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# THE “ONGOING CRIMINAL INVESTIGATION” CONSTRAINT: GETTING AWAY WITH SILENCE

Luke M. Milligan\*

## INTRODUCTION

The presidencies of William J. Clinton and George W. Bush are in many ways kindred. It seems certain that both will be noted by historians for their determined and mechanistic evasions of public scrutiny. The misleading insinuations, failed memories, perjuries, obstructions of justice, and novel assertions of executive privilege have been exposed sharply and criticized roundly by Congress, academics, and the press.<sup>1</sup> Still, there is a particular tactic of presidential evasion, utilized by Clinton and Bush alike, that has been left undisturbed.<sup>2</sup> This is the White House’s increasingly regular practice of claiming that the President and his advisors are “constrained” from publicly commenting on particular matters due to the existence of an “ongoing criminal investigation.” In many minds, the invocation of this constraint—no matter the circumstances—reflexively transforms a White House stonewall into an instance of “responsible” and “principled” presidential restraint.<sup>3</sup> Perhaps not surprisingly, both administrations have failed to address even the most basic issues surrounding this constraint. Issues such as: What are its origins? Are these origins legitimate? And how far does the constraint reach? (The Bush

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<sup>1</sup> See, e.g., TED GUP, *NATION OF SECRETS: THE THREAT TO DEMOCRACY AND THE AMERICAN WAY OF LIFE* (2007); GEOFFREY R. STONE, *TOP SECRET: WHEN OUR GOVERNMENT KEEPS US IN THE DARK* (2007); Neil Kinkopf, *Executive Privilege: The Clinton Administration in the Courts*, 8 WM. & MARY BILL RTS. J. 631 (2000); Mark J. Rozell, *Executive Privilege Revived?: Secrecy and Conflict During the Bush Presidency*, 52 DUKE L.J. 403 (2002).

<sup>2</sup> This does not suggest that the tactic has not been realized by members of the press corps. See Dan Froomkin, *Some Explaining to Do*, washingtonpost.com, <http://www.washingtonpost.com/wp-dyn/content/blog/2007/03/07/BL2007030701183.html> (Mar. 7, 2007) (“[T]he stench of corruption has taken formal residence at the White House. The president and vice president can pretend it’s not there, and can continue to hide behind their weak and transparent excuse for not commenting on an ‘ongoing criminal investigation.’”).

<sup>3</sup> See, e.g., Press Briefing, Dana Perino, White House Press Sec’y (Mar. 6, 2007), *available at* <http://www.whitehouse.gov/news/releases/2007/03/20070306-5.html> (“I think the President has had a very principled and responsible stand to not comment on the ongoing criminal matter in any way, shape, or form.”); Froomkin, *supra* note 2 (“[T]he main reason they are hiding behind these excuses is that they can. There’s been no public cost to them not talking.”).

administration, at one point, went so far as to claim that the very *assertion* of the constraint barred the President from discussing such foundational issues.<sup>4</sup>)

One point should be emphasized from the outset. The Presidents have not simply claimed that they elect to refrain from public comment. Of course, any person, public official or not, can elect to ignore questions from the press so long as they are prepared to pay the political and social consequences of elective silence.<sup>5</sup> The Presidents have instead attributed their silence to an external constraint on their freedom to make a public comment. To put it another way, it is the difference between claiming that one *may* remain silent and claiming that one *must*.

The plausible justifications for an “ongoing criminal investigation” constraint on presidential commenting seem to be, at casual glance, wide-ranging. One might intuitively think of the rules maintaining grand jury secrecy,<sup>6</sup> the constitutional obligation to faithfully execute the laws,<sup>7</sup> or the pardon power.<sup>8</sup> One might also think of prevalent social norms, such as the belief that it is unfair to assign guilt in a public forum without due process of law. Each of these justifications is legitimate. Yet, importantly, the force of each is highly dependent on context. A particular justification, for instance, might apply fully to Department of Justice (DOJ) investigations, partially to federal trials, and not at all during the appeals processes. A different justification, however, might apply partially (yet never fully) during investigations, trials, and appeals.

The current ambiguity surrounding the “ongoing criminal investigation” constraint undoubtedly impairs democratic self-governance. The relationship between the public and the President is widely understood as one of principal and agent.<sup>9</sup> In the most basic form of this model, the public delegates discretionary power to well-motivated Presidents and withholds or withdraws discretion from ill-motivated ones.<sup>10</sup> Working within this framework, the ill-motivated Presidents, when faced with an empowered press corps, are boxed into the costly trilemma of disclosing ill motives, lying about ill motives, or evading the topic of ill motives.<sup>11</sup> Importantly,

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<sup>4</sup> See Press Briefing, Scott McClellan, White House Press Sec’y (July 11, 2005), available at <http://www.whitehouse.gov/news/releases/2005/07/20050711-3.html>.

<sup>5</sup> See, e.g., U.S. CONST. amends. I & V. While the invocation of the right against self-incrimination cannot be used to establish the invoker’s guilt, it can be costly nonetheless. See generally *Jenkins v. Anderson*, 447 U.S. 231 (1980) (holding that certain forms of pre-arrest silence can be used to impeach a defendant’s testimony); *Baxter v. Palmigiano*, 425 U.S. 308 (1976) (ruling that, in civil matters, adverse inferences can be imputed from certain forms of silence).

<sup>6</sup> See, e.g., FED. R. CRIM. P. 6(e).

<sup>7</sup> U.S. CONST. art. II, § 3, cl. 4.

<sup>8</sup> *Id.* art. II, § 2, cl. 1.

<sup>9</sup> See Eric A. Posner & Adrian Vermeule, *The Credible Executive*, 74 U. CHI. L. REV. 865, 866 (2007).

<sup>10</sup> See *id.* at 883–84.

<sup>11</sup> *Id.* at 885 (arguing that the “credibility dilemma becomes most acute” when the presidential communications privilege is invoked); see also Rozell, *supra* note 1, at 411–13

the ill-motivated executives can escape this trilemma by citing to an external constraint on their freedom to publicly comment. Such constraints make evasion easier to disguise, which dissipates the force of the trilemma and causes broad swaths of information to be unnecessarily shrouded from the public. It is therefore imperative that the scope of the external constraints be narrowly tailored to the discrete executive obligations that called for their design.

This Article seeks to arm the public, and the press corp in particular, with an analytical framework by which they can evaluate the legitimacy of future invocations of the “ongoing criminal investigation” constraint. Part I sets forth the relationship between the public and the President. It frames the office of the President in a principal-agent model, demonstrates that a significant degree of public monitoring occurs through press relations, and explains why the “ongoing criminal investigation” constraint is of particular value to the White House. Part II documents the recent expansion of the constraint and describes how the Clinton administration’s justifications for refusing public comment helped establish the normative framework within which the Bush administration enacted a policy of silence. Part III, the core of the Article, deconstructs the “ongoing criminal investigation” constraint, parses it into its incumbent strains of “positive,” “constitutional,” and “good citizenship” obligations, and discerns the bounds of the constraint by testing each strain under varying conditions. In the light of this analysis, Part IV criticizes the recent expansion of the “ongoing criminal investigation” constraint, proposes a new, tailored constraint, and explains how adherence to this new rule will facilitate stricter public monitoring of the President.

## I. EXECUTIVE POWER AND THE “ONGOING CRIMINAL INVESTIGATION” CONSTRAINT

The White House press corps is central to the public monitoring process in that it presents ill-motivated Presidents with the trilemma of disclose, lie, or evade. The following paragraphs describe the trilemma, discuss the press’s unique ability to enforce the trilemma, and explain why the “ongoing criminal investigation” constraint is of particular value to the White House.

### A. Executive Signals and the Trilemma

The President is widely perceived as an agent of the public.<sup>12</sup> Stated at a most general level, the public will grant the President discretion when it believes “that the

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(discussing the inevitable credibility impairments following assertions of the presidential communication privilege).

<sup>12</sup> See, e.g., Posner & Vermeule, *supra* note 9, at 875–76. For an example of how the agency framework resonates in the popular consciousness, see Jim Rutenberg, *Bush Aide’s Celebrity Meeting Becomes a Global Warming Run-In*, N.Y. TIMES, Apr. 23, 2007, at A16 (quoting a popular recording artist complaining to a White House Senior Aide, “You can’t speak to us like that, you work for us”).

benefits of doing so outweigh the risks of executive abuse.”<sup>13</sup> Conversely, the public will constrain the executive by withdrawing or withholding discretion when it believes “that the risks and harms of abuses outweigh any benefits in security or other goods.”<sup>14</sup>

The public, however, does not have access to all the information it feels it needs to calibrate its grants of discretion to the President.<sup>15</sup> For one, most executive decisions are never subjected to a formal system of external review.<sup>16</sup> And even in settings where judicial review of executive branch action is considered a central tool, like agency enforcement of regulations,<sup>17</sup> there is always a considerable amount of information which, for various reasons, remains concealed from the public.

As a result of this information gap, the public naturally shifts its monitoring efforts toward deciphering signals of presidential motives.<sup>18</sup> Within this signaling

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<sup>13</sup> Posner & Vermeule, *supra* note 9, at 866. Professor Cuéllar defines “discretion” as “the extent of legal flexibility to use government power vested in executive branch officials.” Mariano-Florentino Cuéllar, *Auditing Executive Discretion*, 82 NOTRE DAME L. REV. 227, 236 (2006) (observing that “[t]he distinctions that lawyers and policymakers fight over tend to be about whether to give the executive branch relatively *more*, or relatively *less* discretion compared to a certain baseline”).

<sup>14</sup> Posner & Vermeule, *supra* note 9, at 866. There are many ways in which the public can withdraw discretion. Obviously, if the President is in his first term, the public can thwart his re-election bid. There is formal judicial review of some types of executive actions. Public pressure, stoked by Congress and the press, can mount to the point where the Attorney General is compelled to appoint a Special Counsel. *See* 5 U.S.C. §§ 1211–1219 (2000). Congress can rein in the President through rejection of the President’s policy agenda, strictly worded appropriations bills, oversight hearings, closure, or impeachment. Congress could also set forth a non-binding statement of disapproval. And it has been argued that Congress could enact legislation to force the President and other cabinet officials to appear before Congress to answer questions about policy, in a procedure akin to the “Question Time” found in Commonwealth nations. *See* Alex Hontos, Note, *The Executive Reports, We Decide: The Constitutionality of an Executive Branch Question and Report Period*, 91 MINN. L. REV. 1047 (2007).

<sup>15</sup> Professor Wolfe explains that “one of the rock-solid findings of empirical political science research” is that “American voters possess scant information about politics and policy.” *See* ALAN WOLFE, DOES AMERICAN DEMOCRACY STILL WORK? 24 (2006). For interesting discussions of the potential ways to monitor executive discretion, see Cuéllar, *supra* note 13, at 252–74; Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006).

<sup>16</sup> Such review is often the most effective way to get information to the public. *See* Cuéllar, *supra* note 13, at 229–30 (“[T]he hallmark of many executive decisions often proves to be nearly unfettered discretion.”).

<sup>17</sup> *Id.* at 243 (observing that judicial review of agency action, with *Chevron* deference, amounts to almost no judicial review at all).

<sup>18</sup> Posner & Vermeule, *supra* note 9, at 866. Samuel Popkin refers to these, somewhat affectionately, as decisions of “low-information rationality.” SAMUEL L. POPKIN, THE REASONING VOTER: COMMUNICATION AND PERSUASION IN PRESIDENTIAL CAMPAIGNS 9 (2d ed. 1994).

framework, there are three primary ways for a President to proceed when the public inquires into topics in which he holds ill motives. First, he can cut his losses and disclose the information revealing his bad motives. The expected costs here are self-evident. Second, he can give affirmatively false or otherwise misleading answers. The expected costs here are also high. The lie, if exposed, results in costs to the President that are exponential compared to those he would have incurred by a straightforward disclosure of bad news.<sup>19</sup> Third, the President can refuse to answer. The scholarly literature, however, overwhelmingly concludes that evasive behavior signals culpability.<sup>20</sup> The basic idea is that any information withheld is generally interpreted as being negative to the withholder's interests.<sup>21</sup> One can see that each of these options—disclose, lie, or evade—signals ill motives and likely leads the public to withdraw or withhold discretion from the President. These three not-so-good alternatives constitute the trilemma of the ill-motivated President.

### *B. Presidential Press Relations*

The trilemma of the ill-motivated President largely dissipates when the public is unable to detect executive evasion. That said, the public has various tools with which to identify evasion. While congressional hearings and other independent investigations might reflexively come to mind, it seems likely that the press corps is the most regular and thorough detector of White House evasion.

The first seventy-five years of the United States of America constituted the era of the administration "organ."<sup>22</sup> During this period, it could hardly be said that the

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<sup>19</sup> Some lies are, in the public eye, more damnable than others. Presidents Nixon and Clinton, of course, had their policy agendas undone by lies. It is, however, common throughout American history for the public to forgive administration lies about some matters, such as the health of the President. See, e.g., W. DALE NELSON, *WHO SPEAKS FOR THE PRESIDENT?: THE WHITE HOUSE PRESS SECRETARY FROM CLEVELAND TO CLINTON* 10–11 (1983) (documenting that President Grover Cleveland's staff lied to the press about his health condition with impunity).

<sup>20</sup> See Paul R. Milgrom, *Good News and Bad News: Representation Theorems and Applications*, 12 *BELL J. OF ECON.* 380 (1981) (demonstrating that no news is bad news); Paul Milgrom & John Roberts, *Relying on the Information of Interested Parties*, 17 *RAND J. OF ECON.* 18 (1986). For a discussion of how game-theory impacts the law of adverse inferences, see Daniel J. Seidmann & Alex Stein, *The Right to Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege*, 114 *HARV. L. REV.* 430, 487 (2000). The authors conclude that "silence in the face of accusations is largely a reliable signal of guilt." *Id.*

<sup>21</sup> For example, the Democratic National Committee did not refer to President Clinton's testimony about his relationship with Monica Lewinsky as "evasive." Rather, it argued in a far more benign tone that Clinton "drew the line at going into explicit detail. . . . He declined to discuss specific encounters in a graphic and gratuitous way." See Jill Lawrence, *Video Verdict: Tape Falls Short*, *USA TODAY*, Sept. 22, 1998, at 3A.

<sup>22</sup> See JAMES E. POLLARD, *THE PRESIDENTS AND THE PRESS* 70 (1947). An organ was a

President and the general press corps enjoyed *relations* of any kind.<sup>23</sup> For starters, newspapermen had almost no direct access to the President.<sup>24</sup> Moreover, Presidents rarely responded to allegations or issues percolating in the press. President George Washington, in the first draft of his Farewell Address, surmised on the newspaper attacks against him: "I shall pass them over in utter silence never having myself, nor by any other with my participation or knowledge, written or published a Scrap in answer to any of them."<sup>25</sup> Even after the demise of the organ in the mid-nineteenth century, there were only slight advancements in presidential press relations. Presidents granted interviews only intermittently,<sup>26</sup> and their press conferences were notably one-sided affairs, with the President setting all of the terms in his favor, such as strict rules relating to transcripts and attribution (which allowed him to in effect cherry pick the issues in which he felt most secure and ignore the others off the record).<sup>27</sup> It is only at the mid-point of the twentieth century, with emerging forms of technology shifting the balance of power between the White House and the press corps, that we can begin to see the formation of the modern presidential press conference.<sup>28</sup>

The current structure of presidential press relations is an effective means to enforce the trilemma of the ill-motivated President. First, press conferences occur with regularity. It is understood that the President will take questions from the press at least once per month.<sup>29</sup> No matter how unpopular or inartful a President, his regular appearance before a room of inquiring journalists is now a foregone conclusion.<sup>30</sup>

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newspaper that could be relied on to defend the administration from allegations which manifested in the so-called opposition press. The organ was normally published by a loyal party member or personal friend of the President. *Id.*

<sup>23</sup> The press could, however, *communicate* evasive behavior that had been identified by other entities such as Congress, political opponents, or foreign nations.

<sup>24</sup> POLLARD, *supra* note 22, at vi.

<sup>25</sup> *Id.* at 23. Also in the first draft of his Farewell Address, Washington stated: "[I]t might be expected at the parting scene of my public life that I should take some notice of such virulent abuse." *Id.*

<sup>26</sup> The first were granted by Andrew Johnson, though it would be several decades before the presidential interview would become an expected requirement of the job. *Id.* at 413.

<sup>27</sup> The first press conferences are attributed to Theodore Roosevelt. NELSON, *supra* note 19, at 18–20.

<sup>28</sup> Generally speaking, this came about due to maturation of technologies (telegraph, radio, television), changing economic conditions (consolidation and better organization of media outlets), and the precedent of access set by charismatic populists like Presidents Theodore and Franklin Roosevelt.

<sup>29</sup> For instance, during their terms, President Clinton averaged thirty news conferences per year, and the first President Bush averaged thirty-three. President Reagan, however, held a mere average of just over five per year. See Presidential News Conferences, The American Presidency Project, <http://www.presidency.ucsb.edu/data/newsconferences.php> (last visited Oct. 25, 2007).

<sup>30</sup> Facing sliding poll numbers, President Nixon asked the White House Correspondents Association for suggestions on how to improve his press conferences. Their answer: hold more of them. NELSON, *supra* note 19, at 174–75.

Second, Presidential press relations are relatively thorough. They allow journalists to directly confront the President and create a record of his statements. Before the dawn of the press conference, there were no effective means to publicly examine Presidents. The White House's failure to address an issue did not necessarily signal evasiveness—even the most severe populist, after all, would recognize that Presidents lacked the resources to respond to every allegation percolating in the papers. But when Presidents began to hold press conferences, and thereby carve out time from their schedules for the specific purpose of fielding questions, the “constrained resources” justification lost its force.<sup>31</sup> And with the Eisenhower administration's decision to televise press conferences,<sup>32</sup> rendering moot the protective non-attribution rules, Presidents' every comment and expression was exposed fully to the public.<sup>33</sup> Today, Presidents are peppered with questions about a wide range of sensitive and potentially embarrassing topics. These events are broadcast widely and quickly, and any straightforward comment by Presidents that they refuse to address a particular inquiry invariably leaves the public with the feeling that the administration has something to hide.<sup>34</sup> It is not surprising that every President's first goal of a press encounter, as true now as in the radio age in which Charles Willis Thompson famously said it, is to keep from being “trapped into uttering that sentence that has damned so many who have used it, ‘I refuse to answer.’”<sup>35</sup>

The current structure of White House press relations permits journalists to identify presidential evasiveness like never before. Accordingly, the White House

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<sup>31</sup> Presidential press secretaries, from the beginning, were charged to disguise presidential evasiveness. George Cortelyou, President William McKinley's presidential secretary, had the duty of “tell[ing] the newspaper correspondents what they should know without *seeming* to suppress information.” POLLARD, *supra* note 22, at 559 (emphasis added) (quoting Albert Halstead, *The President at Work*, INDEP., Sept. 5, 1901, at 2080–86). Along these lines, Nixon's spokesman, Ron Ziegler, is widely viewed to have been ineffective for evoking suspicion and evasiveness. NELSON, *supra* note 19, at 166–81.

<sup>32</sup> See NELSON, *supra* note 19, at 115–117 (discussing the televising of press conferences).

<sup>33</sup> The press conference has been compared to the “Prime Minister's Questions” of Commonwealth nations. For more on this, see Nixon's comment that British Question Time is more taxing than U.S. presidential press conferences. See Remarks on Departure from Britain, 1 PUB. PAPERS 149 (Feb. 26, 1969). For a discussion of how Presidents restricted the release of transcripts and recording devices and how they punished reporters who breached non-attribution agreements, see POLLARD, *supra* note 22, at 773–778.

<sup>34</sup> See William P. Marshall, *The Limits on Congress's Authority to Investigate the President*, 2004 U. ILL. L. REV. 781, 810.

<sup>35</sup> CHARLES WILLIS THOMPSON, PRESIDENTS I'VE KNOWN AND TWO NEAR PRESIDENTS 119 (1929). Not only does such a refusal impair credibility (both specific and general), but it fails to dispose of thorny issues. The questions will continue to be asked, the pressure to respond will generally increase with time, and the public will eventually punish the President (e.g., calling for investigations by Congress or a Special Counsel or through other, indirect means, such as the concerted obstruction of his policy agenda).



press corps is the public's key enforcement mechanism of the trilemma for the ill-motivated President.

### *C. Escaping the Trilemma*

With the understanding that the modern press efficiently enforces the trilemma of the ill-motivated President, it is important to examine the ways in which the President is able to escape the trilemma. Presidents can, when faced with inquiries about topics in which they hold ill motives, claim that they lack a recollection of the operative facts. Yet this is a costly option as it suggests detachment or incompetency.<sup>36</sup> By far the most credible way for ill-motivated Presidents to escape the trilemma is by pointing to an external constraint on their freedom to respond. This, in effect, links their silence to a good greater than the maintenance of their own political capital. They effectively say to all those who want more information: "Do not blame us! Blame the constraint!"

The White House invariably prefers that constraints be drawn as broadly as possible. This is due to the fact that, as the constraint widens, more and more topics can be ignored without signaling evasion to the public. While providing obvious benefits to the White House, expansive constraints exact few costs from Presidents. An executive, barred by an overly-broad constraint, yet looking to clear his administration of false allegations of malfeasance, will simply (1) acquiesce to selective leaks of exculpatory information, or (2) rely on loyalists from outside of his administration to promote the exculpatory information.

Of the external constraints available to Presidents, one of the most valuable, and least discussed, is that protecting the sanctity of "ongoing criminal investigations." Most citizens have not contemplated the origins of this constraint. Its widespread acceptance is most likely explained by the simple fact that it appears relatively innocuous to the majority of the press and public.<sup>37</sup> First, each invocation is

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<sup>36</sup> For an example, see President Ronald Reagan's claim that he had no knowledge of the Iran-Contra dealings. See Gerald M. Boyd, *White House Happy*, N.Y. TIMES, July 16, 1987, at A1. For an example of claiming lack of recollection, see Alberto Gonzales on the firing of U.S. Attorneys. See Eric Lipton, *No-Confidence Resolution on Gonzales Is Scheduled*, N.Y. TIMES, June 9, 2007, at A10. Both Reagan and Gonzales suffered politically as a result. A different method of escape, though of limited applicability, is refusing to speculate or answer hypothetical questions. See, e.g., Tad Szulc, *Ex-G.O.P. Aide Linked to Political Raid*, N.Y. TIMES, June 20, 1972, at A1 (quoting Ron Ziegler, White House Press Secretary, as saying, "I'm not going to comment from the White House on a third-rate burglary attempt"); Press Briefing, Scott McClellan, White House Press Sec'y (Oct. 1, 2003), available at <http://www.whitehouse.gov/news/releases/2003/10/20031001-6.html> (refusing to discuss anonymous allegations made in the press).

<sup>37</sup> Heuristics are mental rules of thumb that are shared by large portions of the population. Daniel Kahneman, Paul Slovic, and Amos Tversky claimed in a series of papers that "people rely on a limited number of heuristic principles which reduce the complex tasks of assessing

invariably associated with its prior uses,<sup>38</sup> and nearly all Americans have heard the constraint asserted, at one time or another, by serious-minded public officials facing down aggressive, sensationalistic journalists. Think of the police chief who, the night of a large fire, is asked whether “foul play was involved.” Or think of the member of the 9/11 Commission who is asked about his impression of witness testimony prior to the issuance of the committee’s official report. Second, the “ongoing criminal investigation” constraint is valuable to the White House because it implies a temporal limit. Unlike some justifications for executive silence, such as the privileges relating to presidential communications or deliberative process, the “ongoing criminal investigation” constraint suggests that the public will eventually hear from the executive branch (i.e., when the investigation has concluded). Third, the constraint reminds the public that government officials are working to resolve the problem. Fourth, the terminology of “ongoing criminal investigation,” unlike the constraints relating to “deliberative process” or “presidential communications,” suggests that it was articulated in advance of the inquiry as necessary to promote an identifiable executive function.<sup>39</sup> It is for these reasons that the public and press have remained relatively passive as the White House has applied the scope to novel circumstances.

Presidents strive to conceal their ill motives from the American public. The press corps, due to its regular and thorough Presidential relations, presents a trilemma for the White House as it forces it to choose one of three costly options: disclose, lie, or evade. Ill-motivated Presidents, however, can escape the trilemma by citing to an external constraint on their ability to comment. A constraint enjoying particular credibility in the public eye is that pertaining to “ongoing criminal investigations.” The next Part documents how the White House has expanded the reach of this constraint.

## II. THE EXPANSION OF THE “ONGOING CRIMINAL INVESTIGATION” CONSTRAINT

The “ongoing criminal investigation” constraint has been significantly expanded in recent years. Presidents have traditionally behaved as though this constraint applies only to matters over which they have had at least nominal control. But over the past two presidential administrations, there seems to have been an effort to extend the constraint from its historical domain to cover matters independent of the Presidents’ control. The recent expansion can be traced to the late 1990s when President Clinton and his spokespeople repeatedly asserted that it was “proper” and “right” to

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probabilities and predicting values to simpler judgmental operations.” DANIEL KAHNEMAN, PAUL SLOVIC & AMOS TVERSKY, *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* 3 (1982).

<sup>38</sup> This would be an application of the “availability” heuristic. See Cass R. Sunstein, *Hazardous Heuristics* 2-2 (John M. Olin Law & Economics, Working Paper No. 165, 2002), available at [http://ssrn.com/abstract\\_id=344620](http://ssrn.com/abstract_id=344620).

<sup>39</sup> See *THE LAW AND ECONOMICS OF IRRATIONAL BEHAVIOR* 20 (Francesco Parisi & Vernon L. Smith eds., 2005) (discussing the value of articulation in game theory).

refuse to comment publicly about the Whitewater investigation.<sup>40</sup> President George W. Bush, working within Clinton's normative framework, crystallized the expansion into an administration policy that has been followed with remarkable consistency.<sup>41</sup> As will be shown, this expansion of the "ongoing criminal investigation" constraint has effectively immunized a substantial amount of presidential silence from charges of evasion.

### A. *The Traditional Constraint*

The White House has historically behaved as though it were constrained from commenting on the merits, progress, or information gathered during ongoing federal criminal investigations or prosecutions of which the President is perceived to be at least nominally in control.<sup>42</sup> Such "control" is thought to exist if the President can obtain access to or exert direct influence over the investigation.<sup>43</sup>

#### 1. Investigations Under the President's Control

The first presidential reference to the "ongoing criminal investigation" constraint likely occurred in 1867. President Andrew Johnson, facing the prospect of impeachment, wove his way through the American interior and, along the way, granted a series of press interviews—the first of their kind by a U.S. President.<sup>44</sup> At one point, a correspondent of the *New York World* asked Johnson for his views on the pending case of William McCardle, a newspaper publisher who had been detained by U.S. military authorities for allegedly obstructing federal reconstruction efforts.<sup>45</sup> Johnson quietly explained that the matter was pending before the U.S. Supreme Court and that it was improper for him to express an opinion in advance of the Court's decision.<sup>46</sup>

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<sup>40</sup> See *infra* Part II.B.2.

<sup>41</sup> See *infra* Part II.C.

<sup>42</sup> This would include primarily investigations by the Departments of Justice and Defense but would of course extend to agency investigations as well.

<sup>43</sup> The President can be considered, in a sense, the chief prosecutor of the United States in that he has access to or influence over all federal investigations unless he decrees otherwise, as in the case where a Special Counsel is appointed. See Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521 (2005). Although Professor Prakash has noted his disagreement, the Supreme Court has unambiguously upheld the power of Congress to remove the President from the control of a federal prosecution. See *Morrison v. Olson*, 487 U.S. 654 (1988).

<sup>44</sup> POLLARD, *supra* note 22, at 413.

<sup>45</sup> *Id.* at 423. McCardle, an editor from Vicksburg, Mississippi, had been arrested and detained by military authorities "on the charge of criticizing that authority and the Reconstruction policy." *Id.* at 423 n.70.

<sup>46</sup> *Id.* at 423.

Over the 135 years since Johnson's interview with the *World*, Presidents have rigorously followed Johnson's precedent and refused to comment on general investigative matters pursued by their administrations' departments or agencies. Some of the more famous examples include President Richard Nixon's public silence regarding the FBI's investigation of Justice Abe Fortas,<sup>47</sup> President Gerald Ford's refusal to comment on whether he would pardon Nixon,<sup>48</sup> and the refusal of President Ronald Reagan to comment publicly on the federal prosecution and conviction of his would-be assassin.<sup>49</sup> Another, more recent, example is President George W. Bush's refusal to comment about the investigation into abuses at Abu Ghraib. Bush's press secretary explained that "[i]f the Commander-in-Chief says anything that might be regarded as prejudicial to the proceedings, those who are conducting the inquiries and those who might be called upon to conduct trials are . . . going to be hamstrung."<sup>50</sup>

The so-called Travelgate controversy of the early 1990s offers a good case study on the impropriety of presidential commenting on investigations within their control. The Clinton administration fired numerous travel personnel who had served during George H. W. Bush's administration.<sup>51</sup> In response to claims that the firings were politically motivated, the administration suggested that the employees had been fired because they were under investigation by the FBI for alleged criminal activities.<sup>52</sup> In the face of enormous public criticism, the White House promptly recanted its comments, chalked it up to its lack of experience, and assured the public that it would not again divulge information about ongoing FBI investigations.<sup>53</sup>

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<sup>47</sup> Fred P. Graham, *Mitchell Confirms that He Gave Warren 'Certain Information' About Fortas*, N.Y. TIMES, May 13, 1969, at 23.

<sup>48</sup> NELSON, *supra* note 19, at 185 ("[U]ntil any legal process has been undertaken, I think it is unwise and untimely for me to make any commitment.").

<sup>49</sup> Stuart Taylor, Jr., *Hinckley Is Cleared but Is Held Insane in Reagan Attack*, N.Y. TIMES, June 22, 1982, at A1, D27 ("No comment all the way. We haven't commented on any aspect of this, and we won't comment now.").

<sup>50</sup> Press Briefing, Tony Snow, White House Press Sec'y (June 1, 2006), available at <http://www.whitehouse.gov/news/releases/2006/06/20060601-5.html> ("What you don't want is . . . somebody saying . . . here's what the President had to say—because that suddenly—here's the President, all [the prosecutors] answer to him, you've got to be very careful."). The current Bush administration similarly refused to comment on the FBI's investigation into allegations that Sandy Berger, Clinton's National Security Advisor, unlawfully removed and destroyed files from the national archives. Press Briefing, Scott McClellan, White House Press Sec'y (July 21, 2004), available at <http://www.whitehouse.gov/news/releases/2004/07/print/20040721-6.html>.

<sup>51</sup> For a discussion of the events of Travelgate, see Joe Conason, *Travelgate: The Untold Story*, COLUM. JOURNALISM REV., Mar./Apr. 1996, at 40.

<sup>52</sup> See Press Briefing, George Stephanopoulos, White House Press Sec'y (May 21, 1993), available at <http://www.presidency.ucsby.edu/ws/?pid=60159>.

<sup>53</sup> See Press Briefing, Mack McLarty, White House Chief of Staff (July 2, 1993), available at <http://www.presidency.ucsby.edu/ws/?pid=60182> ("[T]he communication was not as it should have been between certain parts of the White House and the Communications people that briefed the press.").

## 2. Investigations Outside of the President's Control

Although Presidents have felt constrained from publicly commenting about investigations nominally under their control, they have historically followed a different practice when it comes to investigations definitively beyond their control.<sup>54</sup> In relation to such "independent" investigations, Presidents have regularly adopted the utilitarian mantra held by all private citizens who are asked to comment about investigations: speak up when you feel that it will help your cause; shut up when you feel it will help your cause.<sup>55</sup>

Both Watergate and Iran-Contra illustrate this point. President Richard Nixon, just three days after appointing Archibald Cox as Special Prosecutor, gave a detailed public explanation of his involvement in Watergate, where he defended himself and went on to insinuate that laws had been broken by individuals within his administration.<sup>56</sup> Several months later, Nixon held a press conference to publicly explain an allegedly incriminating conversation between himself and his former Attorney General.<sup>57</sup> And, regarding the charges against White House aides, Nixon promised

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<sup>54</sup> This "control" distinction is nicely illustrated by Herbert Hoover's public comments regarding the investigations into the conduct of his Secretary of the Interior, Ray Lyman Wilbur. The Department of Justice investigated allegations that Wilbur had improperly invested funds in companies which he regulated. See POLLARD, *supra* note 22, at 750–51. At the same time, students at Stanford University, where Hoover served as a trustee, called for a proceeding to force Wilbur to resign his post as the university's president (a position he was holding in abeyance while working in Hoover's Cabinet). See *Valuable Wilbur*, TIME, Oct. 27, 1930, available at <http://www.time.com/time/magazine/article/0,9171,787627,00.html>. While Hoover felt constrained from discussing the ongoing federal investigation, he freely commented on the independent investigation into Wilbur's status at Stanford. The President's News Conference of October 14, 1930, 1 PUB. PAPERS 432, 432 (Oct. 14, 1930) ("The University will gladly extend his leave as long as it is necessary . . . . Being one of the trustees of that institution myself, I can speak with more authority than the student daily."). It is unclear how much authority Hoover, as trustee, would have had in any eventual university proceeding. If his authority had been substantial, Hoover arguably should have withheld comment about his views of Lyman. But then again, the matter was not criminal, and thus the policy justifications for withholding comment would, of course, have had far less force.

<sup>55</sup> Compare Bill Carter, *HBO Chairman Held in Dispute with Girlfriend*, N.Y. TIMES, May 8, 2007, at C7 (quoting an attorney for an HBO executive, who was charged with domestic assault, that it would be inappropriate to comment while there was an ongoing criminal investigation), with *Enron's Ken Lay: I Was Fooled*, CBS NEWS, July 8, 2005, <http://www.cbsnews.com/stories/2005/07/05/60minutes/main706398.shtml>.

<sup>56</sup> See R.W. Apple, Jr., *Nixon on Watergate: A Shrinking Defense*, N.Y. TIMES, May 23, 1973, at 29 (discussing segments of Nixon's press release). These statements were far more extensive than those provided from the White House before the appointment of Cox.

<sup>57</sup> John Herbers, *A Rare News Talk*, N.Y. TIMES, Aug. 23, 1973, at 1.

the American public that “[w]hen all the facts come out, when they have an opportunity to have their cases heard in court . . . they will be exonerated.”<sup>58</sup> Throughout the entire independent investigation, it was never once suggested by Nixon, Congress, or the press that it was improper for Presidents to publicly defend themselves and members of their administration from insinuations of wrongdoing.

During the Iran-Contra scandal, President Ronald Reagan implemented a less aggressive, but similarly public, strategy. The White House public relations office was expressly charged “to be ready with a forceful and detailed [public] rebuttal of any charge that Mr. Reagan insists is not true.”<sup>59</sup> Accordingly, upon the release of the Independent Counsel’s report, Reagan met with the press to defend himself, stating that he had not been informed by Admiral John Poindexter of the money funneled to Nicaraguan rebels.<sup>60</sup> At no point during the Iran-Contra investigation did Reagan, Congress, the Independent Counsel, or the press assert that Presidents were constrained from defending themselves through the press.

### *B. The Rhetoric of the Expanded Constraint*

President Clinton began in the tradition of Presidents past. He did not comment on matters over which he could potentially exert influence or enjoy access, and as for independent investigations, he, like Nixon and Reagan before him, took a utilitarian approach, answering questions when he thought it was to his advantage and refusing to comment when that seemed to his advantage. But as the administration wore on, and the pressure to comment increased, Clinton and his spokespeople began to frame their refusal to comment in attitudinal terms, suggesting that silence was “proper” and “responsible.” Whereas past Presidents simply stated that they had *decided* not to comment,<sup>61</sup> the Clinton administration took it a step farther, routinely suggesting that a President in his position *should not* comment and that it would be *improper* to do so. The following Section profiles how the Clinton

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<sup>58</sup> *Id.*

<sup>59</sup> Steven V. Roberts, *Reagan Aides Look to Worst Case, Defending President Against Surprise*, N.Y. TIMES, Apr. 27, 1987, at B6 (“[I]f a document is quoted out of context, or someone makes a statement we think is not consistent with the sum total of what we believe to be true, we will at least have the opportunity to respond.”).

<sup>60</sup> Philip Shenon, *Inquiry by Walsh Said to Scrutinize High U.S. Officials*, N.Y. TIMES, Apr. 29, 1987, at A1 (quoting Reagan as saying that Admiral Poindexter “thought he was being, in some way, protective of me”). Reagan stated at a press conference that “both Secretary Shultz and Secretary Weinberger advised me strongly not to pursue the [Iranian arms sale] initiative . . . . [I]t turned out they were right and I was wrong.” Radio Address to the Nation on National Security and Administration Goals, 1 PUB. PAPERS 245, 245 (Mar. 14, 1987).

<sup>61</sup> For example, the Reagan administration simply stated that they were not going to comment on any part of the Iran-Contra investigation. Gerald M. Boyd, *Reagan Won’t Comment on Admiral*, N.Y. TIMES, July 17, 1987, at A7.

administration handled inquiries into independent investigations, placing particular emphasis on the ways in which its rhetoric differed from its actual practices.

### 1. Traditional Practice

When asked by the press about an investigation that was independent of the influence of the White House, the Clinton administration, like past Presidents and any citizen-target of an investigation,<sup>62</sup> based its decision to comment solely on its perception of its own self-interest. For example, where there was no upside to commenting on independent investigations, such as the arrest of Representative Charles Rangel by the New York City Police Department or the prosecution of O.J. Simpson by the State of California, the administration elected to stay silent.<sup>63</sup> Yet when there was some upside to commenting, such as when the President felt he had been unfairly characterized during aspects of the Whitewater investigation, the administration commented freely.<sup>64</sup>

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<sup>62</sup> See, e.g., *60 Minutes* (CBS television broadcast July 8, 2005) (profiling the public defense of Kenneth Lay, former CEO of Enron, to charges in a federal criminal indictment).

<sup>63</sup> When asked to discuss the merits of the arrest of Congressman Charlie Rangel, the press secretary responded, "There is an ongoing investigation and I don't think the President wants to prejudge the result of that investigation." Press Briefing, Joe Lockhart, White House Press Sec'y (Mar. 16, 1999), available at <http://www.presidency.ucsb.edu/ws/?pid=47711>. This refusal to comment is the product of a straightforward cost-analysis: the benefit of supporting Rangel was so small that it was outweighed by the negative consequences of giving the appearance of meddling—a violation of a social norm—in an investigation about which the President has no personal knowledge. See The President's News Conference with President Ernesto Zedillo of Mexico, 2 PUB. PAPERS 1559 (Oct. 10, 1995) (reiterating that he would not comment on the trial of O.J. Simpson).

<sup>64</sup> Examples include public defenses of his relationship with Webster Hubbell. During the investigation into Hubbell, Clinton's press secretary, Mike McCurry, provided an extraordinarily detailed account of the President's recollection of and position on contested matters:

[W]e've asked [the President] again, in light of the documents from those submitted by Mr. Ickes with respect to the phone calls suggested to him by the DNC, does he have any recollection making those calls. He says, no. In fact, he has more of a recollection that he did not make calls as suggested by the DNC. They sent over a call sheet as they've indicated. The Democratic National Committee has now indicated they have no information that would suggest the President made those calls.

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And on the second thing, the President still, to the best of his recollection, says that he was not aware of Mr. Hubbell's retention by the Lippo Group until he read about it in the press. As the Special Counsel has said before . . . the President never asked or suggested anyone hire Webb Hubbell. The President does think he may have heard from either Bernie Rapoport or Truman Arnold that they had intended to hire Mr. Hubbell—we've said that previously.

The administration's utilitarian approach to such press queries is best evinced by its two-step response to the allegations that Clinton had suborned perjury from Monica Lewinsky, a White House intern with whom he had an extramarital affair.<sup>65</sup> In phase one—which constituted quick, circumspect, and bold denials of wrongdoing—the public heard directly from the President.<sup>66</sup> When asked by a news anchor whether the allegations were true, Clinton responded: “That is not true. That is not true. I did not ask anyone to tell anything other than the truth. There is no improper relationship. And I intend to cooperate with this inquiry. But that is not true.”<sup>67</sup> Clinton infamously reiterated this denial five days later at a Rose Garden press conference:

But I want to say one thing to the American people. I want you to listen to me. I'm going to say this again. I did not have sexual relations with that woman, Miss Lewinsky. I never told anybody to lie, not a single time—never. These allegations are false.<sup>68</sup>

It is clear that, during phase one of its strategy, the Clinton administration perceived itself as free to publicly comment on independent investigations that threatened its political status.

The day after Clinton's Rose Garden comments, the administration, however, shifted gears and ushered in phase two of its public defense strategy: the stonewall. It was unveiled by Hillary Clinton on a morning talk show.<sup>69</sup> After making a few final public arguments, like claiming that Starr's office was intimidating witnesses and that his investigation was the product of a “vast right-wing conspiracy,” she officially signaled the administration's retreat to silence.<sup>70</sup> The First Lady implored the American public to “just wait and find out what the truth is” and then promised that, as far as this issue goes, “[y]ou won't be hearing any more from my husband.”<sup>71</sup>

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Press Briefing, Mike McCurry, White House Press Sec'y (Mar. 25, 1997), *available at* <http://www.presidency.ucsb.edu/ws/?pid=48450>.

<sup>65</sup> This closely parallels the advice of Pat Buchanan and Ron Ziegler to President Nixon in the early stages of Watergate: deny involvement and decline any other comment. NELSON, *supra* note 19, at 176.

<sup>66</sup> Clinton's press secretary also stated that Clinton did not suborn perjury and did not have an improper relationship with Lewinsky. Press Briefing, Mike McCurry, White House Press Sec'y (Jan. 21, 1998), *available at* <http://www.presidency.ucsb.edu/ws/?pid=48182>.

<sup>67</sup> Interview with Jim Lehrer of the PBS “News Hour,” 1 PUB. PAPERS 89 (Jan. 21, 1998).

<sup>68</sup> Remarks on the After-School Child Care Initiative, 1 PUB. PAPERS 110, 111 (Jan. 26, 1998).

<sup>69</sup> *The Today Show* (NBC television broadcast Jan. 27, 1998). For an article on Hillary Clinton's interview on *The Today Show*, see David Maraniss, *First Lady Launches Counterattack*, WASH. POST, Jan. 28, 1998, at A1.

<sup>70</sup> *The Today Show* (NBC television broadcast Jan. 27, 1998).

<sup>71</sup> *Id.*; Katharine Q. Seelye, *A Second Stage in a Battle to Defend the President*, N.Y.



As it turned out, the President refused to comment on the matter for the next seven months.<sup>72</sup> As with its decision to publicly comment and deny the allegations, the administration's decision to remain silent was based on its perceived self-interest.

## 2. Expansive Rhetoric

Despite the administration's awareness that silence was strategic and self-interested, Clinton and his spokespeople regularly laced their elective silence with attitudinal terminology. An early instance of the use of such terminology followed Clinton's interview with Independent Counsel Robert Fiske regarding the death of Vince Foster: "As Mr. Fiske has said, it's a component of an ongoing investigation, and I *can't* answer any questions specifically about what they may have talked about."<sup>73</sup> The administration gave a similar response to press inquiries into whether the White House Counsel's Office had any notes or documents reflecting the President's conversations about Whitewater. The administration told the press corps that "[i]t's a matter under investigation and it's not—it would be *proper* for comments on that to come from the independent counsel."<sup>74</sup> Because in both of these situations the obligation of confidentiality rested solely with the prosecutor rather than the witness, Clinton had implied an external constraint where one did not exist.

Regarding the President's tactic to remain silent during phase two of the administration's management of the Lewinsky scandal,<sup>75</sup> his press secretary chose to frame the calculating strategy in attitudinal terms of right and wrong: "I think the President will *properly*, as he has indicated he wants to do at the *proper* time, respond. But there are legal proceedings underway now in at least two different venues, and I think it's *important* for those matters to run their course."<sup>76</sup> And when asked when the President met Lewinsky, the administration similarly responded: "The Counsel's Office elects to provide the President the opportunity to respond to

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TIMES, Jan. 29, 1998, at A17 (describing the Clinton administration's general evasiveness about Monica Lewinsky); *see also* John F. Harris, *Say-Nothing Strategy Prevails*, WASH. POST, Jan. 30, 1998, at A1.

<sup>72</sup> On August 17, 1998, the President publicly addressed the scandal and admitted that he lied to the American people about his relationship with Monica Lewinsky. *See* James Bennet, *Clinton Admits Lewinsky Liaison to Jury: Tells Nation 'It Was Wrong,' but Private*, N.Y. TIMES, Aug. 18, 1998, at A1.

<sup>73</sup> Press Briefing, Dee Dee Myers, White House Press Sec'y (June 13, 1994) (emphasis added), available at <http://www.presidency.ucsb.edu/ws/?pid=59866>.

<sup>74</sup> Press Briefing, Mike McCurry, White House Press Sec'y (Apr. 23, 1997) (emphasis added), available at <http://www.presidency.ucsb.edu/ws/?pid=48468>.

<sup>75</sup> Harris, *supra* note 71, at A17 ("Only on a not-for-attribution basis will White House aides expand on this. Their allegation is that once Clinton offers a public version, Starr might pressure Lewinsky to tailor her story so that it contradicts the president's.").

<sup>76</sup> Press Briefing, Mike McCurry, White House Press Sec'y (Jan. 26, 1998) (emphasis added), available at <http://www.presidency.ucsb.edu/ws/?pid=48184>.

these types of questions in the *proper* forum. The *proper* forum which exists at this point now is an inquiry by the Office of Independent Counsel and whatever other legal venues are available.”<sup>77</sup>

After the press clamored for the release of certain records that the White House had turned over to the Independent Counsel, Clinton’s press secretary explained that “they’re in the custody of the independent counsel and we’re cooperating with them and we believe that we *can’t* make them available at this point.”<sup>78</sup> And over a series of press conferences in the spring of 1998, President Clinton made the following comments about the Lewinsky scandal:

I have already denied the legal charges, strongly, and I do so again. But there is an ongoing investigation. Under those circumstances, the *right* thing for me to do is to go back and do the job the American people hired me to do, and that’s what I am doing.<sup>79</sup>

Well, you know I’m not going to talk about that today. I *can’t*. I’ve got to do the work that the people of this country hired me to do, so I can’t—I’m not going to discuss that.<sup>80</sup>

The Clinton administration’s use of attitudinal terms, such as “proper” and “right,” did little to quell the press corps. This is in part because the claim ran contrary to the practices of past presidential administrations. And at one point, Clinton’s press secretary effectively acknowledged that there would be nothing wrong with a President commenting on an independent investigation so long as he was truthful.<sup>81</sup> The press also argued that the normative tone of the denials was

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<sup>77</sup> Press Briefing, Mike McCurry, White House Press Sec’y (Jan. 29, 1998) (emphasis added), *available at* <http://www.presidency.ucsb.edu/?pid=48186>. McCurry stated further that “there has to be a *proper* forum in which you can bring out and present truth, and we can’t do it in a fashion in which we are responding to a cascade of allegations and stories and developments that—and sources that are anonymous.” *Id.* (emphasis added).

<sup>78</sup> Press Briefing, Mike McCurry, White House Press Sec’y (Jan. 28, 1998) (emphasis added), *available at* <http://www.presidency.ucsb.edu/ws/?pid=48185>.

<sup>79</sup> Remarks Prior to Discussions with Prime Minister Tony Blair of the United Kingdom and an Exchange with Reporters, 1 PUB. PAPERS 174, 178 (Feb. 5, 1998) (emphasis added).

<sup>80</sup> Remarks Prior to Discussions with United Nations Secretary-General Kofi Annan and an Exchange with Reporters, 1 PUB. PAPERS 354, 355 (Mar. 11, 1998) (emphasis added).

<sup>81</sup> Q.: Mike, during Watergate, the President—there was a grand jury investigation, congressional hearings, a special prosecutor—the President and his spokesman at that time didn’t feel constrained—  
Mr. McCurry: Yes, and they did an awful lot of lying to the American people. I remember that quite clearly. And that’s one thing I’m not going to do myself in this room.

Press Briefing, Mike McCurry, White House Press Sec’y (Jan. 30, 1998), *available at* <http://www.presidency.ucsb.edu/ws/?pid=48187>.

self-contradictory. They pointed out that, during the independent investigation into potential violations of campaign finance laws, the White House had complied with the press's request that it release certain records relating to the 1996 campaign.<sup>82</sup>

Despite the fact that Clinton and his spokespeople did their very utmost to *implicitly* frame the issue as one of constraint, they stopped short of *explicitly* pointing to a binding external constraint. This is made clear by the following dialogue between Press Secretary Mike McCurry and the White House press corps:

Q.: Mike, can you try to disabuse us of the notion that you're trying to use the investigation to—as a pretext to stop talking about it?

Mr. McCurry: No. . . . I mean, it's *in part* the investigation; it's in part the President feels like he has said what he is in a position to say on the issue at this point.<sup>83</sup>

. . . .

Q.: Mike, his refusal to answer questions doesn't mean that he can't answer them.

Mr. McCurry: You're right . . . they are not necessarily the same.<sup>84</sup>

McCurry later insinuated that the President's refusal to publicly release records pertaining to Lewinsky was based on self-interest rather than any external constraint:

Q.: You're suggesting that there's a legal reason why you can't make [the records] available.

Mr. McCurry: *No*, I'm just suggesting that we elect not to because the independent counsel has a proceeding underway and we choose not to release them at this time.

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Q.: Mike, the campaign finance investigation was and is an ongoing criminal grand jury investigation. Yet you folks released piecemeal a lot of White House records in that case. Can you explain why you didn't feel similarly constrained then as you do now?

Mr. McCurry: Because they are two different situations. In the case of the campaign finance discussions, there were ongoing procedures on Capitol Hill.

Press Briefing, Mike McCurry, White House Press Sec'y (Jan. 29, 1998), *available at* <http://www.presidency.ucsb.edu/ws/?pid=48186>.

<sup>83</sup> Press Briefing, Mike McCurry, White House Press Sec'y (Jan. 28, 1998) (emphasis added), *available at* <http://www.presidency.ucsb.edu/ws/?pid=48185>.

<sup>84</sup> Press Briefing, Mike McCurry, White House Press Sec'y (Jan. 29, 1998), *available at* <http://www.presidency.ucsb.edu/ws/?pid=48186>.

....

Q.: What are the reasons, Mike?

Mr. McCurry: There are a number of them.

Q.: Legal reasons?

Mr. McCurry: Legal reasons. There are [sic] the fact that we are *in a hostile proceeding* right now with a very determined independent counsel; that we've got other legal actions that are underway; and that there are going to have to be places and venues in which the truth can prevail, and settings in which witnesses can be examined and cross-examined. And those are the settings in which in our system of justice the truth prevails and justice is done.<sup>85</sup>

And in perhaps the most candid moment of the scandal, McCurry clarified the position of the President as follows:

He's not in the position to comment. . . . Sometimes it's because of the gag order of a court, *other times it's because he elects not to given the legal jeopardy he faces at the hands of a prosecutor* that others have suggested is out of control. So he's in the situation he's in.<sup>86</sup>

So one can see that the Clinton administration, when pressured by the press corps to justify its use of these attitudinal terms, tended to retreat to the utilitarian argument that Clinton was in "legal jeopardy" and enmeshed in a "hostile proceeding." The Clinton administration's use of attitudinal terms, a rudimentary insinuation of the "ongoing criminal investigation" constraint, was thus easily exposed as nothing more than a euphemism for those four unavoidably evasive words: "I refuse to answer."

### *C. The Implementation of an Expanded Constraint*

Although President Clinton insinuated an expanding "ongoing criminal investigation" constraint, his successor, President George W. Bush, would be the first to benefit from the expansion. Clinton's repeated use of attitudinal terms, while

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<sup>85</sup> Press Briefing, Mike McCurry, White House Press Sec'y (Jan. 28, 1998) (emphasis added), available at <http://www.presidency.ucsb.edu/ws/?pid=48185>.

<sup>86</sup> Press Briefing, Mike McCurry, White House Press Sec'y (Mar. 6, 1998) (emphasis added), available at <http://www.presidency.ucsb.edu/ws/?pid=48204>.

generally unhelpful in his own bid to evade public scrutiny, laid the groundwork for the Bush administration to do so. Bush is the first President to adopt a policy under which he and his advisors were externally *constrained* from discussing matters that were the subject of “ongoing criminal investigations” conducted outside of the President’s control.<sup>87</sup> The following paragraphs document the emergence and reach of this expanded form of the constraint.

### 1. The Constraint

In July 2003, the Bush White House was accused of leaking the name of a covert CIA operative, Valerie Plame, in order to punish her husband, Joseph Wilson, IV, who had been an outspoken critic of the administration’s decision to invade Iraq.<sup>88</sup> When news of the leak first broke, the administration took the position that it would not comment on anonymous allegations in the press.<sup>89</sup> Once the DOJ commenced its initial investigation, the White House kept its silence, explaining that all inquiries about the matter should be directed to the DOJ.<sup>90</sup> Under mounting pressure from the press corps, White House Press Secretary Scott McClellan publicly defended three officials, two of whom were senior White House aides Karl Rove and I. Lewis “Scooter” Libby.<sup>91</sup> Shortly thereafter, in October 2003,<sup>92</sup> the White House adopted a “policy” of not commenting on the leak because it was the

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<sup>87</sup> As one veteran Washington reporter, Walter Pincus, recently commented, “[E]ach Administration has learned from the other, and . . . this group is just the cleverest I’ve ever seen.” *Bill Moyers Journal* (PBS television broadcast Apr. 25, 2007) (transcript available at <http://www.pbs.org/moyers/journal/btw/transcript1.html>).

<sup>88</sup> The operative was outed in a column by Robert Novak. See Robert D. Novak, Op-Ed., *Mission to Niger*, WASH. POST, July 14, 2003, at A21 (“Wilson never worked for the CIA, but his wife, Valerie Plame, is an agency operative on weapons of mass destruction.”).

<sup>89</sup> Press Briefing, Scott McClellan, White House Press Sec’y (Sept. 29, 2003), available at <http://www.whitehouse.gov/news/releases/2003/09/20030929-7.html> (“[I]t’s not our practice to go and try to chase down anonymous sources every time there’s a report in the media.”).

<sup>90</sup> Press Briefing, Scott McClellan, White House Press Sec’y (Oct. 1, 2003), available at <http://www.whitehouse.gov/news/releases/2003/10/20031001-6.html> (“The Department of Justice is investigating this, they’re the appropriate agency. As I have said earlier in the week, that is where information should be reported.”).

<sup>91</sup> Press Briefing, Scott McClellan, White House Press Sec’y (Oct. 10, 2003), available at <http://www.whitehouse.gov/news/releases/2003/10/2003/20031010-6.html> (“I spoke with those individuals [Rove, Abrams, and Libby], as I pointed out, and those individuals assured me they were not involved in this.”).

<sup>92</sup> In July 2005, the administration explained that it had been following a policy of not commenting on “ongoing criminal investigations.” This policy, it stated, began in the fall of 2003. Press Briefing, Scott McClellan, White House Press Sec’y (July 11, 2005), available at <http://www.whitehouse.gov/news/releases/2005/07/20050711-3.html> (explaining that the prosecutors asked McClellan to stop commenting on the investigation “[b]ack at that time period,” which is in reference to an earlier comment regarding October 2003).

subject of an “ongoing criminal investigation.”<sup>93</sup> Two months later, the Plame matter was referred to Special Counsel Patrick Fitzgerald.<sup>94</sup> Once Fitzgerald commenced his investigation, the administration stuck to its policy that it was constrained from commenting on the matter because it was the subject of an “ongoing criminal investigation.”<sup>95</sup>

The administration’s refusal to comment, the public was told, reflected an external constraint by which the administration was inconveniently bound. Vice President Richard Cheney, when asked by a reporter when he first heard Plame’s name, responded in typical fashion:

I have been *constrained* for the last 2.5 years not talking about that case because there was an investigation under way. And now with a trial pending, I think it would be inappropriate for me to say anything about it at all, so I have not said anything about it and won’t. . . . There will be a time when I can discuss it, but not now.<sup>96</sup>

A similar tone was commonly evoked by Bush’s press secretaries: “It has nothing to do with whether or not I want to comment on anything that was previously said. There will be an appropriate time to talk about all this.”<sup>97</sup> Like their counterparts in

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<sup>93</sup> For examples of the White House referring to silence as a presidential policy, see Press Briefing, Scott McClellan, White House Press Sec’y (Oct. 18, 2005), *available at* <http://www.whitehouse.gov/news/releases/2005/10/20051018-1.html> (“[B]ut as you know . . . our *policy* is not to comment on an investigation while it’s ongoing. And that means any question relating to it.” (emphasis added)); Press Briefing, Scott McClellan, White House Press Sec’y (July 11, 2005), *available at* <http://www.whitehouse.gov/news/releases/2005/07/20050711-3.html> (“[O]ur *policy* continues to be that we’re not going to get into commenting on an ongoing criminal investigation from this podium.” (emphasis added)). Despite the Bush policy, the administration commented in general terms on ongoing investigations in a series of other incidents. For example, the President weighed in on the issue of guilt in the state matter involving Tom DeLay and in the federal matters concerning former congressman Duke Cunningham and former lobbyist Jack Abramoff. *See Special Report with Brit Hume: Bush Talks with Brit* (FOX News television broadcast Dec. 14, 2005) [hereinafter *Bush Interview*] (transcript available at <http://www.foxnews.com/story/0,2933,178760,00.html>).

<sup>94</sup> *See* Letter from James B. Comey, Acting Att’y Gen., to Patrick J. Fitzgerald (Dec. 30, 2003), *available at* [http://www.usdoj.gov/usao/iln/osc/documents/ag\\_letter\\_December\\_30\\_2003.pdf](http://www.usdoj.gov/usao/iln/osc/documents/ag_letter_December_30_2003.pdf).

<sup>95</sup> *See, e.g.*, Press Briefing, Scott McClellan, White House Press Sec’y (Oct. 18, 2005), *available at* <http://www.whitehouse.gov/news/releases/2005/10/20051018-1.html>.

<sup>96</sup> Interview by Terry Moran with Richard Cheney, Vice President, *Nightline* (ABC broadcast Dec. 18, 2005) (emphasis added) [hereinafter *Richard Cheney Interview*].

<sup>97</sup> Press Briefing, Scott McClellan, White House Press Sec’y (July 12, 2005), *available at* <http://www.whitehouse.gov/news/releases/2005/07/20050712-4.html>; *see also* Press Briefing, President George W. Bush (July 18, 2005), *available at* <http://www.whitehouse>

the Clinton administration, they laced presidential silence regarding independent investigations with attitudinal terminology:

I think the President has had a very principled and responsible stand to not comment on the ongoing criminal matter in any way, shape, or form, and that has been his position. It's been the—it's a responsible one, it's a principled one, and that's what he's done.<sup>98</sup>

The administration has adhered to this policy of constraint for over four years. Within this period, it has commented on the Plame matter but once: the President, when commuting Libby's jail term, made a brief statement that he was compelled to act because the sentence imposed had been excessive.<sup>99</sup> The next day, however, the White House made clear that the policy of not commenting on the Plame investigation, due to its ongoing nature, remained in full force.<sup>100</sup> It should be noted that, except for Libby's commutation, the policy of silence has been rigorously followed by the Bush administration.<sup>101</sup>

## 2. Justifications for the Constraint

When reviewing the record closely, one will find that the Bush administration has proposed three alternative policy justifications for the "ongoing criminal investigation" constraint. First, the administration has several times claimed that White House comments will undermine the presumption of innocence for criminal targets or defendants. Vice President Cheney stated that "[Scooter Libby]'s entitled to the *presumption of innocence*, and from my perspective it would be totally inappropriate for me to comment, period."<sup>102</sup> Following Libby's conviction, Bush's

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.gov/news/releases/2005/07/20050718-1.html ("I would like this to end as quickly as possible so we know the facts, and if someone committed a crime, they will no longer work in my administration.").

<sup>98</sup> Press Briefing, Dana Perino, White House Press Sec'y (Mar. 6, 2007), *available at* <http://www.whitehouse.gov/news/releases/2007/03/20070306-5.html>.

<sup>99</sup> Statement by the President on Executive Clemency for Lewis Libby (July 2, 2007), *available at* <http://www.whitehouse.gov/news/releases/2007/07/20070702-3.html> (explaining that he was commuting Libby's jail sentence to zero days because the sentence imposed by the judge was excessive).

<sup>100</sup> Press Briefing, Tony Snow, White House Press Sec'y (July 3, 2007), *available at* <http://www.whitehouse.gov/news/releases/2007/07/20070703-6.html>.

<sup>101</sup> At this point, it would be unsurprising if Bush and his advisors refused to comment on the Plame matter through the end of his presidency. The administration has explained that, despite Libby's commutation, it will not comment on the matter so long as Libby is appealing his convictions. *See infra* note 125 and accompanying text.

<sup>102</sup> Richard Cheney Interview, *supra* note 96 (emphasis added).

press secretary commented that “our view is that you have an ongoing legal proceeding, and we’re very wary of saying anything that may *prejudice the rights* of Scooter Libby as he proceeds to seek a retrial or an appeal.”<sup>103</sup>

Second, the administration stated that public comments from the White House would undermine respect for the rule of law. President Bush explained that “it is very important for people not to *prejudice the investigation* based on media reports. . . . I will be more than happy to comment on this matter once the investigation is complete.”<sup>104</sup> Similarly, Press Secretary McClellan remarked, “I’m not going to comment on news reports that come out in the middle of an investigation or during an investigation, because that could just *prejudice the outcome of the investigation*.”<sup>105</sup> Press Secretary Tony Snow, in June 2006, in a tone echoing that of Hillary Clinton eight years earlier, said:

[L]et’s also try to figure out what the facts are. I’m simply not going to be talking about [whether an allegation] smacks of this or smacks of that when neither you nor I has seen the evidence, neither you nor I has heard the prosecution or the defense, [neither] you nor I has seen any of the documents. That would be moral grandstanding, and I think we owe it to ourselves to figure out what the facts of the case are, and we all may be able to draw appropriate morals at the appropriate time.<sup>106</sup>

Third, the administration has explained that silence is a way to conceal prosecutorial strategy. Bush’s press secretaries have often uttered that “[t]his is an ongoing investigation. I think that the officials in charge would prefer that questions be directed to them.”<sup>107</sup> This same justification has been alternatively stated as follows:

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<sup>103</sup> Press Briefing, Tony Snow, White House Press Sec’y (Mar. 7, 2007) (emphasis added), available at <http://www.whitehouse.gov/news/releases/2007/03/20070307-4.html>.

<sup>104</sup> Press Conference, President George W. Bush (July 13, 2005), available at <http://www.whitehouse.gov/news/release/2005/07/20050713-3.html>. Five days later, Bush commented that:

We have a serious ongoing investigation here. And it’s being played out in the press. And I think it’s best that people wait until the investigation is complete before you jump to conclusions. And I will do so, as well. I don’t know all the facts. I want to know all the facts. The best place for the facts to be done is by somebody who’s spending time investigating it.

Press Conference, President George W. Bush (July 18, 2005), available at <http://www.whitehouse.gov/news/releases/2005/07/20050718-1.html>.

<sup>105</sup> Press Briefing, Scott McClellan, White House Press Sec’y (July 12, 2005) (emphasis added), available at <http://www.whitehouse.gov/news/releases/2005/07/20050712-4.html>.

<sup>106</sup> Press Briefing, Tony Snow, White House Press Sec’y (June 2, 2006), available at <http://www.whitehouse.gov/news/releases/2006/06/20060602-5.html>.

<sup>107</sup> Press Briefing, Scott McClellan, White House Press Sec’y (June 24, 2004), available



The prosecutors overseeing the investigation had expressed a preference to us that one way to help the investigation is not to be commenting on it from this podium. And so that's why we are not going to get into commenting on it while it is an ongoing investigation, or questions related to it.<sup>108</sup>

In sum, the Bush administration, building on the attitudinal terms used by the Clinton administration, has adopted a rigid policy of not discussing matters that are the subject of an "ongoing criminal investigation." The administration explained that its silence is required to maintain presumption of innocence, rule of law, and respect for the prosecutorial blueprint. The following paragraphs explore the reaches of the Bush constraint.

### 3. The Scope of the Expanded Constraint

Broad swaths of information can be withheld by the expanded version of the "ongoing criminal investigation" constraint. Take, for example, the Plame matter, which was particularly limited in subject matter. The Special Counsel had been charged to conduct an independent investigation regarding allegations that White House officials illegally disclosed the covert status of a CIA operative to reporters, and the sole indictment filed in the matter alleged only that a grand jury witness, Scooter Libby, obstructed justice and committed perjury. Despite the tailored scope of the investigation and prosecution, the Bush administration claimed that the "ongoing criminal investigation" constraint barred them from addressing the following topics:

- The scope of the "ongoing criminal investigation" constraint.<sup>109</sup>
- The apparent inconsistency of recognizing a constraint after having previously commented on investigations.<sup>110</sup>

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at <http://www.whitehouse.gov/news/releases/2004/06/20040624-3.html>.

<sup>108</sup> Press Briefing, Scott McClellan, White House Press Sec'y (July 11, 2005), *available at* <http://www.whitehouse.gov/news/releases/2005/07/20050711-3.html>.

<sup>109</sup> Q: . . . [Y]ou acknowledge that he is free, as President of the United States, to take whatever action he wants to in response to a credible report that a member of his staff leaked information. He is free to take action if he wants to.

Mr. McClellan: Again, you're asking questions relating to an ongoing investigation . . . .

Press Briefing, Scott McClellan, White House Press Sec'y (July 11, 2005), *available at* <http://www.whitehouse.gov/news/releases/2005/07/20050711-3.html>.

<sup>110</sup> Q: Scott, I mean, just—I mean, this is ridiculous. The notion that you're going to stand before us after having commented with that level

- The willingness of the President to fully discuss the matter following the completion of the investigation.<sup>111</sup>
- The likely response by the President if one of his aides would be charged as a result of the investigation.<sup>112</sup>
- The President's confidence in White House advisors who were under investigation.<sup>113</sup>
- The results of internal White House investigations into the allegations.<sup>114</sup>

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of detail and tell people watching this that somehow you decided not to talk. You've got a public record out there. Do you stand by your remarks from that podium, or not?

Mr. McClellan: And again, David, I'm well aware, like you, of what was previously said, and I will be glad to talk about it at the appropriate time.

*Id.*

<sup>111</sup>

Q: When the leak investigation is concluded, does the President believe it might be important for his credibility, the credibility of the White House, to release all the information voluntarily that was submitted as part of the investigation, so the American public could see what the—what transpired inside the White House at the time?

Mr. McClellan: This is an investigation being overseen by a special prosecutor. And I think those are questions best directed to the special prosecutor. Again, this is an ongoing matter; I'm just not going to get into commenting on it further at this time. At the appropriate time, when it's complete, then I'll be glad to talk about it at that point.

*Id.*

<sup>112</sup> "Q: . . . [I]f in the administration someone did disclose this information, what action is the President prepared to take against that individual? . . . Mr. McClellan: Well, this in an ongoing investigation, John, and I'm going to direct further questions to the officials in charge of the investigation." Press Briefing, Scott McClellan, White House Press Sec'y (June 24, 2004), *available at* <http://www.whitehouse.gov/news/releases/2004/06/20040624-3.html>.

<sup>113</sup> "Q: Does the President continue to have confidence in Mr. Rove? Mr. McClellan: Again, these are all questions coming up in the context of an ongoing criminal investigation. And you've heard my response on this." Press Briefing, Scott McClellan, White House Press Sec'y (July 11, 2005), *available at* <http://www.whitehouse.gov/news/releases/2005/07/20050711-3.html>. Over the next few days, however, McClellan seemed to capitulate that this was not sufficiently related to the investigation and commented that the President had confidence in all of his advisors. Press Briefing, Scott McClellan, White House Press Sec'y (July 13, 2005), *available at* <http://www.whitehouse.gov/news/releases/2005/07/20050713-9.html>.

<sup>114</sup>

Q: Has the Vice President assured the President that neither he, nor anyone in his office had anything to do with this? You said that you received assurances last year from Lewis Libby and Karl Rove. Has the President received similar assurances from the Vice President?

Mr. McClellan: John, there's an ongoing investigation right now. Those questions are best directed to the officials in charge.

Press Briefing, Scott McClellan, White House Press Sec'y (June 24, 2004), *available at*

- The reaction of the White House to the allegations and the investigation.<sup>115</sup>
- The remedial measures implemented by the White House.<sup>116</sup>
- The ethical (rather than legal) implications of the alleged conduct.<sup>117</sup>
- The President's reaction to claims that the allegations were eroding the credibility of the White House.<sup>118</sup>

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<http://www.whitehouse.gov/news/releases/2004/06/20040624-3.html>.

<sup>115</sup> Q: Scott, last week there was a story in The New York Daily News, I think, that you—the question is accuracy—a question about—or a story about the President dressing down Karl Rove. So it would not be inconsistent if you thought that The New York Times story was inaccurate for you to say that?

Mr. McClellan: Again, I'm just not going to have further comment on an ongoing investigation, and I indicated that at that time, as well.

Press Briefing, Scott McClellan, White House Press Sec'y (Oct. 25, 2005), *available at* <http://www.whitehouse.gov/news/releases/2005/10/20051025-1.html>.

<sup>116</sup> Q: . . . So are you saying that he's not going to do anything about this until the investigation is fully over and done with?

Mr. McClellan: Well, I think the President has previously spoken to this. This continues to be an ongoing criminal investigation.

Press Briefing, Scott McClellan, White House Press Sec'y (July 11, 2005), *available at* <http://www.whitehouse.gov/news/releases/2005/07/20050711-3.html>.

Q: What is his problem? Two years, and he can't call Rove in and find out what the hell is going on? I mean, why is it so difficult to find out the facts? It costs thousands, millions of dollars, two years, it tied up how many lawyers? All he's got to do is call him in. . . . Why doesn't he ask him?

Mr. McClellan: I'll tell you why, because there's an investigation that is continuing at this point . . . .

Press Briefing, Scott McClellan, White House Press Sec'y (July 18, 2005), *available at* <http://www.whitehouse.gov/news/releases/2005/07/20050718-2.html>.

<sup>117</sup> Q: But, Scott, there's a difference between what's legal and what's right. Is what Karl Rove did right?

Mr. McClellan: . . . The best way to help the investigation come to a successful conclusion is for me not to get into discussing it from this podium. . . . I don't think that helps advance the investigation.

Press Briefing, Scott McClellan, White House Press Sec'y (July 12, 2005), *available at* <http://www.whitehouse.gov/news/releases/2005/07/20050712-4.html>.

<sup>118</sup> Q: When the leak investigation is concluded, does the President believe it might be important for his credibility, the credibility of the White House, to release all the information voluntarily that was submitted as part of the investigation, so the American public could see what the—what transpired inside the White House at the time?

Mr. McClellan: This is an investigation being overseen by a special prosecutor. And I think those are questions best directed to the special prosecutor. Again, this is an ongoing matter; I'm just not going to get into commenting on it further at this time.

Press Briefing, Scott McClellan, White House Press Sec'y (July 11, 2005), *available at*

- The personal recollections of the press secretaries.<sup>119</sup>
- The President's reaction to the conduct of the Special Counsel.<sup>120</sup>
- The President's sympathy for victims of the matter under investigation.<sup>121</sup>

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<http://www.whitehouse.gov/news/releases/2005/07/20050711-3.html>.

Q: Scott, back on the Rove question, you are continuously saying it's an ongoing investigation. But it's also an ongoing news story that has opened up what has been described as a credibility gap here. Do you not sense—is there no sense here that perhaps you, the President and/or Karl, need to say something more about this situation to close that gap? Mr. McClellan: Well, Bob, I think that if I started getting into questions relating to this investigation, I might be harming that investigation from moving forward.

Press Briefing, Scott McClellan, White House Press Sec'y (July 12, 2005), *available at* <http://www.whitehouse.gov/news/releases/2005/07/20050712-4.html>.

<sup>119</sup> “Q: So at this point, you can tell us that you don't know for a fact that you were dealt with truthfully when you came out here in October—. Mr. McClellan: I'm just not going to comment any further, thanks.” Press Briefing, Scott McClellan, White House Press Sec'y (Oct. 25, 2005), *available at* <http://www.whitehouse.gov/news/releases/2005/10/20051025-1.html>.

<sup>120</sup> Q: . . . You said several weeks ago that Special Counsel Peter [sic] Fitzgerald was handling the CIA leak investigation in a very dignified way. Yet some of your Republican supporters have recently suggested he may be an overzealous prosecutor, or one obsessing over legal technicalities. Have you revised you [sic] thinking on this issue?

The President: Nedra, I also said—this may be the fourth time I've been asked about this, which I appreciate, you're doing your job—I'm not going to comment about it. This is a very serious investigation, and I haven't changed my mind about whether or not I'm going to comment on it publicly.

Press Conference, President George W. Bush (Oct. 24, 2005), *available at* <http://www.whitehouse.gov/news/releases/2005/10/20051024-1.html>.

<sup>121</sup> Q: No, no, no, no. This has nothing to do with the investigation. This is about the leak and the effects on this family. I mean, granted there are partisan politics being played, but let's talk about the leak that came from the White House that affected a family.

Mr. McClellan: And let me just say again that anything relating to an ongoing investigation, I'm not going to get into discussing. I've said that the past couple of days.

Press Briefing, Scott McClellan, White House Press Sec'y (July 13, 2005), *available at* <http://www.whitehouse.gov/news/releases/2005/07/20050713-9.html>.

Q: Dana, you said the President is saddened by this. Is he saddened by the fact that a former top advisor in this building is facing this personal problem? Or is he saddened by the fact that a former advisor is convicted of lying in a federal investigation?

Ms. Perino: He was saddened for Scooter himself, personally, and for Scooter's family.

Q: He's not saddened that his top advisor lied to—was found guilty of lying to investigators?

- The President's reaction to public comments by Republican party officials regarding the merits of the allegations.<sup>122</sup>

The constraint has not only been applied to unrelated or peripheral subject matters, but also has been applied over attenuated periods of time. Traditionally, the force of the "ongoing criminal investigation" constraint dwindles with each passing phase of the criminal justice process. To put it generally, the constraint is at its apex during the pre-indictment phase, weakened slightly during the prosecution, and dramatically dissipated at the conclusion of trial.<sup>123</sup> At the point where all related trials have concluded, the only pressing confidentiality concerns are to protect confidential informants and facilitate future pre-decisional deliberations of government agents.<sup>124</sup>

The Bush administration, however, has claimed that the constraint is absolute throughout investigations, trials, and appeals. For instance, on the day Libby was convicted, the administration notified the press corps as follows:

Scooter Libby's attorneys just announced that they are going to ask for a new trial and . . . failing that, they will appeal the verdict. And so our principled stand of not commenting on an ongoing legal investigation is going to continue. I know that's going to be very disappointing for many, but that is the decision that we're going to—that we've made, and the decision—and the practice that we're going to continue on the way forward.<sup>125</sup>

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Ms. Perino: He's saddened for Scooter. We're not going to comment on the trial.

Press Briefing, Dana Perino, White House Press Sec'y (Mar. 6, 2007), *available at* <http://www.whitehouse.gov/news/releases/2007/03/20070306-5.html>.

<sup>122</sup> Q: Does the President believe it's appropriate for the RNC to continue to weigh in on this matter? They put out another memo today, with a top-10 Joseph Wilson lies. If indeed it's an ongoing investigation and it's improper for the White House to discuss it, does he think it's proper for the Republican Party to weigh in on it?

Mr. McClellan: You know, Geoff, I appreciate the question, and as you heard me say yesterday, we are not going to prejudge the outcome of the investigation based on media reports.

Press Briefing, Scott McClellan, White House Press Sec'y (July 14, 2005), *available at* <http://www.whitehouse.gov/news/releases/2005/07/20050714-5.html>.

<sup>123</sup> See discussion *infra* Part III.B.

<sup>124</sup> See discussion *infra* Part III.B.

<sup>125</sup> Press Briefing, Dana Perino, White House Press Sec'y (Mar. 6, 2007), *available at* <http://www.whitehouse.gov/news/releases/2007/03/20070306-5.html>. The Press Secretary went on to remark, "I think you have to let the appeals process play itself out." *Id.*

There are significant consequences to extending the constraint to cover independent matters under appeal. Depending on the jurisdiction, the direct appeals process following a criminal conviction can take somewhere between twelve and eighteen months.<sup>126</sup> The appeals process is oftentimes further protracted in cases, like Libby's, where the defendant maintains large litigation resources.<sup>127</sup> Setting direct appeals aside for the moment, there have been no assurances from the White House that it believes the constraint will not extend to post-conviction litigation (be it habeas corpus or civil actions).

The Bush administration's interpretation of the "ongoing criminal investigation" constraint has the potential to significantly obstruct democratic self-governance. A power-maximizing President, for instance, could respond to allegations of corruption with the following steps: (1) appoint a Special Counsel; (2) signal to the targeted official that he should not discuss the matter with investigators; (3) permit the targeted official to be prosecuted for contempt; and (4) if the official is convicted, pardon him before he is jailed, or at the conclusion of the administration, whichever is first. Throughout the entire process, the White House can refuse to address any facet of the controversy by simply citing to the "ongoing criminal investigation" constraint. All the while it can suggest that it wants to exonerate itself (and the aide) but is not permitted to do so. The seemingly external nature of the constraint placates the public: sensing that everything which can be done is being done, it waits passively for the resolution of the investigation, thereby bypassing alternative means of collecting information (e.g., hearings, impeachment, and obstruction of the President's policy agenda).<sup>128</sup> The administration can effectively

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<sup>126</sup> For example, in Wisconsin, "[t]he average felony case takes approximately two years from sentencing to the final Court of Appeals decision." See OFFICE OF CRIME VICTIM SERVS., WIS. DEP'T OF JUSTICE, VICTIMS' RIGHTS AND CRIMINAL APPEALS, [http://www.doj.state.wi.us/cvs/Victims\\_Rights/Victims\\_Rights\\_and\\_Criminal\\_Appeals.asp](http://www.doj.state.wi.us/cvs/Victims_Rights/Victims_Rights_and_Criminal_Appeals.asp). One study found that it takes 259 days for the average defendant to exhaust his direct appeals in New York state court. See STUART M. COHEN, ANNUAL REPORT OF THE CLERK OF THE COURT TO THE JUDGES OF THE COURT OF APPEALS OF THE STATE OF NEW YORK (2003), available at <https://www.nycourts.gov/ctapps/news/annrpt/2003AR.pdf>.

<sup>127</sup> It should be noted that it took several years to exhaust the appeals of those officials prosecuted in federal courts in the aftermath of Iran-Contra. See *In re North*, 31 F.3d 1188 (D.C. Cir. 1994) (demonstrating nine years between Iran/Contra and Oliver North's last appeal). There is little reason to think the appellate courts will dispose of Libby's claims prior to Bush's departure from office in January 2009.

<sup>128</sup> As a concrete example of the public's passiveness, the first congressional hearings regarding the Plame leak were not scheduled until the week after Scooter Libby's conviction—forty-four months after the public first heard the allegations that the White House facilitated the leak. See *Plame to Testify to Congress on Leak*, REUTERS, Mar. 9, 2007, available at <http://www.reuters.com/article/topNews/idUSN0833270020070309>. One could argue that this delay is instead attributable to the Republican majority of Congress. The timing of the subpoenas—two days after Libby's conviction—and the lack of floor speeches by members of the Democratic minority prior to January 2007 indicate that the public felt

delay the political fallout from the allegations to the end of the administration—a point where there, of course, can be no real fallout.

The Bush White House has relied on an expansive form of the “ongoing criminal investigation” constraint. The tide first began to shift with Clinton’s insinuations that commenting on the independent Whitewater investigation would be wrong or improper. This set the foundation for a new constraint, crystalized by the Bush administration, in which the President and his advisors claim that they are externally constrained from publicly discussing independent investigations. This new constraint has an enormous reach, as it has been used to justify silence on peripheral topics about independent matters in advanced stages of the criminal justice process. This expanded constraint severely limits the press’s ability to identify evasion and thus impairs the public’s enforcement of the trilemma of the ill-motivated President. The entirety of this Article analyzes the legitimacy of the expanded constraint.

### III. DECONSTRUCTING THE “ONGOING CRIMINAL INVESTIGATION” CONSTRAINT

It being clear that an expansive “ongoing criminal investigation” constraint impedes public monitoring, it is essential to identify the actual scope of the constraint. The constraint, as has been applied by the Bush administration, seems to be grounded in exceptionally vague principles of justice such as presumption of innocence, rule of law, and preservation of prosecutorial strategy. And the administration has routinely resisted specific questions from the press corps about the constraint’s origin and reach.

The “ongoing criminal investigation” constraint should not be characterized as monolithic or homogenous. It should instead be viewed as a bundle of three discrete executive duties. These are the obligations grounded in (1) positive law, (2) constitutional law, and (3) the social norms of good citizenship. This Part describes all three in detail and defines the contours of each under varying circumstances. This sharper, more detailed, understanding of the constraint will invite, in Part IV, an evaluation of its recent expansion to matters definitively beyond White House control.

#### *A. The Positive Obligations*

The most obvious limitations on the executive’s ability to discuss certain law enforcement matters are reflected in the positive law. These obligations are tangible

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Congress was inhibited, at least somewhat, by the existence of the ongoing investigation. *See* Letter from Henry A. Waxman, Chair of the House Oversight Comm., to Patrick J. Fitzgerald, Special Counsel (Mar. 8, 2007), *available at* <http://oversight.house.gov/documents/20070308134201-02108.pdf>.

in that they are expressed in statutes, administrative regulations, executive orders,<sup>129</sup> and interpretive case law. A few examples of positive obligations inhibiting public comment about criminal investigations include: Federal Rule of Criminal Procedure 6(e), which sets forth explicit limitations on the government's use of grand jury "material";<sup>130</sup> the Privacy Act of 1974, which regulates the executive's disclosure of discrete types of information it has gathered;<sup>131</sup> the plethora of subject-specific confidentiality statutes, which require the government to protect information regarding matters as diverse as covert operatives to census forms to personnel files;<sup>132</sup> and the statutory proscriptions against the obstruction of justice.<sup>133</sup>

It is unlikely that any positive obligations have motivated Bush's expansion of the "ongoing criminal investigation" constraint. This proposition is straightforward enough: it would have been far easier and more advantageous for him, had a positive obligation in fact barred his comment, to simply cite to the specific law at issue. Such positive obligations tend to come with explicit, carefully circumscribed applicability.<sup>134</sup> Federal Rule of Criminal Procedure 6, for instance, is confined to material obtained exclusively through the grand jury, and the confidentiality statutes apply to specific types of information, almost all of which are easily identifiable to

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<sup>129</sup> Formally, a duly promulgated executive order binds even the President unless and until it is validly abrogated, thereby establishing a new legal status quo. *See United States v. Nixon*, 418 U.S. 683, 695–96 (1974).

<sup>130</sup> FED. R. CRIM. P. 6(e)(2).

<sup>131</sup> 5 U.S.C. § 552a (2000).

<sup>132</sup> One leading treatise refers to these as "statutory privilege[s]." CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, 2 FEDERAL EVIDENCE § 220 (2d ed. 1994); *see, e.g.*, Census Act, 13 U.S.C. § 9 (2000) ("Copies of census reports which have been so retained shall be immune from legal process, and shall not, without the consent of the individual or establishment concerned, be admitted as evidence or used for any purpose in any action. . . ."); Internal Revenue Code, 26 U.S.C.A. § 6103 (West Supp. 2007) (making tax returns confidential and prohibiting disclosure "in any manner" of "any return or return information" by any federal or state officer).

<sup>133</sup> 18 U.S.C. §§ 1501–1517 (2000). Obstruction could occur, for instance, if the President suggested publicly that he might pardon a White House aide who was under investigation, which could signal an obstructive quid pro quo—the target's silence about the President's illicit involvement in exchange for the President's pardon. If, theoretically speaking, the President had suggested to Libby that he would be pardoned in exchange for his silence, the President would be using the pardon power to obstruct justice. *See John W. Dean, The Bush Administration's Dilemma Regarding a Possible Libby Pardon—And How Outsiders Such as Fred Thompson Appear to Be Working on a Solution*, FINDLAW, June 1, 2007, available at <http://www.writ.news.findlaw.com/dean/20070601.html>.

<sup>134</sup> Although much of this clarity is, of course, the result of judicial interpretation. *See, e.g.*, *In re Motions of Dow Jones & Co.*, 142 F.3d 496, 499–500 (D.C. Cir. 1998) (interpreting the phrase "matters occurring before the grand jury" to encompass "'the identities of witnesses or jurors, the substance of testimony' as well as actual transcripts, 'the strategy or direction of the investigation, the deliberations or questions of jurors, and the like'").



the executive branch.<sup>135</sup> There is simply no reason to believe that the President would turn to the nebulous “ongoing criminal investigation” constraint if he could alternatively have relied on one of these clear and discrete obligations. One can thus confidently disregard the possibility that the constraint has facilitated the President’s adherence to a positive obligation.

### *B. The Constitutional Obligations*

It is exceedingly difficult to identify all of the constitutional obligations of a President. Nowhere will one find a comprehensive list. For instance, the federal courts, due to their jurisdictional limitations (such as the case or controversy requirement and abstention doctrines), have left many executive duties undefined or unformed. Congress has also, of course, not defined the executive’s obligations—its interests sometimes conflict with the public’s interest in a fair and effective executive branch (think, for example, of Congress’s desire to be informed of the intricacies of national security matters). One also cannot presume that the executive branch has identified and codified all of its inherent constitutional obligations into orders, rules, and regulations. The executive, after all, may not have had the occasion to consider a particular application of its obligations, or it might not want to bind its future actions with an explicit set of rules.

Because there is no definitive record of Presidents’ obligations, this Article proceeds on a more theoretical basis. One might speculate that there are three “constitutional” obligations which could, in any given circumstance, constrain Presidents from publicly commenting about ongoing criminal investigations: (1) the designation of the President as the Commander in Chief,<sup>136</sup> (2) the President’s power to pardon,<sup>137</sup> and (3) the President’s duty to faithfully execute the laws.<sup>138</sup> On closer inspection, it becomes clear that the Commander-in-Chief and Pardon Clauses do not, as a practical matter, motivate the “ongoing criminal investigation” constraint. The Faithful Execution Clause, however, proves central to this project and will be analyzed in an accordingly detailed manner.

#### 1. The Commander-in-Chief Clause

Article II of the Constitution designates the President as Commander in Chief and the leader in foreign affairs.<sup>139</sup> This implies, among other things, a duty not to

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<sup>135</sup> This information tends to be affirmatively and knowingly collected by the government and often is submitted or transcribed on some type of easily-identifiable government form.

<sup>136</sup> U.S. CONST. art. 2, § 2, cl. 1.

<sup>137</sup> *Id.* art. 2, § 2, cl. 1.

<sup>138</sup> *Id.* art. 2, § 3, cl. 4.

<sup>139</sup> *See id.* art. 2, § 2, cl. 1.

divulge state secrets that could jeopardize national security.<sup>140</sup> Although information relating to law enforcement investigations can (and does) implicate diplomatic, military, or national security secrets, the President's status as Commander in Chief is a relatively poor explanation for the use of the "ongoing criminal investigation" constraint. First, it is not aligned with the justifications advanced by the Bush administration, which, as set forth in Part II, include presumption of innocence, rule of law, and concealment of the prosecutorial blueprint.<sup>141</sup> Second, it is unlikely that any President would turn to the "ongoing criminal investigation" constraint to protect national security when he could just as easily cite to the state secrets constraint, which is, in times of war, a uniquely persuasive justification for executive activity.<sup>142</sup> The Commander-in-Chief Clause is, for these reasons, a weak explanation for the "ongoing criminal investigation" constraint.

## 2. The Pardon Clause

A second provision of the Constitution which could theoretically impose a constraint on the executive branch's ability to comment on ongoing investigations is the Pardon Clause.<sup>143</sup> The Clause provides that Presidents have the power to grant clemency for federal crimes. Most commonly, it manifests itself in the form of a pardon or commutation of the sentence.

There are several practical problems with this explanation. First, the power to pardon is not aligned with the Bush administration's justifications for the use of the constraint. The failure to uphold ideals of criminal justice (like preserving the presumption of innocence, rule of law, and prosecutorial strategy) does not in any way impact Presidents' ability to properly *exercise* the pardon power. After all, clemency is collateral to the entire criminal justice process, reserved in the arm of an executive authority to use in his considered, but unchecked discretion—sometimes due to law, sometimes due to justice, but sometimes due to neither. Regardless of whether a criminal defendant receives due process in a trial or whether a prosecutorial blueprint is unduly forecast, the President's power to pardon remains complete.<sup>144</sup>

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<sup>140</sup> See *United States v. Nixon*, 418 U.S. 683 (1974) (grounding the State Secrets Privilege in the Commander-in-Chief Clause).

<sup>141</sup> See *supra* Part II.C.2.

<sup>142</sup> See *generally* *Rumsfeld v. Padilla*, 542 U.S. 426, 431 n.2 (2004) (discussing military detention of individuals determined by the President to be a "grave danger to the national security of the United States").

<sup>143</sup> U.S. CONST. art. 2, § 2, cl. 1.

<sup>144</sup> A prior comment could, however, have a *political* effect on subsequent consideration of whether to issue a pardon. Seeing that clemency is most often granted on the President's final day in office, these political considerations are significantly diminished.

Second, there appears to be no instance in which a President or Attorney General—throughout the entire history of congressional requests for executive information—has cited the pardon power as a justification for not providing information about an ongoing criminal investigation.<sup>145</sup> To the contrary, Presidents Nixon, Reagan, and Clinton commented liberally on matters despite the high probability that the individual subjects of their comments would be candidates for clemency. As such, it seems unreasonable to suggest that the “ongoing criminal investigation” constraint originates in this Clause.

### 3. The Faithful Execution Clause

Only one constitutional obligation seems to motivate the “ongoing investigation constraint.” This is the Article II clause providing that Presidents “shall take Care that the Laws be faithfully executed.”<sup>146</sup> It imposes on Presidents “the duty to ensure faithful law execution using whatever constitutional powers and statutory means are at the President’s disposal.”<sup>147</sup> This Clause, many have argued, grants Presidents the constitutional role of chief federal prosecutor,<sup>148</sup> which gives them the ultimate, albeit oftentimes nominal, power to direct federal prosecutions.<sup>149</sup> The following paragraphs examine how and why the Faithful Execution Clause inhibits presidential commenting about ongoing criminal investigations.

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<sup>145</sup> The President should not, however, comment about whether he would likely pardon a person under investigation as this would potentially constitute obstruction of justice. This is a limited exception. The pardon power would not, of course, inhibit a President from commenting on the investigation so long as it did not relate to the specific issue of the potentiality of a pardon.

<sup>146</sup> U.S. CONST. art. 2, § 3, cl. 4.

<sup>147</sup> Saikrishna Prakash, *Removal and Tenure in Office*, 92 VA. L. REV. 1779, 1837 (2006); see Prakash, *supra* note 43, at 536 (“The Constitution’s grant of executive power means that the president may control law execution, including prosecutions of alleged law breakers. The Faithful Execution Clause, by imposing a duty about how the president must use his executive power, helps confirm that the president can prosecute alleged offenders and thereby set the wheels of justice in motion.”).

<sup>148</sup> See Prakash, *supra* note 43, at 536–37. That being said, the President’s role as chief prosecutor can be curtailed. Congress may constitutionally preclude him from directing the day-to-day operations of particular investigations and prosecutions. He can also limit his own participation via executive order. The Supreme Court, in *Morrison v. Olson*, made clear that so long as the President retains authority to initiate a prosecution and to remove the prosecutor for good cause, the Faithful Execution Clause is not violated. 487 U.S. 654 (1988).

<sup>149</sup> Prakash, *supra* note 43, at 539 (“Taken together, the Executive Power and Faithful Execution Clauses suggest that the president may direct official prosecutors and, in some cases, has a duty to do so.”); *id.* at 575 (“The president has the constitutional authority to control prosecutors by virtue of the executive power. . . .”).

*a. Faithful Execution Mandates Silence*

The Faithful Execution Clause dictates presidential silence about ongoing criminal investigations. First, there are enforcement concerns. Public comments could provide a helpful tip to a target, thereby making conviction less likely.<sup>150</sup> Less directly, public exposure of an investigation would inhibit candidness between law enforcement officials<sup>151</sup> and increase the difficulty in securing the cooperation of essential informants and witnesses.<sup>152</sup>

Second, public comment could negatively affect the notion of presumption of innocence. Due to the perception that Presidents have access to information obtained during federal investigations and prosecutions,<sup>153</sup> their comments could taint the objectivity of potential jurors<sup>154</sup> or harm the reputations of persons who are never ultimately charged.<sup>155</sup>

Third, such comments could violate the sanctity of rule of law. Prosecutors must make principled and reasoned decisions throughout a criminal investigation. When a high-level executive official speaks about a case and indicates some

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<sup>150</sup> 40 Op. Att'y Gen. 45, 46 (1941) ("Disclosure of the reports could not do otherwise than seriously prejudice law enforcement. Counsel for a defendant or prospective defendant, could have no greater help than to know how much or how little information the Government has, and what witnesses or sources of information it can rely upon.").

<sup>151</sup> If information about the prosecution's views were released, those charged with prosecutorial decisions may "be chilled from providing the candid and independent analysis essential to the sound exercise of prosecutorial discretion and to the fairness and integrity of federal law enforcement." *Investigation into Allegations of Justice Department Misconduct in New England: Hearings Before the H. Comm. on Gov't Reform*, 107th Cong. 510 (2002) (statement of Daniel J. Bryant, Ass't Att'y Gen., Office of Legislative Affairs).

<sup>152</sup> 40 Op. Att'y Gen. 45, 46–47 (1941) ("A disclosure of the sources would embarrass informants—sometimes in their employment, sometimes in their social relations, and in extreme cases might even endanger their lives. We regard the keeping of faith with confidential informants as an indispensable condition of future efficiency.").

<sup>153</sup> Prakash, *supra* note 43, at 521 ("As a matter of the Constitution's original understanding, constitutional text, structure, and history establish that the president is the constitutional prosecutor of all federal offenses whether prosecuted by official or popular prosecutors.").

<sup>154</sup> There is a legitimate concern that pretrial publicity emanating from Congress could have adverse effects on a prosecution. See, e.g., Randall K. Miller, *Congressional Inquests: Suffocating the Constitutional Prerogative of Executive Privilege*, 81 MINN. L. REV. 631, 646 (1997) (noting how disclosure of law enforcement information may "bias a subsequent prosecution with pre-prosecution publicity").

<sup>155</sup> 40 Op. Att'y Gen. 45, 47 (1941) ("Disclosure of information contained in the reports might also be the grossest kind of injustice to innocent individuals. Investigative reports include leads and suspicions, and sometimes even the statements of malicious or misinformed people. Even though later and more complete reports exonerate the individuals, the use of particular or selected reports might constitute the grossest injustice, and we all know that a correction never catches up with an accusation.").

preference about how the investigation should go, he plausibly sends mixed signals to line prosecutors within his control who are charged with making prosecutorial determinations.<sup>156</sup> Also, by releasing privileged information to the public, Presidents might invite extraneous pressure from either Congress or the media, which could also potentially influence prosecutors.<sup>157</sup>

Fourth, an implicit societal agreement would be violated if Presidents were permitted to simply blurt out law enforcement information to the general public under any circumstances.<sup>158</sup> With the power to gather information to enforce criminal laws comes the responsibility to restrict the use of that information to enforcement matters. Presidents are provided with robust powers to collect information to prevent and punish criminal activity.<sup>159</sup> With such investigatory tools at their disposal, it seems reasonable to obligate Presidents to channel the use of information extracted by such tools to carefully delineated fora, such as grand juries, discovery, and criminal trials. For these reasons, Presidents' faithful execution of the laws require them, under at least some circumstances, to refuse public comment about ongoing criminal investigations.

#### *b. Parsing the Faithful Execution Clause*

It is clear that the Faithful Execution Clause justifies presidential silence about at least some parts of some ongoing criminal investigations. Moreover, it is apparent that Presidents have been implicitly relying on this Clause. The Clause, after all, demands silence for the very same reasons cited by the Bush administration. Also, the term "ongoing criminal investigation" is a sufficiently proportionate way to

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<sup>156</sup> 10 Op. Off. Legal Counsel 68, 76 (1986) ("[W]ell founded fears that the perception of the integrity, impartiality, and fairness of the law enforcement process as a whole will be damaged if sensitive material is distributed beyond those persons necessarily involved in the investigation and prosecution process.").

<sup>157</sup> Justice Powell wrote in *INS v. Chadha*, "The Framers were well acquainted with the danger of subjecting the determination of the rights of one person to the 'tyranny of shifting majorities.'" 462 U.S. 919, 961 (1983) (Powell, J., concurring); see also THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 129 (J.W. Randolph ed., 1853) (1787) (expressing concern that the legislature "[has] accordingly, in many instances, decided rights which should have been left to judiciary controversy"); Benjamin R. Civiletti, Address Before the Heritage Foundation, Justice Unbalanced: Congress and Prosecutorial Discretion (Aug. 19, 1993), in THE HERITAGE FOUND., THE HERITAGE LECTURES NO. 472 (1993) (arguing that due process rights could be overwhelmed by congressional demands for prosecution in the individual's case).

<sup>158</sup> The Travelgate controversy provides a good example of a breach of this agreement. See *supra* notes 51-53 and accompanying text.

<sup>159</sup> Examples include the grand jury, where documents and testimony can be subpoenaed under threat of contempt of court, and the investigatory interview, an oftentimes intimidating engagement whereby the subject's fears of law enforcement (and imprisonment) loom large.

invoke the obligations of the Clause—it would be unrealistic to expect Presidents to state this obligation with any more particularity.

Realizing that the Bush administration has been relying in part on the Faithful Execution Clause to justify its use of the “ongoing criminal investigation” constraint merely begs the question: under what conditions does the Clause inhibit public comment? Because federal courts often abstain from resolving conflicts between the White House and Congress, the case law is of little guidance.<sup>160</sup> As an alternative, one might think to turn to internal agency guidelines, professional codes of ethics, and prosecutorial handbooks. While such sources are helpful, they should be read with a certain dose of skepticism. First, they do not reflect the views of all interested parties. For example, the U.S. Attorneys’ Manual is a product of the Department of Justice only—neither the general public, the courts, nor Congress participated in the deliberative or drafting process.<sup>161</sup> Thus there is a real concern that the executive will overdraw the scope of its powers or will supplement the Guidelines with new powers when circumstances so require. A second problem with relying exclusively on these sources is that they focus only on the practices of attorneys and their associates.<sup>162</sup> They do not portend to govern the President or his aides, who might very well be regulated by a narrower constraint. A third concern is that the sources do not claim to interpret Article II responsibilities but instead set forth pragmatic rules of management or aspirational rules of professional conduct.<sup>163</sup> For example, the Attorney General might want to control press relations by barring his prosecutors from speaking to the press without his express permission. This rule, of course, does not necessarily reflect the bounds of the Faithful Execution Clause but merely the preferred management style of a particular cabinet official. For these reasons, this study must go beyond a mere review of the applicable guidelines and professional rules.

Ultimately, it seems that the most accurate method to identify the reaches of the executive’s obligations under the Faithful Execution Clause is through examination

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<sup>160</sup> By one commentator’s count, there is only one reported case addressing an executive’s assertion of the law enforcement privilege vis-à-vis Congress. See Roberto Iraola, *Congressional Oversight, Executive Privilege, and Requests for Information Relating to Federal Criminal Investigations and Prosecutions*, 87 IOWA L. REV. 1559, 1584 (2002) (noting that since “[the] litigation ‘raise[d] difficult constitutional questions in the context of an intragovernmental dispute,’ the court found it inappropriate to address such issues until the circumstances indicated that judicial intervention was warranted” (citing *United States v. House of Representatives*, 556 F. Supp. 150, 152 (D.D.C. 1983))).

<sup>161</sup> DEP’T OF JUSTICE, U.S. ATTORNEYS’ MANUAL, ch. 1-1.100 (“The Manual provides only internal Department of Justice guidance. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal.”).

<sup>162</sup> See *id.*

<sup>163</sup> See *id.*

of the “law enforcement privileges.” Like the agency guidelines and professional rules, there are no underbreadth problems: The privileges encompass at least the entirety of the executive’s duties relating to the dissemination of law enforcement information.<sup>164</sup> Yet unlike agency guidelines and professional rules, the privileges seem to present few, if any, overbreadth problems. First, the law enforcement privileges apply to the President (rather than just prosecutors). Second, the privileges have been formed over the centuries through an adversarial process—the United States has a rich history of contentious battles between the President, Congress, and the judiciary about the scopes of executive privileges.<sup>165</sup>

“Executive privilege” has been defined as “the variety of privileges and immunities, grounded in the constitutional structure of the presidency, that allows the President to withhold information or refrain from participation in the processes of the other branches.”<sup>166</sup> While privileges are generally thought to protect the holder of information only, the privileges of the Presidents—as agents of the public—often serve to preserve the integrity of executive processes, and, in particular, the rights of vulnerable members of society such as confidential informants and grand jury targets. So the privileges, at least under certain circumstances, constitute actual “obligations” on the executive.<sup>167</sup>

There are various forms of executive privilege, of which law enforcement privileges are an important, yet relatively new, subset. It was Attorney General Robert Jackson, who, relying explicitly on the Faithful Execution Clause, ushered in the era of privileges over law enforcement information in 1941:

It is the position of this Department, restated now with the approval of and at the direction of the President, that all investigative reports are confidential documents of the executive department of the Government, to aid in the duty laid upon the

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<sup>164</sup> If the privileges did not encompass all the law information which must be concealed under the Faithful Execution Clause, then the Clause would be regularly undermined by Congress, Freedom of Information Act (FOIA) applicants, and civil litigants. There is no evidence that the concealed nature of this information, as it currently exists, is attributable to the disinclination or good will of Congress, FOIA applicants, or civil litigants.

<sup>165</sup> These disagreements are most often resolved through the process of accommodation or judicial review.

<sup>166</sup> Kinkopf, *supra* note 1, at 632; *see also* Carl Zeiss Stiftung v. Carl Zeiss, 40 F.R.D. 318, 324 (D.D.C. 1966) (“Executive privilege is a phrase of release from requirements common to private citizens or organizations”—an exemption essential to discharge of highly important executive responsibilities.”).

<sup>167</sup> This brings to mind Posner and Vermeule’s “well-motivated executive,” who chooses the policies and makes the decisions “that voters would choose if they knew what the executive knows.” Posner & Vermeule, *supra* note 9, at 876–77. The President’s motives need not be pure; he must simply care about his legacy and be aware that his papers will be released in the long run.

President by the Constitution to “take care that the laws be faithfully executed,” and that congressional or public access to them would not be in the public interest.<sup>168</sup>

Although it is well settled that executive privilege encompasses law enforcement information,<sup>169</sup> terminological debates abound.<sup>170</sup> In its broadest form, it is known as the “law enforcement investigatory” privilege or simply the “law enforcement” privilege. Yet these terms subsume or overlap more discrete privileges such as the prosecutorial deliberative process privilege,<sup>171</sup> the work product privilege,<sup>172</sup> the self-critical analysis privilege,<sup>173</sup> and the informants privilege.<sup>174</sup> Moving forward, this Article will focus on the broad form and refer to it generically as the privilege over law enforcement information.<sup>175</sup>

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<sup>168</sup> 40 Op. Att’y Gen. 45, 46 (1941).

<sup>169</sup> See generally *In re* U.S. Dep’t of Homeland Security, 459 F.3d 565 (5th Cir. 2006) (holding that a law enforcement privilege protects government documents relating to an ongoing criminal investigation); see also 26A CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5681 (1992) (explaining that the majority of circuits have recognized such a privilege).

<sup>170</sup> As Professor Kinkopf observes, “Executive privilege is remarkably protean; it can assume a seemingly limitless array of forms and, consequently, is difficult to grasp.” Kinkopf, *supra* note 1, at 631–32.

<sup>171</sup> “By longstanding common-law tradition . . . the government’s official information privilege (often under the name ‘executive privilege’) covers matters of an advisory or deliberative nature embodying opinions or recommendations and generated in connection with government policymaking and decisionmaking functions.” MUELLER & KIRKPATRICK, *supra* note 132, § 224. In order to be protected by the privilege, information must be both (1) predecisional and (2) deliberative. See *Jordan v. U.S. Dep’t of Justice*, 591 F.2d 753, 774 (D.C. Cir. 1978).

<sup>172</sup> See, e.g., *Hickman v. Taylor*, 329 U.S. 495, 510–11 (1947) (finding that the primary purpose of the work product privilege is to prevent exploitation of a party’s efforts in preparing for litigation).

<sup>173</sup> See Theodore R. Lotchin, Note, *No Good Deed Goes Unpunished? Establishing a Self-Evaluative Privilege for Corporate Internal Investigations*, 46 WM. & MARY L. REV. 1137 (2004).

<sup>174</sup> This is “the Government’s privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law.” *Roviaro v. United States*, 353 U.S. 53, 59 (1957). Of course the aggregate law enforcement privilege does not include work product information that is not related to a criminal investigation or prosecution.

<sup>175</sup> For a detailed discussion of the components and the overlapping nature of the privileges relating to law enforcement information, see WRIGHT & GRAHAM, *supra* note 169, § 5681. See also Kinkopf, *supra* note 1, at 633 (stating that “the courts have followed the standard account, regarding each claim as an application of the general separation of powers principle, rather than as a distinct privilege” and that “courts have accepted the notion that this welter of factually disparate claims actually forms a single doctrinal category”).



To realize the contours of the Faithful Execution Clause, this Section undertakes a relatively arduous task. It begins by inventorying the scope of the executive privileges concerning law enforcement information. It then examines the privileges and seeks to parse the President's *obligations* inherent in such privileges.<sup>176</sup> Finally, it extrapolates these obligations (which are largely discerned from the executive's relations with Congress, Freedom of Information Act (FOIA) applicants, and civil litigants) to the level of the press forum.<sup>177</sup> It ultimately concludes that the Faithful Execution Clause only obligates presidential silence about those ongoing criminal investigation matters in which the President is perceived as having at least nominal access to, or direct influence over, the proceedings.

*c. The Scope of Executive Privileges over Law Enforcement Information*

A consensus has emerged regarding the limits of the law enforcement privileges.<sup>178</sup> The law enforcement privileges have different reaches depending on whether the subject matter relates to an open or closed investigation.<sup>179</sup> If a file is open, the privileges seem to apply to all information and statements regarding a criminal matter handled by a government agency or department of which the executive official is affiliated (either as a member or a supervisor).<sup>180</sup> There are, however, a few narrow exceptions. The general rule does not apply to (1) officially disclosed information such as that found in the charging papers,<sup>181</sup> (2) public safety

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<sup>176</sup> Some portion of the privilege simply reflects executive power separate and apart from any underlying obligations.

<sup>177</sup> The press inquiry, which is the focus of this Article, places a special burden on the executive branch. Thus it is imperative to extrapolate the contours of the obligation (as gleaned from the privileges) to the level where the press and executive relate. *See generally* Kinkopf, *supra* note 1, at 633–34 (distinguishing between the reach of privileges in relation to federal courts and Congress).

<sup>178</sup> *See In re U.S. Dep't of Homeland Security*, 459 F.3d 565 (5th Cir. 2006); WRIGHT & GRAHAM, *supra* note 169, § 5681.

<sup>179</sup> *See* 10 Op. Off. Legal Counsel 68, 76 (1986) (stating that “the policy of the Executive Branch throughout our Nation’s history has generally been to decline to provide committees of Congress with access to, or copies of, open law enforcement files except in extraordinary circumstances”).

<sup>180</sup> *See generally* 5 U.S.C. § 552(b)(7)(A) (2000) (providing an exemption regarding information that will interfere with law enforcement proceedings). “The privilege is most often invoked as to investigative materials collected in conjunction with civil or criminal law enforcement efforts by such agencies as the Department of Justice (including the FBI) or local police.” MUELLER & KIRKPATRICK, *supra* note 132, § 225.

<sup>181</sup> This would include information provided through discovery without a protective order or stated in the non-sealed charging papers, pleadings, or in the open record. *See In re U.S. Dep't of Homeland Security*, 459 F.3d at 570–71 (noting a ten-factor test used to determine the applicability of the law enforcement privilege, one of which is “whether the information sought is available through other discovery or from other sources”).

information such as the time and place of the defendant's arrest,<sup>182</sup> or (3) non-identifiable information, such as statistics or studies aggregating various enforcement efforts.<sup>183</sup> The general rule, which applies to all members and supervisors of the handling agency, is based on the presumption that all such officials have special access to or influence over the matter.<sup>184</sup> Importantly, if an official had been recused from participating in a particular matter at its outset,<sup>185</sup> he would have no access to or influence over the matter and thus would be barred from relying on the law enforcement privilege to withhold information regarding the matter.<sup>186</sup>

If, on the other hand, a file is closed, the scope of the law enforcement privileges is, roughly speaking, a direct corollary of the Freedom of Information Act.<sup>187</sup> FOIA provides that members of the public are entitled to copies of certain public records for a nominal fee within a reasonable period of time.<sup>188</sup> In terms of tracing the

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<sup>182</sup> *See id.*

<sup>183</sup> *See id.*

<sup>184</sup> 10 Op. Off. Legal Counsel 68, 76 (1986) (citing the "well-founded fears that the perception of the integrity, impartiality, and fairness of the law enforcement process as a whole will be damaged if sensitive material is distributed beyond those persons necessarily involved in the investigation and prosecution process").

<sup>185</sup> This presumes that the recusal was strictly enforced and that the individual at issue did not view official information.

<sup>186</sup> Examples would include an individual who was the target of an investigation or, if for some reason, the individual was asked in a hearing to speculate about the appropriateness of a particular investigative decision in light of his experience in that department. With records, the application of this concept for open files is relatively clear-cut: it would apply so long as the information could be reasonably linked to an identifiable matter. It is not as easy, however, to apply this concept when the information comes in the form of testimony. For example, it seems that comments by a member of the investigating department which go beyond the facts in the charging papers is necessarily based (or impossible to ensure that it is not based) on information which remains confidential. It is therefore likely treated as privileged information. But simply repeating public information, or discussing general departmental information that will not impair an ongoing proceeding, is of course not a component of the privilege.

<sup>187</sup> 5 U.S.C. § 552 (2000). Exemption 7 of FOIA "has been used as authority for the existence of the privilege or as an analogy giving it shape." WRIGHT & GRAHAM, *supra* note 169, at 158 (footnotes omitted); *see also* MUELLER & KIRKPATRICK, *supra* note 132, § 220 ("[T]he exemptions in FOIA have considerable impact on the dimensions of government privileges. It is clear, for example, that those exemptions limit (and probably narrowed) at least two governmental privileges—those covering state secrets and official information. . . . the latter by Exemptions 5 and 7. The reason for the limiting effect is that necessarily anything disclosable under FOIA cannot be privileged . . . for that which the Act entitles a member of the public to obtain by suit cannot remain privileged against disclosure to a litigant, a point which has been recognized in the cases.").

<sup>188</sup> FOIA requires each agency to publish in the Federal Register a description of its organizations and a list of its personnel through whom the public can obtain information. 5 U.S.C. § 552(a). Each agency must also explain the procedures by which it will furnish information. *Id.*

privileges over law enforcement information, FOIA is not underbroad, as Congress has a traditional and strong institutional interest in forcing the executive to divulge information about its inner workings.<sup>189</sup> And it is not overbroad, as FOIA has been upheld by the courts as not encroaching unconstitutionally upon the executive's constitutional powers and duties.<sup>190</sup> The FOIA statute includes a series of exemptions which define the scope of information that the government can withhold.<sup>191</sup> Exemption 5 provides that the executive can withhold all deliberative internal memoranda from the Justice Department.<sup>192</sup> Exemption 7 ensures that executives can withhold law enforcement information which could reasonably be expected to (a) interfere with enforcement proceedings, (b) constitute an unwarranted invasion of personal privacy, (c) disclose the identity of a confidential source, (d) endanger the life or physical safety of any individual, (e) deprive a person of a right to a fair trial or an impartial adjudication, or (f) disclose techniques and procedures for law enforcement investigations or prosecutions.<sup>193</sup> Any law enforcement information falling outside of the provisions of Exemptions 5 and 7 is undoubtedly not privileged.<sup>194</sup> This would certainly include public comments about closed matters so long as particularly sensitive information, such as the identity of confidential sources, was withheld.<sup>195</sup> It would also include comments by federal officials regarding the guilt or innocence of persons whom had never been investigated or prosecuted by the agency or department to which the official belonged.<sup>196</sup>

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<sup>189</sup> In theory there could be a Congress disinterested in strictly scrutinizing executive functions. With a deferential legislative branch, a significant information gap would exist between (1) congressional disclosure acts and (2) the executive privileges. Under such a theoretical scenario, the scope of the disclosure acts would not reveal much about the scope of privileges.

<sup>190</sup> See, e.g., *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001).

<sup>191</sup> 5 U.S.C. § 552 (b). These exemptions protect information in both open and closed files (though to varying degrees). "If an agency's investigatory files were obtainable without limitation after the investigation was concluded, future law enforcement efforts by the agency could be seriously hindered." *Frankel v. SEC*, 460 F.2d 813, 817 (2d Cir. 1972); *WRIGHT & GRAHAM*, *supra* note 169, at 4.

<sup>192</sup> See 5 U.S.C. § 552 (b)(5).

<sup>193</sup> *Id.* § 552 (b)(7).

<sup>194</sup> If it were otherwise, FOIA applicants could access privileged information—thus totally undermining any value of the privilege.

<sup>195</sup> *WRIGHT & GRAHAM*, *supra* note 169, at 4.

<sup>196</sup> Importantly, FOIA does not govern the Office of the President—that is, the President and his closest staff. See *Kissinger v. Reporters' Comm. for Freedom of the Press*, 445 U.S. 136, 156 (1980). Congress enacted the Presidential Records Act (PRA) to regulate the public disclosure of presidential records. See 44 U.S.C. §§ 2201–07 (2000). FOIA is highly relevant to our discussion even if it does not describe the contours of the *President's* privilege over law enforcement information. The President's *obligations* relating to an ongoing criminal investigation are the same as those of the Attorney General and thus can be inferred from the obligations underlying the privileges as applied to general executive officials. See Posner &

In sum, the law enforcement privileges extend, for open files, to all information or speculation about that matter (so long as the information was not previously disclosed through valid channels such as the charging papers or discovery process). The privileges over closed files extend to all documents (and, by extension, any comments revealing the substance of such documents) encompassed by FOIA Exemptions 5 and 7.<sup>197</sup> Importantly, the privileges do not apply to all members of the executive branch but only to those who have had access to or influence over the criminal matter at issue (which, in the case of closed files, includes those who have previously had control over the file). In order to glean the scope of the obligations inherent in the Faithful Execution Clause, the next paragraphs parse the executive obligations embedded within the law enforcement privileges and then extrapolate such obligations to the press forum.

*d. The Obligations Embedded Within the Privileges*

This Article's review of the law enforcement privileges indicates that, when faced with an inquiry from Congress, civil litigants, or FOIA applicants, the relevant executive officials *can* withhold (1) all information from open law enforcement matters and (2) information from closed law enforcement matters that fall under FOIA Exemptions 5 and 7. The "relevant" officials are those who have had access to or influence over the investigatory matter at issue. This is the *maximum potential* reach of the executive's obligation to withhold law enforcement information when faced with a congressional, FOIA, or civil discovery request.<sup>198</sup> The following paragraphs discuss the ways to parse the obligation's actual reach from this maximum potential reach.

*i. Identifying the Obligations*

Information is sometimes privileged not simply because Presidents have the *power* to conceal it but because they also have the *obligation* to conceal it. A sufficiently calibrated method to identify the obligations within the law enforcement privileges is to simply inventory which privileged information has been, over time,

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Vermeule, *supra* note 9, at 876–77 (discussing the President's concern with history and his knowledge that in twelve years, per the PRA, 44 U.S.C. § 2204, most or all of his currently private information will be revealed); Cf. Exec. Order No. 13,233, 3 C.F.R. 815 (2001) (ensuring further implementation of the Presidential Records Act). *But see* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2335 (2001) (discussing the problem with executive accountability during a President's second term).

<sup>197</sup> See 5 U.S.C. §§ 552 (b)(5), (7).

<sup>198</sup> See, e.g., *Frankenhauser v. Rizzo*, 59 F.R.D. 339, 344 (E.D. Pa. 1973) (holding that a federal court must carefully balance the public's interest in nondisclosure against the need of a particular litigant for access to the privileged information).

disclosed voluntarily by the White House. That said, the executive almost never voluntarily discloses privileged information to civil litigants or FOIA applicants. And Congress, despite its capacity to accommodate confidentiality concerns, does not fare much better.<sup>199</sup> One commentator concluded that the executive branch has disclosed files of open cases to Congress on no more than three criminal ongoing matters.<sup>200</sup> The Office of Legal Counsel during the Reagan administration explained: "The policy of the Executive Branch throughout our Nation's history has generally been to decline to provide committees of Congress with access to, or copies of, open law enforcement files except in extraordinary circumstances."<sup>201</sup> As to closed matters, the executive branch is far more willing to accommodate congressional requests, but even these disclosures are tied to assurances that the information will remain confidential. The parties might agree, for instance, that the executive branch will show, but not release, the requested documents; or they might agree that the executive branch need only brief Congress on the subject matter of the documents.<sup>202</sup>

The actual reach of the executive's obligation, as one can see, is far from clear. It is most definitely weaker than the maximum potential, as the executive is sometimes willing to disclose privileged law enforcement information to Congress based on certain confidentiality assurances. But the executive's disclosure in any given case is spongy, invariably turning on the executive's discretionary consideration of factors such as the impact of release on the public interest, the strength of the inquirer's need, and any assurances by the inquirer that the information remains confidential.<sup>203</sup> As such, it seems that there can be no rule of general applicability

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<sup>199</sup> In a detailed memorandum, Attorney General Robert Jackson listed instances dating back to 1904 where the Attorney General had refused to supply information concerning ongoing criminal investigations. 40 Op. Att'y Gen. 45, 46-49 (1941). Jackson staked out a policy of not accommodating Congress's interest in open files, and this policy has served as the backbone of subsequent administrations. *Id.* at 47-48; see also Posner & Vermeule, *supra* note 9, at 885 ("Executive officials worry that, with many legislators even on select intelligence committees, someone is bound to leak, and it will be difficult to pinpoint the source. Aware of the relative safety that the numbers give them, leakers are all the more bold.").

<sup>200</sup> See Todd David Peterson, *Congressional Oversight of Open Criminal Investigations*, 77 NOTRE DAME L. REV. 1373, 1388-1411 (2002).

<sup>201</sup> See 10 Op. Off. Legal Counsel 68, 76 (1986); see also 13 Op. Off. Legal Counsel 77, 83 (1989) (proclaiming that under the doctrine of executive privilege, Inspectors General, "absent extraordinary circumstances," are not obligated to provide to Congress "confidential information concerning an open criminal investigation").

<sup>202</sup> See, e.g., Neal Devins, *Congressional-Executive Information Access Disputes: A Modest Proposal—Do Nothing*, 48 ADMIN. L. REV. 109, 110 (1996); Dawn Johnsen, *Executive Privilege Since United States v. Nixon: Issues of Motivation and Accommodation*, 83 MINN. L. REV. 1127, 1139 (1999); Marshall, *supra* note 34, at 807.

<sup>203</sup> At an absolute minimum, it encompasses information protected by law, such as grand jury material. Professor Peterson has argued that only pre-indictment open investigations should be protected per se by the DOJ. Peterson, *supra* note 200, at 1446. This approach disregards the fact that, at this phase, jurors can still be influenced, prosecutors can be

that would define the executive's *actual* obligation to withhold information from Congress, FOIA applicants, or civil litigants. For the purposes of this Article, one should give the executive the benefit of the doubt and assume that, for those officials who have enjoyed access to or influence over the investigatory matter,<sup>204</sup> the obligations inherent in the law enforcement privileges extend to all information from open files and all information from closed matters falling within FOIA Exemptions 5 and 7.

## ii. Extrapolating the Obligations to the Level of Press Relations

The subject of this Article is to define exactly how Presidents are constrained from responding to *press* inquiries regarding ongoing criminal investigations. As stated above, the obligations inherent in the law enforcement privileges arguably extend, for those officials who have had access to or influence over the matter, to all information from open matters and all closed matters covered by FOIA Exemptions 5 and 7. The scopes of these obligations were defined through congressional, civil discovery, and FOIA requests. But when information is sought by the public directly and immediately, say, during a press conference, the executive's obligation might be different.<sup>205</sup> It is self-evident that the obligation to withhold information during press conferences would be at least as broad as when Presidents are confronted with a congressional, civil discovery, or FOIA request.<sup>206</sup> That said, it needs to be explored whether the obligation is perhaps broader during the press conference. Does asking the President about an investigation in a press conference put him in such an unusual spot that the public should give him a wide berth and, in effect, create a buffer zone so he is not pressured into unwittingly disclosing information he would be obligated to withhold from a congressional, discovery, or FOIA inquiry?

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inhibited, and the prosecutorial blueprint can be forecast. It is hard to disagree with Peterson, however, on the dramatic shift in interests that occurs once the matter has matriculated to the appeals processes. *See Wood v. Breier*, 54 F.R.D. 7, 11–12 (E.D. Wis. 1972) (citing “the great majority of cases which have addressed the propriety of discovery of law enforcement [information]” and concluded that general discovery should be allowed once an investigation and prosecution have been completed).

<sup>204</sup> What about those individuals who are recused from a case? They of course would be barred from divulging information they acquired through their official duties. But they would not be prohibited by the Faithful Execution Clause from discussing the case after their recusal so long as they did not refer to such information acquired while on the case.

<sup>205</sup> As Professor Kinkopf points out, privileges are context-based, and as a result, one must always consider against which entity they are asserted. *See Kinkopf, supra* note 1, at 633.

<sup>206</sup> Any information released to the press would constitute a waiver of any future assertion of privilege against Congress or the courts. *See, e.g., Sherman v. U.S. Dep’t of Army*, 244 F.3d 357, 363 (5th Cir. 2001) (citing *Kimberlin v. Dep’t of Justice*, 921 F. Supp. 833, 836 (D.D.C. 1996); *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885 (D.C. Cir. 1995)).

The answer seems to be yes. The press inquiry potentially inhibits the White House's ability to preserve law enforcement information for a variety of reasons. First, the press inquiry demands a quicker response than those prompted by Congress, FOIA applicants, or civil litigants. Presidents normally have not, at the time the press inquiry is made, had the opportunity to inventory all the relevant information and deliberate the full impact of their response.<sup>207</sup> Congressional, civil discovery, or FOIA inquiries, on the other hand, are each presented in written form and thus offer a grace period to allow the administration to undertake needed inventory and due deliberation.<sup>208</sup> This time period is essential. The Reagan administration took the position that "inherent in the constitutional doctrine of executive privilege is the right to have sufficient time to review subpoenaed documents in order to determine whether an executive privilege claim should be made."<sup>209</sup> It explained that:

If the Executive Branch could be required to respond to a subpoena (either judicial or congressional) without having adequate opportunity to review the demanded documents and determine whether a privilege claim would be necessary in order to protect the constitutional prerogatives of the President, the President's

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<sup>207</sup> See 13 Op. Off. Legal Counsel 77, 83 (1989) (cautioning that, in the absence of a specific congressional request for documents, it could not advise whether a particular document should be withheld); see also 10 Op. Off. Legal Counsel 68, 92 (1986) (emphasizing that the "decision must be based on the specific facts of the situation, and therefore it is impossible to predict in advance whether executive privilege could or should be claimed as to any particular types of documents").

<sup>208</sup> For example, government agencies are obligated to respond within twenty business days. See DEP'T OF JUSTICE, FREEDOM OF INFORMATION ACT REFERENCE GUIDE (2006), available at [http://www.usdoj.gov/oip/04\\_3.html](http://www.usdoj.gov/oip/04_3.html); see also John Dean, *The Leak of CIA Agent Valerie Plame's Identity*, FINDLAW, Jan. 30, 2004, available at <http://writ.news.findlaw.com/dean/20040130.html> ("Under House Rules, a resolution of inquiry is addressed to the head of an executive department, including the president, and must be limited to seeking only factual information. It is considered a 'privileged' resolution because it cannot be ignored, or easily buried. After being introduced, the resolution is referred to the House committee with jurisdiction over the matter. The committee must report back to the House after fourteen legislative days. At that time, it is voted on by the full House."). In addition to its expedited nature, another difficulty of the press inquiry is that it is less discriminating. Unlike with Congress or the courts, it seeks comments on topics that have not been vetted by accountable individuals. While obnoxious or unfounded congressional and civil discovery requests bring a risk of backlash from any number of forces, the reporter is potentially anonymous and thus more dangerous. While FOIA inquirers are not accountable, they are only seeking records—not comments.

<sup>209</sup> 8 Op. Off. Legal Counsel 252, 269 (1984).

ability effectively to assert a claim of executive privilege would be effectively nullified.<sup>210</sup>

Mike McCurry, one of President Clinton's press secretaries, put the same idea in more succinct and colorful terms: "There's not a room in the White House that's called the Truth Room, where you go unlock the door and it's all sitting there . . . [y]ou have to go and collect this information and ask people their memories and assemble the kinds of records and materials that have been requested."<sup>211</sup>

During this initial time period, when it is not yet definite which information is obligated to be concealed and whom this obligation governs, the executive should be especially cautious.<sup>212</sup> Thus, to extrapolate the White House's obligation, discerned in the previous Section, to the press forum, one should focus on the *perceivable* obligation. Because the scope of the discerned obligation turns on the distinction between exempted and non-exempted information (e.g., it extends to all information relating to open cases and only that part of closed cases protected by FOIA Exemptions 5 and 7) and parsing exempted information from non-exempted information takes time, the obligation in a press forum should extend to *all* information concerning open and closed matters. This will effectively insulate the

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<sup>210</sup> *Id.*; see also *The Petroleum Import Fee: Dep't of Energy Oversight: Hearings Before Subcomm. of the H. Comm. on Gov't Operations*, 96th Cong. 1–8 (1980) (statements of Tony Moffet, Chairman, and Thomas Newkirk, Deputy General Counsel, Dep't of Energy) (demonstrating the Carter administration's refusal to comply on the ground that it needed sufficient time to review the documents before deciding whether to invoke executive privilege).

<sup>211</sup> Press Briefing, Mike McCurry, White House Press Sec'y (Jan. 22, 1998), *available at* <http://www.clintonfoundation.org/legacy/012298-press-briefing-by-mccurry.htm>. For instance, during the week that the Monica Lewinsky allegations hit the public, Clinton's press secretary observed: "I think the President clearly would like to [respond to the allegations], but I think he also needs to make sure that he can do it in a way that's satisfactory to them so he can be complete and thorough and answer the questions they have." Press Briefing, Mike McCurry, White House Press Sec'y (Jan. 23, 1998), *available at* <http://www.clintonpresidentialcenter.org/legacy/012398-press-briefing-by-mccurry.htm>.

<sup>212</sup> It can be argued, however, that the unfavorable (from the President's perspective) conditions of the press fora are offset by the fora's favorable conditions. For example, to benefit from the privilege in the congressional or judicial (or the exemption in the FOIA) context, (1) a responsible government official must lodge a formal claim based on personal consideration of the information sought; and (2) the claim must assert with particularity the information sought to be protected and why the information falls within the scope of the privilege. The decision to claim a privilege must be weighed carefully because, for if no other reason, there are significant costs to not fully complying with these requirements. This is an argument for narrowing the executive obligation in the press context (i.e., the lower the cost of asserting the privilege, the more likely it will be abused, the narrower the privilege should be defined). This Article, in order to give the executive the benefit of the doubt, will disregard these arguments and proceed under the presumption that the press fora only impedes the President in his ability to uphold his obligations.



President from the risk of underestimating his obligation. And because the discerned obligation governs all those who have access to or influence over the relevant matter, the obligation at the press fora should govern individuals who *perceivably could* have access to or influence over the matter. This would include individuals who could reasonably be expected to become involved with a case at a later point. Imagine, for example, a state prosecutor who is asked about a recent FBI raid within his jurisdiction.

Despite the obvious problems with relying exclusively on the internal guidelines and professional rules, as discussed earlier, it is nonetheless worthwhile to revisit these sources for comparative purposes. The ABA Model Rules of Professional Conduct, for example, preclude prosecutors from making “extrajudicial statement[s]” that “will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.”<sup>213</sup> This exact terminology is employed by the U.S. Attorneys’ Manual.<sup>214</sup> Importantly, the ABA prohibition, like the perceived obligation inherent in the law enforcement privileges, extends only to persons “who [are] participating or ha[ve] participated in the investigation or litigation of [the] matter.”<sup>215</sup> The Rules’ comments explain their limited applicability as follows:

[Because] the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.<sup>216</sup>

Importantly, none of the other regulations suggest that the obligation to refrain from public comment extends to persons who have, and will likely continue to have, no access to or influence over the relevant matter.<sup>217</sup>

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<sup>213</sup> MODEL RULES OF PROF’L CONDUCT R. 3.6(a) (2006).

<sup>214</sup> DEP’T OF JUSTICE, U.S. ATTORNEYS’ MANUAL, ch. 1-7.510 (1998) (“At no time shall any component or personnel of the Department of Justice furnish any statement or information that he or she knows or reasonably should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding.”).

<sup>215</sup> MODEL RULES OF PROF’L CONDUCT R. 3.6(a) (2006); *see also id.* at R. 3.8(f) (stating that the special responsibilities of a prosecutor include that he should take care to prevent extrajudicial statements from “investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case”).

<sup>216</sup> *Id.* at R. 3.6(a) cmt. 3.

<sup>217</sup> *See, e.g.*, FLA. R. OF PROF’L COND. 4-3.6(b) (2005) (“Counsel shall exercise reasonable care to prevent investigators, employees, or other persons assisting in or associated with a case from making extrajudicial statements . . .”); VA. R. OF PROF’L COND. 3.6 (2000) (applying trial publicity rules to those “participating in or associated with the investigation”). The Department of Justice Manual has a similarly limited reach. U.S. DEP’T OF JUSTICE, THE DEP’T OF JUSTICE MANUAL, ch. 1-7.112 (1998) (providing that “careful weight must be given

Presidents have a constitutional obligation to refrain from commenting on certain investigations while they are ongoing, and this obligation is grounded not in the Commander-in-Chief or Pardon Clauses, but rather exclusively in the Faithful Execution Clause. To glean the scope of this Clause, this Article has juxtaposed those obligations inherent in the law enforcement privileges with those set forth in the professional and agency rules guiding prosecutors. The Faithful Execution Clause, interpreted in its most robust manner, generally precludes the President from commenting in the press on non-essential matters<sup>218</sup> relating to open or closed federal investigations.<sup>219</sup> Yet even when read in the broadest of terms, the Clause does not bind Presidents who have, and will likely continue to have, no access to or influence over the matter at issue.

### *C. The Norms of Good Citizenship*

The final strain of obligation within the “ongoing criminal investigation” constraint, after the positive and the constitutional, is that based on social norms of good citizenship. The good citizen, no matter what his official obligations might be, does not want to rush to judgment. He respects his fellow citizen’s right to the presumption of innocence within society, does not want to undermine rule of law by publicly criticizing investigative decisions about which he has little understanding, and does not wish to call attention (if only by accident) to the likely direction of an investigation which would allow a guilty person to elude conviction. And so it is, that all persons, including Presidents, are bound to at least some degree by the good citizenship obligation.<sup>220</sup>

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in each case to the constitutional requirements of a free press and public trials as well as the right of the people in a constitutional democracy to have access to information about the conduct of law enforcement officers, prosecutors and courts, consistent with the individual rights of the accused. . . . These principles must be evaluated in each case and must involve a fair degree of discretion and the exercise of sound judgment, as every possibility cannot be predicted and covered by written policy statement”).

<sup>218</sup> Essential matters are those, like charging papers, disclosed in order to conduct the prosecution or basic facts concerning public safety such as the conditions of a suspect’s apprehension.

<sup>219</sup> See, e.g., Saikrishna Prakash, *The Constitutional Status of Customary International Law*, 30 HARV. J.L. & PUB. POL’Y 65, 68 (2006) (“With respect to text, the Faithful Execution Clause does not reference *all* laws. For instance, no one thinks it references state laws.”).

<sup>220</sup> Professor Parisi has observed that:

What is legally termed a mere usage is defined in sociological literature as a custom . . . in the sense of a typically uniform activity that is not considered to be socially necessary. Convention—the sociological notion closest to the legal concept of custom—amounts to conduct manipulated by express approval or disapproval by other members of the group, but lacking the enforceability that characterizes a legal custom.

One important point, however, is that the good citizenship obligation definitively lacks the force to ever constrain a person from publicly commenting on insinuations that he or his subordinates committed improprieties. Due to the implications of being named as a potential target of a criminal investigation—reputations are ruined, business prospects disappear, and personal relationships erode—there is a long tradition in the United States of criminal suspects and defendants arguing their cases to the people through the media.<sup>221</sup> Society does not criticize these public defenses—rather, it welcomes them. Moreover, defending oneself publicly from governmental accusations of wrongdoing goes to the very core of the public's understanding of freedom of speech.<sup>222</sup> The Framers well understood that comments about the functioning of the government—and in particular its ability to restrain the liberty of persons—should be subjected to a healthy dose of public criticism.<sup>223</sup>

One might counter that Presidents are held to higher standards of good citizenship than the average person, and as a result, they must refrain from publicly commenting on all investigations—even those focusing on actions by their administrations.<sup>224</sup> But our history makes clear that the public does not discourage Presidents from defending themselves or their associates from insinuations of impropriety. In the last thirty-five years, we have seen Presidents Nixon, Reagan, and Clinton take their cases to the people. While there were of course those who criticized the *content* of their comments, none challenged their *freedom* to comment. And although it is plausible that a public defense from a President will, in theory,

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Francesco Parisi, *The Formation of Customary Law* 7 (2000) (unpublished manuscript, on file with *The William & Mary Bill of Rights Journal*) (presented at 96th Annual Conference of the American Political Science Association), available at <http://www.law.gmu.edu/faculty/papers/docs/01-06.pdf>.

<sup>221</sup> For just a few high-profile examples, consider the public defenses of President Nixon, President Reagan, President Clinton, Enron CEO Kenneth Lay, and baseball's Roger Clemens.

<sup>222</sup> The President, as a "person" within the United States, is of course protected by the First Amendment. To demonstrate that societal norms do not obligate a person to withhold public comment, see, for example, *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1034 (1991) ("There is no question that speech critical of the exercise of the State's power lies at the very center of the First Amendment."); FED. R. CRIM. P. 6(e)(2) (not including witnesses as those bound by grand jury secrecy rules); Press Briefing, Mike McCurry, White House Press Sec'y (Feb. 20, 1998), available at <http://www.clintonfoundation.org/legacy/022098-press-briefing-by-mike-mccurry.htm> ("Q: The person who testifies doesn't have to keep it secret. McCurry: That's correct. He can talk about his testimony, if he so chooses.").

<sup>223</sup> See, e.g., *Pell v. Procunier*, 417 U.S. 817, 832 (1974) (stating that the First Amendment "secures 'the paramount public interest in a free flow of information to the people concerning public officials'" (quoting *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964))).

<sup>224</sup> Put another way, the argument is that the obligation is *effectively* constraining against the President because the public disapproves (even if irrationally) of a President who comments on, and thus appears to meddle in, an ongoing investigation.

unduly influence an independent investigation or proceeding more often than a similar statement by say, your typical criminal suspect,<sup>225</sup> the chance that his comments will have a significant influence on the direction of an investigation or the disposition of a prosecution is de minimus. Any competent state judge or prosecutor would reflexively and wholly disregard a comment in the press from a President. And as for potential jurors, procedural mechanisms such as voir dire and jury instructions adequately neutralize any prejudicial effects of pre-trial publicity. As the Supreme Court observed in *Gentile v. State Bar of Nevada*: “Empirical research suggests that in the few instances when jurors have been exposed to extensive and prejudicial publicity, they are able to disregard it and base their verdict upon the evidence presented in court.”<sup>226</sup> So it seems clear that the social norms of good citizenship, which arguably have the potential to bind Presidents to silence under some circumstances, can never obligate Presidents to withhold comment about investigations in which they or their subordinates are implicated.

The “ongoing criminal investigation” constraint, once deconstructed, is shown to be a product of two obligations: (1) those inherent in the Faithful Execution Clause, and (2) those in societal norms of good citizenship.<sup>227</sup> The Faithful Execution Clause requires the President, as chief prosecutor, to refrain from public comment about nearly all federal investigations—but it does not inhibit him from discussing ongoing matters in which he has, and will likely continue to have, no access to or influence over.<sup>228</sup> And the good citizenship obligation, stemming from the ideals of citizenship, is so thin that it will never prevent the President from publicly addressing allegations involving him or his subordinates.

#### IV. A NEW CONSTRAINT

Upon analysis of its incumbent strains, the contours of the “ongoing criminal investigation” emerge with a certain degree of clarity. The constraint extends to all information and statements concerning existent criminal investigations in which (1) the President has, and will likely continue to have, no access to or influence over, and (2) there has not been an insinuation that the President or his subordinates

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<sup>225</sup> This might be a result of the President’s larger audience and a misperception in certain corners of society that the President might have special access to or influence over state or congressional investigations.

<sup>226</sup> 501 U.S. 1030, 1054–55 (1991) (citing; Robert E. Drechsel, *An Alternative View of Media-Judiciary Relations: What the Non-Legal Evidence Suggests About the Fair Trial-Free Press Issue*, 18 HOFSTRA L. REV. 1 (1989); Rita J. Simon, *Does the Court’s Decision in Nebraska Press Association Fit the Research Evidence on the Impact on Jurors of News Coverage?*, 29 STAN. L. REV. 515 (1977)).

<sup>227</sup> This Article quickly disposed of the theory that the constraint is motivated by the positive obligations. See *supra* Part III.A.

<sup>228</sup> See *supra* Part III.B.3.

committed improprieties. This Part evaluates the legitimacy of the Bush administration's claim that it was constrained from publicly commenting on the Plame matter. It then goes on to unveil an easily applicable rule to which the press and public can refer when confronted with future presidential invocations of the constraint.

### *A. Evaluating the Recent Expansion*

#### 1. "Independent" Investigations

Before analyzing the nature of the Plame investigation, it is worth briefly discussing which types of investigations the President lacks access to or influence over. If the relevant matter is not affiliated with the federal executive branch, the issue is relatively straightforward. For example, the President never has the ability to control investigations brought by Congress, another government, or a private organization. Conversely, for matters handled by his cabinet or agencies, the President *normally* has the capacity for a certain degree of access to and influence over the investigation.<sup>229</sup> That said, it seems clear that the President does not have the capacity to access or influence every federal investigation.<sup>230</sup> The following paragraphs survey three types of federal investigations which are seen, at least

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<sup>229</sup> Even in such investigations, the White House regularly tries to refrain from inserting itself into the decisionmaking processes. Regarding the expansion of the Clinton pardon probes, the administration stated that:

[T]he matters of the Department of Justice pursuing criminal investigations are not political decisions. They should not be made because of or as a result of support or opposition to the thoughts of the President. Those are decisions made by career professionals for their reasons, and it would not be appropriate for the White House to say, proceed or don't proceed.

Press Briefing, Ari Fleischer, White House Press Sec'y (Mar. 13, 2001), *available at* <http://www.whitehouse.gov/news/briefings/20010313.html>. A few months later, the White House observed: "When it comes to law enforcement agencies and their carrying out their ongoing and legitimate investigations, many of which are criminal investigations, the President does not think it is the proper course of action for the White House to tell the Justice Department how to go about its investigations." Press Briefing, Ari Fleischer, White House Press Sec'y (Aug. 31, 2001), *available at* <http://www.whitehouse.gov/news/releases/2001/08/20010831-15.html>.

<sup>230</sup> Peterson, *supra* note 200, at 1440. An early example of independent prosecutions can be found in the 1920s. President Calvin Coolidge appointed Special Counsels to investigate and prosecute on behalf of the government any wrongdoing related to the Teapot Dome scandal. Coolidge named "Owen J. Roberts, a Philadelphia attorney at the time, and former U.S. Senator Atlee Pomerene, then practicing law in Ohio," to manage the investigation. John W. Dean, *An Open Letter to Special Counsel Patrick Fitzgerald from Former White House Counsel John W. Dean*, FINDLAW, Nov. 18, 2005, *available at* <http://writ.news.findlaw.com/dean/>.

through the public's lens, as having at least some degree of "independence" from the President: those pursued by Independent Counsels, Special Counsels, and Intra-Agency Investigators.

*a. Independent Counsel Investigations*

Watergate was probably the seminal moment in the history of independent prosecutors. As the scandal grew ever closer to implicating the Department of Justice and White House, Nixon felt compelled to appoint a special prosecutor.<sup>231</sup> When the special prosecutor, Archibald Cox, later requested Nixon's White House tape recordings, Nixon ordered his Attorney General, Eliot Richardson, to fire Cox.<sup>232</sup> After both Richardson and the Deputy Attorney General (who was next in the line of succession) resigned to avoid carrying out Nixon's order,<sup>233</sup> Cox was fired by Robert Bork, who had become acting head of the Department of Justice following the two resignations.<sup>234</sup> The firing of Cox spurred Congress to later enact the Ethics in Government Act.<sup>235</sup>

Title VI of the Act created the "independent counsel" to investigate and, if appropriate, prosecute certain high-ranking government officials for violations of federal criminal laws.<sup>236</sup> The Act required the Attorney General, upon receipt of information that he determined was "sufficient to constitute grounds to investigate whether any person [covered by the Act] may have violated any Federal criminal law," to conduct a preliminary investigation of the matter.<sup>237</sup> Within ninety days,

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<sup>231</sup> Carroll Kilpatrick, *President Abolishes Prosecutor's Office; FBI Seals Records*, WASH. POST, Oct. 21, 1973, at A3 (stating that Nixon discharged Cox because he "refused to comply with instructions" the President gave him Friday night through the Attorney General).

<sup>232</sup> *Id.* at A1.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (codified as amended at 28 U.S.C. § 591 (2000)). The Independent Counsel Act provision was re-enacted on three occasions (with only slight modifications): Ethics in Government Act Amendments of 1982, Pub. L. No. 97-409, 96 Stat. 2039 (1983); Independent Counsel Reauthorization Act of 1987, Pub. L. No. 100-191, 101 Stat. 1293; Independent Counsel Reauthorization Act of 1994, Pub. L. No. 103-270, 108 Stat. 732. See, e.g., Donald C. Smaltz, *The Independent Counsel: A View from Inside*, 86 GEO. L.J. 2307, 2322 (1998) (discussing the origins of the Independent Counsel Act).

<sup>236</sup> 28 U.S.C. § 592(c)(1).

<sup>237</sup> *Id.* § 591(a). Section 591(b) sets forth the individuals who may be the target of an investigation by the Attorney General, including the President and Vice President, Cabinet officials, certain high-ranking officials in the Executive Office of the President and the Justice Department, the Director and Deputy Director of Central Intelligence, the Commissioner of Internal Revenue, and certain officials involved in the President's national political campaign. *Id.* § 591(b).

the Attorney General had to report to a special court created by the Act.<sup>238</sup> If the Attorney General determined that there were “reasonable grounds to believe that further investigation is warranted,” then he would “apply to the division of the court for the appointment of an independent counsel.”<sup>239</sup>

Importantly, the Independent Counsel, once appointed by the judicial panel, had “full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice.”<sup>240</sup> Moreover, he could only be removed from office “by the personal action of the Attorney General and only for good cause.”<sup>241</sup> Independent Counsel Robert Ray put it plainly: “I’m the person who makes the judgment of whether the full power of and authority of the U.S. government are brought to bear with regard to any prospective defendant.”<sup>242</sup> Although the Attorney General retained discretion to apply for an Independent Counsel, once such counsel was appointed, neither the Attorney General nor the President had any access to or real influence over the direction of the investigation.<sup>243</sup>

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<sup>238</sup> *Id.* § 592(a)(1).

<sup>239</sup> *Id.* § 592(c)(1). If, on the other hand, he does not find that there are reasonable grounds warranting a further investigation, he must notify the panel of this result. In such a case, the “court shall have no power to appoint an independent counsel.” *Id.* § 592(b)(1). If he does not report to the court within ninety days, he is obligated to apply for an independent counsel. The application to the court “shall contain sufficient information to assist the division of the court in selecting an independent counsel and in defining the independent counsel’s prosecutorial jurisdiction.” *Id.* § 592(d).

<sup>240</sup> *Id.* § 594(a).

<sup>241</sup> *Id.* § 596(a)(1). The counsel may also be removed for physical disability or mental incapacity. *Id.* If removed, the Attorney General is required to submit a report to the court and to Congress “specifying the facts found and the ultimate grounds for such removal.” *Id.* § 596(a)(2). The counsel can obtain judicial review of the Attorney General’s action by filing a civil action in federal district court, and the reviewing court is authorized to grant reinstatement. *Id.* § 596(a)(3).

<sup>242</sup> Interview by USA Today’s Editorial Board with Robert Ray, *Clinton Prosecution “An Option of Last Resort”* (Jan. 17, 2001) (transcript available at <http://www.usatoday.com/news/opinion/ngquest1.htm>).

<sup>243</sup> The constitutionality of the Independent Counsel Act was challenged in *Morrison v. Olson* on grounds that it was an improper congressional aggrandizement of executive authority. 487 U.S. 654 (1988). The Court upheld the law, concluding that the Office of Independent Counsel was sufficiently within the ambit of the executive branch. *Id.* Chief Justice Rehnquist, writing for the 7–1 majority (Justice Kennedy recused himself from the case), emphasized that an independent counsel could not be appointed without executive branch acquiescence and that the executive branch retained authority to terminate counsel for good cause. *Id.* *Morrison* suggests that Congress can constitutionally carve Presidential access and influence out of a federal prosecution so long as the President retains the authority to prevent an investigation and terminate the prosecutor for good cause. *Id.* at 696.

*b. Special Counsel Investigations*

To the relief of Democrats and Republicans alike, the Independent Counsel Act expired in July 1999.<sup>244</sup> In its place, the Attorney General amended the Federal Code of Regulations to provide for the appointment of a Special Counsel.<sup>245</sup> The Special Counsel is more firmly situated within the executive branch than was the Independent Counsel. The Special Counsel is selected by the Attorney General, rather than a judicial panel, and moreover, the Special Counsel must obtain the Attorney General's clearance before expanding the investigation.<sup>246</sup>

Yet it seems clear that the Special Counsel retains the spirit, if not the exact lines of authority, of the Independent Counsel. First and foremost, the President has almost no control over the Special Counsel's prosecutorial decisionmaking processes. Once appointed, the Special Counsel has "the full power and independent authority to exercise all investigative and prosecutorial functions of any United States Attorney."<sup>247</sup> Patrick Fitzgerald, for example, was explicitly given "plenary" authority to investigate the Plame matter.<sup>248</sup> The Special Counsel regulation states that:

The Special Counsel would be free to structure the investigation as he or she wishes and to exercise independent prosecutorial discretion to decide whether charges should be brought, within the context of the established procedures of the Department.<sup>249</sup>

Although the Attorney General may conduct oversight of prosecutorial "steps,"<sup>250</sup> this authority is, as a practical matter, substantially checked by political processes.

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<sup>244</sup> See Ross E. Wiener, *Inter-Branch Appointments After the Independent Counsel: Court Appointment of United States Attorneys*, 86 MINN. L. REV. 363, 363 (2001) ("With the expiration of the Independent Counsel Act in June 1999, many believed this controversial practice had become a historical footnote."); Linda Greenhouse, *Blank Check: Ethics in Government: The Price of Good Intentions*, N.Y. TIMES, Feb. 1, 1998, at WK1 (discussing the reasons behind the Act as well as its problems).

<sup>245</sup> A.G. Order No. 2232-99, 64 Fed. Reg. 37,038 (July 9, 1999). See generally Julie O'Sullivan, *The Independent Counsel Statute: Bad Law, Bad Policy*, 33 AM. CRIM. L. REV. 463, 483-92 (1996) (documenting the contending reasons for abandoning the Independent Counsel Act).

<sup>246</sup> See John R. Martin, *Morrison v. Olson and Executive Power*, 4 TEX. REV. L. & POL. 511, 538 (2000) ("If the Attorney General names the Special Counsel, this alleviates one of the constitutional problems of the Independent Counsel Act—taking the appointment power away from the Executive Branch.").

<sup>247</sup> 28 C.F.R. § 600.6 (2007).

<sup>248</sup> Letter from James B. Comey, Acting Att'y Gen., to Patrick J. Fitzgerald (Feb. 6, 2004), available at [http://www.usdoj.gov/usao/iln/osc/documents/ag\\_letter\\_february\\_06\\_2004.pdf](http://www.usdoj.gov/usao/iln/osc/documents/ag_letter_february_06_2004.pdf).

<sup>249</sup> A.G. Order No. 2232-99, 64 Fed. Reg. 37,038 (July 9, 1999).

<sup>250</sup> 28 C.F.R. § 600.7(b) (2007).



After all, the Attorney General must notify Congress every time he overrides a decision of the Special Counsel.<sup>251</sup> It is particularly telling that Bush's Attorneys General never attempted to challenge Fitzgerald's investigation—particularly when one considers that Republicans constituted a majority of Congress during each of the critical steps in the investigation.

A second core element of the Independent Counsel retained by the Special Counsel is job security.<sup>252</sup> The regulations provide that "[t]he Special Counsel may be disciplined or removed from office only by the personal action of the Attorney General. The Attorney General may remove a Special Counsel for misconduct, dereliction of duty, incapacity, conflict of interest, or for other good cause, including violation of Departmental policies."<sup>253</sup>

The Attorney General is thus severely limited in the ways he can affect a Special Counsel prosecution. He can contain the scope of the investigation and terminate the Special Counsel for good cause, but both of these actions require congressional notice. So even presuming that the Attorney General acts as a simple proxy for the President, Special Counsels, once appointed, are substantially insulated from the White House's control.<sup>254</sup> It is thus apparent that the President lacks access to or influence over Special Counsel investigations.

### *c. Intra-Agency Investigations*

Although not directly relevant to the Plame matter, it is worth briefly inquiring about the independence of internal agency investigations such as those brought by the Office of Inspectors General (OIG) and the Department of Justice's Office of Professional Responsibility (OPR). Congress passed the Inspector General Act in the wake of Watergate. It provides: "Neither the head of the establishment nor the officer next in rank below such head shall prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation, or from issuing any subpoena [sic] during the course of any audit or investigation."<sup>255</sup> An Inspector General may be removed from office by the President, but "[t]he President

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<sup>251</sup> *Id.* It is notable, but of perhaps only marginal relevance, that the Special Counsel regulations were enacted in the Chapter entitled "Offices of Independent Counsel."

<sup>252</sup> *Id.* § 600.7(d).

<sup>253</sup> *Id.* Also like the Independent Counsel, the Special Counsel can hire his own staff independent of the federal government. *Id.* § 600.5.

<sup>254</sup> The constitutionality of the Special Counsel is far beyond debate. Even those who, like Professor Prakash, advance the theory of President as chief prosecutor and vehemently disagree with the holding in *Morrison*, recognize that the President can, within the bounds of Article II, voluntarily remove himself from prosecutorial functions so long as he retains the ultimate power to terminate prosecutorial officials for good cause. See Prakash, *supra* note 43, at 575.

<sup>255</sup> Inspector General Act of 1978, 5 U.S.C.A. app. § 3 (West Supp. 2007).

shall communicate the reasons for any such removal to both Houses of Congress.”<sup>256</sup> The OPR is charged with investigating “allegations of misconduct involving Department attorneys that relate to the exercise of their authority to investigate, litigate or provide legal advice.”<sup>257</sup>

It seems that the “independence” of these investigations from White House influence will turn on a case-by-case analysis. Investigations by the OIG and OPR focus on allegations of agency, rather than White House, malfeasance. Although there are reasons why a President would elect not to access or influence an OIG or OPR investigation, there are no legal prohibitions of such involvement. When evaluating whether, in any given circumstance, these investigations are sufficiently independent of the White House, one should presume that the President has retained nominal control over the matter unless his public statements strongly suggest otherwise.<sup>258</sup>

In sum, the old Independent Counsel and the current Special Counsel are sufficiently independent from the White House in that the President lacks access to or influence over these matters. This, however, is not necessarily the case for matters handled by intra-agency investigators, which should be evaluated on a case-by-case basis.

## 2. Evaluating the Plame Affair

Now to the issue of whether President Bush was constrained from publicly commenting on the Plame matter. Plame’s identity was revealed in the press on July 14, 2003.<sup>259</sup> An initial review of the allegations was commenced by the Department

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<sup>256</sup> *Id.*; see also DANIEL P. CARPENTER, *THE FORGING OF BUREAUCRATIC AUTONOMY* 353 (2001).

<sup>257</sup> U.S. DEP’T OF JUSTICE, OFFICE OF PROFESSIONAL RESPONSIBILITY, POLICIES AND PROCEDURES (2006), available at <http://www.usdoj.gov/opr/polandproc.htm>. The OPR “was created in 1975 as one response to the revelations of ethical abuses and misconduct by Department of Justice officials in the Watergate scandal.” *Id.* at \*1. The OPR Policies and Procedures also set forth that “the determination whether to conduct an inquiry and/or full investigation in a specific case is a matter of investigative judgment. Many factors are weighed, including the nature of the allegation, its apparent credibility, its specificity, its susceptibility to verification, and the source of the allegation.” *Id.* at \*2. “In cases in which it finds professional misconduct (either intentional misconduct or conduct in reckless disregard of an applicable standard or obligation), OPR ordinarily advises bar disciplinary authorities in the jurisdiction where the attorney is licensed of its finding.” *Id.* at \*4–5.

<sup>258</sup> For example, the Bush administration has refused to comment on the ongoing OIG investigation of former Justice Department official Monica Goodling. See Eric Lipton, *Colleagues Cite Partisan Focus by Justice Official*, N.Y. TIMES, May 12, 2007, at A1. For a discussion of the role of the Inspector General, see PAUL C. LIGHT, *MONITORING GOVERNMENT: INSPECTORS GENERAL AND THE SEARCH FOR ACCOUNTABILITY* (1993).

<sup>259</sup> Novak, *supra* note 88, at A21; see also Michael F. Buchwald, *Of the People, By the People, For the People: The Role of Special Grand Juries in Investigating Wrongdoing by Public Officials*, 5 GEO. J.L. & PUB. POL’Y 79, 80 (2007).

of Justice on September 16, 2003.<sup>260</sup> It is abundantly clear that the President and other White House officials had recused themselves from the DOJ's review. The White House, when asked about its involvement in the Attorney General's review of the Plame matter, affirmed that

it wouldn't be our place to get involved in that. . . . I'm not aware of any contact the Attorney General has had with anyone in this administration . . . . The Department of Justice is charged with independently looking into matters like this.<sup>261</sup>

The matter was officially referred to the Office of Special Counsel on December 30, 2003,<sup>262</sup> at which point the White House was removed from the investigation in a more formal, involuntary, and permanent sense.<sup>263</sup>

It is unequivocal that, once the Special Counsel was appointed, the Bush White House was not externally constrained from publicly commenting on the Plame matter. The first element of the constraint analysis, regarding the obligations of the Faithful Execution Clause, is satisfied because President Bush, after Fitzgerald's appointment, had (and would always likely have) no access to or control over the matter. And the second element of the analysis, regarding the obligations of good citizenship, is satisfied because the matter under investigation clearly insinuated that the President or his subordinates engaged in improprieties. It is thus apparent that the "ongoing criminal investigation" constraint has been, and continues to be, used in an illegitimate fashion by the Bush administration to avoid explaining its involvement in the leak. While this does not mean that the administration is required to

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<sup>260</sup> See JOSEPH WILSON, *THE POLITICS OF TRUTH: INSIDE THE LIES THAT LED TO WAR AND BETRAYED MY WIFE'S CIA IDENTITY* 359 (2004) (reprinting Letter from Stanley M. Moskowitz, Director of Congressional Affairs, CIA, to Representative John Conyers (Jan. 30, 2004)) (showing that the CIA turned the Plame investigation over to the DOJ on September 16, 2003).

<sup>261</sup> Press Briefing, Scott McClellan, White House Press Sec'y (Sept. 29, 2003), *available at* <http://www.whitehouse.gov/news/releases/2003/09/20030929-7.htm>. ("There are a lot of career professionals at the Department of Justice that address matters like this. I have made it clear that they're the ones, that if something like this happened, should look into it. You need to direct that question to the Department of Justice.").

<sup>262</sup> Letter from James B. Comey, Acting Att'y Gen., to Patrick J. Fitzgerald (Dec. 30, 2003), *available at* [http://www.usdoj.gov/usao/iln/osc/documents/ag\\_letter\\_december\\_30\\_2003.pdf](http://www.usdoj.gov/usao/iln/osc/documents/ag_letter_december_30_2003.pdf); Press Conference, James Comey, Deputy Att'y Gen., U.S. Dep't of Justice, Appointment of Special Prosecutor to Oversee Investigation into Alleged Leak of CIA Agent Identity and Recusal of Attorney General Ashcroft from the Investigation (Dec. 30, 2003), *available at* <http://www.fas.org/irp/news/2003/12/doj123003.html>.

<sup>263</sup> John Padilla & Alex Wagner, *The "Outing" of Valerie Plame: Conflicts of Interest in Political Investigations After the Independent Counsel Act's Demise*, 17 GEO. J. LEGAL ETHICS 977, 980 (2004).

speak publicly about the matter, it does, however, mean that the public should be fully cognizant of the elective nature of its silence.

Considering the illegitimacy of the recent expansion of the “ongoing criminal investigation” constraint, it is worth speculating as to how the White House was able to apply the constraint to these novel circumstances with such ease. Although the constraint has a certain degree of inherent appeal, as discussed earlier,<sup>264</sup> the acquiescence of the press and public is largely attributable, it seems, to the lack of clear guidelines on the scope of the constraint. There are currently no accessible rules by which the press and public can evaluate Presidents’ uses of the constraint. As a result, the press and public are left to muddle through a series of vague administration explanations concerning due process and the rule of law.<sup>265</sup> Complicating matters is the fact that the reach of the constraint is reflected in law enforcement privileges, whose scopes are notoriously difficult to discern. Such ambiguity leaves the press corps on seemingly shifting ground when it tries to expose the White House’s abuse of the constraint.<sup>266</sup>

### *B. Enforcing a New Constraint*

If the Clinton and Bush administrations serve as examples, it will be essential that the press and public at large be armed with a clear, easily applicable “rule” to combat future Presidents who try to escape the trilemma of ill motives through illegitimate assertions of the “ongoing criminal investigation” constraint. This new bright-line rule can be summarized as follows:

The President is not constrained from commenting on “ongoing criminal investigations” which (1) he has lacked, and will likely continue to lack, access to or influence over; and (2) insinuate that he or high-level members of his administration committed improprieties. Specifically, this would include nearly every investigation and prosecution undertaken by a Special Counsel.

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<sup>264</sup> See discussion *supra* Part I.C.

<sup>265</sup> See WRIGHT & GRAHAM, *supra* note 169, at 187 (discussing how the investigative files privilege “can become twisted by its uncertain justification and weak conceptual structure”).

<sup>266</sup> Compare Press Briefing, Ari Fleischer, White House Press Sec’y (Mar. 13, 2001), available at <http://www.whitehouse.gov/news/briefings/20010313.html> (explaining the Clinton administration’s statement on privileges), with MORTON ROSENBERG, CONG. RESEARCH SERV., LEGAL AND HISTORICAL SUBSTANTIALITY OF FORMER ATTORNEY GENERAL CIVILETTI’S VIEWS AS TO THE SCOPE AND REACH OF CONGRESS’S AUTHORITY TO CONDUCT OVERSIGHT OF THE DEPARTMENT OF JUSTICE (1993), reprinted in *EPA’s Criminal Enforcement Program: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce*, 103d Cong. 12–23 (1993) (describing Congress’s “plenary power to compel information needed to discharge its legislative function”).

Any reference to the “ongoing criminal investigation” constraint under such circumstances should be interpreted by the press corps and general public as a euphemism for a straightforward refusal to answer.

Through the application of this rule, the public will interpret illegitimate assertions of the constraint as nothing more than another way of saying: “I refuse to answer.” A straightforward refusal to answer is, as discussed earlier, highly costly for Presidents: it signals ill-motives, which heightens the suspicions of press and public suspicions, and stokes the attention of Congress. One can see that the faithful application of the new, tailored constraint will expose hidden forms of presidential evasion and prompt the public to seek alternative answers to its questions.<sup>267</sup>

Importantly, there is a trickle-down benefit to this rule. Even if Presidents have no knowledge about a matter under investigation, this rule will help the public hold Presidents accountable for the conduct of officials working in their administration. For example, if one of the President’s aides is implicated by the investigation of a Special Counsel and illegitimately relies on the “ongoing criminal investigation” constraint (or avoids the press altogether), the press should draw an adverse inference against that official due to his evasiveness. Critically, this adverse inference forces the President’s hand—either the President suffers the potential public backlash of retaining an aide who is refusing to publicly comment, or he can vouch for the aide’s good character and conduct and thereby tie his fate to that of his aide. Either way, the President is held at least somewhat accountable by the public for his aide’s continued presence on his staff. (As it currently stands, the President and the aide can simply claim that it is improper for them to comment on the ongoing investigation, which allows the President to (1) retain the aide on staff and then, if the aide is subsequently convicted, (2) distance himself from the controversy.)

So how, one might ask, can the public enforce this tailored constraint? The most obvious way is through concerted political pressure by the press corps. If the rule were dutifully applied by the press, it could be integrated into press inquiries

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<sup>267</sup> See Dean, *supra* note 208 (“Congress was warned that its investigation could result in an inability to prosecute wrongdoers. Nevertheless, it took that risk, and called Oliver North and John Poindexter to testify; granted them immunity from prosecution; and compelled them to testify about the Reagan White House’s scheme of providing arms for hostages and then forwarding the funds from the sales to the Nicaraguan Contras notwithstanding a Congressional prohibition. Later, the Independent Counsel prosecuted and convicted North and Poindexter despite their Congressional immunity. But their cases were later thrown out. The court held that their immunized testimony had tainted the testimony of witnesses the government used to prosecute them. In the end, immunity from being prosecuted based on their Congressional testimony meant, in practice, that North and Poindexter were immune from being prosecuted at all. The North and Poindexter case showed how Congress’s decision to immunize witnesses could thwart later attempts to prosecute them.”).

during White House briefings and then communicated to the public in corresponding news stories. A second enforcement option would be to pressure presidential candidates to commit themselves to the tailored constraint during election campaigns.<sup>268</sup> In an effort to distinguish themselves from ill-motivated candidates, well-motivated candidates naturally undertake commitments that are more relatively costly to the ill-motivated.<sup>269</sup> While not all election promises are enforceable through political pressure, some of course are.<sup>270</sup> Think, for example, of George H.W. Bush's infamously breached promise to not raise taxes during his term.<sup>271</sup> A third option would be the enactment of a congressional resolution stating that the "ongoing criminal investigation" constraint has no applicability to Special Counsel matters, and as a result, any presidential utilization of the constraint during such matters constitutes evasive behavior.

### CONCLUSION

The "ongoing criminal investigation" constraint on public commenting, as applied to Presidents, has a definite scope. It does not extend to investigations which (1) the President has lacked, and will likely continue to lack, access to or influence over; and (2) insinuate that he or his associates committed improprieties. The practical impact of this finding is that Presidents are almost never externally constrained from publicly commenting on matters pursued by Special Counsels, which, by their very nature, are independent of Presidents' control and insinuate that Presidents or high-level members of their administrations committed improprieties.<sup>272</sup> This new approach, which isolates a heretofore hidden form of executive evasiveness, closes a large loophole in the trilemma of ill motives and will, if duly followed by the press corps and public, facilitate stricter public monitoring of the Presidents of the United States.

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<sup>268</sup> Perhaps analogously, it has been suggested that constitutions represent an attempt by the people to bind themselves against their own decisionmaking pathologies. See JON ELSTER, *ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY* 36–47 (1979).

<sup>269</sup> Posner & Vermeule, *supra* note 9, at 900 ("Public promises that inflict reputational costs on badly motivated behavior help the well-motivated executive to credibly distinguish himself from the ill-motivated one.").

<sup>270</sup> See Saul Levmore, *Precommitment Politics*, 82 VA. L. REV. 567 (1996) (offering suggestions for holding officials legally accountable for their campaign promises).

<sup>271</sup> Andrew Kohut, *Voters Forget (Unless They Don't)*, N.Y. TIMES, Dec. 16, 1998, at A17 ("In 1992 voters remembered that George Bush had broken his 'read my lips' pledge not to raise taxes, any many people who normally voted Republican defected to Ross Perot, ushering in the Clinton era.").

<sup>272</sup> This would, of course, only apply to the President whose administration was under investigation. It would thus not bar a President from commenting on a Special Counsel's investigation into the activities of a previous administration.