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## Review Essay: What We Knew or Should Have Known About the Independent Counsel

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## REVIEW ESSAY: WHAT WE KNEW OR SHOULD HAVE KNOWN ABOUT THE INDEPENDENT COUNSEL

ERIN DALY\*

Bob Woodward, *Shadow: Five Presidents and the Legacy of Watergate* (Simon & Schuster 1999); Richard A. Posner, *An Affair of State: The Investigation, Impeachment and Trial of President Clinton* (Harvard University Press 1999)

Since the end of President Clinton's impeachment trial in February 1999, a slew of books about the events that led up to it have appeared in bookstores. Two books that shed light on the workings of the Office of Independent Counsel and so are of particular relevance to this Symposium are Bob Woodward's *Shadow: Five Presidents and the Legacy of Watergate* and Richard Posner's *An Affair of State: The Investigation, Impeachment and Trial of President Clinton*. Not surprisingly, the approaches taken by one of the nation's foremost political journalists and one of the nation's foremost judges are quite distinct.

*Shadow* presents a factually dense, longitudinal study of, in Woodward's words, "the most important moments . . . when the honesty and truthfulness of the presidents and those closest to them were challenged."<sup>1</sup> Posner's book, like a well-written opinion, provides only the facts necessary to understand the legal and political analysis. Although neither book is primarily concerned with the efficacy of the independent counsel statute, both (whether intentionally or not) effectively raise important questions about the statutory scheme and they provide some insightful historical and analytical background information that goes a long way toward answering those questions. That both books are worth reading is a testament to the good writing, since in both cases the authors are fighting the uphill battle of telling us a story we already know—too well.

*Shadow* surveys how the five presidents who succeeded Richard Nixon did or did not heed the lessons (that Woodward thought they should have learned) of Watergate.<sup>2</sup> Because many of the scandals involved independent counsels under the Ethics in Government Act, including especially the Iran-Contra and Clinton-Lewinsky matters, this overview provides a useful long-range perspective on how the Act has affected the investigation and management of the scandals that seem

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1. BOB WOODWARD, *SHADOW: FIVE PRESIDENTS AND THE LEGACY OF WATERGATE* xiii (1999). Woodward says the book is not a "history of all the scandals and investigations that occurred during their administrations," but because that is exactly how it reads, it is in fact quite a useful (if incomplete) survey of the uses of the independent counsel. *See id.*

2. I don't think it's giving away too much to say at the outset that for Woodward the lessons of Watergate are, first, that facts relating to questionable activity should be disclosed early and often and, second, that "outside inquiries [should not] harden into a permanent state of suspicion and warfare." *See id.* at 514. Query whether the book benefits from Woodward's hiding this ball until the Epilogue.

inevitably to plague presidential administrations. (More than half of *Shadow's* 500 pages are devoted to Clinton). The book reads exactly as one would expect from Woodward: a moment-by-moment account of important events, replete with quotations of usually private conversations among people at the highest levels of government. Page after page of riveting detail evidence Woodward's thorough research, consisting primarily of interviews and review of notes, diaries, and memoranda of highly placed people.<sup>3</sup> From Woodward we get just the facts, unencumbered by editorial commentary or analysis. At the end of each president's section, there is a very brief effort to summarize how well each one did in heeding Watergate's lessons. But Woodward does not present himself as a legal analyst, so although these provide closure and therefore are useful from a literary standpoint, they do not tackle the difficult questions.<sup>4</sup>

Posner's book, on the other hand, is a more or less legal analysis of the impeachment of President Clinton and the events that led up to it. He does not pretend to give us the inside scoop. He says that his book is based exclusively on the public record.<sup>5</sup> No private interviews, no "knowledgeable sources," no

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3. The presentation of the facts has, of course, come under intense scrutiny. Woodward's style is to present conversations as his sources tell him they occurred. Thus, he relies heavily on memory and notes of the individuals who agree to be his sources (and one can tell from the less-than-friendly treatment of others, as well as by their absence in his notes, who did not cooperate). The style is certainly effective, but perhaps to a fault: the writing is so good, it's hard to know whether it's fact or fiction.

Furthermore, the degree of detail is sometimes frankly unnerving. Either Woodward is making up the details (for reasons that are hard to fathom since padding can only jeopardize his justifiably excellent reputation for excavating truly important information) or he is not making them up, and they can be found in diaries, records of conversations, etc. If the latter is true, it shows an uncanny attention to irrelevancies by people who should have better things to think about. How does Woodward know, for instance, that President Reagan said "Oh boy!" in a meeting one day, *see* WOODWARD, *supra* note 1, at 141, or that when Warren Rudman and David Souter dined, "Souter had a salad, Rudman a sandwich." *See id.* at 181. Who wrote this down? Who remembered it? Who cares?

4. At the end of Carter's section, for instance, Woodward simply says that Carter's fatal flaw was that he broke his campaign promise that he would always tell the truth. *See id.* at 87. Reagan's section ends with the report of an interview with Lawrence Walsh since Reagan's health made a personal interview with him impossible. *See id.* at 168-70. Bush's section ends with an extensive quotation of the letter George Bush wrote Woodward explaining why he would not be interviewed. *See id.* at 220-23.

5. *See* RICHARD A. POSNER, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT AND TRIAL OF PRESIDENT CLINTON 3 n.7 (1999). Posner states that:

I have not tried to go beyond the public record of the facts. I am not a journalist or a detective or even an habitu  of the World Wide Web. I have not conducted interviews, or rested conclusions on any of the rumors that continue to swirl around the controversy, although, while trying to avoid speculation, I have not hesitated to draw the kind of inferences that judges and jurors are permitted to draw from a public record.

*Id.*

review of the private diaries. A lot of careful legal and factual research and Posner's own intellectual, powerful writing and legal acumen drive the narrative.

His initial premise is that these events have long-lasting significance in part because they expose institutional weaknesses. This exposure, he indicates, is not necessarily a bad thing, since we probably expect too much of our institutions anyway; if they are weak, that weakness should be patent and not latent.<sup>6</sup> Among the institutions that were found wanting—too “brittle” in Posner's words<sup>7</sup>—were: all three branches of the federal government (the presidency of course, both houses of Congress during the impeachment and trial, and the “inept”<sup>8</sup> Supreme Court, whose duo of hyperformalist decisions in *Morrison v. Olson*<sup>9</sup> and *Clinton v. Jones*<sup>10</sup> made this crisis possible); the academic community, for being too quick to defend the President and too slow to retract when indisputable or at least undisputed facts became known; and the trial bar, which argued poorly and acted worse.<sup>11</sup> Indeed, he gives the impression of having been virtually compelled to write about this because no one else was doing an adequate job. Lest anyone object to a federal judge undertaking this task, Posner assures us (unconvincingly in my view) that he is completely objective, as a federal judge ought always to be.<sup>12</sup>

The underlying structure of Posner's argument is that the criminal should not go free just because the constable has blundered.<sup>13</sup> In his first chapter he shows that President Clinton committed crimes—many of them—so that in subsequent

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6. *Id.* at 14–15.

7. *Id.* at 5.

8. *See id.* at 14 (referring to the Court's “ineptitude”).

9. 487 U.S. 654 (1988).

10. 520 U.S. 681 (1996).

11. The entire book is an elaboration of these accusations, but Posner summarizes them at 14–15.

12. “[C]riticism of the President's conduct, and that of other political actors in the drama, crosses party lines, indeed is nearly universal. I have striven to avoid any hint of partisanship in my analysis, and I hope that to the extent I have succeeded this will neutralize the objection [of a federal judge writing about this subject.]” *Id.* at 3. His section on the behavior of Ken Starr seems particularly imbalanced, though other sections seem to follow the logic that if I attack everyone and everyone hates me, I must be doing something right.

13. *See* POSNER, *supra* note 5, at 60.

To turn the trial of a suspected criminal into a trial of the law-enforcement process complicates and protracts the trial and distracts and confuses the tribunal. It produces acquittals that excuse a greater wrong to punish a lesser one. Better that the defendant and the enforcer should be tried separately and punished separately than that they should be tried together and the enforcer punished by annulling the defendant's punishment.

*Id.*

chapters he can and does use the "defendant's" guilt as a given. Any mistakes made by Starr or others are therefore harmless.<sup>14</sup>

In terms of pure cleverness, the cover of Posner's book deserves mention. Posner's argument that the Clinton-Lewinsky affair is some kind of a large moral drama (as well as a political and legal one), is illustrated by a classical painting, set against an enshadowed photograph of the Capitol. In the painting, an ardent Paulo kisses a coy Francesca (who is dropping a book—*Vox* perhaps?), while Francesca's husband lurks, dagger in hand, behind a curtain. Lost in their private moment, the lovers are not aware of the impending danger. But like any parties in an illicit love affair, they would have to be crazy not to notice the jealous husband, or zealous prosecutor, waiting to pounce. The painting is a perfect representation of Posner's view of the events: whereas many others have pitted Clinton and Starr against each other with Lewinsky playing merely what Hollywood calls the love interest, the central fact of this story for Posner is the sexual relationship between Clinton and Lewinsky. Starr just happened to be at the right place at the right time, dagger at the ready. The image represents Posner's view of the events in another way as well: though Clinton consistently, if absurdly, maintained his passivity in his relationship with Lewinsky, the Paulo figure who represents him is clearly the pursuer. In any event, Posner seems to be saying, they both end up in hell.<sup>15</sup>

Woodward's cover also deserves mention, but for a different reason. The cover photograph is a wonderful representation of all five living presidents who are the subject of the book looking pensive and solemn, apparently at Richard Nixon's funeral. The cover brilliantly suggests that, at the time the photograph was taken, the men were contemplating the exact subject matter of the book: the shadow that Nixon's presidency cast on them. Ironically—or perhaps fittingly—the photograph turns out to have been doctored, the presidential wives having been airbrushed into oblivion.<sup>16</sup> The temptation to judge this book by its duplicitous cover is almost unavoidable.

Arguably, the books are most useful when considered in tandem. From Woodward, we get that fly-on-the-wall sense that we were present at all the important events, public and private. From Posner, we get an intellectual distance from the events, which permits us to process and analyze what we saw when we were flies on the wall. Their different methods and goals preclude comparing them or judging one by the other's standards. Despite these differences, however, the books intersect exactly where this Symposium begins:

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14. This, at least, is the IC-centric description of the book which I am using for purposes of this Symposium. Others, more focused on legislative behavior or some other aspect of the crisis, might focus on the middle sections of the book.

15. Although in Dante's story, Francesca's husband spends eternity in a lower circle of hell than Francesca and Paulo.

16. See, e.g., John McCaslin, *Dark Shadow*, WASH. TIMES, July 6, 1999 at A7.

what, if anything, did we lose when the independent counsel law disappeared into the sunset?

Because Woodward's book is long on conversation and short on analysis, legal or otherwise, the burden falls to the reader to discern whatever lessons might be learned from the story. A few things become clear, however, as twenty-five years of scandals unfold. One curious conclusion that might be drawn is that Watergate did not cast a very large shadow at all on future presidents. Neither the presidents, their men, nor Woodward himself mentions Watergate very often, and when it is mentioned, the reference is fleeting. If the men at the funeral were contemplating Nixon's shadow, it might very well have been the first time, for all that is mentioned in the book about it. Obviously Ford dealt directly with it, confronted as he was with the challenge of succeeding Nixon and the option of pardoning him. But nothing in the book suggests that either Ford, Carter, Reagan, Bush, or Clinton otherwise spent much time trying to glean any lesson from Nixon's experience, dwelt much on the condition in which Nixon left the presidency, or considered Nixon as a model to follow or avoid when managing their own scandals. Of course, it wouldn't be in Woodward's interest to draw attention to the fact that there wasn't much there. Given that it was a great idea to write about Watergate's legacy and that Woodward was probably the best person to do the follow-up report, one can not blame Woodward for declining to be explicit on this point. In this sense, *Shadow* is an apt title: although shadows are always there, they are often unnoticed and rarely do they change the course of events.

Perhaps one reason for this unexpectedly dormant legacy is that, as the book makes clear, Watergate was virtually *sui generis*. There isn't much one can learn from a unique confluence of events since, by definition, there won't be an opportunity to use the lessons. But the Watergate Congress thought it learned a lot from the experience and what it thought it learned, it put into the Ethics in Government Act. As the uses of the Act documented in *Shadow* illustrate, however, Congress's solution was ill-suited to the vast majority of political scandals, either before or since. Just as bad facts make bad case law, they also apparently make bad statutory law.

Watergate was aberrational in that President Nixon was directly involved in the events that Special Prosecutor Cox was investigating. In the Saturday Night Massacre—the central feature of Watergate that shaped the independent counsel law—Nixon fired Cox because Cox came too close to the White House and threatened Nixon politically and personally. He had the power to fire Cox, and so he did. The statutory response to Watergate was an elaborate, Rube-Goldbergesque scheme to prevent that particular set of events from repeating itself. But as Woodward's book shows, most scandals do not directly involve the president. From Hamilton Jordan to Bruce Babbitt, the targets of the independent counsel investigations are by and large subordinate to the president. And, when the heat is on a subordinate, the president is more likely to fire the trouble-causing subordinate than the prosecutor. This is true of investigations

large and small, from Bert Lance and John Sununu to John Poindexter and Oliver North. Where the target is an underling, it is the underling and not the prosecutor who threatens the political status of the president. Firing the subordinate ends the controversy, with little or no political cost. Firing the prosecutor, on the other hand, has serious political consequences and, furthermore, may be ineffectual: as Nixon's story shows, even where there is no statutory protection, firing the prosecutor is political suicide and it is likely to lead to the appointment of a new prosecutor, who is likely to have at least as much zeal as his or her predecessor. The prosecutor stays in office then, not because of the statutory protections (which can be overcome when necessary), but because of *realpolitik*. Thus, where the target is an executive official subordinate to the president, the Ethics in Government Act's elaborate structure is unnecessary to protect the independent counsel because he or she is protected by the president's political self-interest.

The Act becomes relevant only when the independent counsel is sniffing at the White House door. The only incident that Woodward recounts in which the statutory obstacles to firing the independent counsel might have protected him involved George Bush, in the waning period of Lawrence Walsh's investigation. By 1991, one of Bush's lawyers described Walsh as having "a wish list and George Bush's name is on the top of it."<sup>17</sup> Bush's response to the pressure is recounted by Woodward as follows:

"Take that, Walsh!" Bush shouted, hitting the plastic mallet on his desk. Bang! Bang! Bang! "Take that, Walsh!" He hit the desk some more, a look of relish and anger on his face. "I'd like to get rid of this guy," the president said. [¶] [White House attorneys] Gray and Lytton didn't think Bush had a plan or did intend to fire Walsh, but Bush was visibly frustrated. Lytton could see that his wake-up call had aroused the sleeping president.<sup>18</sup>

This is the only instance in the book in which a president expresses the desire to fire (or fire *at*) the independent counsel, and it is worth noting that this did not occur until Walsh was investigating the President himself. Though Woodward is not explicit on this point, one reasonable inference is that if there is ever a need for an investigator who is independent in the constitutional sense, it is in those rare instances where the target is the president himself—when the president could be so threatened by an investigation that he might risk political suicide in order to get rid of the investigator. That is what Nixon did. One can imagine that, even knowing Nixon's fate, Clinton might have risked the same thing had Starr not been so darned independent.<sup>19</sup> But this is only true where the target is

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17. WOODWARD, *supra* note 1, at 193.

18. *Id.* at 192.

19. Perhaps an unintended consequence of the independent counsel statute is that it saves the country and a president from that president's own worse instincts. This is true not because a president hounded by an independent counsel will be deterred from committing the wrongful acts

the president himself (or, possibly, the First Spouse). Otherwise, the Act is cumbersome and unnecessary.

Posner's book takes us in the opposite direction, arguing that the Act should not apply to the president.<sup>20</sup> He faults the Supreme Court opinion in *Morrison v. Olson*, which upheld the relevant portions of the Ethics in Government Act, for failing to leave open the question of the Act's constitutionality as applied to the president.<sup>21</sup> Further, he faults Clinton's attorneys for failing to argue that the opinion should be limited to situations where the target of the investigation is at the level of an assistant attorney general (or at least to where the target is anyone other than a president).<sup>22</sup> When the Act applies to the president, he suggests, the results can be ridiculously far reaching, and dangerously so, in a democracy that cares about checks and balances.<sup>23</sup>

But in the course of [Ken Starr's investigation], and surely without envisaging any of the consequences that ensued, he brought about the public exposure of the sex lives of several prominent Republicans, the downfall of Newt Gingrich from the Speakership of the House of Representatives and of his designated successor, the defeat of Republican electoral hopes in the 1998 midterm elections, the resolution of budget disputes on President Clinton's terms, the political rehabilitation of Mrs. Clinton, the deferral of congressional action on a number of policy issues, the

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in the first place; recent history has shown that this will not invariably happen. Rather, the statute militates against dismissing the investigator. In Clinton's case, for instance, the statute might have prevented Clinton from firing Starr, though surely he would have liked to. Had the statutory hurdles not been there, he very well might have, which in turn would probably have resulted in the total evaporation of his political support, the only thing standing between him and removal from office. A president can win a fight against an independent foe, but not against a martyred one.

It is ironic, then, that the second-generation reaction to Nixon—the reaction of the 1990's rather than of the 1970's—is that an independent counsel is unnecessary because the right result occurred in Watergate even without it. One might well say that the right result occurred in Clinton's case as well, perhaps because of the independent counsel. In the former case, Cox was fired, but Nixon was brought down much further. In the latter case, Starr survived, but so did Clinton, and Clinton's reputation is probably the stronger for having withstood Starr's investigation.

20. Stephen Griffin elaborates on this point, focusing on Attorney General Janet Reno's decision to extend Ken Starr's investigation to cover the President personally. See generally Stephen M. Griffin, *Presidential Immunity From Criminal Process: Amateur Hour at the Department of Justice*, 5 WIDENER L. SYMP. J. 49 (2000).

21. See POSNER, *supra* note 5, at 13, 218-25.

22. See *id.* at 224.

23. See *id.* Posner notes that "[a]n individual having no political legitimacy, because appointed by a panel of judges and that at two [or three, according to the footnote] removes from an elected official . . . , would thus all of a sudden become one of the most powerful people in the United States." *Id.* "Operating essentially without political check or budgetary constraint," the independent counsel is a "bull in a political china shop." *Id.* Of course, an independent counsel act that did not apply to the president would be something of a historical nonsequitur. Without President Nixon's involvement, there would be no Watergate, and without Watergate, there would be no independent counsel act.



impeachment of the President for crimes that he would not have committed had there not been an independent counsel investigation, and even the firing of the editor of the *Journal of the American Medical Association*.<sup>24</sup>

An independent counsel investigation of an assistant attorney general, or even of a cabinet member, could not possibly have had the ramifications of Starr's investigation of Clinton. But, according to Posner, it is not appropriate to blame Starr personally for this debacle since any independent counsel would have gone more or less where Starr went and would have reached more or less the same conclusions, the odd incidence of harmless error notwithstanding.<sup>25</sup> The fault, Posner says, lies with the statute when applied to the president.<sup>26</sup>

Exactly why the ramifications become so extraordinarily significant when the target is the president becomes clear when the books are considered together. Woodward says that a principal lesson of Watergate is: "do not allow outside inquiries, whether conducted by prosecutors, congressmen or reporters, to harden into a permanent state of suspicion and warfare."<sup>27</sup> But together the books show that, when the president is the target, this state of warfare is inevitable. When the investigation targets a subordinate, the investigation ends when the subordinate is either fired, acquitted, or not indicted. In one way or another, the controversy ends relatively quickly and with relatively few ramifications. When the target is the president himself, however, there is no logical stopping point short of impeachment.<sup>28</sup> Indeed, when the stakes are at their highest, there is no reason why a president should *not* dig in his heels. And this, of course, makes impossible the constructive or efficient resolution of the controversy.

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24. See *id.* at 224-25 (citation omitted).

25. See *id.* at 70. Posner also notes that:

Another independent counsel might, in deference to the Presidency or to privacy, have proceeded more cautiously in the investigation of Clinton's and Lewinsky's conduct in the *Jones* case. But in view of Linda Tripp's tapes, which were bound to surface sooner or later, it is unlikely that a responsible independent counsel would simply have dropped the matter without any investigation, or have taken the President's unconvincing denials at face value and thus pretermitted the inquiry that led to the semen-stained dress.

*Id.*

26. See POSNER, *supra* note 5, at 89-94.

27. WOODWARD, *supra* note 1, at 515. Posner takes the "warfare" metaphor literally, with a long and well-executed essay at the end of the book, showing the parallels between war and the Starr-Clinton feud, including how both are marked by emotionality (and therefore polarization), uncertainties, and blunders on each side. See POSNER, *supra* note 5, at 248-61.

28. Indeed, it is arguable that people called for Clinton's resignation when the investigation first turned to Monica Lewinsky and again when the Starr report was released not so much because they wanted Clinton punished or removed from office, but simply because they did not want to hear more about it.

Woodward's comparison between Reagan and Clinton is illustrative. When Howard Baker became President Reagan's chief of staff, the very first thing Baker did was set up and manage an internal investigation of the White House in order to "find out, to the best of [his] ability, what [had] happened on Iran-Contra, and everything else."<sup>29</sup> In his initial conversation with the President about accepting the job, Baker negotiated complete access to every record in the White House, and insisted on having his own lawyer, who in turn promptly hired a deputy counsel. Between the three of them, they conducted a thorough internal investigation of the White House to determine the extent of Reagan's involvement in Iran-Contra (which, in fact, they didn't really succeed in doing). They managed a legal defense team of 67 people within the White House, reviewed more than 12,000 documents, and conducted 13 "long interrogations" of Reagan.<sup>30</sup> Woodward essentially commends the team for assiduously seeking the facts. This kind of self-examination was not preceded and, unfortunately, not followed.

Baker and the lawyers wanted to ferret out the facts, before the Congress or the Independent Counsel could, in order to manage the disclosures, but they also wanted to protect themselves. They wanted "to make sure that, in defending Reagan, the new team . . . did not get entangled themselves. John Dean and other Nixon administration lawyers had gone to jail in Watergate, and it was obvious that it was easy to be swayed by a president who demanded to be protected."<sup>31</sup> Reagan's men conducted a thorough investigation because they knew that, left to his own devices, the President would use all available resources to control the story to suit his needs. They used their independent corroboration of the President's denial of wrongdoing as a check on the President's unlimited power. For his part, since Reagan was not a direct target of Walsh's investigation, he might have felt as though he had nothing to lose by permitting this full-scale internal inquiry.

Clinton, on the other hand, was not only a target from the outset of Robert Fiske's and Ken Starr's investigations of Whitewater and Vince Foster's death, he was also, obviously, the target of Starr's investigation of the Lewinsky matter, as well as being the defendant in the Paula Jones case. Clinton, therefore, had incentive to use every weapon in his arsenal to fight Starr. Clinton's story, as related by both Woodward and Posner, is the flip side of Reagan's in this regard. Clinton's men were complicit, where Reagan's were independent. Clinton used his resources to control insiders, whereas Reagan encouraged independent investigation by insiders.

The story of Robert Bennett's efforts to learn the truth about his client's relationship with Lewinsky is an illuminating counterpoint to the Baker story. Unlike Baker, Bennett did not conduct an independent investigation of the

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29. WOODWARD, *supra* note 1, at 125 (italics in original).

30. See generally *id.* at 125-70.

31. See *id.* at 132.

President. According to Woodward, he asked Clinton on a few occasions about Clinton's relationship with Lewinsky but accepted the kind of evasive and non-responsive answers that neither Starr nor the public would countenance.<sup>32</sup> It is not at all clear why Bennett did not discern the truth.<sup>33</sup> There are enough indications that Bennett was suspicious of Clinton's story to query why he did not engage in the kind of independent investigation that Baker had done of Reagan or that Starr was doing of Clinton. One explanation might simply be that, with everything at stake, Clinton used his considerable resources—the prestige of his office, the charm of his personality—to blindsight Bennett.

What Woodward's and Posner's books show is how a besieged president will fight to the hilt. The combination of Clinton's extraordinary self-confidence, his ability to exact loyalty from almost anyone, and the unlimited resources at his disposal might have convinced him that he could cover up any wrongdoing. In fact, he was able to control the story for a long time. The point of the Office of Independent Counsel, though, is to counter a president's time, skill, and resources in order to uncover the cover-up. The prosecutor's statutory independence and virtually unlimited time and budget allow him to match, resource for resource, whatever is in a president's arsenal. Furthermore, in terms of sheer will to prevail, a president and an independent counsel are also matched, as each sees his place in history as resting on the outcome. With each one believing he has everything to lose from defeat, and nothing constraining each side's devotion to his cause, the inevitable result is full-scale war.<sup>34</sup>

The escalation of the Clinton-Starr feud is evident at many points along the way and even in the language used to describe it is full of violent metaphors and bellicose imagery. At various times, Woodward tells us that Starr was wounded in one way or another by something the other side did,<sup>35</sup> and that this turned into anger, which metamorphosed into prosecutorial zeal. When, for instance, Ken Starr learned of Hillary Clinton's "right-wing conspiracy" comment, "Starr was

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32. When Bennett asked the President about Lewinsky, Clinton responded, "Not a problem" and when Bennett pressed, Clinton's response was "I'm retired." *Id.* at 361. But the answer to whether he had a sexual relationship with Lewinsky could not be "not a problem." It was either "no" or "yes" and if the latter, it *was* a problem, notwithstanding the client's legal conclusions to the contrary.

33. At one point, Bennett asked the President "What might be the basis for alleging that Lewinsky had an affair with you? Has she ever been to the Oval Office? . . . Is there anything I'm not asking about her? . . . What haven't I asked?" *Id.* at 370. Clinton, according to Woodward, said "Absolutely nothing, no difficulty. . . . Clinton was blank." *Id.* Bennett concludes that "[a]fter this case is over . . . your reputation as a womanizer may go down the drain." *Id.*

34. In the case of Starr and Clinton, the only advantage that Clinton had over Starr was simply that people liked him more, and, ultimately, one might argue this is why Clinton eventually won the war, even though he lost every battle along the way.

35. See, e.g., WOODWARD, *supra* note 1, at 338 ("When Starr saw Clinton's words [about Starr's prosecution of Susan McDougal], he felt cut deeply and personally. The idea that he would encourage or knowingly accept—suborn—perjured testimony was outrageous.").

furious. He told his deputies that in his opinion the first lady had almost threatened potential witnesses. She was sending a message: This is war and anyone perceived to be hostile will be killed. He had to be calmed down.”<sup>36</sup> Posner, too, refers to this hardening of defenses, particularly in the context of Starr’s reaction to what Posner calls the “slander” campaign by people whom Clinton could have controlled but didn’t. After describing the “campaign of vilification” engaged in by James Carville, Abner Mikva, and Alan Dershowitz, and others, Posner says, “It is only speculation that Starr, whose demeanor is phlegmatic and who remained at least outwardly imperturbable throughout the ordeal (and it *was* his ordeal, as well as Clinton’s), was furious, or that if he was this influenced his conduct of the investigation.”<sup>37</sup> Posner continues, “It is an especially plausible conjecture that his subordinates, . . . redoubled their efforts to ‘nail’ Clinton. The harder they fought, the harder he and his supporters, some unscrupulous, fought back. The conflict escalated all the way to a Senate trial.”<sup>38</sup>

The paranoia existed on both sides and informed both sides’ strategies. When David Kendall found out that Starr’s investigation had expanded to include Lewinsky, he concluded:

So the probing into Clinton’s personal life was an iceberg after all. Starr’s moralism had crested and reached a dangerous new high. In Kendall’s view, Starr was not stark raving mad, but he had adopted religious rhetoric and was applying it to the law. An experienced prosecutor would have avoided this zealotry. Starr had commenced the final battle, the death struggle, Kendall thought, and someone was going out the door feet first.<sup>39</sup>

When the target is a president, neither side has any reason to fold before all the cards have been played. And when the investigation is being carried out at that highest level, with virtually unlimited resources, there are many, many cards to be played.<sup>40</sup>

When you put the implicit lesson of *Shadow* together with the explicit prescription of Posner’s book, you get a dilemma: on the one hand, the independent counsel law is only good for investigating the president; otherwise it is convoluted and unnecessary. On the other hand, the law is good for

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36. See *id.* at 396.

37. See POSNER, *supra* note 5, at 72.

38. See POSNER, *supra* note 5, at 72. He concludes, “It strikes me as unjust to blame the Independent Counsel’s office for this spiral.” *Id.* Posner provides no support at all for this conclusion that the White House alone should be held responsible for this double helix of antagonism.

39. See WOODWARD, *supra* note 1, at 387; see also *id.* at 398 (stating that “[t]he only strategy for the White House was to attack and make war, Kendall believed.”).

40. Michael deHaven Newsom’s article in this Symposium explores in great detail the idea of the “titanic battle” between the president and the independent counsel. Michael deHaven Newsom, *Independent Counsel? No. Ombudsman? Yes: A Parable of American Ideology and Myth*, 5 WIDENER L. SYMP. J. 141 (2000).

anything but investigating the president, where it is dangerous and uncontrollable. What is a legislator to do?

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One of the most commonly disputed questions arising from the independent counsel construct is the extent to which the prosecutor's statutory independence translates into unconstrainable discretion in practice. On this score, Woodward's and Posner's books dovetail. The two narratives, coming from different perspectives, combine to make a powerful indictment against any kind of independent counsel law. Woodward's book is, of course, not about the independent counsel per se but it nonetheless contains bountiful hints about the legitimacy and efficacy of the law in action. Its survey style provides a longitudinal narrative of how the law has operated over time and across a variety of political landscapes. Although many lessons might be learned about the operation of the law, I was struck by how much the investigations were shaped not by legal or even political considerations, but by the personalities of the prosecutors themselves and by their own, sometimes idiosyncratic, attitudes toward their unique tasks as independent counsels.

The first use of the independent counsel law, Arthur Christy's investigation of Hamilton Jordan's alleged cocaine use, was characterized by Christy's ambivalence about the seriousness of the charges in the first place. Although his investigation was thorough, it was brief and efficient.<sup>41</sup> Within six months he closed the investigation without returning an indictment against Jordan.<sup>42</sup> Throughout, he was professional and cordial towards his target. Woodward reports that he in fact sought guidance from the Attorney General, Benjamin Civiletti, but felt as though he was basically working from a blank slate.<sup>43</sup> The investigation would be whatever he wanted it to be.

In the case of Iran-Contra, one could infer from Woodward's book that Lawrence Walsh's own style also defined, to a large extent, the nature of his investigation. Walsh, Woodward says:

respected what Reagan had done so far as president. He did not sense public anger with Reagan, as had been the case with Nixon. He decided to move carefully. He would try to make cases against North and Poindexter, and then see what developed. He had no plan to prosecute Reagan, although many in the White House, Congress and the media assumed he was moving to lay the grounds to impeach the president. Walsh suspected that President Reagan knew about the diversion of millions of dollars from the Iran arms sales profits to his beloved

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41. See WOODWARD, *supra* note 1, at 73. "[Christy] thought about simply announcing that the case was closed on the grounds that no prosecutor would ever bring such a case, and no jury would ever convict." *Id.*

42. See *id.* at 81-82.

43. See *id.* at 72-73.

contras. But he couldn't project precisely where he was taking his investigation. "I sort of move as I feel," he said. His style was to be deferential to the president, but not to his men.<sup>44</sup>

By most accounts, Walsh's investigation matched this initial sketch. Any vitriol or vindictiveness that Walsh might have exhibited in the wake of Bush's pardon of five of Walsh's targets on Christmas Eve, 1992<sup>45</sup> would have come too late to affect the course of the investigations. In any event, any unstatesmanlike behavior may simply prove the larger point that the statute does not constrain any particular course of conduct, but may bring out the worst in anybody who comes under its spell. A different person in Walsh's shoes might very well have become vindictive much earlier on.

With respect to Kenneth Starr, much has been written about the degree to which his personal style influenced the course of his investigation. Both Woodward's account and Posner's show how events were in large part shaped by Starr and by his own personal decisions to proceed in one way or another. In both narratives, Starr starts out as even-handed. In the summer of 1995, Starr can still say "earnestly, 'I would do nothing to demean the presidency.'"<sup>46</sup> But, as time wears on, the Prosecutor and the President become increasingly antagonistic. By 1997, Starr "became more determined to find a criminal case to make against the Clintons,"<sup>47</sup> thus prompting the charge that he had inverted the normal chain of events in which a crime precedes the search for the criminal. By the summer of 1998, Starr is "constru[ing] his burden under the law to show what he thought happened, not to prove it,"<sup>48</sup> overstating the strength of his case against Clinton,<sup>49</sup> finding "the evidence more conclusive than anyone else in [his] office,"<sup>50</sup> insisting on the encyclopedic narrative in his referral over the objections of his senior staff,<sup>51</sup> and most importantly, reading as broadly as possible the statutory mandate to refer to the House of Representatives any evidence that "may" constitute grounds for impeachment.<sup>52</sup> (Curiously, despite this range in

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44. *See id.* at 131. George Bush's problem, of course, was that he started out as one of the President's men but ended up as the President.

45. *See id.* at 214-15.

46. *See* WOODWARD, *supra* note 1, at 286.

47. *See id.* at 353. "But Starr seemed more willing to continue than others on his staff. He was reluctant to close anything out while there was still a possibility." *Id.*

48. *See id.* at 418.

49. *See id.* According to Starr, senior members of his staff said that he had an overwhelming case but, according to Woodward, those aides said only that it was a strong circumstantial case. *Id.*

50. *Id.* at 419.

51. *See id.* at 453-54. Two of his top aides had suggested that the section on grounds for impeachment precede the long, sexual narrative. "Starr rejected their suggestion. 'I love the narrative!' Starr said." *Id.*

52. *See* 28 U.S.C. § 595(c) (1994).

attitudes towards his own job and towards his target, the strongest indictment of Starr's behavior that Woodward can muster is that "Starr had lost his way."<sup>53</sup>)

Posner takes a completely different route to reach essentially the same conclusion that the investigation is largely defined by the personality of the independent investigator. Private parties, and all three branches of the federal government are blamed; the only one to survive relatively unscathed is Kenneth Starr in the quasi-private, quasi-public Office of Independent Counsel. Starr is criticized at the margins, mainly for simple over-zealousness—investigating Clinton too thoroughly, and including too much evidentiary support in his referral to Congress.

Most of the irregularities of which the Independent Counsel's office was accused had no effect on the course of the investigation, notably the aggressive tactics used in the initial encounter with Lewinsky, which produced no cooperation from her. In any event, it is irresponsible to suggest that it was the sexual angle that energized Starr's investigation, especially since Starr had no previous prosecutorial experience and therefore perforce relied heavily on the advice of the experienced prosecutors who worked for him on how to proceed.<sup>54</sup>

In other words, Starr made virtually no mistakes, and those he made (including leaks to the press) were harmless error<sup>55</sup> and not his fault anyway. For instance, Posner says that even if one characterizes what Starr did as setting up Clinton by forcing him to testify under oath about a private illicit affair, and even if he did this in concert with Paula Jones' lawyers, this amounts to no more than a sting operation, and "[s]ting operations are not unlawful."<sup>56</sup> But for Posner, Starr's extraordinary power, even within the confines of the law, indicate that the problem is with the law and not with the prosecutor; Posner repeatedly suggests that there are no real lessons to be learned from this series of events, except perhaps that the independent counsel law should not be renewed.<sup>57</sup>

Of course comparing the investigations of Arthur Christy, Lawrence Walsh, and Kenneth Starr may be a little like comparing apples and oranges; there are so many legal and factual distinctions among the three situations, it is difficult to know exactly how to account for the contrasting investigations. But the brief sketches permitted by Woodward's survey and reinforced by Posner strongly

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53. See WOODWARD, *supra* note 1, at 516. This is the same note on which Woodward ends his epitaph of Clinton: "Had the scandals and investigations so defined and crippled the president, ingrained a sense of desperate struggle and blind determination, that he had lost his way?" *Id.* at 517.

54. See POSNER, *supra* note 5, at 70.

55. See, e.g., *id.* at 83.

56. *Id.* at 78. Posner explains that the sting operation, being lawful, is at most "a potent argument against the independent counsel law, without which such a scheme would be unthinkable." *Id.*

57. See POSNER, *supra* note 5, at 15. After surveying the institutions whose weaknesses were exposed by the Clinton scandal, Posner says: "Not all these weaknesses can be cured; perhaps none can be, except to let the independent counsel law expire." *See id.*

suggest that, for instance, Walsh would have handled the investigation of Clinton quite differently than Starr did, and both would have been well within their statutory authority. The point here is only that the independent counsel law is so broad that it authorizes, indeed encourages, both apples and oranges, leaving it only to the person who fills the office to define the contours of his or her own power. The constitutional, statutory, institutional, political, and professional checks that keep ordinary investigations and prosecutions within the Department of Justice from becoming arbitrary exercises of personal will are absent from the independent counsel law.<sup>58</sup> And when we see how the law has operated in a variety of situations, as Woodward's book allows us to do, we see the consequences of withdrawing the checks.<sup>59</sup>

If it is true that the statute leaves it almost entirely to the prosecutor to decide how deferential or aggressive or thorough to be and if we (as the public, including Posner and Woodward) are still not satisfied with the counsel's conduct, then again it is the statute that turns out to be the problem.<sup>60</sup> As Posner says, it is the statute, and not Starr's violation of it, that permits someone to "turn[] the White House upside down in order to pin down the details of Clinton's extramarital sexual activities so that Paula Jones might have a shot at winning her long-shot suit for redress for an offensive but essentially harmless advance made (maybe) by Clinton before he became President."<sup>61</sup> It is the statute that gives someone the full range of governmental powers to do what Starr did, with only minimal checks.<sup>62</sup>

It is at this point that people tend to invoke what is now ubiquitously referred to as the prescient dissenting opinion of Justice Scalia in *Morrison v. Olson*.<sup>63</sup> Whereas the majority in that case was willing to believe that the political and judicial checks on the independent counsel were sufficient to avoid any separation of powers problems, Scalia steadfastly warned that the law would lead to exactly where Ken Starr took it.<sup>64</sup> As Scalia wrote:

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58. The point is made more thoroughly elsewhere, including in articles in this Symposium. See, for instance, H. Geoffrey Moulton, Jr. & Daniel C. Richman, *Of Prosecutors and Special Prosecutors: An Organizational Perspective*, 5 WIDENER L. SYMP. J. 79 (2000).

59. On the level of theory, it is certainly true that the purpose of placing the independent counsel's office outside the Department of Justice is to remove the checks that could otherwise constrain the investigation and prosecution of high-level government officials. As a practical matter, however, the actual effectiveness of those checks on DOJ attorneys is certainly open to debate. The difference, therefore, between the "independent" counsel and the U.S. Attorneys may in practice not be all that great. This is especially true to the extent that the revolving door operates to bring DOJ attorneys into the independent counsel's office.

60. Not surprisingly, this is also the gist of Kenneth Starr's testimony before the House Judiciary Committee arguing against renewal of the statute.

61. See POSNER, *supra* note 5, at 91.

62. See *id.* at 78.

63. 487 U.S. at 697-734 (Scalia, J., dissenting).

64. *Id.* at 732.



How frightening it must be to have your own independent counsel and staff appointed, with nothing else to do but to investigate you until the investigation is no longer worthwhile—with whether it is worthwhile not depending upon what such judgments usually hinge on, competing responsibilities. And to have that counsel and staff decide, with no basis for comparison, whether what you have done is bad enough, willful enough, and provable enough, to warrant an indictment. How admirable the constitutional system that provides the means to avoid such a distortion. And how unfortunate the judicial decision that has permitted it.<sup>65</sup>

As a matter of constitutional law, of course, Scalia lost that argument, so we are left with only political or pragmatic reasons for rejecting the law now. And, as so often happens in our political culture, these arguments bring us back to James Madison. In the end, the strongest argument for the law—that men are not angels and therefore we need effective checks to keep them in line—is an even stronger argument against the law: independent counsels are not angels either.

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65. *Id.*