The Investigation of Scandal from Watergate to Monicagate: The Special Prosecutor in Late Twentieth Century American Politics

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Abstract

The aim of the thesis is to assess critically the role of the Special Prosecutor in recent US politics and to assess the rise and relative decline of the reputation of the office in the period from the Watergate scandal of the mid 1970s to the Lewinsky scandal of the late 1990s. The project will evaluate the role of the Special Prosecutor in the investigation of alleged executive wrongdoing and analyse changing trends in political, judicial, media and popular opinion regarding the conduct of the Special Prosecutor.

The chapters are divided as follows:

Chapter 1 offers an Introduction to the topic, providing an outline of and explanation for material that appears in later chapters. It also briefly refers to pre-Watergate uses of the Special Prosecutor provision.

Chapter 2 examines the hero status accorded to Watergate Special Prosecutors Archibald Cox and Leon Jaworski and the unrealistic levels of expectation about the office that this generated.

Chapter 3 deals with procedural change, particularly Title VI of the Ethics in Government Act of 1978 and the problems that came with it. Early uses of Title VI will also be covered.

Chapter 4 covers how Iran Contra demonstrated the incompatibility of political disputes and criminal investigations, with particular emphasis on the early decline of the Independent Counsel reputation.

Chapter 5 examines the relatively brief and low profile Whitewater investigation carried out by Robert Fiske and how the investigation began to evolve into a partisan conflict.

Chapter 6 explores the Kenneth Starr investigation and the perils of politicized justice, examining how the Whitewater investigation of alleged financial misconduct by President Clinton evolved into a partisanized demand for his impeachment because of personal misconduct over the Monica Lewinsky scandal.

Chapter 7 brings a conclusion of previous chapters.

There is some disagreement among scholars regarding the acceptable plural of the term 'counsel.' The thesis will contain the plural 'counsel' throughout.

1. Introduction: The Investigation of Scandal in American Politics

'Archibald Cox is a model of what a great lawyer should be – a scholar, a public servant, a teacher, a defender of the powerless, a man of indomitable principle and absolute integrity, and, at all times, a gentleman.'

(Arthur Schlesinger Jr.)

'Ken Starr, America's number one pornographer.'

(Arthur Schlesinger Jr.)

According to historian Roy Foster, 'History is not about manifest destinies, but unexpected and unforeseen futures.'[1] This was undoubtedly the case with regard to the role of the Special Prosecutor in late twentieth century American politics. The Schlesinger comments above represent the remarkable evolution in attitude towards the office that was once held aloft as the guardian of US democracy and relied upon to clip the wings of the imperial presidency. The intent of this thesis is to trace the development over a quarter century of the transformation of the reputation of the Office of the Special Prosecutor from saviour of political ethics to scourge of political leadership.

Title VI of the 1978 Ethics in Government Act was the most conspicuous legacy of Watergate. The Special Prosecutor statute, it was hoped, would act as a preventive measure against the abuse of power by high ranking government officials. Created with

benign intent, it was initially deemed a necessary and welcome precaution, but its authors failed to foresee the consequences of their efforts to legislate ethics. The role of the Special Prosecutor produced unexpected, unforeseen and eventually unwelcome results, so its demise was greeted with widespread relief in 1999. The thesis will attempt to explain how and why this office fell from grace, by examining its role, reputation, legitimacy, independence and perception in the politics of scandal. The introductory chapter will define these terms in relation to the thesis and contextualize the topics examined in later chapters.

The thesis will analyse the Special Prosecutor's role in the investigation of Watergate and post Watergate executive branch misdemeanours and assess its contribution to the development of the political culture of scandal in late twentieth century America. It will also examine the fluctuations in the reputation of the office from the Watergate scandal to the Lewinsky scandal.

The thesis is particularly concerned to explain why Watergate Special Prosecutors Archibald Cox and Leon Jaworksi acquired 'hero status' during their investigation of the scandal. It will also examine the unrealistic level of expectation about the office that this generated. Procedural change in the guise of Title VI of the Ethics in Government Act of 1978 will be examined, along with results of early uses of the Act for minor misdemeanours.

The next issue to be addressed will be how Iran Contra demonstrated the incompatibility of political disputes and criminal investigations and hence failed to achieve an outcome comparable to that of Watergate. The thesis also assesses why Independent Counsel Lawrence Walsh did not achieve the kudos of his predecessors.

Special Counsel Robert Fiske's investigation of Whitewater in the 1990s posed questions regarding the changing environment within which the Independent Counsel was operating. The thesis examines why and how Fiske was dropped from the investigation.

Finally, there will be an examination of the perils of politicised justice, covering how the investigation of alleged financial misconduct by President Clinton evolved into a partisanised demand for his impeachment because of personal misconduct in the Lewinsky affair.

There currently exists quite a wide spectrum of literature on the Special Prosecutor, Title VI of the Ethics in Government Act and the Independent Counsel. This ranges from in depth analysis of the legislation and its practical applications to the most extreme partisan views on its use and abuse, or abuse of its users, depending on the author's stance.

From a political science perspective, the key work is that of political scientist Katy Harriger. *The Special Prosecutor in American Politics*, first published in 1992 and reprinted in 2000, is the definitive text as regards examination and analysis of the introduction and continuity of the Independent Counsel Statute. Harriger's institutional

approach draws on state and federal precedents, case law, legislative history and problems of implementation. It is her contention that the use of the special prosecutor is, at its core, an issue concerning the separation of powers system and she uses *The Federalist Papers* as an initial guide to understanding this. She analyses the independent counsel's role within the framework of the separation of powers, explaining how each has interacted with other key players in the political and legal system and showing how those relationships have affected the prosecutor's ability to conduct investigations. Her central framework is that 'the study of the use of the special prosecutor is the study of the separation of powers writ small'. Formalistic notions of separation of powers are rejected in favour of an orientation that is embedded in 'the complex set of relationships that make up modern American politics'. [2]

Harriger uses the independent counsel legislation and the cases it spawned as a microcosm of the larger intricacies a representative government creates. She acknowledges cause for concern regarding the lack of formal constraints, but argues that in practice there have been a number of meaningful constraints on the exercise of that power, which arise from the practical political realities of the separation of powers system. Harriger uses the study of the interaction of the federal special prosecutor's office with other relevant actors in the federal system. Her analysis reveals that there are problematic cases under the independent counsel statute but that more independent counsels than not have operated in ways that can be characterized as restrained and responsible. Many of the alleged abuses of prosecutorial power by an independent counsel are not different from exercises of power by regular prosecutors. The real

difference, she argues, is the amount of scrutiny given their actions. Harriger concludes by stating that in terms of actual case outcomes, as a means of charging targets with crimes and punishing them, the independent counsel statute has not succeeded. In her opinion, it is the strength of elite support for the institution of the special prosecutor that is the arrangement's greatest contribution to American politics.[3]

Writing in 1991, scholar and journalist Suzanne Garment's *Scandal: The Crisis of Mistrust in American Politics* offers an insight into the culture of mistrust that had developed in the political arena. Garment makes a provocative argument that the entire political culture of America has shifted so that actors perpetually collude to produce scandals - among other things, as a distraction from having to produce intelligible policy. It is not that politicians have become more corrupt, she suggests, it is that a culture of scandal has emerged. 'Today's myriad scandals come in much larger part from the increased enthusiasm with which the political system now hunts evil in politics and the ever-growing efficiency with which our modern scandal production machine operates.' Garment, a former *Wall Street Journal* columnist, views the media, zealous investigative groups, and political opposition groups as operating together as a 'scandal machine' that deters capable citizens from serving in government, creates cynicism and a 'culture of mistrust,' and consumes considerable expense and energy. While some misconduct is truly reprehensible, she argues, much becomes the subject of scandal only as a result of the criminalization of politics.[4]

From other journalistic perspectives, there is a dazzling array of interpretations of the workings of the Independent Counsel. Particularly helpful is Bob Woodward's *Shadow*, which offers an excellent journalistic narrative of the post Watergate Special Prosecutor era. *Landslide*, written by Journalists Jane Mayer and Doyle McManus, provides an engaging work on the Iran Contra scandal, and Jeffrey Toobin's *A Vast Conspiracy* is a riveting account of the Clinton/Lewinsky scandal.[5]

From a legal perspective, there has been a wealth of journal articles pondering the benefits and perils of the Independent Counsel Office. The American Enterprise Institute and Brookings Institution in particular have compiled pieces outlining the history, merits and pitfalls of the Statute. Most interestingly, the Special Prosecutors themselves, particularly Archibald Cox, Leon Jaworski and Lawrence Walsh have provided invaluable insights into their experiences via their memoirs and articles on the topic.

The study's claim to originality centres on its analysis of the evolution of the Special Prosecutor/Independent Counsel role and reputation within the broad context of American politics. It examines changing perceptions of the Special Prosecutor over a quarter of a century, based on political, judicial, media and popular opinion. Since no other work offers this particular perspective, this thesis seeks to fill the void between the institutional and journalistic approaches to its subjects. Considering the impact that the Office of Special Prosecutor and later Independent Counsel has had on US politics, a historical analysis of the evolution of the office itself and how it was perceived by elites and the public is a crucial component in understanding how its reputation peaked and

troughed over a quarter century. Examination of the role and reputation of the Special Prosecutor also illustrates how the office evolved in tandem with that of the US president. Starting with a heroic Special Prosecutor and an Imperial President and ending with a vilified Independent Counsel and a beleaguered president, the thesis offers some insight on the broader significance of this transformation.

In order to provide guidelines throughout the text, chapters have been divided into pairs of subheadings where appropriate. These are as follows.

Role, Reputation:

The evolving reputation of the Special Prosecutor forms the crux of the thesis. First and foremost, examination of 'role' lays the groundwork for later topics as it deals with the proposed duties and functions of the independent counsel office and how each prosecutor perceived his position. The thesis examines how each individual performed his role, influenced by what he deemed appropriate under the particular circumstances within which he operated.

Each chapter seeks to establish what the role involved and the expectations of the role were. Historical context is necessary and early uses of the Special Counsel, as they were known, are briefly outlined. Watergate was the defining moment for the Special Prosecutor and led to the role being placed squarely in the public arena for all to observe,

admire and criticise. Title VI of the 1978 Ethics in Government Act redefined the role and gave it a more solid grounding in the hope of increasing its strength and viability as a trusted source of impartial investigation.

The role that emerged from the 1978 legislation was essentially based on a lack of trust in government. This was not a new concept in politics. The Framers of the Constitution had devised the separation of powers system also based on a lack of trust in government. So, little had changed over 200 years regarding attitudes to abuse of political power. To understand the meaning and the purpose of the Office of the Special Prosecutor, a grasp of the role and its desired effects is necessary. Intertwined with this is the notion of the reputation of the individual and the office, and whether each Prosecutor matched the expectations that came with the role. Hence, these subheadings are placed early in the chapters as a means of establishing some context regarding the Office and its requirements.

The subheading of reputation, or, the estimation in which a prosecutor was held, is logically interwoven with that of role. Reputation was a key factor in the perceived success or failure of a prosecutor in his role. The issue of reputation was of paramount importance when choosing an individual for the post, as crucial to the selection process as their education, training and experience. In order to conserve a solid reputation, the individual was obliged to adhere to certain criteria. These included maintaining integrity and objectivity, remaining free of conflicts of interest and displaying competence and expertise.

Sociologist Michael Schudson refers to reputation as a 'social construction based in part on the character of the subject but also on the character of the times and the social groups making use of the reputation.'[6] In fact, a reputation is created as much if not more by others than by the individuals themselves.

Accordingly, if reputation partly exists within the context of one's interaction with others, then it can be viewed as existing in the space between the individual and others. Hence, in common with every other political office, the independent counsel reputation was never the preserve of the holder to control. Over time, the reputation of the office increasingly needed to be defended. By the end of the Iran Contra investigation in particular, the reputation of the office had become contested political terrain.

The focus of the Special Prosecutor/Independent Counsel was the investigation of alleged executive branch misdemeanour. The Ethics in Government Act proposed that an Independent Counsel appointed by a three-judge panel would investigate an individual. This would be based on minimal evidence and have an open mandate and budget. The aim of the role was to ensure that the investigation of executive branch officials for criminal misconduct was not influenced by the executive branch. Watergate resulted in a strong desire to ensure that allegations of wrongdoing by government officials were stringently investigated and prosecuted. Although this was no bad thing, achieving this end whilst ensuring the independence and accountability of the prosecutor has been a particular challenge for all concerned.

The thesis will also trace the Special Prosecutor's relationship with other actors, including Congress, the executive, judiciary, media and interest groups and how the reputation of the office evolved among the other actors over time. Independent Counsel were generally thought to be more aggressive than regular prosecutors but each individual had his or her own unique experience of the role. Special Prosecutor reputations for partisanship were inevitable, but the accusation was even made when those investigating had an affiliation with the accused! The thesis will mainly deal with the Watergate, Iran Contra and Whitewater/Lewinsky investigations, with some focus on the Independent Counsel Statute itself and early uses of it. In particular, the cases of Hamilton Jordan and Tim Kraft will be examined as examples of the more minor matters investigated under the legislation.

Legitimacy, Independence:

The legitimacy of the Special Prosecutor requires examination in order to clarify the office's *raison d'etre*, and how the Special Prosecutor arrangements fitted into the separation of powers framework. The legitimacy of the office was eventually called into question as a result of accusations of abuse of power and partisanship, which ties in with the heading of independence.

Independence was a particularly noteworthy and contentious issue for the Special Prosecutor. To be, and to appear to be, independent was an ongoing challenge for every

prosecutor and virtually all of the presidential Special Prosecutors were challenged on this score. This ties in with the importance of the reputation of the office, as allegations of partisanship, for example, against a prosecutor brought his or her independence into question. The change in title from Special Prosecutor, as used in Watergate, to Independent Counsel, as the office became known in 1983 was a symbolic effort to reinforce the concept of independence in relation to investigations pursued under the Ethics legislation. Ironically, it was in the Independent Counsel era that accusations regarding lack of independence particularly came to the fore.

Attention will be paid to how and why the office came into existence, and how the Special Prosecutor arrangement fitted into the separation of powers framework. Relations with the Department of Justice will be covered, along with how the office proceeded and dealt with its highly formalised grant of authority. The Special Prosecutor had a complex set of accountability relationships, and not everyone was in favour of the office or the individuals appointed. Independence and the appearance of independence were consistently contentious issues. Just because the person appointed to act as independent counsel existed separately from the executive branch did not mean that s/he operated in a vacuum. Some counsel took greater care than others in their quest to appear, and be, independent. Interestingly, although attitudes towards the office essentially went from positive to negative over time, similar accusations regarding lack of independence were levelled against the revered Archibald Cox in the 1970s and the reviled Kenneth Starr in the 1990s. However, every time an independent counsel was named, everyone in the process was guaranteed to be criticised by someone. The Counsel himself was the most

obvious target for abuse. Impartiality was a crucial feature if public confidence was to be maintained in the post. Achieving impartiality and independence whilst ensuring that the Special Prosecutor did not abuse the vast power granted by the statute was an ongoing source of concern for all involved.

Perception of Scandal:

The chapters will conclude by examining perceptions of the independent counsel and the transition from investigation of scandal to investigations being perceived as scandalous. Obviously, the notion of perception is implicit in each of the previous subheadings. However, it does warrant separate coverage in the context of the emergence of perceived scandals. This section in the chapters will focus particularly on the media, and as a result, the public perception of the office. Entwined with this is the notion that some of the investigations were perceived as scandalous.

The Special Prosecutor post was deemed important by political elites because of its perceived symbolic value to the public. Elite support for the office could generally be traced back to the trauma of Watergate. Title VI of the Ethics in Government Act basically institutionalised the distrust that grew out of the Watergate experience. However, there is little evidence to show that the public actually did have much understanding or awareness of the Special Prosecutor institution, so they could hardly obtain much comfort from something they knew little about. Significantly, no direct data,

for example opinion polls, exist to offer an insight into how the public perceived the workings of the Special Prosecutor investigations. Instead, information regarding levels of public confidence in the office came from public opinion literature and general post-Watergate polls and media coverage.

In this context, the evolving role of the media in the post Watergate years and the different ways in which it portrayed the Special Prosecutor investigations were of great significance. The revolution of the information age brought significant changes in how information was presented to the public. The speed and variety of news and information changed to an astonishing degree with the advent of the New Media. Mass public perception of an event is invariably shaped by the conduit of the media, and depending on the sort of media the public chooses as its source of information, the message will have a particular slant, spin or distortion on an event. For example, a member of the public may choose to perceive an event via the lens of *Fox TV* or *Al Jazeera.* As a viewer, it is difficult to believe that both channels are referring to the same matter. Hence the importance of emphasising how a Special Prosecutor investigation was portrayed by the media, to the public, and how the public reacted as a result of what they were exposed to.

The days of reading about Watergate in the local paper, and tuning into the televised hearings were a quaint memory of a bygone era by the time of the Whitewater/Lewinsky scandal. Cable news networks, 24 hour news channels and the internet ensured a fast and furious pace of reporting, where invariably the provision of soundbites and infotainment triumphed over balanced and objective factual analysis. Chapters five and six of the

thesis in particular deal with the radical change in information provision to the public during the 1990s and the increase in media and public cynicism towards politicians and the political process. Chapter six concludes with the expiration of the Independent Counsel statute in 1999.

The Special Prosecutor Before Watergate - Whiskey Ring, Teapot Dome, Truman Tax Scandals:

The Watergate scandal did not occasion the first appointment of a special prosecutor to investigate public corruption. The creation of the Justice Department in 1870 brought with it standing statutory authority, later specified in *28 United States Constitution §515*, for the Attorney General to retain a counsel as a 'special assistant to the Attorney General' or as a 'special attorney.'[7]

The authority was employed for the first time in investigating the Whiskey Ring revenue fraud scandal during the Grant administration. In a forerunner of twentieth century developments, this provoked concern about conflict of interest regarding how the executive could credibly investigate itself.[8]

The next major scandal to rock the executive was the 1920s Teapot Dome case, which involved allegations of bribery and corruption in the leasing of the federal government's naval oil reserves to private business. In this investigation, a Special Prosecutor was

appointed by President Coolidge, subject to Senate advice and confirmation, to operate independently of the Justice Department.[9]

Scholars have drawn comparisons between the great dramas involving Special Prosecutors before the 1978 legislation. These were the Truman tax scandals of 1951-2, Teapot Dome and Watergate. Early exposure of wrongdoing and the publicising of the matter via congressional committee investigations in the Teapot Dome case would be replicated by the Watergate scandal. A Special Counsel, as it was then known, was appointed by President Coolidge in response to congressional pressure and with the intention of avoiding congressional intervention. The president was obliged to choose bi-partisan individuals with solid reputations to investigate as Senate confirmation, and even rejection, had an enormous impact on his choice. In the event, Attorney General Harry Daugherty and the Justice Department were implicated in the affair, with the former being eventually forced to resign. The investigation lasted for years but escaped any criticism that it lacked independence.[10]

The Truman tax scandal began in a similar vein to Watergate in that allegations against executive branch members resulted in a congressional committee launching an investigation. The Bureau of Internal Revenue and the tax division of the Justice Department were investigated and found to be complicit in tax-fixing. The assistant Attorney General responsible for this, T. Lamar Caudle, was fired and later convicted of conspiring to fix a tax case. Other lesser figures were obliged to resign and a number of convictions were made. Despite the administration's efforts, Congress maintained its own

investigation and the president agreed to appoint a special commission, headed by Newbold Morris, to investigate the matter as the negative publicity continued to spread. Not for the last time, the attorney in charge of a scandal investigation was accused of overreaching his jurisdiction, as Morris set about his task with zeal. When the president voiced his concerns to Attorney General J. Howard McGrath, Morris was fired by McGrath and as a result, McGrath was fired by Truman. The president weathered the ensuing storm of protest as McGrath was considered to have overstepped his mandate.[11]

The contrasts with Watergate in this instance included the impact of firing a special prosecutor. Although Morris' firing caused a stir at the time, the general consensus was that he had in fact overreached. Hence, the furore over his departure soon subsided. Also crucially for Truman, although he was deemed politically responsible for the tax scandal, he was not implicated in it and therefore maintained his credibility. So, appointment and firing of ad hoc special prosecutors and abuse of special prosecutorial authority were already a part of history by the time the Watergate scandal unfolded.[12]

It is possible to itemise particulars of scandal in the examples prior to Watergate which used ad hoc special prosecutors. The following table provides the key traits involved.

Whiskey Ring 1875	**Teapot Dome 1920s**	**Truman Tax 1951-52**
Justice Department implicated in the scandal	Began with a congressional investigation that led to the appointment of a Special Prosecutor	Began with a congressional investigation that led to the appointment of a Special Prosecutor
Justice Department accused of inattention to the charges; lack of confidence in it by key congressmen. Led to the investigation	Provided a model for a special law that authorised the president to appoint, with Senate advice and consent, a special counsel who would operate outside of the Justice Department	The Special Prosecutor was appointed within the Justice Department
The Special Prosecutor was appointed within the Justice Department	Attorney General and Justice Department implicated in the allegations	The Attorney General fired the Special Prosecutor after 63 days
First Special Prosecutor was fired after 7 months	Attorney General forced to resign	The President fired the Attorney General
Grant's otherwise accomplished record as president was marred by his association with the scandal	Special Counsel was not required to investigate a sitting or a living president	The firing did not have any long-term adverse effect on the President

Archibald Cox and Watergate:

It is with the final ad hoc use of the Special Prosecutor in particular that the thesis begins to examine the various aspects of the office. Chapter two deals with the investigation of one of the most traumatic peacetime events in twentieth century American history – Watergate. The role of the Special Prosecutor had already entered the historical record, but it was not until the 1970s that its force was really felt. The familiar tale of the break-in at the Democratic National Committee headquarters in June 1972 has been related many times, but the impact on the nation cannot be overstated. It was undoubtedly the premier political scandal of the twentieth century.

Coming hot on the heels of the turbulent sixties and during the trauma of Vietnam, this monumental breach of public trust seemed almost too much to bear. In February 1973 a Senate Select Committee was established to investigate the allegations. In April, President Nixon granted his new Attorney General-designate Elliott Richardson complete authority over the investigation. Richardson nominated his former Harvard law professor Archibald Cox as Special Prosecutor. He offered the Senate the opportunity to informally endorse his choice, which it did, and the Watergate Special Prosecution Force (WSPF) was born.[13]

Cox was generally deemed to be a man of suitable integrity for the job, but Nixon was appalled at the choice. Certain similarities appeared between Cox and his rather more infamous successor two decades later - Kenneth Starr. Both were accused of ferocious

partisanship by their detractors, not least the presidents they were employed to investigate. Both were known to love the law and were considered by those that knew them to be true public servants. Cox was a Kennedy man and to Nixon, this meant that Cox was 'out to get him'. Cox's biographer, law professor Ken Gormley believed that if the president had had a better understanding of Cox, he would have known that his only hope of salvation was through full disclosure of his role in the Watergate affair.[14] In reality, Nixon's character would hardly have lent itself to such a decision.

Nixon found Cox's cultural lineage abhorrent and despised the WASPish, Harvard educated, liberal ethos that he felt the Special Prosecutor represented. Demonising one's prosecutor was an obvious ploy, and Nixon was not the only individual to adopt the role of victim in relation to the Special Prosecutor. However, the general consensus among elites and the public veered more towards seeing Nixon as villain and Cox as hero. This was a time of increased cynicism toward authority and the government and this particular crisis of confidence brought an urgent need for someone to step into the breech. At this juncture, the significance of the Special Prosecutor was monumental as Washington, if not the nation, sensed that the presidency had overstepped its powers. Cox was the knight in shining armour, like no later prosecutor would be, and his 2004 obituaries compounded this view.[15]

Later prosecutors, although given similar exposure, and one of them arguably examining a more serious matter - Iran Contra - never achieved anything like the heroic status awarded Cox, because there was not that same feeling in later scandals of national

trauma. Iran Contra appeared to the public to be a less threatening abuse of power than Watergate, mainly because the intent of this misdemeanour was to enhance national security rather than assist the president's re-election. The Whitewater/Lewinsky scandal appeared to be, and was, positively trivial in comparison, as will be illustrated in later chapters.

Cox was completely lacking in criminal trial experience, but his supporters assumed that his integrity would make up the shortfall. Starr too, had no prosecutorial experience, which was considered an enormous drawback. On accepting the job, Cox did not realise that seven other individuals had already refused the post. It was generally considered to be a thankless position in a no-win situation. The broadsheets of the day reported that Lawrence Walsh had initially been a contender but had not been formally asked. Leon Jaworski had also been considered, but Richardson had decided that his style and temperament were not appropriate for the job.[16]

Cox's reputation among his peers appeared to range from being a man of integrity with good instincts to being considered humourless, not good at dealing with people, and lacking a style that would go over well with the press and Congress. He was also considered by some to be a 'stuffed shirt.'[17] Again, such comments were later leveled against Starr.

Operating as an ad hoc prosecutor, Cox's original charter severely restricted his ability to investigate and prosecute – if a crime was not directly linked to the Watergate break-in,

investigation of it was off limits. However, Richardson realised how debilitating this could be to Cox's progress, and agreed to insert language to the charter that ensured that Cox's scope was 'enormously broad.' Richardson later confessed that this expanded latitude caused unforeseen problems further down the road.[18] Cox was painfully aware of the no-win situation he had agreed to by accepting the post. However, he felt a strong obligation to his country, not to mention an awed sense of responsibility. 'This is a task of tremendous importance,' Cox said, 'somehow, we must restore confidence, honour and integrity in government.'[19]

The press in general approved of Cox's appointment. Many Democrats however, fretted about the independence of any prosecutor appointed by Richardson.[20] Legitimacy and independence would be perennial issues for the special prosecutor as detractors spoke of conflict of interest and partisanship. Cox proceeded in a fashion that would be echoed by Iran Contra prosecutor Lawrence Walsh by starting with the minions and working his way up. Starr would later make a radical departure from this approach by going straight for Clinton. Cox summed up his hopes and intentions as prosecutor when he was sworn in. He wished to act with 'candor, honour, sensibility, dedication to justice and unswerving rectitude with out a taint, I hope, of self-righteousness.'[21]

Cox, however, like Starr, despite possessing many admirable traits, had a political tin ear. Having ten members of the Kennedy clan present at his swearing-in ceremony was deemed a blunder. Cox pointed out that these people were his friends. Nonetheless it looked bad. In politics, as he would soon learn, appearances and reality were one.

Richardson, a staunch Republican, had chosen Cox largely because of his Democratic credentials, but also because he viewed Cox as non-partisan.[22]

Leon Jaworski and Watergate:

Despite the sporadic media criticism and the obvious vitriol emanating from the White House, the Office of the Special Prosecutor continued to be held in high regard. In any case, Cox's shortcomings, real and otherwise, were instantly forgotten the moment he was fired by Acting Attorney General Robert Bork. There was a real feeling of panic as the president appeared to have assumed the role of despot. The White House went into crisis management mode. This was a serious public relations blunder for the White House, as Cox's hero status went into orbit and the constitution appeared to be under threat.

Within a week of the firing, Bork appointed Leon Jaworski in the hope of dousing the intensity of the reaction. The Saturday Night Massacre was without doubt the defining moment of the Special Prosecutor. Nixon's actions encouraged the transition from ad hoc use of the role to that of a permanent office with legislative guarantees of independence. This would take years to put in place, however, and meanwhile, Jaworski operated under the existing system. Congress was temporarily placated by a change in regulations by the Attorney General requiring Senate majority consent before Jaworski could be fired.[23]

Public confidence in the government was at its nadir and Congress recognised the need for a clean-up and for new legislation. In his role as Special Prosecutor, Jaworski maintained a reputation for independence and in the course of his investigation, told the Attorney General of the White House's lack of cooperation and of his intention of resigning after the pardon.[24]

Whilst Cox always maintained the aura of hero as Special Prosecutor, the appointment of Jarowski was nothing short of a disaster for Nixon. The partisan card could not be played against this Texan Democrat. Quite the antithesis of his Ivy-league predecessor, Jaworski could not be accused of partisan bias against Nixon since he had supported the president's re-election in 1972. He also operated in a somewhat more secure environment than Cox, in that he could only be fired for 'extraordinary impropriety'. It appeared that the demands for a truly independent prosecutor had been met. Jaworski was deemed a formidable opponent and Nixon would not act rashly a second time.[25]

During his confirmation hearings, deputy Attorney General Lawrence Silberman assured Senator Kennedy that he would not fire Jaworski for going to court to force Nixon to turn over tapes or other documents. The Saturday Night Massacre had been in vain and the Special Prosecutor was now in a position that Cox could only envy.[26] Jaworski's relationship with the House Committee was constructive and mutually beneficial. Initial tensions were ironed out and Jaworksi later highlighted the significance of the WSPF's decision to turn over information to the committee. Such a move was crucial to the impeachment process.

Independence and the appearance of independence were paramount, and Jaworski confirmed that he was being allowed to progress unhindered.[27] In a bid to prove his independence, Jaworksi continued to fight for the evidence that Cox had requested. His initial feelings illustrated what a thankless job he had undertaken. He felt that many in Congress, on his staff and in the press had issue with the fact that he had been chosen by Nixon and was essentially an establishment man. He later wrote of his first year in office, 'uncertainty gnawed at me, but I tried to hide it as I went about my work. My staff did not exactly rally round, but I sensed that most of them had at least accepted that my intentions were good.'[28]

Similar sentiments would be echoed decades later by Starr, who received a decidedly frosty reception from a wary independent counsel staff. In both instances, unanticipated changes in leadership of the office caused understandable apprehension. Also as would occur with later investigations, the Special Prosecutor and Congress shared an interest in uncovering the truth of the matter under investigation, but their methods often conflicted. Congress served a dual purpose for the independent counsel during the investigation. It provided an important base of support and, equally valuably, monitored its progress. In turn, the WSPF was of use to the committees, providing information and ensuring that there was some control over the amount of information disclosed by the investigations in order to protect their criminal prosecutions.[29]

During the Iran Contra investigation, Lawrence Walsh would not receive the same courtesy and found his progress severely hindered as a result of immunised testimony. [30]

Jaworski had in many ways profited and learned from Cox's experience as Special Prosecutor and as a result was able to be more forceful, even confrontational. The office was in a stronger position to do its job independently, whilst still being deferential to the presidency. Both prosecutors realised the importance of media support in their work, and they generally maintained cordial relations with the press.

Although Jaworski resigned in September 1974, after Nixon's resignation and pardon, the WSPF continued for another two years with two more prosecutors. Jaworksi was initially succeeded by his more low-profile deputy Henry Ruth, and finally by Charles Ruff, would wound the investigation up in June 1977. Ruth had spoken publicly of his opposition to the creation of a permanent post, as did Jaworski. Their 1975 WSPF Report stated their belief that such an option was both unnecessary and undesirable.[31] Nonetheless, Watergate was to see the last ad hoc use of the office for a quarter of a century, as the post Watergate reform came into effect in 1978.

The role of hero accorded in particular to Cox and Jaworski could only lead to unrealistic expectations about the office. However, the public needed somewhere to direct their hope for the future, as Watergate was the first national psychological trauma of its kind. This was an 'American tragedy' of an unprecedented sort. Whilst both liberals and conservatives agreed that Richard Nixon and Watergate were a departure from the norm, nonetheless, Watergate would be perceived as the benchmark for future crises and scandals.

Title VI of the Ethics in Government Act:

Elliott Richardson argued that the Ethics in Government Act would have been better named the No Ethics in Government Act as it was created on the assumption that no one in government could be trusted.[32] Scholar Katy Harriger agrees with this and points out that the reforms work on the assumption that public officials were too weak or greedy or unprincipled to be able to do the right thing. Congress ideally sought to eliminate politicised justice by enacting Title VI of the Ethics Act. Unfortunately it worked on the illusion that morality could be legislated. Watergate did not, as many hoped, bring about a public integrity renaissance. Instead the opposite occurred, resulting in both parties indulging in revelation, investigation and prosecution (RIP) to achieve what they could not accomplish at the polls.[33]

After five years of Congressional deliberation, the Ethics in Government Act was finally passed on October 12 1978. Title VI brought with it a number of vexing problems, many of which would only become apparent over time. Suddenly, it seemed that because there was a permanent Special Prosecutor's office, there was a need for it to be kept in business. Considered by some to be an over-reaction with potential for abuse of prosecutorial power, the law nonetheless had an array of supporters.

Early Uses of the Statute:

It was during the Carter presidency that the Special Prosecutor was first appointed under the new law, to investigate matters that were as trivial as Watergate was serious. Allegations of cocaine use by Carter aide Hamilton Jordan, and later by Tim Kraft resulted in investigations of each. No indictments were made in either case, but the negative publicity caused obvious damage to the individuals and the administration. Using procedures almost identical to those for Watergate for such trivial cases lessened the credibility of the office, as did overuse of the function. Not that public use of an illegal substance by top White House aides was not a serious matter, but engaging the same procedure for scandals great and small did not bode well. The office was called on repeatedly during its first five year period, with a total of three investigations and no indictments. The third, after Jordan and Kraft, at least appeared to be more warranted, as it involved allegations concerning President Reagan's Secretary of Labour Raymond Donovan. Accusations were made regarding bribery of labour union officials and possible connections to organised crime.[34]

The first independent counsel to operate under the new law, Arthur H. Christy, maintained a constructive relationship with Justice Department employees and later remarked that he felt ultimately accountable to the panel of judges who appointed him. The first challenge to the Ethics Act came via the Kraft investigation. His lawyers filed a civil suit seeking a preliminary injunction against Special Prosecutor Gerald Gallinghouse and a judgement of the constitutionality of the act. The suit contended that

Gallinghouse was 'exercising Executive power and authority in violation of the constitution of the United States.'[35] As it happened, Kraft was cleared of the charges levied against him before the civil suit was decided. Despite this, *Kraft V Gallinghouse* (1980) raised a number of important questions, (se chapter 3 for details) particularly regarding constitutionality, which would remain contentious for years to come.[36] Special Prosecutor in the Raymond Donovan case Leon Silverman maintained good working relations with the relevant departments and noted that 'goodwill was the order of the day.'[37]

Professionalism appeared to provide its own set of restraints for the early prosecutors as they were keen for their reputations to remain untarnished by their public sector work. However moderate, unbiased and independent the prosecutors attempted to be, they could not escape the glare and spin of the media. The first real saturation coverage of a post-1978 investigation was during the Silverman case. As would happen much later after the death of Vince Foster during the Starr investigation, the press provided relentless coverage when the gangland style murder of witnesses was revealed in the Donovan case, despite the fact that Donovan had already been cleared at this point.[38] In general, the press provided support for the Special Prosecutor, often vigorously questioning the office and its investigations, but also offering invaluable assistance and exposure to the public.

To begin with, the Special Prosecutor law received support from influential bodies. In particular, the citizen's lobby Common Cause and the American Bar Association voiced their approval of the statute. When the Justice Department refused to help the Special

Prosecutor, Common Cause had provided an amicus brief for Gallinghouse in the civil suit brought against him by Kraft.[39] Even during these early days of widespread support, the Special Prosecutor was already falling victim to the law of unintended consequence. Triggering the Act for lesser offenses was a cause of some concern, and the conflict of interest issue was relevant from the outset. Despite this, until 1999, the ABA's official position was that the office of independent counsel worked effectively and did not require significant change. During the 1992-4 reauthorising period the ABA began to express some reservations about the statute. By 1998, a move had begun within the organisation to withdraw support for the arrangement.[40]

Born of Watergate, it was logical for Common Cause to offer unswerving support for the Special Prosecutor from the outset, but by 1999, it had also changed tack. The role of the Special Prosecutor in the immediate aftermath of Watergate was widely equated with the restoration of government ethics and dignity. In 1978, the Office of the Special Prosecutor was created with a purpose to ensure the rule of law, to monitor any abuse of power in the Executive Branch, and to restore public faith in the government after the trauma of Watergate. This would evolve to quite a differently perceived role over time.

Appearance would play as great a role in the Special Prosecutor investigations as reality, particularly in the areas of independence, propriety, ethics and conflict of interest. It is often remarked in legal circles that 'hard cases make bad law'. It could be argued that in the aftermath of Watergate, the media strongly encouraged, even forced the invention of the Special Prosecutor legislation and later took pleasure in knocking it. Coming in the

wake of the 1960s revolution in moral standards in the US, the law was passed with benign intent, but became a monument to the law of unintended consequence. The public perception of scandal, the presidency and the Special Prosecutor was, to a large extent, shaped by the media. This could loosely be traced as horror at Watergate, confusion at Iran Contra and amusement at Whitewater/Lewinsky. Elliott Richardson stated that when he was asked to appoint a Special Prosecutor for Watergate, he knew that public confidence in the investigation would depend on its being independent not only in reality but in appearance. Richardson believed that he could fulfill the first requirement but not the second.[41] This was a recurring theme with later special prosecutors as the lines between reality and illusion repeatedly blurred.

Lawrence Walsh and Iran Contra:

The Independent Counsel office, as it became known in 1982, was a controversial subject throughout much of its existence. The first really lengthy, expensive and highly politicised investigation to cause a serious furore occurred during the Reagan presidency. The Iran Contra scandal involved the concerted effort by the White House staffers to avoid the constitutional limits of public law by carrying out in secret a policy that the Reagan administration had not been able to accomplish through the constitutional political and legislative process.[42]

Iran Contra expressed the weakness of Reagan's presidency and the shortcomings of his managerial approach. There were many elements of Watergate in Iran Contra. In both instances there were over-zealous secret subordinates, the abrasive chief of staff, the allegedly faulty presidential memory as well as presidential allegations of partisan attacks and efforts to pass off illegalities as 'mistakes.' Iran Contra seemed to expose Reagan as, at best, not in control of the White House, or at worst, a calculating deceiver of the public. [43]

Independent Counsel Lawrence Walsh had to determine whether crimes had been committed and then to prosecute the individuals who had perpetrated them. Aware of his outsider status, operating where the Attorney General and Justice Department could not, Walsh sought to uncover wrong-doing and to uphold the law. In his view, the task of the Senate Select Committee was to provide a full account of the Iran Contra affair. His own task was to uncover violations of the law and if applicable, to bring justice to the individuals who had committed them.[44]

Scholar Suzanne Garment argues that up to this point, Iran Contra differed from other political scandals which had usually involved more common or garden matters such as cupidity and lust. Iran Contra, by contrast, harked back to the sins of Watergate. Abuse of presidential power, subversion of the constitution and fundamental flaws in the leadership and working of the government were the common themes in both. Congress immediately drew from the recent Watergate past to arrange investigation committees and hearings.[45] The scandal machinery cranked into gear.

Iran Contra arguably constituted a graver threat to the constitutional order than its infamous predecessor, but the reaction to it was certainly more muted than to Watergate.[46] The reason for this may have been nothing more than the obvious fact that any impact the second time around can never be as powerful, especially coming as it did so soon after Watergate. The outstanding trait of the Reagan administration response to Iran Contra was that it must not become another Watergate. The language used was directly influenced by Watergate. The word 'impeachment' was studiously avoided and the suffix –gate was initially added, although in this instance, it didn't stick. Watergate became the framework from which Iran Contra was examined. For better or worse, it became a metaphor for understanding the scandal.[47]

Criticism of the Ethics Act received a new lease of life as a result of Iran Contra. The length and expense of the investigation brought derision as well as accusations of abuse of power by the independent counsel. Walsh did himself no favours among his fellow Republicans when he re-indicted Secretary of Defense Casper Weinberger for obstruction of justice immediately before the 1992 elections. Walsh and his team were aware of the accusations of partisanship in such a charged political atmosphere. They realised however, as tended to be the norm for the independent counsel, that whatever course of action they chose would lead to howls of derision from one quarter or another.[48] However, Walsh had been chosen for his impeccable credentials.

Another parallel was drawn between the two major scandals by the obvious inadequacies of the criminal law and independent counsel to deal with accusations against the

president. Scholar Katy Harriger suggests that in the case of constitutional law, the scandals illustrate how the separation of powers works – in keeping the independent counsel power in check and offering alternative methods of inquiry.

At first, the independent counsel proceedings seemed to be the appropriate form of investigation for the Iran Contra scandal. All the ingredients, including alleged high ranking public official misconduct appeared to be present. Hindsight suggests a different conclusion however. The end result illuminated the shortcomings of a criminal investigation in a political case. Walsh brought indictments against fourteen individuals and only five of these were successful. A succession of pardons, overturned convictions and dismissals undermined Walsh's authority. Competing institutional and political forces, including in particular congressional sway regarding public investigation and exposure, immunised testimony, and partisan interests had an enormous impact on Walsh's progress, and he felt thwarted at every turn.

Here was a textbook example of the negative impact of dispersed power on an investigation. Differing requirements inevitably brought discord, and Walsh found his investigation bowing to the requirement of the other participants, namely Congress, the administration and the defendants.[49]

The separation of powers system invoked complexity. Locating the responsibility for misconduct was difficult. Dispersion of power and accountability in the system creates 'the problem of many hands' which makes 'it difficult even in principle to identify who is

morally responsible for political outcomes.'[50] Iran Contra provided a textbook example of these difficulties. In his defense, Lieutenant Colonel Oliver North stated that he had been following orders and had been operating within and guided by a specific policy framework. Theodore Draper observed that the demands of the criminal justice process brought an unsatisfactory resolution to the case. Being forced to focus on the narrow charges against North and Poindexter of misleading Congress hindered Walsh's work. Though serious, said Draper, misleading Congress was 'only a small part of the larger story.'[51] Use of the criminal law distracted public attention from the constitutional issues of the case, and Walsh's office was acutely aware of this. Iran Contra provided a prime example of the difficulties in keeping politics out of such a high stakes and high profile investigation. Walsh particularly felt this, and pointed out in his final report that the independent counsel lacked institutional support and was expected to operate under intense pressure in an unsupportive environment.[52]

Other high profile cases during the Reagan administration included those involving Edwin Meese, Lyn Nofziger and Michael Deaver, all of which were considered controversial. One case that became particularly significant during Reagan's tenure was that of Justice Department official Theodore Olson. Initially the investigation was rather low key, but Olson's legal challenge to the constitutionality of the Ethics Act went all the way to the Supreme Court. It was this move by Olson that resulted in the Supreme Court considering the constitutionality of the act. Before the act was reauthorised in 1987, Michael Deaver and Oliver North had also posed challenges to its constitutionality. Other factors influencing the reauthorisation included the appointment of Edwin Meese as

Attorney General during Reagan's second term, Democratic control of the Senate, as well as Iran Contra.[53]

Robert Fiske and Whitewater:

In traditional investigations, the prosecutor was assigned to investigate a specific crime and to find out who was involved. However, the independent counsel was instructed to investigate a particular individual and find any crimes he or she may have committed, not just the most serious crimes that he was appointed to investigate. The Whitewater/Lewinsky affair illustrated this. An endless series of allegations were aimed at Clinton over time and it appeared that the Special Prosecutor was not being used, as the name intended, only for 'Special' situations, but for a myriad of sundry misdemeanours. Furthermore, if the investigation was prolonged for several years, the investigator came under increasing pressure to bring charges of misdemeanour, even if it was completely unrelated to the original investigation.

As Suzanne Garment observed, there is no plausible evidence of a rise in federal corruption since Watergate commensurate with the phenomenal increase in investigation of scandal during the same period. Instead, she matched the decline in the power of traditional political parties and economic interest groups with the increase in the importance and power of the press, courts and new kinds of ideologically based interest groups to offer an explanation of increased scandal politics.[54]

In 1992, Title VI of the Ethics Act was allowed to expire, due in no small part to Walsh's long and unpopular investigation. However, within a year, Republicans in Congress were witnessing the new Democratic president immersed in the Whitewater scandal, and suddenly the independent counsel provision seemed more appealing. The alternative option of allowing Attorney General Janet Reno to launch an investigation presented concern over her possible conflict of interest. Finally, in June 1994, the statute was renewed, with the support of the president, Attorney General and many in Congress.[55]

Kenneth Starr and Whitewater/Lewinsky:

The difficulties of using the discretionary authority of the Attorney General to appoint a prosecutor were illustrated by Reno's appointment of Robert Fiske in the Whitewater case. Congressional Republicans were wary of Reno's choice, and Fiske's conclusion on the Vince Foster suicide was disputed by Congressional partisans. The moment the statute was reauthorised, Fiske was replaced by Kenneth Starr.[56] Of course, this did not solve the problem either. As was his predecessor, Starr was instantly accused of partisanship, conflict of interest, and the inability to conduct a fair investigation. Clinton advisor James Carville illustrated the gloves-off mentality of the day by stating: 'I think he is an abusive, privacy-invading, sex-obsessed, right-wing, constitutionally insensitive, boring, obsequious and miserable little man who has risen further in this life by willingness to suck up to power than his meagre talents and pitiful judgement ever would have gotten him.'[57]

Carville, of course, had his own partisan agenda, but criticism of Starr from more neutral quarters were harder to ignore. Speaking on *Entertainment Tonight* in October 1998, American Bar Association president Jerome Shestack wondered: 'What should be done if we encounter a public loss of confidence in the counsel whose very work was to instill public confidence? Are prosecutors entitled to ignore ethical prescriptions on the grounds that the pursuit of truth justifies departure from professional standards? [When the IC is perceived] as prosecuting the office more than the crime, then the question arises whether the prosecutor is truly impartial.'[58]

Writing in 2002, Starr opined that the enduring result in *Jones V Clinton* (1997) had been predestined by *Nixon V Fitzgerald* (1982), and to some extent, *Morrison V Olson* (1988).[59] The Nixon case cemented the principle that everyone, even the president, was accountable to the justice system. Clinton could not therefore excuse himself from the civil process. The Morrison case illustrated that executive power was prone to the limitations that Congress chose to impose. The Clinton lawyers did not succeed in their efforts to portray the president as being too busy too deal with the Jones case and Clinton's claim was rejected unanimously by the court.[60]

Starr claimed that he had always been apprehensive about the independent counsel statute, even during his days in the Reagan Justice Department. Although aware of the supposed benefits, Starr and his then colleagues were unhappy with the arrangement. 'At the core', he wrote, 'we felt the statute was unconstitutional, it intruded improperly into

the function of the executive branch.'[61] It did indeed improperly intrude, and independent counsel Starr was under attack from almost every angle. The White House went into defense mode, and acted as though Starr was carrying out some sort of personal vendetta. Whilst much of Starr's decisions and actions were remarkable, and sometimes appeared to be ferociously partisan, the White House had no qualms about a gloves off fight either. James Carville's 1996 extraordinary attack against Starr was likened hypothetically to Nixon's friend Bebe Rebozo launching a negative campaign against Archibald Cox.[62] The media culture too had undergone a remarkable change since Watergate. What had once been referred to as Lapdog Journalism had by the 1990s been well and truly been replaced by relentless and often ferocious journalistic probing. Personal abuse, some of which Clinton claimed was ideologically driven, had also become widespread.[63] The media culture had become coarser, more confrontational.

How the media culture itself evolved during this quarter century had a direct effect on how the various independent counsel investigations and scandals were perceived by the public. Each chapter of the thesis will examine the media portrayal of the investigations and the significance of the media's own role in the evolution of the scandals. The halcyon Woodward and Bernstein days were well and truly over for journalism by the time of the Lewinksy scandal. By the 1990s, polls indicated that journalists as well as politicians were held in increasingly low regard by the public.[64] From the public perspective, the Whitewater battle between the president and the press was one between two morally ambiguous forces. Both sides were willing to stoop to gutter tactics as required, and Starr received unprecedented levels of criticism for his *modus operandi*.

Partisan accusations of conflict of interest against Starr were to be expected. However, there were other, more neutral observers, who worried about Starr's ongoing relationships with partisan conservative groups and causes, whilst carrying out his presidential investigation. Halperin suggests some more serious ethical concerns than the immediately obvious ones. These were whether Starr may have pursued unwarranted charges against the Clintons or whether Clinton or his aides may have been tempted to aid Starr clients in the hope of leniency on Whitewater. Here, the independent counsel made himself vulnerable to criticism on both fronts.[65]

Starr appeared to have forgotten a fundamental principle of politics – that the appearance of conflict of interest is as detrimental as the reality. This forms an ongoing theme throughout the thesis, from Watergate to Monicagate.

Conclusion:

Despite his heroic status, during his time as special prosecutor, Cox had been subjected to harsh criticism by his detractors and accused of partisanship. The Republicans had a harder time making any such criticism stick against Jaworski, but nonetheless he did not escape unscathed. Even the staunchly Republican Lawrence Walsh and his team were accused of partisanship during the Iran Contra affair, despite Walsh's obvious and unswerving respect for the presidency and the rule of law. The thesis will argue that, in common with every other political office, the independent counsel reputation was never the preserve of the holder to control. Criticism of the independent counsel, as opposed to

just the statute that created the office, could be traced back to the days of Archibald Cox. Nonetheless, increased dissatisfaction with the perceived conduct of the prosecutor resulted in the steady decline in his reputation over time.

From the moment the Ethics Act was passed, the statute fell victim to the law of unintended consequence. Its use for frivolous matters in its early days (post 1978) did not bode well for the future, as the enormous damage potential became increasingly apparent through cases such as those brought against Jordan and Kraft. Conflict of interest and the separation of powers issue were ongoing topics of debate, and the statute was amended over the years as deemed appropriate.

By the time Fiske's Whitewater investigation had evolved into Starr's Lewinsky investigation, the role of the independent counsel had become enormously contentious. More and more individuals and groups simply wished it would go away, or at least that Kenneth Starr would go away. The scandal that paralysed the government for far too long ensured that the statute would not be renewed in 1999.

Being anti-Starr by no means had to mean being pro-Clinton, and even if one viewed Clinton as the liberal version of Nixon and deserving all that came to him, it was the impact on the presidency and the country that was the real issue. Although the Whitewater/Lewinsky investigation continued on long after Starr had handed over to his successor, it was Starr himself who came to epitomise all that was wrong with the statute – the roving searchlight, the relentless power, the endless budget.

It is the intention of this thesis to trace the path of the special prosecutor, through its various zeniths and nadirs, to explain how this role, made for the ultimate public servant, went so very off the rails, to the enormous detriment of the country. Alleged abuse of power was a recurring theme among the prosecutors' critics, along with a negatively perceived partisan agenda. The presidents being investigated had each, in their way, acted in a manner not fitting the most powerful and high-profile job in the world. The prosecutors had an enormous duty to maintain the integrity of the office, and by 1999, they had ceased to achieve this aim.

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2. Watergate and the Special Prosecutor: the Evolution of an American Hero

The Watergate crisis brought the Special Prosecutor to the centre stage of American politics. The climatic act in this process was the Saturday Night Massacre of October 20 1973. President Richard Nixon's ill advised effort to remove Archibald Cox from office only succeeded in turning the Special Prosecutor into a knight in shining armour, the essential guardian of the rule of law in the eyes of political elites, the media and public.

Chapter two of the thesis focuses on the political circumstances in which Archibald Cox came to be nominated as an ad hoc Special Prosecutor, and how he dealt with his role. It also covers the Saturday Night Massacre and the role of Cox's successor, Leon Jaworski, and discusses how each prosecutor perceived the office. It assesses how they were perceived in turn by elites and the public at a time when the very essence of American democracy - constitutional law – was under challenge.

The increasingly heroic status bestowed on the Special Prosecutor began with Cox, who would later be remembered for a lifetime of devotion to the law and public service, culminating in his role in the Watergate investigation. A highly respected jurist, Cox emerged as a folk hero in particular as he confronted arguably the most powerful office in the world. His gentlemanly patrician air was compounded by its proximity to the somewhat menacing Richard Nixon, and for a while at least, the lines

between right and wrong seemed clearly defined.

By focusing on a person, rather than a specific crime, the Special Prosecutor investigation ensured that one individual was pitted against another, making personalities, or at least public personas, a key factor in the process. In Cox's (and later Jaworski's) case, hero status was easier to attain when one's opponent had already embraced the role of villain. Such a straightforward situation created a false gold standard for later investigations, as the same level of moral certainty could not be repeated. The simplistic perception of good and evil did not transfer to the Iran Contra case, in which President Reagan never attained villain status, and as a result, Special Prosecutor Lawrence Walsh could never emulate Cox's heroic precedent. By the time of the Whitewater/Lewinksy investigations, Kenneth Starr's perceived prissiness brought unexpected sympathy for President Clinton and the investigation proceeded in a sea of moral ambiguity.

In this chapter, the context in which the Watergate Special Prosecutors worked is examined, including the effects of the imperial presidency, and in particular of Richard Nixon and his near impeachment, on the government and country. The role of the media is examined in relation to the special prosecutor, along with how journalism itself underwent a transformation during this period. The chapter concludes with the pardon granted to Nixon by Gerald Ford and perceptions of the culmination of the Watergate investigation.

Misdemeanours, intrigue and dirty tricks were nothing new to American politics, of course. As James Roosevelt, son of the great FDR, so bluntly reminded Nixon

secretary Rose Mary Woods, 'Everything they ever accuse him [Nixon] of, father did twice as much of.'[1] Whether this was the case or not, and the likelihood is more the latter, Watergate was still considered the mother of all scandals.

Whilst it is not appropriate for this thesis to relay in detail the events of the Nixon presidency, some attention will be given to the historic influence of factors bringing about the conditions of Watergate and hence the use of the Special Prosecutor. Prior to Watergate, an era of divided national government already existed in the US. This could be traced back at least as far as Richard Nixon's 1968 presidential victory, a time when a political impasse appeared to prevail and there was no light at the end of the tunnel in the Vietnam War.

The president was operating with a siege mentality, convinced that his opponents were pursuing his downfall by any means necessary. The evolution of Watergate was, however, due to more than Nixon's paranoia. Public awareness of ethics controversies was spreading, but despite this, when the Watergate scandal did break, the reaction from all quarters was one of shock, anger and disbelief.

Political scientist James Pfiffner looks to the character of Richard Nixon to explain the existence of Watergate. Pfiffner views Nixon as a classically tragic figure, allowing his potential greatness to be overshadowed by his myriad of shortcomings. His paranoia and insecurity led him to ignore the accepted rules of engagement in dealing with his political opponents. Hardly the first politician to court corruption, Nixon took advantage of the imperial presidency to relentlessly pursue his policy goals.[2] His methods and actions tested the limits of the constitutional system and

brought embarrassment to the White House. Nixon maintained his innocence, infamously responding to media allegations of financial impropriety by declaring that he was not a crook.[3]

In his memoirs, Pentagon Papers whistleblower and former marine Daniel Ellsberg concluded that it was not personality that makes presidents habitual liars. Instead it was 'an apparatus of secrecy, built of effective procedures, practices and career incentives, that permitted the president to arrive at and execute a secret foreign policy, to a degree that went far beyond what even relatively informed outsiders, including journalists and members of Congress, could imagine.'[4] Ellsberg may just as easily have been describing the Iran Contra situation. The crux of the imperial presidency was the concentration of power in the executive branch, in violation of the constitutional system of checks and balances. The political fallout of this was that one individual, the president, became responsible for all policy 'failure.' Emphasis was placed on undermining political opposition and staying in office rather than doing the right thing.

According to Ellsberg, even in 1971, most people did not read the Pentagon Papers. As Senator J. William Fulbright remarked to Ellsberg: 'After all, they're only history.'[5] Far more appealing to the mass public than the war in South-East Asia was the soap-opera involving dramas of break-ins, plumbers, hush money, cover-ups, subterfuge, intrigue, resignation, impeachment and the general Mafia vibe emanating from the Nixon White House.

The Watergate crimes were unprecedented in American history. As Historian C. Vann Woodward eloquently surmised:

> 'Heretofore, no president has been proved to be the chief coordinator of the crime and misdemeanour charged against his own administration as a deliberate course of conduct or plan. Heretofore, no president has been held to be the chief personal beneficiary of misconduct in his administration or of measure taken to destroy or cover-up evidence of it. Heretofore, the malfeasance and misdemeanour have had no confessed ideological purpose, no constitutionally subversive ends. Heretofore, no president has been accused of extensively subverting and secretly using established government agencies to defame or discredit political opponents, and critics, to obstruct justice, to conceal misconduct and protect criminals, or to deprive citizens of their rights and liberties. Heretofore, no president has been accused of creating secret investigative units to engage in covert and unlawful activities against private citizens and their rights.'[6]

The Nixon administration crises transcended previous boundaries. They surpassed the money-grabbing pursuits that occurred during the Grant and Harding administrations, and did not compare to the sexual recklessness of other presidents. They were made up of illegal and extra-legal political activities headed by the most senior members of the executive branch, including the former Attorney General of the US, with blatant disregard for the American political system.[7]

The Nixon administration was revealed to be the most scandal ridden in the country's history and Watergate was viewed as the political story of the century.[8] It entailed the use of presidential power to illegally undermine political opposition, obstruct justice and avoid accountability. Typical of the amoral mindset of the Nixon White House was presidential counsel John Dean's memo entitled 'Dealing with our Political

Enemies.' In it, Dean pondered 'how can we use the available federal machinery to screw our political enemies?'[9]

Historian Stephen Ambrose contends that if Watergate had only been about a break-in, this would probably have caused a scandal, but not a disaster. Nixon's downfall came more as a result of the fact that there was so much to cover up, as it emerged that the administration had been bereft of such qualities as sincerity and honesty since its inception.[10] Of course, Nixon was not the first president to be accused of questionable behaviour, but four years of illegal activities and cover-ups were difficult to spin his way out of. Many years earlier, on meeting then-vice President Nixon, Martin Luther King had commented on his 'genius for convincing one that he is so sincere...he almost disarms you with his sincerity...I would conclude that if Richard Nixon is not sincere, he is the most dangerous man in America.'[11] This was an astute take on a man who would later instigate a monumental cover-up and try to maintain it for two years. He planned the cover-up, supervised it, and insisted upon others participating in it.

In his 1977 television interview with David Frost, Nixon famously stated that 'when the president does it, that means that it is not illegal.'[12] This was quite an accurate summary of his leadership methods during his presidency. The age of the imperial presidency had reached its zenith, at the expense of the constitutional order. Operating under a perpetual state of emergency in foreign affairs, it was not difficult for the president to act in a quasi-monarchical fashion. The natural progression was to extend this imbalance of power to the domestic arena. Despite Nixon's paranoia and insecurities regarding his position and power, in some instances, events were

conspiring in favour of the imperial presidency. A gradual weakening of the traditional party system by the 1970s leaked power to the presidency. In the words of liberal historian Arthur Schlesinger Jr, 'Never had party loyalties been so weak, party affiliations so fluid, party organisations so irrelevant.'[13]

Frustrated by the perceived lack of control over Congress, the Nixon revolution was aimed at reducing the power of Congress and redirecting it to the imperial presidency. Schlesinger contended that Nixon displayed more monarchical yearnings than any of his predecessors, hence his imperial state of mind drove his desire to reduce, even abolish any sharing of power with Congress. In doing so, his administration sought to strengthen executive privilege at the expense of legislative authority.[14]

Nixon implicitly justified his actions in terms of the inadequacy of Congress to govern. In Schlesinger's words;

> '[Congress] had proved itself incapable of the swift decisions demanded by the twentieth century. It couldn't make intelligent use of its war-making authority. It had no ordered means of setting national priorities or of controlling aggregate spending. It was not to be trusted with secrets. It was fragmented, parochial, selfish, cowardly, without dignity, discipline or purpose. The presidency had not stolen its power: rather Congress had surrendered it out of fear of responsibility and recognition of incapacity. Was such a system worth preserving?'[15]

Surely then, Watergate was a symptom rather than a cause. Runaway presidential power was the burning issue, which happened to be starkly illustrated by the events

and revelations of Watergate. Watergate began with a break-in at the Democratic National Committee headquarters in June 1972 and ended with the resignation of President Nixon in August 1974. The tangled web of intrigue, illegalities and cover-ups was brought to light by the combined efforts of intrepid journalists, special prosecutors and congressional investigators.[16]

Watergate was, without doubt, a scandal. However, it was far more than this. If a scandal implies conduct that results in reproach or disgrace, Nixon undoubtedly achieved this. The president's personal short-comings resulted in a scandal and it was this facet of Watergate that became embedded in the public consciousness. This was compounded by the role of the Special Prosecutor. Archibald Cox's sacking and Leon Jaworski's focus on the Nixon tapes and their proof of obstruction of justice, rather than abuse of power, helped to cement the notion of a political scandal. This focus on the obstruction of justice became the focus of the Special Prosecutor investigation and as a result, inadvertently helped to downsize the abuse of power elements of Watergate.

Scandals bring their own set of problems, in that the revelation of a scandal is invariably subjective. The publication of information will only ever exist through the prism of the teller's perception, hence no scandal can be objectively revealed. Nixon had enough enemies to ensure widespread glee at the prospect of his character defamation. However, the scandal element of Watergate was merely the tip of the iceberg.

If Watergate itself did not directly leave its mark, it did maintain its influence in other, perhaps more powerful ways. Sociologist Michael Schudson refers to Watergate as a reference point or tool for thinking about American politics, journalism and culture. Historian James McGregor Burns spoke of Watergate as 'a morality tale, complete with villains and saints, winners and sinners, and a Greek chorus of Washington boosters and critics.'[17] It was an easy scandal where right and wrong were clearly defined, hence our ability to perceive Special Prosecutors Cox and Jaworski neatly as the good guys. Such simple categorising did not come so easily in later scandals as the lines between winners and sinners became increasingly blurred. Despite this, Watergate was consistently used as a metaphor for analysing later events, regardless of its relevance. Schudson poses the question of whether Nixon is good to think with? Opinions vary on the matter – Gore Vidal declared 'we are Nixon: he is us.'[18] Others prefer a less challenging interpretation, one of Nixon and Watergate as aberration. This is surely the path of least resistance. Vidal's conclusion may be a thoroughly unpleasant prospect, but at least it is honest.

Political scientist Mark Silverstein concurs with the view that Watergate cannot be neatly categorised under individual culpability. Rather, he argues;

> 'with the wisdom provided by hindsight, we can say with some certainty that Watergate was not merely the product of men blinded by ambition and the hunger for power; nor was it the result of public servants who permitted their zeal to serve to obscure reasoned judgement. The root causes of Watergate were systemic, not personal.'[19]

Hence, Watergate went far deeper than mere scandal. It was a constitutional crisis, and this was the real issue. These interpretations of events are not mutually exclusive, and the reality was a fusion of scandal and crisis which gave the matter such an air of gravitas. The administration's blatant disregard for the law brought the constitutional system into jeopardy and resulted in an unstable period for the nation. However, to focus on the crisis without giving due consideration to the scandal element suggests that Nixon's wrong-doing occurred in a vacuum, which was hardly the case. The abuses and transgressions occurred in a political arena full of individuals with their own agendas and short-comings, and even the most well-meaning and moral Special Prosecutor can only ever be a subjective human being prone to bias, pre-conceived notions and manipulation, however subtle or unintentional.

Sociologist Robert Bellah refers to America's 'Civil Religion' by which he means 'an institutionalised collection of sacred beliefs about the American nation.'[20] If these beliefs are symbolically expressed in the country's founding documents, then violation of the constitution by the president is something akin to blasphemy. Hence the repeated use of the term 'trauma' in the Watergate literature. This is not a term that occurs in the literature for later scandals such as Iran-Contra. The privatisation of foreign policy did not touch the national psyche in the same way as domestic abuse of power and its resulting cover-up.

Watergate and its related events raised constitutional issues regarding the American presidency in unprecedented ways. America's political institutions acknowledged the concept that no one, even the president, was above the law. A president resigned under threat of impeachment and conviction. A Special Prosecutor was appointed

within the executive branch to investigate and prosecute high executive officials. The Supreme Court issued important decisions on executive privilege and immunity. In an unrelated incident, a vice president was forced from office under threat of indictment.

In March 1973, Judge John Sirica sentenced the Watergate burglars. G. Gordon Liddy got 20 years, the Cuban Americans got 40 years each, provisionally, and E. Howard Hunt got 35 years, also provisionally. The issue of White House counsel John Dean's immunity became a burning issue for the president, and on April 30, he addressed the nation. He emphasised 'we must maintain the integrity of the White House, and the integrity must be real not transparent. There can be no whitewash at the White House.'[21] Dean did not receive immunity, and was instead fired. The resignation of top aides H. R. Haldeman and John Erlichman was announced, along with that of Attorney General Richard Kleindienst. Nixon's approval rating among those polled fell from 60% to 45%.[22]

New Attorney General designate Elliott Richardson was handed total control of the Watergate investigation, with the option to appoint a Special Prosecutor if he wished. By waiting so long, Nixon no longer had control of choosing a prosecutor. The decision had now passed to another, and the Democratic majority in Richardson's Senate Judiciary Committee confirmation hearing ensured that he allocated unprecedented independence to the chosen prosecutor.[23] During these hearings, Richardson also allowed the Senate to confirm his choice informally. Harvard law professor Archibald Cox was chosen, Richardson was confirmed, and the Watergate Special Prosecution Force (WSPF) was born. Congress also had to decide whether the

Special Prosecutor should be appointed by the Attorney General under existing law or whether new statutory authority was required.[24]

In their *Project on the Independent Counsel*, Republican Bob Dole and Democrat George Mitchell contended that had the Teapot Dome model of scandal investigation been applied to Watergate, it would have required the House and Senate to allow the president whose administration was under investigation to appoint a Special Prosecutor. Instead, the Senate Judiciary Committee took comfort in the fact that the appointment would be made by the new Attorney General, under existing statutory authority.[25]

Appointment by the executive ensured that the other actors - Congress, the courts, the press and public would remain suitably vigilant in monitoring the prosecutor's progress and actions. The Attorney General's published Watergate Regulation 28 of the Code of Federal Regulations §0.37 (1973) provided the Special Prosecutor with 'the greatest degree of independence that is consistent with the Attorney General's statutory accountability for all matters falling within the jurisdiction of the Department of Justice.' He would be granted 'full authority' to conduct grand jury proceedings, frame indictments, challenge claims of executive privilege, and carry out prosecutions and appeals. He would also have control over the length of his investigation, with the proviso that he would continue 'until such time as, in his judgement, he has completed them or until a date mutually agreed upon between the Attorney General and himself.'[26] Political scientist Katy Harriger credited a successful investigation to the prosecutor's appointment within the separation of powers system. Here, the individual could maintain independence and impartiality

thanks to the relationships he was obliged to nurture with the other participants in the system.[27]

Elliott Richardson chose Archibald Cox, a man whom the Senate Judiciary Committee deemed to be of suitable integrity. The difficulty of securing a suitable individual was not lost on the president, as his taped conversation on May 5 1973 with Secretary of State William Rogers shows:

> Rogers: I never did figure out how Elliott did get him? [Cox]
>
> Nixon: Couldn't get anybody else [chuckles]. He just had a helluva time getting anybody.[28]

The Committee demanded a published charter to ensure Cox's independence, with a provision that removal could only be due to 'extraordinary improprieties.' This was a strengthening of the role in comparison to previous incarnations. The first Whiskey Ring Prosecutor was fired after seven months and the Truman Tax scandal prosecutor lasted only 63 days.[29] (See chapter 1 for details).

After a slow start, the conviction of the seven Watergate burglars in January 1973 gave the momentary impression that the matter had been put to rest. However, the opposite was true. Congressional Democrats agreed on the need for an investigation into the break-in and other campaign abuses. On February 7, the Senate voted unanimously to establish a Select Committee to conduct a Watergate investigation. The Ervin Committee, as it came to be known, employed 97 people at its peak, with a seven member committee and the remainder comprised of lawyers, clerks and assistants.[30]

Haldemann and Erlichman's enforced resignation left the White House in a shambles. Bit by bit, the administration was falling apart. By early summer 1973, Nixon's fate was no longer in his hands. The forces arrayed against the president were growing in strength and numbers. The Senate Select Committee was proceeding with its hearings in the full media glare and Archibald Cox had agreed to take the $38,000 a year post of Special Prosecutor. Unlike a congressional committee, the Special Prosecutor's office could bring individuals to trial, although not, it was thought, the president.[31]

In keeping with the corruption theme, a vice-presidential sub-plot had emerged. On October 10 1973, Vice President Spiro Agnew resigned. As Baltimore County Executive and later as Governor, Agnew had accepted kickbacks for the awarding of state construction contracts without requiring the businessmen to submit proper bids in accordance with state regulations. Charged with accepting bribes and falsifying federal tax returns, Agnew was strongly advised to resign. Attorney General Richardson told Chief of Staff Alexander Haig that he had an 'open and shut' case, and urged Agnew to resign. Otherwise, Richardson feared that with Nixon's volatile position, Agnew could become president.[32] Resignation, however, could have set a dangerous precedent. In Haig's view, Watergate was a straightforward matter. The situation, he told Nixon on May 11 1973, involved 'good strong Americanism versus left-wing sabotage.' Capable of exploiting the president's cynicism, Haig had wanted former Supreme Court Justice Arthur Goldberg as Special Prosecutor because he 'is obnoxious and doesn't wear well with the people, which would be good from our point of view.'[33] One week later, the reaction to Cox's appointment was captured on tape:

May 18 1973: (the President and Haig)

N:Richardson [soon] will have his prosecutor and all that horseshit

H: I see he got a humdinger

N: Who'd he get?

H:A fellow named [Archibald] Cox that used to be Solicitor General for Kennedy

(withdrawn item – privacy)

N: But he's very well respected

H: Yes, conscientious

N: I don't think he's too bad. Did he take him?

H: Well, they haven't endorsed him yet, but he's out and it would be hard for them not to…

N: Cox is not a mean man. He's partisan, but not that mean

H: That's right. That's the description I got. He's not a zealot

N: Believe me, if he'd get Cox, that'd be great. Fine. Fine.[34]

Archibald Cox:

At his initial Cambridge press conference, Cox prophetically remarked 'And whatever else I shall be, I shall be independent.' This was what people needed to hear at this time of political turmoil, and the purpose of employing Cox was to avoid a situation where the White House investigated itself. The Special Prosecutor was to be someone who operated outside of the political dynamic. He was held in the highest regard by

attorney-general designate Richardson, who hailed Cox as 'one of the finest solicitors general in recent history...and a lawyer of courage, independence and integrity.' A one-time student of Cox in labour law at Harvard Law School, Richardson said that 'anyone who knows him knows that he'll do it right without regard to school ties or any other association. We've never been close friends.' At his press conference, Cox stated that 'this is a task of tremendous importance. Somehow, we must restore confidence, honour and integrity in government.' Cox also said the investigation might take a year, 18 months or longer, pointing out that the Teapot Dome took six years.[35]

In his memoirs, Nixon points out that the Ervin Committee had a staff of over 90 and the Special Prosecutor's office had a staff of 80, while the administration had allocated fewer than 10 people to respond to their adversaries. Fred Buzhardt and Leonard Garment worked full-time, constitutional scholar Charles Alan Wright worked part-time, assisted by other young lawyers. In keeping with his victimisation theme, Nixon complained that 'Compared with the forces ranged against us, we were like a high-school team heading into the Super Bowl.'[36] The administration's original strategy, according to Nixon, Haldemann and Erlichman was to 'discredit the hearings' which they believed were overly partisan, and to 'co-operate publicly but quietly destruct'.[37]

Ironically, Cox's great-grandfather, William Evarts had successfully defended Andrew Johnson in the first presidential impeachment trial in US history. With almost $3 million to spend, Cox had 'full authority' to investigate and prosecute not only offences arising from the Watergate burglary, but also 'all offences arising out of the

1972 presidential election for which the special prosecutor deems it necessary and appropriate to assume responsibility, allegations involving the president, members of the White House staff, or presidential employees, and any other matters which he consents to have assigned to him by the Attorney General.'[38] Nixon later complained that 'no White House in history could have survived the kind of operation Cox was planning'.[39]

Another of Nixon's grievances was that seven of Kennedy Democrat Cox's eleven senior appointees had worked for a Kennedy. Some 30 years later, similarities emerged when Kenneth Starr was berated by his detractors for his affiliations with the Federalist Society and for employing overtly staunch Republicans on his team. Interviewed years later, WSPF Phil Heymann recalled Cox's efforts to halt the Senate trial hearings. Although Heymann argued the case against the Senate hearings on behalf of the WSPF, he was actually relieved that they lost. In his opinion, the Senate investigation was vitally important, as was the press investigation. These different avenues provided scope and balance, and did not leave Cox's office out on a limb. In spite of their protestations, Cox's team were able to take advantage of the advances already made by the Justice Department prosecutors and the Ervin Committee.[40]

The political circumstances in which Cox was appointed could hardly have been more dramatic. 'A government of laws was on the verge of becoming a government of one man' was Elliott Richardson's take on where Watergate was heading.[41] As many argued at the time, during such an intense crisis, the system worked. But it very nearly did not, hence the development of an increasingly rigorous set of norms and expectations regarding what was considered to be acceptable behaviour by those in

public life. The existence of the Special Prosecutor was given increased legitimacy as a means of counter-acting the perceived public integrity crisis.

Prior to Watergate, the social and political upheavals of the 1960s and in particular the impact of the Vietnam War had radically altered how much of the public viewed their government and state. Anti war critics spoke of the illegality, immorality, deceit and scandal of America's involvement in South East Asia. Many people, especially younger Americans, saw how this was no mere scandal involving the usual sex or money plot. Instead they believed 'the Vietnam scandal stemmed from the exposure of criminal abuse of power. The presidency itself had become corrupt in the deepest sense. The corruption was so outrageous and threatening that it demanded the almost undivided attention and steady anger of the citizenry.'[42]

Thanks to his service as Solicitor General, Cox was fortunate to have the confidence of many Senators on both side of the political aisle. He had absolutely no trial experience, but his excellent reputation and instinct substantially compensated for this. Cox, of course, had his own reservations about the role. He was immediately and correctly suspicious as to why other high-profile individuals had refused the post. Unbeknownst to Cox, the post had already been offered to and turned down by seven eminent figures in the legal world, including former deputy Attorney General Warren Christopher, and a host of other acting or semi-retired judges. Interestingly, other early contenders included New York lawyer and later Iran Contra Special Prosecutor Lawrence Walsh and Texas lawyer, later Watergate Special Prosecutor, Leon Jaworski. The latter was initially ruled out by Richardson for being too much of a 'wheeler-dealer.'[43]

Cox was under no illusions that he could be entering a no-win situation, stepping into unchartered waters with no guarantee of a successful outcome or career advantage. 'The smart ones knew there was a mess of trouble in this thing', said Elliot Richardson aide Wilmot Hastings.[44] Although the role was initially meant to go to a high-profile individual, soon Richardson received a number of solicited and unsolicited recommendations of Cox as a dark horse. It spoke well of him that his supporters believed his other qualities would compensate for his complete lack of trial experience. However, not everyone supported the choice. Justice Paul C. Reardon of the Supreme Judicial Court of Massachusetts was cautious but said that Cox 'still looks like a very good candidate to [me]. Understands the potential liabilities of the Harvard Syndrome, [ie. the New England self-righteousness that President Nixon viewed with disdain] but still think he is good.' Others were horrified by the choice. Outgoing president of the American Bar Association, lawyer Robert Meserve, thought Cox was a 'humourless man' who was 'probably not very perceptive in his dealings with people.' Others, like Justice Department lawyer Henry Petersen were more blunt: 'Would not recommend' was Petersen's opinion.[45]

As the post had been rejected by the first few candidates, Cox got the job largely by a process of elimination. He had a rock-solid reputation as a trustworthy, objective and professional individual. He also had an ingrained sense of duty to his country, something that later supporters of Special Prosecutor Kenneth Starr would echo in the 1990s. Cox's realistic expectations of the post doubtless made his task somewhat easier. He recalled a conversation with his wife at the time: 'This is probably a no-win job,' he said. 'It'll end up inconclusive – the conclusive evidence exonerating President Nixon or damning President Nixon won't be available. Those who hate him

will be saying "If Cox weren't so damn stupid, he would have proved that Nixon was involved personally." Those who liked and admired Nixon would be saying "If Cox wasn't a prejudiced Democrat, he'd have exonerated Richard Nixon." And I'll be damned by everybody.'[46] However, his sense of duty overrode his reservations, as he pointed out 'Somebody clearly has to do it. It is important that everything possible be done to show that a fair enquiry into wrongdoing at the very highest level of government can be conducted under our system.' He speculated that 'maybe there's no-one better to do it than a sixty-year old tenured law professor who isn't going anywhere [in public life] anyway.'[47]

Across the nation, the press voiced its approval of Richardson's choice. The *Washington Post*, although supportive, mentioned the misgivings of many Democrat Senators regarding the 'independence' of anyone chosen by the Attorney General.[48] Speaking to the *Long Beach Independent*, Cox's wife stated 'I know Archie will love it. It will appeal to his old-fashioned sense of being called by the nation.'[49] Here was what would become a recurring theme also with later Special Prosecutors - that the job was about an obligation to the people, rather than a moment of glory. If celebrity status came with the job, it was sure to be tenuous, and later examples would show that fame could rapidly turn to infamy.

On July 12 1973, Ervin's Select Committee realised it had a problem. The president had refused to provide documents pertinent to the investigation, citing 'executive privilege.' The committee responded in writing stating that Nixon's refusal could cause a 'fundamental constitutional confrontation.'[50] It was at this point that the Senate learned about the existence of the White House tapes. These consisted of

approximately 3700 hours of recordings containing conversations between President Nixon, his staff and visitors. Produced surreptitiously without the knowledge of most participants, their existence was first made public during the testimony of former White House aide Alexander Butterfield before the Senate Watergate Committee in July 1973.

Ervin and Cox immediately requested access to some of the tapes, which met with a resounding negative from the presidential lawyers. Constitutional advisor Charles Wright insisted that presidents had the 'inherent' right to withhold such items, and that in any case, Nixon was Cox's superior. Ervin immediately issued a subpoena for the tapes – the first time since 1807 that a Congressional Committee had subpoenaed a president.[51]

At last, it appeared that Nixon would be able to answer the question posed by Republican Vice-Chair of the Ervin Committee Senator Howard Baker: 'what did the president know and when did he know it?'[52] And so for the next thirteen months, the furious political struggle between Nixon and his adversaries continued, centered on the battle for the tapes.

Nixon's lawyers contended that he had 'absolute power to decide what may be disclosed'.[53] Challenging this assertion of the constitutional legitimacy of presidential power, Nixon's opponents pointed out that the constitution could not protect criminal behaviour. Cox surmised that at this juncture, the President had two available options. He could simply ignore the judicial proceedings that the subpoena had instigated, reasoning that he had a moral and constitutional duty to proceed with his own

interpretation of the constitution in his role as president. Alternatively, he could submit the same arguments to judicial determination. If the judgement went against him, it would still be possible to default to the first option. However, he would be at a disadvantage in that he would have actually defied a court decision rather than just ignoring the courts. Nixon chose to ignore the courts. As a result, Judge Sirica ordered him to produce the tapes and papers and the Court of Appeals confirmed Judge Sirica's order.[54]

Cox recalled his concerns and the enormity of the decisions he was faced with during the debate over the first set of tapes. He worried that Nixon, with his imperial view of the presidency, might decide to defy the courts. Cox was in an unenviable position, facing pressures pertaining to his legitimacy and independence of an intensity that no later Prosecutor ever had to contend with. He also faced the possibility of Nixon being defiant. Compliance – the notion that a powerful executive official should acquiesce to judicial decree – was a fragile bond. In the era of the imperial presidency, Cox wondered 'Who could say in an age of presidential aggrandizement that if one president succeeded in his defiance, he and others might follow that example until there no longer existed a government of law? How far might a man be justified in provoking this kind of constitutional crisis with the outcome so uncertain?'[55]

Cox believed that Watergate illustrated Tocquville's view on the importance of laws and courts in the American system of government. He found comfort in the belief that Congress stood ready to impeach Nixon if the president withheld the required tapes. He was independent of, but supported by, Congress, a luxury that later independent counsel Lawrence Walsh did not experience. Another factor in Cox's favour, unlike

later Ethics Act Prosecutors, was that having been appointed by Attorney General Richardson, Cox retained his support throughout the crisis. This was a particular comfort to Cox when the going got tough.[56]

The public reaction to Nixon's refusal to cooperate gave further credence to Cox's position; his legitimacy was strengthened by the support of the media and public. The US Supreme Court decision ten months later was significant, not only judicially, but psychologically, as the most respected branch of government ruled against the president.[57] However, possessing neither the purse nor the sword, the courts themselves had no power to enforce their rulings on the executive. Philosopher Anachardis pointed out that 'laws are like cobwebs: strong enough to detain only the weak, and too weak to hold the strong.'[58] Cox was painfully aware that, as he put it, 'constitutionalism as a constraint against government depends, in the first instance, on the habit of voluntary compliance and, in the last resort, upon a people's realisation that their freedom depends upon observance of the rule of law. The realisation must be strong enough for the community to rise up and overwhelm, morally and politically, any notable offender. Nor can the people's response be taken for granted.'[59] Or, as Voltaire put it, it is dangerous to be right when the government is wrong – which was exactly the situation that Cox found himself in.

Saturday Night Massacre:

Cox refused to accept Nixon's 'Stennis Compromise'. This proposal involved Senator John Stennis, a conservative Mississippi Democrat, reviewing the tapes, aided by

transcripts prepared by the White House. There is no evidence to suggest that Cox had been confrontational with the president. In fact, he provided an opportunity for Nixon to save face, initially stating that the idea of an impartial outside party reviewing the tapes 'is not unacceptable.' Cox wrote to Richardson, 'there should be no avoidable confrontation with the president. And I have not the slightest desire to embarrass him. Consequently, I am glad to sit down with anyone in order to work out a solution along this line if we can.'[60]

Cox's refusal to accept Nixon's offer was quite a gamble. WSPF Philip Heymann later recalled that Stennis himself was held in the highest regard and Senators Baker and Ervin were in favour of the compromise. Hence much credibility had been marshalled against the Special Prosecutor in favour of this suggested way out of the impasse. Tensions were mounting and by Saturday October 20 1973, Cox's position was increasingly unstable. At the day's press conference, Cox spoke of his predicament in a way that gave a clear illustration of how he perceived his role. Heymann relayed the conversation as 'You know, I hate a fight. I don't like to fight. I said to my wife this morning, "I don't like a fight, I don't want to fight, but I have to do what my duty as prosecutor requires me to do and that is, subpoena these tapes. It isn't because I want to. I was brought up admiring the President and the Presidency. I don't know what my father would think of me if he saw this, but I have to do my duty." And that was the approach all the way through. Somebody said, "Might you not be fired?" He said, "Yes, the President can fire me. And if he fires me I am fired. It is not the most important thing to a nation." "If he fires you, can't he get someone else who won't seek the tapes?" And Cox said, "Yes, Andrew Jackson had to fire four Secretaries of the Treasuries, or whatever number, to kill the national bank, and eventually it will happen."'[61] On that date, Cox was fired upon Nixon's orders. The

Saturday Night Massacre was carried out by acting Attorney General Robert Bork after Attorney General Richardson and his deputy William Ruckleshaus had refused to carry out the order and resigned.

The official reason for firing him was that Cox rejected Nixon's proposed compromise on the tapes. However, in reality, Nixon viewed the Special Prosecutor as more than a persevering public servant. This Ivy League East coast intellectual Harvard professor and friend of the Kennedys encapsulated everything than was anathema to Nixon. 'Now that we've taken care of Agnew' Nixon had said in Richardson's presence, 'we can get rid of Cox.'[62]

The Saturday Night Massacre heightened skepticism towards the president, convincing many that he did indeed have something to hide. The ensuing 'firestorm,' as Alexander Haig put it, prevented Nixon from achieving his avowed goal of abolishing the Special Prosecutor's office.[63] The unprecedented public outrage convinced Congress of the need to consider a long term solution regarding legislation that would create a special prosecutor with guaranteed statutory independence.[64] Nixon's approval rating dropped to 17% among those polled and *Time* magazine took the unprecedented step of writing an editorial to demand his resignation.

In later years, Nixon claimed that he only ever wanted to get rid of Archibald Cox rather than the Special Prosecutor *per se*. However, those involved at the time did not recall it that way. 'A lot of things happened that made it feel like a siege' outgoing deputy Attorney General William Ruckelshaus commented later. After the firing, Cox's press secretary Jim Doyle, tried to leave the offices with a pile of pictures and a copy of the Declaration of Independence that had hung in his office. 'It's the

Declaration of Independence' he told FBI Agent Angelo Lano, his voice quivering. 'Just stamp it 'Void' and let me take it home.' Doyle was not alone in his reaction. Another of Cox's staff, James Vorenberg agreed that 'there was a real sense [that] ...there was a sort of a danger of a fascist takeover.'[65]

In such circumstances, it is no surprise that the office of the Special Prosecutor was held in such high esteem by many of the opinion-making elites and the general public. No-one involved in the Watergate affair could have predicted the protest that engulfed public opinion, the media, Congress, the clergy and many White House staff. Nixon's credibility was permanently damaged and the official and public indignation was immediately and vividly relayed via television. Within ten days of Cox's firing, the Washington Western Union telegraph office received a record almost half a million telegrams in response to the event, almost all of which were opposed to Nixon.[66] The public was outraged by the president's actions. Historian Theodore White later wrote that the explosion of public sentiment after the Saturday Night firing of Cox was as fierce and instantaneous as the day Pearl Harbour had been attacked or the day that JFK had been assassinated.[67]

Years later, Nixon would admit that firing Cox was a 'serious miscalculation'. At the time, in keeping with the Imperial Presidency theme, Nixon's lawyers argued that the president had 'absolute power to decide what may be disclosed' to which Cox had replied that 'unlike a monarch, the president is not a sovereign.'[68] The events of October 20 1973 undoubtedly led to the nation viewing Cox in a heroic light, but there had been one area where he was vulnerable to criticism. This was the matter of his independence. Representing everything that Nixon abhorred ensured that Cox

merely fanned the flames of the president's paranoia - making the Saturday Night Massacre more likely. Faced with a Special Prosecutor of pristine independence, Nixon may not have reacted in such an extreme fashion. Nixon wanted Richardson to rein in Cox for 'conducting a 'partisan political vendetta rather than [doing]...the job he was appointed to do – bring the Watergate defendants to trial at the earliest possible time.'[69]

Historian Stanley Kutler argues that Cox's staff was deeply hostile to the Nixon administration and operated in the certainty that their subjects were guilty. It was quite normal for prosecutors to be encouraged to be aggressive, probing and suspicious of whether they were getting the truth from those under investigation. A Special Prosecutor with no previous prosecutorial experience was bound to employ an aggressive prosecutorial staff. For some, this aggression could be perceived as partisanship.

This would not be the last time that a Special Prosecutor team would be accused of partisanship, but Cox proceeded in a manner that appeared oblivious or defiant to perceptions or allegations regarding his independence and impartiality. His staff choices included press secretary Jim Doyle, well known for his anti-Nixon stance, two Harvard colleagues, and an ex-special assistant to President Kennedy. In total, seven of the eight senior Cox staff had worked in the Kennedy/Johnson administrations and over half of the lawyers on Cox's team were Harvard law school graduates.[70] This, combined with the fact that the precursor to the Ervin Committee, a senate sub committee, was chaired by Senator Ted Kennedy, was enough for Nixon to smell a conspiracy. It must be acknowledged however that, Nixon's guilt notwithstanding, it

is difficult to imagine how such a team could provide the appearance, if not the reality, of impartiality.

The media initially had a mixed reaction to Cox. WSPF Phil Heymann later recalled that the reporters speculated among themselves whether such a sheltered professional could deal with the political world of 'knives and blackjacks.' In Washington, the term academic was an anagram of 'soft, mushy' and 'without sharp cutting edges.' Acknowledging that Cox moved in overtly anti-Nixon circles, Heymann commented 'I do know that Nixon was a major villain to the crowd of liberal Democrats that Archie associated with in Washington and Cambridge.' [71] Whilst Elliott Richardson had referred to Cox as 'fair, honourable, scrupulous,' others were wary. Assistant Attorney General Henry Petersen thought Cox 'ultra liberal' and believed the job required a man 'with more detachment'. Cox's rectitude, in Petersen's view, was 'second only to God.'[72]

Despite Cox's reincarnation as the guardian of constitutionalism, his tenure as Special Prosecutor pointed to some weaknesses that would bedevil the office for years to come. Strong similarities could be drawn with the Clinton-Starr situation two decades later. The sentiments regarding Cox expressed by the Assistant Attorney General and his peers would be echoed during the nineties by opponents of Kenneth Starr. The accusations against the two Special Prosecutors of judgementalism, partisanship and more widely, a complete lack of political acumen, were remarkably similar. It seemed that no-one had learned from previous experience.

Leon Jaworski:

After firing Cox, Nixon was forced to choose a new Special Prosecutor. This time Acting Attorney General Robert Bork chose Leon Jaworski, former president of the American Bar Association, a conservative Texan who headed the Texas Democrats for Nixon in 1972. Once Jaworski received sufficient assurances of independence, he agreed to take the post.[73] New regulations ensured that the Special Prosecutor could not be fired without the consent of a majority of the Judiciary Committee. Having witnessed the experience of his predecessor, Jaworski negotiated his charter with Robert Bork and William Saxbe before accepting the role. He sought further clarification early during his tenure, advised the Attorney General of the lack of cooperation from the White House and of his intention to resign after Nixon's pardon.[74]

Bork's choice turned out to be a serious miscalculation. Jaworski's impeccable reputation and radically different background to Cox prevented Nixon from portraying him as a partisan political enemy. There was ample scope to portray Cox as hopelessly partisan whereas such claims couldn't be used against the Texan Democrat who took his place, despite the fact that Jaworski turned out to be just as troublesome as Cox had been. In fact, he was a far more formidable political force and after a month on the job, he visited Haig and suggested that the president should 'get the finest criminal lawyer he could find'. Jaworski was not amenable to manipulation. On the contrary, the evidence he had examined so far merely made him determined to press for more. Nixon had by now handed over a few of the White

House tapes, which confirmed Jaworski's suspicions that the president had been 'culpably involved.'[75]

In his book *The Right and the Power*, which was tenth on the bestseller list in 1976, and sold 205,000 copies, Jaworski recalled the palpable scepticism displayed towards him by Special Prosecutor office staff at the initial meeting. Jaworski was a different breed of prosecutor to his predecessor. Cox, the law professor, the righteous public servant had been ousted and replaced by the career attorney. Jaworski understood the reticence of his new staff. Many of them had eschewed the corporate path in favour of public service, and were wary of this interloper. The best they could hope from Jaworski was a professional approach. 'Well', thought Jaworski, 'professionalism is what they'll get.'[76]

The new Special Prosecutor inadvertently antagonised his staff during their first meeting, as he warned against 'loose cocktail party talk'.[77] The team prided themselves on their discretion in the face of enormous temptation to throw caution to the wind, and did not appreciate what they perceived as an inappropriate reprimand. The WSPF was not alone in questioning Jaworski's appointment. Starting out, Jaworski had little support from any quarter. His staff was civil, Congress was polite but the media voiced what others were thinking: how could the president's own Special Prosecutor expect to succeed? As the role was deemed both crucial and precarious, various newspapers and members of Congress continued their demands for a Special Prosecutor that was not chosen by the White House. In addition, Ralph Nader filed a suit before the federal district court seeking to overturn acting Attorney General Bork's firing of Cox.[78]

A House Judiciary subcommittee called for Jaworski's appearance. Bork had reassured the subcommittee of the enhanced position of the Special Prosecutor. No doubt mindful of his own reputation, and concerned about appearing like an apparatchik, Bork even suggested that he would quit government service if the White House attempted to interfere with Jaworski's work. 'Should the investigations be compromised, I would regard my position as morally intolerable,' Bork stated.[79]

Jaworski testified before the Senate Judiciary Committee before it ended its hearings on November 20. He assured the committee of the increased independence of his role, pointing to the new regulations requiring a majority consent of the Judiciary Committee in order to fire him. There was a feeling among the committees that the new appointment was a pre-emptive move against congressional action. Hence the continued discussion regarding legislation for a position with statutory independence even after Jaworksi's appointment. In his memoirs, Jaworski recalled 'The debates and discussions in the House and Senate on proposals for a Special Prosecutor other than one appointed by the president weighed heavily on my mind. When committees presented both houses with separate bills for consideration, it sorely taxed my spirit.'[80] Developments did temporarily placate Congress as talks about a judicially appointed office for the case abated. This allowed Jaworski to continue his work in a more secure frame of mind. Also, Cox had called Doyle to one side and requested that the WSPF give their new boss a fair chance, pointing out that he knew Jaworski since 1962 and that 'Leon showed me that he was a man of courage and intellect then, and a man of integrity.'[81]

Over time, Jaworski's ability to relate to people became more apparent, and his discretion and integrity were traits that he would be remembered for. Doyle recounted how Jaworski delicately handled an encounter with White House aide Egil Krogh, one of the more decent men involved in Watergate. As a result, Krogh pleaded guilty to conspiracy to violate the civil rights of psychiatrist Dr. Lewis Fielding, which was significant both to the investigation and to WSPF morale.[82] Fielding's Los Angeles offices had been burgled by the White House 'plumbers' in order to obtain the medical records of anti-war activist Daniel Ellsberg.

Events were also unfolding parallel to the Special Prosecutor's investigation. Just before Jaworski's appointment, the House Judiciary Committee granted chairman Peter Rodino (D-NJ) broad subpoena powers in its upcoming impeachment investigation. He was operating with a $1 million budget and a staff of 106, among whom was young law school graduate and future First Lady and New York Senator Hillary Rodham. Many other famous, or later to become famous, legal names were also involved, including later Clinton White House counsel Bernie Nussbaum and distinguished lawyer John Doar. The Senate side included Sam Dash, later Kenneth Starr's ethics advisor and Charles Ruff who became Clinton's counsel during the Lewinsky affair.[83]

Hence, the investigations were a significant moment in the careers of many of those involved. The House Committee had received information from the Ervin Committee, Cox and the Justice Department, aswell as new information from Jaworski, which included 800 pages of documents, 13 tape recordings, and a 60 page report or 'road

map' to the evidence, which provided direction to the committee in preparing the articles of impeachment.[84]

In Jaworski's view, the input of his office was crucial to the impeachment process. Unsurprisingly, there was initially a certain amount of tension between the two bodies with regard to the exchange of information. Their agendas differed – the committee's priority was to acquire impeachment information, the special prosecutor's was to ensure secrecy to protect criminal cases – and this was bound to cause some friction. Each side stated its case via the media, making for a very public debate.[85]

Horrified though many were at the prospect of pursuing the brutal impeachment process, the anti-Nixon coalition grew steadily. Editorial opinion castigating the president was by no means confined to the East coast liberal media. The pro-Nixon *Chicago Tribune* gave a taste of the mood in conservative Middle America in a May 9 1974 editorial stating: 'he is humourless to the point of being inhumane. He is devious. He is vacillating. He is profane. He is willing to be led. He displays dismaying gaps in his knowledge.'[86]

Those who had so avidly supported their president were reacting with increased shock and horror as events and information unfolded. Not least among those feeling betrayed was the special prosecutor himself. Jaworski's description of how he felt after listening to segments of the subpoenaed presidential tapes acts as a reminder of how cynicism had not yet come to prevail in all echelons of politics, as it would in later years. He was genuinely horrified that:

> '...the President of the United States had without doubt engaged in highly improper practices, in what appeared to be criminal practices. I had heard the evidence. I had listened to that voice I had heard before in person and on radio and television, so decidedly different now, as the president plotted with his aides to defeat the ends of justice. I had not come to Washington expecting this. I had expected to find all sorts of wrongdoing by his aides, conduct unbecoming and even criminal, but it had never occurred to me that the president was in the driver's seat. The gravity of the situation was almost overwhelming. The *president* was involved. Even if a criminal case was never developed against him – and he appeared to be criminally involved – the mere fact that he had participated actively in such sordid undertakings was shattering. And I could not escape the belief that in all likelihood I would be the agent of the president's unmasking.'
>
> 'My heart', he said, 'was shrivelling inside of me.'[87]

By February 12 Jaworski had receive what his staff referred to as 'clear and compelling prima facie evidence of the President's participation in a conspiracy to obstruct justice.' On March 1 1974, a Washington grand jury heard the Special Prosecutor's case indicted Haldeman, Ehrlichman, Mitchell, Mardian, Colson, Gordon Strachan and Kenneth W. Parkinson for participating in the cover-up. Jaworski kept secret at the time that Nixon had been named as an unindicted co-conspirator by the grand jury in a 19:0 vote. The fact that the grand jury had wanted to send their president to trial for bribery, corruption, obstruction of justice and obstruction of a criminal investigation was not broadcast.[88]

Jaworski believed that the president had participated in the 'perjury' phase of the conspiracy in numerous ways. Damage limitation was the main priority of the conspiracy, keeping blame at as low a level as possible. The Senate Committee's 2300 page final report denounced Watergate as 'one of America's most tragic happenings' reflecting 'an alarming indifference displayed by some in high public office or position to concepts of morality and public responsibility and trust.' The House Judiciary Committee released a 3888 page Watergate chronology, without comment.[89] The events spoke for themselves.

The president had lost credibility and moral authority. He had tarnished the office and abused his position. As the battle for the tapes raged on, Nixon lawyer James St. Clair argued in court that his client was under no obligation to provide details of his private discussions. Executive privilege and national security issues were used to justify Nixon's stance, and St. Clair even hinted that Nixon might disobey a Supreme Court order. He conceded that the president was not above the law, but only just. Jaworski argued in favour of the public interest over the use of executive privilege and that anyway, a conspirator could not claim such a privilege. Nixon realised that this was possibly his darkest hour and spoke of resignation on July 23. He acknowledged that the Supreme Court ruling would have a profound, and probably negative, impact on the impeachment hearings.[90] That night he wrote: 'Lowest point in the presidency, and Supreme Court still to come.'[91]

On July 24, in an eight to zero decision written by Chief Justice Burger, the court upheld the doctrine of executive privilege for the first time in US history – but not in Nixon's case. The Supreme Court concluded that 'the generalised interest in

confidentiality...cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice.' Impeachment was looking inevitable. Six days of televised hearings began and 35 million Americans tuned in. This was an unprecedented drama. Almost 75% of those polled at the time believed in the president's involvement in the scandal. By the time the House Judiciary Committee had completed its work, a two-thirds majority of those polled supported the president's impeachment.[92]

As the impeachment process got underway, the Democratic leadership was eager to appear as non-partisan as possible. Around this time, the Supreme Court voted 8-0 to uphold Jaworski's subpoena. With ever-narrowing options, Nixon considered defying the Supreme Court but decided against it.[93] Finally the moment had come. He was the 'first president in 106 years to be recommended for impeachment.'[94]

Article 1 alleged obstruction of justice and passed 27-11; Article 2, the abuse of power including the use of government agencies against individuals passed 28-10; Article 3, the refusal to comply with Watergate related subpoenas issued by the Judiciary Committee passed 21-17. Article 4, which related to concealing the bombing of Cambodia, and Article 5 which related to illicit personal gains and tax fraud, were defeated 26-12. Finally on July 30, Judge Sirica received the first of the infamous tapes.[95]

'The relief I felt is impossible to describe.' said Jaworski. The 'smoking gun' tape had confirmed that Nixon had early knowledge of and participated in the cover-up. Jaworski had spent months of frustration knowing the truth and listening to the

president wilfully misleading the public. Jaworski's conclusions were now corroborated. He later recalled that he had 'walked the streets of Washington knowing that Nixon continually twisted the facts while he, knowing the truth, had had to remain silent.'[96] Jaworski's memoirs provide a telling insight into the arduous task of carrying out a role so vital to the public interest and so challenging for the individual concerned.

Sadly for the nation, the nearest Richard Nixon came to an admission of guilt was a few words of contrition. "I regret deeply,' he said, 'any injuries that may have been done in the course of the events that led to this decision. I would say only that if some of my judgements were wrong, and some were wrong, they were made in what I believed at the time to be the best interest of the Nation.'[97]

Nixon's public support had nose-dived. The polls were indefinite on the decision to indict or pardon. In advance of the resignation, of those polled, a majority was opposed to special consideration for Nixon; after the resignation, a majority of those polled opposed further investigation of him. Jaworski later recalled the volume of correspondence to his office at this time. He received telegrams, mailgrams, letters and telephone calls – some 9500 of them – favouring criminal action against Nixon by 3.5 to 1. The media picked up on the loneliness and isolation of Jaworski's position, deserted by Congress and the president, left to continue his enormous task. The media saw Jaworski's position as being 'damned if I did and damned if I didn't prosecute Nixon.' Experts of various kinds were interviewed about 'Jaworski's dilemma.'

Finally realising that his situation was hopeless, on August 8 1974, Nixon resigned. As much of the media had demonised Nixon in its coverage, his resignation could be seen as the means of restoring faith in the system. As far as the media was concerned, resignation was an admission of guilt.[98]

On October 25, Jaworski resigned as planned, leaving the WSPF to continue under the leadership of Henry Ruth and later Charles Ruff, until it finally ceased existence in 1976. Jaworski later wrote that he was both surprised and pleased at the wealth of editorial comment on his decision. Not all reactions were favourable, as the *New York Times* editorial page, never a Jaworski supporter, illustrated:

> 'After nearly a year of exemplary performance as Special Watergate Prosecutor, Leon Jaworski is leaving office under conditions that border on desertion of duty. Too many strands of the legal tangle left by the Nixon presidency remain unravelled to justify Mr Jaworski's assertion that his task is largely finished.....He was appointed in the wake of the Saturday Night Massacre in circumstances requiring exceptional integrity, independence and legal professionalism. Mr Jaworski supplied that and more. He took over a deeply shaken staff, kept it together and moved ahead almost without missing a step.....While Mr Jaworski deserves the nation's thanks for the job he did, there can be no applause for the jobs he left undone or for the manner in which he failed to do them. The plain fact is that the job he was appointed to do is not yet done and he considerably reduced the likelihood that it will ever be...'[99]

How ironic that in years to come, brevity on the part of the Special Prosecutor investigations would be prized in the face of seemingly unending investigations. Even non-presidential investigations tended to last for years rather than months, costing millions of dollars. Independent Counsel Lawrence Walsh was criticised in particular for his almost seven year investigation of President Reagan, totalling $47,873,400.[100] Accusations of partisanship against the stalwart Republican Walsh investigating a Republican administration illustrated the absolute no-win situation that Special Prosecutors invariably faced.

An unexpected comparison could be drawn between Jaworski and Kenneth Starr, who was also taken to task, albeit by the right-wing press, when he attempted to resign from his post as Whitewater independent counsel. Long term, Starr had been disparaged for his endless investigation, but at one point during his tenure had attempted to disengage himself and take up a university post in California. His decision was met with a mixture of confusion and delight from his detractors and of horror from his supporters. The significant difference between the Jaworski and Starr situations was in how they were perceived by the media and the public. In a nutshell, the liberal media took issue with Jaworski's departure and the more conservative outlets took issue with Starr's proposed departure.

In defense of his actions, Nixon's claim of 'everybody does it' did not go down well with the media or the public. Jaworski no doubt spoke for many more than himself when he recalled,

> 'I had thought Nixon would make a good and strong president. I was mistaken. He became petty and arrogant, determined to use the powers of his

> office as he pleased – whether right or wrong. His arrogance made him contemptuous of the public. And this was a tragic mistake, because an aroused public had a mighty impact on the course of events after Watergate.'[101]

General Haig described the public reaction to the Saturday Night Massacre to Jaworski as 'almost revolutionary'. According to him, things were 'coming apart'. Jaworski understood the significance of what he represented in the face of executive wrong-doing and realised that this would be the toughest assignment of his life. Symbolically and actually, his role carried weight and the public found his independent position reassuring at a time when the White House reputation had been so severely tarnished. He also realised that he was the pragmatic, rather than the ideal choice, to replace Cox. In the end, Nixon's skulduggery forced even his most ardent supporters to question their loyalty. Senator Goldwater, it was reported, wept at Nixon's resignation. In conclusion on his time as Special Prosecutor, Jaworski drew consolation from the fact that 'from Watergate, we learned what generations before us have known: our constitution works. And during the Watergate years it was interpreted again so as to reaffirm that no-one – absolutely no-one – is above the law.'[102]

One area where Jaworski's actions may have somewhat disrupted the rosy perception of him was with regard to Nixon's pardon. There is no precise information on his interaction with President Gerald Ford on the matter. However, WSPF attorneys Ben-Veniste and Frampton later concluded that Jaworski must have given tacit support for a pardon. He had acknowledged that he had no desire to try Nixon and that he believed a fair trial for Nixon was out of the question in the light of all the publicity.

Jaworski's opinion, however, was not shared by many of the WSPF staff or the public.[103]

The pardon negated any formal charges and public hearings against Nixon, thus depriving the nation of an important cathartic moment. Just as mourners need a body, a cheated nation needed justice in order to move on. Ford, his advisors and Jaworski, it seems, misjudged the national mood. Assuming that a time may ever have been right for a pardon, invoking it so soon and with the element of surprise was a substantial error. Bob Woodward summarised Ford's mishandling of the situation:

> '..for Ford a pardon was the only way of ending the public and media obsession with his predecessor's future. The problem with the pardon was in Ford's execution. The public, Congress and the media needed to be prepared. Ford should have mustered all of his sense of decency to explain his actions to the public....He should have required Nixon to sign a statement admitting his guilt and released it with the pardon.'[104]

Michael Schudson suggests that if a president was driven from office and

> 'no-one clearly remembers why,' one reason is that the pardon granted by President Ford with the acquiescence, perhaps the relief, perhaps the encouragement, of the special prosecutor prevented the courts from impressing on the public mind just what Richard Nixon had done. However unwittingly, the pardon became just what House Judiciary Committee member Jerome Waldie called it, 'the ultimate cover-up'.[105]

The Role of the Media:

The importance of Watergate as a political scandal was about more than its dramatic significance. It also illustrated how such scandals are created and maintained. It highlighted the multi-faceted aspects of American scandals, as later illustrated by the the Iran Contra and Whitewater/Lewinksy affairs. Emphasis moved from media reports to FBI investigations, court hearings to special prosecutors to congressional committees and back again. Such a variety of input meant that those involved in the scandal had to react with a multi-pronged approach, making a defense strategy more challenging. Covering up a scandal is a complex operation and often the success or failure of a cover-up can be the result of a judgement call. For example, misreading the public mood can be disastrous, as with the final disclosure of the Nixon tapes and the showdown with the Special Prosecutor, whereby the president merely sank lower in the public esteem.[106]

It is the intention of this section of the chapter to emphasise the significance of the media's role in Watergate. This was a period of rapid evolution for the US media, and its input in the scandal helped to shape the outcome. The term 'credibility gap,' coined by the Washington press corps, was not born of Watergate. It came about as a result of Johnson's inability to tell the truth on a host of issues, not least Vietnam.[107] By the time of Watergate, a whole new era of journalism was underway. In autumn 1973, Daniel Schorr of CBS commented: 'This past year, a new kind of journalism developed, and I found myself doing on a daily routine some things I would never have done before. There was a vacuum on investigation, and the press began to try men in the most effective court in the country. The men involved in Watergate were

convicted by the media, perhaps in a more meaningful way than any jail sentence they will eventually get.'[108]

For the majority of those beyond the Beltway, Watergate was mainly a distant and abstract event in the way that an energy crisis, for example, was not. Experienced overwhelmingly through television, Watergate could not help but take on the quality of entertainment rather than real life as it did not appear to affect ordinary Americans directly. Nonetheless, millions tuned into the televised Senate hearings in the summer of 1973. When the White House tapes were released, nineteen metropolitan newspapers printed the thirteen hundred pages of transcript as a supplement, and within a week, three million copies of the transcripts had been put into print.[109]

By the tenth anniversary of Nixon's resignation, the *LA Times* reported that 'most experts find no evidence that the traumatic ousting of a US president had caused any basic change in public attitudes about either the American system of government or the persons who occupy public positions.' The article acknowledged that public confidence in government subsided after Watergate, but this had been occurring for a decade anyway. Schudson quotes a 'highly regarded historian', interviewed in *US News* on the same occasion, who claimed that for her undergraduates 'Watergate is already a dim and distant curiosity' and that she expected Watergate to 'end up as a relatively insignificant event' in American history.[110] Undoubtedly an amazing turnaround for what historian Stephen Ambrose labelled 'the political story of the century.'[111]

Elements within the media played a crucial role in unravelling the Watergate debacle. As well as the Woodstein–esque reporting, those actually involved in the scandal

were able to use the media as a forum for 'the battle for public opinion.' Whilst Nixon held the media in utter contempt, he also realised its importance and influence. The Special Prosecutor's office too saw the value of the press in securing a base of public support. Early in his tenure, Cox created a public affairs office, explaining that he 'was mindful of the national concern over Watergate and of the public's right to be kept as fully informed as possible' about the work of his office.[112] He was also aware that in the summer of 1973, the media was controlling the public perception of Watergate, and he could not afford to alienate such a powerful player.

Lauding the media role in Watergate's resolution was not a universal reaction. Conservative British journalist and historian Paul Johnson argued that Watergate was 'the first media putsch in history, as ruthless and anti-democratic as any military coup by bemedaled generals with their sashes and sabres'. Watergate was a 'maelstrom of hysteria', one of America's periodic 'spasms of self-righteous political emotion in which all sense of perspective and the national interest is lost.' It was a 'witchhunt...run by liberals in the media.' For those people, 'Nixon's real offense was popularity.' There was a conscious effort 'to use publicity to reverse the electoral verdict of 1972.' This view completely ignores any wrongdoing by Nixon and places him in the role of victim, in opposition to the perceived liberal bias of the Special Prosecutor. 'Watergate *was* a mess and nothing more,' Johnson conveniently concludes.[113]

Watergate's complexity, and the difficulty in neatly labelling it was due, in Schudson's view, to the plausibility of both the liberal and conservative views of it as a constitutional crisis on the one hand, and the radical left and ultraconservative views

of Watergate as a scandal, on the other. The difference being that Watergate as a constitutional crisis was something that people discovered whilst Watergate as a scandal, in contrast, was something that people constructed.[114]

Journalist and presidential speechwriter William Safire spoke of the 'fusion of hypocrisy and hysteria' that gripped the nation in 1973-4. He was particularly angered at what he perceive as the 'double standard of political morality applied to Richard M. Nixon by old admirers of John F. Kennedy.' To Nixon's supporters, it appeared that all of those in powerful positions to damage or destroy Nixon, in particular the media and the special prosecutor's office, were liberal supporters of the Kennedy regime (even after Cox's departure, the staff remained solidly Ivy League).[115]

However, whilst much of the hyperbole may have been partisan fuelled, the media and others could be forgiven for making a drama out of a constitutional crisis. The hero status allocated to Cox and Jaworski in stark contrast to the president and his men provided a simple definition for the masses between the promotion of right and wrong. The fact that Cox received numerous death threats[116] merely strengthened his position of moral crusader striding ahead in the face of adversity. However, some of those employed to investigate Watergate did find fault with Cox. The US attorneys from the original prosecutor's team did not have a particularly constructive relationship with Cox. One of them privately concluded that the Special Prosecutor was a 'publicity seeking self-promoter who had his eye set on a Supreme Court seat if Teddy Kennedy was elected president in 1976.'[117]

Cox's Harvard students had referred to him as arrogant, but his WSPF press secretary James Doyle interpreted this to be a reaction to his combination of shyness and relentless pursuit of excellence in scholarship. Doyle paints a picture of a man passionate about his teaching and respected for his reputation as a peacemaker during the turbulent anti Vietnam period. Whatever Cox lacked in popularity among his students, he made up for in respect. His WSPF staff also held him in the highest regard.[118] On the Special Prosecutor's initial off the record meeting with the press, Cox was deemed friendly, articulate, cautious and non-specific in his comments. Doyle recalled that Cox was more like a dolphin than the shark a Special Prosecutor was expected to be.[119]

Cox got off to a somewhat shaky start by immediately antagonising Senator Sam Ervin. He asked the Senator to call off the Senate Watergate hearings, a request that Ervin deemed 'extremely arrogant.'[120] As far as the press was concerned, Cox's request highlighted his two glaring weaknesses – personal arrogance and political naïveté. Up to that point, the Ervin Committee had been the focal point for media coverage. As the press took an interest in the WSPF, Cox quickly realised that the level of public support his office received was dependent on how the media portrayed him and saw his need for someone far more media savvy than himself to court the press. Bringing in a journalist to act as press officer gave the WSPF a much needed advantage, as Cox was not initially held in particularly high esteem by many Washington journalists. This may have dated back to his involvement in President Kennedy's 1960 campaign. Back then, he was considered to have done an excellent job, but was useless as a source for reporters. He did not involve himself in the gossip and information exchange that was so crucial to reporters, and so he gained a

reputation for being stuffy and aloof. After joining the WSPF, Doyle noted that much of the Washington press corps wondered if Cox was up to the job of Special Prosecutor. Many of them expressed concern that he may have been too soft, too naïve, too remote.[121] In the event, Cox rose to the challenges posed by the job, with a rock solid staff to compensate for any shortcomings he may have had in the areas of prosecutorial experience and political *savoir faire*. By the time of the Saturday Night Massacre, journalists were displaying their support and commenting on Cox's 'moral courage'.[122]

The level of media and public esteem that Cox had risen to was illustrated by his placement in 1978 by the *Washington Post* in the company of Winston Churchill, Abraham Lincoln and others. The crux of the article was the discussion of famous men who had made the wearing of the bow-tie fashionable [123]. The *New York Times* had previously cited Cox as one of the reasons that flat-top haircuts had seen a resurgence in popularity.[124]

In the words of colleague Phil Heymann, "Something amazing happened to Archie's life. He became a permanent American hero.' Flippant though the hair and bow-tie related articles may have sounded, such information compounded a specific notion for the 95% of Americans who were not hyper-political. They may not have been able to explain the finer details of Watergate, but they knew that Archibald Cox represented the forces that were fighting for - the truth, the presidency and the constitution.[125]

In examining how and to what extent this perception emerged, the president himself must take at least some of the credit. Nixon was a convincing villain, worthy of a

Special Prosecutor investigation. Even such basics as physical appearances played a role – Nixon had the misfortune to look like a crook whilst Cox, in contrast, looked like everyone's favourite uncle. Hence the public's sudden penchant for bow-ties and flat-tops, imitation being the sincerest form of flattery.

The 'smoking gun' tape of June 23 1973 particularly enhanced and cemented the Office's legitimacy and purpose. Political elites lauded the Special Prosecutor arrangement due to its perceived symbolic value to the public, but this comfort factor was based on the assumption that the masses were politically engaged, which did not especially appear to be the case. In 1927 Walter Lippmann argued that normally the public 'will not be well informed, continuously interested, nonpartisan, creative or executive.' 'We must assume' wrote Lippmann, 'that a public is inexpert in its curiosity, intermittent, that it discerns only gross distinctions, is slow to be aroused and quickly diverted; that, since it acts by aligning itself, it personalises whatever it considers, and is interested only when events have become melodramarized as a conflict.'[126]

The public was likely to be reactive to information provided by the media and other elites. Relations between the Prosecutor's office and the Attorney General, the Senate Watergate Committee, the House and Senate Judiciary Committees and the press, were, in general, very cordial. Both Cox and Jaworksi felt that the press was relatively supportive, providing the Office with public support, despite the perception that, as an executive creation, the Watergate Special Prosecution Force was never to be fully trusted.[127]

Nixon essentially saw himself as the pitiful and helpless victim of a media conspiracy. He felt persecuted as he experienced the evolution of the media's role from lapdog to watchdog. Until the social and cultural upheavals of the mid 1960s, most Americans most of the time believed what their government told them. Within a decade, this was decidedly no longer the case. There was an unprecedented level of cynicism towards the government. This, above all, was a high price to pay for the secrecy system.[128]

The perceived impact of Watergate on the press was monumental. One observer of the press noted that Watergate 'had the most profound impact of any modern event on the manner and substance of the press' conduct.' According to another, the *New York Times* publication of the Pentagon Papers and the *Washington Post* coverage of Watergate 'inspired a whole generation of young journalists to dig below the surface of events.' Altruism was not necessarily the driving force behind every budding journalist at this time. The Woodward and Bernstein story struck a chord throughout the nation and the journalistic profession suddenly became acutely appealing. In reality, it was not 'the press' that pursued the scandal, it was the *Washington Post*, and at that, it was a mere two reporters persevering in the face of lack of support and even adversity. From the June 1972 break-in until the November election, no other paper took the matter seriously, and *Post* publisher Katherine Graham recalled famously saying to editor Ben Bradlee, 'if this is such a hell of a story, where is everybody else?'[129]

The myth of journalism in Watergate, in its unadulterated form, is probably overblown. Woodward and Bernstein did not single-handedly save the United States from fascism. It does, however, remain a powerful force in the news media and

rightly so. If Nixon's involvement had not been uncovered, the scandal would not be remembered the way it is today. It is still at the heart of American journalism mythology. Presidential crimes, a cover-up, an independent counsel investigation and a forced resignation ensure that Watergate became the benchmark for later scandals.[130]

Schudson states that a 'career is a socially constructed *location* of an individual in a culture over time.' The careers of Cox and Jaworski, Woodward and Bernstein were radically altered by Watergate and they in turn played their respective parts in the Watergate saga. However, the perception that Watergate had a radical impact on the press does not necessarily stand up under close examination. Journalist Anthony Lewis observed in 1975 that the press might start believing the hype that it was a 'tiger – a remorseless antagonist of official deceit, probing for the truth.'[131] In reality, it was nothing so romantic.

As a means of reputation enhancement, Watergate worked in the favour of a number of key players. The Special Prosecutors and their staffs were hailed as heroes, along with many of their peers in Congress, the media and elsewhere. Archibald Cox and Sam Dash both died on 29 May 2004 and their obituaries left little doubt as to how they are remembered. For Cox, the press retold a tale of David and Goliath proportions, outlining how the Special Prosecutor persevered against President Nixon in the face of massive political and legal obstruction. The Harvard website concluded that 'his reputation for integrity and fairness led to his playing a pivotal role in one of the most turbulent episodes in the nation's political history.'[132]

Sam Dash, the man Nixon referred to as a 'son of a bitch' had been chief counsel to the Ervin Committee, when possibly the defining moment of his very distinguished public career occurred. It was during Dash's examination of White House aide Alexander Butterfield that Nixon's taping system became known. This led directly to the Supreme Court decision that Nixon must hand over the tapes. Dash was later involved in drafting Independent Counsel legislation and worked as Kenneth Starr's ethics advisor for four years until he resigned in protest at Starr's interpretation of his role as independent counsel. His obituaries reflected his standing as a voice of conscience for the nation. Both Cox and Dash understood, revered and followed the law and were held in the highest esteem by their peers.[133]

In contrast, Nixon spent the remainder of his life attempting to rehabilitate himself in the hope that the immediate association with his name would be that of Elder Statesman or geopolitical genius, rather that Watergate. Despite his best efforts, however, no détente with the Soviets or trips to China could knock quite knock that stain off his reputation.

On Friday August 9 1974, Nixon formally resigned and Ford was sworn in as president. In his inaugural remarks, Ford declared,

> 'I feel it is my first duty to make an unprecedented compact with my countrymen. I believe that truth is the glue that holds government together, not only our government but civilisation itself. In all my public and private acts as your president, I expect to follow my instincts of openness and candour with full confidence that honesty is always the best policy in the end. My fellow Americans, our long national nightmare is over.'[134]

This was the phrase that was picked up by the news media – finally there was an overt effort to draw a line under the issue, clearly stating that Nixon and Watergate were, in fact, wrong. The famous scene of Nixon leaving the White House by helicopter provided the impression of closure. The nation appeared to breathe a sigh of relief, and the new president initially received a sincere outpouring of goodwill. The future suddenly seemed a little brighter and simpler.[135]

In offering Nixon a pardon, Ford was eager to establish closure and insisted that the nation could not afford to 'prolong the bad dreams that continue to reopen a chapter that is closed.'[136] Nixon was initially opposed to accepting the pardon, as he correctly felt it would imply some kind of guilt. Nixon's defense attorney Herbert J. Miller strongly advised Nixon to accept a pardon. His client was drained financially, physically and emotionally and if the Special Prosecutor indicted him, he would be bankrupt. He would also have almost no chance of a fair trial. 'How in God's name could you find an impartial jury?' Miller asked.[137]

Under these circumstances, and with the apparent compliance of Jaworski, Ford made his decision. It appeared to be yet another betrayal. The pardon was early, fully accommodating, and crucially, without acknowledgement of the severity of Nixon's actions. It was also a total surprise.[138] Ford always justified his decision by producing a copy of the Supreme Court ruling in *Burdick V United States* (1915).[139] In it, the court stated that a pardon 'carries an imputation of guilt, acceptance, a confession of it.' So, by accepting the pardon, Nixon had, in effect, confessed. 'That was always very reassuring to me' said Ford.[140]

Ford had to lead in spite of the constraints placed on a president after Vietnam and Watergate. Congress had passed bills limiting the two most important areas of presidential decision making: budget making and war making. There was a feeling of absolute determination that the days of the imperial presidency were over.

Public interest in the Special Prosecutor proceedings dwindled over time, despite the sporadic media coverage whenever specific cases were brought to trial. Henry Ruth encouraged the press to ignore him, rarely granting interviews and offering little information when he did. His strategy was successful. In March 1975, a question on the quiz show *Jeopardy* asked who succeeded Jaworski as Special Prosecutor. None of the contestants knew the answer.[141] Media and public attention had moved on. Charles Ruff took over from Henry Ruth as Special Prosecutor in 1975, when all that remained were a few clean-up prosecutions. Yet even as he tied up the loose ends of Watergate, he also took on new investigations. When Kenneth Starr acted in this way in the 1990s, continuing to subpoena individuals after the main event, he received ferocious criticism from all angles.

Ruff, however, was operating under different circumstances. In the final days of the 1976 presidential campaign, Ruff looked into allegations that Gerald Ford had diverted political contributions for his personal use while in Congress. Ford, ever the Republican team player and definitely not a crook, was in a quandary. Challenging the Special Prosecutor before the ink was dry on Nixon's resignation letter would be far too reminiscent of the Saturday Night Massacre. He believed however, that Ruff was playing politics and proceeding too slowly. On September 30, Ford reiterated his

innocence to the press. Soon after, Ruff completed his investigation with no charges against Ford, but the damage of negative publicity was done.

Eight months later, he closed the office and issued the final Watergate report. Ford believed that the Watergate hangover negatively affected his election drive. Losing the 1976 election by 2% suggested that Ford had been tainted with the Nixon brush. Suspicion of a deal on the pardon never quite subsided.[142] Coming hot on the heels of Vietnam, Watergate created a situation that would result in reactive legislation. The Special Prosecutor provision of the 1978 Ethics in Government Act would, however, bring its own set of problems.

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3. Title VI of the Ethics in Government Act 1978: Enactment and Initial Implementation

'There can be no final truth in ethics any more than in physics until the last man has had his experience and said his last.'

(William James)

This chapter deals with Title VI of the Ethics in Government Act and its early uses. Areas examined include the circumstances surrounding the introduction of the Act in the post Watergate climate, attitudes and reactions to the legislation, and how Title VI fitted into the existing legislative framework. Early uses of the Act, particularly the cases of Hamilton Jordan and Tim Kraft, are also featured, and attention is given to elite perception of those investigations. The chapter concludes by reviewing the concerns associated with the consequences of hard cases making bad law and the resulting amendments to the legislation in 1983.

The abuse of public trust was hardly a new concern for legislators. In 1788, James Madison wrote in *The Federalist Papers* 'If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed, and in the next place, oblige it to control itself.' [1]

Watergate illustrated that the government was not controlling itself at all, hence the perceived need for new legislation. Although this particular scandal triggered Title VI,

ethics concerns predated it. Reaction to Watergate was the culmination of a growing concern regarding ethics in government over the previous quarter century. The Truman scandals of the early 1950s, involving allegations of tax fixing (see chapter 1 for details) illustrated how even minor scandals could erode public trust in government. President Truman delivered a stringent message to Congress on September 27 1951 regarding the importance of high ethical standards for public employees. Republicans were determined not to allow Truman to gain kudos for improving public ethics, and their 1952 campaign attacked the 'mess in Washington' on a banner of 'Korea, Communism and Corruption.'[2]

The Republican victory was followed by the scandals within the Eisenhower administration involving conflict of interest and influence peddling, which fuelled new ethics anxieties. The resignation of chief of staff Sherman Adams in 1958, in the face of allegations of unethical conduct in his relations with financier Bernard Goldfine was a political embarrassment for the Republicans. Hence the 1978 Ethics Act was not a knee jerk response to Watergate. It would no doubt have materialised anyway, at some juncture, but perhaps in a different format. Corruption had long been a feature of US politics, particularly at state levels. Watergate deviated from the past in that it was more about abuse of power and obstruction of justice than corruption for personal financial gain.

In an attempt to tackle the issue in the 1960 presidential campaign, and to capitalise on the Adams scandal, the Kennedy strategy aimed at creating an 'ethics gap'. As did President Clinton in the 1990s, Kennedy focused on governmental, rather than personal, ethics. Kennedy urged Congress to enact a 'simple, comprehensive code on

conflict of interest', that eliminated 'duplications, inadvertencies and gaps' in existing laws and regulations. Whilst ethics issues did not play a prominent role in the election, the new administration nonetheless implemented a new executive branch ethics management programme. Political pragmatism, not ideology, was the driving force behind these ethics reform initiatives. Kennedy's newly appointed advisory panel on ethics in government made strong recommendations to supplement criminal restrictions with uniform ethics guidelines as outlined by the White House. According to political scientists Robert Roberts and Marion Doss, the real focus should have been on Congress and yet the ethics panel made no recommendation to tighten Congressional rules. [3]

On May 3 1977, President Jimmy Carter requested Congress to pass a new law that would 'require appointment of a special prosecutor to investigate and prosecute alleged offences by high government officials'. Reiterating his campaign pledge, the president stated, 'During my campaign I promised the American people that as president I would assure that their government is devoted exclusively to the public interest.' This promise included the provision of new legislation whereby the Justice Department would no longer be responsible for the investigation of top government officials including the president. [4]

Samuel Dash, chief counsel to the Senate Watergate Committee from 1973 to 1974, had been promoting reform since the Saturday Night Massacre of 1973.He believed that his Watergate Committee had a dual function – to inform the public and to suggest new legislation. Dash, along with Senator Samuel J. Ervin (D-North Carolina) and many of their peers, had been horrified that Nixon's firing of Archibald Cox was

technically lawful and that the same fate could have been visited on Leon Jaworski. Ervin and Dash were adamantly in favour of legislation that prevented a situation whereby a president would oversee an investigation of himself. Correctly or not, the assumption that presidentially appointed prosecutors could not act independently was taken for granted. Hence, the emphasis for a successful future mechanism was placed on genuine investigative independence. [5]

The Ethics in Government Act was firmly rooted in the Watergate experience. History had seen Special Prosecutors involved in the Teapot Dome and Truman Tax scandals, but it was the central role played by the Watergate Special Prosecution Force (WSPF) in the resolution of the scandal that laid the groundwork for what would become Title VI of the Ethics in Government Act. Public cynicism towards the government had been on the increase since the 1960s. The American National Election Studies surveys revealed that the percentage of respondents who believed that the government in Washington could be trusted to do the right thing 'all of the time' or 'most of the time' declined from 77.7% in 1964 to 49.3% in 1970.[6]

Nonetheless, it was undoubtedly Watergate that created a drive towards a specific legislative response. Under the political circumstances, a variety of options were considered. The first, based on the Watergate conclusion that 'the system worked', was to do nothing. A more proactive approach was to institute reforms within the executive branch, and a more radical option was to create new, independent institutions. It was the third option that was ultimately chosen. [7] It would take a full five years of debate before this would become law.

Immediately after the Saturday Night Massacre, the House and the Senate held hearings on the establishment of an office of Special Prosecutor with a legislative guarantee of independence. Restoration of public confidence was a major theme during the hearings and so the existence of a Special Prosecutor, preferably with a sterling reputation was considered highly desirable. A bill introduced on October 26 1973, by Senator Birch Bayh (D-Indiana) and 52 other senators provided for judicial appointment of an independent prosecutor. Bayh argued that 'our system of government is facing a crisis of unprecedented proportions...Congress must set out as its first order of business, the difficult but...essential goal of re-establishing the public faith and confidence from which all else proceeds in a democracy.'[8]

Congress continued its hearings until November 20, despite the appointment of Leon Jaworski. The new Special Prosecutor expressed his satisfaction regarding his independence and status. His charter had been amended to ensure that he would only be removed for 'extraordinary improprieties' and even so, the president would need the consent of a majority of the Senate Committee before Jaworski could be removed. Such assurances temporarily quelled the Congressional debate regarding a statutory Special Prosecutor to replace Archibald Cox.

In general, however, the debate continued about the future of the Special Prosecutor arrangement. Over the next few months 35 different bills with 165 sponsors were introduced in Congress. The common theme was to protect the Department of Justice from political influence and outline details for an independent Special Prosecutor of some description. And so the memory and impact of Watergate would be maintained

largely due to Cox's firing, Congressional resurgence and the decline in public confidence towards the government. [9]

In 1974, Senator Sam Ervin had suggested the creation of an 'independent' Justice Department with an Attorney General appointed by the president for a six-year term and not subject to removal by the president. Cox, former Attorney General Kleindienst and others were strongly opposed to such an idea. The Senate Watergate Committee's final report included a recommendation for the establishment of a permanent Office of Public Attorney giving the courts, rather than the Attorney General, the power to hire and fire.

Speaking before the Committee on Government Operations, Senator Walter Mondale (D-Minnesota) argued that 'if we let the history of Watergate fade without taking those steps that need to be taken in the legal sense we may well find in later generations a threat that will succeed and destroy American democracy itself.' In sociologist Michael Schudson's words, Mondale urged legislative reform to institutionalise collective memory. Sam Dash urged the Congress to 'learn the lessons of Watergate,' and he did not agree with those, including former Special Prosecutors, who did not believe that preventative legislation would stop a future Watergate.[10] There were even those who voiced concerns about an over-reaction to Watergate but soon, the ethics reform bandwagon was such that no one wanted to be left behind, or worse still, seen as anti-ethics.

During the Spring and Summer of 1974, Dash worked on finishing a final report that would contain specific recommendations for reform. The Watergate Committee report

concluded that rather than relying on an ad hoc prosecutor when the next crisis arose, '[i]t is far better to create a permanent institution now than to consider its wisdom at some future time when emotions may be high and unknown political factors at play.'[11]

The problem regarding appointment remained. A guarantee of independence was crucial, but the creation of a fourth branch in the federal government had to be avoided. The president couldn't make the appointment and neither could the Attorney General. Appointment by the judiciary was considered as an option, as the courts had appointed prosecutors in special circumstances in the past. So, the Ervin-Dash proposal suggested a prosecutor to serve for a five year period 'and be chosen by members of the judicial branch to ensure his independence from the executive control or influence'.[12]

James Madison had written in *The Federalist Papers*, 'A dependence on the people is no doubt the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions'.[13] Dash felt that his proposal tied in with this sentiment but all of the Watergate Special Prosecutors opposed it. Henry Ruth, Jaworski's successor, testified that the real danger lay in his independence. 'As Special Prosecutor now,' Ruth testified, 'I take directions from no-one, I report directly on ongoing investigations to no-one, and I could easily abuse my power with little chance of detection.'[14] After years of haggling and flawed recommendations, finally in 1978, Senate drafters produced a viable proposal which involved the Attorney General conducting a ninety-day investigation after which he would decide whether the case warranted further action. A federal appeal court judge panel of three

would if necessary appoint a Special Prosecutor who would possess powers akin to those of the Attorney General to carry out an investigation. [15]

It took nearly a year and a half for the Ethics in Government Act to move through the legislative process, from introduction to enactment. Watergate was still a fresh political memory and the law was generally viewed as an integral part of the promotion of ethics. On October 12, the Ethics Bill passed 344 to 49. Carter signed it on October 26, declaring, 'I believe that this act will help to restore public confidence in the integrity of our government'. Dash and Ervin felt that the Ethics Act was the most important by-product of their Watergate investigation. They were confident that the system would be equipped for whatever crises or dramas presented themselves in the future. [16] Referring to James Madison's emphasis on the necessity of auxiliary precautions, Dash later wrote that 'the independent counsel legislation was enacted by Congress as such an auxiliary precaution against the recurrence of a "Saturday Night Massacre". Madison would not be surprised that this legislation does not work perfectly; since it is the product of men and women – not angels. Yet it is still the best alternative to resolve the serious conflict created when the Attorney General receives specific and credible criminal charges against the president or other high executive branch official.'[17]

The political importance of the federal judiciary was increased by the Ethics Act. The Special Prosecutor, uniquely, would be independent of the executive branch. In theory, the president could fire the individual, but such a situation was highly unlikely to occur after the Saturday Night Massacre debacle. The legislation was to be reauthorised in five-year increments, and was set to expire in 1999. Under its terms,

the Attorney General would initially respond to a request for an investigation and following a review lasting a maximum of ninety days would then decide if a Special Prosecutor investigation was warranted. If so, the Attorney General was required to submit a report on his findings with a special division of the Court of Appeals for DC, requesting a Special Prosecutor investigation. Interestingly, the Independent Counsel provision did not apply to Congress itself. [18]

Former Attorney General Elliot Richardson, writing with the benefit of hindsight many years later in criticism of the Ethics Act, argued that instead of leading to higher standards and better enforcement of existing laws, public reactions to actual wrongdoing have spawned new laws, new penalties and new policing devices. He pointed out that since the Ethics Act was based on the assumption that no-one in government could be trusted - for example - it required upper level federal employees to disclose all earned income exceeding $200 - it might more appropriately have been called the 'No Ethics in Government Act'. Richardson raised the age-old question of 'who will watch the watchmen' - a concern that would become increasingly relevant during the lifespan of the Ethics Act.[19]

Richardson argued that the Ethics Act was based upon a host of negative assumptions, notably that public officials were too weak, too greedy or too unprincipled to be willing or able to do the right thing. 'Bans on dealing with your former agency, requirements for the divestiture of investments, restrictions on communication, and 'recusal' for the mere appearance of a conflict of interest all work on the premise that public servants have neither backbone nor integrity.' Whilst these rules did have a role in the promotion of reform, Richardson's issue with them was that they generated

the illusion that morality could be legislated. He found it odd that the focus of virtually all of the legislation including conflict-of-interest laws, 'revolving-door restraints, lobbying registration, campaign-contribution limits, and various other restrictions' was economic. In his view, the chances of the desire for power, prestige and influence, rather than for mere economic gain playing an influential role in individual's motives were high. [20]

More hindsight-based criticism came from the American Enterprise Institute and Brookings Institute Project on the Independent Counsel Statute, Report and Recommendations, co-chaired by Senators Robert Dole and George J. Mitchell. This argued that the Act's reach was too broad and too arbitrary. Writing in 1999, as the Act was about to expire, the authors voiced their concern over the fact that not all of the Special Prosecutor investigations were necessary. In certain instances, a Justice Department investigation may have been more than enough. Via the Act, Congress made a legislative judgement regarding an assumed conflict of interest whenever specific officials were criminally implicated. Although the Attorney General did possess some discretion initially, the Act limited the time and means he would have available to him to decide if a case warranted further investigation.[21]

The Act specifically offered advice concerning when a Special Prosecutor should be deemed necessary, including, as stated in 28 United States Code §591 (C) (1) if 'an investigation or prosecution of a person by the Department of Justice may result in a personal, financial, or political conflict of interest.' This standard combined with personal judgement was the means of decision making for attorneys general in their

appointment of prosecutors. Such methods strongly pointed towards the importance of astute judgement and extensive experience in making such significant decisions.

Serious allegations made concerning the president or attorney general were deemed the obvious times when a Special Prosecutor was necessary, although there was scope for manoeuvre, depending on individual circumstances. In Watergate, for example, a Special Prosecutor was appointed before the involvement of the president was established. Conversely, appointment was not a foregone conclusion for high-ranking officials as in the case of Vice President Agnew, where the US Attorney in Maryland successfully handled the prosecution. [22]

Over a thirty year period, a distinct pattern in American politics had emerged. Republicans controlled the White House and Democrats controlled Congress, particularly the House of Representatives. Such a situation had become so accepted that each party attempted to cement its institutional stronghold at the expense of its opponents. Hence the Democratic Congress legislating such curbs on presidential power as the War Powers Act, the Arms Export Control Act and the Budget and Impoundment Control Act. [23] Enacted slightly later in 1978, the Special Prosecutor statute came at a time when a Democrat was president and the party expected to maintain long-term control of the White House. Hence, the longer-term pattern of a Democratic Congress initiating Special Prosecutor proceedings against (usually Republican) executive branch officials was, to a certain extent, an unforeseen consequence of the Act.

Scholars Ginsberg and Shefter argue that on being asked to appear before the three judge panel to request a Special Prosecutor, an Attorney General would in general be reluctant to refuse a request from Congress for fear of a backlash. Therefore, Congress was usually assured of getting its way when it requested the appointment of a Special Prosecutor.

Once appointed, Special Prosecutors had a wealth of power at their disposal, not least in that they were not appointed to investigate an alleged misdemeanour. Significantly, the Special Prosecutor was assigned to determine if a crime has been committed. Such a non-specific mandate allowed great scope in what could be investigated, regardless of how relevant matters were to the original concern. The Special Prosecutor's budget was essentially unlimited. This in itself was a source of considerable power and an almost inevitable imbalance between the Prosecutor and defendant. Another area of unlimited scope was the investigation itself, because unrelated areas could be investigated with no specified boundary. [24]

Speaking in 1981, former Attorney General Benjamin Civiletti voiced his concerns regarding well-intentioned reforms. 'We cannot be complacent' he said.

> 'We cannot be content to congratulate ourselves of our original legislative intentions, the soundness of our values, the beauty of our policies in theory. We must find out how our policies actually work. We must acquaint ourselves with facts. We must be pragmatists.'[25]

Post-Watergate, it was the Democrats who paved the way in enacting the Special Prosecutor law – over a myriad of objections mainly from Republicans. Each re-

authorization of the statute allowed the Democrats to reiterate their belief in the Act, even as the Reagan Justice Department argued unsuccessfully in the Supreme Court that the statute should be abolished. [26]

From its inception, the law received constructive criticism, particularly from those concerned with the issue of unintended consequence. Terry Eastland, who served in the Justice Department from 1983 to 1988, opposed the legislation on constitutional and public policy grounds. In his view, Title VI was a direct result of the perceived lessons of Watergate. Eastland recalled that the Office of the Special Prosecutor was regarded by many at the time at least as an essential reform, if not an achievement of political science virtually on a par with what the framers wrought when they drafted the constitution, but he himself deemed it more a case of generals fighting the last war.[27]

Eastland was not alone in his concerns. Republicans, some Democrats and the Watergate Special Prosecution Force itself had reservations, particularly regarding the appointment of an individual who was essentially answerable to no one. In its final report, the WSPF voiced its alarm that the policy considerations allowed 'great potential' for abuse of power. A Special Prosecutor, it stated, 'can easily stretch from proper investigative techniques or attempt unfairly to widen the conduct of the persons included within a criminal sanction'. Former Attorney General Edward Levi believed that the law would create 'opportunities for actual or apparent partisan influence in law enforcement; publicize and dignify unfounded, scurrilous allegations against public officials, result in the continuing existence of a changing band of multiplicity of Special Prosecutors; and promote the possibility of unequal justice.' [28]

Mechanisms to prohibit the abuse of public office were, of course, deemed essential to the smooth running of government. The Senate Government Affairs Committee said that the Ethics Act would 'preserve and promote the accountability and integrity of public officials and of the institutions of the Federal government' and that it would 'increase public confidence in the government.' [29] Nonetheless, the dangers involved in such a system soon made themselves apparent. These included partisan motives and interests along with the risk of any investigation over time reaching far beyond the original focus of its concern and resembling the 'roving searchlight' feared by Clinton White House lawyer Bernard Nussbaum. [30]

As a result, the establishment of parameters for a Special Prosecutor investigation fell short in the areas of jurisdiction and budget. The Brookings Report suggested that these matters should have been addressed by the Attorney General at the outset of an investigation, with room for amended provision at a later date. The most significant point made was the need for a focus on events in question, rather than the individual in question.

During the Watergate investigation, the Special Prosecutor's jurisdictional boundaries were established by Archibald Cox and Attorney General Elliott Richardson, in the setting of the Judiciary Committee's nomination hearings. Under the Ethics Act, the Attorney General played a reduced role in establishing investigative jurisdiction, and Congress and the courts played an increased role. Congress instructed the courts, as stated in 28 USC §593(b)(3) to 'assure that the independent counsel has adequate authority to fully investigate and prosecute the subject matter with respect to which the Attorney General has requested the appointment of the independent counsel', and

stipulated that each counsel's jurisdiction encompass 'all matters related to that subject matter.'[31] Here lay a major flaw of the legislation, in that the scope of any investigation was not clearly defined and there was invariably potential for excessive prosecutorial zeal.

The budget was another area of concern as from 1978 it was unlimited and ongoing. The Attorney General did not have control over a Prosecutor's spending and the court lacked any power to react to the bi-annual budget reports provided by Prosecutors. This was in contrast to the Watergate budgetary set-up whereby a Special Prosecutor was obliged to 'submit budget requests for funds, positions and other assistance' as stated in 28 Code of Federal Regulations §0.37 (Appendix)(1973) [32]

Establishment of an overtly independent Special Prosecutor was deemed necessary and proper in the wake of the Watergate investigation to avoid a repetition of the Cox firing and to rebuild public confidence in the proceedings. The exclusion of political influence and the assurance that all investigations and prosecutions were guided by regular Justice Department policies and procedures were high on the agenda for attempting to secure the bedrock provision of independence. However, experience would show that independence could come at the price of accountability. Political scientist Katy Harriger suggested that placing too much emphasis on impartiality and the appearance of it, may very well have led to a different problem: a disturbingly free rein for the Special Prosecutor. A burning issue during the five years preceeding the Act was the constitutional debate over the meaning of the separation of powers. Harriger viewed the 1978 Act as a reasonable effort by Congress to balance the competing values of accountability and independence in such a way that could

withstand constitutional scrutiny. Dating back to the days of James Madison and *The Federalist Papers*, the separation of powers and checks and balances were viewed as a means of maintaining equilibrium. However, in order to avoid deadlock, the various branches of government had to adhere to the system's guidelines. Madison emphasised the need for public officials to be made responsible not only to the electorate but also to each other. [33]

The operation of the separation of powers system was not simply a matter of 'three branches with separate functions'. Louis Fisher of the Congressional Research Service claimed that 'Congress and the presidency function within a political environment that consists of the judiciary, the bureaucracy, independent regulatory commissions, political parties, state and local governments, interest groups, and foreign nations.' [34] Hence, Harriger's suggestion that a more appropriate title would be the Interdependent Special Prosecutor. [35] The crux of the disagreement regarding the ethics legislation was the issue of whether the power to appoint a Special Prosecutor could be taken from the executive branch and passed to the judicial branch and how to establish parameters for removal. [36]

The Watergate regulation provided that '[t]he Special Prosecutor will not be removed from his duties except for extraordinary improprieties on his part' as stated in 28 CFR §0.37 (Appendix) (1973). In 1976, Senator Charles Percy of Illinois made the basic point '[w]hat we are trying to get away from is dismissal just because [the Special Prosecutor] is too vigilant in exercising the responsibility that he holds. And there we must stand firm, there we want no loopholes.' In 1982, Congress replaced the 'extraordinary improprieties' standard – which the original Act had borrowed from

the Watergate regulation – with a 'good cause' standard. In doing so, it accepted the Department of Justice's argument that the 'good cause' standard would mean that the Special Prosecutor was 'no more independent than the officers of the various so-called independent agencies in the executive branch.' (*Morrison V Olson*, 487 US at 692 n32 (quoting testimony)). [37] *Morrison V Olson* (1988) was considered a significant case in that the constitutionality of the Independent Counsel's authority was questioned. The majority of the Supreme Court in the 1988 case found the independent counsel provisions to be constitutionally valid. [38]

On the issue of removal, the Watergate regulations stated that '[t]he Special Prosecutor will carry out these responsibilities, with the full support of the Department of Justice, until such time as, in his judgement, he has completed them or until a date mutually agreed upon between the Attorney General and himself' as stated in 28 CFR §0.37 (Appendix) (1973). Initially, under the Ethics Act, the length of an investigation was theoretically controlled by the special division of the court or the Attorney General. In 1994, Congress stipulated that the court panel determined at regular intervals, which after four years would be annual, whether termination was required because a counsel's investigation 'and any resulting prosecutions, had been completed, or so substantially completed, that it would be appropriate for the Department of Justice to complete such investigations and prosecutions,' as stated in 28 USC §596 (b) (2). [39]

A vague mandate, ample funding from Congress and an open timeframe essentially gave a Special Prosecutor *carte blanche* to pursue an investigation. As Congress was usually the instigator of an investigation, it was eager to provide generous backing.

Freedom to pursue leads into unrelated areas added to the power of the office. In the case of executive branch officials other than the president, the Special Prosecutor could secure a grand jury criminal indictment if he believed that the facts warranted such action. Regarding presidential misconduct, the Special Prosecutor was limited to providing Congress with information for a possible impeachment proceeding. [40]

Some scholars argue that as the power of political parties declined and political deadlock emerged, Republicans and Democrats resorted to the process of Revelation, Investigation, Prosecution (RIP), to achieve what they had not at the polls. In their view, this procedure was unintentionally institutionalised by the Ethics Act and instantly became a powerful weapon for antagonists of the executive branch. Most notably, Ginsberg and Shefter claim that whereas both parties could have focused their energies on attempting to mobilise new or even existing voters, in reality they had little mind to 'stir up trouble from below'. Getting the vote out at the lower end of the socio-economic scale brought its own set of risks. A more viable means of destabilising the opposition presented itself via the RIP process, whereby annihilation of one's political opponent could be successfully achieved through the courts, with the assistance of the media. [41]

Early Uses of the Act:

In the 1976 presidential campaign, Jimmy Carter played the Watergate card to his advantage and promised the electorate 'I'll never lie to you'. [42] This was a high-risk strategy, which, as it turned out, did not pay off. Carter's friend and advisor Bert

Lance was obliged to resign as Director of the Office of Management and Budget after questions arose about his banking practices in Georgia. Lance had been Carter's de facto deputy president, as the president had declined to appoint a Chief of Staff, wishing to avoid the perceived trappings of the imperial presidency. *New York Times* columnist William Safire got hold of the story and quickly dubbed it "Lancegate'.[43] Using all of the Watergate language, Safire ensured that terms such as 'stonewall' and 'smoking gun' would enter into the vernacular. Despite a 394 page report issued by the Comptroller of the Currency, and Carter's insistence that the matter was over, the media refused to let go. In the face of two months of media scandal-mongering, Lance decided to resign, even though no Special Prosecutor had been appointed to investigate him. This was the first in a series of post-Watergate blows for the Carter presidency. [44]

In rapid succession came 'Billygate', which involved speculation regarding the integrity of the president's brother, whose business connections with Libya, combined with his alcoholism, quickly attracted the attention of the Justice Department and the media. William Safire and others demanded details of all dealings with Libyans, and after enormous coverage, the story eventually deflated. Although again no Special Prosecutor was involved as Carter's brother was not an executive branch employee, the Watergate-induced investigative culture was once again demonstrated.

The Special Prosecutor procedures were initiated a total of eleven times between 1978 and 1982. In only three of those instances was a Special Prosecutor actually appointed to investigate. Investigation under the Ethics Act got off to a bizarre start as Carter's chief political strategist Hamilton Jordan was accused by the *New York Times* of using

cocaine in a New York nightclub.[45] One wonders if this was the sort of issue that the Special Prosecutor provision was meant for. It hardly constituted a threat to national security. However, Studio 54 was not just another urban nightclub. It was an institution. It represented all that was liberated or depraved about New York, depending on one's viewpoint. It was a bastion of serious hedonism, where the only rules were that there were no rules. Hence, it was a risky hang out for a senior politician, regardless of what he was actually doing there. In any case, Jordan's trouble in Washington had already begun, when the *Washington Post* recounted the tale of Jordan's infamous 'I've always wanted to see the pyramids' comment, allegedly directed at the Egyptians Ambassador's wife's bosom.[46] The White House did not officially respond. This was followed by the tale of Jordan spitting amaretto and cream on the dress of woman in a bar. This time the White House took no chances and issued a 33 page rebuttal. [47]

So, with an already tarnished reputation, tales of Jordan's alleged debauchery in the basement of Studio 54 were met with glee by the media. And now that the Ethics Act was in effect, the allegation against Jordan went to the Justice Department to decide if a Special Prosecutor should be appointed. The fact that Jordan's accusers were two of the club's owners indicted on tax evasion charges was not taken into account.

As with other early Prosecutors operating under the Act, the individual appointed to investigate Jordan enjoyed a reputation for outstanding personal credentials and unimpeachable reputation.[48] Such standing worked to great advantage for many Special Prosecutors, allowing them to adopt a narrow approach to their job and avoid becoming bogged down in partisan meanderings. Corporate lawyer Arthur H. Christy

had a highly successful New York practice and had already made a name for himself when he was approached by Federal Appeals Court Judge J. Edward Lumbard. The judge, Christy's old mentor and colleague, told him, 'We need a Special Prosecutor. We don't know what the hell it is, but how would you like to try it out?'[49]

Christy was initially cautious, and consulted with his law partners. They were not particularly impressed with the idea but offered no specific objections. Christy was reluctant to accept, but felt conflicted nonetheless. He realised that if he did take on the job, he would be carrying on the tradition of Cox and Jaworski, but this time for a line of cocaine in a club restroom. It was not Watergate. Attorney General Civiletti had told the president he thought investigating the matter was preposterous, but he was obliged to proceed. He concluded that due to the 'limitations imposed on the [Justice] Department during the course of the preliminary investigation I am unable to find that this matter is so "unsubstantiated that no further investigation...is warranted."' Hence, he felt he had no choice but to recommend that a Special Prosecutor be appointed by the court.[50] Carter too was nonplussed but could not intervene.

At his first press conference, Christy promised to pursue 'a very thorough, complete and certainly very impartial investigation as expeditiously as possible in fairness to Mr Jordan.' Aware that there were no geographical limits, Christy gave his assurance that he would be examining the drug possession allegation only. 'I'm going to call it the way I see it. Either way, there's going to be flack.'[51] Once appointed, Christy realised that there were more than legal requirements at work. Those involved could not be seen to undermine the very first attempt to use the Ethics Act. [52] Christy

realised he was blazing the trail. He later recalled his situation; 'So there I was, the first Special Prosecutor. What to do? Where to go? There were no guidelines, no paths to follow, no light to show the way, not even, it seemed to me, any light at the end of the tunnel.'[53]

Christy soon had second thoughts. He pointed out to Civiletti that no ordinary prosecutor would touch such a case, regardless of the outcome, and that perhaps the Attorney General should resist being railroaded into requesting an investigation. However, the matter was already in the public arena, and the investigative process officially underway. It was too late for common sense to prevail. Cary Feldman, Deputy Independent Counsel in the 1990s Bruce Babbitt investigation, points out that one of the most effective uses of the office would have been to examine an allegation and then decline to proceed with an investigation. This would have avoided the wild-goose chase syndrome whilst simultaneously strengthening public confidence.[54] However, the statute was too new for such an avenue to be pursued.

Within a week of assuming the post, Christy contemplated announcing that the case was closed, which he was entitled to do, but momentum and prudence overrode such plans. 'I did not think that result would be politic after all the hoopla of being appointed the first Special Prosecutor particularly as the Attorney General did not decline prosecution.' He also found the level of independence granted to his office unsettling. Consequently, he offered to provide progress reports to the three-judge panel throughout the investigation but they were not interested in hearing from him until the job was complete.[55]

Jordan initially believed that Christy was out to advance his career through a high-profile investigation. In reality Christy was genuinely reticent about accepting the post, did not agree with the investigation and had no need or desire to boost his already successful career. Also, Christy actually believed that Jordan was innocent. Jordan later wrote that after this initial suspicion, he was impressed with Christy's low-key approach to the investigation. [56]

Studio 54's Steve Rubell also publicly commented on how fair and decent Christy had been towards him. Having maintained a 'friendly and informal' relationship with the Justice Department, Christy completed his investigation within six months – twice as fast as his initial estimate.[57] He was operating under a certain amount of time pressure as the White House did not want Jordan to be unduly distracted during an election year. The three judge panel made the Special Prosecutor aware of their desire for a swift conclusion. Ironically, ex-Watergate Special Prosecutor Henry Ruth was hired as Jordan's attorney. When Christy released his report on May 28 1980, it concluded that there was insufficient evidence to bring charges. The grand jury had unanimously voted a No True Bill. [58]

Despite the resulting champagne celebrations in the White House, Jordan did not feel exonerated. His reputation had taken a battering. The press had a field day portraying him as a womanising coke fiend. Now that his name was cleared, he was the media's darling, as they rushed to point out the weakness of the case brought against him.[59]

On a purely practical level, the financial cost was enormous. Taxpayers paid Christy's bill of $182,000 and Jordan had to pay his own bill of up to $100,000, as the law had

not yet been amended to provide for the reimbursement of legal fees in cases where the defendant was not indicted. Then there was the cost to the Carter administration, both on a practical and psychological level.[60] Jordan had been in the middle of various negotiations when the investigation emerged, which obviously caused embarrassment and inconvenience, and, in the light of Carter's noble campaign promises and commitment to the Ethics Act, Jordan's alleged behaviour seemed doubly inappropriate. The scandals which afflicted Carter's administration most likely did not by themselves destroy his chances of re-election in 1980, but they also did him no favours.

In 1998, Carter said,

> '...it was much more serious because of my claiming the high moral ground than it would have been if I had not ever raised the subject that I'm more filled with integrity than others. I mean that was kind of a brash thing for me to do. And possibly a mistake in having done it once I got to be president. But I think that those kind of claims that I put forward about my moral status and my commitment to the truth got me into the White House. So it cuts both ways. It helped me get elected, but it also came back to haunt me later on.' [61]

Jordan was generally considered lucky in that his exoneration was widely publicised and his situation was used by many as an example of what not to do with a Special Prosecutor investigation.[62] Christy, who had handled the matter expeditiously and fairly, emerged from the investigation with his good reputation intact. Speaking in 1999, he acknowledged that in comparison to later investigations, his 'single shot against a singe target' inquiry was 'a piece of cake'. Though in favour of maintaining

the Independent Counsel Act, he felt it needed amendment to exclude personal indiscretions from its purview. [63]

One of Christy's main reasons for supporting the act was the issue of perception. Based on his experience, Christy observed that Special Prosecutors had to made tough decisions and close calls. Their reactions and decisions would not necessarily be the same as those of an Attorney General, as the latter would have loyalty issues towards the administration. 'We want the public to feel the investigation is not tainted with bias, and that whoever conducts the investigation will conduct it without regard to any influence.' For Christy, the appearance of impartiality was as important as the reality. An investigation by the Attorney General of a close colleague would not instil confidence in the minds of the American public and would therefore undermine faith in the investigation.[64] Support of the statute from such an experienced, non-partisan, informed individual certainly gave weight to the pro Independent Counsel contingent.

In the midst of the Jordan drama, there had emerged a sub-plot. Christy and his deputies heard that Carter's current campaign manager Tim Kraft had also used cocaine. Despite Christy's instructions to the contrary, one of his deputies pursued the matter and the allegations went on record. Because the Kraft allegations were not sufficiently connected to the Jordan case, a separate Special Prosecutor was requested and Gerald Gallinghouse was appointed in September 1980. Kraft was obliged to resign, which was another blow to the administration. After a sixteen month investigation, which fortunately cost a mere $3300, Gallinghouse declared that he found the allegations 'so unsubstantiated that it did not warrant further investigation'.[65]

The Kraft case was deemed significant not so much for its content but for the fact that Kraft's lawyers were the first to file a civil suit seeking an injunction against an Ethics Act Special Prosecutor. The suit challenged the constitutionality of the Act, and claimed that Gallinghouse had acquired a high-level executive position without being nominated by the president or confirmed by the Senate. It stated, 'Defendant has, in effect, become the Attorney General of the United States with plaintiff Kraft as his sole and exclusive target. It is plaintiff's position that defendant is exercising executive power and authority in violation of the constitution of the United States; that defendant should be enjoined from proceeding further; and that the legislation pursuant to which defendant is acting is unconstitutional on its face and as applied.' Kraft's attorneys also contended that Gallinghouse's services as a US attorney in Louisiana until February 1978 made him ineligible for appointment as a Special Prosecutor under the terms of the Ethics Act.[66] The constitutional question of the statute could have been settled via *Kraft V Gallinghouse* (1980) but it was not to be, as the Kraft investigation ended before the civil case was decided. Nevertheless, *Kraft V Gallinghouse* was deemed noteworthy in the evolution of the role of the Special Prosecutor.[67]

The Kraft investigation inadvertently highlighted a particular danger of the Ethics Act. This was the vulnerability of the Special Prosecutor if the subject of his investigation decided to counter-attack. Despite its initial agreement, the Justice Department refused to provide assistance to Gallinghouse in the Kraft civil case. The Special Prosecutor was unable to hire a private lawyer at the going rate of $150 per hour as he was 'not authorised to commit the Department of Justice to such fees.' Attorney General Civiletti claimed that defending the Special Prosecutor 'would be

contrary to the exclusive prohibitions of the Act and we could be subject to criticism for that. We believed that it would be better within the spirit of independence of the special prosecutor that he have his own counsel.' The citizens advocacy group Common Cause offered to file an amicus brief for Gallinghouse.[68]

Suzanne Garment argued that turning the likes of the Kraft and Jordan situations into criminal investigations enormously inflated their significance, even if the investigation was not partisan-driven or staffed by zealots. The procedure and attending hype inevitably sent a message that subterfuge and intrigue abounded in government. [69] Even Common Cause, a strong supporter of the 1978 Ethics Act was wary of pursuing cases such as Jordan's and Kraft's 'because they raised fuzzier questions than the basic integrity questions for which the act was designed.'[70]

In a highly critical assessment of the Jordan case, the *Washington Star* editorialised that a law meant to 'slay dragons of official corruption' was instead using 'this heaviest of hammers on every gnat of petty rumour.' The *Washington Post* viewed the Kraft case as proof that Title VI had 'a trigger so sensitive that a senior official's slightest misstep is likely to bring him face to face with the full array of government power.' It called for a change in the law, arguing that 'Special Prosecutors ought to be kept for special cases.' [71] Nonetheless, the law had its defenders. Future deputy independent counsel on the Bruce Babbitt investigation, Cary Feldman, pointed out that Ethics Act jurisdiction had to be defined in some way. As individuals so close to the president, Jordan and Kraft were worthy targets for an investigation. Their actions, in these particular circumstances, were not. Feldman pointed out the difficulty of finding a balance between ensuring an independent investigation of alleged top level

executive misdemeanour and chasing down every unsubstantiated alley of accusation.[72] As the table below illustrates, in the pecking order of public concern regarding vices (in this case, about presidential candidates), cocaine use was taken rather seriously. [73]

THE PUBLIC RATES CANDIDATE VICES		
Accusations re presidential candidate	**Yes, press should report it %**	**Respondent would vote against candidate %**
Uses cocaine	89	91
Was guilty of cheating on income tax	81	65
Lied about war record	72	46
Had been hospitalised for psychiatric treatment	70	55
Was guilty of drunk driving	66	39
Was unfaithful to his wife	40	36
Source: CBS News/*New York Times* poll, May 5-6, 1987		

Garment argued that media coverage of a Special Prosecutor investigation involving an executive branch member would doubtless have involved the possibility, however vague, that they may be imprisoned. When public attention focuses on a scandal, and then the scandal subsides because the Special Prosecutor does not issue indictments, the original story tends to remain in the public consciousness. So, even though an individual under investigation may have their name cleared, and the Special Prosecutor may have acted in a restrained, professional manner, the damage could

remain. It was not just the Special Prosecutors, but the defendants too, that needed to be mindful of their reputations. By the end of the Carter presidency, it was apparent that the post-Watergate laws, institutions and attitudes were permanent fixtures and were not to be taken lightly by those in power. [74]

As well as spotlighting potential scandal, the office of the Independent Counsel had the unforeseen consequence of diminishing the public's trust in government rather than reassuring it that wrongdoing would be investigated and rooted out. Increased legalization of political life should in theory have reduced public concern regarding abuse of executive office. In reality however, ethics laws brought previously hidden aspects of officialdom into the public realm, which, sociologist John B. Thompson argues, has tended to have the adverse effect of increasing public concern. He also suggests that ethics legislation increased the likelihood of political leaders being valued more for their character than their competence. Post-Watergate public trust depletion allowed Carter to build his campaign strategy on the basis of his integrity as well as his competence, which was both necessary and appropriate in the wake of the moral nadir that had preceeded him. Whilst acknowledging that the character issue should not be underestimated, Thompson worried about its significant elevation above competence in the assessment of candidates for high office. [75]

This was not the only perceived disadvantage of the ethics law. Judge Scalia declared in his dissenting opinion in *Morrison V Olson* that the work of a Special Prosecutor was the work of impeachment by other (easier) means and judged Title VI to be 'acrid with the smell of threatened impeachment'. Terry Eastland, a proponent of the 'System Works' school, argued that the traditional methods worked in the

investigation of Watergate in the sense that they ran their natural course and produced results consistent with public opinion. [76]

In his tome on the Imperial Presidency, Arthur Schlesinger sums up his criticism of the Act by stating: 'Of the many consequences of Watergate, one of the worst will be the panaceas it puts into circulation. Generals fight the last war, reformers the last scandal. Reformers therefore run the risk of deforming the constitutional system forever in order to put to rights a contingency of fleeting moment.' [77]

In an attempt to explain the reason for the hard case of Watergate making the bad law of Title VI, Schudson proposes that in liberal democracies, 'reform' is one of the ways the present pays debt to the recent past, and that reform is a key instance of collective memory in action. It was predominantly in the Congressional arena that the System Worked theory was pitched against the System Didn't Work theory. [78]

Whilst many did not view legislative reform as a means of preventing future Watergates, others, including Senators and executive branch officials, urged the Justice Department to take preventative action. Washington insider Lloyd Cutler, among others, believed that the Nixon situation was not an aberration. 'What happened then will happen again; the memory of the last few years may very well prevent it from happening for a decade or so, but we all know it will happen again, just as it happened fifty years earlier in the Teapot Dome scandal.'[79] Schudson's interpretation of these remarks is that reform is explicitly entertained as a functional alternative to memory: short term, personal memory could prevent a repetition, but

long term, personal memory would deteriorate and the deterrent of the law would need to substitute for the protective coating of memory.

In contrast, Senator Howard Baker (R-Tennessee) regarded Watergate as a unique event, and worried that the government could 'overlegislate as well as underlegislate.' He expressed confidence in the press's ability to bring to light allegations of misconduct by public officials. The Senator's opinion was somewhat surprisingly supported by Jaworski, who testified that 'I have the feeling that Watergate has been a lesson that this Nation has learned. It has been a tragic lesson, of course. But I believe it will have a long-lasting effect.' Henry Ruth similarly claimed that Watergate was a 'unique combination of abuses of power, and future possible abuses will not require the permanent existence of a special prosecution force as a deterrent.' [80] Such concerns about hard cases making bad law focused more on the personal rather than the systemic aspects of Watergate.

The propensity to overlegislate was not new. In 1965, President Johnson inadvertently created a monster with Executive Order 11222, which established what became known as the appearance standard. Far more radical than any previous efforts, it directed all federal employees to avoid the appearance of impropriety and the Office of Government Ethics (OGE) had the task of overseeing this ambiguous measure. [81] The Ethics Act had established the OGE in order to impose and oversee requirements on personal financial disclosure and post-employment restrictions. Trying to implement Executive Order 11222 which warned against activities that 'might result or create [the appearance of] an impropriety' could only result in difficulty. As one former OGE director put it, 'you can hang anybody on that language.' [82] Summing up

the negative aspect of the ethics issue, Washington lawyer Peter W. Morgan stated 'success in Washington more and more is gauged not by how many substantive accomplishments one can point to, but rather whether and how well one has avoided any charges of misconduct or ill-chosen words.'[83]

Nonetheless, the growth of the new public integrity management contributed to a significant improvement in the ethics management practices of federal agencies and departments. The newly powered bureaucracy was something that presidents found difficult to accept. Investigation of misdemeanour or impropriety was suddenly no longer in the hands of the executive. Soon, virtually any allegation of improper behaviour brought with it the expectation, if not the demand, for an independent investigation by a Special Prosecutor. The situation had surely spiralled out of control when an independent investigation would often be required to prove that administration or White House officials did *not* do anything improper.[84]

Public awareness of government activities and corruption had increased through the 1970s. This was facilitated by new legislation which gave journalists and the public increased access to information and public meetings. The Freedom of Information Act of 1966 gave reporters new means of getting information on government activities.[85] The other legislation referred to open-meetings. Such a law required that any government agency run by a board must give public notice on when and where it met, must open the session to the public, and must conduct no public business (with certain exceptions) outside this session. These laws made a significant difference to how reporters and state government officials operated. The 1971 Pentagon Papers case paved the way for reduced tolerance of non-disclosure and misconduct in general.

Public corruption prosecutors leaked information to the media, and interest groups including Common Cause put pressure on journalists to publicise their often highly critical findings on federal employees. All this, combined with the expansion of First Amendment rights resulted in a far wider scope for journalists. [86]

The *Washington Post* has long been lauded as the agent that foiled the Watergate conspirators and it did undoubtedly spawn an era of investigatory journalism. However, to an extent, Watergate lulled many journalists into a false sense of security, whereby journalists expected the public to embrace them with open arms. The reality, as it turned out, was quite different. The public was unimpressed with the relentless and probing coverage of public officials as the political power of the news media rocketed. By the late 1970s and early 1980s, the country seemed to be trapped in a great moral and ethical morass and the media was not helping. In the immediate afterglow of Woodward and Bernstein, the public held journalists in high esteem, but this mood did not last.

The public did appear to differentiate between media investigation of illegal conduct of public officials and of their private lives. It supported the former but not the latter. The period of watchdog journalism was an important development for the nation as there needed to be an acknowledgement that government could make mistakes. The social and cultural upheavals of the 1960s led to a fundamental reassessment of previously unshaken assumptions. The establishment was not only questioned, it was challenged in ways that were unprecedented. A corollary of this was that social mores began to morph and the public were exposed to increasingly frank revelations about their leaders that would previously have been unthinkable. The Vietnam War ensured

the complete annihilation of all lap-dog tendencies of the press. By the end of the 1960s, many Americans were concerned with where their country was headed but not all for the same reasons. Some viewed as the solution a return to traditional mores and standards, whilst others proposed radical reform as the only way forward. Each element hoped that media portrayal of society's fundamental ills would urge the masses to gravitate towards their respective movements. [87]

As well as the increased journalistic scope and public access to government information, there was also, by the late 1970s, far wider scope for prosecution. The Brookings Report concluded that it would be prudent to limit to 'truly extraordinary circumstances' occasions where government institutions needed to be supplemented. The consensus was to maintain faith in the workings of the Justice Department, whilst taking comfort in the knowledge that for those rare occasions that warranted it, a Special Prosecutor could be called upon to undertake an investigation where the input of a regular prosecutor may have caused or seemed to cause conflict of interest. The Report stressed the importance of a Special Prosecutor receiving a clear mandate establishing regulations, independence and ensuring protection from abuse. [88]

Watergate's legacy was essentially the passage of a swathe of tougher conflict-of-interest and ethics laws, which both raised the standards of acceptable behaviour and set new hair-trigger traps for public officials. It also bred a journalistic culture that expected politicians to be more open with the public about their personal lives. [89] The creation of the Office of the Special Prosecutor helped to set in motion a new dynamic whereby reaction to executive misdemeanour was more institutionalised and powerful, a situation which would be increasingly illustrated as serious investigations

unfolded in the 1980s and 1990s. The broad political consequences of Watergate were far-reaching and profound on both the legislative activity and political climate of Congress, the conduct of presidential politics and the political orientation of the media. [90]

There were however, a number of problems with the Special Prosecutor provisions in action. According to Terry Eastland, the statute 'has had perverse and unintended consequences, not least of which is to wire the Washington political culture in such a way as to make it think another Watergate is around the corner whenever there is some allegation of malfeasance involving the executive branch.' Eastland insisted that the statute 'has helped elevate the pursuit of government malfeasance to such a high priority that elites in the city seem to believe, perhaps unconsciously, that the whole point of our political system is to root out official wrongdoing.' [91] Garment similarly referred to the statute as part of Washington's 'ethics police', an element in a 'self-reinforcing scandal machine.' [92] Strong rhetoric from both, particularly considering that they were writing before the runaway train of Whitewater.

Schudson and Harriger argue that both critics and supporters of Title VI exaggerate its importance. Schudson takes particular exception to Eastland's view, and instead places emphasis on issues including whether such an office violated the separation of powers doctrine. An individual appointed by a panel of judges, as requested by the Attorney General, answerable to the judiciary rather than the executive branch was bound to raise constitutional questions. Also problematic was the possibility of wasting taxpayers' money by initiating unnecessary and costly investigations which resulted in damaged reputations of those under investigation.

Schudson further wondered if the parameters set for those eligible for investigation were fair and whether the scope should have been increased or reduced. The issue of governing-by-prosecuting was a widespread concern during the Ethics Act years, as there was a strong possibility that using a Special Prosecutor could result in situations better dealt with via the political process instead being unwisely turned into criminal litigation matters. Schudson also warned, in common with many analysts, that such stringent ethics legislation would discourage many eligible candidates from running for public office, but there is no direct proof that this was the case. In essence, he saw the ethics legislation of the 1970s as another manifestation of the 'metalegislative' discussion that perennially plagues reform and reformers: that of overlearning form the past. [93] This brings us back to the System Worked theory versus the System Nearly Didn't Work theory of Watergate.

To its supporters, the Ethics Act promised to usher in a golden age of ethics in government. It was lauded as a milestone in the evolution of modern public ethics management and as a means of reinstating public confidence in government. As each five year sunset was reached, dislike for the arrangement continued to grow and public concern over the decline of ethics in government did not recede. A 1986 Gallup poll reported 'amid widespread reports of unethical conduct and illegal activities in many areas of public life, almost two-thirds of Americans [expressed] dissatisfaction with the honesty and standards of behaviour of their compatriots.' The enactment of ethics legislation had patently not done much to raise public trust in government. [94]

When the law came due for initial reauthorisation, experience indicated the need for some amendment. The investigations of Jordan, Kraft and Secretary of Labour

Raymond Donovan, which returned no indictments, gave credence to the claim that the Act had a 'hair trigger' and was therefore unfair. A civil suit challenging the constitutionality of the provision and a Republican administration hostile to the act itself also contributed to the momentum for change. Change, however, did not guarantee improvement. In 1983, Ronald Reagan signed the amended bill into law despite the reservations of his administration. The 'Special Prosecutor' became the more neutral 'Independent Counsel', and the standard for triggering the Act was lowered to allow the Attorney General to consider the specificity of the allegation and the credibility of the accuser. [95] The standard for independent counsel removal dropped from 'extraordinary impropriety' to 'good cause.'

Roberts and Doss claim that the 1980s provided dramatic evidence of the futility of the battle for public integrity. The Independent Counsel provision was used, individuals were prosecuted (or not), the media reported on corrupt public officials and waste, fraud and abuse in public programmes. The sides dug their heels in and blamed each other. Liberals continued to believe that conservatives planned to destroy the administrative state and ignore the less fortunate. Conservatives blamed liberals for exacerbating the problems confronting the country. And so, 'the stalemate continued and the casualties mounted'. [96]

In her 1992 book on the subject, Harriger concluded that in practice, the independent counsel was neither so bad as its critics portrayed, nor so good or necessary as its supporters believed it to be. Whilst the statute had its staunch supporters too, interest in the topic appeared to be a largely Washington based phenomenon.

Archibald Cox had declared in the wake of his dismissal as Special Prosecutor, that it was the time to see 'whether ours shall continue to be a government of laws and not of men.'[97] Elliot Richardson offered an interesting corollary to this famous phrase, stating that 'the outcome of Watergate, we keep hearing, proved that our system works, that our government is still one of laws and not of men. That's so. But it was never intended to mean good laws without good men, who will always be needed.'[98] As the Ethics Act increasingly became a functioning part of political life, questions were continually raised as to whether the problem rested with laws, men or both.

Footnotes:

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[14] Woodward, *Shadow*, p.65
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[53] Christy, 'Trials and Tribulations', p.2289
[54] Cary Feldman interview with the author, 20 February 2004
[55] Christy, 'Trials and Tribulations', p.2290
[56] 'I wondered what kind of a man would take an assignment like that: to drop a lucrative private practice to prosecute a misdemeanour against a public official. It seemed plain to me: a publicity seeker, an ambitious lawyer trying to get his name in the newspaper. However, Christy surprised me. Not that he did me any favours, but I was impressed with his businesslike manner...he was polite but kept a proper distance.I appreciated his sensitivity to the publicity surrounding my case. He made it possible for me to come and go to his office quietly and without any news leaks: he seemed as interested in keeping my visit out of the papers as I was. When we headed back to Washington I felt better. At least I knew that an honourable man was investigating me and that he seemed determined only to find the truth. I hoped that he would'. ibid, p.2297
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[58] Christy, 'Trials and Tribulations', p.2289
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[82] MacKenzie, *Scandal Proof*, p.69
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[84] ibid, p.97
[85] *http://www.usdoj.gov/oip/foia_updates/Vol_XVII_4/page2.htm*

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[88] Dole and Mitchell, 'Project on the Independent Counsel', p.17
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[94] Roberts and Doss, *From Watergate to Whitewater*, p.124
[95] Harriger, 'The History of the Independent Counsel Provisions', p.11
[96] Roberts and Doss, *From Watergate to Whitewater*, p.128
[97] Richardson, *Reflections of a Radical Moderate*, p.14
[98] Schudson, *Watergate in American Memory*, p.101

4. Iran Contra: Night-time Again in America

'It's Morning Again in America'

(Ronald Reagan)

The Iran Contra affair resulted in the first investigation under the Ethics Act to rival Watergate in its scope and significance. As with Watergate, Iran Contra stemmed from charges that the president and administration officials had abused political power and ignored the rule of law. Flaws in the working and leadership of the government were clearly illuminated. The Reagan presidency had taken Washington by storm in 1981 in the wake of the Vietnam debacle, the Watergate scandal and the Jimmy Carter 'malaise'.

Under Carter, the nation craved strong leadership which would invigorate American self-confidence after the prolonged crisis of national self-esteem in the late 1970s. In the Iran Contra affair, however, the Reagan administration appeared to cross the line between strong leadership and abuse of power. In the Concluding Observations of his Final Report on the affair, Iran Contra Independent Counsel Lawrence E. Walsh stated: 'The underlying facts of Iran Contra are that, regardless of criminality, President Reagan, the Secretary of State, the Secretary of Defence, and the Director of Central Intelligence and their assistants committed themselves, however reluctantly, to two programs contrary to Congressional policy and contrary to national policy. They skirted the law, some of them broke the law, and almost all of them tried to cover up the president's wilful activities.'[1]

1979 was a challenging year for US foreign policy. A new fundamentalist regime in Iran combined with the Sandinista uprising in Nicaragua raised the spectre of instability in both the Middle East and Central America. [2] Reagan was determined to act on his election promise to reassert the nation's strength and will in the realm of foreign affairs. As part of the Reagan Doctrine of using military force to ensure communist rollback, in December 1981, the president authorized the CIA to undertake a covert programme of support for the anti-Sandinista Contra rebels and Congress funded the programme. Before long, Congress concluded that the CIA actions needed to be regulated. Accordingly, Representative Edward P Boland (D - Mass) introduced a series of legislative limits on the use of government appropriations. Fearing that their much vaunted 'Freedom Fighters' would be significantly weakened, the CIA – assisted by the Department of Defense – decided to stockpile arms for the Contras. [3]

Reagan's engaging personality and sunny disposition quickly endeared him to the nation but his policies did not always meet with public approval. In keeping with his determination to halt the spread of Communism, the Nicaraguan issue was a particular bone of contention for him. Reagan was deeply committed to supporting the Contras in their efforts to overthrow the leftist Sandinista government, but his passion for their cause cast a shadow on his otherwise optimistic picture of a rejuvenated America. Despite his pro-Contra stance, Reagan signed the appropriations acts containing the Boland Amendments. In his memoirs, Special Prosecutor Lawrence E. Walsh categorically states that Reagan had no intention of abiding by their restrictions.[4] National Security Council aide Lieutenant Colonel Oliver North became the administration's point of contact and chief fundraiser for the Contras.

In 1981, at a time of increased hijackings, kidnappings and bombings in the Middle East, the Reagan administration announced that its foreign policy would be more concerned with international terrorism than human rights. Reagan sharply increased the military budget in order to gain superiority over the Soviets, but also publicly stated that negotiating with hostage takers was a definite non-starter. Despite this, the plight of kidnapped CIA station chief William Buckley in Beirut was an ongoing issue for the administration.[5]

At this time the US was vocal in its insistence that its allies should comply with US policy in avoiding any form of collusion with terrorists. The Reagan administration acted in violation of its own foreign policy principles and began to deal indirectly with kidnappers of seven American hostages being held captive in Lebanon by the Islamic group Hezbollah. The US agreed to sell arms to Iran on the premise that the Iranian leaders would pressure the kidnappers to cooperate. For the first half of the Iranian arms sales initiative, the American weapons were secretly relayed through Israel. Israel provided weapons from its own supply, on the assumption that they would be replenished by the US. Such a set up was in violation of the Arms Export Control Act which specified that Congress had to be notified of any transfer of US arms by recipients.[6]

In 1986, Reagan authorized the CIA to sell arms direct to Iran. Oliver North, head of this operation, negotiated low purchase prices with the Department of Defense and marked them up for the sales to Iran. Around the same time, money for the Contras was drying up rapidly, and it was at this point that the 'neat idea' of diverting the surplus Iranian money to fund the Contras was spawned. In June 1986, Congress

approved $70 million in military aid to the Contras. The Reagan administration had made a supreme effort to encourage a Congressional change of attitude towards supporting the Contras. Wary of a Vietnam type involvement, the Democrats in Congress were initially slow to commit any military funding to the Contras. By the time of the fourth Boland Amendment in 1985, Congressional opinion was changing. This may have had as much to do with Sandinista leader Daniel Ortega visiting Moscow as with the president's powers of persuasion. The fifth and final Boland Amendment of 1986 included military aid.[7]

In an ironic piece of timing, a mere twelve days before military aid from Congress would be restored, and as the legislation awaited reconciliation by a conference committee, a C-123K plane loaded with illegal supplies was shot down on October 5 over Nicaragua by Sandinista anti-aircraft fire. The surviving crew member, Eugene Hasenfaus, confessed to working for the CIA. When the leftist Beirut publication *Al-Shiraa* published the story of the arms sales to Iran, it raised the suspicion that once again, the US presidency was out of control.[8] The diversion of funds to the Contras illustrated that the Reagan administration had made a deliberate and sustained effort to ignore and deceive Congress.

When the Iran Contra scandal broke, the Reagan presidency became little short of paralysed. Reagan himself grew so withdrawn that Chief of Staff Howard Baker even considered invoking the 25th amendment to remove a disabled president. As Baker's advisor, Jim Cannon, realised, this could cause a constitutional crisis. However, he concluded that if the president was as incompetent as his aides indicated, invocation of the 25th amendment could be the only way to serve the national interest. [9]

Well before the Iran Contra scandal broke, there had been a feeling among the administration's inner circle that the White House was 'strangely adrift.' [10] Beyond his charm and personal grace, the president struck many observers as having little or no specific mandate for the future. Moreover, even after four years in the White House, Reagan still appeared to regard the government as his adversary rather than his responsibility, a view reflected in his willingness to circumvent governmental restriction in Iran Contra. [11]

In 2001, political scientist Michael Genovese described him as the Wizard of Oz president. From this perspective, Reagan appeared invincible at first glance, but on closer examination, a more weak and vulnerable president was revealed; one who had a wonderful ability to deliver the lines of a script but little else. As these words were written, however, a historiographical debate on the merits of the Reagan presidency was moving into full swing. As is the norm with the historical process of judging presidents, Reaganism has gone through the three major cycles. During the initial post-office summation, he received some rough treatment, followed by a rather early reappraisal as a result of the collapse of communism. In more recent times, the revisionist perspective, coming with its own epicycles, has cast Reagan as a 'pragmatic conservative,' an astute political strategist who was not the one-dimensional jelly-bean actor that his critics maintained. However, the extravagant claims made by Reagan's proponents and opponents ensure that the arguments regarding his place in history and whether he changed the world will continue.[12]

The diversity of opinion regarding his legacy was highlighted in his *New York Times* obituary with the following quotes. The former speaker of the House, Tip O' Neill (D

– Massachusetts), a contemporary of Reagan, had once said: 'Most of the time he was an actor reading lines who didn't understand his own programmes. I hate to say it about such an agreeable man, but it was sinful that Ronald Reagan ever became president.' In stark contrast, and in keeping with the emerging trend in Reagan historiography, Kenneth Lynn, Professor of History at the Johns Hopkins University stated that Reagan 'will remain as one of the most important presidents of the twentieth century.'[13]

In any event, the secret attempt to fund the Contras must figure strongly in evaluating Reagan. It was in direct violation of public law and a serious threat to the constitution. Despite the seemingly watertight language of the Boland Amendment, aid to the Contras was continued regardless.

Public Law 98-473, 98 STAT 1935-37, sec 8066 stated: 'During fiscal year 1985, no funds available to the Central Intelligence Agency, the Department of Defense, or any other agency or entity of the United States involved in intelligence activities may be obligated or expended for the purpose or which would have the effect of supporting, directly or indirectly, military or paramilitary operations in Nicaragua by any nation, group, organization, movement or individual.' [14] Such a straightforward declaration was nonetheless insufficient against an administration determined to pursue its agenda regardless of legal impediment.

Essentially, Iran Contra, like Watergate, highlighted the principle that the United States is a constitutional republic of limited government. Nixon's effort to legitimise the Imperial Presidency was encapsulated in his contention: 'When the president does

it, that means it is not illegal.' This flew in the face of constitutional principle. The president cannot be above the law. As Supreme Court Justice Louis Brandeis had put it in 1928: 'Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law, it invites every man to become a law unto himself, it invites anarchy.' [15]

Long after the events of Iran Contra, when Independent Counsel Walsh was forming his concluding observations, he posed the question of what protection do the people of the US have against a concerted action by powerful officials. Constitutionally-provided Congressional oversight could only work if the legislature was kept informed, but often, in the perceived need to keep government functioning, this did not happen.[16] Certain administration members were determined to carry out their objectives regardless of official constraints. To Oliver North, foreign policy was a continuation of war by other means and the president was the nation's commander in chief, even in peacetime. As with Reagan, CIA Chief William Casey had assumed office with a straightforward mission: he wanted to break free of the constraints on covert action that Congress imposed on US intelligence agencies in the 1970s. If individuals at the NSC and CIA were confused about events in Nicaragua in early 1985, they were not alone. Congress and the public were equally in the dark. [17]

The Iran Contra scandal reached its peak at an unfortunate time for the administration. The economy was not booming, the first signs of the Savings and Loan crisis were emerging, the Democrats had regained a majority in the Senate hence the sudden political potential of this Republican scandal was deemed enormous. [18] This was

classic scandal timing; an event embarrassing to the executive publicised by the opposition during the administration's second term.[19]

The shadow of Watergate loomed large, and once the scandal was exposed, Reagan found himself under immediate pressure to come clean about what he and his officials had done. This time, there could be no whitewash at the White House and the need for a speedy clarification was paramount. As soon as the scandal broke, all sides scrambled to acquire some sort of legitimacy for their stance and take hold of the political agenda. [20]

In the midst of the administration's frantic spin control, Congress demanded hearings on the arms sales. Casey, North, Poindexter and McFarlene attempted three cover-ups. They tried to hide the truth about the first Israeli arms shipment in August 1985, which was very probably illegal and the November 1985 shipment, which did not have legal authorization. They also urgently needed to draw a veil over the existence of 'Project Democracy', the umbrella term for the privatised foreign policy initiatives undertaken by North and his colleagues.

As the pressure from Congress and the media built, Reagan agreed to hold a press conference on 16 March 1986. His speech was undoubtedly full of factual errors, how many of which were intentional lies is hard to gauge. [21] Reagan's memory may well have been eroded at this juncture by the early stages of the Alzheimer's Disease that would become more pronounced after he left office.

Role/Reputation:

On December 19 1986, a three judge panel named Lawrence E. Walsh, former district court judge, diplomat and deputy Attorney General, as Independent Counsel for the Iran Contra matter. Walsh was considered to be a quintessential Eisenhower Republican and a solid, non-zealous individual. He had stated that whilst honoured to be chosen, he assumed the role would go to Robert Fiske (later the first Whitewater prosecutor), who appeared to have a better balance of prosecutorial experience and judiciousness for the task. Walsh was chosen, however, for his excellent reputation, background and credentials.

Judge McKinnon explained

> 'No-one else really touched him on background and experience. He had been president of the ABA, had been involved in the Little Rock [school segregation] litigation, had foreign affairs experience, Department of Justice experience, had been a federal judge, had been a prosecutor with Dewey in his early career...there was no-one in America that came close. In addition, he met the fundamental requirement of being generally recognized as someone not influenced by political considerations.' [22]

Attorney General Meese later admitted that requesting a criminal investigation into the diversion of Iranian arms sales funds to the Contras was partly politically motivated. 'The actions were taken' he explained, 'because they were the appropriate actions under any circumstances but one of the concerns was to prevent this situation from being used by policy opponents of the president, yes.' [23] Reagan had already

appointed a Special Review Board headed by Senator John Tower on December 1 to provide a study of the operations and future of the National Security Council staff.

Walsh set the scene of his arrival from Oklahoma in Washington where his was only one of a myriad of operations probing the affair.

> 'When I arrived to take the formal oath of office on December 19, Washington already teemed with Iran Contra investigators. I inherited the FBI agents who had been mobilised initially by the Attorney General and who outnumbered and, at first, seemed to dominate my legal staff. The topflight press corps were also going all out after the story, and excellent reporters were uncovering fresh details almost daily. A three-member blue-ribbon panel appointed by the president and headed by former Senator John Tower was reviewing the operations of the NSC and its staff. On Capitol Hill, the Senate Intelligence committee's hearings continued, and both houses of Congress were establishing select committees of inquiry.' [24]

The Tower Commission was undoubtedly the dominant player in the early days of the investigations. However, in keeping with the emergence of personalised scandal politics, when the Commission released its report in late February 1987, media attention focused almost exclusively on Reagan himself rather than the NSC. [25] Keeping the mandate of the Tower Commission in mind, Reagan swiftly replaced Admiral Poindexter with an untainted individual. According to Theodore Draper, it was Chief of Staff Don Regan's suggestion to appoint an independent commission because 'nobody would believe it if just Ed Meese looked into this.' Nonetheless, Regan had strong reservations about appointing an Independent Counsel[26]

Because the appointment of an independent counsel carried a certain amount of political baggage, the move indicated that the president was taking the matter seriously and all manner of shovel brigades would be used to clarify the situation. This was the theory. In reality, however, White House promises of truth and cooperation were not fulfilled. For example, the Tower Commission could not force key individuals such as North and Poindexter to appear before it, thus rendering its report at best incomplete. A similar situation hindered the Senate Intelligence Committee Report. [27]

However, the Tower Report did conclude that errors had been made, laws had been broken and serious flaws had occurred in the foreign policy making process. The report did not claim illegal conduct by Reagan himself but concluded with the gentle rebuke that 'the President's management style is to put the principal responsibility for policy review and implementation on the shoulders of his advisors.' It implicitly shifted blame for Iran Contra to those advisors in affirming that 'knowing his style, they should have been particularly mindful of the need for special attention to the manner in which this arms sales initiative developed and proceeded.' [28]

Under pressure, Meese did gather and provide a version of the essential facts in an early press conference, while North and his colleagues were engaged in shredding documents. The shortcomings of the Congressional investigation committee became apparent from its inception. Composed of members of the House and Senate, it resembled two committees rather than one and was riven by institutional rivalry. Members were eager to involve themselves in the investigation, in no small part due

to the possibility of a moment in the limelight. Hence the enlarged size of the committee did not make for swift and streamlined decision making. [29]

Despite his reservations regarding the appointment of an independent counsel, Meese was obliged to capitulate in the face of widespread demand. The Justice Department increasingly appeared to have a conflict of interest, particularly as Meese had delayed in sealing off North's office and neglected to issue subpoenas to North and his colleagues as soon as the scandal broke. Meese had procrastinated, and during that time, those involved had ample opportunity to shred relevant documentation claiming that they were unaware that a full criminal investigation was underway. [30] At a time of such executive aggrandizement, the need for an external and objective counsel was great and appointing one was generally viewed as an astute tactical move. Almost two centuries earlier, James Madison had written to Thomas Jefferson in 1798:

> 'The management of foreign relations appears to be the most susceptible of abuse of all the trusts committed to a government, because they can be concealed or disclosed, or disclosed in such parts and at such times as will best suit particular views; and because the body of the people are less capable of judging, and are more under the influence of prejudices, on that branch of their affairs, than of any other. Perhaps it is a universal truth that the loss of liberty at home is to be charged to provisions against danger, real or pretend, from abroad.' [31]

Historian Theodore Draper argued that the Constitution imposed limits on the president particularly in his ability to make war. However, this by no means prevented

the president from actually waging war, as long as there was no overt declaration or admittance of the matter. [32] The President's capacity to pursue an interventionist policy abroad was partially circumscribed by Congress, notably regarding Congress' control of the power of the purse. However, Reagan sought to circumvent such restrictions through covert measures pursued outside the conventions of constitutional balance. Iran Contra highlighted two particular areas of ambiguity in constitutional powers - the scope of executive power in foreign affairs and the issues involved in pinpointing responsibility in the separation of powers system. This ensured that the Iran Contra affair was complicated and the decision to prosecute would be more momentous.

However, despite the complications, the opportunity for the opposition to bask in the administration's embarrassment was all but irresistible. Special Prosecutor Investigations invariably involved the 'in' party accusing the 'out' party of overtly partisan use of the statute and for strategically leaking congressional investigation allegations to the press. Opponents of the independent counsel provision included US attorney for the Southern District of New York Rudolph Giulaini, who claimed that allowing congressional involvement further politicised the process because 'calls for the special prosecutor are useful to the opposition party'. [33] Despite the widespread opposition, there were those who appreciated the pragmatism of appointing an independent counsel. Attorney General Meese did not waste time with a lengthy preliminary investigation before getting the Iran Contra independent counsel investigation underway [34]

In his memoir, Walsh outlined the challenge of conducting a complex, difficult and controversial criminal investigation in the midst of a constitutional maelstrom. He was strongly aware of the widespread opposition to his investigation and had the unenviable task of trying to unravel an enormous cover-up whilst defending his office from a two-pronged attack by Republican Congressional members and the Reagan cabinet.[35]

In spite of this, Walsh admitted that he respected what the Reagan presidency had so far achieved. His caution was largely guided by the fact that he did not sense public anger with Reagan, unlike the Watergate situation where the feeling of public betrayal targeted at Nixon had been palpable. Walsh, along with his fellow investigators, including virtually all of the press, did not have the will to attack a popular president. Watergate was so fresh in everybody's mind that the general consensus was to proceed with caution. Such a consensus suggested that it was politics more than the whole truth that shaped the strategic perspective of the 'independent' counsel. No-one, least of all Walsh, wanted another president-paralysing scandal. Walsh decided to pursue North and Poindexter to begin with and desist from attacking the president. His mode was one of deference to the president but not to his men. [36]

Bob Woodward argued that it was Reagan's White House lawyers and not the independent counsel, the Tower Board or Congress who conducted the most vigorous of all of the Iran Contra investigations. Chief of Staff Donald Regan had been replaced by Howard Baker, who saw the importance of an aggressive internal investigation, and one kept out of the media spotlight. [37] In this highly unusual situation, Baker and his colleagues carried out thirteen interrogations of the president,

set up an internal team of sixty-seven people and examined over 12,000 documents. Their conclusion did not prove or disprove Reagan's claim to have had no knowledge of the diversion of funds. [38]

In the Concluding Observations of his Final Report, Walsh explained that the role of the independent counsel was generally not well understood. The office was inherently different to that of US attorneys, district attorneys or private attorneys, and comparisons to these were misleading. This was not about an individual being put in charge of an existing agency, but instead an individual being plucked from a private practice and instructed to create a new agency, as assigned by the court. Unlike a US attorney, the independent counsel was obliged to operate not only without the support of the government, but was expected to actually confront the government with little expectation of co-operation. The likely government reaction to it was downright hostility, which could be manifested in failure to declassify information, suppression of documents and a variety of evasion tactics. [39] This institutional disrespect for the independent counsel would cause a myriad of problems, frustrations and delays for Walsh.

Another hugely important area where Walsh felt his role was hindered was where Congress granted what was known as 'use immunity' to North and Poindexter so that they could eliminate the need for testimony from Reagan and Vice President George Bush. The usual logic of immunity, to ensure that a witness would incriminate someone more important than himself, was bypassed. North and Poindexter incriminated themselves only and received immunity anyway. This caused major setbacks and complications for Walsh's investigation. [40]

Congress had taken the easy option and accepted the scenario of a runaway conspiracy conducted by subordinates rather than tackle the unpleasant issue of presidential responsibility. North and his associates were allowed to present their actions as resulting from 'a legitimate frustration with abuses of power and irresolutions by the legislative branch; and an equally legitimate frustration with leaks of sensitive national security coming out of both Congress and the executive branch.'[41] In his Final Report, Walsh concluded that the Congressional Committees knew that they had been deceived but did not have the heart to really pursue the matter. The whole thing would have taken the country to the epicentre of the constitution and the wounds of Watergate had not sufficiently healed for that.

Publicity and expediency were key factors in the Congressional investigations which was quite the opposite of Walsh's priorities. With its pond-skating approach, the Congressional arm of the investigation actually conflicted with and frustrated Walsh's efforts to work his way up from the bottom in examining every individual involved in the scandal. There was a distinct lack of Watergate repetition at a number of levels. No one really shouted for impeachment, no one compared Reagan to Nixon and no-one used the trump card of executive privilege. It was the immunity issue, however, that particularly enraged Walsh, who felt that it made a mockery of his entire investigation.[42] In his opinion, immunity, combined with the administration's refusal to declassify relevant intelligence information, was the real scandal of Iran Contra. Whilst he experienced nothing like the brutal fate of Cox, Walsh faced his own more subtle coup, for the White House and Congress between them made his task nigh on impossible. [43]

In the face of adversity, Walsh insisted that his office had achieved a number of successes and his role had not been hollow. He brought indictments against nine government officials and five private citizens and achieved seven guilty pleas and four convictions (two of which were later overturned). More importantly from his perspective, in maintaining his reputation as a dogged prosecutor, he provided a more accurate view of how the two clandestine policies of arms sales to Iran and maintaining the Contras' body and soul' merged and ended up crossing the boundaries of criminality. The findings of his investigation were clear and coherent in comparison to the contradictory conclusions of the Tower Commission report. This claimed that the president had been aiming at a geo-strategic opening with Iran but also asserted that there was no evidence 'that President Reagan and his immediate colleagues knew what was going on.' [44]

There was little to admire in the behaviour of America's highest leaders. President Reagan hid behind his management style, delegating his authority to officials whom he assumed would act responsibly and then denying any knowledge of what was going on. This allowed him a certain amount of plausible deniability but it also made him look like a president not in control of his administration.[45]

In full non-controversial fashion, the Tower Report directed its criticism at Reagan's 'management style,' which no doubt had enormous short-comings but fell far short of dealing with the burning issue of the political decisions. By concluding that the president probably did not have prior knowledge of the diversion of funds, the Tower Commission may very well have saved the president from impeachment. With hindsight, it appears probable that Reagan knew of the diversion but was provided

with sufficient plausible deniability by his staff, including John Poindexter who said of himself that 'the buck stops here.'[46]

The Tower Commission proposed the aberrationist version of events, in which a 'cabal of zealots' was responsible for the misdemeanour and gave the president a mild rap on the knuckles for his casual management style. To the relief of many, it did not delve into the more controversial aspects of the affair. Nor did it focus on individual criminal culpability, arguing that this was a job for the independent counsel. All concerned appeared eager to promote the Tower version of events, and Senator Sam Nunn (D – Georgia) complimented the Commission for its depth, detail and honesty and for the fact that its concluding press conference was held at the White House. This apparently sufficiently illustrated the strength of US democracy. [47]

The Independent Counsel's refusal to subscribe to the aberrationist theory, led to accusations of partisanship from his detractors, even though Walsh had impeccable Republican credentials. He merely found that the Iran Contra affair was the result of two foreign policy directives of questionable legality by the president which were carried out by NSC staff with the knowledge and support of members of the CIA, State and Defense Departments. [48]

Spin control became the order of the day at the White House and before he departed, Chief of Staff Donald Regan aimed to direct the blame on the lower echelons of the administration. Regan later conceded that the ethic had simply and quickly become 'every man for himself.' [49] The one individual whose reputation was suddenly and utterly on the line was that of Lieutenant Colonel Oliver North. Faced with the

prospect of being investigated for possible criminal violation of the law, as repeatedly implied by the Attorney General, North was horrified. He recalled, 'It was – I guess – probably one of the most shocking things I had ever heard.' North had anticipated a possible political scapegoat role for himself, but had never envisaged a criminal aspect. 'It never crossed my mind that this could be contemplated as criminal behaviour' he recalled. [50] Theodore Draper suggests that North's inability to admit to wrong-doing meant that he was willing to be a martyr in a holy cause. Criminal scape-goating, however, cast a different light on his role and gave him a sense of having been betrayed. [51] North, it appeared, genuinely had no regrets. Of the diversion, he repeatedly stated, 'I don't think it was wrong. I think it was a neat idea.' [52]

North felt enormously aggrieved when faced with the full bureaucratic firepower of a government that he had faithfully served over the years. He felt particular ire towards the independent counsel who was conducting his investigation into North's actions with gusto. However, Walsh in turn felt aggrieved at the immunity granted to North and Poindexter. This essentially undermined the role of the independent counsel and to an extent, negated the purpose of the criminal investigation. Walsh was obliged to prove that no immunised testimony whatsoever had been used, which turned out to be an impossible task. As a result, the DC Circuit Court convictions of North and Poindexter was struck down on appeal. [53]

It was apparent that Walsh's role was being challenged from every angle. As well as dealing with a variety of roadblocks from Congress, the independent counsel had entered into protracted negotiations pertaining to the North trial with the Attorney General, the defence and the district court over access to thousands of pages of

supposedly relevant classified documents. [54] Yale Law professor Harold Koh pointed out that the prosecutor's case 'degenerated into the case of the US V itself...the Justice Department, the Congressional Committees, the White House and the intelligence agencies all subsequently threw major roadblocks into the independent counsel's path.'[55] Institutional competition surrounding this case made it remarkable that the North and Poindexter cases ever made it through trials. What is clear is that the competition created a situation in which the criminal investigation and prosecution ended up being relatively meaningless.

Walsh viewed his primary role as being that of prosecutor of criminal conduct, rather than that of information provision to the public. He viewed the latter function to be the responsibility of a Congressional inquiry. However, the ambiguities about the legitimate exercise of power by the executive's higher echelons and North and Poindexter's immunity grants greatly reduced the likelihood of their prosecutions. Walsh feared that the negative Congressional and executive interference in his investigation would impose 'costs on society that far transcend the failure to convict a few law-breakers. There is significant inequity when...the more peripheral players are convicted while the central players in the criminal enterprise escape punishment. And perhaps more fundamentally, the failure to punish governmental law breakers feeds the perception that public officials are not wholly accountable for their actions.' [56]

Based on his experience, Walsh highlighted the limits of the independent counsel office when dealing with an investigation as grave as that of Iran Contra. In a situation where the future of the presidency was an issue, the stakes were high, and Walsh himself doubted if there could even be such a thing as an 'independent' counsel.

'Time and again' he recalled he found himself 'at the mercy of political decisions of the Congress and the Executive Branch.' [57] The investigation had dozens of tentacles, and Walsh and his team pursued just about all of them, including CIA involvement, classified information and the money trail. Walsh did nothing for his popularity by indicting and trying CIA members but he felt obliged to pursue all leads, wherever they went. Unfortunately, many of the leads took Walsh and his team further from, rather than nearer to, the answers. [58]

It was a full five and a half years into the investigation before Walsh's team finally had a strategic rethink. All along, they had pursued a conventional strategy of working from the bottom up, but they had never actually progressed beyond the middle echelons of those involved in the affair. They had neglected to pursue the decision makers. At this point, Reagan had been out of office for three and a half years. Once again, unperturbed about his unpopularity, Walsh contacted Reagan's private attorney, Theodore Olson, later George W Bush's solicitor general.[59]

Walsh had always refrained from pursuing the president but in the years since Reagan had left office, various newspapers had hinted that the independent counsel might actually target him. Walsh announced in July 1992 that he wanted to get Reagan's sworn testimony. Such a move compounded his negative reputation among his detractors, including Olson, who viewed the procedure as a travesty. Olson had a ferociously negative view of the independent counsel as he had previously challenged its constitutionality and lost in the Supreme Court. However, he was astute enough to realise that cooperation was essential to protect Reagan's reputation in history.

Equally importantly, Olson realised that there were probably no legitimate grounds for a former president to resist a subpoena in a criminal investigation.[60]

On a personal level, Olson was deeply opposed to the entire Walsh investigation and was certain that the independent counsel was overstepping his mandate. However, from Walsh's perspective, the move was partly about maintaining his reputation for thoroughness and fairness. 'We want to close the loop' deputy independent counsel John Barrett explained to Olson, "We want to protect ourselves from criticism. When the investigation that's gone for years is finally closed down, people will say, 'Well, Walsh never interviewed Reagan.' " [61]

As it turned out, the Reagan interview was both a disappointment and a relief for Walsh. All the preparation was useless as Reagan remembered literally nothing of note. Walsh was in no doubt that this was not an act. Two days after the interview, the *Washington Post* declared 'Walsh may seek indictment of Reagan in Iran Contra.' Immediately Walsh put the matter to rest with a letter to Olson declaring that this would not be the case.[62] Morally and ethically, this was a most fortunate decision. On November 5 1994, Reagan wrote a letter addressed to 'My fellow Americans' which began with the statement, 'I have recently been told that I am one of the millions of Americans who will be afflicted with Alzheimer's Disease.' [63]

In 1998, Bob Woodward interviewed Walsh at the Watergate hotel, where, ironically enough, he had stayed during the investigation. Woodward never subscribed to the notion of Walsh as a ferocious prosecutor hell bent on punishing the president. In his informed opinion, Walsh had been continuously deferential to the president. 'Well, I

admired him as a partisan Republican' Walsh began, 'because he carried success with him and he was terribly likeable, at least from the outside.' [64] Explaining why he held off for so many years before interviewing Reagan, he said 'I figured I'd only get one shot at him' Walsh said. He wanted to be respectful. 'One, I didn't think I should go back repeatedly, although I would have done if I'd had to, and second, I thought there would be a public reaction if I started, you know, did anything that looked at all like I was heckling him.' [65]

Despite the initial furore about Reagan's future once the scandal broke, the independent counsel resisted jumping on any bandwagon. He persevered with his traditional prosecutorial strategy, working from the bottom up. Here, however, as he would later admit to Woodward, was where the problem developed.[66] He realised he had been too deferential to Reagan. For example, his team had interviewed Shultz several times and tried to shake him up. Walsh recalled that they had never dealt that severely with Reagan, stressing that the lack of a smoking gun worked enormously in Reagan's favour. [67]

Walsh entitled his memoir of the investigation '*Firewall*', a name which succinctly summed up his interpretation of the administration's stand. The memoir was written in recognition that the record of his investigation and the reputation of his office were strongly in need of defense. By the end of the Iran Contra investigation, the reputation of the office had become contested political terrain. Despite Walsh's impeccable Republican credentials, working in the midst of constitutional turbulence and widespread opposition to his investigation ensured that many Republicans increasingly questioned his motives and reputation.

In a radical departure from the Watergate experience, undermining the reputation of the office became not only necessary but justifiable to partisan elites. Walsh faced increasing isolation as the parallel investigations pursued the path of least resistance and swiftly subscribed to the aberrationist theory of events. In his quest for thoroughness and fairness, Walsh drew sustained criticism, particularly at the prospect, albeit brief, of his office seeking to indict the former president. As Walsh's reputation deteriorated, for the first time, criticism focused on an independent counsel, rather than just the statute itself. This was a significant point of transition in the transformation of the independent counsel from hero to villain in the canon of late twentieth century American politics.

Legitimacy/Independence:

Oliver North's aide, Colonel Robert Earl, outlined three distinct phases in the White House reaction to the scandal. Initial denial was followed by an unsuccessful attempt to fob off Congress with a story that would not endanger the project. Here the problems really started, as Earl recalled 'phase two...was not washing, was not going over, and that therefore the decision was taken to go to phase three, which was termination of the project; that it was politically embarrassing and that the political mistake, if you will, of the whole Iran Contra operation would be blamed on Oliver North. He was going to be the scapegoat for this failure, this mess of the Iran thing, and so he was doing his duty.' [68]

Reagan himself remained relentlessly defiant and unrepentant. Others in the administration emulated his stance. Nonetheless, there was a heightened sense that the president was either stalling or completely out of touch, since he needed two internal investigations to discover what his own NSC had done. [69] Reagan's acting skills went into overdrive as he maintained the façade that the situation was under control, but events and headlines outstripped the act and soon desperate measures were called for. Hence the grants of 'use immunity' for North and Poindexter by the Senate Intelligence Committee.

As Walsh's frustration over the immunity grants grew, North was horrified at the scope and power of the independent counsel as well as his portrayal in much of the press. *Newsweek* referred to North as 'the Rambo of diplomacy, a runaway swashbuckler who has run his own foreign policy from the White House basement.' [70] Such headlines conveniently kept the emphasis on the minions and away from the master. Of course, there were numerous others under investigation besides North and Poindexter, both of whose convictions were overturned. These included Assistant Secretary of State Elliot Abrams, National Security Advisor Robert McFarlene, Secretary of Defense Casper Weinberger, the CIA's Duane Clarridge, Alan D. Friers Jr., Clair E. George, (all pardoned), Joseph D. Fernandez, (case dismissed) and businessmen Carl R. Channel, Thomas Clines, Albert Hakim, Richard Miller and Richard Secord.[71] Interestingly, only the businessmen's convictions were sustained.

Not surprisingly, North had held the Iran Contra hearings in remarkably low regard. He saw them as mere politics. In his memoirs, he described the hearings as just one more battle in the two-hundred year old constitutional struggle between the legislative

and executive branches over the control of foreign policy. He saw constitutional hearings as a means to damage and even humiliate the presidency but was particularly shocked at the idea of forced testimony of public witnesses who would also be facing an independent counsel. In his opinion, taken together, the hearings and the special prosecutor became a way for the two branches of government - legislative and executive – to avoid resolving the broader issues of who would determine foreign policy.

Like Don Regan, North spoke of the 'every man for himself' attitude that prevailed in the White House by summer 1987. He was critical of the administration for allowing the actions of those who had served it to be criminalized, in the cause of distancing itself from the real issues involved. Ironically, North's main complaint paralleled that of the left-wing analysts of the scandal. The Committee's attention remained fixed on the diversion, which focused attention away from many of the deeper issues and, from North's perspective, kept the spotlight on him. [72]

North continuously questioned the legitimacy and motives of the independent counsel in his memoirs. In *US V North* (1988), he was appalled to see House Iran Contra Committee Chairman Lee Hamilton testifying against him at his trial. He deliberately referred to Walsh always as a special prosecutor rather than using the correct and more neutral term of independent counsel, in keeping with his assumption that Walsh was neither independent nor neutral. He scorned Walsh's public affairs staff, whom he viewed as nothing more than spin doctors promoting a biased view of the proceedings. In North's view, the special prosecutor's public affairs officers took every opportunity to huddle outside the courtroom with members of the press to

'clarify' prior or upcoming testimony and evidence. [73] The special prosecutor, he declared, answered to no-one, and he had only disdain for the staff who he insisted had only sought their jobs in the hope of achieving increased visibility. 'Unlike other public prosecutors, who are required to take cases as they come in, these guys were more like a lynch-mob in pin stripe suits.' [74]

North's attack on Walsh as politically motivated made him a hero to conservative sections of the media and public opinion. He skilfully portrayed the Contras as freedom fighters and in doing so won increased support.[75] North viewed the independent counsel office as a strange entity created by Congress for the sole purpose of going after members of the executive branch. This was essentially an accurate description, apart from the crucial point that the office went after members of the executive branch when they had circumvented or broken the law.[76]

As with other defendants being investigated by independent counsel, North bemoaned the ever-widening scope of the inquiry which rapidly came to 'include just about everything short of fishing without a license.' Acknowledging that the Attorney General in theory could fire the independent counsel, North claimed that in practice it was as if Congress has its own Justice Department. He declared, 'The Independent Counsel is independent alright: independent of financial restraints, independent of time limitations, and independent of any obligations to show results within a given period of time. The office of the independent counsel has become a pervasive and powerful machine, a legalistic tank that can roll over and flatten its victims beneath its unlimited time, size and money.' [77]

North's critique foreshadowed the views of those of those being prosecuted in the Whitewater investigations in the 1990s. In Whitewater however, the situation was that of a perceived right-wing zealous prosecutor harassing a more left-wing administration. In the Iran Contra case, it was a not-so right-wing prosecutor harassing a trenchantly right-wing administration. The common thread was that all defendants felt persecuted as well as prosecuted.

In words that would be echoed by very different individuals a decade later, North complained that the independent counsel held the largest and most unaccountable prosecutorial staff ever assembled in the US. It included over fifty lawyers, seventy five investigators and numerous support personnel. North was not alone in his outrage at the fact that the independent counsel office was the only government office in the US subject to no oversight and no budgetary restraints. Walsh's lawyers were held at the top of the federal pay scale and at one point, he claims, Walsh's press office rivalled that of the Attorney General. It was, he argued, 'like a whole separate law firm being financed by the American taxpayers, who are powerless to limit it or stop it.' [78]

Whatever one's opinion of North, his activities and his politics, he provided a descriptive narrative of life on the receiving end of the independent counsel's power. The right-wing perspective on the actions of the independent counsel and the hearings held that they became the means for Congress to criminalize legitimate policy differences between co-equal branches of government. This, however, neglects to address the fact that the US policy of no arms for hostages and the Boland Amendments were blatantly ignored. Such actions, from a rational perspective, only

underlined the need for a system of checks including the independent counsel office. Iran Contra, like Watergate, grew out of a conflict between a liberal-orientated Congress and a conservative-orientated Presidency. In both cases, partisan frustrations led the president to overstep constitutional constraints in pursuit of policy objectives.

One particular outcome of Walsh's investigation was that it offered a new avenue for critics to challenge the Ethics Act. In particular, as a result of efforts by Senate Minority Leader Bob Dole in late 1992, Congress allowed the independent counsel provisions to expire without reauthorisation. (See Chapter 5 for details). Dole was not alone in his opinion that the legislation should be allowed to expire due to Walsh's perceived abuse of power. Dole declared his exasperation by stating that 'each and every workday, Mr Walsh and his staff report to work at their lavish suite of offices in one of Washington's most expensive buildings. Each and every workday, they continue to add to their thirty to fifty million dollar bill, payable by the United States taxpayers...Today I am sending a letter to Attorney General Thornburgh, asking him to request the court to [terminate the office].' [79]

Others echoed Dole's sentiments. Congressman Bill Broomfield, the ranking Republican on the House Foreign Affairs Committee supported Dole's request in a letter signed by fourteen other senior Republican congressmen. The letter concluded by saying, 'The time for the Iran Contra investigation has come and gone; it is time to wrap it up.' As it happened, the Attorney General's response stated that he was under the impression that Walsh's investigation was nearing completion anyway, and that his intervention would be unnecessary. [80]

Walsh acknowledged that Dole was far from alone among the Republican right-wing in his resentment of what he perceived as Walsh's interference with George Bush's 1992 presidential campaign. Four days after the 1992 presidential election, the *New York Times* commented 'in the finger-pointing ambience of the post-election White House, the Walsh-as-saboteur theory has already risen to the status of received wisdom... some Bush loyalists suggest that Mr Walsh has finally achieved by negative publicity what he failed to accomplish in the courts: driving a high Reagan administration official from office over the affair'.[81]

As a result, Dole and his fellow Republican partisans, including Senators Alan Simpson and Strom Thurmond harshened their rhetoric and political manoeuvring in the hope of shutting down Walsh's office.[82] Walsh's detractors held him up as an example of all that was wrong with the implementation of the statute, citing not only the length and expense of the investigation, but also Walsh's alleged abuse of power.[83] Walsh was shocked at Dole's intrusion into a federal prosecution and stunned at the barrage of unsubstantiated charges levelled against his office, particularly at Dole's reference to the office as a team of 'hired assassins.'[84] Walsh felt betrayed that as a registered Republican, he had been attacked by the Senate Minority Leader.[85]

The general consensus was that there was little or no justification for the length (Walsh's investigation continued for two years after the Act had expired) and cost of the inquiry. $48 million, as the bill would eventually be, seemed like an awful lot of taxpayers money for fourteen indictments, seven guilty pleas and four convictions, two of which were later overturned. [86]

The crimes charged fell under two broad categories; operational crimes and 'cover-up' crimes. Walsh was quick to point out that all of the individuals charged were convicted, except for one CIA official whose case was dismissed on national security grounds and those who received unprecedented pre-trial pardons from President George Bush after his electoral defeat in 1992. In his Final Report, he stresses that the two convictions reversed on appeal on constitutional grounds in no way cast doubt on the factual guilt of the men convicted. [87]

George Bush appeared to take particular exception to the workings of his fellow Republican Walsh. Like Congressional Republicans, he attempted to refocus the scandal spotlight by accusing the independent counsel of biased behaviour. Believing that Iran Contra was about political, not legal, issues, Bush argued that 'an attempt to criminalize public policy differences jeopardises any president's ability to govern. By seeking to craft criminal violations from a political foreign policy dispute, the office of independent counsel was cast in a biased position from the beginning.' Bush put his beliefs into action when he controversially pardoned Casper Weinberger. [88]

During the 1980s, there were a number of challenges to the legality of the independent counsel statute which renewed concern and interest regarding its constitutionality. One of the more high profile challenges came via the case of *North V Walsh* (1987)[89] in which North argued that the independent counsel provisions violated the principle of the separation of powers. As North was only one of many posing such challenges to the statute, there was a very real possibility that the Iran Contra investigation may have been at least disrupted if not worse. As a precautionary measure, Attorney General Meese offered Walsh a collateral appointment with the

Justice Department. The terms of the appointment were agreeable to Walsh and he carried on with his investigation. [90]

A discontented North mounted a second challenge in which he claimed that the Attorney General did not have the authority to make such an appointment and that in any case, officers exercising executive power must be removable by the president at will. As it was, Walsh was protected by the 'good cause' removal standard. The cases were dismissed by the district court as North had not demonstrated sufficient hardship that would warrant the court's early involvement in the constitutional process. Whilst the dismissal of the complaint was procedural, the court's comment on the constitutional issue was 'North's arguments do not merely challenge the legality of the office of independent counsel. His rather doctrinaire approach to the separation of powers issues would require the Executive to reserve all prosecutorial powers for itself. Such a requirement would call into question the constitutionality of vesting prosecutorial power in independent agencies and other institutions.' [91]

A supporter of the independent counsel provisions, Judge Barrington D. Parker did not condone early judicial intervention into ongoing criminal proceedings. In *North V Walsh,* (1987) he wrote that Walsh 'was appointed and is acting pursuant to a law enacted by Congress and signed by the president, a law which carries the presumption of constitutionality.' In a footnote to that statement, he claimed that North's 'rigid vision of the separation of powers doctrine is not supported by our constitutional structure of government' [92]

On appeal, the DC Circuit Court remanded the case to the district court. Based on the Watergate precedent, the district court supported the Attorney General's decision to offer Walsh the collateral appointment. The court did not take any action regarding the constitutionality of the act. [93] Although North did not receive any satisfaction from his challenges, they no doubt strengthened the anti statute drive which would ultimately win out in 1992 after the statute's chequered fourteen year history.

In justifying the investigation, the Iran Contra Special Congressional Committee declared that the Executive had neglected the rule of law. Walsh used the same line of argument. He described the case as a 'conflict between the rule of law, as administered by the courts and prosecutors, and the system of political checks and balances, as exercised by the courts and prosecutors, and the system of political checks and balances, as exercised by the president and the Congress.' [94]

A serious challenge to legitimacy faced by Walsh and his team was that of classified information. North's lawyer had even predicted that this would be more troublesome than the immunity issue. The Classified Information Procedures Act of 1980 was an effort to deal with the goings on between the Justice Department and the intelligence services over intelligence materials being used in trials. The creators of CIPA had obviously not anticipated the possibility of a showdown between the independent counsel and the Attorney General and intelligence agencies combined. In the case of Iran Contra, secret documents from government files were crucial to prosecution and defence. The law, however, left the keepers of official secrets in complete control of such documents and 'that authority' argued Yale Law Professor Harold Koh, 'enabled

them to impose broad de facto limits on Walsh's freedom to prosecute, even though the independent counsel law barred them from controlling his prosecution directly.' [95]

North's lawyer did his utmost to discourage Walsh, stating publicly that an indictment would expose the independent counsel to 'national ridicule' and a trial would leave Walsh's 'reputation destroyed.' [96] In the end, as a result of the pressure he was under, Walsh made significant compromises to ensure that the North trial would go ahead. These included dropping the central conspiracy charges against North because allegedly crucial evidence required by North to defend his case was not permitted for release as instructed by Reagan. National security priorities won out in this and other instances, and Walsh was soon obliged to also drop the same conspiracy counts in the other cases. [97]

Suddenly, the scope of Walsh's investigation was radically depleted as it could only focus on North's personal behaviour, which encompassed lying to Congress, shredding documents, and accepting an illegal gratuity, but totally bypassing the core of the scandal, which was the privatisation of US foreign policy. According to Harold Koh, 'The guts of the original indictment lay in its first two counts, which examined the full sweep of the defendant's covert plan to sell arms to Iran and to direct the profits to the Nicaraguan Contras...in Contrast to these two core charges, the rest of the original twenty-three count indictment focused upon epiphenomena, not the heart of the affair.'[98] Michael Tigar, professor of law at the University of Texas, points out that the impact and influence of the Attorney General in the North trial severely undermined the legitimacy of the independent counsel. 'The idea' he said 'was to

ensure that the foxes didn't have custody of the henhouse. Now it turns out...that the foxes are in charge of the hen house when it really matters.' [99]

It is no coincidence that Iran Contra and Whitewater were the cases, initially at least, most suited to independent counsel investigation and so they were also the most controversial and criticised cases. Because they directly implicated the president, they received heavy media attention and in turn captured public awareness and interest. Political Scientist Katy Harriger argued that these cases illustrated not so much the triumph of law over politics but rather the limit of the law in addressing cases of profound political importance. Initially the Iran Contra case seemed a prime candidate for independent counsel attention. The ingredients had seemed complete: misbehaviour by high-ranking officials including possibly the president, foreign policy gone wildly astray, a severe dent in public confidence towards the government, and an independent counsel who was considered sufficiently neutral politically to carry out a genuinely independent investigation. In reality, the outcome of the investigations merely highlighted the shortcomings of resort to criminal proceedings. The odds were heavily stacked against Walsh. Problems included congressional desire for fast and public exposure of the scandal, the immunity grants in exchange for public testimony, the CIPA arrangements, executive powers of pardon and overturning of convictions. [100] All this, combined with an absolute partisan interest in avoiding impeachment and the power of the media severely undermined the independent counsel's legitimacy and independence. Hence, Walsh's job was made all but impossible.

In his Final Report, Walsh recognised that there was some conflict between the roles of Congress and the independent counsel. He acknowledged that in the case of Iran Contra there was actual conflict, but asserted that, in such an instance, the law was clear that Congress should prevail. [101] Walsh catalogued the evasion of the Executive branch and Congress, the lies and conspiracies and the acts of obstruction, and addressed the issue of whether the Attorney General actually deliberately sabotaged the prosecutions. In his Executive Summary, he pointed out the glaring contradiction of the CIPA situation. 'Under the Act, the Attorney General has unrestricted discretion to decide whether to declassify information necessary for trial, even in cases in which independent counsel has been appointed because of the Attorney General's conflict of interest. This discretion is inconsistent with the perceived need for independent counsel, particularly in cases in which officers of the intelligence agencies that classify information are under investigation.' [102]

Walsh rather bitterly concluded that 'at the heart of the Iran Contra affair, then, were criminal acts of Reagan administration officials that the Reagan administration, by withholding non secret classified information, ensured would never be tried.' [103]

Similarly, political scientist Robert Williams describes the Final Report as ultimately a catalogue of prosecutory failure. Walsh was unable to prosecute key members of the Reagan administration and he used the Final Report to allege criminal behaviour in the absence of prosecution and conviction. Independent counsel acting as judge and jury raised questions regarding legitimate boundaries and where to draw the line in such a complex situation. [104]

Despite his myriad legitimate woes, Walsh did have one advantage over his predecessors. The independent counsel removal bar had been lowered in 1982 from that of 'extraordinary impropriety' to 'good cause'. In reality this was not the case. Despite the blatant contempt and impatience exhibited by the Bush administration towards Walsh and his team, Attorney General William Barr would not have dared to make such a move. Tempted as Bush and Barr both apparently were to fire the independent counsel after the reindictment of Weinberger right before the 1992 presidential election, they realised that there would be a new firestorm. Despite the relatively luke-warm public reaction to Iran Contra, firing the independent counsel right before a presidential election could have provoked an intense reaction from elites as well as the public. [105] So, such a situation illustrates the paradox. An independent counsel who could be removed at will was not independent. But even in the most extreme circumstances, as Whitewater would later illustrate, no-one was willing to do what Robert Bork had done on Richard Nixon's orders. The political risk was far too high.

Perceptions of the Scandal:

After the investigation had ended, Walsh provided this assessment: 'What set Iran Contra apart from previous political scandals was the fact that a cover-up engineered in the White House of one president and completed by his successor prevented the rule of law from being applied to the perpetrators of criminal activity of constitutional dimensions.' [106]

Iran Contra has been interpreted as everything from the 'end of constitutional government as we know it, or much ado about nothing.' Respected academics voiced their horror at the catastrophe of it all, including Louis Fisher, who referred to it as nothing less than 'a stunning collapse of democratic government'[107] However, those beyond the beltway did not demonstrate strong outrage, because the scandal did not generate that much public or media reaction. Such an outcome illustrates the importance of the role of the media in defining a scandal in relation to that of an independent counsel investigation. To the public at large, independent counsel proceedings did not make a particularly significant impact.

Perhaps the muted media response was to do with the continuity of personnel from Watergate to Iran Contra not only in the administration but also in Congress and the media. Everyone, consciously or not, was using Watergate, the mother of all scandals, as what sociologist Michael Schudson termed a 'pre-emptive metaphor'. This impacted on how the situation was dealt with on a practical level in the administration's immediate effort (however cosmetic) to illustrate that there would not be another 'whitewash at the White House'. Internal, external and Congressional investigations were immediately called for and scapegoats were quickly found. News providers found it convenient to refer to the Watergate dictionary of terms when describing Iran Contra to the public. Everyone took some comfort from the available analogy, but repeated journalistic comparisons of the two managed to diminish the impact of scandal reporting.[108] Hence, the existence of and repeated reference to Watergate cushioned the impact of Iran Contra.

Meese and his associates had the Watergate cover-up vividly in mind as they put their damage control strategy into effect. Although no-one was overtly shouting for impeachment at the beginning, the dreaded prospect was lurking in the air and Congress was certainly not the only reason for making information public at the earliest possible opportunity. Assistant Attorney General Charles J. Cooper summarised the situation: 'Well, we recognized the sensitivity of this information, the fact that it was information that had to be made public by the president and nobody else, that if the *Washington Post* made this fact public prior to the time the president did, it would be very calamitous, because no-one would believe that we had discovered this along the lines that we had and it was something that, you know, we fully intended to make public.' [109]

Ironically, in his Final Report, Walsh charged Meese with a cover-up anyway, as a result of which Meese's lawyer wondered why did Walsh 'so abuse his public trust and dishonour his appointment by issuing a document filled with distortions of fact, misuse of evidence, and false accusations against honourable public officials who are totally innocent of any wrongdoing?' [110]

Writing in the *Washington Post,* David Ignatius and Michael Getler gave a taste of media opinion in the immediate aftermath of the Tower Report with an article entitled 'This isn't Watergate but the moral is the same.' The article suggested that although Iran Contra lacked the clear criminality of Watergate (hopefully a premature conclusion rather than a wilful ignorance of reality), there was still somehow an eerie similarity. It was the same sense of fascination and dread at witnessing the country's

rulers in disarray perhaps, but with no heroic Cox, Jaworski, Richardson or Dash figures this time. [111]

This point may explain why Iran Contra never caught hold of the national psyche in the way that Watergate did. Even taking into account the fact that there may have been a deep loss of innocence as a result of the Vietnam/Watergate years and that the 1980s was undoubtedly a far more cynical era than the previous decade, this did not seem to fully explain the sense of public and media apathy that surrounded Iran Contra.

To American Enterprise Institute scholar Susan Garment, Iran Contra was a scandal hollow at its core because Reagan made such an unsatisfactory villain and his officials did not act for electoral or personal gain.[112] Whatever one's opinions of Reagan's politics, his geniality and personal popularity made it very difficult psychologically to place him in the Richard Nixon/crook category. As a result, Lawrence Walsh was never granted the kudos of his predecessor Cox, despite his judicial thoroughness and impeccable legal credentials. From a media and public perspective, the Iran Contra waters were quite muddied and few journalists took a particularly strong stance on the fact that the administration of one of the most right-wing presidents of the twentieth century had made a concerted and not unsuccessful effort to privatise US foreign policy and subvert the Constitution.

Watergate, it appeared, only worked as a pre-emptive metaphor with regard to scandal response. It had set the standard for crisis management and the mechanisms went smoothly into gear as soon as the Iran Contra details emerged. However, the most

important elements of the Watergate lesson had patently not been heeded, namely that executive power had its limits, and secrecy in a democracy could not last forever. In his book 'Consequences', the Chairman of the Tower Commission described the Board's shock and suspicion over President Reagan's changed testimony. Tower said when he asked clarifying questions, Reagan at once, 'picked up a sheet of paper and...said to the Board "this is what I am supposed to say", and proceeded to read us an answer prepared by Peter Wallison, the White House counsel.' [113] Such reports fail to tie in with the notion of Reagan as an astute political strategist. However, it may have been the case that the president was taking advantage of his reputation as a broad-brush style leader to sustain his plausible deniability.

Although the *New York Times* ran a total of 2253 articles on the Iran Contra affair, the public never seemed to really get a grip of the details either of the scandal or of Walsh's role in it. At certain peak moments, the story made big headlines, but usually it was found tucked away in the inside pages, particularly after the first year of the scandal. [114] The drawn out Congressional hearings ensured that the issue was kept in the public domain. However, it also resulted in public interest in the story declining over time, particularly as the country was overwhelmed with detailed foreign policy information when the scandal broke.

As the White House claimed to be providing full cooperation with all manner of investigations, Reagan himself blamed the press for exposing the operations. Maintaining his insistence that the entire saga hinged on the hope of hostage releases, he complained: 'This whole thing boils down to a great irresponsibility on the part of

the press,' he said. 'We got three people back. We were expecting two others. The press has to take responsibility for what they've done.' [115]

In reality, the questions raised by the scandal went to the heart of the Reagan presidency. The Wizard of Oz presidency had been exposed and Reagan's 'broad stroke' management style with all its shortcomings was revealed. The 'Morning Again in America' package that had so successfully been sold to the nation suddenly seemed remarkably hollow.

Soon the leakage in the media was torrential. Something much more than the intelligence network had been destroyed and that was American credibility abroad. Preaching one policy and doing the opposite was held in low regard around the world. The entire administration was embarrassed and disrupted and even Republican stalwarts were shocked. Senator Barry Goldwater called it 'a dreadful mistake, probably one of the major mistakes the US has ever made in foreign policy.' [116] Emboldened by their recapture of the Senate in 1986, Congressional Democrats charged that Iran Contra showed up a 'state within a state.' [117]

Despite its empowered position, Congress did not triumph over the White House in the way it had during Watergate and Walsh was never elevated to the level of Archibald Cox. One key factor was that in Watergate, it was Congress that uncovered the White House tapes and was on hand to impeach Nixon if he refused to cooperate with the special prosecutor. In Iran Contra, there was no such unity, hence the administration could hinder Walsh at every turn by refusing to provide relevant classified documents. [118]

When Walsh eventually released his Final Report on December 3 1993, Presidents Reagan and Bush had left office along with the majority of relevant players and, ironically, the independent counsel law was due to expire twelve days later. Not surprisingly, media reaction to the report was limited. [119] Walsh somewhat justifiably defended the length of his investigation by pointing out that he had only acquired some of the most relevant evidence after Reagan had left power.[120]

Under such constrained circumstances he had decided not to bring charges against Reagan, Bush, Meese or Regan, on grounds that 'the belated production of notes and other documents delayed the investigation beyond the point where it could be effective.' By now, too much time had elapsed for Walsh to continue. [121]

Walsh never had any doubts about the White House efforts at a cover-up. On November 6 1986, Reagan had insisted to the press that the story had 'no foundation,' and that the publicity was 'making it more difficult for us in our effort to get the other hostages free.' [122]

'This whole irresponsible press bilge about Iran has gotten totally out of hand' he noted in his diary for November 12. 'The media looks like it's trying to create another Watergate...I want to go public personally and tell the people the truth.' Maintaining this stance made him look seriously deluded, utterly misinformed or downright dishonest. On November 7 Reagan spoke to the nation from the Oval Office, maintaining that the normalisation of relations with Iran had been the primary motive, and releasing the hostages an important second. Polls by the news media and the

White House showed that for every individual who believed his story, six others doubted him. [123]

Reactions to the scandal were diverse, falling in and around the 'aberrationist' and 'legalist' schools of thought. For example, the Majority Report of the Iran Contra Committee adhered to the aberrationist view, contending: 'the Iran Contra affair resulted from the failure of individuals to observe the law, not from deficiencies in existing law or in our system of governance.' [124] The Tower Report also subscribed to the aberrationist model, which essentially absolved any institutions from blame and conveniently placed the blame on individual deceit and thus neatly contained the scope of the Report. It summed the affair as being 'one of people, not of process,' which produced individual political casualties rather than radical institutional reform. Those 'political zealots' made for convenient scapegoats. [125]

Despite the prevailing image of the junior officer at the steering wheel with the commander in chief dozing in the rear seat, it was the unambiguous opinion of the independent counsel that 'the Iran Contra affair was not an aberrational scheme carried out by a "cabal of zealots."' [126] North actually had a mixed effect on the administration's efforts at damage control. It did not take Iran Contra for Washington to realise that Reagan was not a detail man. The one-man runaway conspiracy version of events was a convenient decoy, and much to Walsh's annoyance, was what was presented to the public at crucial moments to preserve Reagan and the national security establishment from anything more than superficial scrutiny. The administration was faced with the unfortunate choice of allowing the president to be portrayed as either deceitful or ignorant. It chose the less politically explosive option

of ignorance, which Reagan obviously found somewhat galling. 'As a matter of fact,' he told newspapers editors in May 1987, 'I was very definitely involved in the decisions about support to the freedom fighters. It was my idea to begin with.' [127] Hence the opportunity to distort Howard Baker's famous Watergate question 'what did the president know and when did he know it?' into 'did the president know anything and when did he forget it?' [128]

North's televised Congressional testimony was probably the high point of the Iran Contra scandal. In general, there had been timidity from Congress and the press towards Reagan as presidential popularity make it rather difficult and unappealing to write negative stories. The president would obviously not be impeached, and the majority report did not contain any headline-grabbing material. The majority and minority reports were so radically different in their interpretations that Senator Orrin Hatch, who voted against the majority report, claimed that it reached 'hysterical conclusions' and 'reads as if it were a weapon in the guerrilla warfare' between Congress and the White House.' [129]

When the scandal was at its peak, Reagan asked Richard Nixon for advice in dealing with the crisis. The latter put his emphasis on the presentation issue. 'Most important is that the president looks good and feels good,' he declared. 'That's more important than his words.' Nixon's other advice was that Reagan should 'be aggressive. Don't give any ground on the Contras.' [130] Nixon himself spoke publicly about the scandal in December 1986. In his opinion, it was the president's aides who had 'screwed it up' and he declared: 'Watergate was a domestic matter. This is a foreign policy matter...Watergate was handled abysmally. This is being handled expeditiously.'[131]

He adhered to the aberrationist view of events and reminded the Republicans of the importance of party loyalty in such times of crisis. However, Nixon still had his own credibility issues and as a result his comments were not met with wide acclaim. [132]

Media Response to Iran Contra:

Writing in the *Columbia Journalism Review*, journalist Scott Armstrong strongly criticised the hit and miss approach of the press toward the Iran Contra affair. He was incredulous that in the years before the full scandal emerged, there had been occasional nuggets of reporting but it appeared that the press did not read itself. Hence, there was no institutional memory. According to Armstrong, press response to the scandal went through various stages: tenacity when the scandal first broke; passivity during the Congressional hearings; and loss of nerve at crucial moments such as the 1988 election. In the wake of the North trial, he interviewed over a dozen journalists in an attempt to clarify some key points, but the general consensus was that the majority of the press and the public did not really have a full understanding of what had occurred. [133]

With everyone focusing narrowly on the question of the diversion, journalists who had pursued other areas of the scandal did not get front page exposure. When the Congressional Committees reports were released in November 1987, the press did not rise to the occasion. The general consensus was that this was a matter best left to the independent counsel and his team.[134] Armstrong's interviewees particularly directed their frustration towards the independent counsel and Congressional committees for

shirking their responsibilities and not pursuing what were considered the more obvious leads. These included mutually beneficial and legally dubious arrangements between the US and third countries whereby the former would provide assistance in return for questionable favours. These journalists refused to accept Walsh's line of reasoning for not pursuing such matters. He insisted that his mandate did not stretch past specific criminal prosecutions and so other matters were better suited to impeachment inquiries.

The criticism levelled against Congress pertained to its apparent catch-22 approach to allegations against the administration. Congress was not interested in mounting a serious challenge to the alleged constitutional violations because it did not deem there to be sufficient public (or press) interest in the subject.[135] This seems an incredibly flippant excuse for not pursuing matters of such grave national concern. It was hardly up to the public to take the matter seriously before Congress would act. Surely the procedure should have been the other way around.

However it was the press itself that came in for the most criticism from Armstrong's interviewees who felt that their editors and colleagues had been lulled by Congress's tepid investigation into believing that constitutional violation was not the real issue. Congress in turn had justified its response by claiming that it was appropriate due to the lack of public or press interest. [136] And so the circle of apathy was cosily complete, with everyone neatly placing the blame elsewhere. Fatigue and boredom were apparently factors, but Armstrong was quick to berate the press for failing in its duty to hold the various branches of government accountable under the constitution. [137]

Iran Contra never saw the avid Woodstein-esque reporting that had characterised the media coverage of Watergate. Watergate reporting had started off slowly via a handful of reporters and spread deeper and wider as the facts emerged. Not so with Iran Contra. As speculation and rumour abounded, the press and Congress did little to confront and explore the serious constitutional violations that were occurring. [138]

Despite the damage inflicted on the presidency during the whole Iran Contra debacle, Reagan successfully redeemed himself as a result of the Cold War victory and Intermediate-Range Nuclear Forces Treaty. As a result, he left office more popular than any president since polling began. [139] Walsh continued his investigation under duress, with the particular problem of securing an impartial jury for such a high profile situation. The Ethics law was amended to give the special judicial panel the authority to order the federal government to pay the legal expenses of those not prosecuted by the independent counsel. Reagan received $562,111. [140] Walsh could never prove that Reagan authorized or knew of the diversion or that he had knowledge of the extent of North's control of the Contra funding and Reagan always denied unequivocally that he authorised or knew of the diversion. [141] Particularly galling for Walsh was the exoneration of North on appeal and his decision to campaign for political office in the Senate, a body he vocally held in low regard.

Walsh also had to contend with the impact of the Bush pardons, which blatantly illustrated the president's contempt for Walsh's work, and surprisingly, had the support of key Democrats in Congress. [142] According to a *USA Today/CNN Gallup* poll, those polled disapproved of the pardons by a ratio of 2:1. However, there was no major backlash.[143] Some of those caught up in the public integrity disputes, including

Iran Contra, viewed themselves as political prisoners and Washington accepted the return of numerous individuals involved, and not only those whose names had been cleared. There was a widespread belief that the investigations themselves had provided punishment enough to those involved. [144] The prediction of Common Cause president Fred Wertheimer that Iran Contra would have the same effect on the 1988 election as Watergate had on the 1976 election proved hopelessly wrong.[145]

The blatant snubs to Walsh's investigation carried on long after he had reached his conclusions. Reagan's assistant secretary of state Elliott Abrams, who had described himself as a 'gladiator' for the president's policies in Central America, had pleaded guilty to two misdemeanours in the Iran Contra affair. Sentenced to two years probation and 100 hours of community service, he was pardoned by President George H.W. Bush. In 2001, without a trace of irony, Abrams was appointed by George W. Bush to the Office for Democracy, Human Rights and International Operations. Robert White, former US ambassador to El Salvador said of his appointment: 'To qualify for public office by lying to Congress is not an example you want to trumpet...A huge number of the appointments of George [W] Bush are people associated with his father, so it is inevitable that they will be tarnished by the Iran Contra affair.' Abrams was only one of a number of individuals employed by the George W. Bush administration. Larry Burns, Director on the Council on Hemispheric Affairs, who described Abrams as the apotheosis of democracy, declared: 'It's a rather scary script. All of a sudden, we have the 'Contra alumni association' being brought back into government.' [146]

In early 2002, Poindexter was appointed to head a new agency to 'counter attacks on the US', named the Information Awareness Office. His job title was that of 'crisis manager' but by mid 2003, he had tendered his resignation as a result of widespread criticism regarding his past. In defending his Iran Contra role, Poindexter explained that he had 'made a very deliberate decision not to tell the president so that I could insulate him from the decision and provide some future deniability for the president if it ever leaked out.' His words compounded the notion of a privatised foreign policy, run by unelected officials. North himself became a success on the talk radio circuit. [147]

Despite the independent counsel conclusions, not only did the major players avoid any long-term negative consequences, but it appeared that they actually prospered from their roles in the scandal. It is therefore not surprising that Walsh's Final Report and personal writing on the topic are heavily tinged with bitterness. Walsh's Final Report is the only really authoritative work on the Iran Contra scandal. The Tower and Congressional Reports were distinguished more by the questions that they did not ask rather than the ones that they did. Walsh concluded with the hope that presidential subordinates would in future remember that 'their oath and fealty are to the Constitution and to the rule of law, not to the man temporarily occupying the Oval Office.' Walsh's report differed from the others in that his mandate was to pursue criminality and prosecute. He took care to pursue his own paths of evidence and did not lean on the findings of the joint congressional committee. [148]

Walsh essentially accused the administration of a cover-up, headed by Attorney General Meese and the Final Report outlined the difficulties he experienced in trying to progress when faced with roadblocks at every turn. His conclusions and style did

not meet with universal approval. Theodore Draper commented: 'Walsh's report was written in a militantly prosecutorial vein and sometimes oversteps the bounds of logic and fair play. It alleges a conspiracy and cover-up that are never made clear or convincing. From time to time it uses more extravagant language than is usual in a legal document.' This may well have been Walsh's means of venting his frustrations after the years of interruptions, distractions and general hostility that his investigation received.[149] Walsh's seven year investigation and three volume report cost $47,873,400. [150] His report depicts Reagan as a detached, feckless and forgetful chief executive. [151] He concluded his observations with the statement: 'the lesson of Iran/contra is that if our system of government is to function properly, the branches of government must deal with one another honestly and cooperatively.' [152] A lot of time and money were spent establishing this truism.

The one impact that Walsh's investigation, along with those of his peers, led to throughout the 1980s was a backlash against the independent counsel law. The law faced a challenge from the Reagan Justice Department which questioned the constitutionality of the special panel being authorised to appoint an independent counsel.[153]

Nonetheless, Reagan reauthorised the law, as a veto of the bill only a year before a presidential election would not have reflected favourably on the administration. Republican opposition to the statute continued regardless. The Iran Contra investigation did serious damage to the reputation of the office and in 1992, Congressional Democrats failed to acquire enough votes to oppose Republican

determination to end the law. It was allowed to expire a year before the Iran Contra investigation drew to a close.

Writing years later on the Independent Counsel Act, Walsh spoke of the impact of individual prosecutors on the renewal of the statute.

> 'The principal criticism of the investigation of prior independent counsel, including my own Iran Contra matter, has been not only the cost and time required for completion, but also a concern that an independent counsel, preoccupied with a narrow area of investigation, will become obsessive in an attempt to validate his efforts, and will take excessive action that a regularly appointed federal prosecutor would not take.'[154]

Whilst not a direct admission of culpability, such as assessment suggests a level of awareness of the major pitfall awaiting an independent counsel.

As Michael Schudson observed, the Watergate precedent may have been the very thing that saved the Reagan presidency. The issue was rapidly narrowed to whether the president had direct knowledge of specific criminal activity. To mix metaphors, however, the 'smoking gun' may have been a red herring. [155] Such oversimplification of the vast complexities of the case, in particular by the media eager to engage a disinterested public, resulted in misplaced attention, as the *New Yorker* eloquently surmised: "The object in question is the body of the Constitution; when we find it with a hundred stab wounds, there's no point in looking for a smoking gun.'[156]

The pre-emptive metaphor of Watergate provided such a strong framework, legal, political and psychological, for dealing with Iran Contra that it may well have

prevented the kind of national trauma that had resulted with Watergate. The down side of this was that the seriousness of the Iran Contra affair, with its enormous constitutional, political and criminal aspects, were never taken quite as seriously as it should have been.

Such an outcome was compounded by Reagan's press obituaries in June 2004. Among the lengthy tributes, Iran Contra was mentioned but not dwelt upon. Whilst the *New York Times* offered what was probably the sternest review of events from the US perspective, the *Washington Post* was more sympathetic, adhering more to the revisionist view of the president. It cited the view of eminent political historian James MacGregor Burns that Reagan would rank with Franklin D. Roosevelt among the 'great' or near great' presidents of the twentieth century. Other publications, including the *LA Times* and *Boston Globe* provided more glowing accounts of the Reagan years. Brief mention was made of a special prosecutor who found no provable criminal offense in an otherwise joyous rendition of these years of 're-invigorated American conservatism.' [157]

Walsh, who provided the harshest criticism and the most damning report on the Iran Contra scandal, nonetheless maintained a deferential attitude to the president even in hindsight. In an interview with Walsh years after the events of the scandal, Bob Woodward asked 'How will Iran Contra be remembered in history?'

> 'I think it will be remembered as a non-sordid disregard of constitutional restraints,' Walsh said. 'I think the president was wrong, he was defiant, he was deliberate but he wasn't dirty.' [158]

However, the question would have been better answered by focusing on the effects of Iran Contra on the independent counsel office itself. Forced by the pre-emptive metaphor of Watergate to measure its success on the unearthing of smoking gun proof of White House culpability, Walsh's investigation was doomed to fail. The absence of such black-and-white evidence exposed his office to charges of abuse of power and excessive zeal.

Hence, the groundwork was laid for the later accusations levelled against Kenneth Starr. In the minds of many, the role of the independent counsel had evolved from that of mere prosecutor to politicised partisan tool. By the late 1990s, the investigation of alleged executive misconduct had become as much the subject of scandal as the allegations themselves.

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5. Robert Fiske and the Whitewater Investigation: the Perils of Moderation

When Robert B. Fiske Jr. was appointed independent counsel in January 1994, the authorising legislation had been allowed to lapse. As a result, authority rested with the Attorney General to set the parameters of the investigation into the so-called Whitewater affair. The resultant charter sanctioned a probe into whether Bill and Hillary Clinton had committed any offences in relation to a failed 1970s Arkansas land deal. It also covered 'other allegations or evidence of violation of any federal criminal or civil law by any person or entity developed during the independent counsel's investigation...'[1]. The scope of this mandate, devised with good intentions, allowed for a sprawling inquiry that would later delve into the most irrelevant epiphenomena. As the independent counsel statute had expired, Attorney General Janet Reno was placed in the uncomfortable position of having to choose the prosecutor. Hugely aware that any choice she made could be construed as partisan, but under pressure to make an appointment, she did her utmost to select someone with impeccable credentials.

Reno could hardly have done more to ensure the appearance of propriety. Her choice of prosecutor appeared to meet the required criteria. The sixty-three year old Fiske had both a moderate Republican pedigree and an impressive résumé. He had joined the prestigious Davis Polk law firm in 1955 and became a partner in 1964. He acted as Assistant US Attorney in the Southern District of New York from 1957 to 1961 and was appointed US Attorney for the same district by President Ford and kept in

office by President Carter from 1976 to 1980. He also held a number of prestigious positions including president of the American Bar Association, the American College of Trial Lawyers and the Federal Bar Council.[2]

This civic-minded Manhattan-style Republican, described as 'a fair and balanced man' by Clinton, [3] was well respected among his peers. On his appointment, the junior Republican Senator for New York Alfonso D'Amato referred to Fiske as 'uniquely qualified for this position...a man of uncompromising integrity...one of the most honourable and most skilled lawyers anywhere.' Minority Senate Leader Bob Dole of Kansas stated that 'people who know him think he is extremely well qualified [and he] is independent.' Fiske himself promoted confidence in his ability and determination by announcing at a press conference that 'I would certainly expect, before this investigation is over, [that] I would question both the president and the first lady, and it would be under oath.'[4] Although there were no notable objections to Fiske's appointment in January 1994, within less than three months, discontented sounds were emanating from the Republican Party. Mindful of the difficulty that his predecessor had encountered with Congressional inquiries and immunity, Fiske declared that any such Whitewater hearings should be postponed until his investigation was complete.

Despite his plea, hearings were scheduled for March, with the concession that the Senate 'would not interfere' with Fiske's investigation and would not grant witness immunity.[5] During his six month tenure, the attacks on the independent counsel by his opponents increased in fervour and regularity. On August 5 1994, Fiske was fired for a perceived conflict of interest as a result of being 'affiliated with the incumbent

administration'.[6] Such logic was questionable, as Republican Fiske's only affiliation with the administration was that the Attorney General had appointed him to a post he did not seek.

In order to contextualise the growing opposition to the independent counsel statute and the ever increasing politicisation of the role, some explanation of the early 1990s political climate, the circumstances of the expiration of the statute in 1992 and the animosity towards Lawrence Walsh is necessary. Some reference to the role played by conservatives and the media is also appropriate in order to set the scene for the Culture Wars – in which the Clinton investigation played an integral part.

The purpose of this chapter is to cast light on an important stage in the evolution of the independent counsel office from that of revered righter of wrongs, transcending the political scuffle, to that of perceived partisan tool. The reinvigorated conservative movement was a crucial factor in the political power plays of the 1990s. The Clintons had to deal with a rock solid and well financed opposition unlike anything their predecessors had to contend with. Fiske's intentions and non-partisan agenda did not suit conservatives intent on discrediting Clinton. They wanted to oust him at the first available opportunity and replace him with a far more controversial appointee. By the mid 1990s, the independent counsel office had been commandeered by those seeking revenge for previous investigations of Republican officials and those who took exception to what they perceived as Clinton's progressive agenda.

1992 Expiration of Title VI of the Ethics Act:

Simply put, it was Watergate that set the stage for the creation of the Independent Counsel Act of 1978. The intention was that the use of judges to appoint the prosecutor would depoliticise high profile investigations and provide comfort and neutrality where there had previously been chaos and partisanship. The trauma of the Saturday Night Massacre still hung in the air when the legislation was created and the emphasis in 1978 leaned more towards abuses of the prosecutor than by the prosecutor. Hence the Act has been described as 'a monument both to the law of unintended consequence and to the cost of good intentions'.[7] Experience would show that non-partisan neutrality was, for the most part, a myth.

In 1992, the independent counsel provision was allowed to expire without reauthorisation. This was effectively a direct result of the perceived abuse of power by Lawrence Walsh. Senate Minority Leader Bob Dole of Kansas was particularly vocal in his opposition to the renewal of the legislation. President Bush was also deeply hostile to Walsh and his investigation. Just after the 1988 election, the *LA Times* reported that Bush was 'clearly angered by the release of' Weinberger's notes and had 'declined to rule out firing Walsh.' Associated Press writer Pete Yost compared Walsh's situation to that of Archibald Cox, but Bush refrained from actually firing the independent counsel. In order to undermine Walsh's investigation, Bush opted for the controversial pre-trial pardons instead.[8] Walsh later stated that he 'never actually felt that being fired was a danger.'[9]

Dole was also doing his best to discredit the investigation. On November 9 1992, Dole wrote to Walsh to publicly voice his concern over assistant independent counsel James Brosnahan's Democratic affiliations. He declared, 'It is my opinion that the credibility of your office is severely compromised by the employment of Mr Brosnahan...While I do not know Mr Brosnahan personally, I have strong reservations over the ability of such an individual to function independently of what would appear [to be] a strong political bias.'[10]

Two days later, four Republican members of the Senate Judiciary Committee agreed to Dole's request to petition Attorney General William Barr in order to appoint an independent counsel to investigate the independent counsel! The crux of the request lay in the concern that Walsh may deliberately have re-indicted Weinberger with the intention of politically embarrassing Bush. In his accompanying letter, Dole voiced his concerns that Walsh's office was 'a hotbed of Democratic activist lawyers.'[11]

The *Washington Times* reported that Bush supported 'an investigation into special prosecutor Lawrence Walsh's probe of the [Iran Contra] affair.' Walsh was in the frustrating position of being unable to agree to media interview requests, as it was not appropriate for him to publicly comment on the highly sensitive Weinberger matter. Criticism against Walsh continued via the media, but his office declined to respond. Speaking on NBC's *Meet the Press* on December 6, Defense Secretary Dick Cheney referred to Weinberger's indictment as a 'travesty'. He declared, 'I was the senior House Republican on the Committee that investigated the Iran Contra matter...The fact that now – six years after the fact – the special prosecutor, who has yet really to

nail anybody, and has spent millions of dollars, is out trying to prosecute, I think is an outrage.'[12]

Dole reiterated his demand that Brosnahan be fired, avowing, 'There is either impropriety or the appearance of impropriety, and it ought to be investigated...It's time for Mr Walsh and his staff to plead guilty to partisan politics with their taxpayer-funded inquisition. The taxpayers have gotten a lot of politics and not much justice for the $41 million Walsh has wasted in his lavish operation.' Hitherto, the majority of the press coverage of the Dole attacks on Walsh had been covered by the overtly partisan *Washington Times*, so it was appropriate for Walsh's office not to respond. This would reduce the chances of the mainstream press picking up the story. In mid-December however, a *Washington Post* editorial entitiled 'Dole V Walsh' concluded that 'if Senate Republicans can prove that Mr Walsh's operation did not meet this high standard [lack of partisanship] – and it is important to remember they have not done so – the new version of the [independent counsel] statute can set guidelines and incorporate safeguards.'[13]

After Walsh's Christmas Eve press conference and numerous interviews, the mainstream press provided balanced first-page coverage, but public response towards the pardons was hugely dulled by their timing. The majority of Americans had seasonal matters on their minds. In the midst of the media coverage, Dole stated that Walsh was 'totally out of control and ought to resign immediately.' He followed this statement with a charge that Walsh should be disbarred. Walsh recalled that at this point he had become immune to Dole's criticism.[14]

When Walsh eventually released his Final Report on January 18 1994, the Republican Party reaction was mixed, ranging from admiration to hatred – his detractors referring to his staff as 'hired assassins.'[15] Although much of the mainstream press reacted positively towards him, his investigation and his report, the nation had long since fallen out of love with the independent counsel statute. It was with a collective sigh of relief that it was allowed to expire in December 1992.

In Summer 1992, the Subcommittee on Oversight of the Senate Committee of Governmental Affairs held hearings on the reauthorisation of the statute. The Justice Department testified against the act, declaring that the Attorney General could appoint special counsel without having to resort to alternative methods. In contrast, Anne McBride spoke for Common Cause and Sam Dash for the ABA, both in favour of renewing the statute. Although committees in both houses of Congress approved reauthorisation legislation, it appeared increasingly unlikely that this would happen before the December expiration date. Disinclination spread across both parties, and Senator William S Cohen (R – Maine), one of a minority of Republicans who supported reauthorisation, acknowledged that 'Walsh is a large part of the problem.' On September 29, Bob Dole declared that he would block consideration of the bill. Senator Cohen warned that his party might later pay a price for such a decision if Bill Clinton were elected and became involved in a scandal. However, resentment towards the Iran Contra investigation was still bubbling and the act was allowed to expire.[16]

Appointment of Special Counsel:

By late 1993, unsurprisingly, Republicans experienced a change of heart by calling for an independent counsel investigation into the Whitewater affair. By early 1994, Congressional Democrats had joined their Republican colleagues in calling for an independent inquiry. Chief White House counsel Bernard Nussbaum, who had once hired Hillary on the House Judiciary Committee staff to work on the Nixon impeachment, was horrified at the prospect. 'Here is an institution I understand,' he told Clinton, 'It is evil. They have one case. They have unlimited resources. They have no time limit. Their entire reputation hinges on making that one case.'[17]

Under intense political pressure, Clinton felt he had no choice. Perhaps, he later mused, it was because he was not thinking straight in the immediate aftermath of his mother's death. Whatever his logic, it was doubtless a monumental miscalculation, as he recalled in his memoirs, 'It was the worst presidential decision I ever made, wrong on the facts, wrong on the law, wrong on the politics, wrong for the presidency and the Constitution.' He likened the initial appointment of the independent counsel to taking an asprin for a cold. It brought very temporary relief.[18]

Nussbaum made a formal request to the Attorney General to appoint someone. Reno had already taken the position, privately and publicly, that if a special counsel was to be appointed, then the statute should be re-enacted. Otherwise, if the individual was appointed by the Attorney General, who was an employee of the president, the crucial issue of independence could be undermined.[19] As events unfolded, Reno's fears were justified as her special counsel appointee was criticised for his apparent conflict of

interest. Fiske's detractors were concerned with more than just his appointment by the Attorney General.

During the Reagan administration, Fiske had been chairman of the ABA's standing committee on the federal judiciary. In this post, he was involved in reviewing nominations and issuing ratings, where he paid particular attention to a candidate's records on women's and civil rights. The committee did not always approve Reagan's more conservative candidates. In 1987, Reagan nominated the deeply conservative Robert Bork for the Supreme Court. Fiske was still a member, but no longer chairman of the ABA committee when it raised some questions about Bork's past decisions. Fiske interviewed Bork and asked about his decision to follow President Nixon's orders in 1973 and fire Watergate Special Prosecutor Archibald Cox. The end result was that Bork's nomination was not successful, and although Fiske claimed he did not oppose Bork, conservatives blamed him nonetheless. In 2001, President George W. Bush removed the ABA's judicial review standing committee from the federal judiciary nominating procedure. In his memoirs, Sidney Blumenthal claimed that this was as a direct result of Fiske's tenure on the committee. It was replaced by the highly conservative and libertarian Federalist Society.

This was not Fiske's only run-in with conservatives. In 1989, President George H. Bush's Attorney General Richard Thornburgh nominated Fiske to be his deputy. The right-wing Washington Legal Foundation led an anti-Fiske attack, which included fourteen conservative senators writing a letter to denounce him. President Bush was not held in particularly high regard by the more extreme elements within his party,

and he had no desire to antagonise them further. Hence, Fiske's nomination was dropped. [20]

The Political Environment in which Fiske was Appointed:

Long before Fiske began his investigation, Hillary Clinton felt that the attacks, both on the Clintons personally and on their policies, were politically motivated. She believed that the country was approaching a sea change in government thinking, outlook and policy. As a result, she feared that conservatives would retaliate against a possible liberal renaissance by any means necessary. The Clintons' enemies were a mixed bag of partisan conservative Republicans, secular neoconservatives and Christian fundamentalists. The president, and by implication, his wife, had projected themselves as New Democrats, but the public was uncertain of what this entailed. The New Democrat shift was viewed by many as a practical manifestation of the political, social and cultural changes that had been brewing and evolving since the late 1960s. Clinton's philosophy was in many respects in direct contradiction to that of his predecessors in the White House and although he had expected opposition and a demanding press, he could not have envisaged what was to come. From Hillary's perspective, initially at least, she felt strengthened by the force of the attacks as it reinforced her conviction that she and her husband were striking at the heart of what needed to be changed.[21]

In his book *Blinded by the Right*, ex-right-wing scandal journalist David Brock described the vitriol levelled against the Clintons from a culture he renounced as one

of 'corrosive partisanship, visceral hatred and unfathomable hypocrisy'.[22] Considering the severity of Brock's political about-face, his book must be treated with a certain amount of caution. Nonetheless, he provides a riveting first hand account of the ideological and cultural war that divided the country and poisoned politics, a war in which he had played a leading role. His writings in the *American Spectator* as part of the Arkansas Project acted as the initial catalyst in the Clinton's impeachment. The Arkansas Project was the title given to the assorted methods of ensuring that the right-wing political and media battle against Clinton would be well financed and sustained.

Pre-Whitewater, the power of the independent counsel office was, as yet, under-utilised. Prior to Fiske's appointment, the general consensus among the political right was that Reagan's popularity and success had enraged the Democrats, who had orchestrated a record number of independent counsel investigations during his administration. Conservatives rallied against what they viewed as false accusations and harassment by an embittered opposition who were obliged to resort to scandal politics and abuse of the independent counsel statute in order to score points.

In a *Washington Post* op-ed piece, Reagan communications chief and former Nixon speechwriter Pat Buchanan charged, 'What liberalism and the left have in mind is the second ruination of a Republican presidency within a generation'. Compounding the siege mentality, House Minority Whip Newt Gingrich declared that 'the left has started a no-holds-barred struggle to see if they can retain power in the country...if Reagan is the Reagan of mythology, it's time to strap on the guns and re-enact 'Death Valley Days.'[23]

Not surprisingly, when the opportunity presented itself to go for Clinton's jugular, the Republican Right did not hold back. Clintonism posed a particularly severe threat to its opponents as it had the potential to split the Right and even marginalize it for a generation. The Clintons just happened to personify much of what the Republican Right deeply resented in terms of the social, cultural and political changes that had occurred since the 1960s. They were a two-career baby-boomer couple with an agenda that instilled fear and loathing in many conservatives.[24]

Opposition research on the Clintons had moved swiftly into gear during the presidential campaign and went into overdrive once the presidency had been decided. One influential figure to emerge early in the opposition research campaign was Peter Smith, a staunchly Republican millionaire and avid admirer of the *American Spectator*. A strong supporter of and contributor to Newt Gingrich's Grand Old Party Action Committee (GOPAC), Smith informed Brock of his willingness to bankroll right-wing media opposition to what he perceived as liberal bias in the mainstream media. In 1992, Smith spent $80,000 on employing researchers and consultants to trawl through Clinton's Arkansas past.[25]

An independent, indeed aggressive media is widely viewed as an important facet of modern democratic society, a crucial counterweight to the spin, polish, image and sometimes dishonesty that characterises the majority of politicians. However, attack journalism reached new heights in the 1990s, and no politician could have survived unscathed. Political scientist Larry Sabato described a feeding frenzy, in the journalistic sense, as 'the press coverage attending any political event or circumstance where a critical mass of journalists leap to cover the same embarrassing or scandalous

subject and pursue it intensely, often excessively, and sometimes uncontrollably.'[26] The evolution of technology ensured that by the 1990s, any feeding frenzy could instantly become a global phenomenon with devastating consequences for the individuals involved.

American Spectator editor and independent counsel expert Terry Eastland pointed out that the scandal-a-week theme 'was a staple of journalism from the midpoint of the first Reagan term onward.' In the 1990s, Eastland claimed, 'there is a ready reason for journalists to be toting this up. Reagan did not enter office claiming he would be the greatest ethics president in the world. Clinton entered office saying he would be the greatest ethics president we ever had.'[27]

When challenged on his claim during a press conference in 1995, Clinton declared that 'no-one has accused me of abusing my authority as President. Everybody knows that I have tougher ethics rules than any previous President.'[28] In the era of attack journalism, this was a bold declaration, from a president whose personal integrity had long been challenged. White House press secretary Mike McCurry was quick to point out that there only appeared to be ethical issues because the integrity bar had been set at such an unattainable height. It took the Clinton administration some time to adjust to this new reality.

In the 1980s, executive misdemeanour was Republican misdemeanour, so Congressional Democrats seized on every opportunity to highlight this. From 1995 onwards the institutional partisan roles were reversed and investigation of executive misdemeanour became a GOP weapon.[29]

Whitewater:

By mid October 1992, Bush campaign aides were devoting serious resources towards uncovering a Clinton smoking gun of any description. They came up with Whitewater, a topic previously raised in a *New York Times* article in March of that year. In this failed real estate venture that dated back to 1978 prior to Clinton's days as Governor of Arkansas, the Clintons were accused of using their Arkansas political connections for financial gain. Their business partners were the owners of a failed Savings and Loan association. The *Times* article made it all sound harmless enough.[30]

This was hardly earth-shattering stuff in itself. However the McDougal's interests in a bank and a savings and loan association and the 1989 failure of McDougal's Madison Savings and Loan cost the taxpayer approximately $60 million. This cast a deep shadow over the Clintons' Whitewater involvement. Suddenly there appeared to be overlap between the bank, Madison and Whitewater. The scandal was initially staved off by the Lyons Report, compiled on request by James Lyons, a Colorado lawyer friend of the Clintons. The report concluded that the Clintons had, contrary to speculation, actually lost $70,000 in the deal.[31]

The conservative foundations joined ranks, and the right-wing media, particularly the *Wall Street Journal* editorial board, the *American Spectator*, *Washington Times* and Murdoch-owned media launched a collective offensive. Early in his administration, Clinton referred then-journalist and later presidential advisor Sidney Blumenthal to a passage from *The Prince*: 'there is nothing more difficult to plan, more doubtful of success, nor more dangerous to manage, than a creation of the new order of things.'[32]

In the opinion of the neoconservatives, it was time for political payback against the Democrats for the Iran Contra investigation. Elliott Abrams, architect of Reagan's Contra policy, and one of those indicted by independent counsel Lawrence Walsh in the Iran Contra affair, had close personal and political links with the neoconservative movement. He was the son-in-law of arch neoconservatives Norman Podhoretz and Midge Decter, and in the wake of the appointment of independent counsel Fiske, his wife, Rachel Abrams, wrote a piece for the *Washington Times*:

> 'I know something about Bill and Hillary Clinton right now. I know how their stomachs churn, how their anxiety mounts, how their worry over their defenceless child increases. I know their inability to sleep at night ad their reluctance to rise in the morning. I know every new incursion of doubt, every heartbreak over bailing friends, every sting and bite the press gives, every jaw-clenching look at front-page photographs of...the special prosecutor. I know all this, and the thought of it makes me happy.' [33]

Vitriolic partisanship was hardly a new phenomenon but the sustained intensity of the right-wing attack was groundbreaking. Thomas Jefferson had been hounded by his opponents as a godless anarchist, a sexual mauler, an adulterer, a betrayer of friends, a chronic liar and a keeper of a black concubine. Andrew Jackson was labelled a bigamist, a crook and a murderer.[34] However, the modern mudslingers had the financial and technological means to orchestrate a sustained and sophisticated attack.

The Clintons were perceived as personifying a dangerous threat to established order and morals. The Republicans had worked hard throughout the 1980s to establish a

conservative framework in the wake of the Carter years. The 1987 nomination of Robert Bork to the Supreme Court, which ferocious liberal opposition succeeded in defeating, was the embodiment of this. According to David Brock, this was intended to be the culmination of a strategy imposed early in the Reagan administration to ensure a right-wing economic and social agenda on the country by judicial fiat. Many of those belonging to the staunchly conservative Federalist Society were major players in the judicial system. These included Edwin Meese, Theodore Olson, Clarence Thomas, Robert Bork, Lawrence Silberman and Kenneth Starr. The Federalist agenda included restriction of privacy rights and reproductive freedom, reversing civil rights progress and reducing the authority of government to regulate industry in the public interest.[35] Robert Bork gave a taste of the prevailing attitude among his peers towards the president by publicly referring to Clinton as a sociopath.[36]

At their most vitriolic, neoconservatives saw their battle with Clinton as a continuation of the Cold War. The movement's intellectual guru Irving Kristol declared in 1993, 'There is no 'after the Cold War' for me. So far from having ended, my Cold War has increased in intensity, as sector after sector has been ruthlessly corrupted by the liberal ethos. Now that the other 'Cold War' is over, the real Cold War has begun. We are far less prepared for this Cold War, far more vulnerable to our enemy, than was the case with our victorious war against a global Communist threat.'[37]

Just as the independent counsel statute was about to expire in 1992, Joseph di Genova was appointed to investigate allegations against those in State Department and White

House who were implicated in the misuse of the passport files of president-elect Clinton. As part of the character issue, Clinton was accused of once attempting to renounce his US citizenship. The investigation concluded after four years at a cost of $3,089,082 with no indictments.[38] Speaking in the wake of the Starr investigation, di Genova publicly criticised the statute and proposed that it be allowed expire in 1999. 'It's a bad statute,' he avowed, 'It's a bad constitutional law. Even though the Supreme Court has ruled in the *Morrison* case that it is constitutional, just because something is constitutional doesn't mean that it's wise. And I'm not being critical of Ken Starr here. I think structurally this law is an anomaly. It's a monstrosity in our constitutional scheme.'[39] Throughout the 1990s however, the statute retained support from many Congressional Republicans who regarded it as a potentially powerful weapon in their war with Bill Clinton.

Travelgate and the Death of Vince Foster:

During Clinton's first term, the myriad accusations levelled against him tended to be ethical, focusing on personal conduct and potential abuse of power, with no charge of illegality.[40] In Spring 1993, seven members of the White House Travel Office were fired after independent auditors found evidence of 'gross mismanagement'. Travel office Director Billy Dale was indicted for transferring $68,000 of media funds into his personal account. Amidst cries of nepotism, the business was transferred to a distant cousin of Clinton's and to a Little Rock travel agency. The White House brought in the FBI to investigate and launched its own internal inquiry. By

announcing that there was to be an investigation, the FBI made a technical violation of procedure, which reflected badly on the White House.[41]

In July 1993, the White House travel office report was issued, criticising staff management. Deputy White House counsel, former Rose Law Firm partner and friend of Hillary's, Vince Foster was not formally reprimanded in the report but reacted badly to it nonetheless. He was concerned that Hillary's reputation would suffer as a result of the scandal.[42]

Also concerned about his own reputation, Foster found the media assault on his character difficult to bear. The *Wall Street Journal* editorial page was a particular scourge, running a story entitled 'Who is Vince Foster?' and accusing him of 'carelessness about following the law'. He was dubbed as 'one of the legal cronies from Little Rock' and scorned for his 'legal corner cutting that leads to trouble.' On July 20 1993, six months to the day after Clinton's inauguration, and suffering from untreated depression, Foster shot himself. His body was found in Fort Marcy Park, North Virginia.[43]

Much controversy would ensue as to whether Foster's death really was suicide and whether the correct procedures had been followed by White House staff regarding the handling of his documents. On December 20, the *Washington Times* ran a front page article entitled, 'Clinton papers lifted after aide's suicide.' It claimed that Foster's Whitewater documentation had been removed from his office to the White House residence.[44] In addition, the Whitewater issue found its way back into the headlines. With a possible criminal investigation of Whitewater looming, the Clintons realised

they would have to hire private legal representation. David Kendall, a Yale Law School classmate, was chosen.

Anti-Clinton allegations were mounting, including systemic criminality, larceny, obstruction of justice and cover-ups, but the *piece-de-resistance* was the suicide/murder of Hillary's former law-partner/lover, the slant varying depending on who was reporting. The old Watergate mantra of 'what did he know and when did he know it?' was applied posthumously to Foster.

No shred of evidence was ever unearthed to prove the Clintons guilty of misdemeanour in the Whitewater affair, let alone in the wilder charges of involvement in Foster's death or drug smuggling in Arkansas. Commentators such as the avowedly pro-Clinton Sidney Blumenthal and neoconservative turncoat David Brock could trumpet this truth until they were blue in the face. But the truth soon ceased to matter in the increasingly frenzied atmosphere in the nation's capital. The Clintons, in Brock's view, became the victims of 'political terrorism.' [45]

Speaking at the 1993 Washington Conservative Political Action Committee, Arkansan Justice Jim Johnson preached to the converted in referring to the president as a 'queer-mongering, whore-hopping adulterer; a baby-killing, draft-dodging, dope-tolerating, lying two-faced, treasonist activist.'[46] To Clinton's adversaries, the Whitewater scandal was heaven–sent. It became the nucleus from which all the other scandals could evolve and put the Clintons on the defensive. Funding from right-wing donors poured in to ensure relentless negative media coverage. If the Cold War had been the unifying factor for the Republican Party in the past, it was now, without doubt,

opposition to Bill Clinton. Ironically, one of the few in the GOP who did speak out against the anti-Clinton campaign was archconservative Barry Goldwater. Speaking about Whitewater at a press conference in early 1994, he declared, 'I haven't heard anything yet that says this is all that big of a deal.' He suggested that Clinton's opponents 'get off his back and let him be president.' When faced with Republican criticism for his statements he responded, 'I don't give a damn.'[47] Goldwater was the exception to the rule.

Whitewater offered an interesting test of whether Congressional Democrats would treat allegations of misconduct by a Democratic president with the same fervour as in the case of a Republican one. During the Reagan/Bush presidencies, eight independent counsel investigations were conducted.[48] Naturally, the argument could be made that the independent counsel in all of its incarnations had continuously been used as a partisan tool by those wishing to employ the gravitas of legal proceedings against their political opponents. There is little doubt that these investigations initiated by Congress were fuelled by more than mere civic duty. The Democrats held a majority in the House of Representatives from 1981 and in the Senate from 1987. However, by the time Robert Fiske was appointed, the culture wars were underway and the stakes involved more than the usual partisan sparring. Every possible method of attack was employed against a Clinton-led executive that was perceived by many to embody the antithesis of what the Republic as well as the Republicans stood for. Hence the intense level of antipathy and frustration from the president's opponents at what they perceived to be Fiske's conciliatory approach.

Fiske Appointed as Special Counsel:

On January 20 1994, Fiske was appointed by Reno who announced that he was the 'epitome of what a prosecutor should be'.[49] An ex-partner of Lawrence Walsh at law firm Davis Polk, Fiske turned to his old colleague for guidance during his early days as special prosecutor. Walsh had the utmost respect for the new counsel, who was known to be an excellent trial lawyer, and was held in the highest regard among the bar. Describing him as an 'ideal' candidate for the post, Walsh considered Fiske efficient, able and capable of moving the investigation rapidly along. In Walsh's opinion, Fiske was unlikely to bring prosecutions in the Whitewater investigation. Whitewater was an old matter, and there were no very good cases against anybody.[50]

Colleagues described Fiske as fair, cool under pressure and consummately professional. Being at the top of his profession endowed him with extra kudos as his position affirmed that he had no social or political ambitions. He had nothing to prove. Having maintained his distance from partisan politics while moving in and out of public service during his professional life, he was politically experienced without being unduly swayed or distracted by ideology and party calculation.[51]

Fiske had voted for Bush in 1992 but felt confident that he had no strong feelings either way for Clinton.[52] He was granted a broader jurisdiction than any of his predecessors. With a reputation for being careful, meticulous and tough, Fiske adopted a vigorous strategy and made swift progress. Taking leave of absence from his law firm, he moved to Little Rock in order to concentrate fully on the task at hand. He also benefited from the loyal and experienced staff he hired. At their first meeting,

Fiske reportedly had two words of advice for his team: 'Lawrence Walsh.'[53] Without disrespect for his old mentor, Fiske was determined to avoid the pitfalls that befell the Walsh investigation. In other words, there were to be no peripheral investigations, no politicisation of his actions, no pussy-footing around the president and definitely no seven-year odyssey.

By March 1994 Fiske had summoned much of the White House before a grand jury. He used his subpoena power and took a far more confrontational stance than the high-profile Lawrence Walsh. By April, the Clinton administration was also facing the prospect of a major Congressional oversight inquiry. Although no allegations had particularly stuck at this point, Clinton's perceived inability to take control generated a negative impression.[54] Journalist E. J. Dionne justifiably wondered why, if the Clintons had nothing to hide, they seemed to be hiding things. In his view, the Clintons' problem lay 'not with Whitewater but in a White House permeated by a hatred of the press, a resentment of disclosure and an attitude of permanent embattlement.'[55]

Repeatedly referring to the investigation and scandal in his memoirs as 'Whitewater World', Clinton gave an impression of how he perceived and dealt with the scandal. As the drama unfolded, he spoke of it as though it were a parallel universe, where logic and sanity did not prevail. However, recalling the Fiske period, Clinton spoke with respect of his prosecutor's professionalism and efficiency. Both Clintons believed that had Fiske not been fired, he would have completed his task in a timely and balanced manner.[56] The president claimed that he was glad to hear Fiske was investigating the Foster case. Although he would no doubt have publicly voiced this

opinion regardless, Clinton genuinely had little cause for concern as Fiske worked towards a rapid and low profile conclusion.

On June 30 1994, Fiske released a report stating that Foster had committed suicide and that there had been no obstruction of justice because of contacts between White House aide and Treasury officials.[57] Fiske specifically mentioned Foster's distress regarding the adverse publicity he had received. In his independent counsel report, Fiske stated 'In reference to the *Wall Street Journal* editorials, [Foster] wrote that, "the *Wall Street Journal* editors lie without consequence." He concluded the [suicide] note by saying "I was not meant for the job or the spotlight of public life in Washington. Here ruining people is considered sport."'[58]

The anti-Clinton conservatives found these conclusions wanting. From this point onwards, they and their media counterparts turned against Fiske and began to call for his resignation. The *Wall Street Journal*, for example, produced editorials with titles such as 'The Fiske Coverup' and 'The Fiske Hangout'. The Western Journalism Centre, funded by right-wing millionaire Richard Mellon Scaife, took out full-page ads in protest at Fiske.[59] *New York Times* columnist William Safire encapsulated the conservative viewpoint by asking: 'what's with this non-independent counsel who helps Democrats avoid oversight? Find a way to get rid of him.'[60]

The 1994 mid-term elections saw the Republicans take control of Congress for the first time since 1954 and make significant gains in state capitols and town halls. The elections gave the public an opportunity to voice their displeasure with Washington politics. Whether the vote provided a new mandate for conservatism was more open

to question. However, many of the new Republican members were staunch conservatives, whose presence ensured that the 104th Congress would move considerably to the right of its predecessor. With Newt Gingrich as the Speaker of the House of Representatives and Bob Dole leading the Senate, the Clinton administration had little or no hope of pursuing its agenda.[61] Dole had made his stance clear in January by calling for an independent counsel appointment on the day that Clinton's mother died.[62]

In March 1994, Lloyd Cutler took over as Clinton's counsel. Cutler believed that the key to dealing with Whitewater would be to show good faith and cooperation with the prosecutor. On meeting with Fiske, Cutler said the independent counsel reminded him of Archibald Cox - honest, frank but hard-nosed.[63]

Troopergate:

Whitewater, Travelgate and Vince Foster's death were not the full extent of Clinton's woes. On December 20 1993, the *American Spectator* ran an 11,000 word article by David Brock entitled 'His Cheatin' Heart.' In it, former Arkansas State Troopers provided details of Clinton's alleged sexual liaisons. Anti-Clinton millionaire Peter Smith had put Brock onto Christian fundamentalist Arkansas lawyer Cliff Jackson a few months earlier with the intention of promoting the Troopers' story. Jackson was aware that a story about consensual sex was of little value, so he encouraged Brock to concentrate on Clinton's abuse of power as governor and misuse of state resources by forcing the state troopers to assist in enabling his sexual dalliances. There was also to

be a book on the topic, written by Brock, assisted by the troopers. Unknown to Brock, Jackson had already signed a contract guaranteeing himself a portion of royalties from any book or television deals coming out of the story.[64]

The initial Troopergate story had been written by a *LA Times* reporter but killed by editors before *The Spectator* story emerged. Once the tale had been released into the ether, it was then acceptable for the *LA Times* to run the story in response.[65] Before he went ahead with the piece, Peter Smith put Brock in touch with lawyer Richard Porter, a protégé of Bush White House counsel C. Boyden Gray. Gray had worked on opposition research for the Bush-Quayle campaign, and was presently working for the Chicago branch of Kirkland and Ellis, the same firm that employed Kenneth Starr.[66]

Brock had managed to convince himself and others that he was the new Woodward and Bernstein, but the credibility of the 'Troopergate' story, as it immediately became known, was somewhat tarnished by the fact that both the author and the troopers had been paid by Peter Smith, and received a contribution from one of the Reverend Jerry Falwell's organisations. Although *The Spectator*'s editors had insisted on removing the names of the women involved in the Troopergate story, there had been one minor oversight. Reference to a woman named 'Paula' inadvertently remained in the article.

Paula Jones:

Paula Corban Jones held a press conference at the Conservative Political Action Committee's annual convention on February 11 1994. The same convention was

promoting a 'Troopergate Whistleblowers Fund.'[67] No major networks covered this press conference and the *Washington Post* refused to run Michael Isikoff's stories which largely confirmed Jones' story. In his book on the topic, Isikoff explained that the truth of the matter was secondary to the *Post* editors; the issue was more about propriety and whether the public should know.[68] This, the essence of media-gatekeeping, was something that would later dissolve completely during the Lewinsky scandal.

Paula Jones claimed that on May 8 1991, at the Excelsior Hotel in Little Rock, Arkansas, Bill Clinton had made unwanted sexual advances towards her. Her claim was never disproved. Although the White House regarded the matter as just another 'bimbo eruption', the president's opponents saw it as a prime opportunity to shred his moral authority to govern. Lending credence to Hillary Clinton's vast right-wing conspiracy theory, Paula Jones waited until the last moment to take action, and when she did, it was not to sue *The Spectator* for libel. Instead she threatened to file a federal civil lawsuit against Clinton. It was at this point that the mainstream press began to take notice of her. David Brock believed that the main reason he was not sued for the article was that Jones was being advised and influenced by a group of right-wing lawyers who had their own agenda of undermining the presidency. Anti-Clintonites Cliff Jackson, Peter Smith and Richard Porter put Jones' lawyer in touch with the Landmark Legal Foundation, a conservative public interest law firm financed by Richard Mellon Scaife, who was also the main benefactor of *The Spectator*. Right-wing talk show radio host Rush Limbaugh sat on the legal foundation's board of advisors.[69]

Jones lawyers Gilbert Davis and Joseph Cammarata, both Virginia Republicans, were soon viewed as being out of their depth with the case, and were offered pro bono assistance from three conservative lawyers who quickly became known as 'the elves.' Davis and Cammarata also received help from legal heavyweights Robert Bork and Theodore Olson, who was also counsel for *The Spectator*.[70]

Davis and Cammarata strongly advised Jones to settle her case, but she refused. Her lawyers were replaced by members of the right-wing Rutherford Institute, another recipient of funding from Richard Mellon Scaife. George Conway, one of the elves, explained to Brock that whether Jones was telling the truth or not was not the point. He explained that the Jones team were planning to examine Clinton under oath about his consensual sex life with the hope of catching him out in a lie or lies. Their plan was to create a perjury trap.[71]

Jones' credibility was shaken by Michael Isikoff's revelation in the *Washington Post* that she and her lawyer had signed a contract with provision for the sale of a book and movie rights. This did nothing to prevent her anti-Clinton supporters from flocking to help. The wife of conservative judge Lawrence H. Silberman wanted her anti-feminist group, the Independent Women's Forum, which was also funded by Scaife, to assist Jones.[72] The lawyer that Ricky Silberman had in mind to file the amicus brief for Jones was Federalist Society stalwart Kenneth Starr. Widely viewed as a moderate conservative, Starr's voting record on the appellate court was actually as conservative as Robert Bork's.[73]

Around the same time, two anti-Clinton videos were released, both produced by the Reverend Jerry Falwell and promoted by the Citizens for Honest Government. In the *Clinton Chronicles*, which sold over 150,000 copies, former marketing director of the Arkansas Development Financial Authority Larry Nichols accused Clinton of all manner of criminality. This included cocaine use and supply, money laundering, paying off lawyers, judges and banks, as well as being a 'womanising, dope-smoking liar and a draft-dodger.' Nichols was one of the first to call for Clinton's impeachment.[74]

The burning question in mid 1994 was whether a sitting president could be brought to court by a citizen in a civil case. On May 6 1994, two days before the statute of limitations on her case ran out, Jones filed a civil suit in the US District Court seeking $700,000 in damages. Clinton chose Robert S. Bennett, Counsel for Casper Weinberger in the Iran Contra trial, as his counsel to deal with the suit. The Clinton defence team adopted a two-pronged approach. Clinton categorically denied any improper behaviour on his part and his team launched its crucial public relations battle. Bennett referred to the Jones lawsuit as 'tabloid trash', and in keeping with the theme, White House strategist James Carville observed that if you 'drag $100 through a trailer park and there's no telling what you'll find.' Obviously neither side had any qualms about gutter fighting. The Clinton team also attempted to delay the course of litigation by arguing the case for presidential immunity.[75]

Initially, Jones had stated she wanted no money, just an apology from Clinton. For a brief period, there had been talk of a settlement and a statement was negotiated.

However, the deal fell apart and Jones went ahead with her case. With hindsight, it was a monumental miscalculation on Bennett's part not to nip the problem in the bud. He realised that the case was rooted more in politics than in law. Hillary Clinton's vast right wing conspiracy theory was becoming less of a theory and more of a reality but the Clinton team were just as willing to engage in spin, demagoguery and exaggeration as their adversaries.[76]

In June 1994, Bennett filed a motion in a Little Rock federal court requesting that the Jones case be dismissed when Clinton was in office, to be reinstated afterwards.[77] The most famous case arguing the limits of presidential power was that of *US V Nixon* (1974) when the court upheld Judge John Sirica's subpoena of Nixon's White House tapes. This ruling ensured that the president could not be placed above the law.[78] The issue involved concerned Nixon's official actions, but the Clinton case centered on his personal actions. In the normal run of things, conservatives would have supported Clinton's claims of immunity and liberals would have agreed with a citizen's right to sue. In fact, the opposite occurred. The two sides were represented on the *MacNeil/Lehrer Newshour* on May 24 1994. White House counsel Lloyd Cutler posed the question 'suppose there were twenty libel suits filed against the president. Would he have to defend all those libel suits?' The opposition countered by pointing out that the current choice of president appeared to be a particularly unfortunate one. 'This is a novel situation, which suggests to me that we elect as president of the United States not perfect individuals but people who have conducted themselves in a way that at least thus far in our history has not given rise to private civil litigation against them' The spokesman in support of the Jones case was Kenneth Starr.[79]

Reauthorisation of the Statute and Consequences:

After interviewing both Clintons under oath, Fiske issued his reports on June 30. On the same day the Independent Counsel provisions were reauthorised, containing a special provision allowing Fiske to be reappointed under the act.[80] As the Clintons worried about the possibility of Fiske being replaced, White House counsel Lloyd Cutler reassured them that their fears were unfounded. He told Hillary that should Fiske be ousted, he would 'eat his hat.'[81] On August 5 Fiske was ousted.

Speaking on the floor of the Senate, Senator Lauch Faircloth (R-South Carolina), not for the first time, called for a 'new and truly independent counsel.'[82] Senator Dan Burton (R – Indiana) and nine other Republicans wrote to the independent counsel three-judge panel to register their displeasure with Fiske and his Foster report.[83] Fiske was accused of being 'insufficiently aggressive in pursuit of the president.'[84] Citing a possible conflict of interest because Fiske had been appointed by Reno, the three-judge panel appointed former federal appeals court judge Kenneth Starr in his stead. Another cited conflict of interest issue involved the fact that Fiske's law firm had had once represented the International Paper Company, who years earlier had sold land to the McDougals. Starr's law firm Kirkland and Ellis also represented the International Paper Company. This was not deemed a problem.[85]

When the law was re-enacted, Chief Justice Rehnquist appointed Judge David Sentelle to head the three judge panel responsible for appointing independent counsel. Sentelle, an ex-colleague of Starr's on the court of appeals, was the ultra conservative protégé of Senator Jesse Helms (R-North Carolina), who was concerned about the

'leftist heretics' trying to turn the US into a 'collectivist, egalitarian, materialistic, race-conscious, hyper-secular and socially permissive state.'[86] In defence of its decision the panel claimed that 'it is not our intention to impugn the integrity of the Attorney General's appointee, but rather to reflect the intention of the [Independent Counsel] Act, that the actor be protected against perceptions of conflict.'[87] Relatively speaking, Fiske's perceived conflicts of interest would fade into insignificance in comparison to those of his successor. Starr's appointment was dogged with controversy from the outset. The *Washington Post* was informed that Judge Sentelle had been seen lunching with Senators Helms and Faircloth on July 14, just before Fiske was fired.[88] Although the three denied discussing the case during their lunch, the appearance of propriety had certainly not been maintained.

Starr's remit was later broadened to cover Travelgate and Filegate. Continuing to work at his law firm, he immediately prepared to convene two grand juries, one in Little Rock and the other in Washington DC. The Clinton team knew that Starr would be under enormous pressure to come up with indictments to justify his efforts. However, the majority of the Whitewater hype appeared to start and end in Washington. Being complex and unglamorous, the matter was of little interest to ordinary Americans. Clinton gave the appearance of cooperation and the opposition had little success in turning the investigation to their political advantage.[89]

Hillary Clinton was absolutely convinced of a vast right–wing conspiracy, as she witnessed the president being attacked by his opponents. She already blamed conservative forces for the annihilation of her health care reform programme in view of the financial assistance Newt Gingrich received from right-wing billionaire Richard

Mellon Scaife.[90] According to the *Washington Post*, Scaife had contributed over $200 million to the conservative movement between 1974 and 1992.[91] Speaking about the attempts at achieving politics by other means, Hillary said of her husband 'There has been a concerted effort to undermine his legitimacy as president, to undo much of what he has been able to accomplish, to attack him personally when he could not be defeated politically.'[92] The siege mentality at the White House was increasing on a daily basis as the barrage of attacks grew stronger and more sustained.

Meanwhile, Starr was obliged to deal with the problem of simultaneous congressional investigations and possible witness immunity, an issue that had caused enormous trouble for Iran Contra prosecutor Lawrence Walsh. As a result of Walsh's experience, congressional investigators were more accommodating towards Fiske. He had written to the Senate and House banking committees in March 1994 stating that their Whitewater interviews could 'pose a severe threat to the integrity' of his inquiry. He feared that both investigations interviewing the same witnesses could lead to 'premature disclosures' and 'tailored testimony'. Democrats eagerly reiterated Fiske's arguments against open-ended Congressional hearings in the hope of stalling such a drain on the presidency.[93]

The decision to delay the hearings was not completely down to altruism on the part of Congress. Holding the hearings nearer the 1996 presidential elections had more damage potential. Despite the media frenzy surrounding Whitewater, in 1994 the public did not show any sustained interest in the matter.[94] The replacement of Fiske by Starr was another factor in the delay. Starr's appointment had taken Fiske and his staff by surprise. 'We found out about Starr's appointment because the press called

us' recalled one of Fiske's staff. 'Then the special division faxed us this order after it had already been released. It was pretty awful and it hit us pretty hard.' Not surprisingly, many of Fiske's staff resigned, which posed obvious problems for Starr, who lacked prosecutorial experience and needed a solid team to support him.[95] However, the biggest loser in the affair was the president because his hopes for a swift conclusion to the investigation had been dashed.

The Role of the Media:

Technological evolution and the new mixed media culture played a significant role in how the Clinton scandals and independent counsel investigation evolved. Sensationalism, infotainment and tabloid-esque reporting had become so much the norm that the usual journalistic standards and ethics were rapidly eroded. Just as politicians and their handlers had become masters in the art of spin, the media had become equally adept at shaping and manipulating the messages they were delivering to the public.

'It's a hunt,' is how the executive editor of one national newspaper explained the Clinton media frenzy to Sidney Blumenthal. 'If they hadn't acted like prey, we wouldn't treat them like prey.'[96] Clinton's media debut in Washington had not been a resounding success, as he had made insufficient efforts to woo the media elite on arrival. His days on the campaign trail where he and his running mate were treated as the liberal media darlings were over, and the relationship with the Washington media went steadily downhill. Hence the glee among many pundits when Clinton's standing

took a nosedive in the polls and the Whitewater-induced frenzy overshadowed whatever progress his political programmes were making.

Writing in the *Washington Post* in March 1994, E. J. Dionne posed the question: 'if the press saw Whitewater as a trivial matter during the presidential campaign, why did it hyperventilate this year with comparisons of an old land deal to Watergate and Iran Contra?' Dionne did not blame the Republicans for this, although he acknowledged that they did, as any opponents would, ride the story for all it was worth. Thanks to the press' development of a grammar of scandal, Dionne pointed out that the recipe was simple; 'Pull a few evocative words off the shelf - 'shredding' and 'White House in disarray' are my favourites – and blend into a portentous tone that mixes astonishment, outrage and studied concern. Bake for a while and - presto! – you have judicial investigations, congressional hearings and an army of reporters assigned to keep the story going.'[97]

Just as responsible for the media's scandal recipe though, was the Clintons' mishandling of the situation, creating a siege mentality when there should have been openness and cooperation. They suffered from what William Safire termed the 'Us and Them syndrome' which confused legitimate questions with invasions of privacy and was potentially as harmful to the administration as the Whitewater story itself.

Somehow, Clinton managed to weather the various media feeding frenzies of the early 1990s, the polls often indicating that the public did not want to be over-informed of politicians private lives. A *CNN/Time* poll during the Gennifer Flowers drama found that 82% of those asked believed that the press concentrated too heavily on

candidates' personal lives and only 25% 'wanted to be informed about the private lives of presidential candidates, including any extra-marital affairs' - a dramatic drop from the 41% of respondents who wanted to be kept informed of such matters in 1987.[98] Although the public may have progressed in their thinking since the 1987 Gary Hart debacle, the American right appeared to be doing the opposite. 'Overwhelmingly vengeful, greedy, bigoted, and blindly reactionary' was how they were viewed by the White House.[99]

During the early Clinton scandals at least, the general public was not particularly up in arms, as the real estate matter appeared too complex and the infidelity matter too personal. Thanks to the new media, snippets of scandal were constantly being offered, via the cable networks, internet and supermarket tabloids. Stories that the mainstream media would not directly have reported due to the inability to corroborate sources or the distasteful nature of the topic, were introduced into the ether and picked up by more respected elements in the media.

When Brock's Troopergate article was published on December 18 1994, *CNN* led with the story, without having done any work itself to examine the allegations. The *Associated Press, LA Times* and *Washington Post* immediately followed suit. In the age of the new media, anything could find its way into the mainstream. A prime example of this was the 1978 rape allegation made against Clinton by Arkansas nursing home employee Juanita Broadrick. This story made its way from the bowels of the Arkansas Project eventually to the editorial page of the *Wall Street Journal*.[100]

The Emergence of Scandal Politics:

Journalist Jeffrey Toobin argued that since the Second World War, there had been a 'conspiracy within the legal system to take over the political system of the United States.'[101] He made reference to Tocqueville's famous remark that, 'scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.'[102] Considering the history of the independent counsel office, Tocqueville's observation seemed particularly relevant a century and a half later.

Lawyers at the NAACP had used the courts successfully to achieve political change, and others followed in their wake. Post Watergate, the Democrats created the independent counsel act in an optimistic attempt to legislate ethics. Those on the right soon realised the power of the courts in advancing their agenda. Methods used at the NAACP and American Civil Liberties Union were adopted by right-wing organisations such as the Federalist Society, Rutherford Institute and Landmark Legal Foundation.[103] Litigation substituting for political debate and legislative struggle is not necessarily a healthy development. Government by litigation subverts democracy; litigation as politics subverts the law.[104] The independent counsel investigation of Clinton clearly illustrated this point. Manipulation of the legal system and the media could ensure the opposition goal of sustained presidential paralysis.

The steady decline of public trust in government since the 1960s has been mirrored by the increased emphasis by the public and government itself on higher standards of conduct. Much of the post-Watergate scandals occurred due to heightened ethical sensitivities, increased ethics legislation and a more aggressive media. The good

character of public servants could no longer be assumed, or indeed their bad character ignored, as had been the case in the past. It was deemed necessary to construct legal walls to protect the public interest from the self-interests of public servants.[105]

The increased ethics emphasis did not come without a price. The rise of the prosecutorial culture was detrimental in a variety of ways. It was potentially discouraging for talented individuals contemplating entering public service, as the potential for character assassination was high. No-one relished the prospect of operating under such heightened scrutiny. This was quite a price to pay, as late president of Yale A. Bartlett Giamatti declared, 'if a society assumes its politicians are venal, stupid or self-serving, it will attract to its public life as an ongoing self-fulfilling prophecy, the greedy, the knavish and the dim.'[106]

Endless investigations became the norm, and partisan combat transcended the election process. Elections became benchmarks in ongoing partisan struggles for control of the policy-making process. The new motto seemed to be: 'if you cannot beat your opponent in an election, beat up on your opponent after the election.'[107] The Independent Counsel statute provided a ready club for those who followed this new convention. Writing in the *Washington Post* in 1995, Meg Greenfield pondered the issue of right and wrong in Washington, asking 'why do our officials need specialists to tell the difference?' [108]

But, ethics investigations were show business and everyone wanted a piece of the limelight. Robert Fiske had been provided with a virtually unlimited mandate. On the day he was appointed, he declared, 'there are no limits on what I can do.'[109] Fiske

showed no overt signs of partisan motivation or extremism, and appeared to handle his vast power well. His successor, however, took a different approach. Kenneth Starr was extremely active in Republican politics, had connections to Clinton's staunch opponents and appeared to have trouble keeping his partisan agenda in check. Ironically, as the White House defence team worried more about Whitewater than Troopergate and Paula Jones, it was the civil suit filed against the president that would bring the real trouble.

Footnotes:

[1] Stewart, James B, *Bloodsport: The President and His Adversaries*, Simon and Schuster, New York, 1997, p.399
[2] *www.dpw.com/lawyers/bio/Fiske.htm*
[3] *http://edition.cnn.com/2000/ALLPOLITICS/stories/12/20/clinton.interview.reut/*
[4] Conason, Joe and Lyons, Gene, *The Hunting of the President: The Ten-Year Campaign to Destroy Bill and Hillary Clinton*, Channel 4 Books, London, 2000, p.120
[5] ibid, p.128
[6] Clinton, Bill, *My Life*, Hutchinson, London, 2004, p.613
[7] Toobin, Jeffrey, *A Vast Conspiracy: the Real Story of the Sex Scandal that Nearly Brought Down a President*, Random House, New York, 1999, p.69
[8] Walsh, Lawrence, *Firewall*, The Iran Contra Conspiracy and Cover-Up, W.W. Norton and Co., New York, 1997, p.469
[9] Lawrence E Walsh interview with author, 29 April 2004
[10] Walsh, *Firewall*, p.471
[11] ibid, p.472
[12] ibid, p.482
[13] ibid, p.484
[14] ibid, p.508
[15] Lawrence Walsh interview with author, 29 April 2004
[16] Harriger, Katy, *The Special Prosecutor in American Politics*, Kansas University Press, 1992, p.91
[17] Woodward, Bob, *Shadow: Five Presidents and the Legacy of Watergate*, Simon and Schuster, New York, 2000, p.234
[18] Clinton, *My Life*, p.574
[19] Clinton, *My Life*, p.240
[20] Blumenthal, Sidney, *The Clinton Wars*, Farrer, Strauss and Giroux, New York, 2003, pp.101-2. The Washington Legal Foundation also accused him of personal corruption, over a tax matter of $14,000 but there was no credible evidence to support this.
[21] Woodward , Bob, *The Agenda: Inside the Clinton White House*, Simon and Schuster, New York, 1994, pp.332-3
[22] Brock, David, *Blinded by the Right: the Conscience of an Ex-Conservative*, Crown, New York, 2002, p.53
[23] ibid, p.43
[24] ibid, p.127
[25] ibid, p.131
[26] Sabato, Larry, *Feeding Frenzy*, p.6
[27] Kurtz, Howard, 'The Big Sleazy: Is Clinton's Clan as Low Rent as Reagan's?' *Washington Post*, 26 March 1995, p.C1; (On the campaign trail in 1992, candidate Clinton castigated some Bush administration appointees for ethical lapses and vowed that his would be 'the most ethical administration in the history of the Republic.' That was the backdrop for executive order 12834 that he signed just hours after taking the oath of office which added new restrictions on post-government employment for the most senior officials) *http://www.appointee.brookings.org/sg/c8.htm*
[28] *http://frwebgate5.access.gpo.gov/cgi-bin/*
[29] Kurtz, Howard, 'The Big Sleazy: Is Clinton's Clan as Low Rent as Reagan's?'
[30] 'the partnership, a real estate joint venture that was developing land in the Ozarks, involved the Clintons and James B McDougal, a former Clinton aide turned developer. It started in 1978, and at times money from Mr McDougal's savings and loan was used to subsidise it. The corporation continues to this day but does not appear to be active.'Gerth, Jeff, 'Clintons Joined S&L Operator in an Ozark Real Estate Venture', *New York Times* 08 March 1992
[31] Williams, Robert, *Political Scandal in the USA*, Keele University Press, Edinburgh, 1998, pp.64-65
[32] Blumenthal, Sidney, *The Clinton Wars*, p.45
[33] '...Yet complete contentment remains just out of reach. The pleasure I take in the suffering of the Clintons isn't full, for it is clear that there is more in store for them, and I feel strongly that they haven't suffered enough...I will be even happier as this unfolds. More important for me is the sense that until now the president and his first lady have been rather too alone in their troubles, that there are others who, worms that they are, should be squirming now with discomfort and embarrassment, and have only just begun to do so...What really counts about them, what binds them to one another and sets them apart from the hoi polloi, is their membership in the educated, left-leaning, affluent professional class.

These are the lawyers, the columnists and editorialists, the reporters, the legislators and the executives, the aristocrats of 'idealism'. Abrams, Rachel, 'When a Special Prosecutor Comes into Your Life' *Washington Times*, 10 March 1994

[34] Blumenthal, *The Clinton Wars*, p.49

[35] Brock, David, *Blinded by the Right*, p.45

[36] Power of Nightmares, BBC2, 27 October 2004

[37] *http://www.findarticles.com/p/articles/mi_m2751/is_n31/ai_13991708/pg_2*

[38] Maskel, Jack, CRS Report for Congress, Pennyhill Press, 24 April 2001, p.17

[39] 'This is the way Congress wanted it to be, though. They wanted it to apply to all these people. I don't think Congress knew what they were doing when they enacted it--this law. I don't think they understand the ramifications of it. I must say that from a political standpoint I know the Democrats used to love this law when there were Republican presidents being bothered by it, like Reagan and Bush. Now that a Democratic President has literally been hoisted by it, many, many Democrats are finally beginning to realize that this is not a very good piece of legislation.' *http://www.pbs.org/newshour/bb/white_house/jan-june98/counsel_1-26.html*

[40] Pfiffner, James, *The Modern Presidency*, 2nd edition, St Martins Press, New York ,1998, p.204

[41] Woodward *Shadow*, pp.230-1

[42] Woodward, *Shadow*, p.232

[43] Blumenthal, *The Clinton Wars*, p.67

[44] Seper, Jerry, 'Clinton Papers Lifted After Aide's Suicide', *Washington Times*, 20 December 1993, p.A1

[45] Power of Nightmares, BBC2, 27 October 1994

[46] Stewart, *Blood Sport*, p.313

[47] ibid, p.52

[48] Leon Silverman was appointed on 29 December 1981 and again on 11 June 1985 to investigate Secretary of Labour Raymond Donovan
Jacob A. Stein was appointed on 02 April 1984 to investigate Attorney General nominee Edwin Meese
James C. McKay and Alexia Morrison were appointed on 23 April 1986 and 29 May 1986 respectively to investigate Assistant Attorney General Theodore Olson
Whitney North Seymour was appointed on 29 May 1986 to investigate presidential aide Michael Deaver
Lawrence E. Walsh was appointed on 19 December 1986 to investigate Lt. Colonel Oliver North and others
James C. McKay was appointed on 02 February 1987 to investigate White House aide Frank Nofziger and Edwin Meese
Carl S. Rauh and James R. Harper were appointed on 19 December 1986 and 17 August 1987 respectively. This investigation was sealed.
A independent counsel was appointed on 31 May 1989. The entire investigation was sealed.
Maskell, Jack, *CRS Report for Congress*, 'Independent Counsel Appointed Under the Ethics in Government Act of 1978, Costs and Results of Investigations', 24 April 2001

[49] Blumenthal, *The Clinton Wars*, p.97

[50] Lawrence Walsh interview with author, 29 April 2004

[51] Blumenthal, Sidney, *The Clinton Wars*, p.100

[52] Woodward, *Shadow*, p.242

[53] Toobin, *A Vast Conspiracy*, p.71

[54] Grant, *Contemporary American Politics*, p.48

[55] Dionne, E.J., 'Whitewater: Who Made this Monster?' *Washington Post*, 22 March 1994, p.A17

[56] Clinton, Hillary, *Living History*, Headline, London, 2003, p219; Clinton, Bill, *My Life*, p.574

[57] Report of the Independent Counsel in Re: Vincent W Foster Jr, Washington DC, 30 June 1994

[58] Report of the Independent Counsel in Re Vincent W Foster Jr, Washington DC, 30 June 1994

[59] Blumenthal, *The Clinton Wars*, p.101

[60] Safire, William, 'Chorus Line', *New York Times*, 01 August 1994

[61] Grant, *Contemporary American Politics*, p.236

[62] Woodward, *Shadow*, p.236

[63] ibid, p.251

[64] Brock, *Blinded by the Right*, p.142

[65] Williams, Bruce A, Delli Carpini, Michael X, 'Unchained Reaction: the Collapse of Media Gatekeeping and the Clinton-Lewinsky Scandal', *Journalism*, 1 No 1, California, (2000), 70

[66] Brock, *Blinded by the Right*, p.148

[67] Woodward, *Shadow*, p.243
[68] Williams and Delli Carpini, 'Unchained Reaction', p.71
[69] Brock, *Blinded by the Right*, p.179
[70] Blumenthal, Sidney, *The Clinton Wars*, p.90
[71] Brock, *Blinded by the Right*, p.185
[72] ibid, p.80
[73] ibid, p.187
[74] 'Clinton Chronicles' video, Citizens for Honest Government, 1994
[75] O'Connor, Karen and Hermann, John R., 'The Courts: The Perils of Paula', in Rozell, Mark J. and Wilcox, Clyde, (ed), *The Clinton Scandal and the Future of American Government,* Georgetown University Press, Washington, 2000, p.46
[76] Toobin, *A Vast Conspiracy*, p.51
[77] Williams, Joel, "Clinton Seeking Harrassment Suit Delay Till He Leaves Office', Associated Press, 27 June 1994
[78] The case of *Nixon V Fiztgerald* (1982) was more significant in terms of creating the ideological divide over presidential power and immunity. A bitterly divided court ruled, five to four, that Fitzgerald did not have the right to bring his case. Toobin, *A Vast Conspiracy*, p.58
[79] ibid, p.59
[80] Isikoff, Michael, 'Whitewater Special Counsel Promises Thorough Probe', *Washington Post*, 21 January 1994, p.A1
[81] Clinton, *My Life*, p.607
[82] Blumenthal, *The Clinton Wars*, p.102
[83] Schneider, Howard, 'Judge Met Senator Faircloth Before Fiske was Ousted; Sentelle Says Special Counsel Wasn't Discussed', *Washington Post*, 12 August 1994, p.A1
[84] O'Connor, Karen and Hermann, John R, 'The Courts: the Perils of Paula' in Rozell, Mark and Wilcox, Clyde, *The Clinton Scandal and the Future of American Government*, p.51
[85] Blumenthal, *The Clinton Wars*, p.107
[86] Clinton, *My Life*, p.613
[87] *www.courttv.com/archive/legaldocs/government/whitewater/starr_appt.html*
[88] Schneider, Howard, 'Judge Met Senator Faircloth Before Fiske Was Ousted; Sentelle Says Special Counsel Wasn't Discussed,' *Washington Post,* p. A1
[89] Busby, Robert, *Defending the American Presidency: Clinton and the Lewinsky Scandal*, Palgrave, Hampshire, 2001, p.45
[90] Clinton, *Living History,* p.246
[91] *http://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/scaifemain050299b.htm*
[92] Clinton, *Living History,* p.443
[93] *http://www-tech.mit.edu/V114/N12/Fiske.12w.html*
[94] Harriger, *The Special Prosecutor in American Politics*, p.225
[95] Katy Harriger interview with Julie O'Sullivan, associate counsel for R. Fiske and K. Starr, quoted in ibid. p.226
[96] Blumenthal, *The Clinton Wars*, p.114
[97] Dionne, E.J, Whitewater: Who Made this Monster?' *Washington Post,* p.1
[98] Sabato, *Feeding Frenzy,* p.124
[99] O' Hagan, Sean, 'No Smoke Without Fire', *Observer*, 25 May 2003
[100] Walsh, Joan, The Ugliest Story Yet, 20.02.99 - *www.salon.com/news/1999/02/cov_20news.html*
[101] Toobin, *A Vast Conspiracy,* p.5
[102] *http://xroads.virginia.edu/~hyper/DETOC/1_ch16.htm*
[103] *www.salon.com/news/1999/02/cov_20news.html*
[104] Samuelson, Robert J, 'Delegating Democracy', *Newsweek,* 12 June 2000, p.59
[105] MacKenzie, G. Calvin, *Scandal Proof: Do Ethics Laws Make Governments More Ethical?* Brookings, Washington, 2002, p.31
[106] Giamatti, A Bartlett, *The University and the Public Interest*, Atheneum, New York, 1981, p.168
[107] MacKenzie, *Scandal Proof*, p.144
[108] 'the monkey business isn't what's distinctive; what's distinctive is the pretension that these are generally very arcane, difficult matters to unravel, requiring the assistance and sustained attention of independent, resident 'specialists.' Greenfield, Meg, 'Right and Wrong in Washington', *Washington Post*, 06 February 1995, p.2
[109] Isikoff, *Uncovering Clinton*, p.36

6. Kenneth Starr and the Whitewater/Lewinsky Investigation: Beyond the Call of Duty

'our long national embarrassment'

(Sidney Blumenthal)

According to Karl Marx, history repeats itself the first time as tragedy, the second time as farce. The Independent Counsel Act was passed in order to prevent or at least contain another Watergate. Instead, the legislation helped to ensure that the Iran Contra affair was judged only by the experience of Watergate. As a result, it fell short of ensuring proper justice in a situation that posed a grave threat to the moral authority of the president. Furthermore, the measure allowed the Whitewater-Lewinsky affair to be dealt with by assuming the same magnitude as Watergate. Therefore there was a complete loss of perspective and proportion in the investigation of a failed 1970s land deal and a consensual sexual liaison.

This chapter deals with the controversial change of independent counsel in 1994 from moderate Republican Robert Fiske to the more partisan Kenneth Starr. The latter's unprecedented interpretation of his role generated controversy, as he acted in a fashion more akin to a truth commissioner than an independent counsel.

The chapter will outline White House reactions to Starr's unique method of procedure and illustrate how the White House scandal management strategy itself became the subject of huge criticism. It will deal with opinions of the newly reauthorised Title VI of the Ethics Act, the many tentacles of Whitewater and the increasingly clear

division along party lines of those in the pro and anti Starr camps. The evolving credibility of Hillary Clinton's 'vast right-wing conspiracy' theory will be examined in the context of Starr's perceived conflicts of interest. The chapter concludes with the increasingly complex nature of what had evolved into a highly publicised probe into the president's sex life, how the scandal was perceived by elites and the public, and how the unpopularity of the president's opponents may have prevented his downfall.

Role and Reputation:

The shortcomings of the independent counsel statute were apparent as early as 1993, when the Clinton White House was contemplating the application of the law to itself. Lawrence Walsh's seven year investigation was coming to a close and had not been a good advert for the process. Accusations of excessive length, zeal, expense and partisanship abounded as Walsh's investigation closed with a whimper. At the time, the Democrats refrained from criticism of Walsh, but they were rapidly faced with a reverse situation where a perceived partisan investigation was undertaken against one of their own.[1]

Individual discretion was a key factor in maintaining a balanced independent counsel investigation. The potential scope of interpretation was vast, and different prosecutors perceived their roles in different ways. In the 1990s, the name of one prosecutor in particular became synonymous with zeal and excess. Political scientist Paul J. Quirk coined the term 'Starrism' to denote an attitude that 'no national interest is higher than that of getting the goods on a high level public official, even if the offence is minor,

harmless or irrelevant to the conduct of his or her office.' He stressed that Whitewater independent counsel Kenneth Starr did not invent Starrism, but expressed its most salient features. In Quirk's opinion, guidelines pertaining to the independent counsel's function had never stressed proportionality. [2] Many of Starr's predecessors had been accused of partisanship and abuse of power, but the reactions to Starr's investigation were unprecedented in their strength. His detractors were virulent, his supporters staunch in the face of adversity. Such polarised responses contrasted starkly with reactions to Starr's previous involvement in an ethics investigation which had a very different outcome.

In Autumn 1993, Kenneth Starr had been assigned to the Senate Ethics Committee investigation of Senator Robert Packwood's alleged sexual misconduct. The *Washington Post* observed that 'even those that regularly crossed swords with him credited him with being fair. He was not seen as being ideologically driven.' Although the Packwood case was full of salacious detail, there was never a leak from Starr or a complaint about his work.[3] Before Starr became mired in the Lewinsky controversy, legal journalist Stuart J. Taylor observed in 1993 that he 'is liked and respected, with an extraordinary degree of unanimity, by lawyers and judges of all political stripes across all the country.'[4]

Starr had originally been short-listed by Attorney General Janet Reno for the post of special prosecutor as his credentials were solid. He was viewed as one of the Republican party's leading conservative figures – law clerk to Chief Justice Warren Burger in the mid 1970s and chief of staff for Attorney General William French Smith from 1981 to 1983. In 1989, Starr became solicitor general after being a US Court of

Appeals Judge for the DC Circuit Court during the Reagan administration. The general consensus was that Starr was a moderate conservative, rather than a right-winger, and was rumoured to have been passed over for appointment to the Supreme Court during the Bush administration because of opposition from the Right.[5] After Bush lost the 1992 election, Starr went into a $1 million a year position at the Washington law firm of Kirkland and Ellis where he remained until 2004.

The son of a Baptist minister from Texas, Starr was a staunch Christian, which may or may not have been known to the three-judge panel that appointed him. However, in fairness to Starr, assuming that he held the conventional conservative Christian views on sexual misconduct, the Whitewater investigation at that point was nowhere near investigating Clinton's philandering. Starr himself had publicly criticised the independent counsel act, stating that he felt it unconstitutional, bad policy and harmful to the orderly administration of justice.

During his time as the Attorney General's chief of staff in the Reagan administration, Starr had been involved with a group of conservative lawyers who desired to overturn a series of laws and court rulings. These included school bussing for racial balance, the ban on organised school prayer and the independent counsel statute. Despite his opposition to the statute, Starr accepted the post. Clinton's private lawyer David Kendall reckoned that Starr would be obliged to start from scratch. He knew little or nothing about the Whitewater facts and he had no prosecutorial experience.[6]

David Kendall was determined that the White House should project a positive reaction to Starr's appointment. In his past dealings with Starr, Kendall had found him

smooth, witty and polished, with no hint of extremism. However, Starr's recent background as a high official in the Bush administration did not suggest complete neutrality and perhaps the three-judge panel should have considered the impact of appointing someone who had recently held a senior position among Clinton's opposition. White House counsel Lloyd Cutler attempted to reassure Clinton of Starr's reputation. He had commanded respect as a judge and solicitor general, and Cutler had debated him on television about presidential immunity in civil cases. Starr did not believe there was immunity, but he did not come across as a zealot. Cutler's concern was that Starr would have to retrace all of Fiske's steps, which could lead to a lengthy and protracted investigation. He issued a statement promising openness and cooperation with the OIC. In a television interview, Cutler said he thought replacing Fiske was a 'total waste of taxpayers time and money' but that he had 'every confidence' in Starr.[7]

Not everyone was so optimistic. Unlike the lawyerly Kendall, notoriously partisan Clinton aide James Carville was instantly suspicious of the new independent counsel because Starr had once criticised Clinton in Carville's presence, and had been appointed by David Sentelle, whose patron had been arch-conservative Senator Jesse Helms (R-NC). Carville was convinced that Starr should be exposed as a partisan pawn. Confronted with these two opposing views, Clinton turned to Robert Bennett, his defense lawyer for the Jones case and asked him to go public with his own take on Starr. Bennett obliged and announced in early August 1994 that he had no personal doubts about Starr's 'intellect and integrity,' but had reservations based on Starr's recent comments regarding the presidential immunity question in the Jones case and his offer to file an amicus brief on behalf of Jones opposing Clinton's position. Starr

did not endorse Jones' lawsuit and did not actually file the amicus brief. 'I think Starr should decline it,' Bennett publicly stated. 'I think there is a real appearance of unfairness. If Starr found anything wrong, I don't think that anyone could have any confidence in that.'[8]

Bennett also criticised Starr's complete lack of prosecutorial experience, arguing that he had 'nowhere near the practical experience' of Fiske. As the three-judge panel announced that Fiske was being replaced because of the need for the 'appearance of independence,' Bennett opined: 'If appearances are really going to be that important, then you don't pick somebody like Starr.' Speaking at the ABA's annual meeting in New Orleans on August 8, Starr responded to Bennett's comments, declaring he would act impartially and 'with an open mind.' He avowed:

> 'Judges are accustomed to setting aside their views and proceeding apace with a fresh perspective and saying that was yesterday and this is today and my duty is to go forward with an open mind.'[9]

Cutler continued to urge accommodation rather than confrontation, as he firmly believed that antagonising Starr would be self-defeating and could hurt the president. Responding to Bennett's public comments, Cutler announced that Bennett had not been speaking for the White House. 'We have no reason to doubt the fair-mindedness of Ken Starr. The president does not think that Starr should step aside.'[10]

An enraged Carville wrote to White House chief of staff Leon Panetta. 'I am convinced that the appointment of Kenneth W. Starr as independent counsel represents a historic and unconscionable violation of fairness and justice.' He further

claimed Starr had been appointed because of 'political pressure from virulent opponents of the president.' A copy of this letter was sent to the *Washington Post*, but Cutler threatened to resign if the *Post* story ran and so Carville withdrew it.[11]

Nonetheless, the political consultant was determined to make his opinion known. He pointed out the incongruity of Starr's new role with his $1000 contribution to Tex Lezar. This Texas Republican was an old friend and colleague of Starr's from the Reagan Justice Department and was running 'Whitewater update' radio slots attacking Clinton. [12] Carville was also highly suspicious of Judge Sentelle's motives. 'What is a political protégé of Jesse Helms doing appointing a potential senatorial candidate to a position like that?' Carville asked. '..Partisan politics is driving this whole thing.'[13]

On August 10 1994, Clinton was first asked in public what he thought of the Starr appointment. Clinton avoided revealing his own role in the positive and negative statements coming out of the administration about Starr, contradictory as they were. 'I'll cooperate with whoever's picked. I just want to get it done,' the president stated.[14]

White House Counsel Lloyd Cutler, whose six month tenure was drawing to a close, intensely disliked the White House working environment with its post-it note culture. He had to supply the committees with drafts of his investigative report on the White House-Treasury contacts, internal memos and general correspondence. Speculation and advice were hindered by the fear that any views expressed, however hypothetical, could be seriously damaging if used by political opponents. The ongoing Watergate hangover continued to adversely affect the presidency. A siege mentality soon gripped

the president and those around him, as they braced themselves for the impending independent counsel onslaught. When Abner Mikva replaced Cutler as White House counsel, the latter advised him, 'Don't take notes.' Clinton stressed the important of cooperation, or at least the appearance of it, and instructed Mikva to provide everything Starr's office required. The president told him that the only mistake he and his wife had made was in making the McDougals their business partners.[15]

By the time of the Republican Congressional victory in the November 1994 elections, Hillary's health care reform package had been defeated and Starr was backtracking over Fiske's investigation. In addition, House Speaker Newt Gingrich was initially quoted as saying that up to twenty task forces or committees might investigate administration wrong-doing. 'Washington just can't imagine a world where Republicans had subpoena power' Gingrich said.[16]

A rather glum White House appointed Cutler associate Jane Sherburne to deal with Whitewater and related matters and make sure that they did not adversely affect the next presidential election. There needed to be a concerted reaction to Starr, and Sherburne rapidly identified thirty-nine areas of investigation or concern spanning Whitewater, the Jones case and everything in between. Her approach was straightforward. 'Nothing to hide, stick to the facts, get right the first time, keep it simple, resist harassment, govern America.'[17] There was logic in her conciliatory approach. Working on the principle that peaceful cooperation was not headline grabbing, the relationship with the independent counsel would be cordial and accommodating.

The new scandal management team was to be headed by Mark Fabiani, who believed, probably correctly, that the public at large was disinterested in Starr's investigation.[18] Fabiani was determined to take control of how information was disseminated. Appropriate disclosure to selective reporters would bring positive results. There were a number of other independent counsel investigations running concurrently with that of Whitewater. The financial dealings of Commerce Secretary Ron Brown, a friend and political ally of Clinton's were under investigation. More unnerving for Clinton was the investigation into Housing Secretary Henry Cisneros' alleged lying to the FBI regarding the amount of payments made to a former mistress.

In Mikva's opinion, Starr's appointment was quite fortunate for the Clintons. Having worked with Starr for seven years on the court of appeals, he knew his shortcomings. Starr tended to spread himself too thin. He spent much time travelling and making speeches. He had retained his position at Kirkland and Ellis. The independent counsel post was a demanding role, and for optimum results, required a prosecutor's full attention. On the other hand, Mikva believed that Starr was a decent and moderate conservative, who would not drag the investigation into the gutter.[19]

In his early days as independent counsel, Starr received widespread praise for his previous appointments. Even the White House joined in the chorus of approval. However, his partisan affiliations did his credibility few favours and as his investigation developed, approbation quickly gave way to disapproval. Whether he genuinely misinterpreted the essence of his role as independent counsel, or he was consistently led astray by his attention to detail, or he was just plain bloody minded and partisan is difficult to ascertain precisely.

Washington Post journalist Benjamin Wittes suggests that Starr's folly was that he fundamentally misunderstood his role as Independent Counsel and hence did much damage to his reputation. In his interviews with Starr, Wittes found his subject human, thoughtful and surprisingly open to criticism. Wittes was eager to dispel the two simplistic good and evil caricature impressions of Starr created by his friends and foes. In his opinion, Starr was neither as bad as his critics alleged nor as good as his supporters insisted. Wittes concluded that Starr read the Independent Counsel role as authorising an inquest more akin to Archbishop Desmond Tutu's South African Truth and Reconciliation Committee than to a typical federal criminal investigation. Such an interpretation, he believed, caused Starr to distort his investigative priorities far beyond any that the statute itself authorised. By interpreting a truth-seeking function as part of his role, Starr managed to largely miss the point of the investigation and misinterpret his role.[20]

Initially, Starr's sensitivity toward the inherent flaws of the statute created the impression that he would be proceeding with extreme caution. In his interviews with Wittes, he did not pass any judgement on Independent Counsel Lawrence Walsh's investigation, but did not hold back in his opinion of Whitney North Seymour Jr. who had prosecuted Michael Deaver and tried to subpoena Canadian Ambassador Allan Gotlieb. Starr referred to this event as the 'monomaniacal pursuit of prosecutorial goals and the expense of other important goals' and he was highly unimpressed with Seymour's tactics.[21]

Speaking, apparently without a trace of irony, in 1999, Starr declared 'If there is one thing that my background lends itself to, it's the creation of careful procedures and

structures that will safeguard against that no-no in governmental life...arbitrary and capricious government action.'[22]

In his determination to avoid the pitfalls of his predecessors, Starr sought to 'build in structures that [would] reflect, in essence, the Justice Department at its very best.'[23] Such an aim did not seem either possible or appropriate and indeed did not appear to be achieved. Wittes was convinced that Starr was a man led astray by good intentions and his biography offered a kind assessment of an individual doing his best under arduous circumstances.

Fiske, operating as an ad hoc special prosecutor under Justice Department regulations, had chosen to interpret the role rather differently. He claimed, 'I viewed the powers and the responsibility I had as identical with what they would have been if I had been appointed by the three-judge court.' Truth was not his mission.[24] Independent Counsel Robert Ray did not overtly criticise his predecessor's interpretation of the role. He summarised his interpretation of the role as 'There is a view of the independent counsel statute that is kind of the report view: shine a spotlight and gather the facts. I am not going to shine a spotlight unless it is going to bring me facts with which I can bring a case. I am not a congressional committee, nor am I a newspaper. I am a prosecutor. I turn a spotlight on to see if there are crimes to prosecute, and when I decide I don't have a case, I turn the spotlight off, because my tools are dangerous tools.'[25]

The criticism against Lawrence Walsh for excessive zeal and partisanship seemed almost laughable in the light of the Starr investigations, as Walsh had held a far

narrower interpretation of the mandate of the independent counsel. 'The only power that the independent counsel has to compel testimony is through the grand jury, so you come down to [the question of] what is the grand jury's role in compelling testimony,' Walsh explained. 'I never used the grand jury simply as a broad truth seeking agency.'[26]

Walsh said the question did arise of whether he should function as a truth commissioner, especially in the light of the elder President Bush's pardon of former Defense Secretary Casper Weinberger. Walsh did contemplate calling Bush before the grand jury, both because he felt that Bush had broken a promise to give him a deposition after the election and because he was interested in whether the pardon had been prompted by the president's 'concern about being a witness himself'. He did not do so, however, mainly because his staff pointed out that 'the grand jury is not a device to answer your questions.'[27]

Other independent counsel were similarly perplexed by Starr's interpretation of his role. 'I frankly do not agree with – or even understand the basis for - the truth commission view' said former independent counsel Alexia Morrison, whose investigation of former Assistant Attorney General Theodore Olson led to litigation ensuring that Title VI of the Ethics Act was upheld. In Morrison's opinion, 'the thrust of the position created by the law simply does not seem to be to be open to debate.'[28] John Barrett, who served under Lawrence Walsh, did not mince his words. 'Starr's is a bad – almost a crazy bad – reading of the law' he claimed. 'The independent counsel law itself doesn't contain the truth-finding duty Starr is describing.'[29]

Former prosecutor and head of the Treasury Department's law enforcement agencies Robert Noble, felt that Starr's 'view is simply radically different from the view of most experienced prosecutors.'[30] Bearing in mind the unspoken loyalty and camaraderie that existed among the legal fraternity, the level of outspokenness against Starr illustrated just how astounded and dismayed many of his peers were at his courses of action.

There is a possibility that Wittes took Starr's truth-commission explanation at face value, since it was given as a defense of an investigation that appeared to be out of control. Starr acknowledged to Wittes the dangers of a prosecutor functioning as a truth commission and apparently considered them strong policy arguments against the statute. Such an acknowledgement undermines Starr's argument. He also agreed that it was unconstitutional for the independent counsel to use the grand jury mechanism to complete a report in the absence of a potential criminal question.[31] However, he deduced from *Morrison V Olson* (1988) that coercive grand jury power could be deployed undiminished even in situations which were more similar to congressional oversight than to criminal prosecution. Starr did not adhere to the idea that he should perhaps have taken a more minimal view of his role, arguing that such a reading 'robs the independent counsel structure of its need for being.'[32]

Senator Carl Levin (D – Michigan) who played a leading role in the reauthorisation of the statute, argued that 'as far as the type of investigation, [Starr is] exactly wrong as a matter of history. We wanted an investigation that treated [the covered official] no better than an average citizen – no different, in other words. We thought we were

writing in safeguards. We tightened the safeguards. The whole direction of the history of the bill was towards reining in the independent counsel.'[33]

The independent counsel statute stipulated that the final report should 'set forth fully and completely a description of the work of the special prosecutors'. This entailed a requirement to report on the work of the independent counsel office, rather than an actual discussion of the topic under investigation. Starr interpreted the report mechanism as a means not for Congress to view his progress, but to publicise the maximum amount of information on the investigation.

To begin with, Starr's sense of his truth-commission role, if it existed, was subtle. The Whitewater investigation was extremely complex and the majority of the public did not have a full understanding of state and federal bank, savings and loan and tax regulations and campaign finance law. Neither did they grasp the detail of federal investigation procedures and law firm billing practices. There was little widespread understanding of the details and impact of Vince Foster's death, police procedures and jurisdiction, forensic evidence and congressional forms of inquiry. In addition, there were all the associated issues of the Madison Guaranty Savings and Loan debacle, Hillary Clinton's commodities speculation, the roles of the McDougals, David Hale, Webster Hubbell and others. In July 1996, the Senate Special Committee on Whitewater produced a 1000 page report, but the reality was that the issues did not particularly embroil the masses.[34]

For the most part, until the Lewinsky story broke, Whitewater was of interest mainly to the Washington elite and the press. Even among the members of the public who did

follow the investigation, the majority of them would have had no intuitive sense of how an independent counsel would conduct their search, or what their accepted parameters would be. Initially at least, it would not have been possible to appreciate the difference between the way a prosecutor or a truth-commissioner would progress.[35]

The D'Amato Senate Committee report divided sharply along party lines and there was a minority Democrat report that reached distinctly different conclusions from those of the majority Republican report. Although strongly critical of the Clintons' actions, the majority report did not make criminal allegations.[36] Instead it alleged misconduct, obstruction of investigations and appearance of wrongdoing. In contrast, the minority report sought to deny wrongdoing and did not accept the majority report conclusions. Essentially, a year-long investigation produced two inconclusive, contradictory and incompatible reports on Whitewater. To the president's detractors, it provided evidence of wrongdoing, evasive testimony and destruction of records, and to his supporters, it confirmed the view that Whitewater was a politically motivated investigation 'in search of a scandal.'[37]

Perhaps Starr's truth commission interpretation of his role would explain his extraordinary reluctance to bring closure on various issues. From the outset, in contrast to Fiske, he did not pretend to make speed a priority. He intended to be exhaustively thorough, no matter the length of time involved. The initial example of this was his reopening of the Foster suicide investigation, which Fiske had concluded in June 1994. This was a particularly controversial decision, as the notion that Foster's death was, in fact, murder, was the core belief of the anti-Clinton contingent.

Starr would later be labelled a 'Pontius Pilate' by Clinton-hating journalist Ambrose Evans-Pritchard for eventually determining that Foster did commit suicide.[38]

Starr's entire *modus operandi* invited slowness. Many of his staff conducted relatively sprawling, unfocused probes. Indictments were sometimes brought against uncooperative witnesses in the unlikely hope that they would come forward and tell the truth. He was very quickly accused of excessive prosecutorial zeal, but perhaps his actions and methods were merely a manifestation of his perception of his role as independent counsel.[39]

During his brief six month tenure, Fiske had made swift progress. He was prepared to indict Hillary Clinton's former law partner, Webster Hubbell, for an over-billing scheme at the Rose Law Firm and had a grand jury up and running. He had gathered pleas from three Whitewater-related individuals in Arkansas, including a highly significant witness in David Hale. He had closed the Foster inquiry and found no evidence that the White House or Treasury Department officials had obstructed the Resolution Trust Corporation inquiry into the Whitewater deal.

Speaking in 1999, Starr claimed he did not believe that the Clintons were guilty of any serious misconduct. 'The president is not a wealthy person,' he recalled, 'he didn't seem by his life to be avaricious.' Starr asked rhetorically, 'How could he be in the middle of some huge fraud? And the people who were taking advantage of these [savings and loans] were really living these unbelievable lifestyles and he didn't strike me as leading the lifestyle of the rich and famous.' He claimed he had been surprised to find how far Fiske's investigation had travelled from the original Whitewater land

deal. 'When I got to Little Rock...I found that the work went far beyond a real-estate transaction once upon a time.[40]

Legitimacy and Independence:

The creation of the independent counsel statute had been viewed as a reasonably successful method of removing executive branch influence from the investigation of executive officials accused of criminal misconduct.[41] From its inception, however, critics of the statute questioned the legitimacy of the post and its independence. From the early days of the Clinton scandals, Congressman Jim Leach (R – Iowa) had led the call for Congressional oversight. Congressional Democrats were torn between loyalty to a president that had restored their party to the White House and desire to be seen to do the right thing in the face of alleged executive wrongdoing. Lee Hamilton (D - Indiana) was the first senior Democrat to join the Republican call for a Congressional Whitewater investigation. A veteran of the Iran Contra hearings, Hamilton was intimately acquainted with the independent counsel proceedings and was aware of their damage potential on a sitting president.[42]

In the past there had been a mystical assumption that the presidency was more likely to be right than Congress. Such an argument did not hold much sway in the post-Vietnam years. The traditional arguments for presidential supremacy – including unity, secrecy, superior expertise and superior sources of information, turned out to be somewhat overrated.[43] A Special Prosecutor or Congressional investigation of a president in the 1990s did not seem anywhere as monumental as it did in 1974. In the

days of the post-imperial presidency, the office was held in increasingly low public esteem. Nonetheless, Starr continuously failed to mobilise public sentiment to his cause. As one scholar has concluded, perhaps he did not care about his public approval rating, as he was not an elected official.[44] Nonetheless, in order to maintain credibility, he needed to ensure the legitimacy of his investigation, and avoid the appearance of a partisan witchhunt.

The recognition of the fallibility of the president was no bad thing, but Starr took the matter a step too far, and it turned out that even a rather jaded and cynical public was not ready for it. Starr initiated a situation where a popular president during a period of unprecedented prosperity stood to lose his office over lying about a sexual indiscretion. The second impeachment in US history would divide Americans, but nowhere more so than in Washington.

With regard to the Lewinsky scandal, Clinton's supporters claimed that the president did what any married man would have done under the circumstances: deny the liaison to protect his marriage. Lying about sex, therefore, may have been grounds for divorce, rather than a constitutional crisis. Clinton's opponents pointed out that he had committed perjury and obstruction of justice and the reasons for this were not the issue. In general, attitudes towards the scandal tended to divide along party lines. Political scientist Chris Achen observed that possibly for the first time, party affiliation could be observed from a single comment about the investigation proceedings.[45]

It was not until the Lewinsky scandal broke that the general public really sat up and took note of what was going on with Starr's investigation. This was in no small part due to the existence of the New Media. (See chapter 5 for details). Prior to the Lewinsky scandal, most major news outlets adhered to the unwritten rule of only putting previously published information on their websites. However, the first mainstream news coverage of the Lewinksy scandal appeared on the *Washington Post* website, swiftly followed by the *Newsweek* website.[46] The salacious minutiae ensured that everyone loved the scandal, but really did not want or need to know that much information about their nation's leader. The tabloid press had a field day with the details, whilst the mainstream media struggled to inform the public without falling headlong into the gutter. Clinton found much support from the broadsheets, who questioned Starr's legitimacy and motives.

The initial Clinton-Lewinsky liaison occurred as a result of the November 1995 government shut-down. It was a time when the president took two of the biggest gambles of his presidency. He refused to back down over a budget impasse with the Republican majority in Congress, and so the White House interns temporarily replaced the furloughed employees. Assigned to the office of chief of staff Leon Panetta, Lewinsky was within easy reach of the Oval Office. There began an eighteen month sexual relationship between the president and the intern which drew to a close just as the Supreme Court was about to announce its ruling in the Jones case. They had maintained their high-risk relationship through tempestuous times for the president, and had the most contact during the worst month of Hillary's tenure as first lady. Hillary's reaction to the myriad of scandals and the independent counsel investigation had been to batten down the hatches and assume that all her fears were

real. Her billing records for the Rose Law Firm had been previously subpoenaed by Starr but Hillary's lawyers had been unable to produce them.

On January 4 1996, 115 pages of Hillary's billing records were found. Although White House officials were quick to point out that the records supported Hillary's claim that she had done 'minimal' work at Rose for Madison Guaranty, suspicion hung in the air at the disappearing and reappearing records. On January 8, William Safire attacked the first lady in a *New York Times* article headed 'Blizzard of Lies.' In it he stated, 'Americans of all political persuasions are coming to the sad realisation that our First Lady – a woman of undoubted talents who was a role model for many in her generation – is a congenital liar.'[47] On the same day, a three-judge panel of the federal appeals court in St Louis rules that Jones could proceed with her lawsuit against the president.[48]

After the Safire column, Hillary's lawyers insisted to Starr's office that the billing document debacle was a genuine mistake. Starr was already six months past his self-imposed one year deadline for completing his investigation, and he had come up with little so far. The trials of Tucker and the McDougals had yet to begin, and the negative impact of a lengthy, inconclusive and unpopular investigation was taking its toll on his staff. Some of the more experienced lawyers were turning back to private practice, leaving the independent counsel office increasingly in the hands of the more partisan contingent.[49]

Approaching its second anniversary, the investigation was not making much headway, but soon Reno gave jurisdiction over what became known as the Filegate

investigation to Starr. Essentially, it involved allegations that the White House had improperly obtained hundreds of FBI files of past administration officials in an effort to find political dirt on prominent Republicans.

Starr was not enthusiastic about taking on the case, but everyone else was hopelessly compromised. The FBI could not investigate itself. The White House was too involved and the Justice Department would have had at least the appearance of conflict of interest in investigating the FBI or White House. Turning the investigation back to the Justice Department may have been a wise course of action for Starr, as he was already juggling Whitewater, Travelgate and the Foster suicide. However, he was not inclined to refuse Reno's request, and so for the third time that year, Starr was obliged to change his structure and increase his staff. His apparent reticence in taking on an increased workload contradicts the notion that he was hell-bent on launching partisan attacks on the White House from every angle. He also made it clear that he would not take any public action in any of his investigations through the November presidential elections.

Despite the president's and his aides insistence that the Filegate situation was an 'innocent bureaucratic snafu', the investigation, enormously sidetracked by the Lewinsky scandal, went on for years and produced a final report that completely vindicated the White House.[50]

In the midst of the multiple assaults on the White House, the Clintons had some good news. On June 24 1996, at the end of the Supreme Court's term, the justices announced that they would hear the case of *Jones V Clinton* during the October term.

This was an enormous relief for Bob Bennett, who had worked hard for the case not to be resolved before the election. He had managed to delay the proceedings since the case had been filed in May 1994, and the Supreme Court's decision meant that no-one would be able to take depositions in the case until at least 1997. On November 5 1996, Clinton was re-elected after a campaign in which Starr's investigation had maintained a low profile. Nonetheless, Clinton's 49% share of the popular vote hardly constituted a landslide.

Prior to the election, the White House ended its months of silence towards Starr's investigation went on the offensive to question his legitimacy, credibility and independence. In September, Clinton criticised the independent counsel via a *PBS* interview, voicing his frustration with the investigation, and his thoughts were echoed by aide George Stephanopoulos, who claimed, 'this investigation is flawed because of Starr's obvious partisan ties and his ties into tobacco,' an industry that had been hard hit by the anti-smoking Clinton administration.[51] Asked on the *PBS* interview if he thought Starr was out to get himself and his wife, the president responded 'isn't it obvious?'[52] This was probably his harshest language to date against the investigation. Engaging in confrontation only weeks before the election was a risky strategy.

In response, a *Washington Post* editorial, while acknowledging the independent counsel's Republican credentials and the conflict-of-interest worries raised by his law firm's work, contended that Clinton's 'latest assault goes well beyond what is legitimate in the way of campaign spin.' It expressed concern at the prospect of a presidential pardon for Susan McDougal, who had gone to jail in contempt of court, or for other Whitewater related figures. Contemplating pardons for individuals who

may have had information bearing on the president or first lady was a cause for concern. The *Post* stressed the importance of Clinton not subverting the judicial process through attacks on the special prosecutor or by abusing his pardon power.[53]

The administration remained divided as to whether the strategy should be one of confrontation or conciliation. Ignoring cautions about the perils of locking horns with an investigator who had two grand juries at his disposal, the hawks publicly declared their anger at the process. 'We're prepared to respond,' said one Clinton aide of Whitewater, 'We are going to specifically discuss Starr's work on behalf of the sworn enemies of the president.'[54] The doves believed that the risks would probably be outweighed by the benefits of being ahead of Starr in the public relations war, particularly as the offensive was being driven by the president himself. Pollster J. Brad Coker observed that 'people who are voting for Clinton think it's a political witchhunt.'[55]

The White House offensive was supported by a 332 page report documenting an alleged 'conspiracy commerce' of 'scandalous fringe stories' about the president. Written in mid 1995 by lawyer and White House scandal manager Mark Fabiani, the *Communication Stream of Conspiracy Commerce Report* was deemed to have reflected the general view of the White House.[56] Finally published a year and a half later by the *Wall Street Journal*, it put forward the theory of how 'fantasy can become fact' by promoting anti-Clinton rumours through the 'media food chain,' spawning from ideological journals and making their way into the mainstream press. The report alleged that 'a close connection...exists between Republican elected officials and the right-wing conspiracy industry.' The timing of the document's publication was no

doubt connected to Clinton's successful re-election. His victory, modest though it may have been, was significant in that he was the first Democrat to win re-election since Franklin D. Roosevelt. The triumph spurred a move to consolidate his renewed legitimacy against the threat posed by Starr's investigation. Publication of the document may also have been used as a show of force, coming as it did only days before the Paula Jones case began. By releasing details of the anti-Clinton cabal at this particularly charged moment, the administration gave credence to the theory of a sustained right-wing plot. 'We wanted to refute some of the very aggressive charges being made fallaciously against the president, most often on the internet, coming from a variety of kind of crazy, right-wing sources' White House press secretary Mike McCurry stated.[57]

Less than a month later, on February 17, 1997, Starr announced that he would be stepping down as independent counsel to become Dean of the School of Law and Public Policy at Pepperdine University, California. This decision did not support the notion that Starr was on a mission from God to topple the presidency. It may have suggested that Starr understood the people's message: whatever accusations were levelled against the president, he was still deemed fit to govern the nation.

The White House no doubt heaved a sigh of relief at the prospect of its nemesis relocating to Malibu. Reinforcing the impression of Starr's partisan affiliations, his new post involved working for a department directly financed by the overtly anti-Clinton Richard Mellon Scaife, who also funded the right-wing *American Spectator*. William Safire accused Starr of having 'brought shame on the legal profession by walking out on his client – the people of the United States.'[58] After four days of

ferocious criticism, Starr called a press conference to say he was staying until the end of the investigation.[59] If there was ever a moment of sympathy for Starr, it was then. He was genuinely damned if he did stay in the job and damned if he didn't.

For the first two years of the investigation, Starr's team proceeded by the book. Acting as any other federal prosecutors would, they concentrated on pursuing crimes rather than people. Had Starr continued with his Pepperdine plan, he would have departed without his office having inflicted any monumental damage on the president. At that point, the independent counsel appeared to have little to do with keeping the anti-Clinton fires burning. The well-financed Arkansas Project, the umbrella term for the right-wing battle, was thriving independently of Starr. [60]

Speaking as an ex-insider, David Brock opined that the right-wing had been plotting since 1993 to nullify the 1992 election, and that Monica Lewinsky was merely an afterthought. Brock wrote that one of the strategists for the Jones case informed him that the point of the sexual harassment suit was to question Clinton under oath about his consensual sex life with the intention of creating a crime where one may not have otherwise existed. By taking a retrospective step-by-step approach, the OIC succeeded in filling in the blanks and creating what some considered a perjury trap for the president. In January 1998, Lewinsky's former colleague, Linda Tripp, provided Starr's office with taped conversations regarding Clinton's clandestine sexual liaison. The tapes contradicted Clinton's sworn testimony in the Jones case, which the president gave just days after Tripp handed over the tapes.[61]

Continuing right to the end of the second term, the anti-Clinton Arkansas contingent, combined with the conservative media and talk radio hosts, succeeded in promoting the impression of relentless and widespread presidential wrong-doing.[62] This was all part of what Brock referred to as political terrorism. By embroiling himself in the anti-Clinton projects, Starr entered unchartered territory for an independent counsel and set himself up for harsh criticism. In doing so, he made his investigation unique and also undermined his legitimacy.

Partisanship was not the only accusation levelled against the independent counsel office. The constitutionality of the Ethics Act was a perennial issue of debate in the first decade of its existence. The case of *Morrison V Olson* (1988) had found the independent counsel provisions to be constitutionally valid, and made an important contribution to the resolution of the ongoing uncertainty surrounding the arrangement.[63] Starr's investigation regenerated doubts about the benefits of the role.

The office existed largely to symbolise impartiality and public confidence, but the price of this became increasingly high. Although the independent counsel replaced the regular prosecutor in the Ethics Act cases, the same legal and political procedures and constraints applied. Starr's relationship with the Justice Department went downhill throughout his investigation, and he refrained from consulting department personnel as he considered his office to have sufficient expertise on the matters at hand.[64]

Starr in particular, like his predecessor Lawrence Walsh, experienced the impact of the differing needs of a representative institution such as Congress with those of his office. Congressional inquiries caused two specific problems for the independent

counsel. Firstly, congressional inquiries generated enormous publicity. Secondly, and more significantly, was the congressional granting of immunity in exchange for testimony. Starr was acutely aware of the difficulties encountered by Walsh in dealing with immunised testimony. Intense publicity in Congressional enquiries was deemed an asset, for various reasons, including straightforward personal ambition and partisan motives. The independent counsel, however, preferred publicity to be kept to a minimum because of the impact of extensive exposure on the investigative and prosecutorial stages of the case. Publicity in the investigative stage of the case may have resulted in tipping off both the targets and witnesses or informants whose testimony was necessary for the case. Starr and Walsh both had the prosecution stage of their cases complicated by witness immunity and effectively had their legitimacy undermined.[65] Walsh referred to congressional investigations as a 'continuing handicap' and categorically stated that the Iran Contra Congressional grant of immunity to North and Poindexter resulted in the reversal of their convictions. [66]

Interest groups also played a key role in the creation and implementation of the independent counsel statute, and two in particular held a vested interest in its continuance. The American Bar Association, a prime force in the creation of the statute, maintained support for the measure until the early 1990s.[67] By 1998, however, a move had begun within the organisation to withdraw support for the arrangement. After much deliberation on whether the statute could be saved through amendment, ABA task forces proposed that the organisation vote in favour of Congress allowing the statute to expire in 1999, claiming that 'it can't be fixed – the tradeoffs are too great and attempts at fixes in the past haven't worked.'[68] The task force pointed out that after drawing on twenty years of experience, the ABA felt

obliged to conclude that the statute was 'severely flawed' and actually hindered the fair administration of justice.[69] For twenty-one years, the ABA had observed the evolution of the arrangement and by the end of Kenneth Starr's tenure had decided that it was no longer working in harmony with its original values.

Common Cause, the 'citizen's lobby' had lost its long-standing faith in the independent counsel act. Founded in 1970 at a time when public opinion polls showed declining public confidence in government, the organisation had strongly supported the Ethics Law in 1978.[70] By 1999, however, in light of Reno's refusal to appoint an independent counsel for the campaign finance scandal and the highly negative public reaction to Starr's investigation, Common Cause had become disillusioned with the statute. As an alternative, it proposed returning authority over these cases to the Justice Department Criminal Division, which was designed to operate unhindered by political influence.[71]

Some elements within the Department of Justice perceived an overlap of duty with the independent counsel office. However, not all officials felt it devalued their role. In her earlier days as Attorney General, Reno had publicly supported the statute. By 1999, she testified against it, voicing her concern that the statute contained structural flaws that could not be corrected within the constitutional framework. Nonetheless, she continued to stress the importance of public confidence in the administration of justice. Her main concern was that the entire process had been politicised beyond repair, and so did not inspire public confidence as was originally the intention.[72] Many in Congress did argue in favour of maintaining the statute in 1999, even in the light of Starr's controversial investigation.[73]

The White House had long been ambivalent towards the independent counsel. Despite his protestations that the act was unconstitutional, Reagan had not delayed in requesting the appointment of Lawrence Walsh. Even those not in favour of the arrangement acknowledged its symbolic function. One of Theodore Olson's defense attorneys observed 'there was a feeling at the time that it was a good way to clear your name. The previous investigations had been relatively short and the experience so far had not been that bad.'[74] However, as the Clinton White House operated under siege for years, it increasingly failed to perceive any redeeming features of the independent counsel arrangement.

Independence:

As officers of the court, independent counsel were hardly more 'independent' than the US attorneys in carrying out the law enforcement function. The difference between them lay in the highly formalised grant of authority, which had two particular consequences for the development of relationships with other political actors. The independent counsel could obtain resources with less resort to bargaining and diplomacy and could also assume that there was a strong degree of acceptance of his role.[75]

Two ways in which independent counsel differed from their regular counterparts were in the reporting requirement and the removal procedure. Here the conflict of having a prosecutor who was both independent and accountable was highlighted. The report process was deemed necessary to ensure accountability, but the legal community

claimed that it could lead to overinvestigation and have negative consequences for those who were investigated but not charged. The 1994 amendments allowed prosecutors to minimise their reports but Starr vividly illustrated how much scope there still was for astonishing detail. His Clinton impeachment referral was consequently criticised by politicians and the press.[76]

The removal process for independent counsel was also different to that of regular prosecutors. The former could be removed for 'good cause' and the decision to remove was subject to judicial review. In reality, the standard for removal was much higher that that of 'good cause'. Whilst an independent counsel who could be removed at will was not independent at all, the post-Watergate political climate ensured that no special prosecutor could actually be removed at will. As a result, Katy Harriger concluded that the ultimate check on independent counsel power was really no check at all.[77] However, there were other, more subtle ways to remove an independent counsel, as illustrated by the non-renewal of Fiske's tenure. After six months in the post, he was replaced due to a perceived conflict of interest.

There were other formal statutory checks on the independent counsel besides the removal process. The political and legal processes also imposed their own restraints on the power of the office. The role of the Attorney General and the jurisdictional limitations acted as effective curbs on prosecutorial power in the past. However, the most obvious factor in restraining power was the character of the individual chosen for the job. Independent counsel Leon Silverman believed the appointment authority was the only real check on the office. 'If the judges are honest', he said, 'then they appoint honest men to the position. Otherwise, there are no restraints. You just don't

pick a bad person to do it.' Fellow prosecutor Whitney North Seymour Jr agreed. 'The independent counsel institution is perfectly workable if the panel picks experienced professionals. You don't need artificial restraints if you pick the right person. If you pick the wrong person, those restraints won't mean much anyway.'[78]

Starr exemplified this more than any of his predecessors. It was crucial for independent counsel to have their own sense of self-restraint. This would usually stem from the fact that they had left positions in the private legal community and intended to return there on completion of their investigation. Hence to acquire a reputation for abuse of power would have been detrimental to their good name. The intense media scrutiny that investigations tended to attract also acted as a further encouragement to self-restraint.[79]

Although it would be tempting to conclude, particularly from the Starr investigation, that there were no checks on independent counsel power, the office did still operate within the confines of the legal system. However, there was still room for negative outcomes for those under investigation, in terms of damage to their reputation and the enormous legal costs incurred, particularly galling for those who were acquitted.[80]

The Starr investigation also resulted in much interaction between the independent counsel office and the White House. However, relations went downhill as Whitewater evolved into the Lewinsky scandal and particularly when Starr's office was accused by Clinton lawyers of leaking grand jury testimony to the press. This resulted in an investigation by the Justice Department and the initiation of a court order by Judge Johnson to scrutinise the proceedings.[81]

Despite the perennial accusations of unaccountability, not all independent counsel abused their power. Even among those that did, or appeared to have, (in particular Kenneth Starr with Whitewater/Lewinsky and Whitney North Seymour Jr. with Michael Deaver's post-employment conflict of interest), Katy Harriger points out that the statute did not 'make them do it'.[82] As illustrated by many of the prosecutors, restraint was possible, it just was not always chosen. On examination of the evidence, accusations of abusing the coercive prosecutorial power granted to the office never evolved much further than partisan complaints until the Starr investigation. Yet Starr had his defenders throughout. Even as late as 1997, when he was under widespread attack from much of the mainstream media, legal journalist Jeffrey Rosen observed '... it would be wrong to assume that Starr's office is a simmering cauldron of partisan enthusiasm, determined to bring down the president.'[83]

According to law professor Michael J. Gerhadt, the Clinton impeachment process highlighted two major non-constitutional defects in the independent counsel statute. Firstly, there appeared to be inadequate safeguards against any excessive efforts by independent counsel to have an impact on the course of the impeachment proceedings. Starr made a variety of attempts to influence the impeachment proceedings which did little for his claims of independence and, in Gerhardt's opinion, reinforced the need for reform of the law to prevent such developments in the future.'[84] Secondly, Gerhardt expressed concern at how the impeachment hearings legitimised the pragmatic justification for abandoning the statute altogether. Faced with the relentless White House public relations machine, the independent counsel had little hope of convincing the public of his independence. Despite maintaining the

public relations upper hand throughout, as well as steady support in the polls, Clinton's acquittal hardly constituted a personal vindication.[85]

Starr was not the only individual to make errors of judgement during the investigation. By repeatedly expanding his jurisdiction, Reno put Starr under enormous pressure, as he became increasingly unable to bring closure to the various tentacles of his investigation. In July 1997, he had issued a report to the court on the Foster suicide. After the 1998 elections, he announced that Clinton had committed no legal offenses in Travelgate or Filegate. The Starr Report itself, however, did not contain any reference to the non-Lewinsky scandals.[86] *Washington Post* op-ed anti-Clinton columnist Maureen Dowd was outraged at this failure. 'Kenneth Starr, all these years and all these millions later, has not delivered impeachable offences. He has delivered a 445-page Harold Robbins novel,' she fumed. 'These are not grounds for impeachment. These are grounds for divorce.'[87]

It was unclear whether Starr had reached these conclusions before the election, although whether he had released his findings before or after, he would have incurred criticism from one side or another. He suffered further criticism for what appeared to be conflict of interest duties undertaken during his tenure as independent counsel. In September 1997, the *Washington Post* reported that Starr had earned $87,385 for his work as independent counsel as well as $1.12 million from his private practice at Kirkland and Ellis. He also taught a course at New York University's School of Law for which he received $25,000. He travelled around the country giving lectures, often to conservative groups, which naturally undermined any perception of independence. He continued to serve on outside groups, sat on the boards of seven organisations and

maintained an extensive client base.[88] During the Clinton investigation, Starr represented the conservative Bradley Foundation, which was known for its anti-Clinton stance on a multitude of issues.[89] As a result, Starr's reputation had been seriously damaged by late 1997. His objectivity and neutrality were under intense scrutiny and there appeared to be increasing evidence to question his approach and tactics.

In view of all this, it was amazing that Reno allocated the Lewinsky investigation to Starr soon after the Pepperdine University episode. This provided further grist to the anti-Starr mill, as his opponents viewed this expansion of his responsibilities as furnishing another avenue of partisan attack on a popular president. Even from the perspective of his own self-interest, Starr would have been better advised to redirect the Lewinsky probe elsewhere. He met with ferocious opposition from the White House at every turn as he attempted to compel administration staff to provide grand jury testimony. Hillary Clinton believed that her discussions with a government attorney were privileged.

Also, the secret service claimed it should not be forced to testify against the president, but in each case, Starr fought his corner and won, from the district court to the appellate court. The White House did not succeed in its efforts to bring matters to the Supreme Court. Starr's successes carried a price, and as the investigations lingered, he was increasingly accused of being out to 'get the president' - the same accusation that had been levelled against Cox and Walsh.[90] This pattern of complaint illustrated the thankless task that any independent counsel faced. The partisan accusations against Walsh were the least credible as he was a diehard Republican and deeply respectful of

both his president and the presidency. Nixon's conviction that the East coast liberal intellectual Cox was determined to bring him down, and Clinton's constant referral to Starr's questionable affiliations with the president's right-wing opponents were identical, if ideologically reversed, complaints.

White House scandal manager Mark Fabiani desired to collate negative background information on Starr and share it with the media. However, Fabiani's colleague Jane Sherburne was uncomfortable with the idea. In her opinion, any White House interfering or negative comments could result in the appearance of obstruction of justice. Sherburne insisted that there could be no White House campaign or private investigation. Only the facts should be made available, and it would then be up to the reporters to decide their own slant on the proceedings. The success of Fabiani's strategy became apparent when reporter Sam Skolnik of the Washington based *Legal Times* informed him that he was interested in researching Starr's conflicts of interest.[91]

With the benefit of reams of press clippings and background information from Fabiani, Skolnik published an article entitled 'Kenneth Starr's Conservative Conflict' on October 23 1995. This examined the issue of Starr's work for Wisconsin Republican Governor Tommy Thompson on behalf of the conservative Bradley Foundation. Thompson was a potential 1996 Republican candidate, whom Starr was advising on a school voucher court case, a favourite conservative cause. Skolnik also raised the issue of Starr's work for the anti-Clinton Brown and Williamson Tobacco Corporation. He did not mention Fabiani's assistance in collating the article, and stated instead that 'a White House spokesman declined comment for this article',

which was technically the truth. Fabiani was delighted and immediately realised the potential for further media investigation, as he could pass the Skolnik article on to other reporters in the hope of them finding further conflicts of interest. Fabiani and his staff coined the term 'pollinization' for this method of negative investigation of Starr.[92]

On January 19 1996, Starr issued a subpoena for Hillary Clinton to appear before the grand jury. The latest White House counsel Jack Quinn declared at a meeting at Starr's office that subpoenaing the first lady was nothing but a political act. Independent counsel ethics advisor Sam Dash insisted that this was routine and proper, and that no negative implications would be drawn from it. In Quinn's opinion, the lifelong Democrat Dash, had rented himself out to the independent counsel office to provide the echoes of Watergate and to endow the investigation with an aura of propriety and non-partisanship.

Dash appeared to be failing on both counts. Starr insisted that Hillary's grand jury appearance would be handled with decorum, but the White House representatives were sceptical. Sherburne viewed Starr as both pious and sanctimonious. Convinced that Starr had no legal justification for the first lady's subpoena, she could no longer abide by Cutler's counsel not to politicise the Special Prosecutor.[93] Clinton lawyer David Kendall also viewed the first lady subpoena as a turning point. The evolution of Kendall's opinion was highly significant, as he had initially been the voice of reason, calm and caution in the White House when Starr was appointed. Back then, he did not condone James Carville's very vocal protestations at Starr's perceived conflict of

interest, and he preached restraint to his highly political colleague. However, by 1996, in Kendall's opinion, Starr was overseeing a politically motivated investigation.

Hillary Clinton was increasingly frustrated at what she perceived as Starr's glaring conflicts of interest. However, Fabiani was loath to declare open war on the independent counsel, as he understood the need to maintain some kind of constructive channel with the office, however tenuous. He was also aware of the potential backlash against the White House, should it get too overtly critical of the investigation.[94]

Whilst the non-confrontational approach had its advantages, there were occasions where the Clintons missed the opportunity to curtail or deflame the investigations. It would have been astute of Clinton to express even a little public outrage on the topic of Filegate. Plenty of those who dismissed Whitewater itself were painfully aware of the legal and constitutional horror if the White House was found to have used FBI files for political purposes. But rather than a public display of righteous indignation, the Clintons chose the lawyerly approach. By not speaking out on the topic and condemning any bureaucratic snafus that may have occurred, Clinton chose the path of diminished responsibility, which made it look as though he had something to hide.

If he really had nothing to hide, he certainly was acting as though he had. The White House siege mentality was increasing, as the president and first lady felt they were being attacked from every angle. Clinton complained to his political strategist Dick Morris that Senators Helms and Faircloth were out to get him. They had chosen Judge Sentelle, and Nixon-Reagan conservative Chief Justice Rehnquist had chosen Sentelle to head the three-judge panel. It looked like a conspiracy to Clinton.[95]

Starr felt that his office was under siege from a relentless White House public relations machine and a savage press. The stated intention for his reopening of the Foster case was to close the lingering questions left by the Fiske investigation and put an end to the speculation and scepticism. In the event, Starr's report on the Foster case largely confirmed Fiske's conclusions, and did not contradict his predecessor in any significant way.[96] Criticism was unavoidable though. Foster's sister said of the second investigation that 'a more expeditious handling of this matter by the independent counsel would have spared the family further anguish and the public further uncertainty caused by the ridiculous conspiracy theories proffered by those with a profit or political motive. In my view, it was unconscionable for Mr Starr for so long to allow the American people to entertain any thought that the president of the United States somehow had complicity in Vince's death.'[97]

Hence, Starr came under attack from every angle for his three year investigation of an already concluded case. The liberal media had long since been suspicious of Starr, his conflicts of interest and his questionable independence. Writing in the *New York Review of Books*, journalist Lars Eric Nelson argued that Starr played by no known rules and answered to no-one. The $4 million that Starr had allocated to proving that the president lied in the Jones case seemed 'wildly disproportionate to the offense, but makes sense if Starr's goal was, in advance, to bring down the president at all costs.' In Nelson's opinion, the independent counsel's actions deserved serious, impartial examination. [98]

Perceptions of the Scandal:

The term scandal has been defined as being a 'perplexity of conscience occasioned by the actions of one who is looked up to as an example'.[99] Using this definition, it could be concluded that scandals occurred on both sides of the investigation. Running concurrently with Whitewater and other administration scandals was the scandal of how the Starr investigation mutated from an inquiry into a failed 1970s Arkansas land deal to the most intimate details of a consensual presidential affair. It was a phenomenal leap, and a highly controversial one. As the investigations evolved and expanded, Clinton supporters increasingly perceived Starr not as an independent counsel but as an enemy. Previous prosecutors, Walsh in particular, had been strongly criticised but the level of venom directed at Starr was unprecedented. Speaking on *Meet the Press*, James Carville declared 'there's going to be a war.' Referring to Starr, also present on the programme, as a 'pretty big liar', he threw discretion to the wind and derided the 'scuzzy, slimy tactics of this Independent Counsel, who was put in there by a political hack to do the jobs of political hacks.'[100]

Despite partisan insistence to the contrary, the reality was far from a simple persecuted prosecutor/president situation. Both sides were under enormous pressure, and with good reason. During his tenure as White House counsel, Abner Mikva had come to feel that Clinton's credibility was in question, as well as his morality and leadership.[101]

By the time of his planned Pepperdine departure, Starr had spent three years investigating Whitewater and was still to find *the* witness, the John Dean who would

provide the precise detail of White House wrongdoing, of presidential high crimes and misdemeanours. Criticism was no longer focused merely on the statute – it was now firmly fixed on the individual. Ethics advisor Sam Dash cautioned Starr in the wake of Clinton's re-election. The voters had made their view crystal clear. Whatever they felt about Clinton the man, they were perfectly content with Clinton the president. In Dash's opinion, if Starr was planning on rocking the world, then he needed to have nothing short of a smoking gun, particularly as the public did not hold him or his investigation in particularly high regard. Starr was increasingly determined, however, to push on with his investigations and was very reluctant to close any avenues when there was even a hint of uncertainty. After being pressured into cancelling his Pepperdine appointment, Starr continued with renewed determination and authorised his staff to pursue lines of inquiry into every area of the Clintons' past. The Trooper Project, initiated by prosecutor Hickman Ewing, was deemed unwise by his colleagues, including Star's deputy John Bates. They felt that it cast their investigation as a sex probe.[102]

With Starr now in full attack mode, Clinton gave a sworn deposition to the Jones lawyers on 12 January 1998. The legal teams would finally have the president where they wanted him – under oath.[103] On the same day, the independent counsel was officially brought into the Jones loop. Linda Tripp called Starr's office offering information regarding Lewinsky lying in a sworn statement about an affair with Clinton. Tripp had approximately twenty hours of taped conversations with Lewinsky and alleged that Clinton and Vernon Jordan had encouraged Lewinsky's perjury.[104]

Tripp was not the only avenue through which efforts were being made to connect the Jones case with the Starr investigation. On January 8, the Jones elves, Marcus, Porter and Conway, who had been surreptitiously assisting Jones for years, had dinner with Paul Rozenzweig, one of Starr's independent counsel staff. They told him about the Tripp tapes and he duly reported back to his superiors. By January 12, Starr had agreed to receive any information, and the message was relayed back to Tripp.[105]

Here was an opportunity for Starr to finally make some concrete progress. The partisan and blatant anti-Clinton aura surrounding the Jones contingent was not an issue. Tripp was given immediate immunity from prosecution and agreed to wear a wire on her meeting the next day with Lewinsky.[106] At this point, Starr's investigation had lasted almost three and a half years, and was in dire need of either winding down gracefully, which he had no intention of doing, or of uncovering something worthy of investigation. On January 16, Reno asked the three judge panel to expand Starr's jurisdiction to cover the Lewinsky matter. He was immediately allowed to investigate 'whether Monica Lewinsky or others suborned perjury, obstructed justice, intimidated witnesses or otherwise violated federal law.'[107]

On the night of January 17, the internet-based *Drudge Report* had the scoop of a lifetime, entitled 'Newsweek kills story on White House intern – blockbuster report: 23 year old former White House intern, sex relationship with president... '[108]

The *Washington Post* rapidly followed with an article entitled 'Clinton accused of urging aide to lie.'[109] David Kendall was immediately appointed to deal with this aspect of the Starr investigation. He did not think that Starr was mad but rather that he

had applied his religious zeal to the law. Perhaps a more experienced prosecutor would not have made such an error of judgement.[110] Once again, Kendall's opinion carried weight as he had always preached caution in the White House's response to Starr's progress.

After years of successfully staving off the endless Whitewater allegations against him, Clinton was suddenly backed into a corner. He immediately went into lawyerly defense mode and claimed to be outraged by the allegations.[111] Meanwhile, Sam Dash was again threatening to quit as Starr's ethics advisor at the prospect of Tripp having been wired before the office had acquired jurisdiction in the case. Once again on the defensive regarding his reputation, Starr insisted that his office had not acted improperly and Dash agreed to stay.

At the White House, staff displayed public unity but privately wondered what the truth of the Lewinsky matter really was. Appearing on NBC's *Today Show*, Hillary Clinton defended her husband, leaving the public in no doubt as to her opinion of the prosecutor. 'Bill and I have been accused of everything including murder...The great story here for anybody willing to find it and write about it is this vast right-wing conspiracy that has been conspiring against my husband since the day he announced for president.'[112]

The interview was deemed a roaring success for the First Lady; she was strong, defiant and supportive of her husband. At this point, she was not fully aware of the Lewinsky details. The general response was that if Hillary had settled the matter with Bill, then why should anyone else dwell on it. Media attention had been redirected to

Starr. That night, Clinton gave a strong performance at his State of the Union address, providing a positively joyful account of the economy and showing no signs of being under pressure.[113]

The following day Starr issued an angry response to Hillary's accusations. 'The first lady today accused this office of being part of a 'vast right-wing conspiracy. This is nonsense.' He pointed out that the investigation had the support of Reno and the three-judge panel.[114] In truth, whatever her private opinion, professionalism did not allow Reno to comment on Starr's behaviour. As two members of the three-judge panel were known to be conservative stalwarts and supporters of Starr, his claims regarding their endorsement were hardly significant.

Much to Starr's dismay, as the Lewinsky scandal unravelled, Clinton's public approval rating steadily increased. A *Washington Post* poll taken during the first week of the scandal recorded a 59% presidential approval rating among those asked. The polls continued to defy gravity.[115] David Kendall wondered if it was Starr's unpopularity, the strong economy or that lying about sex was acceptable.[116]

Whatever the reason, public opinion played a crucial role in salvaging Clinton's presidency. Starr wanted the focus to remain on the legal rather than the sexual aspect of the case, but the tale was simply too salacious for that to happen. Clinton was fortunate in the sense that the sexual detail of the case caused difficulty for elite media coverage. To report the full events and still maintain the standard of only publishing 'news that is fit to print' caused a quandary for many in the media.

The internet, however, had no such dilemma. There were no limits on what could be posted on the internet, and the White House found the world wide web to be both a help and a hindrance during the scandal. The barrage of information via unconfirmed sources was a cause of concern for Clinton as his spin doctors were powerless to control what was distributed. However, use of the internet as an information source was not yet widespread, so it was often up to the tabloid media to pick up on internet reports and regurgitate them back to the public.

The key to Clinton's ability to weather the Lewinsky storm was that the outrage expressed by the mass media failed to ignite the public. Media and public opinion appeared to fall into two completely separate camps. Journalists were attempting to recreate Watergate and the public didn't want to know the lurid details of Clinton's sex life. In general, the public reaction to the media coverage was that it was disproportionate and did not serve the best interests of the nation. All players in the arena had to seriously consider public opinion. Clinton's damage limitation strategy evolved according to public opinion. In the end, it contributed enormously to saving his presidency.[117]

Of the players, Starr was the least susceptible to public opinion, which was fortunate, as his approval rating was consistently abysmal. He did, however, have to consider public opinion to a certain extent, as it would later influence the actions of Congress. The White House took full advantage of Starr's unpopularity and did nothing to challenge the idea that he was undertaking a partisan witch-hunt.[118]

The unpopularity of the president's opponents was of enormous benefit to him. Much of the public was sceptical about the motives of the independent counsel office. Therefore, maintaining Clinton as president did not seem like the worst of options. A September 1998 Gallup poll taken in the wake of the grand jury tapes release supported this stance with 66% of Americans polled said they approved of the way Clinton was handling his job. [119]

As the Lewinsky drama unfolded, it was difficult to find any sympathetic characters. Lewinsky was not generally viewed by the public as a victim, despite her youth. Tripp came across as mean-spirited and self-serving. Jones appeared to be driven by financial gain (or at least her husband was) and was most certainly a pawn of the anti-Clinton lobby. A Pew poll taken in April 1998, in the middle of the investigation, recorded that 62% of those asked held a favourable opinion of Clinton, 36% held a favourable opinion of Speaker of the House Newt Gingrich, 22% of Starr, 17% of Lewinsky, 17% of Jones and 10% of Tripp.[120] It was perhaps one of the greatest ironies of the scandal that Clinton survived in no small part because his opponents were held in such low regard by the public. He also survived because the public drew a definite distinction between Clinton's affair and his performance as president. Of those polled by NBC in August 1998, 63% said they believed that the affair was a private matter. This did not mean that Americans condoned lying. They merely compartmentalised their judgements about the moral conduct, allowing condemnation of the behaviour whilst supporting the president's political agenda.[121] This may have been helped by Clinton's strategy of carrying on business-as-usual as president instead of allowing the scandal to become all-consuming as Nixon had.

Based on public reaction to the proceedings, David Kendall maintained his strategy of making Starr's conduct the issue. He complained about the report that Tripp had briefed the Jones attorneys the day before Clinton's deposition. Kendall continued to send letters to the independent counsel office questioning the fact that Starr's Kirkland and Ellis partner Richard Porter was one of the Jones elves. He also echoed the query raised by Sam Dash regarding the legitimacy of wiring Tripp before Starr had jurisdiction in the Lewinsky matter. On March 18 Kendall stated that there were so many issues regarding the independent counsel office that he felt the investigation was 'a campaign to embarrass and harass the president.' On April 1 1998, Judge Wright's judgement on the Jones case was announced. She had thrown it out completely and declared it had no merit. The White House was ecstatic.[122]

Meanwhile, much of the media continued to be unimpressed by Starr, and the general consensus was that, in the words of South Carolina's *The State* newspaper, he 'desperately needs to get a life.'[123] Starr took drastic action. He hired Charles Bakaly as spokesman in the hope of putting a tough but professional face on his investigation. Bakaly's previous experience included practicing law, working for the Reagan administration and as deputy independent counsel in the Mike Epsy investigation, hence he was in a position to offer excellent all-round advice to Starr's office.[124]

Bakaly's take on the situation was that Starr did not appreciate the rhythm of battle and lacked the prosecutorial instinct for the kill. Starr had already demonstrated this by agreeing to the Pepperdine University offer. The White House continually had the upper hand in the public relations battle. In Bakaley's opinion, the independent counsel office needed to go on the public relations offensive. Starr agreed to Bakaly's

initiatives. Starr's actions were constantly regarded in a negative light, including his efforts to obtain information on Lewinsky's Washington bookstore purchases. This resulted in accusations that he was defiling the First Amendment.[125]

Section 595c of the Ethics in Government Act outlined the independent counsel duties in a possible impeachment. The law stated that the prosecutor 'shall advise the House of Representatives of any substantial and credible information...that may constitute grounds for an impeachment'. In Starr's opinion, the term 'may' was an incredibly low legal standard and he believed that his investigation had met that standard. His protégé Brett Kavanaugh pointed out that there was no direct testimony from anyone implicating Clinton in wrongdoing or illegal activity.[126] It was important for Starr to move on from 595c territory in order not to repeat Lawrence Walsh's 1992 'VP favoured' controversy. Walsh released information detrimental to Bush five days before the election and faced ferocious criticism for doing so. Acutely aware of possible accusation of interfering with the 1998 midterm elections, Starr set a ferociously tight July 31 deadline for a referral to Congress. He did not manage to submit to the House until five weeks after this date.[127]

In the immediate run-up to Clinton's testimony, the media reported that he was considering admitting that there was some sort of sexual relationship with Lewinsky. All of the White House lawyers denied responsibility for the leak.[128] Clinton had single-handedly raised the stakes in January with his finger-wagging denial of a sexual relationship. The Lewinsky testimony on August 6 and the positive match of the president's DNA on Lewinsky's dress had changed the goalposts somewhat. He addressed the nation the evening of his grand jury testimony. He admitted to having 'a

relationship with Miss Lewinsky that was not appropriate. In fact, it was wrong.' This was about as contrite as he got, and his anger increased throughout the speech, declaring, 'It's time to stop the pursuit of personal destruction and the prying into private lives and get on with our national life.'[129]

To the media, this was a misjudgement. It should have been a moment for repentance rather than defiance. Clinton's speech drew almost unanimous derision in the news media. There was no hint of moral growth, only anger, which, despite the unpopularity of his prosecutor, no-one was ready to hear. However, crucially, whilst the press rejected the speech, the public embraced it. Two thirds of those polled said they thought Clinton was 'sincere' and they didn't want to hear any more from him on the topic.[130] His personal character rating was low, but that was nothing new. The media was almost apoplectic about the president's behaviour. *Newsweek* columnist Joe Klein referred to Clinton's affair as 'an almost pathological lapse in judgement'[131]

The president was not alone in making almost pathological lapses in judgement at this time. When submitting his report to the Judiciary Committee in 1974, Leon Jaworksi had done so in a dry, understated fashion, drawing no conclusions and making no arguments. Starr rejected this model and decided on a very different option. His report was enormous, running to 452 pages with 1660 footnotes.[132] It contained continuously expanding and overlapping material, and therefore extensive repetition, with a negative slant against Clinton and no salacious details omitted. Some of Starr's staff voiced their concerns at the fact that they appeared to have created an encyclopaedia of Clinton's sexual behaviour. They feared that this would legitimise the claims of Starr's opponents that he was a sex-crazed prosecutor who had lost all sense of

perspective. Prosecutor Brett Kavanaugh reminded Starr that their goal was the provision of information, not the removal of the president.[133]

Determined not to be accused of collaborating with the House Republicans, Starr did not give notice to Congress of when the report would arrive. On September 9, with no prior notice, the Starr Report was submitted to the House of Representatives. No-one in the House had read the report before it was released onto the internet. AOL reported that its 13 million users spent a record 10.1 million hours logged on that day and almost 24.7 million individuals viewed the Report the first two days it was online. This was more than the combined circulation of the country's top 50 daily newspapers, and to a great extent, was the internet's defining moment. [134] Chelsea Clinton read the report on the internet. This was, without doubt, the lowest moment for the president.

The initial reactions of shock, disbelief, rage and amusement at Clinton's ferociously reckless behaviour that reverberated through Washington and the nation were matched, in large part, by horror at the Starr Report itself. No previous presidential prosecutor had ever produced anything comparable. The independent counsel staff had voiced their concern about releasing the report without some kind of warning. By not heeding the warnings, Starr exposed himself to an instant backlash. Kendall released two rebuttals, attacking the report as 'pornographic' and a 'hit and run smear campaign...that no prosecutor would present to any jury.'[135]

Republican Chairman of the House Judiciary Committee Henry Hyde had long held Starr in high regard and had repeatedly publicly stated that he did not want to preside

over a partisan witch-hunt. A serious impeachment investigation required at least some Democratic support, none of which was, initially at least, forthcoming. The Republicans themselves lacked leadership. Newt Gingrich was the subject of an ethics investigation and there was no obvious contender to fill the power vacuum. [136]

Amazingly, Clinton's public support did not waver. The economy was humming and the president's lack of personal integrity did not appear to have a bearing on this. A *Washington Post* article that week supported this finding with a poll of its own, running a front-page headline 'Poll finds approval of job, not of person.' [137]

On September 20, a *New York Times* article argued that the Whitewater-Lewinsky investigation was essentially a personal war between the president and the independent counsel. Starr claimed that this was not the case. He insisted that he maintained a non-judgemental attitude towards Clinton, apart from the president's overt wrong-doing. Starr pointed out that Clinton had done wrong in other parts of the investigation, the only difference in the Lewinsky matter was that they had better proof.[138]

Despite the steady opinion polls, it was these few days after the Starr Report was released that the Clinton presidency was at its weakest. Republicans were apoplectic, Democrats were furious, the press was hysterical and the public unimpressed. When Clinton's grand jury testimony was aired on television on September 21, there was much prior speculation that this would surely bring public opinion into line with elite opinion. It didn't.[139] If anything, the four hours of footage increased public sympathy for a president under fire. The *Washington Post* noted that 'viewers who sat through it

may well have emerged with a new or renewed feeling of sympathy for the president.'[140]

With pundits predicting they would gain seats in the House and Senate in the November 3 elections, the Republicans spent an extra $10 million on their advertising campaign but to no effect. After the elections, the Senate remained unchanged, and the House saw the Republicans lose five seats.[141] This was the first mid-term election since 1934 in which the president's party did not lose seats. It was a phenomenal outcome for the Democrats, and a resounding statement from the public that they had had enough of the scandal. The following day, Gingrich announced his resignation from the House.

There were other welcome developments for the White House that month. On November 13, a milestone was reached in the *Jones* case. Fearing that the court of appeals might reinstate the case, Robert Bennett announced that the president intended to pay Paula Jones $850,000. One week later, Sam Dash announced his resignation as Starr's ethics advisor. Having made a variety of previous threats to quit, Dash finally left in protest over Starr's testimony before the House Judiciary Committee as an advocate of impeachment.

Starr had viewed the chance to testify as a major opportunity to explain and defend his tactics and referral.[142] In his letter of resignation, Dash stated that the independent counsel's testimony had transformed him from a mere prosecutor into an 'aggressive advocate for the proposition that the evidence in your referral demonstrates that the president committed impeachable offenses.' He further claimed that by arguing

evidence before the committee, rather than contenting himself with having provided that evidence to Congress, 'You have violated your obligations under the independent counsel statute and have unlawfully intruded on the power of impeachment which the Constitution gives solely to the House.'[143] If Dash's intention was to illustrate the unfairness of Starr's investigation, he also undermined the independent counsel at a crucial moment, gave the White House a public relations coup and set himself up for accusations of egoism and inconsistency.

Starr's testimony only served to strengthen his conservative support. Henry Hyde considered him a superb witness and at the end of the day, Republican members and staffers gave Starr a standing ovation. Meanwhile, responsibility for Clinton's defense had shifted to Charles Ruff, who had been the fourth and final Watergate prosecutor. In his closing statements in Clinton's defense to Hyde's committee, Ruff spoke of the president's behaviour as 'morally reprehensible' but that he should not be impeached. Ruff's presentation was variously described in the media as sombre, respectful, reserved, grave and serious.[144] Unlike his predecessor, he had struck the right chord.

The impeachment debate opened on December 18. Article one, lying before the grand jury, passed 228:206, with five Democrats voting in favour and five Republicans against. Article two, perjury in the Jones deposition, was defeated 229:205, with five Democrats voting in favour and twenty-eight Republicans against. Article three, obstruction of justice passed 221:212, with five Democrats voting in favour and twelve Republicans voting against. Article four, abuse of power, was defeated 285:148, with one Democrats voting in favour and eighty-one Republicans voting

against.[145] The result meant that the second presidential impeachment trial in US history would take place. As the trial got underway, Starr decided to indict Julie Hyatt Steele, a peripheral player in the Whitewater saga. This appeared to be a phenomenally bad judgement call, and even his own staff cautioned him on proceeding. He did not heed their advice, the prosecution ended with a hung jury on May 7, and further damage to Starr's reputation.[146]

Starr had not heeded the lesson of Watergate, which was that it was actually very difficult to remove a president. Bob Woodward listed four elements that had to be present. These were: low public opinion polls, a bad economy, a hostile media and incontrovertible evidence.[147] All had been present for Nixon. None were really present for Clinton. In particular, the US economy had expanded by 50% in real terms since 1992 and the economic benefits were felt across the income spectrum. Such prosperity softened the blow of presidential misdemeanour. In addition, Watergate acted as a 'pre-emptive metaphor' for the Whitewater-Lewinsky scandal, as it had for Iran Contra.[148] Although Clinton believed in himself implicitly, prior to the impeachment vote, he remarked to a friend that acquittal would be a hollow victory. The damage was done, distrust was deep, betrayal was the order of the day and bad feeling was rampant.[149]

On February 12, Clinton was acquitted 55:45 on perjury and 50:50 on obstruction of justice. The White House was under strict instructions to retain a rigidly impassive tone. It was to be a 'gloat-free zone.'[150] In truth, there was little to gloat about. Clinton had survived, but only just, and none the institutions involved in the scandal

investigations emerged untarnished. Clinton was neither victorious nor defeated. To his closest advisors, Clinton said, 'thank God for public opinion.'[151]

Speaking to the media over the following few months, Starr maintained his version of events. In an interview in December 1999, two months after he was succeeded in his post as independent counsel by Robert Ray, Starr insisted he was a victim of the White House 'spin machine.' He rejected the notion that he was over-zealous, and noted that his opponents had turned the investigation into 'part of the culture wars.'[152] He continually claimed that he was engaged in a straightforward investigation that was conducted honourably, but that he had been misunderstood by large segments of the public because he was bulldozed by a slick White House public relations machine. Starr also later claimed that he had not anticipated that Congress would release his report unscreened. Both of these points were valid to some extent. He was no match for Clinton's clever defensive onslaught, and perhaps he really hadn't anticipated that the nation would read his unedited report on the internet. However, he could not lay the blame for his numerous bad judgement calls at the door of others. In the end, he was the independent counsel, and he had virtually unlimited power. He did not use it wisely.

Starr continued to receive support from some quarters during the last months of his tenure. 'He needs to tell his side of the story' said Robert Bork. 'He's a fair-minded guy, not a right-wing zealot.'[153] Bork and his right-wing associates notwithstanding, many of Starr's predecessors and peers were baffled by his interpretation of the role and his misuse of power. His greatest failure lay in his inability to see how his actions would be perceived. Sacrificing independence or the appearance of independence

were equally fundamental errors. Hence Starr left himself hugely vulnerable to attack by those who believed that he had actually or apparently allowed himself to be compromised.

One concrete outcome from the uncertainty surrounding Starr was that his tenure as independent counsel did nothing to promote the extension of the independent counsel act. The bill's framers obviously had good intentions and did their best to create as neutral a process as possible, but politics inevitably prevailed. The independent counsel law was intended to reassure the public that the chosen individual would be impartial and immune to partisan sway, but Starr's conduct had undermined this. Once again, as had occurred after the Iran Contra scandal in 1992, Title VI of the 1978 Ethics in Government Act was allowed to expire in 1999. This time, it was permanent. In future instances, a Special Counsel would be appointed by the Department of Justice and given broad powers to operate independently.

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7. Conclusion

'I know of no method to secure the repeal of bad or obnoxious laws so effective as their stringent execution.'

(Ulysses S. Grant)

The purpose of the thesis has been to provide an overview of the uses of the Special Prosecutor/Independent Counsel provision over the twenty-five year period from Watergate to the culmination of the Whitewater/Lewinsky affair. Having examined the office from the aspects of role, reputation, legitimacy, independence and perceptions of scandal, the thesis has assessed the rise and decline in reputation of the office during this period. The trajectory from perceived hero to villain was not so straightforward as it might later have appeared. In truth, Watergate Special Prosecutor Archibald Cox was criticised by the Nixon White House from the outset for being partisan, judgemental, lacking in political acumen and trial experience, a sheltered professional, and not up to the job. Initially, at least, the media had little time for this patrician academic. Cox, however, guaranteed his place in the history books by winning respect and admiration for his performance as Special Prosecutor. His reputation as an American Hero was secured, as his 2004 obituaries confirmed.

Cox's successor, Leon Jaworski, faced a different set of problems. Initially, he received little support from any quarter. Cox's staff was wary of him, Congress was polite but distant and the media wondered how a Special Prosecutor chosen by the White House could actually maintain independence. As with Cox, Jaworski won the respect of his peers through his professionalism and integrity.

These Watergate Special Prosecutors had a different experience to their high-profile successors in the Iran Contra and Whitewater/Lewinsky cases. Whilst the former earned their good reputations over time, the latter experienced the reverse. A reputation is never the preserve of the holder's to control, and the Iran Contra and Whitewater/Lewinsky independent counsel particularly embodied this. Lawrence Walsh conducted his investigation with caution and respect for the president. Some critics maintained that he was too deferential to Reagan and should have used more aggressive tactics. However, he was an old-fashioned Republican and did not believe in untoward methods. Despite his penchant for proceeding by the book, Walsh was heavily criticised for a drawn-out investigation that failed to satisfy either the pro or anti-Reagan camps.

Even more dramatically, Starr became the most infamous of all independent counsel. All accounts suggest that he began his investigation in a measured fashion. There were no early complaints regarding his methods, merely about the fact that he may not have been a sufficiently neutral choice politically. As time went on, however, Starr's methods, associations and suspected motives came increasingly under fire. He was attacked by the liberal media for conducting a partisan witch-hunt, and turning a straightforward land-deal investigation into a tawdry exposé of the president's sexual indiscretions. Far more than his predecessors, Starr faced vehement opposition and was reviled by Clinton protagonists as a man out to get the president. Even many of those who found Clinton's behaviour abhorrent still viewed Starr in a negative light.

The Iran Contra scandal was a significant turning point in the reputation of the Office of Independent Counsel. The controversy generated by the Walsh investigation prefaced many of the problems that would later dog the Starr investigation of Bill

Clinton. Walsh's investigation brought with it a shift in the evolving reputation of the post from that of straightforward hero investigation villain (Cox and Nixon) to an interaction between two morally ambiguous forces (Starr and Clinton). By the time of the Lewinsky scandal, the lines of right and wrong were so blurred that it became impossible to draw any neat conclusions regarding moral high ground or heroism on the part of the investigator or the investigated.

The Iran Contra Affair resulted in the first investigation of alleged executive wrongdoing under the 1978 Ethics in Government Act to rival Watergate in scope and significance. As with Watergate, Iran Contra stemmed from charges that the president and administration officials had abused political power and ignored the rule of law. Previous use of the facility for minor investigations, including one-off allegations of cocaine use by Carter aides Hamilton Jordan and Tim Kraft, had resulted in a few dents it its reputation. Until Iran Contra, however, the Office of Independent Counsel was still viewed as 'the jewel in the post-Watergate crown.'[1]

With its institutionalization in the Ethics in Government Act, the office raised constitutional issues regarding its legitimacy that had not bedevilled the Watergate prosecutors. From this juncture onwards the debate over whether it violated the separation of powers doctrine became a burning political issue for those involved. Those on the receiving end of the Independent Counsel investigations were often outraged that the office was the only U.S. government body not subject to any oversight and budgetary restraints. Walsh, and later Fiske, stated that they had never had power like it. This raised questions about the legitimacy of the so-called 'fourth branch' of government. Iran Contra was the first post-Watergate scandal to involve

enormous issues of national security and alleged presidential wrong-doing. Some took the matter to court, but in each instance, they lost their case and therefore the legality and legitimacy of the office was upheld. Nonetheless, some independent counsel were obliged to operate whilst enduring a legal attack which threatened their existence.

However, the real Achilles heel of the office was its perceived lack of independence. Any notion that the independent counsel selection process or investigative procedure could be depoliticised was wildly unrealistic. Whilst many of those chosen for the post may have genuinely lacked an overt political agenda, some choices were particularly controversial. In such situations, it was of course impossible to please all of the people all of the time, but some appointments met with particular outrage. Fiske and Starr were prime examples of this. The choice of the moderate Fiske to investigate Whitewater incensed the anti-Clinton lobby and his replacement with the conservative Evangelical Starr brought accusation of a conspiracy from the president's supporters.

Opposition use of the media to attack the Independent Counsel towards the end of Iran Contra was in stark contrast with Watergate but heralded the later tactics of the Clinton administration during the Whitewater/Lewinsky investigation. Not only did Walsh receive virulent written and verbal criticism from opponents such as Theodore Olson but also from journalists themselves. With Iran Contra, for the first time, criticism focused on the independent counsel, rather than just the statute that created the office. Walsh's detractors accused him of abusing his power, a charge that he strongly denied. Despite proving initial crimes and obstruction of justice, Walsh lost

the public relations battle as his detractors accused him of being out of step with expediency.

All Independent Counsel fully appreciated the power of the media to shape public opinion through its coverage of their investigations. Parallels may be drawn between the Nixon and Clinton investigations in this respect. Both presidents claimed that they were victims of an aggressive media. Nixon was convinced that the liberal media was reporting the scandal in a manner that portrayed him as a crook. Indeed, much of the liberal and mainstream press did not present him in a positive light but as events unfolded, it was difficult to depict him in any other way.

Clinton, in turn, felt victimised by the right-wing press. His wife spoke of a 'vast right-wing conspiracy.' While she may have been hyper-sensitive to criticism during the Whitewater investigation, there was nonetheless sufficient evidence to suggest that at least some of her fears were real. The Clintons did experience an intense media campaign against them, with the added realm of new technology – something their predecessors had never experienced. Whilst the Watergate reporting in the press grew increasingly anti-Nixon, it was mainly in reaction to unfolding events and therefore more horrified in tone than vitriolic. Even before the Whitewater/Lewinsky scandals really exploded, there was a venomous anti-Clinton drive stretching from the Arkansas Project to the *Washington Times*. Decades earlier, Woodward and Bernstein had been uncovering a specific story whereas David Brock and his ilk appeared intent on creating a story and engaging in character assassination.

Watergate was the psychological framework for which future scandals were judged, as so, by definition, Watergate saved the Reagan and Clinton presidencies.

Schudson's reference to a 'pre-emptive metaphor' illustrates how the existence of such a high-profile and devastating crisis as Watergate ensured that later scandals would always be viewed through the prism of previous experience. This Freudian need to reconstruct the past in the present was a recurring phenomenon however inappropriate or ill-fitting the pre-emptive metaphor actually was.

There is always a danger that any power that can be abused, will be abused. Insofar as the independent counsel were concerned, assessments as to whether their activities were unconstitutional usually reflected the political persuasion of those expressing this particular viewpoint. The conduct of each counsel in office was shaped by his previous experience, since none came to the post with a clean cognitive slate. Hence, any action he deemed appropriate in light of his experience and understanding, others could consider partisan or an abuse of power. In the same way that one man's terrorist is another man's freedom fighter, the same independent counsel could be considered to be the ultimate public servant or an illegitimately appointed politically motivated pest.

Since the demise of the Independent Counsel statute in 1999, the US has once again experienced executive wrongdoing and a Special Counsel investigation. However, the resignation of Lewis Libby, Chief of Staff and Assistant for National Security Affairs for Vice President Cheyney, occurred in the post 9/11 climate. Then, as during the early Cold War, national security was paramount. During times of external threat, perceived or imaginary, the desire for national unity overrides the urge for partisan battle. Coupled with this situation, in an era of moral relativism, it is easier to become

bogged down in the ethical quagmire of what behaviour is considered acceptable and what is not, as social and civic mores become increasingly fluid.

Once the post 9/11 consensus collapses, it is highly likely that scandals regarding perceived abuse of power or obstruction of justice by the executive will reappear on the political agenda. Foreign policy consensus is not perennial and the post Cold War Clinton years provide a shining example of how the absence of a common enemy facilitates the expression of internal political divisions. After the trauma of Watergate and the zenith of the imperial presidency came decades of diminished executive strength. Developments since the new millennium, however, suggest a resurgent presidency, unafraid to wield executive power in an overt fashion. Classic scandal timing tends to be the second year of the second presidential term, so with regard to the current George W. Bush administration, at the time of writing, the president had, for the first time, been directly implicated in the Libby Affair.

The situation from Watergate to the present has evolved in a cyclical fashion. The Watergate Imperial Presidency was investigated by a respected and successful ad hoc Special Prosecutor. The next significant scandal occurred during a reduced but by no means weak Reagan presidency (as Tip O'Neill famously said of him, 'he would have made a great king') which was investigated by a less successful Lawrence Walsh operating under Title VI of the Ethics Act. Presidential power had greatly diminished since its Nixonian zenith by the time Clinton had to face an independent counsel. The runaway train that was the Starr investigation ensured that the credibility of the independent counsel was soon in tatters, clearly illustrated by the fact that the statute that created the office was allowed to expire in 1999. Hence the current situation has

returned to something akin to that of the Nixon period – a resurgent presidency and the lack of an independent counsel office. Under such circumstances, scandal investigation is a more reactive affair, no longer involving an office with unlimited time and budget in search of a crime.

The study of the Office of Independent Counsel does offer at least one lesson – that nothing is ever simple. Created with benign intent, the office failed to live up to its high ideals and instead resulted in a profound irony. In its quest to make the political process more ethical, it inadvertently politicised the ethics in government process.

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