FOIA Marker

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Counsel's Office, White House

Walker, Helgard (Helgi)

Stack:	Row:	Sect.:	Shelf:	Pos.:	FRC ID:	Location or Hollinger ID:	NARA Number:	OA Number:
W	20	29	4	1	10388	23251	6641	6747

Folder Title:

Binder - Judicial and U.S. Marshal Selection Meeting with the President, 05/16/2003

Withdrawn/Redacted Material
The George W. Bush Library

DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
001	Agenda	Judicial and U.S. Marshal Selection Meeting with the President	1	05/16/2003	P2; P5; P6/b6;
002	Information Sheet	Brett M. Kavanaugh [page 1]	1	N.D.	P6/b6;
003	Briefing	Brett M. Kavanaugh	2	N.D.	P5;
004	Information Sheet	Janice R. Brown [page 1]	1	N.D.	P6/b6;
005	Briefing	Janice R. Brown	2	N.D.	P5;
006	Information Sheet	F. Dennis Saylor IV [page 1]	1	N.D.	P6/b6;
007	Briefing	F. Dennis Saylor IV	2	N.D.	P5;

COLLECTION TITLE:
Counsel's Office, White House

SERIES:
Walker, Helgard (Helgi)

FOLDER TITLE:
Binder - Judicial and U.S. Marshal Selection Meeting with the President, 05/16/2003

FRC ID:
10388

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

Deed of Gift Restrictions

A. Closed by Executive Order 13526 governing access to national security information.
B. Closed by statute or by the agency which originated the document.
C. Closed in accordance with restrictions contained in donor's deed of gift.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
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b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Records Not Subject to FOIA

Court Sealed - The document is withheld under a court seal and is not subject to the Freedom of Information Act.

This document was prepared on Thursday, August 23, 2018

2014-0108-F
2018-0009-P

Withdrawn/Redacted Material
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DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
008	Information Sheet	Kenneth M. Karas [page 1]	1	N.D.	P6/b6;
009	Briefing	Kenneth M. Karas	2	N.D.	P5;
010	Cover Sheet	[Divider 5 with attachments]	4	N.D.	P2; P5; P6/b6;
011	Cover Sheet	[Divider 6 with attachments]	6	N.D.	P2; P5; P6/b6;
012	Email	Janice Brown - To: Jennifer Brosnahan - From: Kyle Sampson	8	05/15/2003	P5;
013	Email	[No Subject] - To: Jennifer Brosnahan - From: Brett Kavanaugh	10	05/15/2003	P2; P5; P6/b6;

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SERIES:
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COLLECTION:
Counsel's Office, White House

SERIES:
Walker, Helgard (Helgi)

FOLDER TITLE:
Binder - Judicial and U.S. Marshal Selection Meeting with the President, 05/16/2003

FRC ID:
10388

OA Num.:
6747

NARA Num.:
6641

FOIA IDs and Segments:
2018-0009-P
2014-0108-F

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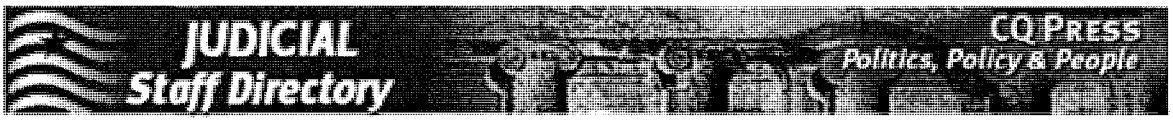

Williams, Stephen F.

Senior Judge, U.S. Court of Appeals for the District of Columbia Circuit, Room 3818, E. Barrett Prettyman U.S. Courthouse, 333 Constitution Avenue, N.W., Washington DC 20001. Nominated for appointment in 1986 by President Reagan (R). Confirmed by Senate; took Senior Status in 2001. Born Sept. 23, 1936 in New York, NY. Married June 11, 1966 to Faith Morrow. Five children.

Education: Yale University, New Haven, CT, 1958, B.A.; Harvard Law School, Cambridge, MA, 1961, J.D.

Military Service: entered active duty, U.S. Army in 1961; released in 1962

Career Record: 1962-66, Associate, Debevoise, Plimpton, Lyons and Gates, New York, NY; 1966-69, Asst. U.S. Attorney, Southern District of New York, Dept. of Justice; 1969-77, Asst. Professor, 1977-86, Professor of Law, University of Colorado; 1975-76, Visiting Professor, University of California at Los Angeles; 1979-80, Visiting Professor, Fellow in law and economics, University of Chicago; 1983-84, William L. Hutchison Visiting Professor, energy law, Southern Methodist University; 1974-76, consultant, Administrative Conference of the U.S. Admitted to New York State Bar, 1962; Colorado Bar, 1977

Member: Judicial Conference to Administrative Conference, liaison rep., 1991-96; American Law Institute.

The Court
The Court Staff

(The Court sits at Washington, DC)

General Information: 202-216-7000
ABBS Registration: 800-676-6856
ABBS Connection (Opinions and Dockets): 800-426-3231
ABBS Connection (local): 202-219-9600
ABBS Access Fee: $.60 minute
AVIS Connection: 800-552-8621
AVIS Connection (local): 202-273-0926
Web PACER: http://pacer.cadc.uscourts.gov
Web PACER Access Fee: $0.07 per displayed page
Web Site: http://www.cadc.uscourts.gov
Fax on Demand: 202-216-7200

DC 1: E. Barrett Prettyman U.S. Courthouse, 333 Constitution Avenue, N.W., Washington, DC 20001

The Court

The Court Staff

Authorized Judgeships: 12
Vacancies: 4
Active Senior Judges: 2
Circuit Justice: William H. Rehnquist, Chief Justice

Douglas H. Ginsburg, Chief Judge; Harry T. Edwards, Judge; David B. Sentelle, Judge; Karen LeCraft Henderson, Judge; A. Raymond Randolph, Judge; Judith W. Rogers, Judge; David S. Tatel, Judge; Merrick B. Garland, Judge; Laurence H. Silberman, Senior Judge; Stephen F. Williams, Senior Judge

	Name/Phone	Title		Building	Room
1)	Douglas H. Ginsburg * R 202-216-7190	**Chief Judge**	Reagan	DC 1	5128
2)	Harry T. Edwards * D 202-216-7380	**Judge**	Carter	DC 1	5400
3)	Merrick B. Garland * D 202-216-7460	**Judge**	Clinton	DC 1	3836
4)	Karen LeCraft Henderson * R 202-216-7370	**Judge**	Bush 41	DC 1	3118
5)	A. Raymond Randolph * R 202-216-7425	**Judge**	Bush 41	DC 1	3108
6)	Judith W. Rogers * D 202-216-7260	**Judge**	Clinton	DC 1	5800
7)	David B. Sentelle * R 202-216-7330	**Judge**	Reagan	DC 1	5108
8)	David S. Tatel * D	**Judge**	Clinton	DC 1	3818
9)	John Roberts R		Bush 43		
10)	(Miguel Estrada)				

5 - R
4 - D

202-216-7160				
Laurence H. Silberman * R 202-216-7353	**Senior Judge** Reagan		DC 1	3400
Stephen F. Williams * R 202-216-7210	**Senior Judge** Reagan		DC 1	3800

The Court Staff

Name/Phone	Title	Building	Room
Jill Sayenga 202-216-7340	**Circuit Executive**	DC 1	4826
Mark J. Langer * 202-216-7300	**Clerk of Court**	DC 1	5409
Marilyn R. Sargent 202-216-7300	**Chief Deputy Clerk**	DC 1	5409
Martha J. Tomich 202-216-7500	**Director, Legal Division**	DC 1	3429
Nancy W. Padgett * 202-216-7400	**Circuit Librarian**	DC 1	5518
Theresa Santella 202-216-7400	**Deputy Librarian**	DC 1	3518

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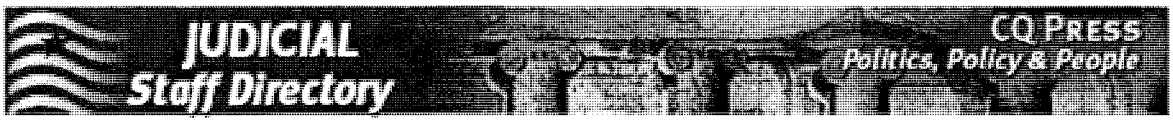

Silberman, Laurence H.

Senior Judge, U.S. Court of Appeals for the District of Columbia Circuit and Judge, Foreign Intelligence Surveillance Court of Review, Room 3400, E. Barrett Prettyman U.S. Courthouse, 333 Constitution Avenue, N.W., Washington DC 20001. Nominated for appointment in 1985 by President Reagan (R); took Senior Status Nov. 1, 2000. Born Oct. 12, 1935 in York, PA. Married April 28, 1957 to Rosalie G. Gaull. Three children.

Education: Dartmouth College, Hanover, NH, 1957, B.A.; Harvard Law School, Cambridge, MA, 1961, LL.B.

Military Service: U.S. Army

Career Record: 1961-67, Associate and Partner, Moore, Torkildson and Rice (later Moore, Silberman and Schulze), Honolulu, HI; 1967-69, attorney, Appellate Division, Natl. Labor Relations Board, Washington, DC; 1969-70, Solicitor, 1970-73, Under Secy., Dept. of Labor; 1973-74, Partner, Steptoe and Johnson; 1974-75, Deputy U.S. Attorney General; 1975-77, U.S. Ambassador to Yugoslavia; 1977-78, Senior Fellow, American Enterprise Institute; 1979-83, Executive V.P., Crocker Natl. Bank; 1981-85, Member, General Advisory Committee on Arms Control and Disarmament; 1978-79, 1983-85, Partner, Morrison and Foerster. Adjunct Professor of Law, Georgetown Law Center, Washington, DC, 1987-94, 1997, 1999-; New York University School of Law, 1995-96; Harvard University, 1998

Member: Association of Former U.S. Attorneys

1. Brett M. Kavanaugh

THE WHITE HOUSE

WASHINGTON

May 16, 2003

MEMORANDUM FOR THE PRESIDENT

FROM: ALBERTO R. GONZALES

SUBJECT: JUDICIAL SELECTION

The White House Judicial Selection Committee and I recommend that you approve for possible nomination to the Senate the following individual:

Brett M. Kavanaugh, of Maryland, to be a Circuit Judge of the United States Court of Appeals for the District of Columbia Circuit, vice Laurence H. Silberman.

Upon your approval all necessary clearances will be initiated. An announcement of intention to nominate will be made as soon as the clearances have been obtained. Nomination to the Senate will be forwarded immediately following the announcement.

APPROVE: _____ DISAPPROVE: _____

Judge Silberman 11th seat ~50 when appointed
Reagan appointee 1985
Senior status Nov. 2000, after 15 years on the bench
Now 67 years old.

Still on Foreign Intelligence Surveillance Court of Review

PREPARED BY: Jennifer Brosnahan

NAME:	**Brett M. Kavanaugh**		
NAME & STATE:	**Brett Michael Kavanaugh of Maryland**		
POSITION:	**United States Court of Appeals for the District of Columbia Circuit**		
TYPE: ***(bold one)***	**PAS** PA SES	**FT** PT	**TERM:** **LIFE**
VICE:	**Laurence H. Silberman**	**GENDER:** **M**	**DOB:** **2/12/1965**
BIRTHPLACE:	**Washington, D.C.**	**PARTY:** **R**	**SSN:** (b)(6)
ETHNIC HERITAGE:	**Caucasian**	**RACE:**	**Caucasian**
CHILDREN:		**SPOUSE:**	
VOTING CITY, STATE ***(in 2000)***	**Bethesda, MD**	**HOME STATE:**	**Maryland**
CURRENT HOME ADDRESS:	(b)(6)	**CURRENT POSITION AND WORK ADDRESS:**	**Associate Counsel to the President The White House Washington, D.C. 20502**
HOME PHONE:	(b)(6)	**WORK PHONE:**	**(202) 456-7984**
EDUCATION:	**Yale Law School, J.D., 1990.** **Yale College, B.A., 1987.**	**AWARDS:**	
PREVIOUS POSITIONS HELD:	**Partner, Kirkland & Ellis, 1997-98, 1999-2001.** **Associate Independent Counsel, Office of Independent Counsel, 1994-97, 1998.** **Law Clerk, Hon. Anthony M. Kennedy, U.S. Supreme Court, 1993-94.** **Attorney, Office of Solicitor General, 1992-93.** **Law Clerk, Hon. Alex Kozinski, U.S. Court of Appeals for the Ninth Circuit, 1991-92.** **Law Clerk, Hon. Walter Stapleton, U.S. Court of Appeals for the Third Circuit, 1990-91.**	**MILITARY SERVICE:**	**None.**
PREVIOUS PRESIDENTIAL APPOINTMENTS:	**Associate Counsel to the President**		

President approved: _____

Security package sent: _____

Withdrawal Marker
The George W. Bush Library

FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Briefing	Brett M. Kavanaugh	2	N.D.	P5;

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COLLECTION:
Counsel's Office, White House

SERIES:
Walker, Helgard (Helgi)

FOLDER TITLE:
Binder - Judicial and U.S. Marshal Selection Meeting with the President, 05/16/2003

FRC ID:
10388

OA Num.:
6747

NARA Num.:
6641

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2014-0108-F

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2. Janice R. Brown

THE WHITE HOUSE

WASHINGTON

May 16, 2003

MEMORANDUM FOR THE PRESIDENT

FROM: ALBERTO R. GONZALES

SUBJECT: JUDICIAL SELECTION

The White House Judicial Selection Committee and I recommend that you approve for possible nomination to the Senate the following individual:

Janice R. Brown, of California, to be a Circuit Judge of the United States Court of Appeals for the District of Columbia Circuit, vice Stephen F. Williams.

Upon your approval all necessary clearances will be initiated. An announcement of intention to nominate will be made as soon as the clearances have been obtained. Nomination to the Senate will be forwarded immediately following the announcement.

APPROVE: _____ DISAPPROVE: _____

Judge Stephen Williams 12th seat ~ 49 when appointed

Reagan appointee 1986
Senior status in 2001, after 15 years on the bench
Now 66 years old

PREPARED BY: Jennifer Brosnahan

NAME:	Janice R. Brown		
NAME & STATE:	Janice Rogers Brown of California		
POSITION:	United States Court of Appeals for the District of Columbia Circuit		
TYPE: *(bold one)*	PAS PA SES	FT PT	TERM: LIFE
VICE:	Stephen F. Williams	GENDER: F	DOB: (b)(6)
BIRTHPLACE:	Greenville, AL	PARTY: R	SSN:
ETHNIC HERITAGE:	African American	RACE:	Black
CHILDREN:	Nathan	SPOUSE:	Duane Allen Parker
VOTING CITY, STATE *(in 2000)*	Sacramento, CA	HOME STATE:	California
CURRENT HOME ADDRESS:	(b)(6)	CURRENT POSITION AND WORK ADDRESS:	Associate Justice California Supreme Court 350 McAllister Street San Francisco, CA 94102-4783
HOME PHONE:		WORK PHONE:	(415) 865-7000
EDUCATION:	UCLA Law School, J.D., 1977. California State University, B.A., 1974.	AWARDS:	
PREVIOUS POSITIONS HELD:	Associate Justice, California Court of Appeals for the Third District, 1994-96. Legal Affairs Secretary, Gov. Pete Wilson, 1991-94. Attorney, Nielsen Merksamer Parrinello Mueller & Naylor, 1990-91. Deputy Secretary & General Counsel, California Department of Business, Transportation, and Housing, 1987-90. Attorney, Office of California Attorney General, 1979-87.	MILITARY SERVICE:	None.
PREVIOUS PRESIDENTIAL APPOINTMENTS:	None.		

President approved: _____

Security package sent: _____

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Briefing	Janice R. Brown	2	N.D.	P5;

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2014-0108-F

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3. F. Dennis Saylor IV

THE WHITE HOUSE

WASHINGTON

May 16, 2003

MEMORANDUM FOR THE PRESIDENT

FROM: ALBERTO R. GONZALES

SUBJECT: JUDICIAL SELECTION

The White House Judicial Selection Committee and I recommend that you approve for possible nomination to the Senate the following individual:

F. Dennis Saylor, IV, of Massachusetts, to be United States District Judge for the District of Massachusetts, vice Robert E. Keeton.

Upon your approval all necessary clearances will be initiated. An announcement of intention to nominate will be made as soon as the clearances have been obtained. Nomination to the Senate will be forwarded immediately following the announcement.

APPROVE: _____ DISAPPROVE: _____

PREPARED BY: Ted Ullyot

NAME:	F. Dennis Saylor IV						
NAME & STATE:	Frank Dennis Saylor IV of Massachusetts						
POSITION:	United States District Judge for the District of Massachusetts						
TYPE: *(bold one)*	PAS	PA	SES	FT	PT	**TERM:**	LIFE
VICE:	Robert E. Keeton			**GENDER:**	M	**DOB:**	(b)(6)
BIRTHPLACE:	Royal Oak, Michigan			**PARTY:**		**SSN:**	
ETHNIC HERITAGE:	Anglo American					**RACE:**	White
CHILDREN:	Three (John, Charles, & Alex)					**SPOUSE:**	Catherine Adams Fisk
VOTING CITY, STATE *(in 2000)*	Weston, MA					**HOME STATE**	Massachusetts

CURRENT HOME ADDRESS:	(b)(6)	**CURRENT POSITION AND WORK ADDRESS:**	Partner, Goodwin, Procter & Hoar Exchange Place Boston, Massachusetts 02109-2881
HOME PHONE:		**WORK PHONE:**	(617) 570-1977
EDUCATION:	Harvard Law School, J.D., 1981. Northwestern University, Medill School of Journalism, B.S.J., 1977.	**AWARDS:**	Edmund Jennings Randolph Award for Outstanding Contributions to the DOJ, 1993. DOJ Special Achievement Award, 1991 & 1992. Internal Revenue Service Special Award
PREVIOUS POSITIONS HELD:	Chief of Staff to the Assistant Attorney General, Criminal Division, U.S. Department of Justice, 1991-93. Special Counsel to the Assistant Attorney General, Criminal Division, U.S. Department of Justice, 1990-91. Assistant U.S. Attorney, District of Massachusetts, 1987-90. Associate, Goodwin Procter & Hoar, 1981-87.	**MILITARY SERVICE:**	None.

PREVIOUS PRESIDENTIAL APPOINTMENTS:
President approved: _____

Security package sent: _____

Withdrawal Marker
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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Briefing	F. Dennis Saylor IV	2	N.D.	P5;

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2018-0009-P
2014-0108-F

RESTRICTION CODES

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THE WHITE HOUSE

WASHINGTON

May 16, 2003

MEMORANDUM FOR THE PRESIDENT

FROM: ALBERTO R. GONZALES

SUBJECT: JUDICIAL SELECTION

The White House Judicial Selection Committee and I recommend that you approve for possible nomination to the Senate the following individual:

Kenneth M. Karas, of New York, to be United States District Judge for the Eastern District of New York, vice Sterling Johnson, Jr.

Upon your approval all necessary clearances will be initiated. An announcement of intention to nominate will be made as soon as the clearances have been obtained. Nomination to the Senate will be forwarded immediately following the announcement.

APPROVE: _____ DISAPPROVE: _____

PREPARED BY: Jennifer Newstead

NAME:	**Kenneth M. Karas**				
NAME & STATE:	**Kenneth Michael Karas of New York**				
POSITION:	**United States District Judge for the Eastern District of New York**				
TYPE: ***(bold one)***	**PAS** PA SES	**FT** PT		**TERM:**	**LIFE**
VICE:	**Sterling Johnson, Jr.**	**GENDER:**	**M**	**DOB:**	(b)(6)
BIRTHPLACE:	**Colorado Springs, CO**	**PARTY:**		**SSN:**	
ETHNIC HERITAGE:	**European American**			**RACE:**	**White**
CHILDREN:	**One (Nathan)**			**SPOUSE:**	**Frances Bivens**
VOTING CITY, STATE ***(in 2000)***	**New York, New York**			**HOME STATE**	**New York**

CURRENT HOME ADDRESS:	(b)(6)	**CURRENT POSITION AND WORK ADDRESS:**	**Chief, Organized Crime and Terrorism Unit United States Attorney's Office, Southern District of New York One St. Andrews Plaza New York, NY 10007**
HOME PHONE:		**WORK PHONE:**	**212-637-1034**
EDUCATION:	**Columbia University School of Law, J.D., 1991.** **Georgetown University, B.A.,** ***magna cum laude,*** **1986.**	**AWARDS:**	**The Attorney General's Award for Distinguished Service, 2002.** **Federal Law Enforcement Association Prosecutor of the Year, 2001.** **The Attorney General's John Marshall Award for Outstanding Legal Achievement, 1995.**

PREVIOUS POSITIONS HELD:	**Member, Organized Crime and Terrorism Unit, United States Attorney's Office, Southern District of New York, 1996–present.** **Member, Narcotics, Asset Forfeitures and General Crimes Units, United States Attorney's Office, Southern District of New York, 1992-1996.** **Law Clerk, Honorable Reena Raggi, United States District Court, Eastern District of New York, 1991-92.** **Corporate Finance Analyst, Kidder Peabody & Co., 1986-88.**	**MILITARY SERVICE:**	**None.**

PREVIOUS PRESIDENTIAL APPOINTMENTS:
President approved: _____
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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Briefing	Kenneth M. Karas	2	N.D.	P5;

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Walker, Helgard (Helgi)

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2014-0108-F

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99 YLJ 187
(Cite as: 99 Yale L.J. 187)

C

Yale Law Journal
October, 1989

Note

*187 DEFENSE PRESENCE AND PARTICIPATION: A PROCEDURAL MINIMUM FOR BATSON v. KENTUCKY HEARINGS

Brett M. Kavanaugh

"Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill-equipped to second-guess those reasons." [FN1]

In Batson v. Kentucky, [FN2] the Supreme Court held that a prosecutor's purposefully discriminatory use of peremptory challenges [FN3] against venirepersons of the same race as the defendant violated the equal protection clause of the Fourteenth Amendment. [FN4] Batson eased the difficult burden of proof that the Court had imposed on defendants in Swain v. Alabama. [FN5] Swain required a defendant challenging the prosecution's practices to prove repeated striking of blacks over a number of cases. In Batson the *188 Court stated that this requirement had placed a "crippling burden of proof" [FN6] on defendants, rendering peremptory challenges "largely immune from constitutional scrutiny." [FN7]

To establish a prima facie case of purposeful discrimination under Batson, the defendant must show: (1) that he is a member of a cognizable racial group; (2) that peremptory challenges have been used to remove members of the defendant's race from the jury; [FN8] and (3) that the facts and other relevant circumstances raise an inference that the prosecutor used peremptories in a racially discriminatory manner. [FN9] In deciding whether a prima facie case has been raised, the trial judge [FN10] is to consider such circumstances as a pattern of strikes against black jurors and a prosecutor's voir dire questions and statements. [FN11]

After the defendant has made out a prima facie case, the prosecutor must explain the peremptory challenges in question. The prosecutor is not entitled to peremptorily challenge a juror on the assumption that because of shared race the juror would be partial to the defendant, nor may a prosecutor simply assert good faith performance of his duties. [FN12] Rather, the prosecutor "must articulate a neutral explanation related to the particular case to be tried." [FN13]

One of the questions Batson left unanswered [FN14] is what procedure courts *189 should use when inquiring into prosecutorial motives for peremptory challenges. Once the defense [FN15] makes out a prima facie case of purposeful discrimination, a court can hear the prosecutor's reasons for the peremptory challenges in question in one of four ways: (1) an ex parte, in camera hearing in which the prosecutor explains his peremptory challenges out of the defense's presence and the defense has no opportunity for rebuttal; (2) an open, non-adversarial hearing in which the defense is present but is not given an opportunity to rebut the prosecutor's reasons; [FN16] (3) an open, adversarial hearing allowing the defense to rebut the prosecutor's reasons and attempt to show them to be pretextual or openly discriminatory; or (4) a full- scale evidentiary hearing in which the prosecutor is a witness, testifies to the reasons for his peremptories, and is subjected to cross-examination by the defense counsel.

The federal circuit courts have split on the question of Batson procedure. Some courts have allowed ex parte, in camera Batson hearings (the first option above) and thus the exclusion of the defense from listening to or rebutting the prosecutor's reasons, while other courts have stated that Batson hearings should be adversarial (the third option above). [FN17] No court has yet required full-scale evidentiary hearings (the fourth option above), [FN18] but no court has ruled that they are impermissible, either.

This Note argues, first, that the defense must be present to hear the prosecutor articulate his "neutral explanation" and, second, that the defense ***190** should have an opportunity to rebut the prosecutor's reasons before the trial judge decides whether to allow the prosecutor's peremptories.

Section I analyzes the Batson opinion and the procedures it requires or suggests, if any, and argues that Batson left the formulation of procedures to the lower courts. Section II considers the present split in the federal circuits and also examines state court decisions. Section III contends that a defendant's presence at a Batson hearing is a requirement of the due process clause of the Fifth Amendment. This Section also demonstrates that the general presumption in American criminal procedure is to allow the defendant to be present at all stages of the criminal prosecution.

Section IV argues that a standard in which the defense has the opportunity for rebuttal after the prosecution has articulated reasons for the peremptory challenges in question should be adopted as a floor of protection against the potential abuse of the jury selection process that still exists in the wake of Batson. Section V considers the fourth option above-full-scale evidentiary hearings-and concludes that they should be neither required nor forbidden. This option should fall completely within the discretion of the trial judge.

I. PROCEDURAL REQUIREMENTS OF Batson

In Batson, the Supreme Court declined "to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges." [FN19] The Court made "no attempt to instruct ... lower courts how best to implement" [FN20] the holding " i n light of the variety of jury selection practices followed in our state and federal trial courts." [FN21]

Despite this apparent refusal to construct a standard procedure, conflicting signals emerge from the language of the opinion, leading some courts to believe that the Court did in fact envision a particular procedure. One portion of Batson suggests that a Batson hearing should consist of three steps: (1) the defense makes out a prima facie case of purposeful discrimination; (2) the prosecutor gives reasons for the peremptory challenges in question; and (3) the trial court rules on the validity of those peremptories. [FN22]

At another point, however, the Court hinted that Batson hearings should be more extensive and follow the lead of Title VII proceedings, which would permit defense rebuttal of the prosecutor's reasons. In a footnote, the Court cited three Title VII cases [FN23] that "explained the operation ***191** of prima facie burden of proof rules. The party alleging that he has been the victim of intentional discrimination carries the ultimate burden of persuasion." [FN24]

Some lower courts have read the Court's use of Title VII cases as evidence that a Title VII-type procedure is required in Batson hearings. [FN25] However, the footnote in which the Title VII cases were cited purported to explain the operation of prima facie burden of proof rules. In this way, the Title VII cases merely illustrate how the burden shifts to the prosecutor after the defendant has made out a prima facie case. It may not have been intended to specify the particular procedure to be followed, but rather to identify who carries the ultimate burden of proof. [FN26]

Courts that have attempted to "divine" a particular procedural mandate from Batson have missed the point. In spite of mixed signals in the opinion, the Court deliberately declined to formulate procedures, thus leaving lower

courts room to experiment. This does not mean that courts should not find that Title VII provides an appropriate example for Batson hearings. However, to come to that conclusion merely by relying on language in Batson is to misread that decision.

II. CASE LAW IN THE FEDERAL CIRCUITS AND THE STATES

This Section considers the present split in the federal circuits over the question whether a trial court must allow the defense to be present to hear and rebut the prosecutor's presentation of reasons for his peremptory challenges. This Section also considers state court cases that have addressed this issue.

A. Federal Cases

In the first case to address this question, United States v. Davis, [FN27] the Sixth Circuit held that neither the Constitution nor Rule 43(a) of the Federal Rules of Criminal Procedure [FN28] requires the presence of the defense at a Batson hearing. At trial the prosecution had exercised seven of its peremptory challenges to remove seven of the nine black venirepersons; ***192** the other two black persons were removed for cause. The trial court decided, over the strenuous objection of the defense, to hear the prosecution's reasons for its challenges in camera. After hearing those reasons and denying the defense's motion to disallow the peremptories, the court declined to reveal any of the hearing's record to the defense. [FN29]

In affirming the trial court's decision, the Sixth Circuit relied on the lack of mandatory procedural standards in either Batson or Booker v. Jabe, [FN30] and on Snyder v. Massachusetts, [FN31] which held that a defendant's right to be present at a particular stage of trial was a fact- specific determination. The court in Davis also based part of its decision on the defense's opportunity to present its arguments in open court before the court held the in camera hearing. [FN32]

In United States v. Tucker, [FN33] the trial court had conducted an ex parte, in camera hearing after the prosecution exercised four of its seven peremptory challenges to exclude all four blacks on the thirty-six person panel. The Seventh Circuit upheld the proceeding, [FN34] agreeing with the SixthCircuit that "Batson neither requires rebuttal of the government's reasons by the defense, nor does it forbid a district court to hold an adversarial hearing." [FN35]

In the interim between these two cases, a divided panel of the Ninth Circuit in United States v. Thompson [FN36] disagreed with Davis. The prosecution had exercised its peremptory challenges to remove all four blacks from the venire. After hearing the prosecutor's reasons ex parte and in camera, the trial judge allowed the peremptories without revealing any of the proffered reasons [FN37] to the defendant. [FN38]

In overturning the district court, the Ninth Circuit rejected the government's ***193** argument that defense counsel could contribute nothing to the proceeding by being present and participating. The court also questioned the government's administrative burden argument, stating that "[w]e would be surprised ... if these proceedings were to involve anything more elaborate than the prosecutor's articulation of his reasons, followed by the argument of defense counsel ...." [FN39]

In United States v. Garrison, [FN40] the Fourth Circuit adopted the Ninth Circuit's standard, concluding that "the important rights guaranteed by Batson deserve the full protection of the adversarial process except where compelling reasons requiring secrecy are shown." [FN41] In United States v. Roan Eagle, [FN42] the Eighth Circuit agreed with the Fourth and Ninth Circuits that the defense should have an opportunity to rebut the prosecution, but it refused to require a full evidentiary hearing.

B. State Cases

State courts have also confronted the issue of the most appropriate procedure for conducting a Batson inquiry into prosecutorial motives for peremptory challenges. These courts have either read the Title VII language in Batson as mandating the framework for deciding a claim of discriminatory peremptory challenges [FN43] or assumed that the defendant must be allowed to rebut the prosecutor's reasons. [FN44]

III. REQUIRING THE PRESENCE OF DEFENDANTS AT Batson HEARINGS

This Section addresses the importance of allowing the defendant to be present at a Batson hearing. It argues that: (1) the due process clause of the Fifth Amendment and Federal Rule of Criminal Procedure 43(a) require***194** the defendant's presence at a Batson hearing; and (2) an examination of the few situations in the criminal process where the defense is excluded argues against exclusion from Batson hearings.

A. Constitutional Right to Presence

1. Gagnon and Stincer

The confrontation clause of the Sixth Amendment [FN45] is the source of a criminal defendant's right to be present at every stage of the trial. [FN46] The right applies in state as well as federal proceedings. [FN47] Even in situations where the defendant is not actually confronting witnesses or evidence-and, therefore, not implicating the literal provisions of the Sixth Amendment [FN48]-the defendant's right to be present is protected by the due process clauses of the Fifth and Fourteenth Amendments. [FN49] Federal Rule of Criminal Procedure 43(a) codifies this constitutional requirement. [FN50]

The starting point for analyzing a defendant's claim to be present at a Batson hearing is the Supreme Court's pronouncement that a "leading principle ... [pervading] the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner." ***195**[FN51] Two recent Supreme Court cases have outlined the standards for determining whether a defendant has a right to be present at a particular trial-related proceeding.

In United States v. Gagnon, [FN52] the Supreme Court stated that a defendant has a due process right to be present when the defendant's presence has "a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge." [FN53] In Kentucky v. Stincer, [FN54] the Court reiterated and refined the Gagnon standard, stating that "a defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." [FN55]

***196** 2. Application to Batson Hearings

A defendant's absence at a Batson hearing would violate the Gagnon standard because a Batson hearing has a reasonably substantial relationship to a defendant's opportunity to defend against the ultimate charge. The defendant's right to be present applies to jury selection, including that phase involving the exercise of peremptory challenges. [FN56] Since a Batson hearing is an integral part of the jury selection process, the right to be present should also apply to that proceeding. A fair and just hearing is thwarted by the defendant's absence since the defendant will not witness the determination of the group that will decide his guilt or innocence.

Unlike Gagnon, in which a defendant's presence at an in camera conference was considered counterproductive, [FN57] a defendant could both gain from and contribute to a Batson hearing. By being present to hear the

prosecutor's reasons, a defendant could gain the sense of fairness that the Supreme Court has recognized as an important element of the criminal justice system. By rebutting a prosecutor's reasons, the defense could also contribute to the search for the true reasons behind the prosecutor's peremptory challenges. The defendant's presence at a Batson hearing could not be counterproductive as in Gagnon, since the issue is not the impartiality of a fearful juror but the prosecutor's reasons for her peremptory challenges. Further, unlike Gagnon, where none of the defendants objected at trial, the defense has generally objected when a Batson hearing has been held ex parte and in camera. [FN58]

A Batson hearing also would meet the "critical to the outcome" and the "contribution to fairness" elements of the Stincer standard. There is little doubt that the composition of juries is and has been treated as critical to the ultimate verdict. Numerous Supreme Court pronouncements have confirmed the importance of the jury's composition. [FN59] The very existence of peremptory challenges and the extraordinary amount of time spent on voir dire [FN60] demonstrate the perceived importance of the jury selection procedure in the outcome of the trial.

***197** In addition, the presence of the defendant would meet the second part of the Stincer standard since it contributes both to the actual fairness of the procedure and to the appearance of fairness. As the Court stated in In re Murchison, [FN61] " f airness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." [FN62] Thus, "due process is denied by circumstances that create the likelihood or the appearance of bias." [FN63] Excluding the defendant from a hearing that determines who will sit on the jury, besides presenting opportunities for actual bias, certainly creates the appearance of bias.

B. Total Exclusion of the Defense

The rarity of instances where criminal proceedings are permissible in the absence of defense presence further argues against holding a Batson hearing without the defense. Courts exclude the defense when determining whether evidence possessed by the prosecution is discoverable by the defense. [FN64] Similarly, prosecutors reveal the identities of informers to the court in camera because disclosing their identities might cause harm to the informers. [FN65] The use of an in camera hearing enables the court to weigh the balance of interests between the accused and the government without revealing the information unnecessarily and irretrievably.

The general rule that emerges from these examples is that hearings are held without any defense presence only when the court must initially decide if a compelling justification exists for the government not to reveal certain evidence. The defense is precluded from receiving the information only after a court makes this initial determination.

IV. ALLOWING DEFENSE REBUTTAL OF THE PROSECUTION'S REASONS

The previous Section argued that a defendant's right to be present to hear the prosecutor's reasons for his peremptory challenges is a requirement of both the Constitution and Rule 43(a), and is consistent with the presumption of presence at all stages of the criminal process. This Section argues that, once defense presence is established as a right, policy reasons ***198** favor allowing the defense to rebut the prosecution's reasons before the court decides whether to allow the peremptory challenge in question.

A. Detection of Discrimination

1. Batson

The process of determining whether a prosecutor has exercised her peremptory challenges in a racially discriminatory manner places an enormous burden on the trial court judge. [FN66] Since purposeful racial discrimination is difficult to detect, [FN67] defense rebuttal of the prosecution's reasons for challenging certain venirepersons can assist the judge in his determination by pointing out how the prosecution's explanations do not conform to the facts. For example, the defense counsel could show that white jurors who are similarly situated to the challenged blacks were not challenged. [FN68]

Participation by the defense also would help guard against "outright prevarication," [FN69] " a prosecutor's own conscious or unconscious racism," [FN70] or " a judge's own conscious or unconscious racism." [FN71] Justice Marshall feared that these factors could limit the effort to rid the jury selection process of racial discrimination. Because of this possibility, his concurrence in Batson argued that the only way to end racial discrimination in the jury selection process is to eliminate peremptory challenges entirely. [FN72]

Justice Powell's majority opinion answered Justice Marshall's skepticism about prosecutorial and judicial enforcement of Batson by stating somewhat conclusorily that there was "no reason to believe that prosecutors will not fulfill their duty to exercise their challenges only for legitimate***199** purposes," [FN73] and that "trial judges, in supervising voir dire ... will be alert to identify a prima facie case of purposeful discrimination." [FN74]

If this were true, Batson never would have been necessary. In Swain v. Alabama, the Court stated that prosecutors could not deny blacks "the same right and opportunity to participate in the administration of justice enjoyed by the white population." [FN75] Yet discrimination in the exercise of peremptory challenges remained widespread after Swain. [FN76] The language in Swain prohibiting discrimination obviously did not succeed; reliance solely on the good faith of prosecutors is misguided in light of the history of peremptory challenges in the period between Swain and Batson.

The problem with detection of racial discrimination in the jury selection process extends beyond discovering overt racism. [FN77] Examples of subtle stereotyping and racism point out the need to require defense rebuttal of the prosecution's reasons, since arguably much racism and racial stereotyping is lodged in the subconscious and will stay there unless forced into the open. [FN78]

The assistance of the defense is also necessary because Batson does not prescribe a result but rather proscribes disriminatory purpose. Some courts have had difficulty finding a Batson prima facie case when a black remains on the petit jury despite evidence that a disproportionate number of peremptory challenges were used to strike blacks from the venire. [FN79] This is an incorrect reading of Batson. A court may not simply ensure that an adequate number of blacks remain on the petit jury; rather, the judge must look into the circumstances of each peremptory challenge. [FN80] ***200** Because Batson mandates this difficult inquiry into purpose, the role of the trial judge is better suited to allowing the defense to rebut the prosecution before the judge decides whether to allow a particular peremptory challenge than it is to acting as the sole questioner of the prosecution, as must occur when the judge is without the aid of the defense. [FN81]

2. Sixth Amendment Analysis

To prevent discrimination that Batson does not reach, some courts have relied upon the Sixth Amendment right to a fair and impartial jury composed of a representative cross-section of the community rather than upon the equal protection clause, which Batson utilized. [FN82] A Batson- type standard has been used but, unlike Batson, has been restricted neither to venirepersons of the same race as the defendant [FN83] nor to race as the only factor triggering inquiry. [FN84]

For example, in Booker v. Jabe, [FN85] the Sixth Circuit used the Sixth Amendment as the basis for prohibiting a prosecutor's discriminatory use of peremptory challenges, but did not go so far as to prescribe a result. Instead, under Booker, a prima facie showing is made if "(1) the group ***201** alleged to be excluded is a cognizable group in the community, and (2) there is a substantial likelihood that the challenges leading to this exclusion were made on

the basis of the individual venirepersons' group affiliation ...." [FN86] Since discrimination under such a standard will be as difficult to detect as in Batson and will require the same type of inquiry into prosecutorial motives, an adversary hearing procedure allowing for defense presence and rebuttal should also apply to jurisdictions using a Sixth Amendment standard, such as the one in Booker. [FN87]

B. Standard of Appellate Review

In Batson the Court noted that a trial court's ruling on a claim of a Batson violation will largely be an "evaluation of credibility." [FN88] Because of this, "a reviewing court ordinarily should give those findings great deference." [FN89] This past Term in Tompkins v. Texas, [FN90] an equally divided Supreme Court upheld without opinion an extremely deferential standard of appellate review of a trial court decision on a Batson claim. The lower court in Tompkins found that "the prosecuting attorney's reasons ... constitute a racially neutral explanation, and it is not the office of this Court to judge her credibility." [FN91] The lower court also stated that whether it "would have made the same judgment as the trial judge did is unimportant, because her conclusion, given a subjective belief in the truth of the prosecuting attorneys' explanations, which is supported by sufficient evidence, comports with that of a rational trier of fact." [FN92]

The issue of the defense's role during the prosecution's response to its prima facie case is intertwined with the standard of appellate review. If the Court is to continue its standard of "great deference," then it is even more vital to require defense participation in order to ensure, first, that the trial judge is forced to confront all the facts; and, second, that an adequate record is developed for genuine appellate review since the absence ***202** of defense participation will leave important facts out of the record and make it virtually impossible to overrule a trial court's decision. [FN93]

C. Administrative Costs

An argument such as the one raised by the government in United States v. Thompson [FN94]-that the administrative costs of an adversary hearing will outweigh the benefits-misses on three counts. First, almost all constitutional guarantees involve administrative costs. Second, since the amount of time for both sides to state their arguments, rebut the other side, and let the judge rule should be very short, and usually less than going into chambers to hear the prosecution's reasons, the administrative burden in terms of time spent is very slight. [FN95] Third, if administrative cost is the primary goal, the best solution would be to abolish the peremptory challenge altogether since that would reduce the burden to its minimum level. [FN96]

The procedure this Note advocates could lengthen voir dire for two reasons: Prosecutors who wish to remove a group from the jury may want to ask more questions in order to have neutral justifications to point to, and defense attorneys in response may want to ask more questions to elicit answers that show the prosecutor's reasons to be pretextual. However, judges retain great discretion over the content of questions that may be asked at voir dire. [FN97] In exercising this power, judges should not allow extensive "fishing expeditions" in voir dire by prosecutors attempting to avoid the Batson restrictions. [FN98] Judges could accomplish this by, for example, setting time limits, reviewing questions the attorneys wish to ask prior to voir dire, or conducting voir dire themselves, as is already done in some jurisdictions. [FN99]

***203** D. Deterrence

Although many authors have advocated the elimination of peremptory challenges because they believe that discrimination cannot otherwise be eliminated from the jury selection process, [FN100] an adversary hearing procedure could deter and thus eliminate most, if not all, of the discrimination in the jury selection process while retaining some form of the peremptory challenge, which has historically been an important part of the protection afforded both defendants and the government at trial. [FN101]

The difference between the deterrent value of Swain and that of Batson is that Swain was basically a toothless rejoinder to prosecutors that they should not discriminate, while Batson requires prosecutors to articulate reasons for their challenges. An adversarial Batson hearing further requires a prosecutor, knowing that the defense counsel will be poised to attack any hint of racial motivation, to have truly neutral reasons for the peremptory challenges that she exercises. Forcing a prosecutor to state reasons in an adversary hearing-and possibly under cross-examination if the judge so desires-should help to deter many if not all uses of discriminatory peremptory challenges.

E. Exceptions to the Adversary Hearing Requirement

A prosecutor may have a legitimate reason for not wanting the defense to hear her reasons for a peremptory challenge. Nevertheless, courts must limit any exception to the general rule.

Prosecutors have claimed that open disclosure of their reasons for peremptory challenges will reveal case strategy to the defense. [FN102] In United States v. Thompson, [FN103] the Ninth Circuit, although forbidding ex parte, in camera Batson hearings, carved out an exception to its general rule for circumstances where a prosecutor claims that revealing reasons for his peremptory challenges would divulge case strategy. [FN104] Allowing case strategy ***204** as an exception to a general rule of adversary hearings is too open-ended, for just as prosecutors have become expert in articulating "neutral" reasons for their challenges in the aftermath of Batson, [FN105] so too they could relate their peremptory challenges to case strategy in an attempt to obtain an ex parte, in camera hearing. This exception to a general policy of adversary hearings thus serves to undermine the values that the policy was intended to preserve. As the court in Tucker correctly stated, "the Thompson exception swallows the Thompson rule." [FN106]

The case strategy exception rests on the assumption that a prosecutor's sole duty is to win a case [FN107] and that disclosing case strategy to the defense would create an unfair playing field. Much of the debate over peremptory challenges prior to Batson similarly concerned the idea that the trial is a game in which each side should be allowed to carry its fight to the fullest. [FN108] However, the Supreme Court has recognized the folly of seeing trials as mere sporting events. In upholding a Florida notice-of-alibi rule, which required that a defendant give notice in advance of trial if he intended to claim an alibi, the Court stated: " t he adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played." [FN109]

An exception to the general policy of adversarial Batson hearings should be allowed only for a "compelling reason." A "compelling reason" occurs only when harm to persons unconnected with that criminal proceeding may result from disclosure, such as when a prosecutor strikes a ***205** venireperson because that venireperson is the subject of another criminal investigation. [FN110]

If a "compelling reason" is present and the judge grants the prosecutor's request to give her reasons in camera, the judge should ensure that a court reporter is present to record the hearing. Then the defense should be presented with a transcript of the hearing with such redactions as the judge deems necessary to preserve the rights of persons not connected to the criminal proceeding. This procedure is the best way to balance the competing concerns of the defendant and of ongoing criminal investigations or persons not involved in the defendant's trial.

V. FULL EVIDENTIARY HEARINGS

The previous Sections have argued that courts must allow the defense to be present and to rebut the prosecution during Batson hearings. [FN111] This Section considers whether courts should require prosecutors, after the defense has made out a prima facie case, to testify under oath to the reasons for their peremptories, to answer the defense counsel's questions on cross- examination, and to respond to questions that the trial judge may have.

Because of the administrative burden that would result, appellate courts should not require this procedure, except in hearings on remand, but they should permit them. Therefore, the decision should be entirely within the discretion of the trial judge. [FN112]

***206** A. Balancing the Benefits and Burdens in the Typical Batson Hearing

Appellate courts that have reviewed trial court denial of a defendant's motion to subject the prosecutor to cross-examination have not required such a procedure. [FN113] They wish to avoid the administrative burden of a "trial within a trial." [FN114] This burden is not outweighed by the benefits of the full evidentiary hearing since the additional benefits are usually slight. An adversary hearing in which the parties argue their cases and the defense rebuts will usually be sufficient for the judge to make an informed decision, [FN115] thus making a full evidentiary hearing unnecessary in the majority of cases.

Although no court has yet required a full-scale evidentiary hearing, trial courts should be allowed to conduct such a hearing when, in their discretion, it would be warranted. Therefore, appellate courts should leave this decision entirely within the discretion of the trial judge and neither forbid nor require such a hearing.

B. Balancing in the Batson Hearing on Remand

When an appellate court finds a potential Batson violation and remands the case to the trial level, the appellate court should require that the trial court conduct a full evidentiary hearing. When a court remands a case, it has found some problem that needs to be addressed by the trial court. In such a case, forcing a prosecutor to state reasons under oath, and subject to cross- examination, ensures that the remand is properly handled. Since the amount of time between the original jury selection process and the hearing on remand is likely to be great, testimony under oath and cross-examination will serve as a useful aid in the attempt to reconstruct the earlier event.

In terms of burden,the major difference between the typical Batson hearing and the hearing on remand is the number of times that each occurs. Since Batson hearings on remand should be rare, requiring a fuller hearing would not overly burden the courts in the way that holding such a procedure at every Batson hearing would. [FN116]

***207** VI. CONCLUSION

Allowing the defense to be present to hear the prosecution's reasons and to rebut them whenever a prima facie case of discrimination is made eliminates the truly "peremptory" nature of the peremptory challenge. The Supreme Court, however, recognized this consequence in Batson and subordinated it to a goal of removing racial discrimination. Swain represented an attempt to preserve the "peremptory" nature of the challenge, but the dreadful accounts of the use of peremptory challenges in the years between Swain and Batson convinced the Supreme Court that it could no longer allow these practices.

Courts must not allow the spirit of Batson to be diminished by misguided allegiance to the peremptory challenge. Batson is an attempt to remove discrimination from the jury selection process without eliminating the peremptory challenge. The balance is delicate, but Batson's movement is towards the eradication of discrimination and away from a truly "peremptory" challenge. The post-Batson peremptory is forever changed; allowing ex parte, in camera hearings serves to limit that change and the rights it was intended to protect.

Courts should not read Batson as mandating a procedure, since it did not, but should go beyond Batson and require both the presence and participation of the defendant at the Batson determination unless there is a compelling reason for an in camera hearing. This procedure helps to secure the rights of defendants, the excluded

jurors, [FN117] and the community [FN118] and provides both fairness and the appearance of fairness, fundamental values in the American criminal justice system.

[FN1]. Batson v. Kentucky, 476 U.S. 79, 106 (1986) (Marshall, J., concurring).

[FN2]. 476 U.S. 79 (1986).

[FN3]. After the group of prospective jurors has been assembled, each side is allowed an unlimited number of "challenges for cause," which are made on a "narrowly specified, provable, and legally cognizable basis of partiality." Swain v. Alabama, 380 U.S. 202, 220 (1965). In addition, each side is allowed a specified number of peremptory challenges. These are made "without a reason stated, without inquiry and without being subject to the court's control." Id.; see J. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 139-75 (1977). Peremptory challenges are not a constitutional right. Batson, 476 U.S. at 91; Swain, 380 U.S. at 219.

[FN4]. The Court based its decision in Batson on the equal protection clause of the Fourteenth Amendment rather than on the Sixth Amendment right to trial by an impartial jury. Prior to Batson, two federal circuits had utilized the Sixth Amendment as the basis for prohibiting a prosecutor's discriminatory use of peremptory challenges to sidestep the almost impossible burden that Swain v. Alabama imposed on a defendant. Booker v. Jabe, 775 F.2d 762 (6th Cir. 1985), vacated, 478 U.S. 1001, aff'd on reconsideration, 801 F.2d 871 (6th Cir. 1986), cert. denied, 479 U.S. 1046 (1987); McCray v. Abrams, 750 F.2d 1113 (2d Cir. 1984), vacated, 478 U.S. 1001 (1986). Prior to Batson, five state courts used state constitutional equivalents to the Sixth Amendment to reach the same result. People v. Wheeler, 22 Cal.3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978); Riley v. State, 496 A.2d 997 (Del. 1985); State v. Neil, 457 So. 2d 481 (Fla. 1984); Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499, cert. denied, 444 U.S. 881 (1979); State v. Crespin, 94 N.M. 486, 612 P.2d 716 (Ct. App. 1980). The Supreme Court has granted certiorari in a case raising the question whether the fair cross-section requirement of the Sixth Amendment prohibits the prosecution's racially discriminatory use of peremptory challenges, specifically in the context of a white defendant objecting to the removal of black jurors. Holland v. Illinois, 121 Ill. 2d 136, 520 N.E.2d 270 (1987), cert. granted, 109 S.Ct. 1309 (1989). The Court in the context of "death qualification" for jurors has stated that "an extension of the fair-cross- section requirement to petit juries would be unworkable and unsound ...." Lockhart v. McCree, 476 U.S. 162, 174 (1986). See infra text accompanying notes 82-87.

[FN5]. 380 U.S. 202 (1965).

[FN6]. Batson, 476 U.S. at 92.

[FN7]. Id. at 92-93.

[FN8]. Relying on this language, the Third Circuit held that Batson also applies to white defendants who claim that the prosecutor is purposefully removing white venirepersons from the jury. Virgin Islands v. Forte, 865 F.2d 59 (3d Cir. 1989).

[FN9]. Batson, 476 U.S. at 96.

[FN10]. In Gomez v. United States, 109 S. Ct. 2237 (1989), the Supreme Court held that the Federal Magistrates Act, 28 U.S.C. § 636(b)(3) (1982), does not authorize federal magistrates to conduct voir dire.

[FN11]. Batson, 476 U.S. at 96-97.

[FN12]. Id. at 97-98.

[FN13]. Id. at 98.

[FN14]. For an analysis of many of the unanswered Batson issues, see Alschuler, The Supreme Court and the Jury: Voir Dire, Peremptory Challenges and the Review of Jury Verdicts, 56 U. CHI. L. REV. 153, 163-211 (1989). Alschuler identifies seven questions Batson left in its wake: (1) What constitutes prima facie proof of discriminatory purpose? Compare State v. Vincent, 755 S.W.2d 400, 401-03 (Mo. Ct. App. 1988) (prosecutor's use of all peremptories to strike blacks does not spoil jury that includes substantial number of blacks) with Stanley v. State, 313 Md. 50, 72-75, 542 A.2d 1267, 1278-79 (1988) (prima facie case made when prosecutor used eight of ten challenges against blacks even though three blacks remained on jury). (2) What qualifies as a racially neutral explanation? See Alschuler, supra, at 174 ("Whether the presence of one neutral reason is sufficient, whether the prosecutor must have been wholly uninfluenced by race, or whether the court must probe the prosecutor's psyche deeply enough to determine how he or she would have treated a white juror who exhibited similar characteristics is uncertain."). (3) Should a court remedy improper exclusion by seating the improperly challenged juror or by dismissing the entire panel? (4) Should representation of a targeted group on the jury nullify any attempt to raise a prima facie case of discrimination against that group? This question is related to the first question of what constitutes prima facie proof of discrimination. (5) Is discrimination on nonracial bases allowed? See State v. Oliviera, 534 A.2d 867, 870 (R.I. 1987) ("Batson does not extend to gender-based discrimination."); Alschuler, supra, at 183 ("Were Batson limited to cases of racial discrimination, the limitation would be unattractive. Nevertheless, if Batson were extended to discrimination grounded on 'things like race' as well as race itself, there might be little left of the peremptory challenge."). (6) Does a defendant have standing to object to discrimination against prospective jurors of a race other than his own? The Supreme Court will hear arguments this Term on the question whether either the equal protection clause of the Fourteenth Amendment or the Sixth Amendment right to a fair and impartial jury provides a basis for a white defendant to object to the exclusion of a black juror. Holland v. Illinois, 121 Ill. 2d 126, 520 N.E.2d 270 (1987), cert. granted, 109 S. Ct. 1309 (1989). (7) Is racial discrimination in the use of peremptory challenges permissible for defense attorneys? See Goldwasser, Limiting A Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial, 102 HARV. L. REV. 808, 809 (1989) (Batson restrictions on prosecutorial peremptory challenges should not be extended to defendants' use of peremptory challenges). But see Note, Discrimination by the Defense: Peremptory Challenges After Batson v. Kentucky, 88 COLUM. L. REV. 355, 365-68 (1988) (discriminatory peremptory challenges by either side should be disallowed).
The number of issues generated by Batson led one commentator to remark: "If one wanted to understand how the American trial system for criminal cases came to be the most expensive and time-consuming in the world, it would be difficult to find a better starting point than Batson." Pizzi, Batson v. Kentucky, Curing the Disease but Killing the Patient, 1987 SUP. CT. REV. 97, 155 (1987).

[FN15]. This Note uses the term "defense" to refer to both the defendant and the defense counsel, except where otherwise noted. Section III will discuss the defendant and defense counsel separately. See infra text accompanying notes 45-65.

[FN16]. Gerstein hearings are an example of this procedure: Judges, in the presence of the defendant, conduct a

non-adversarial hearing to determine probable cause in "information" states that do not provide preliminary hearings. Gerstein v. Pugh, 420 U.S. 103 (1975).
This second option is unlikely to be adopted as a rule for all Batson hearings. Nevertheless, some courts have allowed such a Batson procedure to occur.

[FN17]. Compare United States v. Tucker, 836 F.2d 334, 338-40 (7th Cir. 1988), cert. denied, 109 S. Ct. 3154 (1989) and United States v. Davis, 809 F.2d 1194, 1200-02 (6th Cir.), cert. denied, 483 U.S. 1007-08 (1987) with United States v. Roan Eagle, 867 F.2d 436, 441 (8th Cir.), cert. denied, 109 S. Ct. 1764 (1989) and United States v. Garrison, 849 F.2d 103, 106-07 (4th Cir.), cert. denied, 109 S. Ct. 566 (1988) and United States v. Thompson, 827 F.2d 1254, 1257-61 (9th Cir. 1987).

[FN18]. But see Powell v. State, 187 Ga. App. 878, 882, 372 S.E.2d 234, 238 (Ct. App. 1988) (Pope, J., concurring specially) (defense should be allowed to cross-examine prosecutor at Batson hearing).

[FN19]. Batson v. Kentucky, 476 U.S. 79, 99 (1986).

[FN20]. Id. at 99-100 n.24.

[FN21]. Id. at 99 n.24.

[FN22]. "The prosecutor ... must articulate a neutral explanation related to the particular case to be tried. The trial court then will have the duty to determine if the defendant has established purposeful discrimination." Id. at 98 (footnotes omitted).

[FN23]. In Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), the most important Title VII case cited, the Court adopted a three- step procedure that would apply in the following way to Batson hearings. First, the defendant has to prove by a preponderance of the evidence a prima facie case of discrimination; second, the prosecutor has to articulate a legitimate, nondiscriminatory reason for his challenges; finally, the defendant must have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the prosecutor were not true.

[FN24]. Batson, 476 U.S. at 94 n.18 (citations omitted).

[FN25]. See Stanley v. State, 313 Md. 50, 62, 542 A.2d 1267, 1273 (1988); State v. Antwine, 743 S.W.2d 51, 63 (Mo. 1987) (en banc).

[FN26]. See United States v. Davis, 809 F.2d 1194, 1201 (6th Cir.) (Batson "has [not] fashioned any procedural guidelines outside those articulating burdens of proof and persuasion ...."), cert. denied, 483 U.S. 1007-08 (1987).

[FN27]. 809 F.2d 1194 (6th Cir.), cert. denied, 483 U.S. 1007-08 (1987).

[FN28]. "The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule." Fed. R. Crim. P. 43(a).

[FN29]. Davis, 809 F.2d at 1200.

[FN30]. 775 F.2d 762 (6th Cir. 1985), vacated, 478 U.S. 1001, aff'd on reconsideration, 801 F.2d 871 (6th Cir. 1986), cert. denied, 479 U.S. 1046 (1987). Booker was one of the two federal cases prior to Batson that held that the Sixth Amendment applied to a prosecutor's exercise of peremptory challenges. See supra note 4.

[FN31]. 291 U.S. 97 (1934).

[FN32]. This approach ignores the additional information defense rebuttal could bring to a Batson hearing after the prosecutor has given his reasons, such as showing the prosecutor's reasons to be pretextual by, for example, pointing out non-black venirepersons who possess characteristics similar to those of the black venirepersons who were challenged. The court's broad language underscored its view on the trial court's discretion: After the defense has established a prima facie case of racial motivation, defense "participation was no longer necessary for the district court to make its determination. At that point, the district court was entitled to hear from the Government under whatever circumstances the district court felt appropriate." Davis, 809 F.2d at 1202 (emphasis added).

[FN33]. 836 F.2d 334 (7th Cir. 1988), cert. denied, 109 S. Ct. 3154 (1989).

[FN34]. Despite its conclusion, the court stated that it believed adversarial hearings to be the "appropriate method for handling most Batson- type disputes." Id. at 340. It did not, however, require them.

[FN35]. Id.

[FN36]. 827 F.2d 1254 (9th Cir. 1987).

[FN37]. The prosecutor's statements included: "She looked really sullen, and she just, I mean it was like a glare. I felt very uncomfortable with her, and I wouldn't put her on"; "I thought he lived in the neighborhood-he's black, too, and he was dressed casually, and I thought he might identify with him too much so I excused him." Id. at 1256 n.1.

[FN38]. Id. at 1256.

[FN39]. Id. at 1259-60. In addition, the court considered the argument that an adversary hearing is inappropriate because the government lawyer may be required to reveal confidential matters of tactics and strategy, potentially impairing his ability to prosecute the case. Although the court found this reason not to be a sufficient justification in that particular case, it did adopt an exception to its general requirement of open, adversarial proceedings. The court held that a judge can examine the prosecutor's reasons ex parte and in camera if the prosecutor claims that the reasons relate to case strategy and the judge agrees after a separate in camera hearing. The Ninth Circuit affirmed

this exception to the adversarial requirement in United States v. Alcantar, 832 F.2d 1175 (9th Cir. 1987).

[FN40]. 849 F.2d 103 (4th Cir.), cert. denied, 109 S. Ct. 566 (1988).

[FN41]. Id. at 106.

[FN42]. 867 F.2d 436, 441 (8th Cir.), cert. denied, 109 S. Ct. 1764 (1989).

[FN43]. See Stanley v. State, 313 Md. 50, 62, 542 A.2d 1267, 1273 (1988) ("We read Batson as allowing rebuttal as per the Title VII cases."); State v. Antwine, 743 S.W.2d 51, 63 (Mo. 1987) (en banc) ("Batson intimates that it should be read side-by-side with the Supreme Court's Title VII cases.").

[FN44]. See Ex parte Branch, 526 So. 2d 609, 624 (Ala. 1987) (defense can offer evidence that reasons are sham or pretext); Gray v. State, 317 Md. 250, 258, 562 A.2d 1278, 1282 (1989) (trial judge should offer defense opportunity to rebut prosecutor's explanations); Williams v. State, 507 So. 2d 50, 53 (Miss. 1987) (defense afforded opportunity to challenge and rebut explanations); State v. Jackson, 322 N.C. 251, 258, 368 S.E.2d 838, 842 (1988) (defense allowed to offer evidence to strengthen case after prosecution made showing).

[FN45]. "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ... and to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

[FN46]. Illinois v. Allen, 397 U.S. 337, 338 (1970); see also Diaz v. United States, 223 U.S. 442, 453-55 (1912) (defendant in felony case has right to attend all stages of trial from impaneling of jury to delivery of verdict).

[FN47]. Pointer v. Texas, 380 U.S. 400, 403-06 (1965).

[FN48]. In a Batson hearing the only "witness" against the defendant is the prosecuting attorney, and the "evidence" is not of the type that will be used against the defendant at trial.

[FN49]. United States v. Gagnon, 470 U.S. 522, 526 (1985) (per curiam). The due process clause of the Fifth Amendment states, "No person shall ... be deprived of life, liberty, or property without due process of law." U.S. CONST. amend. V. The equivalent clause of the Fourteenth Amendment states, "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV. The Court has also held that the defendant's right to be present at all critical stages of the trial is a "fundamental right." Rushen v. Spain, 464 U.S. 114, 117 (1983).

[FN50]. "The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule." Fed. R. Crim. P. 43(a). When Rule 43 was enacted, it was intended to be a statement of the law existing at the time. Fed. R. Crim. P. 43 advisory committee's notes, ¶ 1. The Supreme Court has not subsequently defined the contours of Rule 43 relative to the Constitution. Some courts have stated that Rule 43 extends beyond the Constitution, including the protections afforded by the common law right of

presence, as well as the Sixth Amendment confrontation clause and the due process guarantee of the Fifth and Fourteenth Amendments. United States v. Gordon, 829 F.2d 119, 123 (D.C. Cir. 1987); United States v. Alessandrello, 637 F.2d 131, 138 (3d Cir. 1980); cert. denied, 451 U.S. 949 (1981); United States v. Brown, 571 F.2d 980, 986 & n.5 (6th Cir. 1978). Contra United States v. Tortora, 464 F.2d 1202, 1210 n.6 (2d Cir. 1972) (rule no more than restatement of defendant's constitutional rights). The minimum guarantee of Rule 43 extends at least as far as the Constitution in requiring the defendant's presence at a Batson hearing. Therefore, an appellate court's inquiry into the defendant's right to be present at a Batson hearing should not end with the Constitution, especially because the language of the Rule explicitly states that the defendant should be present at the "impaneling of the jury." But see United States v. Davis, 809 F.2d 1194, 1202 (6th Cir.) ("unpersuaded" that Rule 43 requires defendant's presence at Batson hearing), cert. denied, 483 U.S. 1007-08 (1987).

[FN51]. Lewis v. United States, 146 U.S. 370, 372 (1892). The trial starts "at least from the time when the work of empanelling the jury begins." Hopt v. Utah, 110 U.S. 574, 578 (1884).

[FN52]. 470 U.S. 522 (1985) (per curiam). In Gagnon a juror expressed concern after noticing that defendant Gagnon was drawing sketches of the jurors. The judge, juror, and Gagnon's counsel conferred in camera to determine the juror's impartiality. The Supreme Court ruled that Gagnon's absence was not a due process violation, stating that the defendant could neither have contributed to nor gained from being present at the conference. In fact, the Court said, the defendant's presence could have been counterproductive in trying to determine whether the juror's concerns had affected impartiality. The Court concluded that the defendant's presence was not required to ensure either fundamental fairness or a reasonable opportunity to construct a defense. Id. at 527. The Court also held that the defendant waived any rights he may have had by failing to object at the time of the conference. Id. at 529.

[FN53]. Id. at 526.

[FN54]. 482 U.S. 730 (1987).

[FN55]. Id. at 745. Like Gagnon and Stincer, the typical presence case arises on appeal when a defendant raises a claim that he was not present a proceeding at which the defendant's attorney was present. Courts analyze such a claim by looking at the stage of the criminal process, by asking whether the defendant was represented by counsel at the proceeding, and, finally, by inquiring whether the defendant's interests were adequately protected by the defense counsel. For example, in United States v. Gordon, 829 F.2d 119 (D.C. Cir. 1987), the D.C. Circuit held that the defendant had a statutory right under Rule 43(a) of the Federal Rules of Criminal Procedure and a constitutional right to be present at voir dire despite the defense counsel's presence. Other cases have held that the defendant's interests were protected by the presence of defense counsel. For example, in United States v. Boone, 759 F.2d 345 (4th Cir.), cert. denied, 474 U.S. 861 (1985), the Fourth Circuit held that the absence of the defendant from an in camera conference concerning the dismissal of a juror was not a constitutional violation so long as counsel for the defendant was present. Courts do this under the rubric of a harmless error analysis: If the defense counsel's representation is adequate and thus the defendant's absence does not affect the outcome, the absence of the defendant is treated as irrelevant. Rule 52(a) of the Federal Rules of Criminal Procedure states: "Harmless Error: Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Fed. R. Crim. P. 52(a). In Chapman v. California, 386 U.S. 18 (1967), the Court stated that the purpose of the harmless error rule was to avoid "setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial." Id. at 22.
When a court uses harmless error analysis and asks whether the defendant's interests were adequately represented by defense counsel, the court implies that the stage of the trial is one in which the defendant has a right to be present. If the stage of the trial were not one in which the defendant has the right to be present, then the court

would simply dispose of the case. Therefore, Gagnon and Stincer, and other cases that address a defendant's right to be present by looking at whether the defendant's interests were adequately represented by defense counsel, suggest that trial courts should allow defendants to be present at those stages. On appeal they may be analyzed under a harmless error standard if the defendant was not present, but the existence of this safety net on appeal does not mean that trial judges should not allow defense presence at the stage in question.

[FN56]. United States v. Bascaro, 742 F.2d 1335, 1349 (11th Cir. 1984), cert. denied sub nom. Hobson v. United States, 472 U.S. 1017 (1985); United States v. Chrisco, 493 F.2d 232, 237 (8th Cir. 1974). For an example of the Supreme Court's acceptance of the jury selection process as a critical stage of the criminal proceeding, see Gomez v. United States, 109 S. Ct. 2237 (1989) (Federal Magistrates Act does not authorize magistrates to conduct voir dire). The Court in Gomez cited Lewis v. United States, 146 U.S. 370, 374 (1892), in "affirming voir dire as a critical stage of the criminal proceeding, during which the defendant has a constitutional right to be present." Gomez, 109 S. Ct. at 2246.

[FN57]. Gagnon, 470 U.S. at 520.

[FN58]. See, e.g., United States v. Tucker, 836 F.2d 334, 337 (7th Cir. 1988) ("All the defendants objected to an ex parte procedure."), cert. denied, 109 S. Ct. 3154 (1989).

[FN59]. Strauder v. West Virginia, 100 U.S. 303 (1880); see also Batson v. Kentucky, 476 U.S. 79, 84 n.3 (1986).

[FN60]. An eleven-county study in New York, a jurisdiction that retains attorney-conducted voir dire, discovered that voir dire took longer than the trial itself in 20% of 462 cases studied by the New York Governor's Commission on Administation of Justice. The average voir dire took 12.7 hours, which was 40f the time of the entire case. Chambers, Who Should Pick Jurors, Attorneys or the Judge, N.Y. Times, June 13, 1983, at B4, col. 3.

[FN61]. 349 U.S. 133 (1955).

[FN62]. Id. at 166.

[FN63]. Peters v. Kiff, 407 U.S. 493, 502 (1972) (opinion of Marshall, J.).

[FN64]. See United States v. Bailleaux, 685 F.2d 1105, 1114-15 (9th Cir. 1982) (court should examine in camera whether evidence is relevant for discovery).

[FN65]. See United States v. Sharp, 778 F.2d 1182, 1187 (6th Cir. 1985) (court must conduct in camera interview of informant before disclosing identity), cert. denied, 475 U.S. 1030 (1986).

[FN66]. See State v. Antwine, 743 S.W.2d 51, 64 (Mo. 1987):
The trial judge's task is extremely difficult. One doubts that a prosecutor will admit that his decision to challenge a particular member of the venire was based upon race. ... Batson thus requires the trial judge to embrace a participatory role in voir dire, noting the subtle nuance of both verbal and nonverbal communication

from each member of the venire and from the prosecutor himself.

[FN67]. The Supreme Court adopted the discriminatory purpose standard for equal protection claims in Washington v. Davis, 426 U.S. 229 (1976). Batson may represent a step away from Washington v. Davis, because it can shift the burden of proof to the prosecutor by allowing evidence of result-a "pattern of strikes" during voir dire-to show purpose. Batson v. Kentucky, 476 U.S. 79, 96-97 (1986).

[FN68]. This method seems to be the best way to show discrimination after the prosecutor has proffered her reasons, since reasons given to challenge black venirepersons may also apply to white venirepersons who were not challenged. See, e.g., Floyd v. State, 511 So. 2d 762, 765 (Fla. Dist. Ct. App. 1987) (disparate treatment of black and white venirepersons "strong evidence [of] subterfuge to avoid admitting discriminatory use of the peremptory challenge"); Gamble v. State, 257 Ga. 325, 330, 357 S.E.2d 792, 796 (1987) (trial court's finding clearly erroneous because, among other reasons, "similarly situated white jurors were not challenged").

[FN69]. Batson, 476 U.S. at 106 (Marshall, J., concurring).

[FN70]. Id.

[FN71]. Id.

[FN72]. Id. at 107.

[FN73]. Batson, 476 U.S. at 99 n.22.

[FN74]. Id.

[FN75]. Swain v. Alabama, 380 U.S. 202, 224 (1965).

[FN76]. See Batson, 476 U.S. at 101 (White, J., concurring); Batson, 476 U.S. at 103 (Marshall, J., concurring).

[FN77]. Professor Lawrence has recently indicated how racial discrimination or stereotyping can occur even among white persons apparently strongly opposed to racial discrimination. Lawrence, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 STAN. L. REV. 317 (1987). Lawrence used examples from modern life to illustrate his point that stereotypes may be present in persons not thought to be racists. Howard Cosell, a consistent champion of the rights of black athletes, referred to a professional football receiver as a "little monkey" on national television. Id. at 339-40. Nancy Reagan spoke to a group of supporters and remarked that she wished her husband could have been present to see all the "beautiful white people." Id. at 340. Lawrence concluded that "[r]acism continues to be aided and abetted by self-conscious bigots and well-meaning liberals alike." Id. at 387.

[FN78]. See id. at 322 ("We do not recognize the ways in which our cultural experience has influenced our beliefs

about race or the occasions on which those beliefs affect our actions. In other words, a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation.").

[FN79]. This of course raises the question of what constitutes a prima facie case. Some courts have used a statistical basis for their decision, stating that a prima facie case is not raised when the jury includes a substantial number of blacks, while others have probed more deeply into the prosecution's actions. Compare United States v. Montgomery, 819 F.2d 847, 851 (8th Cir. 1987) (no remand since jury accepted by prosecution included two of four blacks in original venire) with Stanley v. State, 313 Md. 50, 72-75, 542 A.2d 1267, 1278-79 (1988) (prima facie case made even though three blacks remained on jury). See generally Alschuler, supra note 14, at 170-73.

[FN80]. Batson, 476 U.S. at 96-97.

[FN81]. The American criminal justice system is based upon adversarial argument. Arguing the inferences to be drawn from all the testimony and pointing out the weaknesses in the other side's position helps to sharpen and clarify the issues for the factfinder. Herring v. New York, 422 U.S. 853, 862 (1975).
Typically, the judge renders decision after hearing the arguments of both sides. Placing the judge in an adversarial position, as a closed Batson hearing necessarily does, forces him away from the normal judicial role of objective arbiter. Therefore, to avoid compromising the judicial function and the judge's role as detached decisionmaker, Batson hearings should involve the full arguments of the attorneys and thus include opportunity for defense rebuttal.

[FN82]. Some courts relying on the Sixth Amendment or a state equivalent of the Sixth Amendment did so prior to Batson to overcome the formidable burden of proof under Swain. See, e.g., People v. Wheeler, 22 Cal. 3d 358, 583 P.2d 748, 148 Cal. Rptr. 890 (1978). Others have used the Sixth Amendement since Batson to cover a white defendant-black juror situation, since Batson applies only to jurors of the same race as the defendant. See, e.g., Gardner v. State, 157 Ariz. 541, 544-46, 760 P.2d 541, 544-46 (1988); Seubert v. State, 749 S.W.2d 585, 588 (Tex. Ct. App. 1988). For cases holding that Batson does not apply to the white defendant-black juror situation, see United States v. Townsley, 856 F.2d 1189, 1190 (8th Cir. 1988) (en banc) (Batson does not apply to white defendant tried with black defendants); United States v. Vaccaro, 816 F.2d 443, 457 (9th Cir. 1987) (Batson mandates defendant be of same race as excluded juror). The Court will hear arguments this term in Holland v. Illinois, 121 Ill. 2d 136, 520 N.E.2d 270 (1987), cert. granted, 109 S. Ct. 1309 (1989), to determine if either the equal protection clause of the Fourteenth Amendment or the Sixth Amendment right to trial by an impartial jury covers the white defendant-black juror situation.
Extending the right to a non-discriminatory jury selection process to defendants not of the same race as the juror is a logical extension of Batson. Batson spoke of harm to the excluded juror and the community, as well as to the defendant, when venirepersons are excluded because of race. Batson, 476 U.S. at 87. Therefore, the race of the defendant should not be the only relevant factor. A good example of discrimination against jurors regardless of the defendant's race is contained in a Dallas County District Attorney's Office manual, which stated that prosecutors should not look for "any member of a minority group" when picking jurors. J. VAN DYKE, supra note 3, at 152-53.

[FN83]. See, e.g., Gardner, 157 Ariz. at 546, 760 P.2d at 546; Seubert, 749 S.W.2d at 588.

[FN84]. See, e.g., Commonwealth v. Soares, 377 Mass. 461, 488-89, 387 N.E.2d 499, 516 (using state constitution to prohibit discrimination based on race, sex, color, creed or national origin), cert. denied, 444 U.S. 881 (1979).

[FN85]. 775 F.2d 762 (6th Cir. 1985), vacated, 478 U.S. 1001, aff'd on reconsideration, 801 F.2d 871 (6th Cir. 1986), cert. denied, 479 U.S. 1046 (1987).

[FN86]. Id. at 773; see also State v. Gilmore, 103 N.J. 508, 535-36, 511 A.2d 1150, 1164 (1986) (adopting standard similar to Booker in a post- Batson case).

[FN87]. If the Court holds in Holland v. Illinois, 121 Ill. 2d 136, 520 N.E.2d 270 (1987), cert. granted, 109 S. Ct. 1309 (1989), that the Sixth Amendment applies to the petit jury and requires neither that race be the only prohibited basis of discrimination nor that the venireperson in question be of the same cognizable group as the defendant, the Court should dictate a procedure in which the defense is presented an opportunity to rebut the prosecution after the prosecution has presented reasons for its peremptory challenges.

[FN88]. Batson, 476 U.S. at 98 n.21.

[FN89]. Id.

[FN90]. 109 S. Ct. 2180 (1989), aff'g by an equally divided Court No. 68,870 (Texas Crim. App. Oct. 7, 1987) (WESTLAW, State directory, TX-CS database), 1987 WL 906.

[FN91]. Tompkins v. State, No. 68,870 (Tex. Crim. App. Oct. 7, 1987) (WESTLAW, State directory, TX-CS database), 1987 WL 906, at 51. One of the prosecutor's reasons for striking a black postal worker was that the prosecutor did not have "very good luck with postal employees." Id. at 50.

[FN92]. Id. at52.

[FN93]. See Note, Batson v. Kentucky and the Prosecutorial Peremptory Challenge: Arbitrary and Capricious Equal Protection, 74 Va. L. Rev. 811, 835- 36 (1988) (use of ex parte, in camera proceedings freezes analysis of Batson claims in their infancy).

[FN94]. 827 F.2d 1254 (9th Cir. 1987).

[FN95]. For a similar argument, see id. at 1259-60; Gray v. State, 317 Md. 250, 258-60, 562 A.2d 1278, 1282-83 (1989).

[FN96]. In his concurrence in Batson, Justice Marshall advocated complete elimination of peremptory challenges because he believed it to be the only way to eliminate discrimination from the jury selection process. Batson, 476 U.S. at 102-08 (Marshall, J., concurring). Elimination of peremptory challenges could occur if those concerned most with removing discrimination and those concerned most with trial speed unite as critics of the continued use of peremptory challenges.

[FN97]. See W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 21.3 (1984 & Supp. 1989).

[FN98]. It is also possible that defense counsel may use a Batson challenge as a tool of harassment. One commentator almost invites such abuse by suggesting that "[p]roperly used, [Batson] can become an important weapon in the defense arsenal." JURYWORK § 4.07[3] (E. Krauss & B. Bonora eds. 1989). However, since even one challenge against a same-race juror may raise a prima facie case of purposeful discrimination, harassment, in effect, could never be proved. Defense counsel's subjective purpose may be to harass the prosecution as well as to prevent blacks from being excluded from the jury, but the result remains the same: Most same-race peremptory challenges will have to be explained by the prosecutor if the defense objects.

[FN99]. See V. STARR & M. MCCORMICK, JURY SELECTION, AN ATTORNEY'S GUIDE TO JURY LAW AND METHODS 39-40 (1985) (judges conduct voir dire alone in 13 states, attorneys are primarily responsible in 18 states, judges and attorneys share in 19 states, 75% of federal judges allow no oral attorney participation).

[FN100]. Batson, 476 U.S. at 102-08 (Marshall, J., concurring); J. VAN DYKE, supra note 3, at 167-69; Note, Batson v. Kentucky: A Half Step in the Right Direction (Racial Discrimination and Peremptory Challenges Under the Heavier Confines of Equal Protection), 72 CORNELL L. REV. 1026 (1987); Note, The Case for Abolishing Peremptory Challenges in Criminal Trials, 21 HARV. C.R.C.L. L. REV. 227 (1986); Note, Due Process Limits on Prosecutorial Peremptory Challenges, 102 HARV. L. REV. 1013 (1989). But see Babcock, Voir Dire: Preserving "Its Wonderful Power", 27 STAN. L. REV. 545, 552 (1975) (approving peremptory challenge because it "avoids trafficking in the core of truth in most common stereotypes").

[FN101]. One commentator has suggested that "[a]rguably Batson's force, if any, will lie in the deterrent effect it will have upon prosecutors." Wilson, Batson v. Kentucky: Can the "New" Peremptory Challenge Survive the Resurrection of Strauder v. West Virginia?, 20 AKRON L. REV. 355, 364 (1986).

[FN102]. The Ninth Circuit addressed such a claim in United States v. Thompson, 827 F.2d 1254, 1259 (9th Cir. 1987).

[FN103]. Id.

[FN104]. In that situation the trial judge is to conduct an initial ex parte, in camera hearing to hear the relationship to case strategy; if the judge concludes that revealing the prosecutor's motives to the defense may be prejudicial to the prosecution's case, then the trial court judge has the discretion to hear the reasons for the peremptory challenges in an ex parte, in camera hearing.

[FN105]. Some reasons that courts have allowed prosecutors to use are of questionable racial neutrality. See, e.g., United States v. Cartlidge, 808 F.2d 1064, 1070-71 (5th Cir. 1987) (one venireperson was young, single, and unemployed while defendant was young, separated and experiencing financial hardship, another venireperson avoided eye contact, and third venireperson was divorced and had low income); United States v. Mathews, 803 F.2d 325, 331 (7th Cir. 1986) (one venireperson appeared hostile to prosecutor). While these reasons may seem acceptable, allowing such reasons leaves an easy out for prosecutors determined to obtain the most favorable jury possible: merely "uncovering" similar reasons to use in future trials. Since the substantive protection of Batson can be evaded, a strong procedural framework such as the one advocated in this Note is necessary if discrimination is to be eliminated, or at least reduced.

[FN106]. United States v. Tucker, 836 F.2d 334, 340 (7th Cir), cert. denied, 109 S. Ct. 3154 (1989).

[FN107]. On the contrary, a prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty ... whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." Berger v. United States, 295 U.S. 78, 88 (1935).

[FN108]. The debate over criminal discovery illustrates the demise, over time, of that view of the criminal process. See LAFAVE & ISRAEL, supra note 97, § 19.3, at 474-82. In other contexts, the prosecution has been required to disclose evidence to the defense. See, e.g., Brady v. Maryland, 373 U.S. 83 (1963) (prosecution must disclose material evidence that is favorable to defense); Roviaro v. United States, 353 U.S. 53 (1957) (informer's privilege must give way where disclosure of identity, or of contents of communication, is relevant and helpful to defense of accused, or is essential to fair determination of cause).

[FN109]. Williams v. Florida, 399 U.S. 78, 82 (1970); see also Brennan, The Criminal Prosecution: Sporting Event or Quest for Truth?, 1963 WASH. U.L.Q. 279 (1963) (arguing for discovery in criminal cases).

[FN110]. See United States v. Garrison, 849 F.2d 103, 106 (4th Cir.) (example of compelling exception is government investigation of potential juror's involvement in other crimes), cert. denied, 109 S. Ct. 566 (1988); Gray v. State, 317 Md. 250, 257-58, 562 A.2d 1278, 1282 (1989).

[FN111]. A variation on the question of what procedure to use for hearing a prosecutor's reasons is whether a prosecutor's written submissions that are in addition to or in lieu of her arguments in open court should be subject to the defendant's examination. Two panels of the Fourth Circuit have recently addressed this issue and upheld ex parte, in camera examinations of the prosecutorial papers. United States v. Tindle, 860 F.2d 125 (4th Cir. 1988), cert. denied, 109 S. Ct. 3176 (1989); United States v. Garrison, 849 F.2d 103 (4th Cir.), cert. denied, 109 S. Ct. 566 (1988).
These decisions are incorrect. Although courts may ask for written arguments, they should not compel submission of the prosecutor's notes. When the prosecutor's notes are voluntarily submitted or when written arguments are made to the court, the judge should treat the prosecutor's writing in the same way they handle a prosecutor's request for an ex parte, in camera oral hearing: The written submission, whether it is notes from the jury selection process or a written argument, should be disclosed to the defense except for a "compelling reason." To prevent surprise and to balance the scales, trial courts should inform prosecutors of this rule before any writings are submitted.

[FN112]. One problem with requiring or even conducting a full evidentiary hearing is that in such a hearing the prosecutor must act as both an advocate and a witness. This dual role may appear to conflict with Rule 3.7 of the Model Rules of Professional Conduct. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.7 (1983) states:
(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where: (1) the testimony relates to an uncontested issue; (2) the testimony relates to the nature and value of legal services rendered in the case; or (3) disqualification of the lawyer would work substantial hardship on the client.
This concern is misguided in the context of a Batson hearing because Rule 3.7 is directed towards protecting the rights of the opposing party. The comment to the Rule states: "The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation." MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.7 comment (1983). In a Batson hearing the defendant is the party making the request for a full-scale hearing. Therefore, a court should not deny a defendant's motion to put the prosecutor on the stand solely because of a potential violation of Rule 3.7. Additionally, courts should not be constrained from using this procedure sua sponte, unless the defendant objects.

[FN113]. United States v. Garrison, 849 F.2d 103 (4th Cir.), cert. denied, 109 S. Ct. 566 (1988); Powell v. State,

187 Ga. App. 878, 372 S.E.2d 238 (Ct. App. 1988); Gray v. State, 317 Md. 250, 562 A.2d 1278 (1989); State v. Jackson, 322 N.C. 251, 368 S.E.2d 838 (1988).

[FN114]. Jackson, 322 N.C. at 258, 368 S.E.2d at 842; see also Garrison, 849 F.2d at 106 ("Although a district court could conduct such a hearingif it believed circumstance warranted it, Batson does not require this intrusion on the trial proceedings."), cert. denied, 109 S. Ct. 566 (1988).

[FN115]. See Jackson, 322 N.C. at 258, 368 S.E.2d at 842 ("presiding judges are capable of passing on the credibility of prosecuting attorneys without the benefit of cross-examination").

[FN116]. In several cases involving Batson hearings on remand, the trial court has conducted a full evidentiary hearing with sworn testimony by the prosecutor and cross-examination by the defense. See Shelton v. State, 521 So. 2d 1035 (Ala. Crim. App. 1987); Chew v. State, 317 Md. 233, 562 A.2d 1270 (1989); see also Roman v. Abrams, 822 F.2d 214 (2d Cir. 1987) (prosecutor testified at hearing).
In Gray v. State, 317 Md. 250, 562 A.2d 1278 (1989), the court held that a trial judge's refusal in a Batson remand hearing to require the prosecutor to testify under oath or to permit cross-examination was not an abuse of discretion. When an appellate court is confronted with an appeal after a remand hearing, the decision in Gray is appropriate, so long as the court is satisfied with the procedure utilized by the trial court. However, when an appellate court initially remands a case to the trial court, it should explicitly require a full evidentiary hearing.

[FN117]. "[T]he Court [has] recognized that by denying a person participation in jury service on account of his race, the State unconstitutionally discriminate [s] against the excluded juror." Batson v. Kentucky, 476 U.S. 79, 87 (1986).

[FN118]. Id. (discriminatory jury selection "undermine[s] public confidence in the fairness of our system of justice" and harms entire community).

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Symposium: The Independent Counsel Act: From Watergate to Whitewater and Beyond Contribution

*2133 THE PRESIDENT AND THE INDEPENDENT COUNSEL

Brett M. Kavanaugh [FNa1]

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*2134 INTRODUCTION

Officials in the executive branch, including the President and the Attorney General, have an incentive not to find criminal wrongdoing on the part of high-level executive branch officials. A finding that such officials committed criminal wrongdoing has a negative, sometimes debilitating, impact on the President's public approval and his credibility with Congress--and thus ultimately redounds to the detriment of his political party and the social, economic, military, and diplomatic policies that the President, the Attorney General, and other high-ranking members of the Justice Department champion. [FN1] For those reasons, the criminal investigation and prosecution of executive branch officials by the Justice Department poses an actual conflict of interest, as well as the appearance thereof.

In addition, when the law of executive privilege is unclear or involves the application of a balancing test, the Attorney General labors under a further conflict of interest. When the Justice Department seeks access to internal executive branch communications, the Attorney General simultaneously must perform two potentially contradictory functions. First, she must act as the chief legal advisor to the executive branch (a role in which she generally would seek to protect the confidentiality of executive branch communications). Second, she must serve as a prosecutor (a role in which she generally would seek to cabin privileges so as to secure relevant evidence). As former Watergate prosecutor Archibald Cox recognized and as Attorney General Reno's role in the privilege disputes between the President and the Whitewater Independent Counsel has revealed, those dual roles place the Attorney General in a difficult, if not impossible, position in determining when the President's assertion of privileges should be challenged. [FN2] This conflict alone necessitates an outside prosecutor *2135 (unless the Attorney General

announces at the outset of the investigation that she will not accede to any executive privilege claim other than national security). Otherwise, the public cannot be sure that the Attorney General has not improperly sacrificed law enforcement to the President's assertion of executive privilege.

The conflicts of interest under which the Attorney General labors in the investigation and prosecution of executive branch officials, particularly high- level executive branch officials, historically have necessitated a statutory mechanism for the appointment of some kind of outside prosecutor for certain sensitive investigations and cases. As the Watergate Special Prosecution Task Force stated in its report, "the Justice Department has difficulty investigating and prosecuting high officials," and "an independent prosecutor is freer to act according to politically neutral principles of fairness and justice." [FN3] This article agrees that some mechanism for the appointment of an outside prosecutor is necessary in some cases.

Nonetheless, Congress can improve the current "independent counsel" system, which was established by the Ethics in Government Act of 1978. [FN4] Several problems have been identified with the current system, including the following: (1) the appointment mechanism, by attempting to specify situations where an independent counsel is necessary, requires the President and Attorney General to seek appointment of an independent counsel in cases where it is not warranted and permits the President and Attorney General to avoid appointment of an independent counsel in cases where it is warranted; (2) the appointment and removal provisions (which do not involve the President) are contrary to our constitutional system of separation of powers and, both in theory and perception, lead to unaccountable independent counsels; (3) the investigations last too long; (4) an independent counsel can investigate matters beyond the initial grant of jurisdiction; and (5) independent counsel investigations have become "politicized" (a commonly used but rarely defined term).

This article suggests that those problems--to the extent they are unique to an independent counsel and do not apply to federal white-collar investigations more generally--result primarily from the uneasy relationship between the President and the independent counsel that the independent counsel statute creates. This article advances several proposals that would clarify the President's role in independent counsel investigations, thereby reducing the number of investigations and expediting those that are necessary. Each of these proposals stands on its own; the adoption of any one proposal does not necessitate or depend upon the adoption of any other.

First, Congress should change the provision for appointing an independent ***2136** counsel. A "special counsel" [FN5] should be appointed in the manner constitutionally mandated for the appointment of other high-level executive branch officials: nomination by the President and confirmation by the Senate. Currently, an independent counsel is appointed by a three-judge panel selected by the Chief Justice of the United States. Although this unusual procedure survived constitutional scrutiny in Morrison v. Olson, [FN6] it is unwise to assign a small panel of federal judges to select the special counsel because the prosecutor, no matter how qualified, will lack the accountability and the instant credibility that comes from presidential appointment and Senate confirmation. Appointment by the President, together with confirmation by the Senate, would provide greater public credibility and moral authority to the independent counsel and would dramatically diminish the ability of a President and his surrogates, both in Congress and elsewhere, to attack the independent counsel as "politically motivated." In addition, any supposed concerns about "accountability" would be alleviated if the independent counsel were appointed (and removable) in the same manner as other high-level executive branch officials.

Second, the President should have absolute discretion (necessarily influenced, of course, by congressional and public opinion) whether and when to appoint an independent counsel. The current statute, by attempting to specify in minute detail the precise situations requiring an independent counsel, is largely overinclusive, thus producing too many investigations. At the same time, the statute is underinclusive because it allows an Attorney General to use the law as a shield in situations that by any ordinary measure would warrant the appointment of a special counsel.

For example, Attorney General Janet Reno appointed an independent counsel to investigate whether Secretary of Agriculture Michael Espy accepted illegal gratuities--a very important investigation, but one that Congress and the people might have entrusted to the Justice Department. [FN7] On the other hand, the Attorney General has refused to appoint an independent counsel for the campaign fund-raising matter based on a narrow analysis of the

independent counsel statute's triggering mechanism. That approach ignores the broader question that should be the issue (and historically has been the issue): At the end of the day, will the American people and the Congress have confidence in the credibility of the Justice Department investigation if it culminates in a no-prosecution decision against those high-level executive branch officials under investigation?

Third, with respect to an independent counsel's jurisdiction, Congress should ***2137** codify and expand upon the Eighth Circuit's 1996 decision in United States v. Tucker [FN8] to ensure that the President and the Attorney General, rather than any court, define and monitor the independent counsel's jurisdiction. Such a clarification would place sole responsibility for the independent counsel's jurisdiction on these publicly accountable officials. Congress will exercise sufficient oversight to deter the President and Attorney General from illegitimately restricting the independent counsel's jurisdiction. This change would greatly expedite special counsel investigations. Jurisdictional challenges have caused severe delays. For example, a specious challenge to the Whitewater Independent Counsel's jurisdiction delayed a trial of Arkansas Governor Jim Guy Tucker for over two and one-half years before he and his codefendants finally pled guilty.

Fourth, Congress should eliminate the statutory reporting requirement. The reporting requirement adds great time and expense to independent counsel investigations, and the reports are inevitably viewed as political documents. The ordinary rules of prosecutorial secrecy should apply to evidence gathered during an independent counsel investigation, except that the special counsel should be authorized to provide the President and the House Judiciary Committee with a classified report of any evidence regarding possible misconduct by current officers of the executive branch (including the President) that might dictate removal by the President or impeachment by the Congress.

Fifth, Congress can answer a question that the Constitution does not explicitly address, but that can greatly influence independent counsel investigations: Is the President of the United States subject to criminal indictment while he serves in office? Congress should establish that the President can be indicted only after he leaves office voluntarily or is impeached by the House of Representatives and convicted and removed by the Senate. Removal of the President is a process inextricably intertwined with its seismic political effects. Any investigation that might conceivably result in the removal of the President cannot be separated from the dramatic and drastic consequences that would ensue. This threat inevitably causes the President to treat the special counsel as a dangerous adversary instead of as a federal prosecutor seeking to root out criminality.

Whether the Constitution allows indictment of a sitting President is debatable (thus, Congress would not have the authority to establish definitively that a sitting President is subject to indictment). Removing that uncertainty by providing that the President is not subject to indictment would expedite investigations in which the President is involved (Watergate, Iran- Contra, and Whitewater) and would ensure that the ultimate judgment on the President's conduct (inevitably wrapped up in its political effects) is made where all great national political judgments ultimately must be made--in the Congress of the United States.

Sixth, Congress should codify the current law of executive privilege available in criminal litigation to the effect that the President may not maintain any executive privilege, other than a national security privilege, in response to a ***2138** grand jury or criminal trial subpoena sought by the United States. That rule strikes the appropriate balance between the need of federal law enforcement to conduct a thorough investigation and the need of the President for confidential discussions and advice. Codifying the law of executive privilege in this manner would expedite investigations of executive branch officials and ensure that such investigations are thorough and effective (at least, unless the courts were to reverse course and fashion a broader privilege as a matter of constitutional law).

These six proposals together would reduce the number of special counsel investigations and expedite those investigations that do occur. The proposals would enhance the public credibility of special counsel investigations, reduce the inherent tension between the President and the special counsel, and better enable a special counsel to conduct a thorough and effective law enforcement investigation of executive branch wrongdoing. Finally, the changes would ensure that a specific entity (Congress) is directly and solely responsible for overseeing the conduct of the President of the United States and determining, in the first instance, whether that conduct warrants a public

sanction.

I. BACKGROUND

A. THE CURRENT LEGAL SCHEME

1. The Policy Justification for a Special Counsel

The theory behind the appointment of an outside federal prosecutor is that the Justice Department cannot be trusted to investigate an executive branch official as thoroughly as the Justice Department would investigate some other similarly situated person. [FN9] Regardless whether the Justice Department is actually capable of putting political self-interest aside and conducting a thorough investigation, the problem remains. In cases in which charges are not brought, Congress and the public will question whether the investigation has been as thorough and aggressive as it would have been absent the political incentive not to indict. There is no real or meaningful check to deter an under-aggressive or white-washed Justice Department investigation of executive branch officials or their associates.

On the flip side, however, contrary to the claims of some critics, there is a real check against an over-aggressive special prosecutor--the same check that deters an over-aggressive Justice Department prosecutor. It is the jury. As Professor Katy Harriger correctly noted:
Prosecutors, both independent and regular, must have sufficient evidence to ***2139** convince a jury that a crime has been committed. One clear constraint on independent counsel ... is one that is on all prosecutors. They must ask themselves whether their case will pass the "smell test" in front of a jury. Will they find criminal action beyond a reasonable doubt? There is virtually no incentive for any prosecutor, independent or otherwise, to pursue a criminal case that fails that test. To argue then that there are no checks on the independent counsel is, to say the least, disingenuous for it ignores the fact that independent counsel do not operate outside the established legal system in their pursuit of criminal cases. They cannot escape the requirement that their case against an individual be reviewed by an impartial judge and a jury of his peers. [FN10]

Indeed, an acquittal is far more damaging for an independent counsel (whose record will be judged on, at most, a handful of prosecuted cases) than for the Justice Department prosecutor who will handle dozens if not hundreds of cases in his career and for whom one acquittal is ordinarily not a significant blemish.

2. Two Statutory Mechanisms for Appointment of Special Counsels

Commentators do not always appreciate that current federal law provides two different mechanisms for appointment of special counsel to investigate and prosecute a particular matter. First, under the discretionary "special attorney" provisions, the Attorney General may directly select a special attorney to conduct a particular investigation where she deems it appropriate. [FN11] Consistent with this authority, Attorneys General throughout our history have looked outside the Justice Department to appoint special attorneys to handle particular high-profile or politically charged cases. [FN12] For example, the Watergate special prosecutors and the first Whitewater outside counsel were appointed directly by the Attorney General under this authority.

Second, under §§ 591-599 of Title 28, the mandatory "independent counsel" statute, Congress has specified a number of covered persons as to whom the Attorney General must seek the appointment of an independent counsel if, after a preliminary investigation, she finds "reasonable grounds to believe that further investigation is warranted." [FN13] The Attorney General does not select an independent counsel herself, but instead applies to a panel of three judges (the "Special Division") preselected by the Chief Justice of the United States. [FN14] The panel of judges then selects an independent counsel. [FN15] The independent counsel's ***2140** jurisdiction is technically defined by the Special Division, [FN16] although the Special Division defines it in the manner requested by the Attorney General. [FN17] The independent counsel is to conduct all investigations and

prosecutions "in the name of the United States," [FN18] and is to conclude his investigation by notifying the Special Division and filing a report on "the work of the independent counsel." [FN19] The independent counsel may not expand his jurisdiction to cover unrelated matters except upon application to the Attorney General and approval by the Special Division. [FN20] Pursuant to this statute, nearly twenty independent counsel have served since 1978, most notably in the Iran-Contra and Whitewater matters.

There are two important differences between the discretionary "special attorney" statute and the mandatory "independent counsel" statute. First, the special attorney is appointed by the Attorney General, not by a panel of judges. (Neither system involves the Senate.) Second, the Attorney General possesses unfettered discretion whether to seek a special attorney for a particular case, whereas the independent counsel statute requires that the Attorney General seek an independent counsel in certain cases.

B. ARE OUTSIDE FEDERAL PROSECUTORS EVER NECESSARY?

1. An Illusory Debate

Let's briefly put aside the questions of who should appoint the outside federal prosecutor as well as the question of under what circumstances the outside prosecutor should be appointed. The initial, fundamental issue is whether Congress should provide any statutory mechanism for authorizing the selection of persons outside the Justice Department to lead particular federal criminal investigations and prosecutions. Indeed, the rhetoric spewed and the ink spilled over the independent counsel law often frame the question in these terms--namely, whether an outside prosecutor is ever necessary for the investigation of executive branch officials.

This supposed debate is, however, entirely illusory. Even the most severe ***2141** critics of the current independent counsel statute concede that a prosecutor appointed from outside the Justice Department is necessary in some cases.

For example, Professor Julie O'Sullivan has criticized many aspects of the mandatory independent counsel regime. She nonetheless concedes that "[a]s in the past, in extraordinary cases where the appearance or reality of a genuine conflict of interest requires that a matter be referred to someone outside the DOJ, that referral should be made to a regulatory IC" appointed from outside the Justice Department by the Attorney General. [FN21] In other words, Professor O'Sullivan agrees that there must be some legal mechanism for appointing an outside special counsel to handle high-profile investigations of executive branch officials.

Similarly, former Justice Department official Terry Eastland has criticized the independent counsel statute in a lengthy analysis of the history and policy of special prosecutors. But Mr. Eastland, too, believes that "[i]nsofar as criminal investigation and prosecution goes, Presidents or their Attorneys General could exercise their discretionary authority in cases of conflict of interest and name Watergate-type prosecutors." [FN22]

Theodore Olson, head of the Office of Legal Counsel under President Reagan, has criticized the statute but also has stated that "there is nothing wrong with the idea of going outside the Department of Justice to pick someone special to pursue an investigation because public integrity requires that." [FN23] Mr. Olson noted that Attorney General William Barr, for example, had selected special prosecutors from outside the Justice Department to ensure that the lead prosecutor was not a "permanent direct subordinate of the Attorney General or the President." [FN24]

The Bush Administration lobbied against the independent counsel statute in 1992. However, the Deputy Attorney General conceded that "we all recognize that there is a need" for the Attorney General to appoint an outside counsel on occasion, and explained that Attorney General Barr "has on two occasions availed himself of the statute [28 U.S.C. § 515] that allows him to appoint an outside authority as a special counsel." [FN25]

Finally, the most famous critic of the independent counsel statute is Justice Antonin Scalia. His dissent in Morrison v. Olson, [FN26] the decision upholding the constitutionality of the independent counsel statute, is largely an analysis of the Constitution's separation of powers, including the requirements of the Appointments

Clause and the Court's jurisprudence regarding the removal power of the ***2142** President. Notwithstanding the length and force of his dissent, Justice Scalia's objection to the independent counsel statute was really quite simple: The President must be able to appoint and remove at will the independent counsel. If the President can select the independent counsel, and the President can remove the independent counsel at will, then Justice Scalia would have no objection. [FN27]

2. The Deeply Rooted American Tradition of Appointing Outside Federal Prosecutors

It is not surprising that most critics of the current mandatory independent counsel statute accept the appointment of prosecutors from outside the Department of Justice in certain cases. This Nation possesses a deeply rooted tradition of appointing an outside prosecutor to run particular federal investigations of ***2143** executive branch officials. Outside counsels are not a modern phenomenon. Between 1870 (the birth of the Justice Department) and 1973, presidential administrations appointed outside prosecutors on multiple occasions. [FN28]

In 1875, for example, President Ulysses S. Grant named a special counsel to prosecute the St. Louis Whiskey Ring--a scandal involving a close friend of President Grant. President Grant later ordered the firing of the special prosecutor because the prosecutor was allegedly too aggressive. [FN29]

During President Theodore Roosevelt's Administration, two outside counsels were appointed. In 1902, the Attorney General appointed a Democrat as special counsel to prosecute a land fraud implicating a high-level executive branch officer. The following year, President Roosevelt appointed a special counsel to investigate charges of corruption in the Post Office. [FN31] In so doing, President Roosevelt stated that "I should like to prevent any man getting the idea that I am shielding anyone." [FN30]

In 1924, following a Senate resolution calling for appointment of a special prosecutor, [FN32] President Calvin Coolidge appointed two special prosecutors, one Republican and one Democrat, to jointly conduct the criminal investigation of the Teapot Dome scandal. [FN33] The special prosecutors subsequently obtained the conviction of the former Secretary of Interior for taking a bribe. [FN34]

In 1952, President Harry Truman's Attorney General appointed a Republican as special counsel to investigate allegations of criminal wrongdoing within the administration, including within the Justice Department. [FN35] Like President Grant over seventy years earlier, President Truman's Attorney General eventually fired the special prosecutor.

In 1973, President Nixon's Attorney General named a Democrat, Archibald Cox, as special prosecutor to investigate and prosecute the Watergate cases. President Nixon fired Mr. Cox, but subsequently appointed another Democrat, Leon Jaworski. The prosecutor eventually obtained the convictions of numerous members of the Nixon Administration.

In the wake of Watergate, Congress enacted the Ethics in Government Act of 1978, [FN36] which required the appointment of an independent counsel in certain cases. Since then, Presidents and Attorneys General have sought the appointment ***2144** of nearly twenty independent counsels under the statute but also continued to appoint special prosecutors outside the mandatory independent counsel mechanism in cases where that statute did not apply or had lapsed.

During President Bush's Administration, for example, Attorney General William Barr appointed retired Judge Frederick Lacey as special counsel to investigate allegations related to Iraqi involvement in an American bank, the so-called BNL investigation. He also appointed Judge Nicholas Bua to investigate the Inslaw case, which involved allegations directed at the Justice Department. [FN37]

In 1994, during a brief period when the independent counsel statute had lapsed, President Clinton asked the Attorney General to appoint a special counsel to investigate the Whitewater matter, which involved criminal

referrals and allegations against former business partners of the President (James B. McDougal and Susan H. McDougal) and a separate, specific allegation of wrongdoing against the President by former Arkansas businessman and Judge David L. Hale. The Attorney General selected Robert B. Fiske, Jr., who served until the independent counsel statute was reauthorized, at which time the panel of judges determined that the statute required appointment of an independent counsel who was not an administration official. [FN38]

This extensive history demonstrates a clear "tradition" of "naming special prosecutors in certain, exceptional circumstances." [FN39] It shows that criminal investigations of executive branch officials or their associates were handled either "through normal channels, within the Justice Department, or outside them through counsels specially appointed by the President or the Attorney General and therefore accountable to the President for their exercise of power." [FN40]

***2145** 3. Outside Federal Prosecutors are Necessary in Some Cases

American legal history has clearly demonstrated the necessity of a mechanism to appoint an outside prosecutor to conduct certain sensitive investigations of executive branch officials. In light of this consistent historical practice, it would take an extraordinarily compelling justification for Congress to turn its back on history and common sense by eliminating all mechanisms for appointing a prosecutor from outside the executive branch.

Such a case has not been made--nor has anyone really attempted to make it. And although there is no scientific answer to the question, it is rather untenable as a matter of common sense to contend that an outside prosecutor is never necessary--that an ordinary Justice Department prosecutor should always preside over a Justice Department investigation. What if the allegation of wrongdoing is directed against the Attorney General herself? What if the allegation of wrongdoing is against the President's spouse or his best friend or the White House Counsel? Would any rational American in such a case believe that the Attorney General and the Justice Department would pursue the matter as vigorously as an outside prosecutor whose personal and professional interests would not be adversely affected by a thorough and vigorous investigation? Two centuries of experience inform us that the citizens (as represented by Congress and the media) will not accept such a procedure. Indeed, the fact that there have been so many outside prosecutors appointed throughout our history demonstrates their importance and necessity. And the further fact that even the strongest critics of the mandatory independent counsel statute concede that an outside prosecutor is necessary in some cases is telling evidence that some mechanism for appointment of an outside prosecutor is appropriate.

For these reasons, future debates should not focus on whether a special counsel statute is necessary, but rather on the more pertinent questions of by whom and under what conditions a special counsel should be appointed.

II. IMPROVING THE SYSTEM

This article proposes that Congress enact the following statutory language in lieu of the current independent counsel statute.

Section 1. Appointment and Jurisdiction of a Special Counsel
(a) When the public interest requires, the President may appoint, by and with the advice and consent of the Senate, a Special Counsel to investigate and prosecute matters within the jurisdiction assigned by the President.
(b) The Attorney General and the Special Counsel shall consult as necessary and appropriate regarding the Special Counsel's jurisdiction. The Special Counsel's jurisdiction shall not be reviewed in any court of the United States. Notwithstanding Federal Rule of Criminal Procedure 6, the Attorney General or the Special Counsel may report to Congress regarding the Special Counsel's jurisdiction.

***2146 Section 2. Reports by a Special Counsel.**
The Attorney General or Special Counsel shall disclose evidence of possible misconduct regarding any impeachable officer of the United States in a sealed report to the President, and to the Chairman and Ranking Member of the Judiciary Committee of the House of Representatives. Federal Rule of Criminal Procedure 6 shall not apply to such reports. No person to whom disclosure is authorized under this section shall further disclose the information except as specifically authorized by the Congress.

This article also proposes that Congress adopt two provisions not inextricably linked to special counsel investigations, but which have a substantial impact on them.

Presidential Immunity.
The President of the United States is not subject to indictment or information under the laws of the United States while he serves as President. The statute of limitations for any offense against the United States committed by the President shall be tolled while he serves as President.

Presidential Privileges.
In response to a federal grand jury or criminal trial subpoena sought by the United States, no court of the United States shall enforce or recognize a privilege claimed by the President in his official capacity, or by an Executive department or agency, except on the ground of national security, or as provided by a federal statute or rule that refers specifically to the privileges available to government officials or agencies in grand jury or criminal trial proceedings.

A. Appointment and removal of the special counsel

The single most important change this article proposes concerns the appointment and removal of an independent counsel. Congress should eliminate §§ 591-599 of Title 28, and adopt a new statutory provision:
When the public interest requires, the President may appoint, by and with the advice and consent of the Senate, a Special Counsel to investigate and prosecute matters within the jurisdiction assigned by the President.

This seemingly simple change in appointment and removal would greatly change the perception of the appointed prosecutor and thus would satisfy many opponents of the current statute.

1. Appointment of the Special Counsel

There are two current statutory alternatives for selecting an independent counsel. Under § 515 and § 543 of Title 28, the Attorney General has the ***2147** discretion to select a special attorney herself (as Robert Fiske was selected). If the mandatory independent counsel statute is triggered, under § 592, the Attorney General applies to the Special Division and the three-judge panel selects an independent counsel (as Kenneth Starr was selected).

Neither alternative suffices in the kind of investigations of executive branch officials and their associates likely to cause the President and Attorney General, in the exercise of discretion, to seek a special counsel. Congress, therefore, should repeal the provision in the independent counsel statute providing for appointment of an independent counsel by the Special Division and should instead provide that a special counsel be appointed in the manner constitutionally mandated for high-level executive branch officials: appointment by the President and confirmation by the Senate. [FN41]

Section 515, by which the Attorney General directly selects a special attorney, is problematic because there is no check to prevent the President or Attorney General from handpicking a "patsy" prosecutor. Section 592, the current independent counsel statute by which the Special Division selects a special counsel, is problematic for different

reasons.

First, the judges selecting the independent counsel may be perceived as politically motivated partisans because of their previous careers and affiliations. (Sure enough, the current Special Division panel repeatedly has been attacked as excessively partisan.) If the selection process is perceived as political, the credibility of the independent counsel will suffer. [FN42]

Second, because of its isolation and its inability to conduct a searching inquiry of the candidates, the panel may select someone who does not possess the qualifications that a special counsel should possess--simply because the panel of judges is not able to conduct the kind of search and inquiry that would produce the best possible person.

Third, neither § 515 nor § 592 provides the independent counsel with the moral authority and public credibility that will insulate him from the inevitable political attacks. The need for a special counsel to have the greatest possible insulation against erroneous charges of political partisanship has been demonstrated time and again. Whether it is Ron Ziegler complaining that the Watergate ***2148** Special Prosecution Task Force is a hotbed of liberals or President Clinton agreeing that the Whitewater Independent Counsel is out to get him, charges of political partisanship are almost sure to occur during independent counsel investigations.

Such attacks are inevitable because they are built into the system. The very point of an outside federal prosecutor is to counter the assumption that the investigation has been whitewashed because of political kinship (the charge to which the Department of Justice has been subject in the campaign fundraising investigation). [FN43] For that reason, outside special counsels historically have been selected from the party other than that of the President. [FN44] But the appointment of someone from the party opposing the President inevitably sparks doubts whether the outside counsel--theoretically a political "foe" of the President in some sense--possesses too much of a partisan agenda against the President.

Watergate Special Prosecutor Archibald Cox is perhaps the most notorious example. He had worked in the Kennedy Administration and was a very close friend and ally of Senator Edward Kennedy (an opponent of President Nixon). But in virtually all cases, the independent counsel will be quite vulnerable to attacks of political partisanship by the President and his allies simply by virtue of his known political affiliation.

This is not an idle problem. The glib answer that the independent counsel should just "take it" when he is criticized as politically motivated is a nice theory, but it does not work in practice. Although many prosecutors receive complaints that they are politically motivated, those complaints take on a different order of magnitude when they emanate from the Oval Office. [FN45] Sustained presidential (and presidentially directed) criticism of an independent counsel eventually will have an impact on a large percentage of the citizens and on their opinion of the independent counsel. Those citizens include both potential witnesses and potential jurors. The decision by witnesses whether to volunteer the full truth (or not) often may depend on their impressions of the credibility and integrity of the special counsel. As to juries, a truly energetic political campaign to destroy the credibility of an independent counsel is an effort to obtain a hung jury, and there is a real danger that it will work in all but ***2149** the most clear-cut cases of guilt. [FN46]

Congress can and should make it harder for future Presidents and presidential allies to attack the credibility of outside federal prosecutors. The best way to ensure as much insulation as possible, consistent with our constitutional structure, is to require presidential appointment and Senate confirmation. This process would serve many purposes.

First, the President could not credibly attack the special counsel whom the President had appointed. Similarly, Senate confirmation would make it difficult for anyone to claim that the special counsel is excessively partisan, for any person likely to put politics above law and evidence would not navigate the confirmation process.

Second, presidential appointment and Senate confirmation would ensure that the credentials of a special counsel are extraordinarily high. And particular issues regarding the nominee's past could be fleshed out and explained

rather than being dredged up years down the road by the subjects of the investigation.

Third, unlike the special attorney provision of § 515, Senate confirmation would prevent charges that the special counsel is too sympathetic to the incumbent administration. Before the independent counsel statute was reauthorized in 1994, Robert Fiske was selected by the Attorney General as a special attorney for Whitewater. Like Kenneth Starr after him, Mr. Fiske possessed precisely the kind of superb credentials one would hope for in a special counsel. Yet Mr. Fiske was not subject to Senate confirmation, and Republicans such as Senator Lauch Faircloth were subsequently able to attack Fiske as soft on the administration. [FN47] These attacks on Fiske's supposed partisanship would have seemed ludicrous had those same Senators been forced to vote for him during the confirmation process.

Senate confirmation "serves both to curb executive abuses of the appointment power ... and to promote a judicious choice of persons for filling the offices of the union." [FN48] As Alexander Hamilton noted, "the necessity of their concurrence would have a powerful ... operation. It would be an excellent check upon a spirit of favoritism in the President. ... The possibility of rejection would be a strong motive to care in proposing." [FN49] The Supreme Court similarly noted that " b y requiring the joint participation of the President and ***2150** the Senate, the Appointments Clause was designed to ensure public accountability for both the making of a bad appointment and the rejection of a good one." [FN50]

To be sure, presidential appointment and Senate confirmation is not a fool- proof method of insulating a special counsel from unfair political attacks. But it would render the special counsel "accountable," in theory and appearance, and would give the special counsel greater ability to pursue his tasks without being subject to unfair and unrelenting political attack. In short, it would provide the aura of moral and political authority that the special counsel needs if he is to do his job as aggressively as we would hope.

There no doubt will be some objections to this proposal. Some might argue that the President would not be inclined to appoint a truly independent and aggressive prosecutor because the allegations almost by definition would involve the activities of his close associates. But that is the wisdom of Senate confirmation. Indeed, the President would be wise to and likely would consult closely not only with his Attorney General and perhaps his White House Counsel, but also with Senate leaders, before even nominating a special counsel. Moreover, the media no doubt would aggressively probe the background and credentials of the individual selected by the President. The danger of the President appointing, and the Senate confirming, a crony or patsy as special counsel seems almost nonexistent.

As noted above, some might oppose this proposal by arguing that a prosecutor should not worry about attacks on his reputation. That, too, is a naive view. Attacks on the prosecutor's reputation ultimately are designed to scare potential witnesses and to infect the jury pool with negative feelings towards the prosecution. It is no secret that many defense attorneys engage in these smear tactics. The prosecutor, as a representative of the people of the United States, must take appropriate steps to counter such attacks lest they allow an injustice to occur--namely, a guilty person being erroneously acquitted because of the jury's negative view of the prosecutor. By means of this proposal, Congress can help to prevent such dangerous reputational attacks on a special counsel.

Others might oppose this proposal on the ground that Senate confirmation is a slow and unwieldy process or that it could turn into a political circus. Neither argument is ultimately persuasive. When the Senate considers nominees for important positions as to which there are severe time constraints, the Senate can and does act very quickly. For example, the Senate proceeds with extraordinary expedition to confirm the Cabinet of a newly elected President so that the Cabinet is in place when the President takes office. A respected individual selected as special counsel would be promptly considered and confirmed.

To be sure, certain Senators might use the opportunity to attack the subject of the investigation, or alternatively to attack the nominee. The first scenario seems unavoidable, but not particularly costly. As to the second, that is the point of the process. Any special counsel who would engender significant opposition should ***2151** not be nominated in the first place--or should be withdrawn if serious opposition develops.

2. Removal of the Special Counsel

Currently, an independent counsel can be removed for "good cause," [FN51] a term undefined as a matter of law or practice. A special attorney appointed directly by the Attorney General can be removed at will. [FN52]

The "good cause" provision strikes many commentators as unconstitutional or, at least, unwise. As Justice Scalia intimated in Morrison, at first blush it is somewhat difficult to understand why the President does not have the authority to dismiss any executive branch official at will. [FN53] In any event, Justice Scalia also argued that a federal prosecutor should be removable at will for more practical reasons--that "the primary check against prosecutorial abuse is a political one" and that the independent counsel system thwarts this traditional check on a prosecutor's actions. [FN54] If there is an out-of-control prosecutor, Justice Scalia reasons that the President should possess the authority and the responsibility to remedy the situation.

The notion that the independent counsel is "unaccountable" has become the mantra of subjects of the investigation who inevitably attempt to denigrate the investigation as partisan and out of control. Currently, a President can complain that an independent counsel is politically motivated while implying that he is powerless to do anything about it. This essentially gives the President and his surrogates freedom to publicly destroy the credibility of the independent counsel, and to cleverly avoid questions about why the President does not remove him. Congress should give back to the President the full power to act when he believes that a particular independent counsel is "out to get him." Such a step not only would make the special counsel accountable, but it also would force the President and his surrogates to put up or shut up.

The objection to "removal at will" is that the independent counsel might be too timid because of fear that he could be fired. That objection overstates the danger. After all, a number of special prosecutors have been appointed throughout our history, and there is simply no persuasive evidence that the threat of removal adversely affected their investigations. Indeed, in a perverse way, removal is a sure way to immortality, as Archibald Cox learned. Moreover, ***2152** President Nixon's firing of Cox--the last occasion when a President removed a special counsel--created an enormous controversy and triggered impeachment proceedings. [FN55] History clearly demonstrates that the President will pay an enormous political price if he does not have a persuasive justification for dismissing a special counsel. The deterrent to a President dismissing a special counsel thus would be the same as the deterrent to his firing the Attorney General--a practical and political (as opposed to legal) deterrent requiring the President to be able to explain his decision to Congress and the public.

B. THE CIRCUMSTANCES UNDER WHICH A SPECIAL COUNSEL SHOULD BE APPOINTED

As noted above, this article proposes the following statutory language.
When the public interest requires, the President may appoint, by and with the advice and consent of the Senate, a Special Counsel to investigate and prosecute matters within the jurisdiction assigned by the President.

Congress should no longer try to specify in advance the circumstances requiring a special counsel. The triggering mechanism of the current mandatory independent counsel statute can be grossly over-or under-inclusive depending on the circumstances. In some cases, the Attorney General is required to request an independent counsel even when it seems evident that Congress and the public would accept the credibility of a Justice Department investigation (for example, the investigation of Secretary of Labor Alexis Herman). In other cases, such as the Democratic campaign fundraising matter, the mandatory appointment provision of the statute is not triggered, even though there seems an obvious need for an outside prosecutor in order to assure the public of a thorough and credible investigation.

Indeed, the campaign fundraising matter has revealed a series of heretofore unforeseen flaws in the triggering mechanism of the statute. First, the decision whether to appoint an independent counsel has degenerated into a debate between the Attorney General and her critics over the precise features of the triggering mechanism--for example, whether a sufficiently specific and credible allegation has been made against a "covered person." This

dispute has focused on the question of which telephones were used to make certain fundraising calls. The debate over such technicalities has obscured the broader question of whether United States officials, or members of American political parties, knowingly solicited or accepted contributions which were provided by citizens of foreign countries. [FN56]

***2153** Second, at least at the outset of the investigation, Justice Department prosecutors reportedly used the independent counsel statute as a shield to protect the President and Vice President from the kind of investigation that any ordinary citizen might receive. Over the reported objection of FBI investigators, Justice Department officials prohibited certain investigative techniques because the threshold for triggering the independent counsel statute was not met. [FN57] Thus, the Attorney General (or, at least, her delegates) has used the statute not as a sword against executive branch officials, but as a shield to protect them.

Of course, the precise specificity and credibility of allegations against covered persons should be irrelevant. For purposes of the independent counsel statute, the important question should not be whether certain technical requirements have or have not been met. Instead, it should be the following: Will the Congress and the public have confidence in the credibility and thoroughness of the investigation if the investigation results in a determination that such officials did not violate the criminal law?

There can be no definitive answer to this question, but that is the point. Depending on the circumstances--who committed the alleged offense, the nature of the offense, the credibility of the Attorney General, the confidence of the Congress in the Justice Department--there may be more or less of a perceived need for a special counsel to take over. It has proved wildly unwise for Congress to try to anticipate those situations; the debate over whether an independent counsel should be appointed for the campaign fundraising issues has only highlighted the flaws in the current triggering mechanism.

Some might contend that the statute should still be mandatory against certain officials such as the President and Attorney General. As will be discussed further below, an independent counsel should never be appointed to prosecute the President (because a sitting President should not be subject to criminal indictment until he leaves office or is removed by impeachment proceedings). If the Attorney General is the subject of a truly serious allegation and remains in office, the people can be confident that the President or the Congress will ensure that a special counsel is appointed.

In sum, the decision whether to appoint a special counsel should be at the President's discretion as informed by the Congress and the media. That is as it should be--those audiences are the two primary representatives of the citizens, and the citizens are the persons who ultimately must be persuaded that an investigation resulting in a no-prosecution decision was thorough and credible.

C. JURISDICTION

The following proposed statutory language relates to jurisdiction.

When the public interest requires, the President may appoint, by and with ***2154** the advice and consent of the Senate, a Special Counsel to investigate and prosecute matters within the jurisdiction assigned by the President.

The Attorney General and the Special Counsel shall consult as necessary and appropriate regarding the Special Counsel's jurisdiction. The Special Counsel's jurisdiction shall not be reviewed in any court of the United States. Notwithstanding Federal Rule of Criminal Procedure 6, the Attorney General or the Special Counsel may report to Congress regarding the Special Counsel's jurisdiction.

The current mandatory independent counsel statute authorizes the Attorney General to delineate the independent counsel's jurisdiction, to refer related matters to the counsel, and to seek expansion of the counsel's jurisdiction. The statute is silent on the question of whether a criminal defendant or subpoena recipient can challenge the jurisdiction of the prosecutor. In United States v. Tucker, however, the Eighth Circuit ruled that the independent counsel's jurisdiction, as specified by the Attorney General, is not subject to judicial review. [FN58]

Congress should clarify the jurisdictional provisions in a manner consistent with Tucker, such that only the President and Attorney General, and not the courts, define and monitor the independent counsel's jurisdiction. This clarification would ensure direct oversight over the independent counsel's jurisdiction by the official primarily affected (the Attorney General), but should not unduly hamper the investigation.

As explained by the Eighth Circuit in Tucker, the Attorney General, on behalf of the President, has the competence and authority to monitor an independent counsel's jurisdiction. Ordinarily, she is the "traffic cop" who decides whether a particular investigation should be handled by Main Justice or by a local United States Attorney's Office. She also resolves clashes between different United States Attorneys' offices. So, too, with respect to a special counsel's jurisdiction, the Attorney General should play the role of traffic cop, the role she already performs to some degree. Of course, there is always a danger that the President or Attorney General will attempt to limit an independent counsel's investigation to protect the administration. Regular congressional oversight of the independent counsel's jurisdiction should deter the imposition of such restraints, however.

To be sure, one can expect that there will be some friction at the margins between the special counsel and the Attorney General. [FN59] The Attorney General must take pains not to hamstring the special counsel, not to make his investigation less effective than an ordinary Justice Department investigation. In particular, it is, of course, common and accepted (and even necessary) police and prosecutorial practice to attempt to investigate and prosecute witnesses for other ***2155** crimes, thereby inducing the witness to tell the truth in the primary investigation. As Robert Fiske has correctly noted, it would be unwise in the extreme for the Attorney General to take that authority away from a special counsel: "I do think that it is very important that the independent counsel have the authority to pursue related matters when those related matters involve the use of a key witness that the independent counsel may not want to turn over to someone else and, secondly, when those related matters, in his or her judgment, are reasonably designed to produce, in one way or another, evidence against the subject of the investigation." [FN60]

Codifying Tucker thus would not only clarify the role of the Attorney General and special counsel, but also would greatly expedite special counsel investigations. Judicial challenges to independent counsel jurisdiction have caused severe delays in the Michael Espy and Whitewater independent counsel investigations. For example, a trial of Arkansas Governor Jim Guy Tucker in the Whitewater investigation was delayed well over two and one-half years because of a challenge to the independent counsel's jurisdiction.

D. REPORTS

Congress should enact the following statutory language regarding the special counsel's duty to provide information regarding the evidence developed during his investigation.
The Attorney General or Special Counsel shall disclose evidence of possible misconduct regarding any impeachable officer of the United States in a sealed report to the President, and to the Chairman and Ranking Member of the Judiciary Committee of the House of Representatives. Federal Rule of Criminal Procedure 6 shall not apply to such reports. No person to whom disclosure is authorized under this section shall further disclose the information except as specifically authorized by the Congress.

The most illogical part of the current independent counsel statute is its final report requirement. The provision was originally designed to ensure that the special prosecutor did not "whitewash" the investigation. That rationale does not justify a report; the fear of whitewashing is the reason that a special counsel is appointed in the first place. If anything, the supposed justification for the reporting requirement would call for the Justice Department to provide a report in those high-profile investigations where there is a potential for a conflict, but where the Department nonetheless conducts the investigation.

In any event, § 594(h) of the current statute requires that an independent counsel's final report set forth "fully and completely a description of the work of the independent counsel, including the disposition of all cases brought." [FN61] ***2156** Before the 1994 amendment, the statute also required that the final report set forth "the reasons for

not prosecuting any matter within the prosecutorial jurisdiction" of the independent counsel. [FN62]

Section 595(c) of Title 28 also requires that the independent counsel report to the Congress on any information that "may constitute grounds for an impeachment." [FN63] The latter provision codifies the process by which Leon Jaworski transmitted a report to Congress during the Watergate investigation. As far as is publicly known, however, a report under § 595(c) has never been issued since its enactment in 1978.

As a general proposition, a public report is a mistake. It violates the basic norm of secrecy in criminal investigations, it adds time and expense to the investigation, and it often is perceived as a political act. It also misconceives the goals of the criminal process. A report discussing facts and evidence would make sense if the prosecutor's goal was to establish publicly by a preponderance of the evidence what happened with respect to a particular event--as often is the case in congressional or inspector general investigations, or in civil litigation. That is not the goal of the independent counsel. Instead, an independent counsel is appointed only to investigate certain suspected violations of federal criminal law in order to determine whether criminal violations occurred, and to prosecute such violations if they did occur. That goal--to determine whether criminal violations occurred--is quite different from the goal of issuing public conclusions regarding a particular event. [FN64]

On the other hand, as is reflected in § 595(c), there is a strong sense that evidence of the conduct of executive branch officers should not be concealed, at least not from Congress, which is constitutionally assigned the duty to determine their fitness for office. Thus, any information gathered with respect to executive branch officials that could reflect negatively on their fitness for office should be disclosed to Congress (not dissimilar to the manner in which FBI background information is disclosed when a nomination is pending). The statutory language proposed by this article thus attempts to incorporate the best of § 594(h) and § 595(c), to eliminate the worst, and to ensure that, on the one hand, miscreants not serve in the executive branch, and on the ***2157** other, that personal privacy and reputation not be sacrificed unnecessarily and unwisely.

E. INVESTIGATION AND PROSECUTION OF THE PRESIDENT

This article proposes the following statutory language to establish that a sitting President cannot be indicted.
The President of the United States is not subject to indictment or information under the laws of the United States while he serves as President. The statute of limitations for any offense against the United States committed by the President shall be tolled while he serves as President.

The supposed "politicization" of independent counsel investigations occurs primarily in those investigations where the President is a target or a potential defendant; those investigations quickly become politicized because of the threat that the President might be indicted. As will be explained, a serious question exists as to whether the Constitution permits the indictment of a sitting President. Regardless how the Supreme Court ultimately would rule on that question, however, Congress should enact legislation clarifying the proper procedure to follow when there are serious allegations of wrongdoing against the President. In particular, Congress should clarify that a sitting President is not subject to criminal indictment while in office. Such legislation not only would go a long way towards disentangling the appearance of politics from special counsel investigations, it also would greatly expedite those investigations where the President otherwise would be one of the subjects of the investigation. [FN65]

In an investigation of the President himself, no Attorney General or special counsel will have the necessary credibility to avoid the inevitable charges that he is politically motivated--whether in favor of the President or against him, depending on the individual leading the investigation and its results. In terms of credibility to large segments of the public (whose support is necessary if a President is to be indicted), the prosecutor may appear too sympathetic or too aggressive, too Republican or too Democrat, too liberal or too conservative.

The reason for such political attacks are obvious. The indictment of a President would be a disabling experience for the government as a whole and for the President's political party--and thus also for the political, economic, social, diplomatic, and military causes that the President champions. The dramatic consequences invite, indeed,

beg, an all-out attack by the innumerable ***2158** actors who would be adversely affected by such a result. So it is that any number of the President's allies, and even the Presidents themselves, have criticized Messrs. Archibald Cox, Leon Jaworski, Lawrence Walsh, and Kenneth Starr--the four modern special prosecutors to investigate presidents.

The Constitution of the United States contemplated, at least by implication, what modern practice has shown to be the inevitable result. The Framers thus appeared to anticipate that a President who commits serious wrongdoing should be impeached by the House and removed from office by the Senate--and then prosecuted thereafter. The Constitution itself seems to dictate, in addition, that congressional investigation must take place in lieu of criminal investigation when the President is the subject of investigation, and that criminal prosecution can occur only after the President has left office. [FN66]

Watergate Special Prosecutor Jaworski concluded, for example, that "the Supreme Court, if presented with the question, would not uphold an indictment of the President for the crimes of which he would be accused." Accordingly, he thought it would be irresponsible conduct to recommend that the grand jury return an indictment against the President. He based this conclusion on the arguments presented to him:
[Tlhe impeachment process should take precedence over a criminal indictment because the Constitution was ambivalent on this point and an indictment provoking a necessarily lengthy legal proceeding would either compel the President's resignation or substantially cripple his ability to function effectively in the domestic and foreign fields as the Nation's Chief Executive Officer. Those consequences, it was argued, should result from the impeachment mechanism explicitly provided by the Constitution, a mechanism in which the elected representatives of the public conduct preliminary inquiries and, in the event of the filing of a bill of impeachment of the President, a trial based upon all the facts. [FN67]

President Nixon similarly argued that "[w]hatever the grand jury may claim about a President, its only possible proper recourse is to refer such facts, with the consent of the court, to the House and leave the conclusions of criminality to that body which is constitutionally empowered to make them." [FN68] As Solicitor General, Robert Bork reached the same conclusion, arguing that a Vice President could be criminally prosecuted, but that the President could not. [FN69] Judge George MacKinnon, too, argued that "a President is subject to the criminal ***2159** laws, but only after he has been impeached by the House and convicted by the Senate and thus removed from office." [FN70] To indict and prosecute a President or to arrest him before trial "would be constructively and effectively to remove him from office, an action prohibited by the Impeachment Clause. A President must remain free to travel, to meet, confer and act on a continual basis and be unimpeded in the discharge of his constitutional duties." [FN71] Therefore, he concluded, " t he real intent of the Impeachment Clause, then, is to guarantee that the President always will be available to fulfill his constitutional duties." [FN72]

The Supreme Court's decision in Clinton v. Jones [FN73] indicated that the President is subject to private lawsuits to remedy individuals harmed. But the Court's decision does not apply to criminal proceedings against the President, which seek to enforce public, not private, rights. The Court thus repeatedly referred in its opinion to "private" actions against the President. [FN74]

The constitutional mechanism of impeachment recognizes, at least implicitly, that criminal prosecution of a sitting President is fraught with peril-- virtually untenable as a matter of practice and unwise as a matter of policy. The President is not simply another individual. He is unique. He is the embodiment of the federal government and the head of a political party. If he is to be removed, the entire government likely would suffer, the military or economic consequences to the nation could be severe, and the President's political party (and the causes he champions) would almost certainly be devastated. Those repercussions, if they are to occur, should not result from the judgment of a single prosecutor--whether it be the Attorney General or special counsel--and a single jury. Prosecution or nonprosecution of a President is, in short, inevitably and unavoidably a political act. [FN75] Thus, as the Constitution suggests, the decision about the President while he is in office should be made where all great national political judgments in our country should be made--in the Congress of the United States.

***2160** The words of Alexander Hamilton ring as true today as they did two centuries ago:

[O]ffenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust ... are of a nature which may with peculiar propriety be denominated POLITICAL .... The prosecution of them, for this reason, will seldom fail to agitate the passions of the whole community, and to divide it into parties more or less friendly or inimical to the accused. In many cases it will connect itself with the pre-existing factions, and will enlist all their animosities, partialities, influence, and interest on one side or on the other.... [FN76]

Investigation of the President, Hamilton stated, is a kind of "NATIONAL INQUEST" and "[i]f this be the design of it, who can so properly be the inquisitors for the nation as the representatives of the nation themselves." [FN77]

The Federalist Papers thus suggest the ill wisdom of entrusting the power to judge the President of the United States to a single person or body such as an independent counsel: The discretion "to doom to honor or to infamy the most confidential and the most distinguished characters of the community forbids the commitment of the trust to a small number of persons." [FN78] In the constitutional debates, Gouverneur Morris explained that the Senate should try impeachments, and that the President would be liable to prosecution afterwards. [FN79] The Federalist Papers similarly point out that:
the punishment which may be the consequence of conviction upon impeachment is not to terminate the chastisement of the offender. After having been sentenced to a perpetual ostracism from the esteem and confidence and honors and emoluments of his country, he will still be liable to prosecution and punishment in the ordinary course of law. [FN80]

Hamilton further noted that the checks on a President include that he shall be "liable to be impeached, tried, ... and removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of law." [FN81]

Thus, the Framers explained the wisdom, and perhaps also the constitutional necessity, of the idea that public judgment with respect to the President be ***2161** rendered not by a prosecutor or jury, but by the Congress. A prosecutor acts to vindicate harm to the public, not to any private individual (unlike in a civil case such as Clinton v. Jones). The decision to vindicate harm to the public caused by the President, no matter how he caused it, should belong to the Congress in the first instance.

Why is the President different from Members of Congress or Supreme Court Justices or Cabinet officials? The Constitution vests the entire executive power in a single President: the powers of the Commander in Chief of the Army and the Navy, the power to command the Executive Departments, the power shared with the Senate to make treaties and to appoint Ambassadors, the power shared with the Senate to appoint Justices of the Supreme Court and other civil officers, the power and responsibility to execute the laws, and the power to grant reprieves and pardons. [FN82]

While federal prosecutors have credibly prosecuted Cabinet officers, White House officials, and other friends and associates of the President, a credible determination by a federal prosecutor to indict (or not indict) the President himself would be nigh impossible. The experience of recent years has only reinforced the wisdom of the Framers.

What, then, should happen? When nonfrivolous allegations or evidence of wrongdoing by the President is received by a prosecutor, that evidence should be forwarded to the House of Representatives. If Congress declines to investigate, or to impeach and remove the President, there can be no criminal prosecution of the President at least until his term in office expires. [FN83] (Most criminal investigations include multiple potential defendants, so the criminal investigation as a whole generally might proceed, depending on the circumstances.) As an extreme hypothetical, some might ask what would happen if the President murdered someone or committed some other dastardly deed. In such a case, we can expect that the President would be quickly impeached, tried, and removed; the criminal process then would commence against the President. There is simply no danger that such crimes would go criminally unpunished; the only question is when they can be punished.

F. THE PRESIDENT'S PRIVILEGES

The following statutory language is proposed:
In response to a federal grand jury or criminal trial subpoena sought by the United States, no court of the United States shall enforce or recognize a privilege claimed by the President in his official capacity, or by an Executive department or agency, except on the ground of national security, or as provided by federal statute or rule that refers specifically to the privileges ***2162** available to government officials or agencies in grand jury or criminal trial proceedings.

One major cause of delay in independent counsel investigations has been the repeated assertion of various executive privileges. The privilege assertions not only force the President and various independent counsels into adversary postures, but they also have undermined the independent counsel's ability to conduct an expeditious and thorough investigation. During the last quarter- century, the federal courts have resolved many of the executive privilege issues that have arisen during criminal investigations. [FN84] In particular, the Supreme Court's 1974 decision in United States v. Nixon, [FN85] the Eighth Circuit's 1997 decision in In re Grand Jury Subpoena Duces Tecum, [FN86] and Judge Silberman's 1990 concurrence in United States v. North [FN87] (as well as a subsequent 1997 D.C. Circuit decision in In re Sealed Case [FN88]) have essentially defined the boundaries of the executive privileges that the President may assert in federal grand jury or criminal proceedings. The result of those cases is clear: the courts may not enforce a President's privilege claim (other than one based on national security) in response to a grand jury subpoena or a criminal trial subpoena sought by the United States.

Any dire claims that this rule disables the Presidency are overstated, moreover, because the President is always free to withhold other sensitive or critical information if he finds it necessary. [FN89] To do so, a President must order the federal prosecutor not to seek the information and must fire the prosecutor if he refuses (as President Nixon fired Archibald Cox). [FN90] Such action would surely focus substantial public attention on the President's privilege claims, but if the President's argument is as strong as he purportedly believes, he should (and must) be able to explain it to the Congress and the public. But Nixon, and the cases since Nixon, establish that the President cannot rely on the courts to protect him except with respect to national security information. [FN91]

***2163** The current law of governmental privileges available in criminal proceedings derives from two sources: (1) Section 535 of Title 28, which requires all executive branch officials to disclose any information to law enforcement regarding possible criminal activity by a member of the executive branch, thus overriding any purported common-law privileges available to the President; and (2) the Supreme Court's decision in Nixon regarding the scope of the constitutional executive privilege for presidential communications available to the President under article II of the Constitution.

1. Non-Constitutional Executive Privileges

Federal Rule of Evidence 501 provides that privileges in federal criminal trials and grand jury proceedings are "governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience" except as "provided by Act of Congress" or the Constitution. Section 535(b) of Title 28 makes clear for purposes of federal criminal proceedings that the President may not maintain any common-law privilege claim such as the governmental attorney-client and work product privileges that President Clinton asserted in the Whitewater investigation. The statute provides:
Any information, allegation, or complaint received in a department or agency of the executive branch of the Government relating to violations of title 18 involving Government officers and employees shall be expeditiously reportedly to the Attorney General by the head of the department or agency.... [FN92]

In its decision in In re Grand Jury Subpoena, the Eighth Circuit labeled the statute "significant," and stated that "executive branch employees, including attorneys," have a duty to report information relating to criminal wrongdoing. [FN93]

Some have attempted to dismiss this statute, arguing that it contains an implicit exception for information received by government attorneys. [FN94] That ***2164** argument contravenes the clear and all-encompassing language of the statute. The statute contains no distinction between information obtained by government attorneys and that obtained by other government employees. In addition, Congress included a specific exception to this disclosure obligation for "class es of information" as to which the Attorney General "directs otherwise," [FN95] and the Attorney General has not exempted information obtained by government attorneys representing the government. As a matter of elementary statutory construction, that explicit exception confirms the statute's plain meaning--and no further exceptions can be judicially inferred or created. [FN96]

The legislative history supports that conclusion as well. The House Committee Report accompanying § 535 stated that "[t]he purpose" of the provision is to "require the reporting by the departments and agencies of the executive branch to the Attorney General of information coming to their attention concerning any alleged irregularities on the part of officers and employees of the Government." [FN97] The report emphasizes that " i f the Attorney General or the Federal Bureau of Investigation undertakes such investigation, they should have complete cooperation from the department or agency concerned." [FN98] The Justice Department supported the legislation:
The Department of Justice urges the prompt enactment of the measure, for such legislation will emphasize the congressional intent that the chief law- enforcement officer of the Government is to have free access to all units thereof for the purpose of ferreting out personnel criminally violating their trusts and oaths of office. [FN99]

In addition, the President's official counsels have traditionally recognized this obligation. For example, Lloyd Cutler, who served as White House Counsel in two Administrations, has stated that there can be "problems relating to misconduct that you learn about somewhere in the White House or elsewhere in the Government." [FN100] Mr. Cutler noted that there is a "Government rule of making it your duty, if you're a Government official as we as lawyers are, a statutory duty to report to the Attorney General any evidence you run into of a possible ***2165** violation of a criminal statute." [FN101] Mr. Cutler further remarked that " w hen you hear of a charge and you talk to someone in the White House ... about some allegation of misconduct, almost the first thing you have to say is, 'I really want to know about this, but anything you tell me I'll have to report to the Attorney General.'" [FN102]

Similarly, twenty-five years ago, after White House Counsel John Dean had resigned, Robert Bork was asked whether he would consider becoming President Nixon's official White House Counsel. Bork asked Chief of Staff Alexander Haig whether he would be on the government payroll and was told that he would be. He then explained to Haig that "[a] government attorney is sworn to uphold the Constitution. If I come across evidence that is bad for the president, I'll have to turn it over. I won't be able to sit on it like a private defense attorney." [FN103] (Bork ultimately did not receive the job).

In the same vein, the 1993 White House report on the Travel Office episode stated that "White House personnel may find that they have information about a possible violation of law. If there is a reasonable suspicion of a crime ... about which White House personnel may have knowledge, the initial communication of this information should be made to the Attorney General, the Deputy Attorney General, or the Associate Attorney General." [FN104]

Some have argued against this commonsense conclusion, pointing for apparent support to several unpublished Office of Legal Counsel (OLC) memoranda--but the Eighth Circuit quickly and correctly concluded they were totally inapposite. [FN105] The OLC memoranda do not apply to situations where a government attorney represents a government agency and learns information during ***2166** the course of her official representation of that agency. [FN106]

In short, § 535 refutes any claim of an executive common-law privilege (including a governmental attorney-client or work product privilege) in federal criminal proceedings in response to a grand jury or trial subpoena sought by the United States.

2. Constitutionally Based Executive Privileges

Section 535, of course, does not prevent the President from asserting constitutionally based privileges. In United States v. Nixon, [FN107] the Supreme Court applied the executive privilege for presidential communications, which the President had asserted in response to a criminal trial subpoena sought by the United States. For purposes of criminal cases where the United States has sought a subpoena, the Court concluded that executive privilege protects only national security and foreign affairs information. [FN108]

The dispute in Nixon arose in connection with a criminal trial of seven individuals, including former White House officials. The District Court issued a trial subpoena sought by the United States (represented by the special prosecutor) to obtain tape recordings of conversations among President Nixon and various high-level White House officials, including White House Counsel John Dean. [FN109] President Nixon resisted production of the tapes, citing the executive privilege for presidential communications.

In the Supreme Court, President Nixon argued that the subpoena did not meet the threshold requirements under Federal Rule of Criminal Procedure 17 of relevance and admissibility. [FN110] He also asserted executive privilege, citing article II of the Constitution. [FN111] President Nixon contended that the executive privilege for presidential communications was absolute and that the courts could not compel production of the tapes. Even if the privilege were not absolute and "even if an evidentiary showing as required by Rule 17(c) had been made as to each of the requested items," President Nixon argued that "the Special Prosecutor must demonstrate a unique and compelling need to overcome ***2167** the privileged nature of the materials." [FN112] President Nixon thus argued in the alternative for some heightened showing, not dissimilar to the standard applied by the D.C. Circuit in Nixon v. Sirica, where the Court of Appeals held that the privilege claim of President Nixon was overcome by the "uniquely powerful" showing made by the special prosecutor. [FN113]

The Supreme Court found that the special prosecutor had met the relevance and admissibility requirements of Federal Rule of Criminal Procedure 17 for trial subpoenas: "there was a sufficient likelihood that each of the tapes contains conversations relevant to the offenses charged in the indictment" and there was "a sufficient preliminary showing that each of the subpoenaed tapes contains evidence admissible with respect to the offenses charged in the indictment." [FN114]

The Court recognized, based on Article II, a "presumptive privilege for Presidential communications." [FN115] The privilege derived, the Court said, from the Constitution and from the "valid need for protection of communications between high Government officials and those who advise and assist them"--the "importance" of which "is too plain to require further discussion." [FN116] The Court stated that " t he expectation of a President to the confidentiality of his conversations and correspondence ... has all the values to which we accord deference for the privacy of all citizens and, added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking." [FN117] The privilege, the Court said, was "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." [FN118]

However, the Court stated that the tapes, by President Nixon's concession, did not reveal military or diplomatic secrets and thus did not implicate the President's authority "as Commander-in-Chief and as the Nation's organ for foreign affairs." [FN119] The Court therefore found that the President possessed only a "generalized interest in confidentiality." [FN120]

The Court then struck the balance between the President's generalized interest in confidentiality and the "need for relevant evidence in criminal trials." [FN121] In this regard, the Court said it was important to distinguish the need for evidence in criminal proceedings from the need for evidence in congressional proceedings, civil cases, or Freedom of Information Act (FOIA) actions. In the latter situations, it may well be that the executive privilege for presidential ***2168** communications is absolute (or in the case of congressional subpoenas, a nonjusticiable question). However, the criminal context is different. As the Court emphasized, the traditional commitment to the rule of law is "nowhere more profoundly manifest than in our view that the twofold aim of criminal justice is that guilt shall not escape or innocence suffer." [FN122] The Court further noted that " t he need to develop all relevant facts in the adversary system is both fundamental and comprehensive. ... To ensure that justice is done, it is

imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense." [FN123]

The Court then held that the need for relevant evidence in criminal proceedings outweighed the President's "generalized interest in confidentiality" unless the executive privilege claim was founded on a claim of state secrets:

[T]he allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts. A President's acknowledged need for confidentiality in the communications of his office is general in nature, whereas the constitutional need for production of relevant evidence in a criminal proceeding is specific and central to the fair adjudication of a particular criminal case in the administration of justice. Without access to specific facts a criminal prosecution may be totally frustrated. The President's broad interest in confidentiality of communications will not be vitiated by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal cases.

We conclude that when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial. [FN124]

The Court thus accepted neither President Nixon's primary argument that the privilege was absolute, nor his secondary argument that the Special Prosecutor must show a "unique and compelling need" to obtain the tapes. The Court found that the showing under Rule 17 itself demonstrated a need sufficient to obtain non-state secret presidential communications in criminal proceedings. The Court thus ordered that, upon remand, "[s]tatements that meet the test of admissibility and relevance" must be produced to the special prosecutor. [FN125] Nixon, in short, held that the showing required under Rule 17 (relevance and admissibility for a trial subpoena; relevance for a grand jury subpoena) itself demonstrates the specific need for evidence that overrides the President's ***2169** general need for confidentiality. [FN126]

Lest there be any doubt about the meaning of Nixon, a foray into internal memoranda available from the Library of Congress provides historical confirmation. The Court specifically and consciously rejected the suggestion of President Nixon and the D.C. Circuit in Nixon v. Sirica that there be a case-by-case balancing test in which the prosecutor or grand jury must make some particularized, compelling showing in addition to the showing required by Rule 17. The memoranda among the Justices reveal some initial disagreement regarding this precise question, with Justice Byron White being in favor of the position ultimately adopted and Justice Lewis Powell favoring some undefined higher showing of need. The case was argued on July 8, 1974. On July 12, Justice Powell wrote to the Justices that "[w]e were not entirely in agreement as to the standard to be met in overcoming the privilege." [FN127] Justice White wrote on July 15, 1974:

[T]he privilege does not extend to evidence that is relevant and admissible in a criminal prosecution. The public interest in enforcing its laws and the rights of defendants to make their defense supply whatever necessity or compelling need that may be required to reject a claim of privilege when there has been a sufficient showing that the President is in possession of relevant and admissible evidence. ... I, therefore, differ with Nixon v. Sirica insofar as it held that the Special Prosecutor must make some special showing beyond relevance and admissibility. Necessarily, then, the trial judge, who followed Nixon v. Sirica, did not apply the correct standard in this case. [FN128]

After the Chief Justice circulated a new draft that still did not fully accord with Justice White's views, Justice White wrote the Conference on July 18, 1974:

[The current draft] impl[ies] that there must be a compelling need for the material to overcome presumptively privileged executive documents. I take it that you are suggesting that there is a dimension to overcoming the privilege beyond the showing of relevance and admissibility. This makes far too much of the general privilege rooted in the need for confidentiality, and it is not my understanding of the Conference vote. As I have already indicated, my view is that relevance and admissibility themselves provide whatever compelling need must be shown. I would also doubt that the Prosecutor has made any showing of necessity beyond that of relevance and

admissibility. [FN129]

***2170** Justice White felt sufficiently strong about this issue to add that "it is likely that I shall write separately if your draft becomes the opinion of the Court." [FN130]

On July 22, Justice Potter Stewart circulated an alternative draft on the privilege issue containing the suggestions of Justice White. The draft no longer contained any reference to a heightened standard, and the cover memo indicated that the opinion had received the approval of Justices White and Thurgood Marshall. The Chief Justice then quickly incorporated the Stewart section into his opinion and recirculated the entire draft the next day, July 23. All of the Justices then joined, and the opinion was issued on July 24, 1974. [FN131]

This interpretation of Nixon was advanced by Judge Silberman in his 1990 concurrence in United States v. North. [FN132] The district court in that case, Judge Silberman noted, had interpreted Nixon as "constructing a very high barrier to a criminal defendant who wishes to call a President or ex- President who, it is asserted, will give evidence relevant to the defense." [FN133] Finding "it instructive to note how easily the Court in Nixon was satisfied that the tapes sought by the Special Prosecutor ... were relevant," Judge Silberman indicated that in cases where national security is not asserted, no special showing other than relevance is necessary even after executive privilege is claimed. [FN134] Judge Silberman continued:
To be sure, the Court used the language "essential to the justice of the pending criminal case" and "demonstrated specific need for evidence" in describing what was needed to overcome the President's qualified privilege. But the Court does not appear to have meant anything more than the showing that satisfied Rule 17(c). Nowhere in the opinion does the Court ever describe any offer by the Special Prosecutor other than the rather perfunctory showing of relevance .... Even in the section of the opinion dealing with executive privilege, the Court stated that "the President's broad interest in confidentiality ***2171** of communications will not be vitiated by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal cases." [FN135]

In the 1997 dispute between President Clinton and the Whitewater Independent Counsel over the governmental attorney-client privilege, the Eighth Circuit addressed President Clinton's contention that Nixon set forth some higher standard for executive branch documents than that required by Rule 17. The Court concluded otherwise, stating that "Nixon is indicative of the general principle that the government's need for confidentiality may be subordinated to the needs of the government's own criminal justice processes." [FN136] The Court stated that it "doubt ed " that a case-by-case need determination "constitutes the proper need threshold" set forth in Nixon. [FN137]

The D.C. Circuit also addressed an executive privilege dispute between the President and Independent Counsel Donald Smaltz in the investigation of former Secretary of Agriculture Michael Espy. [FN138] The decision is essentially in accord with the above analysis, although certain parts advance a slightly different articulation. In particular, noting Judge Silberman's opinion in North, the court first opined that it would be "strange" if Nixon required nothing more to overcome the presidential privilege than the showing required by Rule 17, because then the privilege "would have no practical benefit." [FN139] Of course, Nixon indicated that the privilege may well be absolute in civil, congressional, and FOIA proceedings; it is only in the discrete realm of criminal proceedings where the privilege may be overcome. [FN140]

In any event, any difference between Judge Silberman and this D.C. Circuit panel is more apparent than real, more procedural than substantive. At the outset, it is significant that the Court specifically rejected the President's argument that "the information sought must be shown to be critical to an accurate judicial determination." [FN141] That argument, the Court said, "simply is incompatible with the Supreme Court's repeated emphasis in Nixon on the importance ***2172** of access to relevant evidence in a criminal proceeding." [FN142] The court concluded that in grand jury cases where national security is not at issue and where the Rule 17 standard is satisfied, presidential communications can be obtained, first, if "each discrete group of the subpoenaed materials likely contains important evidence," and, second, if the evidence "is not available with due diligence elsewhere." [FN143]

The court stated that this first component "can be expected to have limited impact." [FN144] In the grand jury

setting, moreover, "the fact that evidence covered by the presidential communications privilege may be inadmissible should not affect a court's determination of the grand jury's need for the material." [FN145] The court further stated that the second component also will be "easily" satisfied when "an immediate White House advisor is being investigated for criminal behavior." [FN146] Even in cases where a person outside the White House is under investigation, the court said that this second component still will be satisfied when the proponent can "demonstrate a need for information that it currently possesses, but which it has been unable to confirm or disprove." [FN147] Of course, that showing can be made in virtually all investigations--few facts are ever fully confirmed or disproved. The court further stated that this standard would not impose "too heavy" a burden on the subpoena proponent. [FN148]

In short, the D.C. Circuit opinion does not deviate in substance from Nixon, the Eighth Circuit's opinion, or Judge Silberman's approach; it differs, if at all, only with respect to the time when relevant information can be obtained, as the court itself recognized. [FN149]

3. The Relevance of Nixon to a Claim of Governmental Attorney-Client or Work Product Privilege

Nixon is important not only for constitutionally based privileges, but also because it establishes a principle that applies to other common law privilege claims that the President might raise. For example, even if § 535 of Title 28 were erased from the U.S. Code, Nixon itself demonstrates, as the Eighth ***2173** Circuit held, that any claim of governmental attorney- client or work product privilege would be similarly overcome in federal criminal proceedings.

The judicial process in this country is deeply committed to the principle that "the public ... has a right to every [person's] evidence." [FN150] Because testimonial privileges "obstruct the search for truth," there is a "presumption against the existence of an asserted testimonial privilege." [FN151] Privileges thus "are not lightly created nor expansively construed." [FN152] In light of these settled principles, the Supreme Court has recognized privileges, or applied them in a particular setting, only when the privilege (or application thereof) is historically rooted or recognized in the vast majority of the states, and is justified by overriding public policy considerations.

In criminal proceedings, a governmental attorney-client or work product privilege has no roots whatsoever. There is no case, statute, rule, or agency opinion suggesting that a department or agency of the United States (or any state governmental entity) can maintain a full-blown governmental attorney- client or work product privilege in federal criminal or grand jury proceedings. [FN153]

Nixon, moreover, held that even the deeply rooted and constitutionally mandated executive privilege for presidential communications did not override the need for relevant evidence in criminal proceedings, except when a specific claim of national security was at issue. The decision in Nixon demonstrates that a governmental attorney-client and work product privilege (the other two privileges that have been at issue in investigations of executive branch officials) also cannot overcome the need for relevant evidence in criminal proceedings. If the constitutionally rooted executive privilege for presidential communications is overcome by the need for relevant evidence in criminal proceedings, the result cannot be different for a newly conceived governmental attorney-client and work product privilege. A fortiori, a governmental attorney-client or work product privilege fails in federal criminal proceedings.

4. The Policy of Executive Privileges

Section 535, the Eighth Circuit decision, and the Supreme Court decision in Nixon demonstrate as a matter of law that the only executive privilege currently valid against the United States in federal criminal proceedings is a national security/state secrets privilege. As a policy matter, that rule reflects the proper ***2174** balance of the President's need for confidentiality and the government's interest in obtaining all relevant evidence for criminal proceedings.

Government officials, even government attorneys, are public officials who work for the people. Any claim to confidentiality against the United States stands on a radically different footing than a claim made by a private party. The Supreme Court recognized the difference between such public and private responsibilities in declining to apply an attorney-like privilege to an accountant's work papers:

The Hickman work-product doctrine was founded upon the private attorney's role as the client's confidential advisor and advocate, a loyal representative whose duty it is to present the client's case in the most favorable possible light. ... [T]he independent auditor assumes a public responsibility transcending any employment relationship with the client. ... This "public watchdog" function demands that the accountant maintain total independence from the client at all times and requires complete fidelity to the public trust. To insulate from disclosure a certified public accountant's interpretations of the client's financial statements would be to ignore the significance of the accountant's role as a disinterested analyst charged with public obligations. [FN154]

For this same reason, in addressing the narrow question of a governmental attorney-client privilege, respected commentators and the American Law Institute (ALI) reject equating private corporations with public entities. The McCormick treatise states that "[w]here the entity in question is governmental ..., significantly different considerations appear." [FN155] Professors Wright and Graham note that "the costs of the governmental privilege may be very high. ... L egitimate claims for governmental secrecy should all be worked out in the context of the existing privileges for secrets of state and official information." [FN156] Indeed, the ALI's Restatement (Third) of the Law Governing Lawyers states that the rules for private lawyers do not translate to public lawyers; instead, " m ore particularized rules may be necessary where one agency of government claims the privilege in resisting a demand for information by another. Such rules should take account of the complex considerations of governmental structure, tradition, and regulation that are involved." [FN157]

These commonsense propositions led the Eighth Circuit flatly to reject any claim that a governmental or executive attorney-client or work product privilege could be asserted against the federal grand jury. The court stated that the "general duty of public service calls upon government employees and agencies ***2175** to favor disclosure over concealment." [FN158] Citing Arthur Young, the court explained that " t he public responsibilities of the White House are, of course, far greater than those of a private accountant performing a service with public implications." [FN159] The court added:

[T]he strong public interest in honest government and in exposing wrongdoing by public officials would be ill-served by recognition of a governmental attorney-client privilege applicable in criminal proceedings inquiring into the actions of public officials. We also believe that to allow any part of the federal government to use its in-house attorneys as a shield against the production of information relevant to a federal criminal investigation would represent a gross misuse of public assets. [FN160]

If the law embodied the contrary position, a government official (including the President or White House Counsel) safely could tell a White House or other agency attorney (or other official) that he destroyed subpoenaed documents, paid off potential witnesses, erased a subpoenaed tape, or concealed subpoenaed materials--or worse. The courts have rightly rejected the executive's attempt to conceal such information, and Congress should codify those results to prevent future Presidents from trying the same gambit.

Supporters of broad executive privileges contend that limiting privileges will have a chilling effect--that the presidency might be disabled and that governmental officials might be less forthcoming to a President or government attorney if they knew that the information could be disclosed in criminal proceedings. This argument, however, was rejected by the Supreme Court in Nixon (in the context of the all-encompassing presidential communications privilege) and was rejected by the Eighth Circuit (in the context of governmental attorney-client and work product privileges).

It is surely true that a President and government attorneys must be able to obtain information in order to perform their functions, but that assertion proves nothing. The interest in gathering facts to perform those functions does not require the further step of concealing facts from a federal grand jury if they are (or become) relevant to a federal criminal investigation.

As noted above, the dire claims about the disabling of the presidency are false, moreover, because the President is always free to withhold other information if he finds that necessary. To do so, a President must simply order the federal prosecutor not to seek the information and fire him if he refuses, thus taking political responsibility for his privilege claims. [FN161]

The chilling-effect argument is illusory, in any event, because executive branch employees and attorneys know that they do not control the ultimate ***2176** assertion of privilege in any forum. [FN162] As a result, the government employee can have no expectation of confidentiality and no assurance that his communications or work product will remain confidential if called for in federal criminal proceedings. Thus, government employees necessarily know that their communications and work may be disclosed if relevant to a federal criminal investigation.

In addition, the frequency of disclosure will be low. Even in today's environment, the overwhelming majority of White House business and federal agency work never comes under grand jury scrutiny. [FN163] Grand jury investigations obviously occur more often than criminal trials, but grand juries operate in secret and thus present little risk of chilling particular conversations, as the Supreme Court has emphasized. [FN164]

Finally, the debate over privileges, particularly a governmental attorney- client privilege, often is framed in generalities and fails to consider actual situations where the issue might arise. There are three basic situations where a government attorney or official might obtain information from other government employees and where the information might become relevant to a subsequent criminal investigation.

The first situation occurs when the employee seeks advice from a government attorney or official about his possible future course of conduct. If the employee follows the advice and does not commit a criminal act, it is hard to see what chill or harm might be caused by subsequent disclosure of the information. On the other hand, if the employee ignores the advice and commits a criminal act, then what possible governmental interest is there in protecting the employee from the charge that he knew his activity was criminal? Moreover, if the attorney mistakenly advises the employee that a proposed course of conduct is not criminal, even the employee will wish that communication disclosed if he is subsequently prosecuted. In the end, the only employee seeking advice about proposed conduct who will be chilled is the employee who hopes to obtain a government attorney's blessing for potentially criminal conduct. That scenario, however, hardly justifies creation of a far-reaching privilege.

The second category arises where the employee seeks to discuss past conduct that might be criminal. In that situation, of course, the primary interest of the United States is and must be in detecting and prosecuting crime, as the OLC repeatedly has emphasized. The United States has no interest in harboring criminals in government employment, even at high levels. Agency attorneys employed by and representing the United States are not authorized to act as criminal defense attorneys against the United States.

***2177** The OLC thus has long rejected any suggestion that the United States can participate on both sides of a criminal investigation. [FN165] That explains why there is no tradition suggesting that a government attorney can consult with an employee about the employee's past criminal conduct and then refuse to disclose that information to the federal grand jury. Federal agencies, unlike corporations, are not subject to criminal investigation or indictment by the United States, so an agency cannot be adverse to the United States in a criminal prosecution. When an agency becomes aware of internal wrongdoing, the agency's sole interest is to ferret it out, and there can be no risk of endangering a governmental interest by doing so and by disclosing the results to federal law enforcement authorities.

The third situation occurs not where the employee initiates conversation, but where the agency elicits information from its employees about some event. Government agencies and government agency attorneys often have a legitimate interest in obtaining facts about a particular event; the fact- gathering process enables an agency head (or delegate) to discipline employees, institute new policies that will prevent similar errors in the future, inform the Congress or the public of the facts, or merely deal with the latest political controversy. Thus, the White House has conducted numerous internal investigations, as have many agencies and inspectors general. Given the number of

such investigations, a far-reaching and novel governmental attorney-client privilege is, by definition, unnecessary to encourage such activity. [FN166] Unlike a corporation (which is subject to indictment), no legitimate government agency would be, or has been, discouraged from conducting internal factfinding by the knowledge that any evidence of crime uncovered will in fact be presented to the relevant law enforcement authorities. Indeed, this was the premise behind the enactment of Section 535 (and the many inspector general statutes as well).

CONCLUSION

Outside federal prosecutors are here to stay. They have existed at least since President Grant's Administration. As we have seen over the last twenty- five ***2178** years, the system of outside prosecutors can make an extraordinary difference in how our nation is governed. As Justice Scalia stated, the debate over a special counsel is about power--that is, "[t]he allocation of power among Congress, the President, and the courts in such fashion as to preserve the equilibrium the Constitution sought to establish ...." [FN167]

The fundamental flaw with the current independent counsel statute is that it creates, almost by definition, a scenario whereby the President and the independent counsel are adversaries. From that basic mistake flows most of the other problems that critics identify in the statute. Clarifying the role of the President in the manner proposed in this article would expedite, depoliticize, and enhance the credibility and effectiveness of special counsel investigations; and ensure that the Congress alone is directly responsible for overseeing the conduct of the President of the United States and determining, in the first instance, whether his conduct warrants a public sanction.

[FNa1]. Mr. Kavanaugh served as Associate Counsel in the Office of the Whitewater Independent Counsel from 1994 to 1997 and also for a period in 1998. The views reflected in this article are his own.

[FN1]. The Attorney General is a political actor, as are all high officials of the Justice Department. In other words, the Attorney General supports not only the ideas and policies of the incumbent administration but also publicly supports candidates for elective office who espouse those policies.

[FN2]. Mr. Cox has noted that the "normal position" of the Justice Department is "one for defending an expanding executive privilege," whereas the Special Prosecutor in Watergate and other subsequent investigations "were challenging executive privilege. So there are some real conflicts." 67th Annual Judicial Conference of the United States Court of Appeals for the Fourth Circuit, The Independent Counsel Process: Is It Broken and How Should It Be Fixed?, at 138 (June 27, 1997) [hereinafter Fourth Circuit Judicial Conference] (emphasis added). The Justice Department's brief in the litigation between the President and the Whitewater Independent Counsel Kenneth W. Starr demonstrated this point. The Justice Department has agreed with neither the White House nor the Independent Counsel about the proper scope of privilege. See Brief Amicus Curiae for the United States, Acting Through the Attorney General, Office of the President v. Office of Independent Counsel at 20, 117 S.Ct. 2482 (1997) (No. 96-1783) ("The United States has compelling interests in investigating and prosecuting crimes--inside or outside the government--and the Justice Department's performance of those tasks is aided by the duty of the President and other government officials to report evidence of criminal violations to the Attorney General. At the same time ... the President must have access to legal advice that is frank, fully informed, and confidential.").

[FN3]. 1975 REPORT OF THE WATERGATE SPECIAL PROSECUTION TASK FORCE, at 137- 38.

[FN4]. 28 U.S.C. §§ 591-99 (1994).

[FN5]. The Olympian term "independent counsel" has always promised more than it could deliver. Moreover, the term would be inappropriate under the regime proposed here because "independent" connotes a counsel appointed outside the Executive Branch and accountable to no one. The Ethics in Government Act initially called for the appointment of a "special prosecutor," but Congress changed the name in 1982 to "independent counsel." The term "special counsel" best captures the position and is used here in describing the proposed regime.

[FN6]. 487 U.S. 654 (1988).

[FN7]. See George D. Brown, The Gratuities Offense, and the RICO Approach to Independent Counsel Jurisdiction, 86 GEO. L.J. 2045, 2049 (1998).

[FN8]. 78 F.3d 1313 (8th Cir.), cert. denied, 1 17 S.Ct. 76 (1996).

[FN9]. The Justice Department is a department within the executive branch whose head is appointed by the President. See 28 U.S.C. § 501 (1994) ("The Department of Justice is an executive department of the United States at the seat of Government."); 28 U.S.C. § 503 ("The President shall appoint, by and with the advice and consent of the Senate, an Attorney General of the United States. The Attorney General is the head of the Department of Justice.").

[FN10]. KATY J. HARRIGER, THE FEDERAL SPECIAL PROSECUTOR IN AMERICAN POLITICS 153 (1992) (emphasis added) (quotation marks omitted).

[FN11]. 28 U.S.C. § 515 (1994); 28 U.S.C. § 543 (1994).

[FN12]. See infra text accompanying notes 28-40.

[FN13]. 28 U.S.C. § 592(c)(1)(A). The Attorney General's decision is judicially unreviewable, however, which means that threat of impeachment or other congressional retaliation is the only legally enforceable check requiring the Attorney General to enforce the law.

[FN14]. 28 U.S.C. § 592(c).

[FN15]. Id. § 593(b).

[FN16]. Id. § 593(b)(3).

[FN17]. Morrison, 487 U.S. at 679.

[FN18]. 28 U.S.C. § 594(a)(9). The symbolism of this nomenclature is important and should be retained in any future legislation. Criminal defendants (and other critics) inevitably try to imply to juries (and the public) that the

appointed counsel is somehow an extra-governmental official who does not warrant the same respect as prosecutors representing the United States. In the 1996 trial of Jim Guy Tucker, James McDougal, and Susan McDougal, for example, the defendants refused to refer to the prosecutors as the "United States," arguing that "they are independent Counsel appointed under a special act." The Court put a quick end to this tactic: "The indictment which was rendered by citizens of this state, the caption is United States of America versus James B. McDougal, Jim Guy Tucker, and Susan H. McDougal. Mr. Jahn and his associates represent the United States of America. Disregard the comment made by Mr. Collins." United States v. McDougal, Tucker, and McDougal, No. LR-CR-95-173, Tr. at 4525-27 (E.D. Ark. Apr. 11, 1996).

[FN19]. 28 U.S.C. § 594(h).

[FN20]. Id. § 593(c).

[FN21]. Julie R. O'Sullivan, The Independent Counsel Statute: Bad Law, Bad Policy, 33 AM. CRIM. L. REV. 463, 505 (1996).

[FN22]. TERRY EASTLAND, ETHICS, POLITICS, AND THE INDEPENDENT COUNSEL 134 (1989).

[FN23]. Fourth Circuit Judicial Conference, supra note 2, at 133.

[FN24]. Id.

[FN25]. Reauthorization of the Independent Counsel Law: Hearing on S. 3131 Before the Subcomm. on Oversight of the Senate Comm. on Governmental Affairs, 102nd Cong. 15 (1992) (testimony of George J. Terwilliger III Deputy Attorney General of the United States).

[FN26]. 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

[FN27]. In the final pages of his dissent, Justice Scalia also pointed out what he termed the "[un]fairness" of an independent counsel investigation, and he did so in broad terms that arguably seem to apply to all special counsel, whether appointed by a court or by the President (or Attorney General). In comparing a special counsel to an "ordinary" Justice Department prosecutor, however, Justice Scalia appeared to rely on a romantic vision of "ordinary" federal prosecutors. In fact, an "ordinary" federal prosecutor is at least as likely to engage in hardball, near-the-edge tactics as a special counsel whose every move is publicly tracked, analyzed, and criticized. Moreover, the only concrete measure of over-aggressiveness is the prosecutor's conviction rate. A careful prosecutor should not bring many cases that end in outright acquittal on all counts. As it turns out, the record of independent counsels appointed under the statute is better than that of the Justice Department. Only one independent counsel appointed under the statute has ever suffered an outright jury acquittal, which is an impressive record, particularly given the skilled attorneys retained by the defendants in such cases.
Justice Scalia also pointed out that ordinary federal prosecutors suffer from constraints on resources and that independent counsels generally do not. Morrison, 487 U.S. at 727-33 (Scalia, J., dissenting). That is not an entirely accurate or persuasive argument. First, the fact that some federal prosecutors' offices may be understaffed and thus unable to prosecute federal crimes that should be prosecuted is hardly a model for investigations of possible crimes by our highest national officials. Indeed, that is the kind of backwards logic that Justice Scalia ordinarily ridicules.

Second, in allocating its enormous annual appropriation, the Department of Justice regularly determines that certain kinds of crimes warrant intensive investigation and prosecution, whether it be drug distribution or health care fraud or abortion clinic bombings or church burnings or the like. By means of the independent counsel statute, Congress has simply made the altogether rational judgment that public corruption by high federal officials should be one such area of concentration. That policy judgment hardly warrants condemnation. It is worth noting, in that regard, that the United States Attorney's office for the District of Columbia recently has received severe public criticism for devoting insufficient resources to public corruption cases. See. e.g., Paul Butler, Why Won't the Prosecutor Prosecute?, LEGAL TIMES, Jan. 19, 1998, at 19 (discussing the lack of prosecutions for corruption among public officials). Third, contrary to the implicit undercurrent of Justice Scalia's discussion of "fairness," the Justice Department itself devotes extraordinary resources to numerous high-profile public corruption cases. The Congressman Dan Rostenkowski case, the Mayor Marion Barry prosecution, the campaign fundraising investigation, the Governor Fife Symington case in Arizona, and the Congressman Joseph McDade investigation in Pennsylvania are all recent examples of massive, single-minded, intense, and occasionally out-of-control (in the case of Congressman McDade, perhaps) investigations. The history of independent counsel investigations certainly measures up no worse than those investigations. Fourth, any true comparison of resource constraints is, in the end, virtually impossible because the Justice Department never identifies exactly how much money its prosecutors and the FBI spend on particular investigations and prosecutions; thus, the Department is able to "hide" its costs and avoid the kind of public and congressional scrutiny that independent counsels constantly face. How much money did the United States spend pursuing Congressman McDade? Governor Symington? Mayor Barry? A lot.

[FN28]. See RESPONSES OF THE PRESIDENTS TO CHARGES OF MISCONDUCT (C. Vann Woodward ed., 1974).

[FN29]. See EASTLAND, supra note 22, at 8; DAVID A. LOGAN, HISTORICAL USES OF A SPECIAL PROSECUTOR: THE ADMINISTRATIONS OF PRESIDENTS GRANT, COOLIDGE AND TRUMAN 7 (Congressional Research Service Nov. 23, 1973).

[FN31]. Id. at 8.

[FN30]. EASTLAND, supra note 22, at 8, 14.

[FN32]. S.J. RES. 54, 68th Cong. (1924).

[FN33]. This article advocates the procedure of presidential appointment and Senate confirmation used during the Teapot Dome Scandal.

[FN34]. EASTLAND, supra note 22, at 8-9.

[FN35]. Id. at 8. The Justice Department was not created until 1870, and there was very little federal criminal law before the 20th century.

[FN36]. 28 U.S.C. §§ 591-99 (1994).

[FN37]. See Reauthorization Hearings, supra note 25, at 15 (1992).

[FN38]. The independent counsel statute states: "The division of the court may not appoint as an independent counsel any person who holds any office of profit or trust under the United States." 28 U.S.C. § 593(b)(2). This provision on its face disqualified Mr. Fiske from appointment as independent counsel under the statute. In the public law reauthorizing the statute in 1994, however, Congress stated that the usual disqualification did not apply to persons appointed as regulatory independent counsel, thus granting the Special Division discretion whether to appoint Mr. Fiske. See Pub. L. No. 103-270, §§ 7(a), (h). The court chose not to appoint Mr. Fiske on the theory that, notwithstanding Congress' ad hoc suspension of § 593(b)(2), the policy, if not the strict terms of the provision, still disqualified Mr. Fiske because he was an administration official.

[FN39]. EASTLAND, supra note 22, at 8. This tradition is not confined to the federal system. The state of New York also has a tradition of appointing special prosecutors (Thomas Dewey, for example) to investigate and prosecute public corruption cases. See Harriger, supra note 10, at 3.

[FN40]. Id. at 15. At the same time, there is a long tradition of congressional investigation of executive branch malfeasance. These investigations often occur simultaneously with criminal investigations of executive branch officials. Some of these congressional investigations have led to the resignation of executive branch officials, and sometimes efforts have been made to impeach (although no executive branch official has been impeached by the House and convicted by the Senate). Congressional investigations historically have been the primary manner in which the public learns whether executive branch officials have committed malfeasance in office. This tradition has continued to the present day. This article argues that Congress must continue to have primary responsibility for determining whether the President should be removed.

[FN41]. Although the Supreme Court upheld the system of court-appointed outside counsel in Morrison v. Olson, the separation of powers analysis in that case is quite inconsistent with the analysis in more recent cases such as Edmond v. United States, 117 S.Ct. 1573 (1997). In particular, Morrison held that the independent counsel was an "inferior officer" whose appointment thus could be wrested from the President. Morrison, 487 U.S. at 671-72. In Edmond, however, the Court said that inferior officers "are officers whose work is directed and supervised at some level by others who were appointed by presidential nomination with the advice and consent of the Senate." Edmond, 117 S.Ct. at 1581. Under this mode of analysis, an independent counsel could not realistically be considered an inferior officer. Thus, if the issue were presented today and there were no stare decisis concerns, there is little telling how the Court would resolve the issue. Justices Anthony Kennedy, Clarence Thomas, David Souter, Ruth Bader Ginsburg, and Stephen Breyer have been appointed to the Court since the decision in Morrison.

[FN42]. This was a foreseeable flaw that Justice Scalia correctly identified in his dissent. See Morrison, 487 U.S. at 730 (Scalia, J., dissenting).

[FN43]. See, e.g., CNN Capital Gang (CNN Television Broadcast, Dec. 13, 1997) (Senator Orrin Hatch questioning Attorney General Reno's decision not to appoint an independent counsel to investigate Vice President Al Gore's fundraising, calling it a "conflict of interest").

[FN44]. Some might say that we should find totally apolitical persons to serve as independent counsel. But even if that were desirable (in our democracy, one would hope, all people would be active participants in a variety of political and social causes), "[n]early everybody who is qualified to be independent counsel has some kind of political involvement in their background." Fourth (Circuit Judicial Conference, supra note 2, at 39 (comments of

Special Division Judge David B. Sentelle).

[FN45]. Even with respect to ordinary cases, Eric Holder, a former United States Attorney for the District of Columbia and now Deputy Attorney General, has written that a prosecutor cannot remain publicly silent in the face of challenges to the prosecutor's ethics and motivations. Eric H. Holder & Kevin A. Ohlson, Dealing With the Media in High-Profile White Collar Crime Cases: The Prosecutor's Dilemma (on file with author).

[FN46]. In the Whitewater investigation, the independent counsel obtained the convictions of Jim Guy Tucker, James McDougal, and Susan McDougal in June 1996 despite sustained attacks on his credibility. In a subsequent August 1996 Arkansas trial of two bankers, the result was a hung jury.

[FN47]. See, e.g., Ruth Marcus, The Prosecutor: Following Leads or Digging Dirt?, WASH. POST, Jan. 30, 1998, at A1 (calling Faircloth a "leading crusader" against Fiske).

[FN48]. Edmond v. United States, 117 S.Ct. 1573, 1579 (1997) (quotations omitted). As Justice Joseph Story noted, "If [the President] should ... surrender the public patronage into the hands of profligate men, or low adventurers, it will be impossible for him long to retain public favur." 3 Joseph Story, Commentaries on the Constitution of the United States 375 (1833).

[FN49]. THE FEDERALIST NO. 76, at 457-58 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[FN50]. Edmond, 117 S.Ct. at 1579.

[FN51]. 28 U.S.C. § 596(a)(1).

[FN52]. Id. § 515; id. § 543.

[FN53]. Morrison, 487 U.S. at 723-24 & n.4 (Scalia, J., dissenting). Justice Scalia stated that "the President must have control over all exercises of the executive power" and that "failure to accept supervision" constitutes "good cause" for removal. Id. at 724 n.4 (Scalia, J., dissenting). That, in essence, defines "good cause" such that it means little more than "at will." Although Justice Scalia disclaimed the logical conclusion of his position, it would seem that he believes, as the Court described his position, that "every officer of the United States exercising any part of [the Executive power] must serve at the pleasure of the President and be removable by him at will." Id. at 690 n.29 (majority opinion describing Justice Scalia's position).

[FN54]. Id. at 728-29 (Scalia, J., dissenting).

[FN55]. President Grant and President Truman's Attorney General also ordered dismissal of special prosecutors. See EASTLAND, supra note 22, at 14, 16.

[FN56]. See CNN Capital Gang, supra note 43 (Senator Hatch argued: "Who cares about the phone calls ... It's all

the other stuff that ought to be investigated.").

[FN57]. Susan Schmidt & Roberto Suro, Troubled from the Start; Basic Conflict Impeded Justice Probe of Fundraising, WASH. POST, Oct. 3, 1997, at A1.

[FN58]. United States v. Tucker, 78 F.3d 1313, 1316-19 (8th Cir.1996).

[FN59]. That friction revealed itself, for example, in the investigation conducted by Independent Counsel Donald Smaltz.

[FN60]. Fourth Circuit Judicial Conference, supra note 2, at 91.

[FN61]. 28 U.S.C. § 594(h)(1)(B).

[FN62]. 28 U.S.C.A. § 594(h)(1) (West 1993), as amended by Pub. L. No. 103-270 § 3(o) (1994). After the 1994 revision, the statute also requires that the independent counsel submit to Congress "annually a report on the activities of the independent counsel, including a description of the progress of any investigation or prosecution conducted by the independent counsel. Such report may omit any matter that in the judgment of the independent counsel should be kept confidential, but shall provide information adequate to justify the expenditures that the office of the independent counsel has made." 28 U.S.C. § 595(a)(2).

[FN63]. 28 U.S.C. § 595(c).

[FN64]. See, e.g., The Independent Counsel Reauthorization Act of 1993: Hearing on S. 24 Before the Comm. on Governmental Affairs, 103d Cong. 49 (1993) (Professor Samuel Dash, Georgetown University Law Center, stating: "Independent counsel investigations and prosecutions carry out the responsibilities of the executive branch to enforce the Federal criminal laws. The scope of congressional committee investigations and hearings is generally broader than those of investigations and prosecutions conducted by independent counsel.").

[FN65]. Congress has the power to provide privileges or immunities regardless whether they are constitutionally required. See Clinton v. Jones, 117 S.Ct. 1636, 1652 (1997) ("If Congress deems it appropriate to afford the President stronger protection, it may respond with appropriate legislation."). On the other hand, Congress would not have the power to definitively say that a President is subject to indictment. The courts have the final word on the minimum level of immunity the Constitution affords the President. See id. ("If the Constitution embodied the rule that the President advocates, Congress, of course, could not repeal it.").

[FN66]. See U.S. CONST, art. I, § 3, cl. 7 ("Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.").

[FN67]. REPORT OF THE WATERGATE SPECIAL PROSECUTION TASK FORCE, supra note 3, at 122.

[FN68]. See Brief for Respondent, Cross-Petitioner at 101, United States v. Nixon, 418 U.S. 683 (1974) (Nos. 73-1766, 73-1834) [hereinafter Brief for President Nixon].

[FN69]. Brief for the United States, Agnew v. United States (D. Md. 1974) (No. 73-0535).

[FN70]. Nixon v. Sirica, 487 F.2d 700, 757 (D.C. Cir.1973) (MacKinnon, J., concurring in part, dissenting in part).

[FN71]. Id.

[FN72]. Id.

[FN73]. 117 S.Ct. 1636 (1997).

[FN74]. See id. at 1639 (noting that suit was brought by "private citizen" for damages); id. at 1642 n.12 (noting that question presented involved "litigation of a private civil damages action"); id. at 1645 ("With respect to acts taken in his 'public characte '--that is official acts--the President may be disciplined principally by impeachment, not by private lawsuits for damages. But he is otherwise subject to the laws for his purely private acts."); id. at 1648 n.36 (referring to "suits against the President for actions taken in his private capacity"); id. at 1650 ("We therefore hold that the doctrine of separation of powers does not require federal courts to stay all private actions against the President until he leaves office."); id. (referring to "burdens of private litigation"); id. at 1651 (referring to private plaintiff's "interest in bringing the case to trial"); id. at 1652 (referring to possibility that Congress could provide for "deferral of civil litigation").

[FN75]. Determining how to conduct an investigation or whether to seek an indictment is not a ministerial task, but involves the exercise of judgment and discretion. The exercise of judgment and discretion inevitably means that the decision cannot be separated, in the eyes of the public, from its political consequences.

[FN76]. THE FEDERALIST NO. 65, at 396 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[FN77]. Id. at 397.

[FN78]. Id. at 398. This passage was written largely with respect to a debate over whether the Senate or the Supreme Court should try an impeachment. But the ideas and themes discussed in explaining why the Senate was superior to the Supreme Court in passing public judgment upon the conduct of the President apply, a fortiori, to a single prosecutor attempting to do so.

[FN79]. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 550 (Max Farrand ed., 1966).

[FN80]. THE FEDERALIST NO. 65, supra note 76, at 398-99 (Alexander Hamilton).

[FN81]. THE FEDERALIST NO. 69, supra note 76, at 416 (Alexander Hamilton).

[FN82]. U.S. CONST. art. II.

[FN83]. As indicated in the statutory language proposed by this article, Congress should take appropriate steps to ensure that the statute of limitations would not prevent prosecution of a President after he leaves office.

[FN84]. President Clinton has litigated privilege claims against both the Whitewater and Espy independent counsels. He also has raised privilege claims against the Justice Department. See S.Rep. No. 104-280, at 67-70, 82-83 (1996). The Public Integrity Section issued a grand jury subpoena to the White House in 1994, and that the White House in response claimed privilege as to 120 documents. H.R.Rep. No. 104-849, at 152-53 (1996).

[FN85]. 418 U.S. 683 (1974).

[FN86]. 112 F.3d 910 (8th Cir.), cert. denied, 117 S.Ct. 2482 (1997).

[FN87]. 910 F.2d 843, 950-54 (D.C.Cir. 1990) (Silberman, J., concurring in part, dissenting in part).

[FN88]. 121 F.3d 729 (D.C.Cir. 1997).

[FN89]. This proposed language is premised on the assumption that a special counsel's motion to enforce a subpoena would be justiciable. The Court in Nixon so held, 418 U.S. at 697, and there is no reason to revisit that decision, particularly because the President retains authority to prevent such disputes from reaching the courts.

[FN90]. Even under the current "good cause" restriction, as Justice Scalia stated in Morrison, an inferior officer such as an independent counsel is removable for cause if he refuses to accept supervision. See Morrison, 487 U.S. at 724 n.4 (Scalia. J., dissenting).

[FN91]. Notwithstanding Nixon, it is at least theoretically conceivable that the Supreme Court might rule that the Constitution provides a greater scope of executive privileges than this section would grant. If so, then the Constitution would trump. See Clinton v. Jones, 117 S.Ct at 1652. But that is unlikely, given the clarity of Nixon.

[FN92]. 28 U.S.C. § 535(b). The subsection states in full:
Any information, allegation, or complaint received in a department or agency of the executive branch of the Government relating to violations of title 18 involving Government officers and employees shall be expeditiously reported to the Attorney General by the head of the department or agency, unless--
(1) the responsibility to perform an investigation with respect thereto is specifically assigned otherwise by another provision of law; or
(2) as to any department or agency of the Government, the Attorney General directs otherwise with respect to a specified class of information, allegation, or complaint.

[FN93]. In re Grand Jury Subpoena, 112 F.3d at 920 (emphasis added).

[FN94]. See Petition for a Writ of Certiorari, Office of the President v. Office of Independent Counsel (No. 96-1783) cert. denied, 117 S.Ct. 22, 23 n.7 (1997).

[FN95]. 28 U.S.C. § 535 (b)(2).

[FN96]. See Honig v. Doe, 484 U.S. 305, 325 (1988) (stating a court is "not at liberty to engraft onto the statute an exception Congress chose not to create"). In general, "[c]ourts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so, and no matter how widely the blame may be spread." Brogan v. United States, 118 S.Ct. 805, 811-12 (1998).

[FN97]. H.R.Rep. No. 83-2622, at 1 (1954) (emphasis added), reprinted in 1954 U.S.C.C.A.N. 3551, 3551.

[FN98]. Id. at 3552 (emphasis added).

[FN99]. Id. at 3553 (emphasis added). In an independent counsel investigation, the independent counsel is the official who receives information about matters within his jurisdiction. "When issuing ... subpoenas, an independent counsel stands in the place of the Attorney General." S.Rep. No. 100-123, at 22 (1987); see 28 U.S.C. § 594(a).

[FN100]. Lloyd N. Cutler, The Role of the Counsel to the President of the United States, 8 REC. OF THE ASS'N OF THE B. OF THE CITY OF NEW YORK 470, 472 (1980).

[FN101]. Id.

[FN102]. Id.

[FN103]. A Conversation with Robert H. Bork, 26 D.C.B.REP. No. 3, at 9 (Dec. 1997-Jan. 1998).

[FN104]. White House Travel Office Management Review, 23 (1993) (emphases added). In addition, federal regulations require each agency to have a "designated agency ethics official," generally an attorney, to provide ethics counseling to employees. 5 C.F.R. § 2635.107 (1997). The regulations state: "Disclosures made by an employee to an agency ethics official are not protected by an attorney-client privilege. An agency ethics official is required by 28 U.S.C. § 535 to report any information he receives relating to a violation of the criminal code, title 18 of the United States Code." Id. (emphasis added).

[FN105]. In re Grand Jury Subpoena, 112 F.3d at 921 n.10. The Attorney General has authorized an exception to § 535(b) for information obtained by government attorneys who, pursuant to a specific regulation (28 C.F.R. § 50.15) , represent government employees in their personal capacities--for example, in civil suits alleging Bivens violations. The OLC memoranda address only the exception for these personal representations. See Office of Legal

Counsel Memorandum, at 5 (Mar. 29, 1985) (analyzing duty under C.F.R. § 50.15 and U.S.C. § 535(b) of an Assistant U.S. Attorney who discovered information while representing Bivens defendants); Office of Legal Counsel Memorandum, at 1 (Apr. 3, 1979) (addressing question regarding "propriety of providing Justice Department representation in a civil suit to a government employee"); Office of Legal Counsel Memorandum, at 4 (Aug. 30, 1978) (analyzing under C.F.R. § 50.15 and U.S.C. § 535(b) the "contours of the relationship between a Department attorney and an individual government employee whose representation has been undertaken"); Office of Legal Counsel Memorandum, at 1 (Nov. 30, 1976) (addressing question regarding situation where "[t]he U.S. Attorney's Office is currently representing both a Federal employee and the United States as defendants in a civil suit for damages" and the employee has told the Assistant U.S. Attorney information that could incriminate the employee).

[FN106]. See 6 Opinion of the Off. of Legal Couns. 626, 627 (1982) (stating, in context of proposal for certain kinds of inspector general investigations, that "evidence of criminal conduct 'uncovered' during the course of an investigation will be referred directly to the Department of Justice, as is required by 28 U.S.C. § 535") (emphasis added). The OLC recognizes in the crucial distinction between representation of the personal interests of a government employee and representation of the governmental interests of a government agency. See, e.g., 4B Op. of the Off. of Legal Couns. 749, 751 (1980) (distinguishing between representation of personal interests and governmental interests).

[FN107]. 418 U.S. 683 (1974).

[FN108]. Id. at 706-13.

[FN109]. Id. at 687-88.

[FN110]. Brief for President Nixon, supra note 68, at 122-31. Rule 17 requires that the government demonstrate relevance and admissibility when seeking a trial subpoena. The Rule 17 standard for grand jury subpoenas is more relaxed, reflecting the different goals of grand jury investigation. See United States v. R. Enterprises, Inc., 498 U.S. 292, 297-301 (1991).

[FN111]. Brief for President Nixon, supra note 68, at 48-86.

[FN112]. Id. at 86-87.

[FN113]. Nixon v. Sirica, 487 F.2d 700, 717 (D.C. Cir.1973).

[FN114]. Nixon, 418 U.S. at 700.

[FN115]. Id. at 708.

[FN116]. Id. at 705.

[FN117]. Id. at 708.

[FN118]. Id.

[FN119]. Id. at 710 (quoting C&S Airlines v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948)).

[FN120]. Id. at 712 n.19.

[FN121]. Id.

[FN122]. Id. at 709 (quotation marks omitted).

[FN123]. Id.

[FN124]. Id. at 712-13.

[FN125]. Id. at 714.

[FN126]. The privilege considered in Nixon was the privilege for presidential communications, not the more general executive privilege for deliberative processes. The deliberative process privilege is, of course, even less weighty than the presidential communications privilege. See In re Sealed Case, 121 F.3d 729, 745 (D.C. Cir.1997).

[FN127]. See Files of Justice Thurgood Marshall, United States v. Nixon, 418 U.S. 683 (1974) (available at Library of Congress).

[FN128]. Id.

[FN129]. Id. This memo is veryimportant as an historical matter. Justice White stated that President Nixon would have been entitled to withhold the tapes had some higher standard been adopted. Those who currently favor the adoption of such a higher standard must come to grips with that fact--and how it might have altered the course of Watergate.

[FN130]. Id.

[FN131]. As reported in The Brethren, Justice Powell had last-minute reservations about the legal standard and said at the conference on July 23 that he was considering a last-minute concurrence because "[t]hey were ruling that any grand jury could subpoena material from the President in a criminal investigation. That was too sweeping. They could, and they should, rule more narrowly. ..." BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN 409 (1979). Woodward and Armstrong report that the room "erupted" and Justice William Brennan

"made an impassioned plea for unanimity." Id. Justice Powell then decided to adhere to the Chief Justice's opinion, and thus the opinion rejected a Nixon v. Sirica kind of standard and instead held that evidence meeting the requirements of Rule 17 must be produced unless there was a claim of state secrets. Id. at 410.

[FN132]. United States v. North, 910 F.2d 843, 950-53 (D.C. Cir.1990) (Silberman, J., concurring in part, dissenting in part).

[FN133]. Id. at 951. The issue arose in connection with a trial subpoena to President Ronald Reagan sought by North. The court affirmed the District Court's denial of the subpoena, ruling that such evidence would not have been material or favorable to the defense, and the majority therefore did not reach the question of privilege. Id. at 892 n.26 (per curiam).

[FN134]. Id. at 952.

[FN135]. Id. (citation omitted). Similarly, Professor Laurence Tribe has stated: "Ostensibly, United States v. Nixon suggests that, while presidential conversations are presumptively privileged, the presumption will always be overcome by a showing that the information is relevant to a pending criminal trial in federal court." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 281 (1988) (emphasis added).

[FN136]. In re Grand Jury Subpoena, 112 F.3d 910, 919 (8th Cir.1997). In his dissent on the facts of that case, Judge Richard Kopf agreed that "[a]t this elevated level of abstraction"--namely the "public interest"--"Nixon teaches that the President's general need for confidentiality ... is outweighed by a grand jury's need for evidence of the truth." Id. at 936 (Kopf, J., dissenting).

[FN137]. Id. at 918 n.9.

[FN138]. See In re Sealed Case, 121 F.3d 729 (D.C.Cir.1997).

[FN139]. Id. at 754.

[FN140]. See Nixon, 418 U.S. at 712 n.19 ("We are not here concerned with the balance between the President's generalized interest in confidentiality and the need for relevant evidence in civil litigation, nor with that between the confidentiality interest and congressional demands for information ....").

[FN141]. In re Sealed Case, 121 F.3d at 754.

[FN142]. Id.

[FN143]. Id.

[FN144]. Id.

[FN145]. Id. at 757.

[FN146]. Id. at 755. See also id. at 760 (noting, in explaining standard, that "[h]ere, unlike in the Nixon cases, the actions of White House officers do not appear to be under investigation").

[FN147]. Id. at 761.

[FN148]. Id. at 756.

[FN149]. The Court said that "[i]n practice, the primary effect of this standard will be to require a grand jury to delay subpoenaing evidence." Id. at 756 (emphasis added).
Any open-ended balancing test requiring some higher need showing would violate the Supreme Court's repeated emphasis that the criminal process should not tolerate such delays. See, e.g., United States v. R. Enterprises, Inc., 498 U.S. 292, 298 (1991) ("grand jury proceedings should be free of such delays" that proposed multifactor test would cause); Branzburg v. Hayes, 408 U.S. 665, 705 (1972) (under proposed heightened relevance standard, "courts would ... be embroiled in preliminary factual and legal determinations with respect to whether the proper predicate had been laid").

[FN150]. Jaffee v. Redmond, 518 U.S. 1, 9 (1996) (quotation marks omitted).

[FN151]. Branzburg, 408 U.S. at 691 n.29, 686.

[FN152]. Nixon, 418 U.S. at 710.

[FN153]. The Office of Legal Counsel has not issued an opinion about the application of Executive privileges in criminal proceedings, as the Eighth Circuit correctly recognized. See In re Grand Jury Subpoena, 112 F.3d 910, 921 n.10 (1997). Even for purposes of congressional inquiries, moreover, the OLC has stated that "communications between the Attorney General, his staff, and other Executive Branch 'clients' that might otherwise fall within the common law attorney-client privilege should be analyzed in the same fashion as any other intra-Executive Branch communications." 10 Opinion of the Off. of Legal Couns. 68, 78 (1986) (emphasis added).

[FN154]. United States v. Arthur Young & Co., 465 U.S. 805, 817-18 (1984) (emphases added).

[FN155]. MCCORMICK ON EVIDENCE § 87.1, 321 (J. W. Strong ed. 1992).

[FN156]. 24 Charles A. Wright & Kenneth W. Graham, Federal Practice and Procedure § 5475, 126-27 (1986).

[FN157]. Restatement (Third) of the Law Governing Lawyers § 124 cmt. b (1996) (Proposed Final Draft No. 1)

(also stating that "unlike persons in private life, a public agency or officer has no autonomous right of confidentiality in communications relating to governmental business").

[FN158]. In re Grand Jury Subpoena, 112 F.3d at 920.

[FN159]. Id. at 921.

[FN160]. Id.

[FN161]. See supra notes 89-91 and accompanying text.

[FN162]. The President at the time the information is sought controls the privilege. With respect to the attorney-client privilege (as opposed to the Presidential communications privilege), a President no longer in office would have no authority to assert the privilege. See CFTC v. Weintraub, 471 U.S. 343, 349 & n.5 (1985) (stating that common-law privilege for entities belongs to current management, not former management).

[FN163]. See Nixon, 418 U.S. at 712; cf. Branzburg, 408 U.S. at 691.

[FN164]. See Branzburg, 408 U.S. at 700.

[FN165]. See 4B Opinion of the Off. of Legal Couns. 749, 751 (1980) ("This Office has long held the view that the Government may not participate on both sides of a federal criminal investigation.").

[FN166]. The President (or relevant agency head) can require that the employee cooperate in an internal agency investigation. See 4B Opinion of the Off. of Legal Couns. 421, 427 (1980) ("The obligation of public officials to answer questions related to the performance of their public duties is well- recognized"). To be sure, an agency employee questioned by an agency attorney may refuse to answer questions out of a fear of self-incrimination, although the failure to answer questions may lead to his dismissal. See LaChance v. Erickson, 118 S.Ct. 753, 756 (1998) ("It may well be that an agency ... would take into consideration the failure of the employee to respond.").
The government employee who does not claim the Fifth Amendment and speaks to the attorney could be investigated or prosecuted based at least in part on the communications to government attorneys (Oliver North, for example). But that is a good result: Insulating government employees from criminal investigation and prosecution has never been considered a governmental interest that justifies withholding relevant information from the federal grand jury. Indeed, the only governmental interest is precisely the opposite.

[FN167]. Morrison, 487 U.S. at 699 (Scalia, J., dissenting).

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