say you have to escape a burning plane.

The FAA estimated those seconds could save nine to 16 lives each year. So it opted to toughen cabin flammability standards.

Smart recommendation.

The FAA even mandated that planes manufactured after Aug. 19, 1990, be equipped only with safer cabin materials.

Unfortunately, the FAA's logic stopped there. It set no mandatory deadline for retrofitting more than 4,000 older planes.

The result should have been predictable: Only 15% of planes flying today meet the standards — far short of the 85% compliance FAA expected by 2000. The FAA now hopes, at best, for 50% compliance by 1999.

Even that's a pie-in-the-sky projection. Contrary to the FAA's expectations, airlines aren't replacing interiors when older planes are taken out of service for routine maintenance. A 1993 General Accounting Office report determined that cabin components not meeting flammability standards usually are refurbished and reinstalled rather than replaced.

The FAA says pushing refurbishing isn't worth the price, which it pegs at $3 billion.

Try selling that to the survivors of those nine to 16 passengers who could die each year because retrofitting isn't mandatory. Or to survivors of 140 passengers and crew who died in fires between 1985 and 1991.

The FAA argues that safety in post-crash fires is improving. But a single crash of a crowded airliner could turn those statistics upside down. And even if the cost is passed on to the consumers, as it no doubt would be, most of the 1.3 million daily passengers would probably opt for safety over savings.

After looking at this issue, the GAO concluded that FAA should, at least, take a second look at a mandatory deadline. The National Transportation Safety Board went further, urging the FAA to impose one.

A deadline is needed, particularly now that airlines are flying older planes longer (Cover story, 1B).

Both the FAA and the airlines know how to help passengers on burning planes. They should get on with it.

# Safety program is a success

**OPPOSING VIEW** **Deaths from fire have been reduced dramatically. Our goal is zero — and we'll reach it.**

By David R. Hinson

In calling for a firm date to bring older aircraft up to the latest fire safety standards, USA TODAY overlooks a critical point. This is not an unsafe situation that the Federal Aviation Administration is trying to correct. Rather, we are working to make a safe situation even safer — and we are succeeding.

Almost 20 years ago, the FAA embarked on an aggressive program to protect airplane interiors against fire and to improve emergency evacuation. That effort resulted in several safety improvements, one of which is the requirement for better cabin materials in all new designs and in older airplanes when they receive new interiors.

In the 1970s, an average of 33 people lost their lives annually in post-crash fires. In the 1980s, after FAA's fire-safety enhancements were implemented, that rate dropped by more than 50%. So far in the 1990s, the average is less than six per year.

But even one death is too many. Our goal is zero, and we're moving steadily toward that goal: There have been no fire-related fatalities since February 1991.

The new cabin interior materials are not intended to prevent fires. They are intended to slow down the spread of fire and give passengers time to escape.

When the ValuJet engine caught fire last month in Atlanta, the concept worked perfectly. Everyone got out safely. The materials in the airplane performed well; in fact, the interior sidewalls of the ValuJet airplane already meet the new standards.

Although we're striving for zero accidents and zero fatalities, the FAA is bound — by law — to weigh the costs of any new regulations against the level of safety achieved. Our cost estimate for retrofitting the U.S. commercial fleet with the new fire-resistant materials is about $3 billion.

Inevitably, the additional costs would be passed on to users, making air travel more expensive. And spending $3 billion on old aircraft would leave the airlines that much less to spend on new equipment and other safety measures.

In a time when the aviation community has limited resources — and I include the traveling public in that community — it makes little sense to mandate a $3 billion expense to address a problem we are already solving.

*David R. Hinson heads the Federal Aviation Administration.*

USA TODAY · WEDNESDAY, JULY 5, 1995

THE PRESIDENT HAS SEEN
7/6/95

THE WHITE HOUSE

WASHINGTON

July 5, 1995 95 JUL 5 P6:03

PHONE CALL TO GOVERNOR CHILES

TO: Governor Lawton Chiles
(904)681-4495

DATE: July 5 or July 6.

RECOMMENDED BY: Marcia L. Hale

PURPOSE: To wish the Governor well, as he was admitted to the hospital this morning after awakening with symptoms of decreased blood flow to the brain.

BACKGROUND: Governor Chiles was admitted to Tallahassee Memorial Medical Center early this morning due to symptoms of decreased blood flow to the brain or a transient ischemic attack (small stroke). He will be in the hospital for several days for evaluation and tests.

The symptoms associated with transient ischemic attacks are temporary. They include temporary numbness or weakness in a limb or on one side of the face, temporary blindness or difficulty with speech.

TOPICS OF DISCUSSION: To express your interest and concern in the Governor's quick recovery.

CONTACT PERSON: Nurse's Work Station:
(904)681-4495

Please ask to speak with the FDLE Agent attending the Governor.

DATE OF SUBMISSION: July 5, 1995

ACTION: _____

_____

_____

Immigrants favor ID card

# Poll: 30% of those who came legally want controls

By Maria Puente
USA TODAY

A1

Legal immigrants so resent illegal immigration some are willing to go even further than the general public to stop it.

A USA TODAY/CNN/Gallup Poll of legal immigrants — the first comprehensive poll of its kind — shows 61% favor a national identity card to distinguish citizens and legal residents from illegal immigrants.

Just over half the general public supports the ID card.

But legal immigrants worry that the backlash against illegal immigration is now spilling onto them.

The nation is in the midst of the largest decade-long wave of legal immigration since the turn of the century.

"Immigration should be controlled," says Rosendo Diaz-Peterson, a Spanish-born professor at Drake University in Des Moines. "What's happening in the Southwest (with illegal border crossings) is preposterous."

With illegal immigration estimated as high as 300,000 people a year, proposals to create a national computer registry are gaining momentum in Congress, even though strong opposition remains.

The poll also found 37% want to erect a wall along the Mexican border and 35% want to bar illegal immigrants from public schools and hospitals. Other results:

- 90% say they feel welcome in the USA.
- 59% say it's better if immigrants blend into U.S. culture, not stay separate.
- 86% either already are or planning to become citizens; of those who don't plan to become citizens, 44% cite loyalty to their homeland as the reason.
- 30% say immigration should be reduced, 44% say it should stay at current levels, 15% say it should be increased.
- 61% say they never have felt discrimination as an immigrant; 39% say they have.
- About a quarter of immigrants say they feel more negatively toward the USA than they did before arriving; 64% feel more positive or the same.

▶ What immigrants say, 5A

# Many drug complications in hospitals due to errors

By Doug Levy
USA TODAY

A1

Almost a third of all drug complications among hospital patients are caused by errors, and many could be averted if doctors knew more about the drugs they prescribe and patients' conditions, a study finds.

Two reports in today's *Journal of the American Medical Association* analyze "adverse drug effects" — from simple rashes to life-threatening complications — from inappropriate drugs, overdoses and allergies. Both studies find many such cases are preventable.

A six-month study at two Boston hospitals found 247 adverse drug effects. Of those:

- 57% were significant.
- 30% serious.
- 12% life-threatening.
- 1% fatal.

More than half the mistakes involving drugs came when doctors first ordered them.

Most errors are caught — for every preventable complication, three potential ones were averted by pharmacists, nurses or other doctors.

But researchers say the rate could be cut by getting better information to doctors and using computers more widely.

Insufficient knowledge of a medication or a patient's condition account for many of the errors, says a separate study led by Dr. Lucien Leape of Harvard School of Public Health. That explains problems such as doctors prescribing overdoses or inappropriate drugs, and nurses delivering an intravenous drug too fast.

"Computer-based order entry, where only approved drug doses are accepted by the computer, is likely to limit ordering errors," says Dr. Katherine Kahn of UCLA and RAND in Santa Monica, Calif.

# Two more gas attacks thwarted in Tokyo subway

By Christina Pino-Marina
USA TODAY

A1

Subway passengers in Tokyo scrambled to safety Tuesday night when officials discovered gas devices in two stations.

One device, found by a custodian in a women's bathroom at the Kayabacho subway station, was capable of killing 9,000 people, police say.

The device held a timer set to mix two vinyl bags of chemicals, including one containing cyanide, to form a lethal gas.

Four hours later, police discovered a vinyl bag containing a chemical — possibly sulfuric acid — and a timer in a toilet at Shinjuku station, the busiest stop in the world's busiest subway system and site of an attempted gas attack on March 5.

No injuries were reported in the incidents, which mirror the March 20 subway attack in Tokyo that killed 12 people and sickened 5,500.

Many Japanese have feared retaliatory attacks since the arrest last month of Shoko Asahara, guru of the Aum Shinri Kyo cult, which is blamed in the March 20 subway attack. Asahara and a dozen of his top aides face murder charges.

Authorities haven't linked the cult to the recent attacks, including one Sunday that sickened more than 30 people in Yokohama.

They say copycats may be involved.

# Shuttle leaves Russian craft in intricate space 'ballet'

By Paul Hoversten
USA TODAY

A1

HOUSTON — The space shuttle Atlantis is homeward bound after a picture-perfect undocking Tuesday from Mir, Russia's space station.

The Independance Day departure after five days joined to Mir was like a "cosmic ballet," said Atlantis commander Robert "Hoot" Gibson.

Complicating the maneuver was the presence of the Soyuz capsule. It also was released from Mir and orbited 300 feet away as its crew photographed Atlantis' graceful separation.

Russian ground controllers had Mir rotate into position for Soyuz's redocking, putting three craft in motion simultaneously 245 miles above Earth.

"This is quite a scene," Gibson said.

With eight people aboard, including three from Mir's old crew, Atlantis ties the record for most occupants.

The Mir crew, including astronaut Norman Thagard, will have been aloft 115 days if they land Friday as scheduled.

Until then, Thagard and his two Russian colleagues undergo tests and physical exercises to study the effects of long-duration spaceflight on the body.

Tommy Holloway, shuttle-Mir program chief, compared the mission to the dramatic in-space rescue of Apollo 13.

"The spirit and capability of NASA is still alive," he said.

THE PRESIDENT HAS SEEN
7/6/95

Leon
Wasn't sure you'd want to see something about this. Yesterday & I showed Warren Rudman when he was here. Warren thought you'd be good to see anyway.

cc: T. Lake

JUN 06 '95 10:47PM

THE PRESIDENT HAS SEEN
7/6/95

ILEANA ROS-LEHTINEN
18TH DISTRICT, FLORIDA

COMMITTEES:

INTERNATIONAL RELATIONS
GOVERNMENT REFORM

CHAIRMAN:
SUBCOMMITTEE ON
AFRICA

VICE CHAIR:
SUBCOMMITTEE ON
WESTERN HEMISPHERE

# Congress of the United States
## House of Representatives

PLEASE RESPOND TO

☐ 2440 RAYBURN BUILDING
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(202) 225-3931

DISTRICT OFFICE:

☐ 5757 BLUE LAGOON DRIVE
(NW 137TH STREET)
SUITE 240
MIAMI, FL 33126
(305) 262-4601

June 5, 1995

His Excellency Adrian Nastase
Head of Deputy Chamber
5 Dealul Mitropoliei
Bucharest, Romania

Dear Mr. Nastase:

Please accept my congratulations and best wishes to the people of Romania on the upcoming launch of the ARO automobile in the United States.

I am proud that East European Imports, which is located in the district I represent in Congress, will play a significant role in introducing this vehicle into South Florida.

Our area is looking forward to the growing relationship between East European Imports, Romania and the United States. I am sure that this new venture will make positive contributions both to our economy and yours!

As I am sure you are aware, the automobile industry is very important to South Florida and the rest of our nation. Please accept my best wishes for the success of this enterprise.

Sincerely,

Ileana Ros-Lehtinen
Member of Congress

IRL/joc

CC: Mr. John A. Perez
Chairman
East European Imports, Inc.
3191 Coral Way, Suite 904
Miami, Florida 33145

...vocates say many physi... abortions because they have ...ened by "anti-abortion terror-ists" and they fear for their very lives. A ...ce of Catholic ...Pro-Life Activities. ...aduate students who want to be ...obstetricians be required ...than simply ...

*Joan Beck is a columnist for the Chicago Tribune.*

THE PRESIDENT HAS SEEN

# Report on Bill Clinton's two-year ratings

7/6/95

BY RICHARD MORIN
Washington Post

So how'm I doing? Bill Clinton might rightly ask that question as he begins the second half of his first term in the White House.

Not so bad, suggests a major new Gallup analysis of polls it conducted during the first two years of the Clinton presidency.

The just-released study confirms that Clinton's job approval has endured an historically bad case of the ups-and-downs. Yet it offers some small hope that the naughty bumper sticker "Clinton-Gore—Gone in Four" may be just as wrong as the pundits who ceded a second term to George Bush in 1991.

And the Gallup study attempts to place Clinton in historical context. How does Clinton stand up to past presidents? Actually, rather well, which might be rather surprising given the pounding he routinely takes from media heavyweights.

"After two years, Clinton's approval rating (47 percent) once again compares favorably with recent presidents at the two-year mark in their time of office," Gallup analysts wrote. "Ford (45 percent), Carter (43 percent), and Reagan (37 percent) all received lower ratings, while Nixon's was considerably higher (56 percent)."

But Clinton is different, Gallup found. Very different.

"Between his initial rating and his two-year rating, Clinton received the lowest ratings of any president at similar points in their presidency. In fact, within five months of inauguration, Clinton received the lowest rating of any president at a comparable time."

Who are the Friends and Enemies of President Clinton?

To find out, Gallup analysts collected more than 50 national surveys that it did between Jan. 24, 1993, and Jan. 15, 1995. Then they combined data from surveys done within the same quarter—typically six to nine separate polls—to compute a quarterly average job-approval rating.

Because these eight "mega" quarterly approval ratings were based on many more interviews, a much clearer picture emerged of Clinton's standing with individual demographic, social and political groups than could be obtained from a single survey.

Among Gallup's major findings:

—Fickle youth. Young people were Clinton's biggest fans through the first six months of his presidency, "leading some analysts (to) conclude that Clinton may have been building support for the future," Gallup analysts reported. In fact, the president had actively courted the youth vote in 1992, including an appearance (with saxophone) on the Arsenio Hall show and an interview on MTV. "By the third quarter, however, the age differences disappeared; and from that point on, there have been no consistent differences in Clinton's ratings by age."

—Money matters (a little). Lower-income Americans consistently have favored Clinton with slightly higher approval ratings than the more affluent. But those differences have been surprisingly small, suggesting that views of Clinton differ only slightly by class. "The differences in approval between those earning $20,000 a year or less, and those earning over $50,000 a year have ranged mostly between 5 and 10 percentage points. This is a small difference by income, suggesting how little influence class differences exert on Clinton's presidential approval ratings."

—Race matters (a lot). African-Americans and other minorities remained consistently in Clinton's corner during his first two years, while Clinton could do no better than win a bare majority of white support in any one quarter—and frequently fared much worse. "The quarterly average approval by non-whites has fluctuated within a narrow five-point range over the past eight quarters, from a low of 66 percent to a high of 71 percent. Among whites, however, the quarterly average has fluctuated within a 13-point range: 38 percent to 51 percent."

—So does party. Overall, fewer than 30 percent of all Republicans and no fewer than 70 percent of all Democrats approved of Clinton; overall, the differences between the parties ranged from 50 to 59 points.

"Independents always fell between the two parties, usually (although not always) somewhere closer to the Republicans than Democrats." Gallup analysts also noted that overall changes in Clinton's approval rating "reflected changes in all three groups." The notable exception: Clinton's recent bump up in the polls, which "was due solely to improved ratings among independents and Democrats."

—The "L" word. Liberals consistently approved of Clinton's job performance over his first two years, with his quarterly ratings averaging between 63 percent to 74 percent. But bigger swings were recorded among moderates and conservatives: Moderates fluctuated between 45 percent and 60 percent, while conservatives averaged 25 percent to 39 percent approval.

So what's in Clinton's future? "Based on several measures—approval rating, intensity of approval rating, and favorability rating—Clinton's position with the American people at mid-term is roughly comparable with that of Jimmy Carter and Ronald Reagan at their mid-terms," they wrote. "Carter, of course, lost his bid for re-election; Reagan, on the other hand, won re-election in a landslide."

❖

*Richard Morin is director of polling for the Washington Post.*

Good work — Byron Need a Youth Outreach — PS

Immigrants favor ID card

# Poll: 30% of those who came legally want controls

By Maria Puente
USA TODAY

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▶ What immigrants say, 5A

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By Doug Levy
USA TODAY

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THE PRESIDENT HAS SEEN
7/6/95

# Shuttle leaves Russian craft in intricate space 'ballet'

By Paul Hoversten
USA TODAY

A1

HOUSTON — The space shuttle Atlantis is homeward bound after a picture-perfect undocking Tuesday from Mir, Russia's space station.

The Independance Day departure after five days joined to Mir was like a "cosmic ballet," said Atlantis commander Robert "Hoot" Gibson.

Complicating the maneuver was the presence of the Soyuz capsule. It also was released from Mir and orbited 300 feet away as its crew photographed Atlantis' graceful separation.

Russian ground controllers had Mir rotate into position for Soyuz's redocking, putting three craft in motion simultaneously 245 miles above Earth.

"This is quite a scene," Gibson said.

With eight people aboard, including three from Mir's old crew, Atlantis ties the record for most occupants.

The Mir crew, including astronaut Norman Thagard, will have been aloft 115 days if they land Friday as scheduled.

Until then, Thagard and his two Russian colleagues undergo tests and physical exercises to study the effects of long-duration spaceflight on the body.

Tommy Holloway, shuttle-Mir program chief, compared the mission to the dramatic in-space rescue of Apollo 13.

"The spirit and capability of NASA is still alive," he said.

THE PRESIDENT HAS SEEN
7/6/95

# Screening the Helpers

Among the crime problems America has discovered it has is the sexual abuse of children in the care of volunteer groups such as the Boy Scouts. We say discovered with some skepticism, though it stands to reason that in an age of loose morality the ever-present threat posed by the bad apple has probably grown.

Sparked by scandal stories, the last Congress passed the Child Protection Act to try to solve this problem. Rep. Patricia Schroeder, D., Colo., was the driving force behind the bill, so you know it is a busy piece of legislation. In the fallout from this apple-pie initiative, groups like the Scouts are trying to cope with the costs of criminal-background checks on their adult helpers.

The federal law doesn't impose direct costs on the volunteer sector. In fact, it tries to establish mechanisms that will ease the process of investigating personnel and leaves to the states the chore of setting the rules. Tennessee was the first to rush in, and Boy Scout official Ron Moranville says the result was a $56-per-head cost of taking fingerprints and getting a report that took 8-12 weeks to arrive—often after camp or Little League was over.

Tennessee has since changed its law and no state currently mandates background probes, Mr. Moranville says, but the setting up of the investigative apparatus creates added legal liability for organizations such as his. The Scouts endorse the Child Protection Act and the screening system it has inspired, he adds, but want to see the reports be more timely and complete and be available for about $15. Much beyond that and either volunteers won't volunteer or the groups won't be able to afford them. Of course, even with enhanced computerization the true cost is going to exceed that, which means taxpayers would cover the difference.

Nonprofits argue that cheaper alternatives to background checks are effective. These include training programs for spotting possible child molestation by fellow adults and restrictions on one-on-one situations where abuse might occur. The Scouts' motto in this regard is "recognize, resist and report." Whether this group or others really have seen an upsurge in abuse cases in recent years is not clear, but many of them appear to be taking the matter seriously.

Even once Mrs. Schroeder's law succeeds in getting the FBI to gear up a clearinghouse for tracking pedophiles, the confidentiality barriers that defense lawyers have succeeded in imbedding in state laws will keep some records unavailable. So no system will be foolproof, though we can assume it will be massive. The recent Crime Control Act has extended many of the Child Protection Act's provisions to groups serving the elderly and disabled.

As it is demonstrating again with the antiterrorism legislation, Congress is usually eager to enhance the federal role in allaying public fears. Which is not to say Uncle Sam will pay the bills. As great fans of the mediating institutions that make America work, we hope that they are not going to be loaded with too much of this freight. Avoiding abuses by attending to government paperwork may not leave much room for building character and salvaging lives, which is something no law can accomplish.

# Asides

## *Party Tantrum*

House Democrats are a party in disarray. Last week, Rep. Greg Laughlin switched parties, President Clinton cut a deal with Republicans on $16 billion in spending cuts and the GOP passed its budget resolution. Rep. Mike Parker, a Mississippi Democrat who has openly worked with the GOP on budget issues, poured salt in the wounds by saying, "If I were Dick Gephardt, I'd kick me out of the caucus in a heartbeat. Sam Rayburn never would've put up with a sucker like me." The Democratic response? A temper tantrum. Frustrated Democrats have kept the House up all night on the foreign aid bill and staged an unprecedented party boycott of an Appropriations Committee hearing last Friday. Ironically, Appropriations is one committee where Democrats have little cause for complaint. GOP chairman Bob Livingston kept 76 Democratic staffers from the last Congress and hired only 31 Republicans, a cause of much bitterness in the GOP caucus. Democrats better be careful about these sitdown strikes; the voters may decide to bring in replacement workers.

## *Reality Check*

We think one of the messages coming out of the momentous Orange County vote against a sales-tax bailout is that the sun is setting on governments run by the country-club set—the people who've always loved growth-government combines. But maybe this message is already filtering down. As our news pages reported last week, the stock of MBIA, a company that insures municipal bonds, was up two points on the Big Board after the voters in Orange County voted thumbs down Tuesday. Which is to say, the market is still the best reality check. Let's hope the guys in the clubhouse understand that now.

Q Lopoo very interesting
he'll get some grief! BZ

THE PRESIDENT HAS SEEN
7/6/95

# Don't Cry for Capital Gains Taxpayers

By HERBERT STEIN

There seems to be agreement that if there is any tax reduction this year it will include reduction of the tax on capital gains. Opposition to this move usually consists solely of the argument that its beneficiaries would mainly be rich people. This may be true, but it does not seem to me to be the main point. The main point, in my opinion, is that, contrary to common assertions, capital gains are a form of income that is already relatively undertaxed, even aside from having a lower statutory rate than other forms of income.

The key aspect of capital gains taxation that is usually overlooked, or at least undisclosed, is the value of time. That is peculiar, because the people who seem most interested in reducing the tax on capital gains—i.e., people who work in the world of financial investment—are ordinarily those most conscious of the value of time. They know very well that a dollar to be received 20 years from now is not worth as much as a dollar received today. A dollar received today can be invested at interest and will be worth much more than a dollar after 20 years. A dollar of tax paid every year for 20 years is much more tax than $20 to be paid 20 years from now. If the interest rate is 6%, a dollar a year for 20 years is 1.8 times as much as $20 20 years from now.

*Board of Contributors*

*Capital gains are a form of income that is already relatively undertaxed, even aside from having a lower statutory rate than other forms of income.*

Because of the value of time, the tax on capital gains is lower than it seems—and lower than the tax on many other kinds of capital income. That is due to the deferral of the tax on the gain from the time the gain accrues to the time the gain is realized by sale or exchange. Moreover, contrary to the common belief that tax relief is most justified for assets held a long time, it is those assets that are already treated most preferentially.

Let us compare the taxation of dividends and capital gains. Suppose that an investment of $1,000 yields annual pretax dividends of 10%. If a tax of 28% is paid each year, the after-tax yield is 7.2%. Reinvesting the dividends at the same rate of return will yield an asset worth $4,017 after 20 years. If instead of paying dividends of 10% a year the asset had increased in value by 10% a year, it would be worth $6,728 after 20 years.

If the asset was then sold there would be a realized, taxable gain of $5,728, on which the tax would be $1,604, leaving the owner with an after-tax asset of $5,124, compared with the $4,017 that the dividend-recipient has. The tax on the capital gain has been 15% rather than the 28%. That is, if the annual increase of value had been taxed at 15% (approximately), the value of the asset after 20 years would be $5,124. The effective rate of the tax is lowered by the fact that it does not have to be paid until the gain is realized, rather than year by year as it accrues.

The effective rate of the tax is lower the longer the asset is held. If the holding period had been 10 years, the effective rate of tax would have been 21%. If it had been 30 years, that tax rate would have been 11%.

The difference between the taxation of dividends and the taxation of capital gains is obviously greater if the dividends are taxed at the current maximum rate of 39.6%, compared with the 28% now levied on capital gains when realized. The difference is even greater if the holder of the appreciated asset dies before realizing the gain, at which point all income taxation on the gain is forgiven.

It will be said that the capital gains are the reflection of undistributed corporate profits that have already been taxed at the corporate level. That is true to a considerable degree, but it is also true of the dividends. They have been taxed at the corporate level and will be treated as ordinary taxable income at the individual level.

It will also be said that the real gain of the asset-holder has been eroded by inflation, and that the capital gains tax on the real gain has been greater than on the nominal gain. But that is also true of the dividends. The value of the accumulation of dividends has been eroded by inflation. The tax rate on the real capital gain is still lower than the tax rate on the real accumulating dividends. If the real rate of return is high relative to the inflation rate and the holding period is long, the advantage of deferring the payment of the tax outweighs the disadvantage of paying tax on the inflationary gain. In that case, the real tax on the real gain is lower than the nominal tax rate.

For example, if an asset is held for 10 years, has a real yield of 10% a year, and inflation is anything less than 8% a year, the real tax on the real gain will be less than 28% even if the tax on the nominal gain is 28%.

In the olden days, economists used to refer to the growth of a tree as a metaphor for capital gains. Then they could argue about whether the owner of the tree had income as the tree grew or only when the tree was cut down and sold to be made into lumber. That argument is now over.

Everyone who sits before a computer screen constantly marking himself to market knows and feels that he is earning or losing income each minute as the value of his portfolio rises or falls. Moreover, we have no objection in principle to taxing accruals. For example, the increasing value of bonds originally issued at a discount is considered taxable income as it accrues. There may be good administrative reasons for not taxing other capital gains as they accrue. But that does not diminish the fact that the present treatment gives capital gains a preference.

The basic fact is that we tax capital income in different forms and in different instruments at wildly different rates. Dividends, capital gains, business interest, federal interest, state and local interest, accumulations in pension funds, the rental value of owner-occupied homes and lots of other things that I don't know about but that ingenious people are busily creating—all are taxed at different rates. Some of these differences are probably "arbitraged" out in markets, although not all. To try to reduce these inequalities would be desirable. But to start by reducing the taxation of capital gains, which are already a relatively preferred form of capital income, is the wrong way to go about it.

*A former chairman of the president's Council of Economic Advisers, 1972-74, Mr. Stein is an American Enterprise Institute fellow. His forthcoming book, with Murray Foss, is "The New Illustrated Guide to the American Economy" (AEI Press).*


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THE WASHINGTON POST
WEDNESDAY, JULY 5, 1995

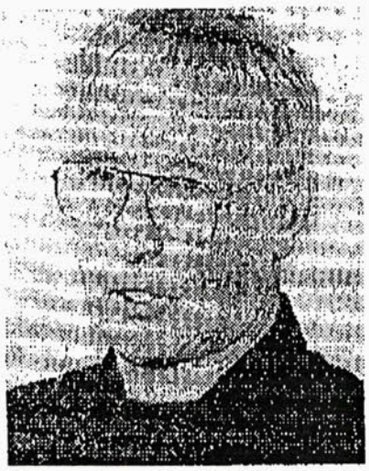
THE PRESIDENT HAS SEEN
7/6/95

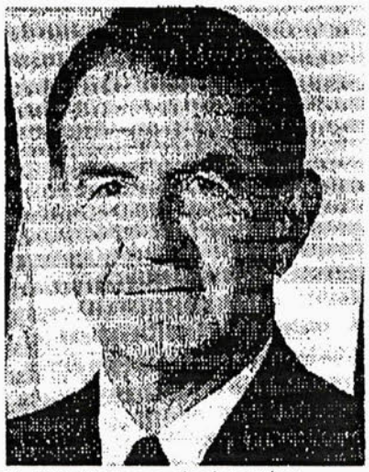
To Helen
Thanks — What's the deal here? What has been done? Bc

# Air Force Flew Loose With 'Facts'

## *Reporters Were Misled About General's Trip*

By Dana Priest
Washington Post Staff Writer





**Newsweek reporter David Hackworth, left, said Air Force officials "lied through their teeth" after his queries about trip of Gen. Joseph Ashy, right.**

Put yourself in these shoes: You are an Air Force spokesman and a couple of bulldog reporters start investigating waste and abuse by a top-ranking Air Force official. You could either a) Find out as much as you can about the matter and turn the facts over to the reporters, with the expected spin to soften the damage; or b) Lie, distort and obstruct the truth in an effort to throw them off the trail.

The Air Force, the Pentagon's inspector general says, chose the second route in dealing with the two reporters who broke the story about Gen. Joseph Ashy, who took a $116,000 military flight from Italy to Colorado with his enlisted aide and pet cat.

"The Air Force was inept in its response to media inquiries about the flight," the report found. "The presentation of a series of incorrect facts, careless communications and lack of central direction . . . defined the Air Force performance. . . . The Air Force did not comply with its policy objectives regarding the quick and candid release of unfavorable information."

The Newsweek contributing editor who unearthed the Ashy story, David Hackworth, has a more unvarnished view of how the Air Force treated him: "They just lied through their teeth, and none of these spinmeisters who worked so hard to con me is being punished." According to the report, various Air Force public affairs officials told Hackworth and ABC producer Donald Thrasher, who worked with Hackworth on the story, "facts" that turned out not to be true. One told Hackworth there were additional passengers on the 200-seat airplane dispatched to pick up Ashy. That was not true. The same official told Hackworth the flight was justified as a training mission. That also was not true.

Col. David Garner, a spokesman for the U.S. Space Command, which Ashy now heads, incorrectly told Hackworth a female aide had accompanied the general because her mother was dying of cancer. Garner also suggested to Hackworth that the aide was considering filing sexual harassment charges against the plane's crew, which also was not true. Garner told investigators he told Hackworth this "hoping to elicit a response."

Finally, Col. Randall Starbuck, Ashy's executive officer, told Thrasher that Ashy's aide wore her blue uniform on the plane, when he knew she had worn her camouflage battle dress uniform.

"Colonel Starbuck indicated that he sought to avoid admitting the aide had changed her clothes in General Ashy's residence because he did not want to fuel an unfounded line of inquiry regarding General Ashy's relationship with the aide," the investigators said.

The report found nothing unusual about the relationship and said the aide was performing her routine duties by accompanying him.

But it did find that Garner failed to take "reasonable steps to ensure that his communications with the media were accurate and completely understood."

Garner was removed temporarily from his public affairs position when the inquiry began and his commanding officer has not decided whether to return him to the post.

Neither he nor any of the spokesman involved in the incident has been disciplined.

According to the IG report, many of the conversations Hackworth and Thrasher had with officials became the subject of internal memos. A few of them went to the secretary of the Air Force, chief of staff and other ranking public affairs officials.

The memos reported on their attitudes, quality of their questions and progress of their work.

Hackworth, who first got on to the story and agreed to work with Thrasher later, served in the Army for 26 years, collected more medals of valor than any other soldier and was awarded eight Purple Hearts. In 1971 he told a national television audience the Vietnam body counts and media briefings were lies. A colonel, he was forced to resign and has been outspoken on the military affairs since.

"There's a culture of deceit and dishonesty" in today's military, he said. "Maybe it's been there all along; it just seems overwhelming right now."

The news media and the military have an inherently uneasy relationship. Public affairs officials readily admit "we work at different goals," as Brig. Gen. Ronald T. Sconyers, chief of Air Force public affairs, said in an interview.

While reporters demand full and untainted information, Sconyers said, his role is to be "an information broker, the filter" between information the military feels it needs to safeguard and information that reporters feel they deserve to have.

To accomplish its goals, each service has a small army of public affairs officials. About 3,500 such military personnel work for the department worldwide, including 275 for the Air Force.

Public affairs specialists are responsible for handling all media inquiries and all other communications with the outside world, such as the Air Force bands that play in communities. Most large public affairs shops produce videos and magazines as well.

Defense Department employees are instructed not to answer reporters' questions unless given permission from public affairs officials, who usually accompany reporters on interviews, tape recorders in hand.

Sconyers said he is concerned about the findings of the report and that a team in his office will review the Air Force's procedures and policies for dealing with the news media.

"Public affairs is probably one of the most difficult assignments" in the Pentagon, he said. "This is a business were you can just break even."

THE PRESIDENT HAS SEEN
7/6/95

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Send him copy of Truman's article, may speak at Truman Library

Washington Monthly article —

Enclosures- 7/5
- Truman article Attached
- need to get remarks of 7/6/95 Mahlon Martin dedication event in Little Rock

July 5, 1995

Bobby Roberts
3501 Hill Road
Little Rock, Arkansas 72205

Dear Bobby:

Thanks for your letter of June 13. I'm sorry I missed you in Little Rock but am glad your stepdaughter Mary Kathryn Williams was able to be there. It was wonderful to see so many old friends. I appreciate, too, what you said about Mahlon. As you may know, when I was home I was able to participate in the dedication of the South Main Street Redevelopment Project, which was named in his honor.

Thanks, too, for sending the copy of Jeanne Hurley Simon's letter about the National Commission on Library and Information Science. I appreciate having your input.

I'm looking forward to receiving the FDR book you said you would send. Come see me sometime!

Sincerely,

Bill

7/5
Carol- need to check w/ Jan U. to see if she has these remarks + if she doesn't, she'll need to get from Stenos

S

7/6/95
Dorskind sent original and all packet —
C. Crudup

THE PRESIDENT HAS SEEN
6/5/95

THE WHITE HOUSE

WASHINGTON

95 JUN 1 P12 : 40

May 31, 1995

MEMORANDUM FOR THE PRESIDENT

FROM: JANE C. SHERBURNE
SPECIAL COUNSEL TO THE PRESIDENT

SUBJECT: Public Materials Related to the Independent Counsel Law

Attached are recent press articles related to current application of the independent counsel law that you may find of interest (Tab A). I also have attached Judge Scalia's dissent in Morrison v. Olson -- the case upholding the constitutionality of the law -- and the amici curiae brief submitted in that case by former Attorneys General Levi, Bell and Smith. These materials form the bases for many of the issues raised by the commentators (Tab B). Finally, I attach Judge Tatel's separate statement in the dismissal by the Judicial Counsel of the District of Columbia Circuit of complaints related to Judge Sentelle (Tab C).

cc: Harold Ickes
Deputy Chief of Staff

A

*Gerard E. Lynch and Philip K. Howard*

# Special Prosecutors: What's the Point?

Just about everybody in the country was focused on terrorism in Oklahoma, but the president of the United States had other pressing business: He was being questioned by independent counsel Kenneth Starr about Whitewater.

Nothing unusual there. In fact, there has hardly been a time, since passage of the Ethics in Government Act in 1978, when a special prosecutor and his target have not been in the news. Justifying the smallest details of a past transaction or decision has become part of the job description for high executive office, always with the suggestion of public scandal and personal ruin.

The progress of the manhunt is chronicled in the daily headlines ("Investigation Moves One Step Closer to the President"), but the titillating prospect of bringing down important leaders is not a healthy sign. Instead of purifying our governing institutions, special prosecutors play into a pathology that thrives on an appetite for scandal and a distrust of our system of government.

The stakes were small in early independent counsel investigations. Who cared whether Hamilton Jordan used cocaine at Studio 54? But the Reagan-Bush administration provided an investigative feast: Did Michael Deaver, Lyn Nofziger or Ed Meese violate conflict-of-interest rules? Did Samuel Pierce preside over a corrupt housing department? Did Iran-contra extend past North, Poindexter and McFarlane to the secretary of defense, perhaps even to Reagan and Bush?

Cries for new independent investigations have dogged the Clinton administration practically every month. This month it's the secretary of commerce who gets his own special prosecutor. And why not Ira Magaziner—who knows whether he told the whole truth? Future occupants of the White House can expect the same.

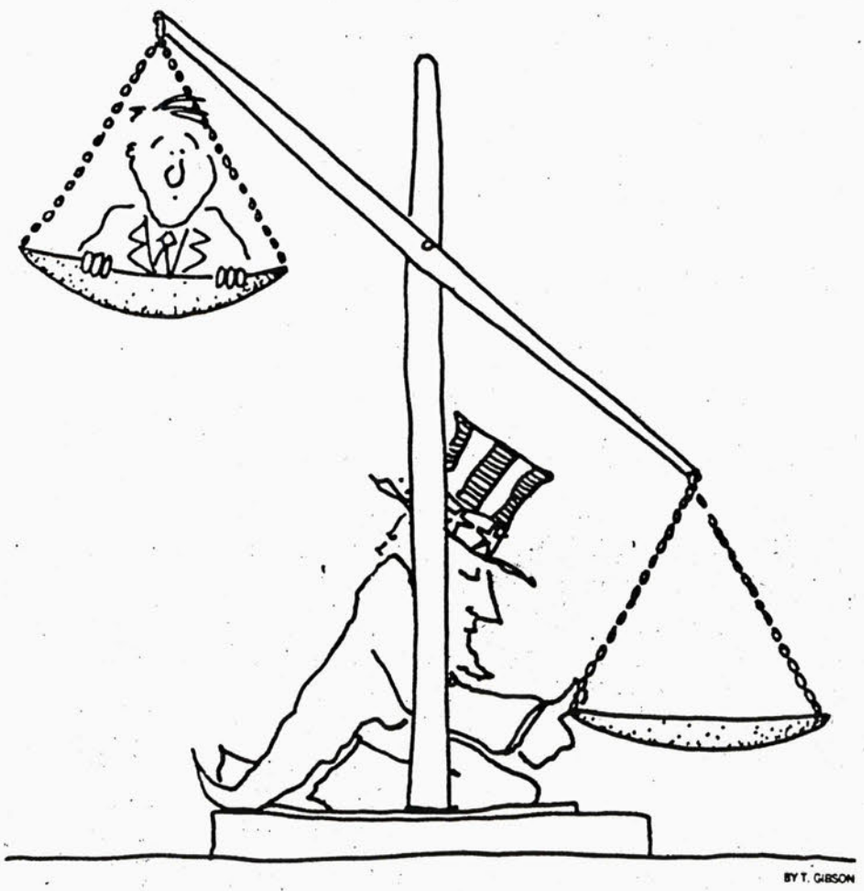
As for actual law enforcement, however, it has been slim pickings. Does anyone remember Thomas Clines, the only Iran-contra figure who went to jail? Deaver pleaded to minor charges, and Nofziger's conviction was reversed. Meanwhile, a lot of apparently innocent people have been investigated intensively for a long time. The anemic results are obscured by all the noise and speculation around new investigations, which consume staggering amounts of taxpayer funds (about *$10 million* so far with Whitewater) and whose primary effect is to divert our leaders from the task of governing.

What, we might reasonably ask, is the point?

Good government orthodoxy has it that "special" prosecutors are needed because the regular Justice Department prosecutors, reporting to a politically appointed attorney general, can't be relied on to prosecute the president's cronies. Special prosecutors supposedly ensure impartiality.

These premises, plausible enough on the surface, happen to be backward. Deciding to prosecute is not a simple matter of finding that a law has been violated. It is a far more subtle decision, made against the reliable backdrop of hundreds of other cases. Judgment and discretion are at the heart of a prosecutor's job. In a world in which regulations are piled so high that many well-meaning people trip over them, prosecutors must decide every day whether a particular violation is merely technical or is one that requires the awesome step of criminal prosecution. Decisions to prosecute are inextricably bound up in priorities—prosecutors regularly allocate scarce resources to violent and drug crimes at the expense of nonviolent white-collar cases—and necessarily draw on society's norms and values.

The premise that professional prosecutors will tend to favor the politically powerful is also wrong. Ordinary assistant U.S. attorneys in Maryland brought down Spiro Agnew. Regular Justice Department employees in New York indicted John Mitchell and Maurice Stans. It was one of Rudy Giuliani's assistants, not an "independent" prosecutor, who called sitting Attorney General Ed Meese, his own boss, a "sleaze" in a prosecution of one of Meese's closest friends.



BY T. GIBSON

The real pressures distorting prosecutors' judgment are the opposite of what reporters and good government editorialists perceive. High officials are the most tempting targets for young prosecutors. Fame and glory (and ultimately a lucrative private law practice) come from handling cases in the headlines.

But what of the "appearance" of partiality? Surely a nonpartisan figure of great repute ensures, if nothing else, that the investigation will be "above politics." Two words refute this claim: Lawrence Walsh. The Iran-contra investigation proved the impossibility of taking a politically sensitive case "above politics." Here we had a special prosecutor of the president's own party, with a long history of moderation and professionalism, a respected and independent figure with a lifetime of achievement in law practice and public service. Surely, his conclusions would be respected by all.

Hardly. When Judge Walsh began to conclude the president's men were crooks, he was vilified by the president's allies (spearheaded by the Wall Street Journal) as politically motivated and biased. Judge Walsh was predictably defended as impartial by Democrats, but he was no more able to escape imputations of bias than regular prosecutors would have been. Indeed, Judge Walsh became a political symbol.

The Whitewater case provides an even more extreme example of the elusive search for nonpartisan appearances. The original special prosecutor, Bob Fiske, another establishment lawyer with Republican credentials and a reputation for unimpeachable integrity, drew criticism from Republicans when he did not seem impressed with the case against Clinton. Fiske was then replaced on the impeccable logic of taint-by-association: He was not quite "special" enough because he had been appointed by Clinton's attorney general. The New York Times, formerly a vigorous proponent of that pristine logic, promptly noted the right-wing Republican connections of the judge heading the panel that dumped Fiske, and attacked his replacement, Ken Starr—another lawyer of high standing and great integrity—as a Republican hack.

The lesson is clear: Partisan arguments intrude into all decisions involving the political arena. The intense spotlight of the special prosecutor does not illuminate so much as blind.

In the ordinary case, the U.S. attorney has to ask himself: Is it fair to treat this case as a felony, as compared to how we treated other, similar cases where the defendant was not politically prominent? The special prosecutor has no such concerns. He has only one investigation to pursue, and the unnatural intensity inevitably skews the decision. The smallest infraction can take on a life of its own.

In the words of three distinguished former attorneys general—Edward H. Levi, Griffin B. Bell and William French Smith—the independent counsel only exacerbates "all the occupational hazards of a dedicated prosecutor: the danger of too narrow a focus, of the loss of perspective, of preoccupation with the pursuit of one alleged suspect."

There may be disputes of constitutional dimension—Watergate, perhaps—where the benefits of special counsel are worth the accompanying diversion and disequilibrium. But in practically all other cases, the discretion and balance found in our ordinary law enforcement system is far superior. And if the people believe that a president or an attorney general has distorted that system to favor his friends, retribution at the hands of political enemies and media interests is never far off.

*Gerard E. Lynch, a law professor at Columbia University, has been both a regular and a special prosecutor. Philip K. Howard is the author of "The Death of Common Sense."*

2ND STORY of Level 1 printed in FULL format.

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St. Louis Post-Dispatch

May 27, 1995, Saturday, FIVE STAR LIFT Edition

SECTION: EDITORIAL; Pg. 14B

LENGTH: 540 words

HEADLINE: WHITHER WHITEWATER?

BODY:

The Whitewater special prosecutor seems to be going down a path that takes him further and further from Washington and the so-called Whitewater scandal. Nothing that Kenneth Starr has developed up to this point has any relationship to President Bill Clinton's conduct in office, and what little he has produced bears only indirectly on Mr. Clinton's conduct as governor of Arkansas.

For example, Mr. Starr's latest catch is an Arkansas banker named Neal T. Ainley, who pleaded guilty to misdemeanor charges that he failed to report cash transactions to the Internal Revenue Service. In 1990, the treasurer of Mr. Clinton's gubernatorial campaign withdrew $ 30,000 in campaign funds from the Perry County Bank, of which Mr. Ainley was president.

However, the money was withdrawn in four installments of $ 7,500 each, allegedly to evade the federal requirement to report cash transactions of more than $ 10,000. Mr. Ainley claims he was told by the Clinton campaign treasurer, Bruce Lindsey, not to report the withdrawals. Though Mr. Lindsey was informed that he probably would be indicted, he wasn't. The statute of limitations ran out Thursday.

What any of this has to do with Mr. Clinton or Whitewater is difficult to discern, as is the connection of another small fish hooked by Mr. Starr. Christopher Wade, a real estate broker in Arkansas, has pleaded guilty of hiding assets when he filed bankruptcy petitions in 1989 and 1990 and of obtaining a loan based on fraudulent information. Presumably, what links Mr. Wade to Whitewater is that he was sales manager for Whitewater Development and the loan was obtained from Madison Guaranty Savings and Loan.

Madison Guaranty went bankrupt in 1989 at a cost to taxpayers of $ 65 million. Whitewater Development went bankrupt, too. Mr. Clinton and his wife, Hillary, were partners in Whitewater Development with James McDougal and his wife. Mr. McDougal was head of Madison Guaranty.

This conjunction and other developments led The New York Times to suggest that money from Madison Guaranty may have been diverted illegally to Mr. Clinton's 1985 gubernatorial campaign and, perhaps, to Whitewater Development. The rest of the media agreed that it must have happened that way. The other component of the scandal is the Republican contention that the Clinton administration sought to prevent a criminal investigation of the Madison Guaranty collapse and then tried to cover up its interference.

Like Mr. Ainley and Mr. Wade, other figures in the Whitewater investigation who have entered pleas have been caught doing things unrelated to what Whitewater is thought to be about. Former Assistant Attorney General Webster

Hubbell, for example, pleaded guilty of defrauding clients in his private law practice and income tax evasion. Robert Palmer admitted making false entries on property appraisals. David Hale admitted defrauding the Small Business Administration.

Special prosecutors are supposed to investigate allegations of misconduct by high-ranking federal officials. If the appointment of a special prosecutor in the Whitewater case is to be justified, Mr. Starr is going to have to bring his investigation a lot closer to the Clintons than he has up to this point.

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THOMAS OLIPHANT

BYLINE: By Thomas Oliphant, Globe Staff

BODY:
WASHINGTON

For those who like their ironies rich, few situations can match the spreading realization at the top of the Clinton White House that a monster in whose re-creation it played a central role has now turned on it with gusto. The monster is known as the special prosecutor law or, as the statutorally correct would insist, the mechanism for having "independent counsel" named to investigate senior government officials.

Candidate Bill Clinton supported it strongly. Rookie President Clinton gave a new version of the law the necessary nudge to enactment last year over Republican opposition that had caused its predecessor to expire. But a more seasoned Clinton is discovering how well-grounded the GOP arguments were. If there is a special twist, it is that the solidifying White House judgment extends not only to the statute, but also to Attorney General Janet Reno's Pontius Pilate-inspired manner of following it.

The intellectually easy way out of this situation is to mumble boilerplate junk about the goring of oxen in an atmosphere where it seems as if you're nobody in the Clinton administration unless a special prosecutor has been assigned to you.

That's the standard partisan wisdom in this sickly partisan city, and it is dead wrong. The truth is that the post-Watergate record of the special prosecutor cottage industry and its important subsidiary - the press - has been atrocious. It has been a mechanism for making charges, not for resolving them. The ratio of lives and careers hurt to crimes solved has been huge.

The only institution that has performed worse than the prosecutors in this period has been the press, which has fed off the probes for nuggets of "wrongdoing," used the helium of "charges" and "questions" to create hot-air balloons falsely labeled as "answers" and shrugged off the scores of cases where nothing ever happened with all the aplomb of Emily Litella intoning her famous "Never mind!" on "Saturday Night Live."

To adhere to this doctrine requires scrupulous bipartisanship, a rare commodity where witch hunts are concerned; people who get righteously indignant only when their own party's people are involved don't count. The fact is that this sorry record is a straight line running from Koreagate and the non-sins of Carter aides Tim Kraft and Hamilton Jordan, through the phony and/or

traffic-violation transgressions of Ed Meese, Lyn Nofziger, Mike Deaver and Ray Donovan in the Reagan years, through the entire sorry mess of Iran-Contra spanning the Reagan-Bush era, in which serious policy and political wrongs were irresponsibly criminalized, right through to today's hotheaded obsession with Whitewater. Every one of these situations, and numerous others, was exacerbated by special prosecutors. Collectively, the moral of them all is that cops and real prosecutors have the background as well as the horse sense to go after real crooks for real crimes, subject always to stern and thorough oversight.

The latest examples of a Washington system gone haywire are to be found in the farces that involve Clinton aide and friend Bruce Lindsey and Cabinet secretaries Henry Cisneros and Ron Brown.

For nearly four months, we have been bombarded with "news" that Lindsey was a Whitewater "target" for "allegedly" involving an Arkansas banker in concealing the withdrawal of get-out-the-vote cash in a governor's race five years ago. Then, out of the blue, it turns out he won't be indicted after all for an alleged concealment of something he actually disclosed days later. The only evidence is that the information was kept from Clinton's political opponents, not from reponsible financial authorities.

In the cases of Cisneros and Brown, Attorney General Reno - incredibly - has passed the prosecutorial buck in two cases where the evidence her office developed points in only one direction, to no criminal misdeeds. Cisneros may not have correctly said how much he had paid a former mistress to settle a legal dispute, and Brown had a complicated pregovernment business life, but in neither case did she develop one piece of evidence of actual misconduct. In fact, she developed a great deal to the contrary.

Nonetheless, Reno has gone the special prosecutor route, in turns out, because she said she isn't sure. Fortunately, while she passed the buck, the president has not, deciding to keep all three on the job in the absence of compelling evidence of misconduct.

Meanwhile, the allegation industry can be expected to continue spinning its libelous wheels.

LANGUAGE: ENGLISH

LOAD-DATE-MDC: May 25, 1995

ERNEST DUMAS

# Some questions for Kenneth Starr

Kenneth Starr, the special Whitewater prosecutor, not long ago sent agents into the hills for about the fiftieth time to see if they had not missed something—*anything*—to suggest that Bill and Hillary Clinton might have done something improper when they invested in a tiny real estate venture 17 years ago.

Agents of the prosecutor again interviewed a few people who bought the rocky little lots in the remote woods off the White River.

It needs to be remembered, after all, that this is what the Whitewater "scandal," as the papers still referred to it last week, is supposed to be all about. The Clintons, while he was attorney general of Arkansas and she a private lawyer, invested in some unimproved land with Jim McDougal and his wife. McDougal, a former aide to two United States senators, was teaching at a Baptist college and speculating in land on the side.

The Clintons hoped to make a few fast bucks, but all in all it was a perfectly wholesome way to make money. No Ponzi scheme for rich Republicans or gullible religious schools. People who bought Whitewater lots actually got what they paid for. Skyrocketing interest rates killed the real estate market and the Clintons just lost their money.

While the Clintons were waiting vainly for the payoff from their land investment, Phil Gramm, the Texas senator who would later demand the Whitewater investigation, was waiting on profitable returns from a pornographic movie in which he had invested. Gramm's movie never got made and his money went instead into a raunchy political spoof. Entrepreneurs all, the Clintons wanted to make money by selling people lots for fishing cottages, Phil Gramm by charging them to see lewd acts performed by naked girls.

Unless the Republican sleuths hired by Starr have found something they have not leaked, the investigation of Whitewater Development turned up nothing. But Starr, who got his appointment from a federal judge who had been visited by his Republican sponsors, obtained a portfolio that allows him to investigate anything in Arkansas that might remotely touch a Democratic officeholder.

Last week, we saw the sad denouement of a central part of the scheme, an investigation of Clinton's campaigns for governor of Arkansas. Having already figuratively hanged a lawyer who had worked in Clinton's old campaigns and had the misfortune of being on Clinton's White House staff, Starr put out a press statement saying there would be no indictment after all.

Grand jury investigations in the United States are supposed to be secret, a supposed protection for the innocent, but the politicians who get special prosecutor assignments often don't observe the rule. Starr has a particularly well-developed network for getting stories into the national media, often before anything is presented to the Grand Jury.

The top of the news for many weeks was that Bruce Lindsey, the president's closest long-time aide, was about to be indicted for his role in a conspiracy to hide perfectly legal bank withdrawals for a campaign from the IRS. It was supposed to shake the very foundations of the presidency. Were it true, a prosecutor might simply have asked why he had done something so dumb and totally pointless.

In the end, the special prosecutor put out a simple statement that there would be no indictment. On background, so that it would not look like the prosecutors had found nothing, reporters were told about a raging debate within Starr's team over whether to indict Lindsey.

No apologies were made for having so terribly devalued the coin of a young lawyer's profession and his life in his community—his reputation for honesty.

Lacking an indictment, the prosecutor still carried out his objective rather well. The day before revealing that the indictment was a fake, he handed off to Sen. Alphonse D'Amato, whose committee will take up the investigation of Clinton's campaigns for governor, along with other potpourri of Arkansas politics, and spend still another million dollars or so.

"Some questions raised by Whitewater go to the very heart of our democratic system of government," D'Amato said.

The first such question ought to be for Starr. Why would a man sworn to uphold justice take an obvious political assignment from political friends? The second should be why he would trade on that obligation during his Whitewater work by taking a fee to sign a brief before his sponsoring judge, as Starr did in a big tobacco case?

MAX BRANTLEY

# A Whitewater watershed?

Late Friday came a happy, if curious, Whitewater development.

Republican Prosecutor Kenneth Starr announced that he would indict no one on or before May 25.

Starr didn't explain what he was talking about, other than to indicate that the announcement was a response to a number of unspecified media reports.

But thanks to the profusion of leaks that have issued forth from Starr's investigation, everyone knew what Starr meant. There would be no indictment this week of Deputy White House Counsel Bruce Lindsey. It was the first Whitewater break for an Arkansan in a long, long time.

Starr's team had been smearing Lindsey for months with the allegation that he had directed a Perryville banker not to file a required currency transaction report when Lindsey withdrew $30,000 cash for the Clinton gubernatorial campaign in 1990. The statute of limitations on filing charges connected with that withdrawal apparently tolled May 25.

The Starr team hoped Lindsey or somebody would crack under the expensive and vexatious pressure of document subpoenas, target letters, etc. and fess up. But confess what? Lindsey had no motive. He reported the campaign cash spending. He volunteered to testify before the Grand Jury. He's famously upright.

Starr, finally, found the case wanting. Not that Lindsey is out of the woods. He was campaign treasurer for Clinton in 1990. There was a cash withdrawal in the fall of that year, by someone else, that could still be fodder for investigators with a conspiratorial bent. Lindsey is also from Arkansas, and thus automatically suspect.

The optimistic want to believe admirers of Starr who say that he will make his prosecutorial decisions on a strict reading of the law, with no consideration for politics. They say the Lindsey decision may be evidence of this.

Such optimism tends to overlook how far afield the Whitewater investigation has ventured. What began as a look at Bill Clinton's financial relationship with a failed savings and loan has turned into a deep sea fishing expedition.

Starr also asserted Friday, "...we have been and will continue to be bound by strict standards of secrecy." If that's so, how come the next day's New York Times carried an insider's description of discussions within Starr's office on whether to prosecute Lindsey. That account and Starr's statement make either the Times or Starr a liar.

And consider the episode six months ago when a respected reporter for the Los Angeles Times wrote that Gov. Jim Guy Tucker would be indicted by Starr. The reporter said later that her sources were unimpeachable. Her sources weren't in Jim Guy Tucker's camp. That leaves Starr's people.

Maybe Starr simply made the fair decision on Bruce Lindsey. Maybe he intends to harass him no more. Maybe his unusual no-indictment statement was meant as a partial makeup for the damage done to Lindsey's good name. If so, a show of integrity was long overdue.

## LIFE SUPPORT

The Insider finally got around to confirming one of the hot rumors in Little Rock's Pulaski Heights: Friends of former Associate Attorney General Webb Hubbell did indeed put together a fund-raising solicitation to help Hubbell and family through the hard times—loss of law license, etc.—following his guilty plea on mail fraud and income tax charges.

Old friends were solicited to contribute to one of three blind trusts set up with the help of an accountant and lawyers. One was to provide for the Hubbell children, another for his legal defense and another for his household expenses.

Reaction to the solicitation was mixed, we're told, particularly among those with smaller houses, cheaper cars and less expensively schooled children than the Hubbells'. "I would guess it was a failure," said one friend who received the letter and did not contribute.

## SPECIAL HANDLING

Speaking of Webb Hubbell, his sentencing is still pending as he continues to cooperate with the Whitewater investigation.

When he is sentenced—and even with a favorable recommendation from the prosecutor he's believed certain to get some prison time—he'll get a touch of deferential treatment.

Hubbell's plea bargain specifies that he may request assignment to the prison of his choice, without objection by the prosecutor, and that he "should be permitted to self-surrender." That means he can drive himself to prison.

# TAKING ISSUE

BY STUART TAYLOR JR.

# Crawling All Over the Presidency

If the Clinton administration has accomplished nothing else, it has at least sensitized Democrats—with a vengeance—to the dangers of the system of court-appointed independent counsel that they used for so long to harry Republican presidents.

President Bill Clinton, and his wife, and his closest White House aide (Bruce Lindsey), and Commerce Secretary Ronald Brown, and Housing and Urban Development Secretary Henry Cisneros, and former Agriculture Secretary Mike Espy, and others now are (or are about to be) squirming under microscopic scrutiny by independent counsel. And suddenly, onetime champions of the statute that mandates such investigations, like Clinton and White House Counsel Abner Mikva, are sounding more like critics.

It's easy to make fun of the hey-those-are-our-oxen-being-gored timing of such Democratic misgivings, and I've done so. But "[w]isdom too often never comes, and so one ought not to reject it merely because it comes late," in the words of Justice Felix Frankfurter.

And the Clintonites' current travails provide perspective—especially for those of us whose hearts did not bleed for the likes of Oliver North and Michael Deaver—on the risk that the current independent counsel regime will have a debilitating effect on the presidency for many years to come.

Governments are not, and never have been, run by paragons of ethical purity. After all, just about every elected official in Washington, and many a Cabinet officer, owes his or her position in large part to success at the legalized corruption of wheedling campaign contributions from special interests seeking political payoffs. It's a dirty business, but somebody has to do it. And some people steeped in sleaze have done it rather well. Like the first Mayor Richard Daley of Chicago. And like Ron Brown.

*Every* administration, at least in recent history, has had people near the top who could be made to look sleazy—and even implicated in arguably criminal violations—under scrutiny by prosecutors with unlimited resources and broad mandates to comb through those officials' closets in search of skeletons.

The independent counsel law has become an engine for unleashing precisely this kind of prosecutorial scrutiny on the president and his top aides. All it takes to start the engine is for a political adversary or journalist to come up with a superficially plausible allegation of ethical impropriety.

Independent counsel probes can be especially onerous in an era when the criminal law has become all-encompassing, sprawling, and vague, and littered with traps for casual perpetrators of petty ethical lapses. Few businesses, or gubernatorial campaigns, or other enterprises could come completely unscathed through such a no-holds-barred investigation.

Kenneth Starr, the independent counsel who is now putting President Clinton, Bruce Lindsey, and many others through the wringer in the sprawling scandal known as Whitewater, suggested in a thoughtful May 13 speech that "[t]he basic policy concern [is the] independent counsel's lack of accountability to the president and the attorney general." I disagree. The 93 U.S. attorneys aren't very accountable either, and some have brought cases more dubious and oppressive than any brought by independent counsel.

Rather, the most serious problem with the statute is the vesting of independent counsel with virtually unlimited time and money (only cosmetically restrained by the 1994 amendments to the law) and an implicit mandate to leave no stone unturned in probing a single target. The one-case independent counsel has every incentive to pursue possible crimes too petty, or too harmless, or too hard to prove, or too close to the line of legality to warrant the attention of an ordinary prosecutor.

As Justice Antonin Scalia has pointed out, the independent counsel statute comes close to institutionalizing what was called "the greatest danger of abuse of prosecuting power" in a 1940 speech by then Attorney General Robert Jackson:

> With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, it is not a question of discovering the commission of a crime and then looking for the man who committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him.

The result is exhaustive exploration of questions that, 25 years ago, would have been of little interest to any good prosecutor, and of limited interest to journalists. Questions like whether Brown enriched himself through corrupt business deals before joining the Cabinet, or why Cisneros lied to the Federal Bureau of Investigation about how much he had paid his former mistress.

This inherent problem with the statute is magnified by the reality that not every court-appointed independent counsel will be a paragon of apolitical wisdom and restraint. Nor will the judges who do the appointing.

Consider the conduct of Independent Counsel Donald Smaltz. His assignment was to focus on Espy's alleged receipt of illegal favors from regulated companies. But Smaltz has seized the opportunity to muckrake widely through Arkansas, while improperly blabbing to the press about his interest in unsubstantiated allegations that Tyson Foods sent envelopes full of cash intended for then Gov. Clinton in the 1980s.

Kenneth Starr appears to have done his job responsibly, and he has a reputation for integrity and good sense. But he is probably the wrong man for the Whitewater job, because he is a politically active Republican who has served in high office—both at the Justice Department and on the D.C. Circuit—and may well hope to serve again.

(Not to mention the appearance problem created by the role of Starr's former D.C. Circuit colleague, the ardently conservative Judge David Sentelle. He heads the special three-judge court that appointed Starr—an appointment made soon after Sentelle had lunched with the intensely partisan Republican senators from North Carolina, Lauch Faircloth and Jesse Helms. Helms is a political benefactor of Sentelle's.)

Starr's political ambitions could well suffer if he resists the enormous pressure from politically motivated Republicans in Congress to bring home Clintonite scalps, or at least to spare no effort in digging dirt. And even if Starr carried no such baggage, he could hardly be expected to confine himself to cases that would be brought by an ordinary prosecutor.

Consider Starr's pursuit of Deputy White House Counsel Lindsey, who is a target of the investigation in connection with his work as treasurer of Clinton's 1990 gubernatorial re-election campaign. Starr appears to be pushing hard to see whether a case can be made that Lindsey told an Arkansas banker not to file routine reports with the Internal Revenue Service about Lindsey's otherwise legal, and non-taxable, withdrawal of $30,000 in cash on May 25, 1990, (and a similar withdrawal later) for use as get-out-the-vote money in the Arkansas campaign.

These alleged crimes are, at worst, so petty that they would hardly be considered worth investigating if, say, Clinton had lost the 1992 presidential election and Lindsey were still just an obscure Little Rock lawyer. But crimes they may have been: The banker has pleaded guilty and become a cooperating witness. And almost any independent counsel with Starr's broad mandate would feel obliged to investigate Lindsey's role thoroughly and to bring any prosecutions for which evidence can be found.

It's easier to find fault with the independent counsel system, of course, than to come up with a flawless alternative.

I've previously proposed creating a quasi-independent, permanent office of public prosecutions outside the Justice Department; headed by a Senate-confirmed presidential appointee; with jurisdiction over all executive, legislative, and judicial branch officials; and with political (but not judicially enforceable) protections against unwarranted removal ("How About a Semi-Special Public Prosecutor?" Dec. 13, 1993, Page 25). But the vast power of such an office could be abused, and the idea has not exactly caught fire.

The Clintonites' troubles tempt me to flirt with the idea of scrapping the independent counsel statute and leaving it to the Justice Department and Congress to cope with high-level crimes.

The risk is that such a change would open the way for a festival of unchecked corruption and executive branch lawlessness. Remember Iran-Contra, which the Reagan Justice Department would have buried quickly if it could.

So what is to be done? Pending further enlightenment, I can only take refuge in a 1986 concurrence by Justice Richard Sims III of the California Court of Appeals: "[H]aving taken all conceivable sides on the issue, I must certainly at some point have been right. Unfortunately, it too obviously follows that at some point I must also have been wrong."

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The Washington Times
* WEDNESDAY, MAY 24, 1995

PAUL GREENBERG

# . and the criminalization of politics

## Abner Mikva reconsiders

You could almost see the light bulb go on above Abner Mikva's head when he confided to a committee of the American Bar Association that all these special prosecutors buzzing around the administration might be getting out of hand. Yes, as a congressman he had voted for the law that licenses these little inquisitions, and as an appellate judge he upheld their proliferation, but that was in the wake of Watergate — a Republican scandal. And now Abner Mikva is no longer a congressman or jurist but an advocate, the counsel to a Democratic president, and a new thought occurs: "Whatever the good intentions," he said of the law that continues to spawn prosecutors here, there and everywhere, "I'm not sure it's working out that well, and therefore I think maybe we ought to look at the problem again."

George Bush used an arresting phrase when he pardoned Caspar Weinberger, his defense secretary and a special prosecutor's next target. Mr. Bush said he wanted to strike a blow against the "criminalization of policy differences," which is what Lawrence Walsh's all-too-independent investigation of Iran-Contra had become.

Now it is the Clinton administration that finds itself the object of one independent prosecution after another. The president and Mrs. Clinton's legal fees ran almost a million dollars last year, in large part because of the need to ward off all-too-independent prosecutors. These are officials who essentially have been legally empowered to ruin the life, finances and reputation of just about anybody they choose.

Like his predecessors since Watergate, Kenneth Starr is proceeding up the ladder of defendants to within striking distance of the White House itself. Armed with scores of lawyers and aides, and millions for expenses, what couldn't he find on almost anybody? You give a special prosecutor enough power, and he'll have Mother Teresa up on building code violations and conduct unbecoming a saint. At last American law has given free rein to the one instinctive impulse of prosecutors: to prosecute. Nor need a crime be found before they do; special prosecutors tend to begin with the prosecution and find the crime later.

It's all right, Kenneth Starr explains, he's conducting his investigation in the most careful and restrained way. Trust him. That was the gist of his speech this year to the graduating class at Duke Law School.

Yes, Mr. Starr acknowledges, the law establishing special prosecutors gives him "a huge amount of unchecked discretion," but he's more than confident he can handle it. Laying out his method of operation, Mr. Starr mentioned his experienced staff ("that superb cadre of prosecutors") and how proposed indictments are reviewed by the staff ethicist — Sam Dash, whom Watergate fans will remember from those Senate hearings.

Yes, if one must have a loose cannon aboard the good ship Constitution, by all means Kenneth Starr is the one to have. Just compare his judicial temperament to the political zealotry of a Lawrence Walsh, or a shoot-from-the-lip type like Donald Smaltz, who is now engaged in investigating Mike Espy, Tyson Foods, and apparently everything in Arkansas and maybe the world.

But why have a loose cannon at all? Mr. Starr's assurances that he and his superb cadre are acting with great self-restraint boils down to a splendid argument for a government of men (of course they'll all be fine, careful, restrained men, like himself) rather than a government of law.

When Louis D. Brandeis warned that the "greatest dangers to liberty lurk in the insidious encroachment by men of zeal, well-meaning but without understanding," the good justice may have overlooked the potential of those men of temperance and moderation so full of understanding that they feel no need to be accountable to anyone but themselves.

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*Paul Greenberg is editorial page editor of the Arkansas Democrat Gazette in Little Rock and a nationally syndicated columnist.*

USA TODAY • THURSDAY, MAY 11, 1995

# Two cases of 'trivial pursuit'

## Pete Wilson's 'crime' wasn't one. Clinton aide's Whitewater woes are far from clear.

LOS ANGELES — California Gov. Pete Wilson and White House adviser Bruce Lindsey were this week's objects of "trivial pursuit," the high-stakes political game where obscure facts can ruin careers and even land a person in prison.

Wilson's "crime" wasn't one at all. He was re-elected on a wave of frustration about the burdens illegal immigration is imposing on the state of California during recessionary times. Last week, it emerged that nearly two decades ago, he and his former wife may have employed an illegal immigrant named Josefina to clean their condominium once a week. Even if Josefina was here illegally, which isn't clear, it was not illegal at the time for the Wilsons to employ her. But the $25 a week they paid her was enough to trigger Social Security payments, which they are making now.

**COUNTERPOINTS**
**By Susan Estrich**

There are many reasons I can think of why Pete Wilson shouldn't be president, but Josefina is nowhere on the list.

One of the rival campaigns is suspected by many of leaking word of Josefina to the press. That's how politics is practiced these days. Six years ago, people were still getting fired for doing that. Today, they get their own department in the campaign. Opposition research is a fancy name for "search and destroy." And the press bites every time. It is unable to resist the faintest aroma of a scandal. Josefina quickly became "maidgate."

For the first time since getting in the race, Pete Wilson made all the networks. The *Los Angeles Times* ran three stories on the same day about Josefina, two on the front page. One of Wilson's advisers told reporters that at least all the coverage would improve the governor's name recognition — being caught in a "scandal" being the only way to get attention when you're running for president.

The Wilsons made a mistake millions of Americans have made. It's certainly fair to report it. But it shouldn't be front-page news. Hypocrisy isn't the issue. If the governor's positions on immigration are wrong, they are wrong regardless of whom he employed; if they are right, then it also doesn't matter whom he legally employed 20 years ago.

By Bob Galbraith, AP

**UNDER FIRE:** Gov. Pete Wilson fields questions on hiring maid, who was illegal alien.

Democrats mostly crowed about Wilson's problems, but they are not crowing about what's being done to Bruce Lindsey. One of the president's most trusted advisers has been notified that he is the target of an investigation led by the Whitewater special prosecutor. The special prosecutor has until May 25 to decide whether to indict Lindsey before the five-year statute of limitations runs out; the press has already convicted him, buried him and written the obituary as part of the constantly exaggerated coverage of Whitewater.

If Lindsey committed a crime, he should be punished. But so far, that's far from clear. An Arkansas bank official has admitted to breaking up a cash withdrawal to the Clinton campaign and thus avoiding federal reporting requirements, but since Lindsey as campaign treasurer reported the spending of the cash shortly thereafter, it's not clear why he would have an interest in obscuring the fact of the withdrawal. It doesn't add up, which won't necessarily stop prosecutors from indicting him but should at least caution the press to go slow on the execution.

I'm not sure how many people could withstand the kind of scrutiny that presidential candidates, White House staff, members of the Cabinet and would-be surgeons general get these days, but my guess is that very few of us would welcome it. It is unfair to the individual and dangerous to our democracy. By treating every mistake like Watergate, the media are feeding the very same cynicism and distrust of government that in its extreme form has shocked and terrified the country.

No one is suggesting a return to the good old days when politicians got away with murder and the public was kept in the dark. But if we don't find a happy medium between the code of silence and public execution before trial, we will all pay the price.

**COUNTERPOINTS'** four columnists provide views from diverse perspectives on today's issues. **Mondays:** Tony Snow; **Tuesdays:** Michael Gartner; **Wednesdays:** Linda Chavez. **Thursdays:** Susan Estrich.

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HEADLINE: Judge George McKinnon Is Remembered In Washington, D.C.

BYLINE: NINA TOTENBERG

HIGHLIGHT: A memorial service will be held today for George McKinnon, who served for 23 years on the U.S. Court of Appeals in Washington. The 89-year-old judge was appointed by Richard Nixon.

BODY:

BOB EDWARDS, Host: Supreme Court justices, members of Congress, and prominent lawyers will gather today at a memorial service for a judge little known outside the nation's capital, but in Washington George McKinnon [sp] was a figure who left an indelible mark on the law, and the course of U.S. history. A distinguished conservative jurist, McKinnon will be remembered for the unprecedented three terms, seven years, he served as head of a special three-judge court. That panel appointed special prosecutors to investigate alleged wrongdoing in high places. NPR's legal affairs correspondent Nina Totenberg reports.

NINA TOTENBERG, Reporter: Crusty, even crotchety on the surface, George McKinnon was loved and admired by his colleagues as the quintessential straight shooter, an incredibly hard worker who called the shots as he saw them without fear or favor. He served for 23 years on the U.S. Court of Appeals in Washington, appointed by President Nixon to a court that was then considered the most liberal in the nation. McKinnon soon fulfilled Nixon's expectations, dissenting frequently from liberal rulings. When the composition of the court changed, however, under Presidents Reagan and Bush, the liberals, by then in a minority, had nothing but praise for McKinnon. Said one liberal judge, 'Unlike some of the conservatives now on this court, George's first loyalty is to the law, not ideology or politics.'

George McKinnon started out in life as a political animal. He was a Republican state legislator in Minnesota, a member of Congress, and run unsuccessfully for governor on the GOP ticket. But he was also a lawyer's lawyer, an experienced prosecutor who served first as U.S. attorney for Minnesota, then as an investigator at the Justice Department and, finally, as general counsel for a major mutual fund.

He had known Richard Nixon in the House of Representatives when they served as freshmen together and worked on the Algier Hiss case. After Nixon appointed

him to the Appeals Court, McKinnon found himself sitting in judgment on the president and his former aides. The Watergate scandal pained him greatly and, to his dying day, he remained concerned that history would correctly reflect his role.

Several weeks ago, before his death, he called this reporter to his home. The 89-year-old judge, once a tall, hulking bear of a man, was a frail 130 pounds, and his booming voice was now a whisper. But he wanted to set the record straight, he said, on a couple of things.

In 1976 he had dissented in part from the Appeals Court decision to uphold the convictions of Watergate defendants Haldeman, Erlichman, and Mitchell. They were guilty, he told me, no doubt about that, and he had written two-thirds of the court's unsigned opinion about their obvious guilt, but he said he thought that the trial should have been moved out of Washington because the publicity about Watergate in the Washington Post had been so overwhelming.

Later, he learned from another federal judge, Milton Pollack [sp] from New York, that one of his liberal colleagues on the D.C. court had remarked that McKinnon had been the only judge who saw the case with 'an even eye,' uninfluenced by politics. In 1990, McKinnon wrote to Judge Pollack, asking him to commemorate the story in writing, and Pollack did just that.

As I sat in Judge McKinnon's living room several weeks ago, he gave me the letter. McKinnon wanted to talk about something else too, and that was his job as head of the judicial panel that appointed independent counsels to investigate charges of wrongdoing by executive branch officials. By and large the law worked well, he said, though, with a hint of criticism, he said he thought it unwise to appoint special prosecutors who had ambitions for higher office. The remark was in response to a question about Whitewater independent counsel Kenneth Star who, at age 48, is still considered a hot prospect for the U.S. Supreme Court.

But, more importantly, McKinnon wanted to talk about the appointment he was most proud of, the appointment of Lawrence Walsh as Iran-Contra special prosecutor. The criticism of Walsh from the Reagan and Bush White Houses, and from Republicans on Capitol Hill, he said, was wrong.

GEORGE McKINNON, U.S. Court of Appeals, Washington, D.C.: It was absolutely unfair. He was doing what he had to do. He proved it. They were holding back the evidence on him, and you couldn't have gotten a better in the world- in the United States to handle that particular case.

NINA TOTENBERG: And McKinnon rejected the notion that Walsh's seven-year investigation had taken too long.

GEORGE McKINNON: It took longer because they held back the evidence.

NINA TOTENBERG: Walsh, he said, had sacrificed an easy, good life in semi-retirement to serve the nation.

GEORGE McKINNON: He did a great service to the country. Nobody could have done any better. I think he merits the Medal of Freedom for all the convictions he got. The reason Republicans are against him was because he convicted Republicans.

NINA TOTENBERG: [interviewing] You're a Republican.

GEORGE McKINNON: Well, I know it, but I'm not that kind of a Republican. I follow the law.

NINA TOTENBERG: Judge George McKinnon died earlier this week at age 89. I'm Nina Totenberg in Washington.

The preceding text has been professionally transcribed. However, although the text has been checked against an audio track, in order to meet rigid distribution and transmission deadlines, it may not have been proofread against tape.

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LOAD-DATE-MDC: May 5, 1995

# MORRISON, INDEPENDENT COUNSEL *v.* OLSON ET AL.

## APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-1279. Argued April 26, 1988—Decided June 29, 1988

This case presents the question of the constitutionality of the independent counsel provisions of the Ethics in Government Act of 1978 (Act). It arose when the House Judiciary Committee began an investigation into the Justice Department's role in a controversy between the House and the Environmental Protection Agency (EPA) with regard to the Agency's limited production of certain documents that had been subpoenaed during an earlier House investigation. The Judiciary Committee's Report suggested that an official of the Attorney General's Office (appellee Olson) had given false testimony during the earlier EPA investigation, and that two other officials of that Office (appellees Schmults and Dinkins) had obstructed the EPA investigation by wrongfully withholding certain documents. A copy of the Report was forwarded to the Attorney General with a request, pursuant to the Act, that he seek appointment of an independent counsel to investigate the allegations against appellees. Ultimately, pursuant to the Act's provisions, the Special Division (a special court created by the Act) appointed appellant as independent counsel with respect to Olson only, and gave her jurisdiction to investigate whether Olson's testimony, or any other matter related thereto, violated federal law, and to prosecute any violations. When a dispute arose between independent counsel and the Attorney General, who refused to furnish as "related matters" the Judiciary Committee's allegations against Schmults and Dinkins, the Special Division ruled that its grant of jurisdiction to counsel was broad enough to permit inquiry into whether Olson had conspired with others, including Schmults and Dinkins, to obstruct the EPA investigation. Appellant then caused a grand jury to issue subpoenas on appellees, who moved in Federal District Court to quash the subpoenas, claiming that the Act's independent counsel provisions were unconstitutional and that appellant accordingly had no authority to proceed. The court upheld the Act's constitutionality, denied the motions, and later ordered that appellees be held in contempt for continuing to refuse to comply with the subpoenas. The Court of Appeals reversed, holding that the Act violated the Appointments Clause of the Constitution, Art. II, § 2, cl. 2; the limitations

of Article III; and the principle of separation of powers by interfering with the President's authority under Article II.

*Held:*

1. There is no merit to appellant's contention—based on *Blair* v. *United States*, 250 U. S. 273, which limited the issues that may be raised by a person who has been held in contempt for failure to comply with a grand jury subpoena—that the constitutional issues addressed by the Court of Appeals cannot be raised on this appeal from the District Court's contempt judgment. The Court of Appeals ruled that, because appellant had failed to object to the District Court's consideration of the merits of appellees' constitutional claims, she had waived her opportunity to contend on appeal that *Blair* barred review of those claims. Appellant's contention is not "jurisdictional" in the sense that it cannot be waived by failure to raise it at the proper time and place. Nor is it the sort of claim which would defeat jurisdiction in the District Court by showing that an Article III "Case or Controversy" is lacking. Pp. 669–670.

2. It does not violate the Appointments Clause for Congress to vest the appointment of independent counsel in the Special Division. Pp. 670–677.

(a) Appellant is an "inferior" officer for purposes of the Clause, which—after providing for the appointment of certain federal officials ("principal" officers) by the President with the Senate's advice and consent—states that "the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." Although appellant may not be "subordinate" to the Attorney General (and the President) insofar as, under the Act, she possesses a degree of independent discretion to exercise the powers delegated to her, the fact that the Act authorizes her removal by the Attorney General indicates that she is to some degree "inferior" in rank and authority. Moreover, appellant is empowered by the Act to perform only certain, limited duties, restricted primarily to investigation and, if appropriate, prosecution for certain federal crimes. In addition, appellant's office is limited in jurisdiction to that which has been granted by the Special Division pursuant to a request by the Attorney General. Also, appellant's office is "temporary" in the sense that an independent counsel is appointed essentially to accomplish a single task, and when that task is over the office is terminated, either by counsel herself or by action of the Special Division. Pp. 670–673.

(b) There is no merit to appellees' argument that, even if appellant is an "inferior" officer, the Clause does not empower Congress to place the power to appoint such an officer outside the Executive Branch—that

is, to make "interbranch appointments." The Clause's language as to "inferior" officers admits of no limitation on interbranch appointments, but instead seems clearly to give Congress significant discretion to determine whether it is "proper" to vest the appointment of, for example, executive officials in the "courts of Law." The Clause's history provides no support for appellees' position. Moreover, Congress was concerned when it created the office of independent counsel with the conflicts of interest that could arise in situations when the Executive Branch is called upon to investigate its own high-ranking officers, and the most logical place to put the appointing authority was in the Judicial Branch. In light of the Act's provision making the judges of the Special Division ineligible to participate in any matters relating to an independent counsel they have appointed, appointment of independent counsel by that court does not run afoul of the constitutional limitation on "incongruous" interbranch appointments. Pp. 673–677.

3. The powers vested in the Special Division do not violate Article III, under which executive or administrative duties of a nonjudicial nature may not be imposed on judges holding office under Article III. Pp. 677–685.

(a) There can be no Article III objection to the Special Division's exercise of the power, under the Act, to appoint independent counsel, since the power itself derives from the Appointments Clause, a source of authority for judicial action that is independent of Article III. Moreover, the Division's Appointments Clause powers encompass the power to define the independent counsel's jurisdiction. When, as here, Congress creates a temporary "office," the nature and duties of which will by necessity vary with the factual circumstances giving rise to the need for an appointment in the first place, it may vest the power to define the office's scope in the court as an incident to the appointment of the officer pursuant to the Appointments Clause. However, the jurisdiction that the court decides upon must be demonstrably related to the factual circumstances that gave rise to the Attorney General's request for the appointment of independent counsel in the particular case. Pp. 678–679.

(b) Article III does not absolutely prevent Congress from vesting certain miscellaneous powers in the Special Division under the Act. One purpose of the broad prohibition upon the courts' exercise of executive or administrative duties of a nonjudicial nature is to maintain the separation between the Judiciary and the other branches of the Federal Government by ensuring that judges do not encroach upon executive or legislative authority or undertake tasks that are more properly accomplished by those branches. Here, the Division's miscellaneous powers—such as the passive powers to "receive" (but not to act on or specifically approve) various reports from independent counsel or the Attorney General—do not encroach upon the Executive Branch's authority. The Act

simply does not give the Division power to "supervise" the independent counsel in the exercise of counsel's investigative or prosecutorial authority. And, the functions that the Division is empowered to perform are not inherently "Executive," but are directly analogous to functions that federal judges perform in other contexts. Pp. 680–681.

(c) The Special Division's power to terminate an independent counsel's office when counsel's task is completed—although "administrative" to the extent that it requires the Division to monitor the progress of counsel's proceedings and to decide whether counsel's job is "completed"—is not such a significant judicial encroachment upon executive power or upon independent counsel's prosecutorial discretion as to require that the Act be invalidated as inconsistent with Article III. The Act's termination provisions do not give the Division anything approaching the power to *remove* the counsel while an investigation or court proceeding is still underway—this power is vested solely in the Attorney General. Pp. 682–683.

(d) Nor does the Special Division's exercise of the various powers specifically granted to it pose any threat to the impartial and independent federal adjudication of claims within the judicial power of the United States. The Act gives the Division itself no power to review any of the independent counsel's actions or any of the Attorney General's actions with regard to the counsel. Accordingly, there is no risk of partisan or biased adjudication of claims regarding the independent counsel by that court. Moreover, the Act prevents the Division's members from participating in "any judicial proceeding concerning a matter which involves such independent counsel while such independent counsel is serving in that office or which involves the exercise of such independent counsel's official duties, regardless of whether such independent counsel is still serving in that office." Pp. 683–685.

4. The Act does not violate separation of powers principles by impermissibly interfering with the functions of the Executive Branch. Pp. 685–696.

(a) The Act's provision restricting the Attorney General's power to remove the independent counsel to only those instances in which he can show "good cause," taken by itself, does not impermissibly interfere with the President's exercise of his constitutionally appointed functions. Here, Congress has not attempted to gain a role in the removal of executive officials other than its established powers of impeachment and conviction. The Act instead puts the removal power squarely in the hands of the Executive Branch. *Bowsher* v. *Synar*, 478 U. S. 714, and *Myers* v. *United States*, 272 U. S. 52, distinguished. The determination of whether the Constitution allows Congress to impose a "good cause"-type restriction on the President's power to remove an official does not turn on whether or not that official is classified as "purely executive." The

analysis contained in this Court's removal cases is designed not to define rigid categories of those officials who may or may not be removed at will by the President, but to ensure that Congress does not interfere with the President's exercise of the "executive power" and his constitutionally appointed duty to "take care that the laws be faithfully executed" under Article II. Cf. *Humphrey's Executor* v. *United States*, 295 U. S. 602; *Wiener* v. *United States*, 357 U. S. 349. Here, the Act's imposition of a "good cause" standard for removal by itself does not unduly trammel on executive authority. The congressional determination to limit the Attorney General's removal power was essential, in Congress' view, to establish the necessary independence of the office of independent counsel. Pp. 685–693.

(b) The Act, taken as a whole, does not violate the principle of separation of powers by unduly interfering with the Executive Branch's role. This case does not involve an attempt by Congress to increase its own powers at the expense of the Executive Branch. The Act does empower certain Members of Congress to request the Attorney General to apply for the appointment of an independent counsel, but the Attorney General has no duty to comply with the request, although he must respond within a certain time limit. Other than that, Congress' role under the Act is limited to receiving reports or other information and to oversight of the independent counsel's activities, functions that have been recognized generally as being incidental to the legislative function of Congress. Similarly, the Act does not work any judicial usurpation of properly executive functions. Nor does the Act impermissibly undermine the powers of the Executive Branch, or disrupt the proper balance between the coordinate branches by preventing the Executive Branch from accomplishing its constitutionally assigned functions. Even though counsel is to some degree "independent" and free from Executive Branch supervision to a greater extent than other federal prosecutors, the Act gives the Executive Branch sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties. Pp. 693–696.

267 U. S. App. D. C. 178, 838 F. 2d 476, reversed.

REHNQUIST, C. J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, BLACKMUN, STEVENS, and O'CONNOR, JJ., joined. SCALIA, J., filed a dissenting opinion, *post*, p. 697. KENNEDY, J., took no part in the consideration or decision of the case.

JUSTICE SCALIA, dissenting.

It is the proud boast of our democracy that we have "a government of laws and not of men." Many Americans are familiar with that phrase; not many know its derivation. It comes from Part the First, Article XXX, of the Massachusetts Constitution of 1780, which reads in full as follows:

> "In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men."

The Framers of the Federal Constitution similarly viewed the principle of separation of powers as the absolutely central guarantee of a just Government. In No. 47 of The Federalist, Madison wrote that "[n]o political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty." The Federalist No. 47, p. 301 (C. Rossiter ed. 1961) (hereinafter Federalist). Without a secure structure of separated powers, our Bill of Rights would be worthless, as are the bills of rights of many nations of the world that have adopted, or even improved upon, the mere words of ours.

The principle of separation of powers is expressed in our Constitution in the first section of each of the first three Articles. Article I, § 1, provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United

States, which shall consist of a Senate and House of Representatives." Article III, § 1, provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." And the provision at issue here, Art. II, § 1, cl. 1, provides that "[t]he executive Power shall be vested in a President of the United States of America."

But just as the mere words of a Bill of Rights are not self-effectuating, the Framers recognized "[t]he insufficiency of a mere parchment delineation of the boundaries" to achieve the separation of powers. Federalist No. 73, p. 442 (A. Hamilton). "[T]he great security," wrote Madison, "against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack." Federalist No. 51, pp. 321–322. Madison continued:

> "But it is not possible to give to each department an equal power of self-defense. In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit. . . . As the weight of the legislative authority requires that it should be thus divided, the weakness of the executive may require, on the other hand, that it should be fortified." *Id.*, at 322–323.

The major "fortification" provided, of course, was the veto power. But in addition to providing fortification, the Founders conspicuously and very consciously declined to sap the Executive's strength in the same way they had weakened

the Legislature: by dividing the executive power. Proposals to have multiple executives, or a council of advisers with separate authority were rejected. See 1 M. Farrand, Records of the Federal Convention of 1787, pp. 66, 71–74, 88, 91–92 (rev. ed. 1966); 2 *id.*, at 335–337, 533, 537, 542. Thus, while "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate *and* House of Representatives," U. S. Const., Art. I, § 1 (emphasis added), "[t]he executive Power shall be vested in *a President of the United States*." Art. II, § 1, cl. 1 (emphasis added).

That is what this suit is about. Power. The allocation of power among Congress, the President, and the courts in such fashion as to preserve the equilibrium the Constitution sought to establish—so that "a gradual concentration of the several powers in the same department," Federalist No. 51, p. 321 (J. Madison), can effectively be resisted. Frequently an issue of this sort will come before the Court clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf.

## I

The present case began when the Legislative and Executive Branches became "embroiled in a dispute concerning the scope of the congressional investigatory power," *United States* v. *House of Representatives of United States*, 556 F. Supp. 150, 152 (DC 1983), which—as is often the case with such interbranch conflicts—became quite acrimonious. In the course of oversight hearings into the administration of the Superfund by the Environmental Protection Agency (EPA), two Subcommittees of the House of Representatives requested and then subpoenaed numerous internal EPA documents. The President responded by personally directing the EPA Administrator not to turn over certain of the docu-

ments, see Memorandum of November 30, 1982, from President Reagan for the Administrator, Environmental Protection Agency, reprinted in H. R. Rep. No. 99–435, pp. 1166–1167 (1985), and by having the Attorney General notify the congressional Subcommittees of this assertion of executive privilege, see Letters of November 30, 1982, from Attorney General William French Smith to Hon. John D. Dingell and Hon. Elliott H. Levitas, reprinted, *id.*, at 1168–1177. In his decision to assert executive privilege, the President was counseled by appellee Olson, who was then Assistant Attorney General of the Department of Justice for the Office of Legal Counsel, a post that has traditionally had responsibility for providing legal advice to the President (subject to approval of the Attorney General). The House's response was to pass a resolution citing the EPA Administrator, who had possession of the documents, for contempt. Contempt of Congress is a criminal offense. See 2 U. S. C. § 192. The United States Attorney, however, a member of the Executive Branch, initially took no steps to prosecute the contempt citation. Instead, the Executive Branch sought the immediate assistance of the Third Branch by filing a civil action asking the District Court to declare that the EPA Administrator had acted lawfully in withholding the documents under a claim of executive privilege. See *ibid.* The District Court declined (in my view correctly) to get involved in the controversy, and urged the other two branches to try "[c]ompromise and cooperation, rather than confrontation." 556 F. Supp., at 153. After further haggling, the two branches eventually reached an agreement giving the House Subcommittees limited access to the contested documents.

Congress did not, however, leave things there. Certain Members of the House remained angered by the confrontation, particularly by the role played by the Department of Justice. Specifically, the Judiciary Committee remained disturbed by the possibility that the Department had persuaded the President to assert executive privilege despite reservations by the

EPA; that the Department had "deliberately and unnecessarily precipitated a constitutional confrontation with Congress"; that the Department had not properly reviewed and selected the documents as to which executive privilege was asserted; that the Department had directed the United States Attorney not to present the contempt certification involving the EPA Administrator to a grand jury for prosecution; that the Department had made the decision to sue the House of Representatives; and that the Department had not adequately advised and represented the President, the EPA, and the EPA Administrator. H. R. Rep. No. 99-435, p. 3 (1985) (describing unresolved "questions" that were the basis of the Judiciary Committee's investigation). Accordingly, staff counsel of the House Judiciary Committee were commissioned (apparently without the knowledge of many of the Committee's members, see *id.*, at 731) to investigate the Justice Department's role in the controversy. That investigation lasted 2½ years, and produced a 3,000-page report issued by the Committee over the vigorous dissent of all but one of its minority-party members. That report, which among other charges questioned the truthfulness of certain statements made by Assistant Attorney General Olson during testimony in front of the Committee during the early stages of its investigation, was sent to the Attorney General along with a formal request that he appoint an independent counsel to investigate Mr. Olson and others.

As a general matter, the Act before us here requires the Attorney General to apply for the appointment of an independent counsel within 90 days after receiving a request to do so, unless he determines within that period that "there are no reasonable grounds to believe that further investigation or prosecution is warranted." 28 U. S. C. §592(b)(1). As a practical matter, it would be surprising if the Attorney General had any choice (assuming this statute is constitutional) but to seek appointment of an independent counsel to pursue the charges against the principal object of the congressional

request, Mr. Olson. Merely the political consequences (to him and the President) of seeming to break the law by refusing to do so would have been substantial. How could it not be, the public would ask, that a 3,000-page indictment drawn by our representatives over 2½ years does not even establish "reasonable grounds to believe" that further investigation or prosecution is warranted with respect to at least the principal alleged culprit? But the Act establishes more than just practical compulsion. Although the Court's opinion asserts that the Attorney General had "no duty to comply with the [congressional] request," *ante*, at 694, that is not entirely accurate. He *had* a duty to comply unless he could conclude that there were "*no reasonable grounds to believe*," not that prosecution was warranted, but merely that "*further investigation*" was warranted, 28 U. S. C. § 592(b)(1) (1982 ed., Supp. V) (emphasis added), after a 90-day investigation in which he was prohibited from using such routine investigative techniques as grand juries, plea bargaining, grants of immunity, or even subpoenas, see § 592(a)(2). The Court also makes much of the fact that "the courts are specifically prevented from reviewing the Attorney General's decision not to seek appointment, § 592(f)." *Ante*, at 695. Yes,[1] but *Congress* is not prevented from reviewing it. The context of this statute is acrid with the smell of threatened impeachment. Where, as here, a request for appointment of an inde-

[1] I agree with the Court on this point, but not because of the section of the statute that it cites, § 592(f). What that provides is that "[t]he Attorney General's determination . . . *to apply to the division of the court for the appointment of an independent counsel shall not be reviewable in any court.*" Quite obviously, the determination to apply is not the same as the determination not to apply. In other contexts, we have sternly avoided "construing" a statute to mean what it plainly does not say, merely in order to avoid constitutional problems. See *Commodity Futures Trading Comm'n* v. *Schor*, 478 U. S. 833, 841 (1986). In my view, however, the Attorney General's decision not to refer would in any event be nonreviewable as the exercise of prosecutorial discretion. See *Heckler* v. *Chaney*, 470 U. S. 821 (1985).

pendent counsel has come from the Judiciary Committee of either House of Congress, the Attorney General must, if he decides not to seek appointment, explain to that Committee why. See also 28 U. S. C. §595(c) (1982 ed., Supp. V) (independent counsel must report to the House of Representatives information "that may constitute grounds for an impeachment").

Thus, by the application of this statute in the present case, Congress has effectively compelled a criminal investigation of a high-level appointee of the President in connection with his actions arising out of a bitter power dispute between the President and the Legislative Branch. Mr. Olson may or may not be guilty of a crime; we do not know. But we do know that the investigation of him has been commenced, not necessarily because the President or his authorized subordinates believe it is in the interest of the United States, in the sense that it warrants the diversion of resources from other efforts, and is worth the cost in money and in possible damage to other governmental interests; and not even, leaving aside those normally considered factors, because the President or his authorized subordinates necessarily believe that an investigation is likely to unearth a violation worth prosecuting; but only because the Attorney General cannot affirm, as Congress demands, that there are *no reasonable grounds to believe* that further investigation is warranted. The decisions regarding the scope of that further investigation, its duration, and, finally, whether or not prosecution should ensue, are likewise beyond the control of the President and his subordinates.

II

If to describe this case is not to decide it, the concept of a government of separate and coordinate powers no longer has meaning. The Court devotes most of its attention to such relatively technical details as the Appointments Clause and the removal power, addressing briefly and only at the end of its opinion the separation of powers. As my prologue sug-

gests, I think that has it backwards. Our opinions are full of the recognition that it is the principle of separation of powers, and the inseparable corollary that each department's "defense must . . . be made commensurate to the danger of attack," Federalist No. 51, p. 322 (J. Madison), which gives comprehensible content to the Appointments Clause, and determines the appropriate scope of the removal power. Thus, while I will subsequently discuss why our appointments and removal jurisprudence does not support today's holding, I begin with a consideration of the fountainhead of that jurisprudence, the separation and equilibration of powers.

First, however, I think it well to call to mind an important and unusual premise that underlies our deliberations, a premise not expressly contradicted by the Court's opinion, but in my view not faithfully observed. It is rare in a case dealing, as this one does, with the constitutionality of a statute passed by the Congress of the United States, not to find anywhere in the Court's opinion the usual, almost formulary caution that we owe great deference to Congress' view that what it has done is constitutional, see, *e. g.*, *Rostker* v. *Goldberg*, 453 U. S. 57, 64 (1981); *Fullilove* v. *Klutznick*, 448 U. S. 448, 472 (1980) (opinion of Burger, C. J.); *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U. S. 94, 102 (1973); *United States* v. *National Dairy Products Corp.*, 372 U. S. 29, 32 (1963), and that we will decline to apply the statute only if the presumption of constitutionality can be overcome, see *Fullilove*, *supra*, at 473; *Columbia Broadcasting*, *supra*, at 103. That caution is not recited by the Court in the present case *because it does not apply*. Where a private citizen challenges action of the Government on grounds unrelated to separation of powers, harmonious functioning of the system demands that we ordinarily give some deference, or a presumption of validity, to the actions of the political branches in what is agreed, between themselves at least, to be within their respective spheres. But where the issue pertains to separation of pow-

ers, and the political branches are (as here) in disagreement, neither can be presumed correct. The reason is stated concisely by Madison: "The several departments being perfectly co-ordinate by the terms of their common commission, neither of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers . . . ." Federalist No. 49, p. 314. The playing field for the present case, in other words, is a level one. As one of the interested and coordinate parties to the underlying constitutional dispute, Congress, no more than the President, is entitled to the benefit of the doubt.

To repeat, Article II, § 1, cl. 1, of the Constitution provides:

> "The executive Power shall be vested in a President of the United States."

As I described at the outset of this opinion, this does not mean *some of* the executive power, but *all of* the executive power. It seems to me, therefore, that the decision of the Court of Appeals invalidating the present statute must be upheld on fundamental separation-of-powers principles if the following two questions are answered affirmatively: (1) Is the conduct of a criminal prosecution (and of an investigation to decide whether to prosecute) the exercise of purely executive power? (2) Does the statute deprive the President of the United States of exclusive control over the exercise of that power? Surprising to say, the Court appears to concede an affirmative answer to both questions, but seeks to avoid the inevitable conclusion that since the statute vests some purely executive power in a person who is not the President of the United States it is void.

The Court concedes that "[t]here is no real dispute that the functions performed by the independent counsel are 'executive'," though it qualifies that concession by adding "in the sense that they are law enforcement functions that typically have been undertaken by officials within the Executive Branch." *Ante*, at 691. The qualifier adds nothing but at-

mosphere. In what *other* sense can one identify "the executive Power" that is supposed to be vested in the President (unless it includes everything the Executive Branch is given to do) *except* by reference to what has always and everywhere—if conducted by government at all—been conducted never by the legislature, never by the courts, and always by the executive. There is no possible doubt that the independent counsel's functions fit this description. She is vested with the "full power and independent authority to exercise all *investigative and prosecutorial* functions and powers of the Department of Justice [and] the Attorney General." 28 U. S. C. § 594(a) (1982 ed., Supp. V) (emphasis added). Governmental investigation and prosecution of crimes is a quintessentially executive function. See *Heckler* v. *Chaney*, 470 U. S. 821, 832 (1985); *Buckley* v. *Valeo*, 424 U. S. 1, 138 (1976); *United States* v. *Nixon*, 418 U. S. 683, 693 (1974).

As for the second question, whether the statute before us deprives the President of exclusive control over that quintessentially executive activity: The Court does not, and could not possibly, assert that it does not. That is indeed the whole object of the statute. Instead, the Court points out that the President, through his Attorney General, has at least *some* control. That concession is alone enough to invalidate the statute, but I cannot refrain from pointing out that the Court greatly exaggerates the extent of that "some" Presidential control. "Most importan[t]" among these controls, the Court asserts, is the Attorney General's "power to remove the counsel for 'good cause.'" *Ante*, at 696. This is somewhat like referring to shackles as an effective means of locomotion. As we recognized in *Humphrey's Executor* v. *United States*, 295 U. S. 602 (1935)—indeed, what *Humphrey's Executor* was all about—limiting removal power to "good cause" is an impediment to, not an effective grant of, Presidential control. We said that limitation was necessary with respect to members of the Federal Trade Commission, which we found to be "an agency of the legislative and judicial

departments," and "wholly disconnected from the executive department." *Id.*, at 630, because "it is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will." *Id.*, at 629. What we in *Humphrey's Executor* found to be a means of eliminating Presidential control, the Court today considers the "most importan[t]" means of assuring Presidential control. Congress, of course, operated under no such illusion when it enacted this statute, describing the "good cause" limitation as "protecting the independent counsel's ability to act independently of the President's direct control" since it permits removal only for "misconduct." H. R. Conf. Rep. 100–452, p. 37 (1987).

Moving on to the presumably "less important" controls that the President retains, the Court notes that no independent counsel may be appointed without a specific request from the Attorney General. As I have discussed above, the condition that renders such a request mandatory (inability to find "no reasonable grounds to believe" that further investigation is warranted) is so insubstantial that the Attorney General's discretion is severely confined. And once the referral is made, it is for the Special Division to determine the scope and duration of the investigation. See 28 U. S. C. § 593(b) (1982 ed., Supp. V). And in any event, the limited power over referral is irrelevant to the question whether, *once appointed*, the independent counsel exercises executive power free from the President's control. Finally, the Court points out that the Act directs the independent counsel to abide by general Justice Department policy, except when not "possible." See 28 U. S. C. § 594(f) (1982 ed., Supp. V). The exception alone shows this to be an empty promise. Even without that, however, one would be hard put to come up with many investigative or prosecutorial "policies" (other than those imposed by the Constitution or by Congress through law) that are absolute. Almost all investigative and prosecutorial deci-

sions—including the ultimate decision whether, after a technical violation of the law has been found, prosecution is warranted—involve the balancing of innumerable legal and practical considerations. Indeed, even political considerations (in the nonpartisan sense) must be considered, as exemplified by the recent decision of an independent counsel to subpoena the former Ambassador of Canada, producing considerable tension in our relations with that country. See N. Y. Times, May 29, 1987, p. A12, col. 1. 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 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. 28 U. S. C. § 594(a)(6) (1982 ed., Supp. V). In sum, the balancing of various legal, practical, and political considerations, none of which is absolute, is the very essence of prosecutorial discretion. To take this away is to remove the core of the prosecutorial function, and not merely "some" Presidential control.

As I have said, however, it is ultimately irrelevant *how much* the statute reduces Presidential control. The case is over when the Court acknowledges, as it must, that "[i]t is undeniable that the Act reduces the amount of control or supervision that the Attorney General and, through him, the President exercises over the investigation and prosecution of a certain class of alleged criminal activity." *Ante*, at 695. It effects a revolution in our constitutional jurisprudence for the Court, once it has determined that (1) purely executive functions are at issue here, and (2) those functions have been given to a person whose actions are not fully within the supervision and control of the President, nonetheless to proceed further to sit in judgment of whether "the President's need to control the exercise of [the independent counsel's]

discretion is *so central* to the functioning of the Executive Branch" as to require complete control, *ante*, at 691 (emphasis added); whether the conferral of his powers upon someone else "*sufficiently* deprives the President of control over the independent counsel to interfere impermissibly with [his] constitutional obligation to ensure the faithful execution of the laws," *ante*, at 693 (emphasis added), and whether "the Act give[s] the Executive Branch *sufficient* control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties," *ante*, at 696 (emphasis added). It is not for us to determine, and we have never presumed to determine, how much of the purely executive powers of government must be within the full control of the President. The Constitution prescribes that they *all* are.

The utter incompatibility of the Court's approach with our constitutional traditions can be made more clear, perhaps, by applying it to the powers of the other two branches. Is it conceivable that if Congress passed a statute depriving itself of less than full and entire control over some insignificant area of legislation, we would inquire whether the matter was "*so central* to the functioning of the Legislative Branch" as really to require complete control, or whether the statute gives Congress "*sufficient* control over the surrogate legislator to ensure that Congress is able to perform its constitutionally assigned duties"? Of course we would have none of that. Once we determined that a purely legislative power was at issue we would require it to be exercised, wholly and entirely, by Congress. Or to bring the point closer to home, consider a statute giving to non-Article III judges just a tiny bit of purely judicial power in a relatively insignificant field, with substantial control, though not total control, in the courts—perhaps "clear error" review, which would be a fair judicial equivalent of the Attorney General's "for cause" removal power here. Is there any doubt that we would not pause to inquire whether the matter was "*so central* to the

functioning of the Judicial Branch" as really to require complete control, or whether we retained "*sufficient* control over the matters to be decided that we are able to perform our constitutionally assigned duties"? We would say that our "constitutionally assigned duties" include *complete* control over all exercises of the judicial power—or, as the plurality opinion said in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50, 58–59 (1982): "The inexorable command of [Article III] is clear and definite: The judicial power of the United States must be exercised by courts having the attributes prescribed in Art. III." We should say here that the President's constitutionally assigned duties include *complete* control over investigation and prosecution of violations of the law, and that the inexorable command of Article II is clear and definite: the executive power must be vested in the President of the United States.

Is it unthinkable that the President should have such exclusive power, even when alleged crimes by him or his close associates are at issue? No more so than that Congress should have the exclusive power of legislation, even when what is at issue is its own exemption from the burdens of certain laws. See Civil Rights Act of 1964, Title VII, 42 U. S. C. § 2000e *et seq.* (prohibiting "employers," not defined to include the United States, from discriminating on the basis of race, color, religion, sex, or national origin). No more so than that this Court should have the exclusive power to pronounce the final decision on justiciable cases and controversies, even those pertaining to the constitutionality of a statute reducing the salaries of the Justices. See *United States* v. *Will*, 449 U. S. 200, 211–217 (1980). A system of separate and coordinate powers necessarily involves an acceptance of exclusive power that can theoretically be abused. As we reiterate this very day, "[i]t is a truism that constitutional protections have costs." *Coy* v. *Iowa*, *post*, at 1020. While the separation of powers may prevent us from righting every wrong, it does so in order to ensure that we do not lose lib-

erty. The checks against any branch's abuse of its exclusive powers are twofold: First, retaliation by one of the other branch's use of *its* exclusive powers: Congress, for example, can impeach the executive who willfully fails to enforce the laws; the executive can decline to prosecute under unconstitutional statutes, cf. *United States* v. *Lovett*, 328 U. S. 303 (1946); and the courts can dismiss malicious prosecutions. Second, and ultimately, there is the political check that the people will replace those in the political branches (the branches more "dangerous to the political rights of the Constitution," Federalist No. 78, p. 465) who are guilty of abuse. Political pressures produced special prosecutors—for Teapot Dome and for Watergate, for example—long before this statute created the independent counsel. See Act of Feb. 8, 1924, ch. 16, 43 Stat. 5–6; 38 Fed. Reg. 30738 (1973).

The Court has, nonetheless, replaced the clear constitutional prescription that the executive power belongs to the President with a "balancing test." What are the standards to determine how the balance is to be struck, that is, how much removal of Presidential power is too much? Many countries of the world get along with an executive that is much weaker than ours—in fact, entirely dependent upon the continued support of the legislature. Once we depart from the text of the Constitution, just where short of that do we stop? The most amazing feature of the Court's opinion is that it does not even purport to give an answer. It simply *announces*, with no analysis, that the ability to control the decision whether to investigate and prosecute the President's closest advisers, and indeed the President himself, is not "so central to the functioning of the Executive Branch" as to be constitutionally required to be within the President's control. Apparently that is so because we say it is so. Having abandoned as the basis for our decisionmaking the text of Article II that "the executive Power" must be vested in the President, the Court does not even attempt to craft a *substitute* criterion—a "justiciable standard," see, *e. g.*, *Baker* v. *Carr*,

369 U. S. 186, 210 (1962); *Coleman* v. *Miller*, 307 U. S. 433, 454–455 (1939), however remote from the Constitution—that today governs, and in the future will govern, the decision of such questions. Evidently, the governing standard is to be what might be called the unfettered wisdom of a majority of this Court, revealed to an obedient people on a case-by-case basis. This is not only not the government of laws that the Constitution established; it is not a government of laws at all.

In my view, moreover, even as an ad hoc, standardless judgment the Court's conclusion must be wrong. Before this statute was passed, the President, in taking action disagreeable to the Congress, or an executive officer giving advice to the President or testifying before Congress concerning one of those many matters on which the two branches are from time to time at odds, could be assured that his acts and motives would be adjudged—insofar as the decision whether to conduct a criminal investigation and to prosecute is concerned—in the Executive Branch, that is, in a forum attuned to the interests and the policies of the Presidency. That was one of the natural advantages the Constitution gave to the Presidency, just as it gave Members of Congress (and their staffs) the advantage of not being prosecutable for anything said or done in their legislative capacities. See U. S. Const., Art. I, § 6, cl. 1; *Gravel* v. *United States*, 408 U. S. 606 (1972). It is the very object of this legislation to eliminate that assurance of a sympathetic forum. Unless it can honestly be said that there are "no reasonable grounds to believe" that further investigation is warranted, further investigation must ensue; and the conduct of the investigation, and determination of whether to prosecute, will be given to a person neither selected by nor subject to the control of the President—who will in turn assemble a staff by finding out, presumably, who is willing to put aside whatever else they are doing, for an indeterminate period of time, in order to investigate and prosecute the President or a particular named individual in his administration. The prospect is frightening (as I will dis-

cuss at some greater length at the conclusion of this opinion) even outside the context of a bitter, interbranch political dispute. Perhaps the boldness of the President himself will not be affected—though I am not even sure of that. (How much easier it is for Congress, instead of accepting the political damage attendant to the commencement of impeachment proceedings against the President on trivial grounds—or, for that matter, how easy it is for one of the President's political foes outside of Congress—simply to trigger a debilitating criminal investigation of the Chief Executive under this law.) But as for the President's high-level assistants, who typically have no political base of support, it is as utterly unrealistic to think that they will not be intimidated by this prospect, and that their advice to him and their advocacy of his interests before a hostile Congress will not be affected, as it would be to think that the Members of Congress and their staffs would be unaffected by replacing the Speech or Debate Clause with a similar provision. It deeply wounds the President, by substantially reducing the President's ability to protect himself and his staff. That is the whole object of the law, of course, and I cannot imagine why the Court believes it does not succeed.

Besides weakening the Presidency by reducing the zeal of his staff, it must also be obvious that the institution of the independent counsel enfeebles him more directly in his constant confrontations with Congress, by eroding his public support. Nothing is so politically effective as the ability to charge that one's opponent and his associates are not merely wrongheaded, naive, ineffective, but, in all probability, "crooks." And nothing so effectively gives an appearance of validity to such charges as a Justice Department investigation and, even better, prosecution. The present statute provides ample means for that sort of attack, assuring that massive and lengthy investigations will occur, not merely when the Justice Department in the application of its usual standards believes they are called for, but whenever it

cannot be said that there are "no reasonable grounds to believe" they are called for. The statute's highly visible procedures assure, moreover, that unlike most investigations these will be widely known and prominently displayed. Thus, in the 10 years since the institution of the independent counsel was established by law, there have been nine highly publicized investigations, a source of constant political damage to two administrations. That they could not remotely be described as merely the application of "normal" investigatory and prosecutory standards is demonstrated by, in addition to the language of the statute ("no reasonable grounds to believe"), the following facts: Congress appropriates approximately $50 million annually for general legal activities, salaries, and expenses of the Criminal Division of the Department of Justice. See 1989 Budget Request of the Department of Justice, Hearings before a Subcommittee of the House Committee on Appropriations, 100th Cong., 2d Sess., pt. 6, pp. 284–285 (1988) (DOJ Budget Request). This money is used to support "[f]ederal appellate activity," "[o]rganized crime prosecution," "[p]ublic integrity" and "[f]raud" matters, "[n]arcotic & dangerous drug prosecution," "[i]nternal security," "[g]eneral litigation and legal advice," "special investigations," "[p]rosecution support," "[o]rganized crime drug enforcement," and "[m]anagement & administration." *Id.*, at 284. By comparison, between May 1986 and August 1987, four independent counsel (not all of whom were operating for that entire period of time) spent almost $5 million (one-tenth of the amount annually appropriated to the entire Criminal Division), spending almost $1 million in the month of August 1987 alone. See Washington Post, Oct. 21, 1987, p. A21, col. 5. For fiscal year 1989, the Department of Justice has requested $52 million for the entire Criminal Division, DOJ Budget Request 285, and $7 million to support the activities of independent counsel, *id.*, at 25.

In sum, this statute does deprive the President of substantial control over the prosecutory functions performed by the

independent counsel, and it does substantially affect the balance of powers. That the Court could possibly conclude otherwise demonstrates both the wisdom of our former constitutional system, in which the degree of reduced control and political impairment were irrelevant, since *all* purely executive power had to be in the President; and the folly of the new system of standardless judicial allocation of powers we adopt today.

III

As I indicated earlier, the basic separation-of-powers principles I have discussed are what give life and content to our jurisprudence concerning the President's power to appoint and remove officers. The same result of unconstitutionality is therefore plainly indicated by our case law in these areas.

Article II, § 2, cl. 2, of the Constitution provides as follows:

> "[The President] shall nominate, and by and with the Advice and Consent of the the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

Because appellant (who all parties and the Court agree is an officer of the United States, *ante*, at 671, n. 12) was not appointed by the President with the advice and consent of the Senate, but rather by the Special Division of the United States Court of Appeals, her appointment is constitutional only if (1) she is an "inferior" officer within the meaning of the above Clause, and (2) Congress may vest her appointment in a court of law.

As to the first of these inquiries, the Court does not attempt to "decide exactly" what establishes the line between

principal and "inferior" officers, but is confident that, whatever the line may be, appellant "clearly falls on the 'inferior officer' side" of it. *Ante*, at 671. The Court gives three reasons: *First*, she "is subject to removal by a higher Executive Branch official," namely, the Attorney General. *Ibid.* *Second*, she is "empowered by the Act to perform only certain, limited duties." *Ibid.* *Third*, her office is "limited in jurisdiction" and "limited in tenure." *Ante*, at 672.

The first of these lends no support to the view that appellant is an inferior officer. Appellant is removable only for "good cause" or physical or mental incapacity. 28 U. S. C. § 596(a)(1) (1982 ed., Supp. V). By contrast, most (if not all) *principal* officers in the Executive Branch may be removed by the President *at will*. I fail to see how the fact that appellant is more difficult to remove than most principal officers helps to establish that she is an inferior officer. And I do not see how it could possibly make any difference to her superior or inferior status that the President's limited power to remove her must be exercised through the Attorney General. If she were removable at will by the Attorney General, then she would be subordinate to him and thus properly designated as inferior; but the Court essentially admits that she is not subordinate. See *ante*, at 671. If it were common usage to refer to someone as "inferior" who is subject to removal for cause by another, then one would say that the President is "inferior" to Congress.

The second reason offered by the Court—that appellant performs only certain, limited duties—may be relevant to whether she is an inferior officer, but it mischaracterizes the extent of her powers. As the Court states: "Admittedly, the Act delegates to appellant [the] *'full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice.'*" *Ibid.*, quoting 28 U. S. C. § 594(a) (1982 ed., Supp. V) (emphasis

added).[2] Moreover, in addition to this general grant of power she is given a broad range of specifically enumerated powers, including a power not even the Attorney General possesses: to "contes[t] in court . . . any claim of privilege or attempt to withhold evidence on grounds of national security." § 594(a)(6).[3] Once all of this is "admitted," it seems

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[2]The Court omits the further provision that the independent counsel exercises within her sphere the "full power" of "*the Attorney General*, [with one minor exception relating to wiretap authorizations] and any other officer or employee of the Department of Justice[.]" § 594(a). This is, of course, quite difficult to square with the Court's assertion that appellant is "'inferior' in rank and authority" to the Attorney General. *Ante*, at 671.

[3]The independent counsel's specifically enumerated powers include the following:

"(1) conducting proceedings before grand juries and other investigations;

"(2) participating in court proceedings and engaging in any litigation, including civil and criminal matters, that [the] independent counsel deems necessary;

"(3) appealing any decision of a court in any case or proceeding in which [the] independent counsel participates in an official capacity;

"(4) reviewing all documentary evidence available from any source;

"(5) determining whether to contest the assertion of any testimonial privilege;

"(6) receiving appropriate national security clearances and, if necessary contesting in court . . . any claim of privilege or attempt to withhold evidence on grounds of national security;

"(7) making applications to any Federal court for a grant of immunity to any witness . . . or for warrants, subpoenas, or other court orders, and for purposes of sections 6003, 6004, and 6005 of title 18, exercising the authority vested in a United States attorney or the Attorney General;

"(8) inspecting, obtaining, or using the original or a copy of any tax return . . . ;

"(9) initiating and conducting prosecutions in any court of competent jurisdiction, framing and signing indictments, filing informations, and handling all aspects of any case filed in the name of the United States; and

"(10) consulting with the United States Attorney for the district in which the violation was alleged to have occurred." §§ 594(a)(1)–(10).

In addition, the statute empowers the independent counsel to hire a staff of a size as large as she "deems necessary," § 594(c), and to enlist and re-

to me impossible to maintain that appellant's authority is so "limited" as to render her an inferior officer. The Court seeks to brush this away by asserting that the independent counsel's power does not include any authority to "formulate policy for the Government or the Executive Branch." *Ante*, at 671. But the same could be said for all officers of the Government, with the single exception of the President. All of them only formulate policy within their respective spheres of responsibility—as does the independent counsel, who must comply with the policies of the Department of Justice only to the extent possible. § 594(f).

The final set of reasons given by the Court for why the independent counsel clearly is an inferior officer emphasizes the limited nature of her jurisdiction and tenure. Taking the latter first, I find nothing unusually limited about the independent counsel's tenure. To the contrary, unlike most high ranking Executive Branch officials, she continues to serve until she (or the Special Division) decides that her work is substantially completed. See §§ 596(b)(1), (b)(2). This particular independent prosecutor has already served more than two years, which is at least as long as many Cabinet officials. As to the scope of her jurisdiction, there can be no doubt that is small (though far from unimportant). But within it she exercises more than the full power of the Attorney General. The Ambassador to Luxembourg is not anything less than a principal officer, simply because Luxembourg is small. And the federal judge who sits in a small district is not for that reason "inferior in rank and authority." If the mere fragmentation of executive responsibilities into small compartments suffices to render the heads of each of those compartments inferior officers, then Congress could deprive the President of the right to appoint his chief law enforcement officer by dividing up the Attorney General's responsibilities among a number of "lesser" functionaries.

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ceive "where necessary to perform [her] duties" the assistance, personnel and resources of the Department of Justice, § 594(d).

Taft's opinion 10 years earlier in *Myers* v. *United States*, 272 U. S. 52 (1926)—gutting, in six quick pages devoid of textual or historical precedent for the novel principle it set forth, a carefully researched and reasoned 70-page opinion. It is in fact comforting to witness the reality that he who lives by the *ipse dixit* dies by the *ipse dixit*. But one must grieve for the Constitution. *Humphrey's Executor* at least had the decency formally to observe the constitutional principle that the President had to be the repository of *all* executive power, see 295 U. S., at 627–628, which, as *Myers* carefully explained, necessarily means that he must be able to discharge those who do not perform executive functions according to his liking. As we noted in *Bowsher*, once an officer is appointed "'it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey.'" 478 U. S., at 726, quoting *Synar* v. *United States*, 626 F. Supp. 1374, 1401 (DC 1986) (Scalia, Johnson, and Gasch, JJ.). By contrast, "our present considered view" is simply that *any* executive officer's removal can be restricted, so long as the President remains "able to accomplish his constitutional role." *Ante*, at 690. There are now no lines. If the removal of a prosecutor, the virtual embodiment of the power to "take care that the laws be faithfully executed," can be restricted, what officer's removal cannot? This is an open invitation for Congress to experiment. What about a special Assistant Secretary of State, with responsibility for one very narrow area of foreign policy, who would not only have to be confirmed by the Senate but could also be removed only pursuant to certain carefully designed restrictions? Could this possibly render the President "[un]able to accomplish his constitutional role"? Or a special Assistant Secretary of Defense for Procurement? The possibilities are endless, and the Court does not understand what the separation of powers, what "[a]mbition . . . counteract[ing] ambition," Federalist No. 51, p. 322 (Madison), is all about, if it does not expect Congress to try them. As far as I can discern from the Court's opinion, it is now

open season upon the President's removal power for all executive officers, with not even the superficially principled restriction of *Humphrey's Executor* as cover. The Court essentially says to the President: "Trust us. We will make sure that you are able to accomplish your constitutional role." I think the Constitution gives the President—and the people—more protection than that.

V

The purpose of the separation and equilibration of powers in general, and of the unitary Executive in particular, was not merely to assure effective government but to preserve individual freedom. Those who hold or have held offices covered by the Ethics in Government Act are entitled to that protection as much as the rest of us, and I conclude my discussion by considering the effect of the Act upon the fairness of the process they receive.

Only someone who has worked in the field of law enforcement can fully appreciate the vast power and the immense discretion that are placed in the hands of a prosecutor with respect to the objects of his investigation. Justice Robert Jackson, when he was Attorney General under President Franklin Roosevelt, described it in a memorable speech to United States Attorneys, as follows:

> "There is a most important reason why the prosecutor should have, as nearly as possible, a detached and impartial view of all groups in his community. Law enforcement is not automatic. It isn't blind. One of the greatest difficulties of the position of prosecutor is that he must pick his cases, because no prosecutor can even investigate all of the cases in which he receives complaints. If the Department of Justice were to make even a pretense of reaching every probable violation of federal law, ten times its present staff will be inadequate. We know that no local police force can strictly enforce the traffic laws, or it would arrest half the driving population on

any given morning. What every prosecutor is practically required to do is to select the cases for prosecution and to select those in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain.

"If the prosecutor is obliged to choose his case, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him. It is in this realm—in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself." R. Jackson, The Federal Prosecutor, Address Delivered at the Second Annual Conference of United States Attorneys, April 1, 1940.

Under our system of government, the primary check against prosecutorial abuse is a political one. The prosecutors who exercise this awesome discretion are selected and can be removed by a President, whom the people have trusted enough to elect. Moreover, when crimes are not investigated and prosecuted fairly, nonselectively, with a rea-

sonable sense of proportion, the President pays the cost in political damage to his administration. If federal prosecutors "pick people that [they] thin[k] [they] should get, rather than cases that need to be prosecuted," if they amass many more resources against a particular prominent individual, or against a particular class of political protesters, or against members of a particular political party, than the gravity of the alleged offenses or the record of successful prosecutions seems to warrant, the unfairness will come home to roost in the Oval Office. I leave it to the reader to recall the examples of this in recent years. That result, of course, was precisely what the Founders had in mind when they provided that all executive powers would be exercised by a *single* Chief Executive. As Hamilton put it, "[t]he ingredients which constitute safety in the republican sense are a due dependence on the people, and a due responsibility." Federalist No. 70, p. 424. The President is directly dependent on the people, and since there is only *one* President, *he* is responsible. The people know whom to blame, whereas "one of the weightiest objections to a plurality in the executive . . . is that it tends to conceal faults and destroy responsibility." *Id.*, at 427.

That is the system of justice the rest of us are entitled to, but what of that select class consisting of present or former high-level Executive Branch officials? If an allegation is made against them of any violation of any federal criminal law (except Class B or C misdemeanors or infractions) the Attorney General must give it his attention. That in itself is not objectionable. But if, after a 90-day investigation without the benefit of normal investigatory tools, the Attorney General is unable to say that there are "no reasonable grounds to believe" that further investigation is warranted, a process is set in motion that is *not* in the full control of persons "dependent on the people," and whose flaws cannot be blamed on the President. An independent counsel is selected, and the scope of his or her authority prescribed, by a

panel of judges. What if they are politically partisan, as judges have been known to be, and select a prosecutor antagonistic to the administration, or even to the particular individual who has been selected for this special treatment? There is no remedy for that, not even a political one. Judges, after all, have life tenure, and appointing a surefire enthusiastic prosecutor could hardly be considered an impeachable offense. So if there is anything wrong with the selection, there is effectively no one to blame. The independent counsel thus selected proceeds to assemble a staff. As I observed earlier, in the nature of things this has to be done by finding lawyers who are willing to lay aside their current careers for an indeterminate amount of time, to take on a job that has no prospect of permanence and little prospect for promotion. One thing is certain, however: it involves investigating and perhaps prosecuting a particular individual. Can one imagine a less equitable manner of fulfilling the executive responsibility to investigate and prosecute? What would be the reaction if, in an area not covered by this statute, the Justice Department posted a public notice inviting applicants to assist in an investigation and possible prosecution of a certain prominent person? Does this not invite what Justice Jackson described as "picking the man and then searching the law books, or putting investigators to work, to pin some offense on him"? To be sure, the investigation must relate to the area of criminal offense specified by the life-tenured judges. But that has often been (and nothing prevents it from being) very broad—and should the independent counsel or his or her staff come up with something beyond that scope, nothing prevents him or her from asking the judges to expand his or her authority or, if that does not work, referring it to the Attorney General, whereupon the whole process would recommence and, if there was "reasonable basis to believe" that further investigation was warranted, that new offense would be referred to the Special Division, which would in all likelihood assign it to the same

independent counsel. It seems to me not conducive to fairness. But even if it were entirely evident that unfairness was in fact the result—the judges hostile to the administration, the independent counsel an old foe of the President, the staff refugees from the recently defeated administration—*there would be no one accountable to the public to whom the blame could be assigned.*

I do not mean to suggest that anything of this sort (other than the inevitable self-selection of the prosecutory staff) occurred in the present case. I know and have the highest regard for the judges on the Special Division, and the independent counsel herself is a woman of accomplishment, impartiality, and integrity. But the fairness of a process must be adjudged on the basis of what it permits to happen, not what it produced in a particular case. It is true, of course, that a similar list of horribles could be attributed to an ordinary Justice Department prosecution—a vindictive prosecutor, an antagonistic staff, etc. But the difference is the difference that the Founders envisioned when they established a single Chief Executive accountable to the people: the blame can be assigned to someone who can be punished.

The above described possibilities of irresponsible conduct must, as I say, be considered in judging the constitutional acceptability of this process. But they will rarely occur, and in the average case the threat to fairness is quite different. As described in the brief filed on behalf of three ex-Attorneys General from each of the last three administrations:

> "The problem is less spectacular but much more worrisome. It is that the institutional environment of the Independent Counsel—specifically, her isolation from the Executive Branch and the internal checks and balances it supplies—is designed to heighten, not to check, all of the occupational hazards of the dedicated prosecutor; the danger of too narrow a focus, of the loss of perspective, of preoccupation with the pursuit of one alleged suspect to the exclusion of other interests." Brief for Edward

H. Levi, Griffin B. Bell, and William French Smith as *Amici Curiae* 11.

It is, in other words, an additional advantage of the unitary Executive that it can achieve a more uniform application of the law. Perhaps that is not always achieved, but the mechanism to achieve it is there. The mini-Executive that is the independent counsel, however, operating in an area where so little is law and so much is discretion, is intentionally cut off from the unifying influence of the Justice Department, and from the perspective that multiple responsibilities provide. What would normally be regarded as a technical violation (there are no rules defining such things), may in his or her small world assume the proportions of an indictable offense. What would normally be regarded as an investigation that has reached the level of pursuing such picayune matters that it should be concluded, may to him or her be an investigation that ought to go on for another year. How frightening it must be to have your own independent counsel and staff appointed, with nothing else to do but to investigate you until investigation is no longer worthwhile—with whether it is worthwhile not depending upon what such judgments usually hinge on, competing responsibilities. And to have that counsel and staff decide, with no basis for comparison, whether what you have done is bad enough, willful enough, and provable enough, to warrant an indictment. How admirable the constitutional system that provides the means to avoid such a distortion. And how unfortunate the judicial decision that has permitted it.

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The notion that every violation of law should be prosecuted, including—indeed, *especially*—every violation by those in high places, is an attractive one, and it would be risky to argue in an election campaign that that is not an absolutely overriding value. *Fiat justitia, ruat coelum.* Let justice be done, though the heavens may fall. The reality is, however, that it is not an absolutely overriding value, and it

was with the hope that we would be able to acknowledge and apply such realities that the Constitution spared us, by life tenure, the necessity of election campaigns. I cannot imagine that there are not many thoughtful men and women in Congress who realize that the benefits of this legislation are far outweighed by its harmful effect upon our system of government, and even upon the nature of justice received by those men and women who agree to serve in the Executive Branch. But it is difficult to vote not to enact, and even more difficult to vote to repeal, a statute called, appropriately enough, the Ethics in Government Act. If Congress is controlled by the party other than the one to which the President belongs, it has little incentive to repeal it; if it is controlled by the same party, it dare not. By its shortsighted action today, I fear the Court has permanently encumbered the Republic with an institution that will do it great harm.

Worse than what it has done, however, is the manner in which it has done it. A government of laws means a government of rules. Today's decision on the basic issue of fragmentation of executive power is ungoverned by rule, and hence ungoverned by law. It extends into the very heart of our most significant constitutional function the "totality of the circumstances" mode of analysis that this Court has in recent years become fond of. Taking all things into account, we conclude that the power taken away from the President here is not really *too* much. The next time executive power is assigned to someone other than the President we may conclude, taking all things into account, that it *is* too much. That opinion, like this one, will not be confined by any rule. We will describe, as we have today (though I hope more accurately) the effects of the provision in question, and will authoritatively announce: "The President's need to control the exercise of the [subject officer's] discretion *is* so central to the functioning of the Executive Branch as to require complete control." This is not analysis; it is ad hoc judgment. And it fails to explain why it is not true that—as the text of

the Constitution seems to require, as the Founders seemed to expect, and as our past cases have uniformly assumed—all purely executive power must be under the control of the President.

The ad hoc approach to constitutional adjudication has real attraction, even apart from its work-saving potential. It is guaranteed to produce a result, in every case, that will make a majority of the Court happy with the law. The law is, by definition, precisely what the majority thinks, taking all things into account, it *ought* to be. I prefer to rely upon the judgment of the wise men who constructed our system, and of the people who approved it, and of two centuries of history that have shown it to be sound. Like it or not, that judgment says, quite plainly, that "[t]he executive Power shall be vested in a President of the United States."

ALEXIA MORRISON, INDEPENDENT COUNSEL, Appellant v. THEODORE B. OLSON, et al.

No. 87-1279

October Term, 1987

April 8, 1988

On Appeal from the United States Court of Appeals for the District of Columbia Circuit

# BRIEF FOR EDWARD H. LEVI, GRIFFIN B. BELL, AND WILLIAM FRENCH SMITH AS AMICI CURIAE IN SUPPORT OF APPELLEES

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INTEREST OF THE AMICI CURIAE

This case concerns the constitutionality of the Independent Counsel provisions of the Ethics in Government Act. The amici are former Attorneys General of the United States, who presided over the Department of Justice, respectively, at the time when an Independent Counsel statute similar to the current provisions was first considered by Congress; at the time when the predecessor of the current provisions was first enacted; and at a time when the Independent Counsel provisions were frequently invoked. Accordingly, the amici are acquainted with the practical effects of the Independent Counsel provisions on the operations of the Executive Branch, and they have a continuing interest in the questions presented in this case. n1

n1 Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

When the Framers designed the separation of powers, they determined that no official would exercise power unless subject to an institutional check. On the most practical level, the Independent Counsel provisions are inconsistent with this determination. The extraordinary isolation of the Independent Counsel from the Executive Branch, in our judgment, creates the potential of both a significant disruption of the Executive Branch and a threat to individual liberty.

A. Every criminal prosecutor exercises great power over the individuals involved. In addition, a criminal prosecution can affect other important government interests. Because most prosecutorial decisions cannot be reviewed by a court, the principal checks on the prosecutor are those supplied by the Executive Branch itself. The Independent Counsel provisions effectively isolate the Independent Counsel from the Executive Branch, thereby leaving the Independent Counsel free from institutional restriants throughout much of her taks -- precisely the condition that the Framers sought to avoid.

B. An Executive Branch prosecutor operates within a network of intra-Branch checks and balances. Because a prosecutor within the Executive Branch must accommodate the competing priorities and responsibilities of the Branch, he or she will sometimes have to subordinate a particular prosecution to the government's interest in pursuing other prosecutions, to the government's longterm interest in the development of the criminal law, or to the interests of other Departments in the Executive Branch.

These internal checks and balances are the direct result of the Framers' decision to establish a unitary Executive Branch. They function precisely as the Framers intended the system of checks and balances to function: they prevent a prosecutor from being overtaken by an excess of zeal or ambition, or by the loss of perspective caused by too narrow a focus on one case.

The Independent Counsel is isolated from the Executive Branch; consequently, these internal checks and balances are absent in her case. Not only does this potentially endanger the liberties of the individuals subject to investigation; in addition, it disrupts the operations of the Executive Branch by preventing effective coordination between those involved in the investigation of high government officials and those responsible for the many other important functions of the government.

C. Contrary to the suggestion of appellant and her supporting amici, the Independent Counsel provisions do not provide for the effective control of the Independent Counsel by the Attorney General in ways that would avert these dangers. By the same token, however, Congress can, if it wishes, invoke alternative devices, provided by the Constitution, that ensure the independence of a prosecution from improper influence without compromising the values that the separation of powers is designed to serve.

TEXT: ARGUMENT

THE INDEPENDENT COUNSEL PROVISIONS OF THE ETHICS IN GOVERNMENT ACT ARE INCONSISTENT WITH THE CONSTITUTIONAL SEPARATION OF POWERS.

This case presents the question whether the Independent Counsel provisions of the Ethics in Government Act, 28 U.S.C. 49, 591 et seq., violate various Clauses of the Constitution relating to the separation of powers. The Court has, in the past, not hesitated to resolve such questions on the basis of the clear limits estblished by the Constitution. See, e.g., Bowsher v. Synar, 106 S.Ct. 3181 (1986); INS v. Chadha, 462 U.S. 919 (1983). In this case, as well, the Appointments Clause and other provisions may provide a clear answer to the questions presented. But when the Court determines that the clear commands of the Constitution are not dispositive, it resolves such separation of powers issues in light of practical realities -- in this case, the practical realities of how the Independent Counsel provisions operate. "The men who met in Philadelphia in the summer of 1787 were practical statesmen, experienced in politics, who viewed the principle of separation of powers as a vital check against tyranny." Buckley v. Valeo, 424 U.S. 1, 121 (1976).

To the extent the Court's resolution of the questions presented here is informed by such practical considerations, the issues in this case are, therefore, whether the Independent Counsel provisions are "unduly disruptive of the Executive Branch" (Nixon v. Administrator of General Services, 433 U.S. 425, 445 (1977); see, e.g., Buckley, 424 U.S. at 122) and whether those provisions weaken the constitutional system of checks and balances in a way that jeopardizes the rights of individuals. It is our judgment that the extraordinary isolation of the Independent Counsel from the Executive Branch creates the potential of both a significant disruption of the Executive Branch and a threat to individual liberty.

A. Introduction

When the Framers designed the separation of powers, they were not concerned principally with venality or rank favoritism. They were instead concerned with excesses of what might otherwise be admirable qualities, such as ambition and zeal. The remedy they prescribed was to ensure that no government official would have free rein in the exercise of power. Every official was to be held in check by another official or another branch of government that had a different constituency and different priorities. n2 In this way, "ambition [would] be made to counteract ambition" (The Federalist No. 51 (Madison) at 322 (C. Rossiter ed. 1961)) and the natural tendencies of those who held power -- tendencies that would be dangerous if left unchecked and unbalanced -- could instead be harnessed for the common good. See The Federalist No. 51 (Madison); see also id., No. 10 (Madison) at 78-84; id., No. 15 (Hamilton) at 111; id., No. 48 (Madison) at 309; id., No. 72 (Hamilton) at 436-440.

n2 See, e.g., The Federalist No. 51 (Madison) at 322 (C. Rossiter ed. 1961): "[T]he constant aim is to divide and arrange the several offices in such a manner that each may be a check on the other -- that the private interest of each individual may be a sentinel over the public rights."

Nowhere in government are these checks and balances more imperative than in the conduct of a criminal investigation. The ultimate checks on the power of the prosecutor are, of course, the authority of the court to dismiss a prosecution, and the authority of the jury to acquit. But as this Court has often recognized, the prosecutor exercises great power in ways that are not, and properly cannot be, subject to judicial control. See, e.g., Young v. United States ex rel. Vuitton et Fils, 107 S. Ct. 2124, 2137 (1987).

In particular, throughout a criminal investigation, the prosecutor must make many significant decisions that cannot be effectively reviewed by a court but that have a dramatic impact on the lives of individuals. The prosecutor must determine, for example, when to seek a search warrant; when to seek to engage in electronic surveillance; when to subpoena documents; when to call witnesses before a grand jury; whom to immunize; and whom to threaten with prosecution. Each of these decisions is but one of many that a prosecutor will make. But for the one of many that a prosecutor will make. But for the individual whose privacy is invaded, whose affairs are disrupted, and who is subjected to extraordinary emotional distress, these are likely to be the most significant decisions that any government official ever makes.

The prosecutor must also decide on the public statements that are to be made during the course of the investigation. Especially in a case involving a high government official, the pressure to make such statements will be great. A prosecutor's public statements can have a profound impact on an individual's reputation. Moreover, the harm that an alleged suspect suffers from such publicity will often persist no matter how completely the individual is exonerated.

Then the prosecutor must decide how long to continue the investigation. Often an investigation will not conclusively determine the guilt or innocence of an individual, and the prosecutor can always find ways to invest more resources and seek more evidence. Finally, of course, the prosecutor must decide whether to seek an indictment.

These decisions, too, can impose enormous burdens on entirely innocent individuals. As Justice Jackson, then Attorney General, stated: "The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous." n3 A person who is the target of a prolonged investigation before being exonerated, or a defendant who prevails at trial, is subject to financial, emotional, and reputational burdens that few members of our society are ever required to endure. "Even if a defendant is ultimately acquitted, forced immersion in criminal investigation and adjudication is a wrenching disruption of everyday life." Young, 107 S. Ct. at 2141.

n3 The Federal Prosecutor, Address delivered at the Second Annual Conference of United States Attorneys, April 1, 1940, at 2. We have reprinted a copy of this address as an appendix to this brief.

Of necessity, however, these decisions cannot be subject to an effective judicial check. That is because, as the Court has often recognized, nearly all of the many decisions that a prosecutor makes are highly discretionary. They require the exercise of judgment on the basis of many complex factors, and they cannot be reduced to a formula or an objective standard of the kind that courts can apply. See, e.g., Wayte v. United States, 470 U.S. 598 607-608 (1985); Heckler v. Chaney, 470 U.S. 821, 831-832 (1985). Courts cannot review these prosecutorial decisions, and they have properly refrained from doing so.

Nor, of course, can prosecutorial decisions properly be subject to a check by Congress. Congress cannot be, and ought not be, concerned with the details of particular cases, especially particular criminal prosecutions. As the Framers recognized when they adopted the Bill of Attainder Clause, congressional concern with specific allegations and specific defendants is a prime potential source

of serious abuse.

It follows that the only practical, realistic check on a prosecutor's power -- a power comparable to that exercised by few others in our system -- is the Executive Branch itself. At bottom, the choice is between, on the one hand, allowing a prosecutor to wield great power essentially unchecked; and, on the other hand, subjecting the prosecutor, in some degree, to the internal controls of the Executive Branch and the President's ultimate accountability to the people as a whole. There can be little doubt that the Framers, who well understood the danger of unchecked, discretionary law enforcement power, would choose the latter course.

Another dimension of the problem is equally important. A criminal prosecution does not just affect the interests of the individuals who are subject to it; it affects the interests of the Executive Branch as a whole. A mishandled prosecution can "prevent[] the Executive Branch from accomplishing its constitutionally assigned functions" (Nixon v. Administrator,, 433 U.S. at 443). It can disrupt the government's overall law enforcement priorities and jeopardize other law enforcement efforts; it can also interfere with Executive Branch responsibilities outside the area of law enforcement, including the President's responsibility for national security and foreign affairs.

It would be folly to entrust an enterprise that is so sensitive and so difficult to a single individual who comes new to the task, who is essentially free of all supervision, and who has no institutional connection to the officials responsible for the many other constitutional responsibilities of the Executive Branch. It would be even worse to place such an individual in a position that creates artificial incentives to prosecute a target with unusual zeal. But that is, in essence, what the Independent Counsel provisions do.

Some of those present at the Constitutional Convention argued against centralizing executive power under a single President; Mr. Randolph, for example, urged that in order to preserve "independence," the execution of the law should be entrusted not to a single President but to three individuals. I Farrand, The Records of the Federal Convention of 1787 at 66 (rev. ed. 1937). But the Framers rejected those arguments. Instead, they accepted James Wilson's view that unifying executive power, far from being a threat to liberty and good government, "would be the best safeguard against tyranny." Ibid. On the most practical level, the operation of the Independent Counsel provisions bears out the wisdom of the Framers' decision.

B. The Insulation of the Independent Counsel Disrupts the Executive Branch and Creates a Potential Threat to Individual Liberty.

In numerous ways, the isolation of the Independent Counsel threatens both individual liberty and the integrity of the Executive Branch.

1. a. A prosecutor in the Department of Justice operates within a network of internal -- intra-Department and intra-Executive Branch -- checks and balances. First, of course, every Department of Justice prosecutor must answer to a superior: an Assistant United States Attorney to the United States Attorney; the United States Attorney to the Attorney General; the Attorney General, ultimately, to the President. But on the day-to-day level, other, less formal, checks and balances are also very important. For example, in the course of an investigation or prosecution, a Department of Justice prosecutor must

routinely take into account the interests of other prosecutors, of law enforcement officials, and of officials outside of the Department. A prosecutor will often have to accommodate or subordinate the pursuit of a particular prosecution to these competing interests.

For example, United States Attorneys are responsible for all federal criminal prosecutions (and, for that matter, all federal civil litigation) within their District -- not not just for one case and one or a few defendants. Thus, the pursuit of any one prosecution will have to be accomodated to the other priorities of the office. Similarly, a Department of Justice prosecutor may have to abandon an effort to press for an expansive interpretation of a federal criminal statute because that effort conflicts with what the Criminal Division of the Department of Justice, or the Solicitor General's Office, sees as the broader long-term interests of the federal government. In addition, a Department of Justice prosecutor may have to subordinate the interest in pursuing a criminal prosecution to the interests of agencies outside the area of law enforcement. For example, a criminal investigation may have to be shaped in a certain way, abandoned, or not pursued in the first place because it implicates important concerns in the areas of foreign affairs and national security.

These internal checks and balances are the direct result of the fact that a Department of Justice prosecutor operates within the Executive Branch. Because of the diverse responsibilities of the Executive Branch, the prosecutor must constantly establish and reassess priorities. Neither the prosecutorial function nor any single prosecution can grow too large. If it threatens to, the competing priorities of the Executive Branch will assert themselves.

In this way, the checks and balances we have described serve the very role that the Framers envisioned for the system of checks and balances: they force a prosecutor to consider different perspectives and to accommodate competing interests. They guard against the dangers that are endemic in any government -- not the dangers of corruption or gross abuse, which are rare, but the everyday danger that a prosecutor will become too close to a case and will lose perspective The most admirable and dedicated prosecutor may exaggerate the importance of a case and underestimate its potential to interfere with other important government interests and with the lives of the individuals affected. Indeed, the danger may be particularly great in the case of the most dedicated prosecutors.

Because of the intra-Executive Branch controls to which Department of Justice prosecutors are subject, any such prosecutor will soon be brought up short by a law enforcement agent who does not share the same zeal and who has other responsibilities; by an official of another Executive Branch Department who can appeal to higher authority if the prosecutor does not give sufficient weight to that Department's interests; by another prosecutor who objects to the diversion of resources from other prosecutions; by another Department of Justice official who recognizes that single-minded focus on one case can jeopardize the government's long-term interest in the development of the law; by a supervisor who will point out the prosecutor's excesses; or just by the need to move on to another case on an overcrowded docket.

b. These institutional restraints are absent in the case of the Independent Counsel. The Independent Counsel has no day-to-day supervisor and, as we will discuss below, the Attorney General's (and therefore the President's)

authority over her is extremely limited. Consequently, the Independent Counsel is not accountable to any official who has responsibility for a broad range of Executive Branch operations.

In addition, unlike a United States Attorney, who has responsibility for an entire federal district, the Independent Counsel has responsibility for only a single matter. Every attorney in the Office of the Independent Counsel is engaged in some way in the prosecution of the same, single case. Moreover, the Independent Counsel provisions specify that the Department of Justice "shall," upon request, provide the Independent Counsel with "the resources and personnel necessary to perform such independent counsel's duties." 28 U.S.C. 594(d). Thus, the Independent Counsel can requisition a team of law enforcement officers who have no competing responsibilities. In all of these ways, the Independent Counsel essentially escapes the condition that shapes the environment of every other prosecutor -- the need to determine and reassess priorities in a setting characterized by competing interests and demands.

The result is the institutionalization of the single-minded prosecutor. Our concern is not that an Independent Counsel will maliciously embark on a personal vendetta or will deliberately engage in gross misconduct. The problem is less spectacular but much more worrisome. It is that the institutional environment of the Independent Counsel -- specifically, her isolation from the Executive Branch and the internal checks and balances it supplies -- is designed to heighten, not to check, all of the occupational hazards of the dedicated prosecutor; the danger of too narrow a focus, of the loss of perspective, of preoccupation with the pursuit of one alleged suspect to the exclusion of other interests.

2. Unlike the Department of Justice, the Office of Independent Counsel lacks what is often called an institutional memory. It has no stock of knowledge of previous criminal prosecutors with which to compare the matter assigned to it. Such an institutional memory is an invaluable asset in making a sound judgment about the effects of a prosecutorial decision on both individuals and other government interests.

We noted above that in the course of an investigation and prosecution, a prosecutor makes many discretionary decisions that can have a powerful effect on both the individuals caught up in the investigation and the government government's long-term law enforcement interests. The officials responsible for a prosecution must decide, for example, whether they have crossed the line that separates thoroughness from the unfair pursuit of an individual. They must also decide such questions as whether they are using a particular tactic so aggressively, or are seeking such a strained interpretation of a statute, that they are likely to create an unfavorable precedent that permanently hampers criminal law enforcement. In making these decisions, formal rules or guidelines are little help; such decisions must be made on the basis of the kind of wisdom and judgment that come from extensive practical experience.

In this respect, no single prosecutor can rival the accumulated wisdom and experience found in a diverse, ongoing institution. In such an institution, the whole is, in a sense, greater than the sum of its parts. An attorney who has, for example, spent a career reviewing applications for search warrants, or determining whether the government should seek review of adverse judicial decisions on issues of criminal procedure, has developed expertise and judgment that literally cannot be matched in any other way. More generally, no matter

what issue arises in the course of a prosecution, there is a good likelihood that someone in the Department of Justice will have dealt with something like it at some time in the past.

The Executive Branch is structured precisely so as to take advantage of these institutional assets. That is why the Executive Branch has an internal hierarchy, mechanisms of internal review and scrutiny, and requirements of cooperation and coordination. For example, prosecutors are required to consult with other officials or to obtain permission before engaging in certain actions -- such as certain means of gathering evidence, indictment under certain statutes, or any appeal of an adverse decision -- that might substantially affect individual rights or the government's long-term interests. n4

n4 See, e.g., United States Attorney's Manual @ 9-2.132 (enumerating statutes under which a United States Attorney may not institute a prosecution without the express authorization of the Criminal Division); id. @ 9-2.133 (enumerating statutes under which a United States Attorney may not convene a grand jury or seek an indictment without consultation with the Criminal Division); id. @ 9-2.161 (Attorney General's approval generally required for issuing subpoena to member of news media); id. @ 9-2.171 (decision whether to seek review of adverse judicial decision is reserved to the Solicitor General).

Because the Office of Independent Counsel is cut off from the Executive Branch, it wholly lacks these important institutional advantages. Not only does the Office -- an ad hoc, temporary institution -- not have the institutional memory of the Department of Justice; it has no structure for taking advantage of the institutional assets that are within the Department of Justice or the Executive Branch. The Independent Counsel is, in general, not required to consult with, or seek approval of, anyone within the Department before taking a significant prosecutorial action. n5 Officials in the Department have no institutional means of keeping abreast of developments in the investigation conducted by the Independent Counsel. There are no institutionalized networks for coordination between the Office of Independent Counsel and attorneys in the Department of Justice.

n5 28 U.S.C. 594(a) does provide that the Attorney General retains control of "those matters that specifically require the Attorney General's personal action under [18 U.S.C.] 2516," a provision regulating certain forms of electronic surveillance. This is, of course, a very narrow exception.

The institutional advantages of the Department of Justice are especially pronounced in cases involving high government officials. These investigations present unusual problems. On the one hand, such officials should be held to a high standard of responsibility, and it is especially important that public confidence in government not be impaired. But on the other hand, cases involving high government officials can create threats to other government interests that are seldom seen in routine criminal prosecutions. Moreover, such cases can raise difficult questions about the distinction between violations of the law and legitimate governmental activity. And such cases can become focal points for intense political pressure.

The Department of Justice undoubtedly has more extensive experience in the prosecution of allegedly corrupt federal and local officials, in a politically charged atmosphere, than any other institution. The accumulated wisdom and experience of the Department of Justice is a unique asset to a prosecutor

engaged in such an investigation.

An ad hoc institution like the Office of Independent Counsel will, by contrast, be confronting every one of these vexing issues for the first time, and it is likely to find itself at sea in dealing with them. It will not have developed institutionalized ways of dealing with political pressure from Congress and other sources. It will not know what weight to attach to, for example, claims of diplomatic immunity or assertions that a particular investigative measure will interfere with national security. It will not know how to assess an official's claim that what might appear to be criminal activity was in fact the vigorous performance of the duties of a public office. Issues like that arise frequently, of course, in investigations of the kind that now must be assigned to an Independent Counsel.

3. a. One of the important functions of the Department of Justice is to provide a counterweight to government agencies that pursue a single programmatic mission. Agencies charged with a specific mission -- whether that mission is enforcing the securities laws, reducing expenditures on social welfare programs, or any of the scores of other tasks in which government agencies engage -- develop a certain unity of outlook. They tend to view their mission as highly important, and to be less sensitive than an outsider might be to the arguments of those who oppose their efforts. Such a unity of outlook and sense of mission should not be derided; they are an important part of establishing a sense of vigor and esprit in an agency, and they often lead to the faithful implementation of the legislature's intentions for a program. But in certain contexts these characteristics can also cause the most able and dedicated agency -- if it is unchecked by an agency with a broader outlook -- to commit damaging errors.

Thus, a central virtue of the role of the Department of Justice as the principal representative of the United States in litigation is that it enables the Department to correct the biases of single-mission agencies. Department of Justice attorneys often require other government agencies to moderate their positions in order to avoid wasteful and unnecessary litigation. Perhaps the most dramatic example is the one of most direct concern to this Court: every year, federal agencies with a more narrow mission ask the Solicitor General to seek review in this Court of hundreds of adverse judgments; the Solicitor General, with his broader perspective, seeks review in only a fraction of those cases.

This aspect of the Department's operations exemplifies the way in which the unitary Executive Branch functions. Under the unitary Executive established by the Framers, no agency with a narrow mission can pursue its policies without restraint. All of them must submit to the authority of higher officials who take a broader view -- and ultimately to the authority of the President, who, as the single person elected by the nation as a whole, has the broadest view.

b. The Office of Independent Counsel is the quintessential single-mission agency. But until it brings an indictment and forces a defendant to withstand a trial, it is not subject to any review by an official or agency with a broader perspective. Moreover, the Office of Independent Counsel is a single-mission agency in an area -- highly publicized, politically charged criminal prosecutions -- where such an agency is least appropriate.

The single-mission nature of the Office of Independent Counsel derives from several sources. The Office is brought together on a temporary basis for one task -- to pursue one or a few alleged suspects. It sense of mission is bound to be heightened by the fact that it operates in the most adversarial context known to our law. In addition, during the crucial investigative stages of the case, it operates essentially on an ex parte basis: it seldom, if ever, goes before an impartial judge who will require it to consider the point of view of the other side. In these circumstances, it would be entirely natural for the Independent Counsel to lose perspective and exaggerate the importance of its mission. And when it does so, there are no countervailing forces - no superior, no competing law enforcement interests, no other Executive Branch Departments - available to correct it.

The temporary nature of the Office of Independent Counsel exacerbates this problem in two important respects. First, it ensures that the investigations conducted by the Independent Counsel will be highly publicized. An ongoing component of the Executive Branch can add another investigation to its docket without attracting public attention. The Independent Counsel provisions theoretically permit the appointment of an Independent Counsel without notice to the public (28 U.S.C. 593(b)), but as a practical matter it is simply impossible to establish an entire investigative office, with a new supervisor and a new staff, to investigate a high government official, without attracting enormous public attention. Thus, the separation of the Independent Counsel from the Executive Branch necessarily casts aside one of the most decent traditions of our criminal law system - the tradition that allegations of wrongdoing are not made public until a grand jury has found probable cause to believe them true.

Second, the temporary nature of the Independent Counsel's position skews the incentives of those who hold that office. In an ongoing, multi-function institution like the Department of Justice, no individual's career is likely to depend entirely on a single assignment. However a particular case is concluded, there will always be another matter waiting. The Independent Counsel, by contrast, has no such diversity of incentives. Her government career consists of one very highly-publicized case, probably with political overtones.

It would be surprising if that institutional arrangement did not skew the Independent Counsel's incentives. She has every reason to pursue an investigation with undue thoroughness; she has no comparable incentive to err on the side of terminating an investigation quickly. She has an incentive to seek an indictment and bring an individual to trial, instead of risking public condemnation for dropping a politically popular charge. We do not question the ability of the individuals who have served as Independent Counsel. But "[t]he Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty." Bowsher, 106 S. Ct. at 3191. The effect of the Independent Counsel's institutional position on her incentives therefore cannot be overlooked.

4. Finally, because of her isolation from the Executive Branch, the Independent Counsel is cut off from Executive Branch officials who might alert her to the danger that she is damaging other important government interests. The prosecution of criminal cases is, of course, only one of the responsibilities of the Executive Branch. Experience has shown that allegations of criminal wrongdoing by high Executive Branch officials often arise out of actions they took while attempting to discharge these other Executive Branch responsibilities.

Because the jurisdiction of the Independent Counsel is confined principally to high government officials, the Independent Counsel's operations can be expected to impinge on the other interests and responsibilities of the Executive Branch in a significant percentage of cases. But the Independent Counsel, unlike the Department of Justice, has no institutional means of taking these interests into account. Because it is a temporary, ad hoc institution that is isolated from the Executive Branch, the Office of Independent Counsel has no established relationships, formal or informal, with any Executive Branch Department, and it is likely to have deficient knowledge of their operations.

For example, it is not always apparent when, in the course of a complex criminal investigation, an issue has arisen that implicates the interests of other Departments. Because of its experience and its institutional ties to other Departments, the Department of Justice is equipped to recognize such issues; the Office of Independent Counsel is not. Once such an issue has been identified, the Department of Justice has developed means of bringing other Departments into its deliberations in a way that permits the various interests to be compromised and accommodated without confrontation. The Office of Independent Counsel has no opportunity to devolp such mechanisms. Moreover, the Department of Justice has experience in weighing the interests that other Departments assert. Because of its ongoing, institutional role in the Executive Branch, it will have a sense of when the claims of other Departments are exaggerated and when they are entitled to deference. The Office of Independent Counsel, with its one-time, exclusively prosecutorial mission, is unlikely to develop this capacity.

These institutional difference between the Department of Justice and the Office of Independent Counsel are especially pronounced, and especially troublesome, in connection with questions concerning national security and foreign affairs. Because of the importance and ubiquity of such questions in the government today, they will arise with some frequency in matters referred to the Independent Counsel. These questions are specialized and sensitive, and it is often difficult to resolve the competing claims.

Officials who are primarily concerned with national security and diplomacy have a sharply different orientation from prosecutors. Such officials often do not share the perspective that so strongly emphasizes the importance of law enforcement and the pursuit of alleged wrongdoers. Prosecutors, on the other hand, are not schooled in the nuances of relations among nations. They are likely to discount the long-term and remote consequences in which the Departments of State and Defense must deal. Prosecutors may not fully understand, for example, the extent to which a nation must not permit certain matters to be publicized in the way that a criminal investigation would inevitably publicize them.

The Executive Branch has institutional ways of resolving issues that arise in such cases. It has institutional arrangements, formal and informal, for discussions at various bureaucratic levels and ultimately mediation by the Office of the President if necessary. The Independent Counsel has nothing comparable. Its resolution of these issues is therefore likely to be far less well-informed, and far more confrontational.

The Framers assigned to the President the responsibility to take care that the laws be faithfully executed. They of course intended that all the laws be faithfully executed. Whatever the theoretical rationale of the Independent

Counsel provisions, their practical effect is to single out one Executive Branch function -- the prosecution of certain high officials -- and to give that function a priority. That task alone is insulated from other, potentially competing interests that the President is charged with protecting. In this way, the Independent Counsel provisions, on the most practical level, undermine the Framers' design.

C. The Limited Statutory Provisions for Control of the Independent Counsel Do Not Alleviate These Problems.

Appellant and her supporting amici contend that -- notwithstanding the principle of the Independent Counsel provisions (and indeed appellant's title) -- the Independant Counsel is in fact not independent of the internal controls of the Department of Justice. In effect, their contention is that the Independent Counsel is independent only in desirable ways, not in ways that interfere with the interests that the Framers sought to protect when they decided upon a unitary Executive Branch. Not surprisingly, this Panglossian view is incorrect. Appellant's arguments do not take into account the realities of the administration of the Independent Counsel provisions.

1. Appellant relies first on 28 U.S.C. 592, which governs the Attorney General's role in the appointment of the Independent Counsel. Appellant asserts that the Attorney General retains "complete power over the initiation of the statutory process" (Br. 19).

This assertion is simply mistaken. The Independent Counsel provisions impose tight controls on the Attorney General's discretion. Indeed, that is part of their very purpose. n6 Far from retaining complete control, the Attorney General has a mandatory duty to seek the appointment of an Independent Counsel in certain circumstances. See 28 U.S.C. 592(c). Courts of appeals have held that the Attorney General's decision not to seek the appointment is not subject to judicial review; n7 but it remains a legal duty, and it goes without saying that Attorneys General have taken in very seriously.

n6 Notably, another provision, 28 U.S.C. 591 (c), provides the Attorney General with an option to seek the appointment of an Independent Counsel in certain circumstances. This is further confirmation of a point that is in any event clear from the language of the statute -- that the provision under which appellant was appointed, 28 U.S.C. 592, is not optional but imposes a duty on the Attorney General.

n7 Dellums v. Smith, 797 F.2d 817, 818 (9th Cir. 1986); Nathan v. Smith, 737 F.2d 1069 (D.C. Cir. 1984).

This mandatory duty arises unless the Attorney General determines, on the basis of a "preliminary investigation," that there are not even "reasonable grounds to believe that further investigation or prosecution is warranted" in a particular case. 28 U.S.C. 592 (b) (1), (c) (1). The Attorney General must make this determination after an extremely brief and superficial investigation. The statute requires the Attorney General to make the determination within 90 days after receiving the information that triggers the preliminary investigation (28 U.S.C. 592 (a) (1)), and it specifically disables the Attorney General from using many of the tools that any prosecutor would use to get to the truth of a matter: he is denied authority to "convene grand juries, plea bargain, grant immunity, or issue subpoenas" (28 U.S.C. 592 (a) (2)). Thus, unless the

Attorney General can determine, after a brief and superficial investigation, that there are not even "reasonable grounds [for] . . . further investigation," he must seek the appointment of an Independent Counsel.

This scheme gives the Attorney General little real control over the decision whether to initiate an investigation by the Independent Counsel. The Attorney General will be able to identify patently frivolous allegations. There is, however, a very substantial class of allegations that cannot be dismissed without a significant degree of investigation but that turn out to be utterly meritless. In those cases the Attorney General is, in practical effect, deprived of all control over the prosecutorial process. He must seek the appointment of an Independent Counsel, and the entire Independent Counsel apparatus will be brought to bear on one defendant.

2. Appellant also relies on 28 U.S.C. 594(f), which provides that the Independent Counsel "shall, except where not possible, comply with written or other established policies of the Department of Justice respecting enforcement of the criminal laws." Appellant suggests (Br. 19-20) that this provision ensures that an Independent Counsel's investigation will be little different from what a Department of Justice investigation, free of political influence, would have been.

This contention is erroneous on two levels. First, it falsely assumes that a criminal investigation is shaped by formal rules written out in manuals. The crucial judgments that a prosecutor makes -- judgments about which investigative techniques to employ, how much resources to expend in the investigation, when to grant immunity, when to plea bargain, whether to indict -- cannot be reduced to a collection of rules. Any established rules and policies must necessarily leave enormous scope to a prosecutor's judgment and discretion. The exercise of this discretion will be governed not by formal rules but by experience and institutional environment; and as we have explained, it is the institutional environment of the Independent Counsel that introduces biases and distortions into the discretionary judgments she must make.

More fundamentally, the decision at the core of prosecutorial discretion -- whether a particular case is a suitable one for the application of the criminal laws at all, or should instead be viewed as a political or an internal disciplinary matter -- is plainly not a decision that can be made in accordance with formal rules. It is sometimes a decision that requires considering all the responsibilities of the Executive Branch. As a knowledeable observer has explained, while "ordinary" criminal prosecutions do not present questions that concern the President or other high officials, there is a significant class of cases in which "the decision of what legal theory to press on the court, what interpretation of the statute to urge, what settlement, perhaps, to adopt, is just as much dependent upon one's policy preferences as it is upon one's judgment as to the facts and law books read in the way a lawyer does . . . . [T]he President should have the power and responsibility for making these decisions . . . or at least should have someone who is attuned to his philosophy of government making them." Removing Politics from the Administration of Justice: Hearings on S. 2803 and S. 2978 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 93d Cong., 2d Sess 202 (1974) (statement of Archibald Cox).

3. Appellant further argues (Br. 20-21) that the Independent Counsel will not be cut off from the institutional resources of the Department of Justice

because she can "request assistance from the Department," which, under the statute, the Department "shall provide" (28 U.S.C. 594(d)). This argument is unrealistic, in several respects. First, this provision contains no requirement that the Independent Counsel consult the Department of Justice. It is unlikely that an Independent Counsel, who has been appointed precisely so that the Department will not conduct the investigation, would risk the public outcry that might result if she were consistently governed by the Department's judgment on significant issues relating to the investigation.

Perhaps most important, even if the Independent Counsel were to ask the advice of Department of Justice officials on important issues, it is unlikely that they would be able to give her useful guidance. That is because Department officials will have had no contact with the investigation as it progressed. All background information about the investigation is localized in the Office of Independent Counsel. Department of Justice officials will not be in a position not to know the background of factual developments and previous tactical decisions that must inform any prosecutor's judgment. They will be able to participate only in isolated aspects of the investigation, taken out of context. In these circumstances, the Department of Justice officials could not, realistically, have any significant impact on the Independent Counsel's investigation. n8

n8 This lack of information will also make it practically impossible for Department of Justice officials to monitor the Independent Counsel's use of resources. As we noted (page 11, supra), under 28 U.S.C. 594(d) the Department of Justice is required to supply the Independent Counsel with "the resources and personnel necessary to perform [her] duties." Even assuming that the statute permits the Department to play a role in determining what resources are "necessary," Department officials, cut off from knowledge about the progress of the investigation, will be in no position to make such a determination.

4. Finally, appellant suggests that 28 U.S.C. 596(a), which provides that the Attorney General may remove the Independent Counsel "for good cause," protects against the kinds of biases and distortions we have described. Br. 19. This argument is incorrect for many reasons. To begin with, the contours of the "good cause" requirement are not well established in the law. It is by no means clear, for example, that even multiple egregious errors of judgment or a pattern of abusive acts (short of legal wrongdoing) would constitute good cause. But in addition, appellant's argument overlooks two relatively subtle but extremely important practical aspects of the removal power.

First, as a practical matter, the most serious problems created by the Independent Counsel provisions -- the dangers of excessive zeal and single-mindedness, of loss of perspective and errors of judgment, of interference with other responsibilities of the Executive Branch -- cannot be dealt with by removal or threats of removal. Removal is an ultimate weapon, rarely used or even threatened. On the practical, day-to-day level, the great power of prosecutors is effectively controlled by more subtle means -- by socializing them into the internal culture of the Department of Justice; by pointing out their errors; by persuading them to change course; by overruling them on specific, narrow issues. These are the devices that actually influence the way prosecutors use their discretion. They are, of course, precisely the devices that the Independent Counsel provisions foreclose to the Attorney General.

Second, appellant's suggestion that the Attorney General can use the removal power to protect against the dangers of the Independent Counsel provisions assumes, again, that the Attorney General is in a position to evaluate the Independent Counsel's decisions. In fact, as we explained, because the Office of Independent Counsel controls all the information developed in the course of the investigation, the Attorney General will be unacquainted with the background against which the Independent Counsel makes her decisions. Consequently, the Attorney General will seldom be able to determine whether a specific decision made by the Independent Counsel was within the bounds of reasonable discretion. n9

n9 In addition, of course, the political costs of dismissing an Independent Counsel make it unlikely that an Attorney General could take that step for anything short of the most extreme wrongdoing. We emphasize in this connection that the political costs of dismissing a prosecutor investigating high government officials are an important aspect of the constitutional system of checks and balances and democratic accountability. But those costs will be incurred if the Attorney General attempts to dismiss a prosecutor who is within the Executive Branch and subject to dismissal at will. There is no sufficient reason for the additional insulation provided by the Independent Counsel provisions.

D. There Are Alternative Ways to Protect Criminal Prosecutions From Political Interference Without Compromising the Integrity of the Executive Branch.

We of course agree with the goal of the Independent Counsel provisions. Wrongdoing by high government officials should not be countenanced; allegations of wrongdoing should be investigated vigorously and fairly. But the flexible scheme of separation of powers designed by the Framers is more than equal to this task. There are ample ways to protect the independence of a criminal investigation from political interference without going to the lengths of the Independent Counsel provisions.

For example, the Constitution permits Congress to require the advice and consent of the Senate to the appointment of an officer comparable to an Independent Counsel. Senatorial confirmation would help ensure that the appointment was not made for partisan reasons; it is not necessary to deny the President the power of appointment or to isolate the Independent Counsel from the Executive Branch. Or Congress might, if it believed that a special prosecutor was necessary, specify a term of office; that would help ensure that the appointment was not made with a specific case in mind. Congress can provide that the term will overlap different Presidential terms, thus further reducing the risk of partisanship. Congress has the option, under the Constitution, of establishing an Independent Counsel who is not within the Department of Justice, if it considers that course desirable.

Thus Congress, if it believes that some form of special prosecutor is needed, has available to it a number of options that do not conflict with the Framers' design and therefore do not produce the severe institutional distortions of the current Independent Counsel provisions. An office inside the Executive Branch would be within the network of intra-Branch and intra-Department checks and balances; it would develop an institutional memory and sense of perspective; it would not institutionalize the single-minded focus on a particular defendant that is characteristic of the current system. It would develop institutional

means of accommodating the responsibilities and interests of other components of the Executive Branch.

Any institutional arrangement designed to handle such a sensitive task as the prosecution of high-ranking government officials will have potential weaknesses. The great error of the current Independent Counsel provisions is their exclusive focus on one concern -- the risk of improper influence -- and their disregard of the perhaps more subtle but very serious practical problems we have described. One of the deepest commitments of the Framers was that no official should exercise discretionary power unchecked by institutional restraints. The Independent Counsel provisions are not consistent with that commitment.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APRIL 1988

APPENDIX

APPENDIX

"THE FEDERAL PROSECUTOR" An Address by ROBERT H. JACKSON, Attorney General of the United States

Delivered at The Second Annual Conference of United States Attorneys

Great Hall Department of Justice Building Washington, D.C.

April 1, 1940 10 A.M.

THE FEDERAL PROSECUTOR

It would probably be within the range of that exaggeration permitted in Washington to say that assembled in this room is one of the most powerful peace-time forces known to our country. The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. He can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations. Or the prosecutor may choose a more subtle course and simply have a citizen's friends interviewed. The prosecutor can order arrests, present cases to the grand jury in secret session, and on the basis of his one-sided presentation of the facts, can cause the citizen to be indicted and held for trial. He may dismiss the case before trial, in which case the defense never has a chance to be heard. Or he may go on with a public trial. If he obtains a conviction, the prosecutor can still make recommendations as to sentence, as to whether the prisoner should get probation or a suspended sentence, and after he is put away, as to whether he is a fit subject for parole. While the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of

the worst.

These powers have been granted to our law-enforcement agencies because it seems necessary that such a power to prosecute be lodged somewhere. This authority has been granted by people who really wanted the right thing done - wanted crime eliminated - but also wanted the best in our American traditions preserved.

Because of this immense power to strike at citizens, not with mere individual strength, but with all the force of government itself, the post of Federal District Attorney from the very beginning has been safeguard by presidential appointment, requiring confirmation of the Senate of the United States. You are thus required to win an expression of confidence in your character by both the legislative and the executive branches of the government before assuming the responsibilities of federal prosecutor.

Your responsibility in your several districts for law enforcement and for its methods cannot be wholly surrendered to Washington, and ought not be assumed by a centralized Department of Justice. It is an unusual and rare instance in which the local District Attorney should be suspended in the handling of litigation, except where he requests help of Washington. It is also clear that with his knowledge of local sentiment and opinion, his conduct with and intimate knowledge of the views of the court, and his acquaintance with the feelings of the group from which jurors are drawn, it is an unusual case in which his judgment should be overruled.

Experience, however, has demonstrated that some measure of centralized control is necessary. In the absence of it different district attorneys were striving for different interpretations or applications of an Act, or were pursuing different conceptions of policy. Also, to put it mildly, there were differences in the degree of diligence and zeal in different districts. To promote uniformity of policy and action, to establish some standards of performance, and to make available specialized help, some degree of centralized administration was found necessary.

Our problem, of course, is to balance these opposing considerations. I desire to avoid any lessening of the prestige and influence of the district attorneys in their districts. At the same time we must proceed in all districts with that uniformity of policy which is necessary to the prestige of federal law.

Nothing better can come out of this meeting of law enforcement officers than a rededication to the spirit of fair play and decency that should animate the federal prosecutor. Your positions are of such independence and importance that while you are being diligent, strict, and vigorous in law enforcement you can also afford to be just. Although the government technically loses its case, it has really won if justice has been done. The lawyer in public office is justified in seeking to leave behind him a good record. But he must remember that his most alert and severe, but just, judges will be the members of his own profession, and that lawyers rest their good opinion of each other not merely on results accomplished but on the quality of the performance. Reputation has been called "the shadow cast by one's daily life." Any prosecutor who risks his day-to-day professional name for fair dealing to build up statistics of success has a perverted sense of practical values, as well as defects of character. Whether one seeks promotion to a judgeship, as many prosecutors rightly do, or

whether he returns to private practice, he can have no better asset than to have his profession recognize that his attitude toward those who feel his power has been dispassionate, reasonable and just.

The federal prosecutor has now been prohibited from engaging in political activities. I am convinced that a good-faith acceptance of the spirit and letter of that doctrine will relieve many district attorneys from the embarrassment of what have hertofore been regarded as legitimate expectations of political service. There can also be no doubt that to be closely identified with the intrigue, the money raising, and the machinery of a particular party or faction may present a prosecuting officer with embarrassing alignments and associations. I think the Hatch Act should be utilized by federal prosecutors as a protection against demands on their time and their prestige to participate in the operation of the machinery of practical politics.

There is a most important reason why the prosecutor should have, as nearly as possible, a detached and impartial view of all groups in his community. Law enforcement is not automatic. It isn't blind. One of the greatest difficulties of the position of prosecutor is that he must pick his cases, because no prosecutor can even investigate all of the cases in which he receives complaints. If the Department of Justice were to make even a pretense of reaching every probable violation of federal law, ten times its present staff will be inadequate. We know that no local police force can strictly enforce the traffic laws, or it would arrest half the driving population on any given morning. What every prosecutor is practically required to do is to select the cases for prosecution and to select those in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain.

If the prosecutor is obliged to choose his case, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him. It is in this realm - in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself.

In times of fear or hysteria political, racial, religious, social, and economic groups, often from the best of motives, cry for the scalps of individuals or groups because they do not like their views. Particularly do we need to be dispassionate and courageous in those cases which deal with so-called "subversive activities." They are dangerous to civil liberty because the prosecutor has no definite standards to determine what constitutes a "subversive activity," such as we have for murder or larceny. Activities which seem benevolent and helpful to wage earners, persons on relief, or those who are disadvantaged in the struggle for existence may be regarded as "subversive" by those whose property interest might be burdened or affected thereby. Those

who are in office are apt to regard as "subversive" the activities of any of those who would bring a change of administration. Some of our soundest constitutional doctrines were once punished as subversive. We must not forget that it was not so long ago that both the term "Republican" and the term "Democrat" were epithets with sinister meaning to denote persons of radical tendencies that were "subversive" of the order of things then dominant.

In the enforcement of laws which protect our national integrity and existence, we should prosecute any and every act of violation, but only overt acts, not the expression of opinion, or activities such as the holding of meetings, petitioning of Congress, or dissemination of news or opinions. Only by extreme care can we protect the spirit as well as the letter of our civil liberties, and to do so is a responsibility of the federal prosecutor.

Another delicate task is to distinguish between the federal and the local in law-enforcement activities. We must bear in mind that we are concerned only with the prosecution of acts which the Congress has made federal offenses. Those acts we should prosecute regardless of local sentiment, regardless of whether it exposes lax local enforcement, regardless of whether it makes or breaks local politicians.

But outside of federal law each locality has the right under our system of government to fix its own standards of law enforcement and of morals. And the moral climate of the United States is as varied as its physical climate. For example, some states legalize and permit gambling, some states prohibit it legislatively and protect it administratively, and some try to prohibit it entirely. The same variation of attitudes towards other law-enforcement problems exists. The federal government could not enforce one kind of law in one place and another kind elsewhere. It could hardly adopt strict standards for loose states or loose standards for strict states without doing violence to local sentiment. In spite of the temptation to divert our power to local conditions where they have become offensive to our sense of decency, the only long-term policy that will save federal justice from being discredited by entanglements with local politics is that it confine itself to strict and impartial enforcement of federal law, letting the chips fall in the community where they may. Just as there should be no permitting of local considerations to stop federal enforcement, so there should be no striving to enlarge our power over local affairs and no use of federal prosecutions to exert an indirect influence that would be unlawful if exerted directly.

The qualities of a good prosecutor are as elusive and as impossible to define as those which mark a gentleman. And those who need to be told would not understand it anyway. A sensitiveness to fair play and sportsmanship is perhaps the best protection against the abuse of power, and the citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility.

Tatel, *Circuit Judge, separate statement*. I write separately because I do not agree that the Judicial Council should review the Chief Judge's order on its merits. As the Chief Judge noted in his opinion, the Special Division is a "national court" whose administrative functions have "little or no relation" to this circuit. *Opinion of the Chief Judge*, slip op. at 6 (Judicial Council, D.C. Cir. Nov. 1, 1994). To me it seems inappropriate that the Special Division, set up as an independent entity by Congress, with its members appointed by the Chief Justice from three different circuits, would be subject to discipline by this circuit's Judicial Council. So too it seems inappropriate that any one member of the Special Division would be subject to this circuit's Judicial Council, for if all three members of the Division were involved in a challenged activity, allowing each circuit's judicial council to consider the complaint against the member from that circuit might lead to inconsistent results.

For these reasons, this matter "in the interest of justice, is not amenable to resolution by the judicial council" of this circuit. 28 U.S.C. § 372(c)(7)(B)(ii) (1988 & Supp. V 1993). Rather than dismissing the complaints under § 372(c)(3)(A)(i), as the Chief Judge did, I would have preferred the appointment of a special committee, pursuant to § 372(c)(4), which in turn could have recommended that the Council certify the complaints to the Judicial Conference under § 372(c)(7)(B). The Special Division is a national court. Complaints against its members should be considered by a national body.

I am also concerned that the Judicial Council's affirmance on the merits suggests that the appearance of impropriety standard of the Code of Judicial Conduct does not always apply to the members of the Special Division. I believe that it does. Because that standard is fundamental to the independence and impartiality of the federal judiciary, it must apply to all official activities of Article III judges, including those undertaken at the direction of Congress pursuant to Article II.

The appearance of impropriety standard is set forth in Canon 2 of the current Code of Conduct for United States Judges. Its purpose is to maintain public confidence in the courts as impartial forums for the resolution of disputes. By its terms, Canon 2 is not limited to our purely judicial functions: "A Judge Should Avoid Impropriety and the Appearance of Impropriety in *All* Activities." Canon 5 advises us to "regulate extra-judicial activities to minimize the risk of conflict with judicial duties," and Canon 5G cautions that "[a] judge should not, in any event, accept . . . an [extrajudicial] appointment if the judge's governmental duties would . . . tend to undermine the public confidence in the integrity, impartiality, or independence of the judiciary." The commentary to Canon 5G deals directly with extra-judicial assignments like the Special Division, recognizing that "[t]he dangers attendant upon acceptance of extra-judicial governmental assignments are ordinarily less serious where the appointment of a judge is required by

legislation," as such assignments "typically do not pose a serious threat to the independence of the judiciary." But that commentary warns that "where Congress requires the appointment of a judge to perform extra-judicial duties, the judge may accept the appointment provided that the judge's services would not interfere with the performance of the judge's judicial responsibilities or tend to undermine public confidence in the judiciary."

Canons 2 and 5, then, apply the Code to our extra-judicial activities, including those assigned by Congress, and make it clear that any action undertaken while participating in such activities that would tend to undermine the public's confidence in the independence and impartiality of the judiciary violates the Code. In certain circumstances, such violations will indeed threaten the "effective and expeditious administration of the business of the courts," and complaints alleging such violations are a proper subject for review under the Judicial Council Act. 28 U.S.C. § 372(c)(1). I do not understand the Chief Judge's opinion or this Council's affirmance to mean otherwise. Yet the Council now affirms the dismissal of complaints charging an appearance of impropriety in connection with a meeting by a member of the Special Division because "even accepting the complaints as true for purposes of this analysis," they do not allege a violation of any "provision of law or ethical Canon." *Opinion of the Chief Judge*, slip op. at 16. While expressing no view on the merits of those complaints -- as I stated above, the Judicial Conference is the appropriate body to consider these allegations -- I do not agree that the circumstances alleged could never constitute a violation of ethical or legal standards. I thus would not have dismissed the complaints "for failure to conform to 28 U.S.C. § 372(c)(1)." *Id.*

My conclusion does not change merely because the complaints allege impropriety stemming from a meeting which, as the Chief Judge points out, is authorized by law. The Code provision barring *ex parte* contacts specifically excepts contacts that are "authorized by law." Canon 3A(4). The Ethics Act plainly contemplates that the members of the Special Division will engage in consultations -- indeed, as Chief Judge Edwards points out, it is hard to imagine how the Division would function without such contacts -- so the fact of such consultations in and of itself does not violate Canon 3A. But Canons 2 and 5 never permit appearances of impropriety, even those associated with activities "authorized by law." Thus, any communication by an Article III judge in connection with Article II activities could, under certain circumstances, amount to an appearance of impropriety and thus a violation of Canon 2 and § 372. The fact that not every provision of the Code may apply to Article II functions or that some difficult distinctions may be necessary for Article II activities does not mean that the appearance of impropriety standard is inapplicable.

Nothing in the language of the Ethics Act suggests that Congress intended to exempt members of the Special Division from the ethical canons prohibiting the appearance of impropriety which may arise from the circumstances surrounding certain *ex parte* consultations. When Congress chose to place this Article II power in the hands of Article III judges it knew that we would be bound by the Judicial Code in all of our official activities. I would thus not assume from its silence that Congress intended to interfere with ethical standards designed to safeguard the integrity of Article III courts.

Indeed, if Congress had intended to ease the ethical restrictions on federal judges serving on the Special Division, it would raise fresh questions regarding the constitutionality of the Independent Counsel provisions of the Ethics in Government Act. In sustaining the constitutionality of the Act, the Supreme Court held only that the Article II appointment power is not "per se" inconsistent with Article III, emphasizing that it did "not mean to say that Congress' power to provide for interbranch appointments of 'inferior officers' is unlimited." *See Morrison v. Olson*, 487 U.S. 654, 679 n.16, 675 (1988). The Court acknowledged that if the "provisions for appointment had the potential to impair the constitutional functions assigned to one of the branches," or if the grant of the appointment power created "any taint of the independence of the Judiciary," the Act might be "invalid under Article III." *Id.* at 675-76, 684.

In the end, the Court sustained the Act because it did not "pose any threat to the impartial and independent federal adjudication of claims within the judicial power." *Id.* at 683 (internal quotation marks and citation omitted). To hold that Congress expected Article III judges to carry out certain Article II communications free from the constraints of the appearance of impropriety standard of Canon 2 would, I believe, pose just such a threat.

THE PRESIDENT HAS SEEN
7.5.95

(E) **Segal memo on important national service developments.** Eli draws your attention to two cost-benefit studies, hearings on the Hill and problems with the Delta Service Corps: 1) An independent cost-benefit study funded by three foundations shows that for every dollar put into AmeriCorps, between $1.60 and $2.60 is returned to the community; 2) A GAO study will be released sometime near the end of July that will vastly overstate the costs of AmeriCorps. According to Eli, their methodology is flawed, but nevertheless the Corporation is readying a press strategy to counter the study; 3) Both the House and Senate Appropriations hearings on AmeriCorps went relatively well. Privately, House Chairman Jerry Lewis assured Eli he would be helpful and include AmeriCorps in his mark; 4) The House Defense Authorization bill includes language prohibiting DoD from supporting civilian operations, specifically including AmeriCorps*NCCC. Eli continues to monitor the situation and keep Pat Griffin posted. Finally, as the Corporation nears awarding grants for next year, Eli wanted to make you aware that the Delta Service Corps is in danger of not being funded again. The Corps has lacked leadership and management since Billie Anne Meyer left. Eli is working with Skip Rutherford to address the problem.

Pls try to keep it going

(F) **Letter from Secretary Jesse Brown on your budget proposal.** Secretary Brown expresses serious concern about the impact of your plan on veterans.

non-veteran analysis of this

(G) **Sosnik memo on recent polls.** Sosnik attaches summaries of several recent polls including your numbers in Michigan and Louisiana and the gubernatorial races in Mississippi and Louisiana.

Don't to Cabo

(H) **Column written by Senator Patrick Leahy.** Forwarded by Pat Griffin. The column is very favorable towards your balanced budget proposal.

(I) **Immigration press clips on the Gatekeeper II announcement.** Forwarded by Rahm.

7/5
Jocelyn Jolley
Per POTUS note (H)
Do THANK you to him.
(Original ltr + ATTachment to Jocelyn

S. Haran

PATRICK J. LEAHY
VERMONT

THE PRESIDENT HAS SEEN
7.5.95

UNITED STATES SENATE
WASHINGTON, D. C. 20510

95 JUN 23 P5:11

Dear Pat

I've been telling the press the President is right — and will continue to.

Don't hesitate to have the press call me.

Pls forward to Peter

THE BURLINGTON FREE PRESS SUNDAY, JUNE 18, 1995

PATRICK LEAHY

# Budget pact a bipartisan possibility

It is time for a bipartisan summit on the budget.

This has been a remarkable week. In New Hampshire last Sunday, President Clinton and House Speaker Newt Gingrich actually sat down together to discuss their differences on a wide range of important issues — without 15-second sound bites aimed at scoring cheap political points.

On Wednesday night, President Clinton laid out a 10-year blueprint to balance the budget and called for bipartisan cooperation to reach some compromise with Republican congressional leaders.

What a difference a week makes. Before their historic meeting in New Hampshire, the speaker and the president were headed for a train wreck on the budget — a wreck that would force the entire government to an abrupt halt this fall.

An immediate bipartisan summit on the budget is needed, building on the spirit of cooperation established by Clinton and Gingrich in New Hampshire.

For a summit to succeed, everything must be on the table: taxes, health care reform, entitlement reform, further spending reductions and the time it will take to get to a balanced budget.

Such a summit will be a grueling, sometimes acrimonious encounter. But anyone who has studied the various blueprints can see the outlines of an agreement — providing there is the political will. Both Republicans and Democrats agree we must consolidate unnecessary government programs, reform welfare and control Medicare and Medicaid spending. We may now disagree on some of the details for accomplishing these goals. That is why we need a bipartisan summit — to hammer out the details of a compro-

Until now, both sides shared the blame for the fix we find ourselves in. This year's budget debate has been just partisan bickering. Congressional Republicans did not seek cooperation from the Democrats, and Democrats, in turn, almost unanimously opposed the budget resolution. Party-line votes, unfortunately, are nothing new in Washington budget debates. When Democrats controlled the majority, the same thing happened. Democrats did not reach out to Republicans, and not a single Republican in the House or Senate voted for the 1993 budget bill.

In 1990, a president and Congress of different parties failed to reach a bipartisan agreement on the budget. The result was a shutdown of the federal government for almost a week. This hurt Social Security recipients, students who relied on federal loans, farmers who relied on federal support programs and millions of others. Luckily, the government shutdown did not last long enough to imperil our air traffic control system and meat inspections.

I foresee the same thing happening this fall, but with the potential for a far longer and more acrimonious stalemate. Before adopting a more conciliatory tone in New Hampshire, Newt Gingrich was issuing partisan ultimatums. He recently told Business Week his strategy of forcing President Clinton's hand: "The appropriations bills — If you don't sign them, there is no government. Which of the two of us do you think would be more worried by that?"

But this was before New Hampshire. Shutting down the government in an attempt to score political points will only bring public scorn of our political system. It is time to put our political differences aside and come together in a bipartisan budget summit — before the crisis.

Once we get the budget on solid footing, there will be plenty of time for a presidential campaign next year.

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