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**SUBMISSION BY COUNSEL FOR PRESIDENT
CLINTON TO THE COMMITTEE ON THE
JUDICIARY OF THE UNITED STATES
HOUSE OF REPRESENTATIVES**

IMPEACHMENT INQUIRY PURSUANT TO
H. RES. 581

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED FIFTH CONGRESS

HENRY J. HYDE, *Chairman*



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SUBMISSION BY COUNSEL FOR PRESIDENT CLINTON TO
THE COMMITTEE ON THE JUDICIARY OF THE UNITED
STATES HOUSE OF REPRESENTATIVES, DECEMBER 8,
1998

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PREFACE

In addition to the factual, legal and Constitutional defenses we present in this document, the President has asked us to convey a personal note: What the President did was wrong. As the President himself has said, publicly and painfully, “there is no fancy way to say that I have sinned.”

The President has insisted that no legalities be allowed to obscure the simple moral truth that his behavior in this matter was wrong; that he misled his wife, his friends and our Nation about the nature of his relationship with Ms. Lewinsky. He did not want anyone to know about his personal wrongdoing. But he does want everyone—the Committee, the Congress and the country—to know that he is profoundly sorry for the wrongs he has committed and for the pain he has caused his family, his friends, and our Nation.

But as attorneys representing the President in a legal and Constitutional proceeding, we are duty-bound to draw a distinction between immoral conduct and illegal or impeachable acts. And just as no fancy language can obscure the fact that what the President did was morally wrong, no amount of rhetoric can change the legal reality that the record before this Committee does not justify charges of criminal conduct or impeachable offenses.

The Framers, in their wisdom, left this Body the solemn obligation of determining not what is sinful, but rather what is impeachable. The President has not sugar-coated the reality of his wrongdoing. Neither should the Committee ignore the high standards of the Constitution to overturn a national election and to impeach a President.

TABLE OF CONTENTS

	Page
PREFACE	VII
I. INTRODUCTION	1
II. THE FACTUAL BACKGROUND	2
A. The Whitewater Investigative Dead-End	2
B. The Paula Jones Litigation	5
C. The President's Grand Jury Testimony About Ms. Lewinsky	6
III. THE CONSTITUTION REQUIRES PROOF OF OFFICIAL MIS- CONDUCT FOR IMPEACHMENT	7
A. Under the Constitution the Conduct Alleged in the Referral Does Not Reach the Level of "High Crimes and Misdemeanors"	7
1. Historical Background of "High Crimes and Misdemeanors"	7
2. The Framers Believed that Impeachment Redresses Wrongful Pub- lic Conduct	9
3. Our Constitution's Structure Does Not Permit Impeachment for Reasons of the Sort Alleged in the Referral	10
B. American Presidential Impeachment Practice and Contemporary Scholarship Confirm that Impeachment Is Only for Political Offenses Against the State Itself, Not for Private Wrongs	12
1. Prior Impeachment Proceedings Against American Presidents	12
2. Contemporary Views Confirm that Impeachment Is Not Approp- riate Here	14
C. Relevant Historical Precedents Demonstrate that No Impeachable Of- fense Has Been Alleged Here	15
1. Alexander Hamilton	15
2. The Failure of the Proposed Article of Impeachment Against Presi- dent Nixon Alleging Fraudulent Tax Filings	16
IV. THE CONSTITUTION REQUIRES CLEAR AND CONVINCING EVI- DENCE TO APPROVE ARTICLES OF IMPEACHMENT	18
A. This Committee Should Apply the Same Clear and Convincing Stand- ard Observed by Its Predecessor in the Watergate Proceedings	18
B. The Clear and Convincing Standard Is Commensurate with the Grave Constitutional Power Vested in the House	20
V. THE COMMITTEE SHOULD NOT RELY ON THE REFERRAL'S AC- COUNT OF THE EVIDENCE	21
A. The Information Presented to the Committee in the Referral Has Not Been Subjected to the Most Basic Adversarial Testing	22
B. The Referral Differs Vastly From the Precedent of the Watergate "Road Map"	22
C. The Resulting Referral Omitted a Wealth of Directly Relevant Excul- patory Evidence	23
D. Mr. Starr's Conduct in the Lewinsky Investigation Has Betrayed a Bias that Helps Explain the Lack of Neutrality in the Referral	25
VI. THE PRESIDENT DID NOT COMMIT PERJURY	27
A. Elements of Perjury	27
B. Contradictory Testimony From Two Witnesses Does Not Indicate That One Has Committed Perjury	28
1. It Must Be Proven that a Witness Had the Specific Intent to Lie	28
2. A Perjury Case Must Not Be Based Solely Upon the Testimony of a Single Witness	29
C. "Literal Truth" and Non-Responsive Answers Do Not Constitute Per- jury	30
D. Fundamentally Ambiguous Questions Cannot Produce Perjurious An- swers	32

	Page
VI. THE PRESIDENT DID NOT COMMIT PERJURY—Continued	
E. It Is Expected and Proper for a Witness To Be Cautious When Under Oath	34
F. Specific Claims of Perjury	35
1. Civil Deposition of January 17, 1998	35
2. Grand Jury Testimony of August 17, 1998	43
VII. THE PRESIDENT DID NOT OBSTRUCT JUSTICE	44
A. The Elements of Obstruction of Justice	44
B. Specific Claims of Obstruction	46
1. There Is No Evidence that the President Obstructed Justice in Connection with Gifts Given to Ms. Lewinsky	46
2. The President Did Not Obstruct Justice in Connection with Ms. Lewinsky's Job Search	57
3. The President Did Not Have an Agreement or Understanding with Ms. Lewinsky to Lie Under Oath	70
4. The President Did Not Obstruct Justice by Suggesting Ms. Lewinsky Could File an Affidavit	72
5. The President Did Not Attempt to Influence Betty Currie's Testimony	75
6. The President Did Not Attempt to Influence the Testimony of "Potential" Grand Jury Witnesses Through His Denials	78
VIII. THE PRESIDENT DID NOT ABUSE POWER	81
A. The President Properly Asserted Executive Privilege to Protect the Confidentiality of Communications with His Staff	81
1. The White House Made Every Effort at Accommodation and Ultimately Asserted the Privilege as Narrowly as Possible	81
2. The Court's Ruling Upholding the White House's Assertion of Executive Privilege Squarely Rebuts the OIC's Abuse of Power Claim	83
B. The President Was Entitled to Assert Attorney-Client Privilege to Protect the Right of Presidents to Request and Receive Confidential and Candid Legal Advice from White House Counsel	84
1. The Governmental Attorney-Client Privilege Claim Was Grounded in the Law of the D.C. Circuit and the Supreme Court	85
2. The Courts' Rulings Squarely Rebut the OIC's Claims of Abuse of Power	85
C. The Privilege Litigation Did Not Delay the OIC's Investigation	86
D. Mr. Starr Misrepresents the Record to Claim that the President Deceived the American Public About the Executive Privilege Litigation	88
E. The President's Decision Not to Testify Before the Grand Jury Voluntarily Was Not an Abuse of Power	89
F. False Public Denials About an Improper Relationship Do Not Constitute an Abuse of Office	89
1. Subjecting a President to Impeachment Would Disrupt Our Constitutional Government	90
2. The President's Denial of an Improper Relationship Is Not Comparable to President Nixon's Denials of Involvement in the Watergate Burglary and Cover-up	91
IX. CONCLUSION	92
X. DOCUMENTARY APPENDIX TO SUBMISSION	94

INDEX

1. August 17, 1998 Statement of President Clinton (App. at 677)	94
2. Transcript of Remarks of President Clinton at Religious Leaders' Breakfast (Sept. 11, 1998)	96
3. Order of Judge Susan Webber Wright (E.D. Ark. Jan. 29, 1998)	99
4. Letter to Newt Gingrich, Richard Gephardt, Henry Hyde, and John Conyers from law professors	103
5. Historians in Defense of the Constitution (Oct. 28, 1998)	128
6. "Founding Fathers Didn't Flinch." <i>The Los Angeles Times</i> (Sept. 18, 1998)	137
7. "High Crimes—It Depends on How You Define 'Murder'," <i>The Los Angeles Times</i> (Nov. 22, 1998)	138
8. <i>In re Report and Recommendation of June 5, 1972 Grand Jury Concerning Transmission of Evidence to The House of Representatives</i> , 370 F. Supp. 1219 (D.D.C. 1974)	140
9. Declaration of Charles F.C. Ruff (redacted version) (March 17, 1998)	153
10. Order and Memorandum Opinion of Judge Norma Holloway Johnson (May 27, 1998) (redacted version) (published as <i>In re Grand Jury Proceedings</i> , 5 F. Supp. 2d 21 (D.D.C. 1998))	188
11. <i>In re Bruce R. Lindsey</i> (D.C. Cir. July 27, 1998) (published at 158 F.3d 1263 (D.C. Cir. 1998))	223
12. <i>Office of the President v. Office of Independent Counsel</i> , No. 98-316, 67 U.S.L.W. 3321 (Nov. 10, 1998)	271
13. "Starr Probes Clinton Personal Life," <i>The Washington Post</i> (June 25, 1997)	272
14. "Linda Tripp Briefed Jones Team on Tapes," <i>The Washington Post</i> (Feb. 14, 1998)	274
15. "Pressgate," <i>Brill's Content</i> (Aug. 1998)	277
16. Order to Show Cause, Judge Norma Holloway Johnson (D.D.C. June 19, 1998)	308
17. Memorandum Order, Judge Norma Holloway Johnson (D.D.C. June 26, 1998)	322
18. Order, Judge Norma Holloway Johnson (D.D.C. July 7, 1998)	328
19. Order, Judge Norma Holloway Johnson (D.D.C. July 9, 1998)	331
20. <i>In re Sealed Case</i> (D.C. Cir. Aug. 3, 1998) (redacted version) (published at 151 F.3d 1059 (D.C. Cir. 1998))	342
21. Order to Show Cause, Judge Norma Holloway Johnson (D.D.C. Sept. 25, 1998) (redacted version)	382

SUBMISSION BY COUNSEL FOR PRESIDENT CLINTON TO
THE COMMITTEE ON THE JUDICIARY OF THE UNITED
STATES HOUSE OF REPRESENTATIVES

I. INTRODUCTION

The President of the United States has not committed impeachable offenses. He repeatedly has acknowledged that what he did was wrong, he has apologized, and he has sought forgiveness. But his apologies, his acceptance of responsibility, and his contrition do not mean either that the President committed criminal acts or that the acts of which he is accused are impeachable offenses. Counsel for President Clinton respectfully submit this memorandum to demonstrate and document this contention.

We offer this memorandum mindful of the fact that this body now confronts one of the most difficult questions our Constitution poses to Congress: whether to invalidate the popular will expressed in the election of the President. "Voting in the presidential election," as Professor Charles Black wrote, "is certainly the political choice most significant to the American people."¹ Accordingly, "[n]o matter can be of higher political importance than our considering whether, in any given instance, this act of choice is to be undone."² Consideration both wise and deliberate must precede any decision to report articles of impeachment. For "the power of impeachment and removal is a drastic one, not to be lightly undertaken . . . and especially sensitive with reference to the President of the United States."³

We previously have submitted three memoranda⁴ to this Committee, addressing various issues arising out of the Independent Counsel's September 11, 1998, Referral.⁵ In this submission, we comprehensively set out our response to the Referral based on the evidence now available to us; address certain questions stemming from the testimony of the Committee's sole witness, Independent Counsel Kenneth W. Starr⁶ and correct fundamental misconceptions about this matter arising from deeply unfair or unsupported inferences drawn in the Referral and significant misstatements

¹ Charles L. Black, *Impeachment: A Handbook* 1 (1974).

² *Id.*

³ Committee on Federal Legislation of the Bar Ass'n of the City of New York, *The Law of Presidential Impeachment* 44 (1974) (hereinafter "New York Bar Report").

⁴ *Preliminary Memorandum Concerning Referral of Office of Independent Counsel* (September 11, 1998)(73 pages); *Initial Response to Referral of Office of Independent Counsel* (September 12, 1998)(42 pages); *Memorandum Regarding Standards of Impeachment* (October 2, 1998)(30 pages).

⁵ *Referral from Independent Counsel Kenneth W. Starr in Conformity with the Requirements of Title 28, United States Code, Section 595(c)*, House Doc. 105-310 (Sept. 11, 1998)(105th Cong. 2d. Sess.)(hereinafter "Ref.>").

⁶ The Committee has heard from certain other witnesses on legal questions, but the Independent Counsel has been the only witness called by the Committee who even attempted to address the allegations in the Referral. As the Independent Counsel conceded, however, he had almost no first-hand knowledge of the facts, since the President was the only witness he interviewed. Transcript of November 19, 1998 Hearing at 339-40.

about the evidence in the press and elsewhere. For example, it is widely alleged among those favoring impeachment that the President “lied under oath” to the grand jury. But a review of the available evidence proves that this allegation often is based *not* on what the President actually said under oath but rather on what some of his accusers *claim* he said—such as that in the grand jury he categorically denied having a sexual relationship with Ms. Lewinsky, or that he denied being alone with her, when in fact he explicitly acknowledged to the grand jury both that he had had an inappropriate intimate relationship with Ms. Lewinsky and that he had been alone with her. There are numerous other examples of allegations, now commonly believed, that are wholly—not just somewhat—unsupported even by the evidence presented to the Committee in the OIC referral. It is in part the purpose of this memorandum to separate fact and fiction and demonstrate why the record supports neither the charges made nor impeachment. We ask that readers set aside their preconceptions of what they think the evidence is, based on the biased presentation in the Starr Referral and subsequent inaccurate coverage, and look instead at the evidence itself.

At the outset, let us be clear. Extraordinary as it must seem in a matter of this gravity, the President has not been specifically notified what allegations are at issue here. The Referral itself cites “eleven possible grounds for impeachment” of the President, Ref. at 129, although it does not identify the rationale for including these grounds.⁷ In his presentation to the Committee, Mr. Schippers identified a somewhat different set of “fifteen separate events directly involving [the] President” which “could constitute felonies which, in turn, may constitute grounds to proceed with an impeachment inquiry.”⁸ The Chairman apparently has indicated that the Committee may consider only two charges,⁹ while recent newspaper articles variously state that the Committee staff is drafting three charges or four charges.¹⁰ We have been provided only the most limited and in some instances no access to significant evidence in the Committee’s possession, elliptically referred to by Members at the November 19, 1998, testimony of the Independent Counsel.¹¹ Without knowing what this evidence is, and being able to analyze and quote it, we cannot fairly or adequately rebut every

⁷The Referral states that “[i]t is not the role of this Office to determine whether the President’s actions warrant impeachment by the House,” Ref. at 5, but, tellingly, the Referral nowhere recites the standard that the Independent Counsel in fact *used* to determine that there should be eleven (but not twelve, or three, or zero) grounds, a tacit acknowledgement of the impossibility of stating a constitutional or precedential standard that would justify impeachment on the basis of such alleged facts.

⁸Schippers Presentation at 11. Mr. Schippers’ analysis was based entirely upon the documentary materials submitted by the Independent Counsel, and he acknowledged to the Committee that “we did not seek to procure any additional evidence or testimony from any other source. . . . [M]y staff and I did not deem it necessary or even proper to go beyond the submission itself.” *Id.* at 5–6.

⁹“Hyde, according to informed sources, may consider streamlining those [fifteen Schippers allegations] into as few as two counts. . . . I frankly don’t see how we can deal with all 15 charges adequately,” Hyde said. “Hyde May Narrow List Of Impeachment Charges,” *The Washington Post* (Oct. 14, 1998) at A1.

¹⁰“As the House Judiciary Committee moves into the final stages of its inquiry, Representative Henry J. Hyde’s senior staff is beginning to draw up three articles of impeachment against President Clinton.” “Impeachment Panel Starts Work On 3 Articles Against President,” *The New York Times* (Nov. 26, 1998) at A1; “The committee could consider up to four articles of impeachment covering perjury, obstruction of justice, and abuse of power, committee Republicans said yesterday.” “Clinton Defense Is Given 2 Days; Panel May Vote Late in Week to Impeach,” *The Washington Post* (Dec. 7, 1998) at A1.

¹¹See Transcript of November 19, 1998 Hearing at 233–35 (remarks of Rep. Watt).

allegation the Committee may later choose to bring forward from the Referral or elsewhere.

Moreover, the Committee has recently launched new investigative forays in areas not covered by the Referral. It has taken depositions related to Ms. Kathleen Willey, and it has authorized (but now apparently withdrawn) subpoenas for depositions and documents related to fundraising for the 1996 Presidential campaign. Simple fairness entitles us to an adequate opportunity to receive, review, and use the information in the Committee's possession (for example, the transcripts of depositions from which we were excluded), be apprised of the *specific* charges the Committee is considering, and have a fair chance to discover and present evidence in rebuttal.

The present memorandum is thus necessarily limited in scope, and we will make a further submission to address any new or revised allegations the Committee may decide to pursue.

II. THE FACTUAL BACKGROUND

Certain undisputed facts are relevant to the legal analysis in this memorandum, in addition to those set forth in previous submissions.

A. THE WHITEWATER INVESTIGATIVE DEAD-END

The Lewinsky investigation had its antecedent in the long-running Whitewater investigation. On August 5, 1994, Kenneth W. Starr was appointed Independent Counsel by the Special Division to conduct an investigation centering on two Arkansas entities, Whitewater Development Company, Inc., and Madison Guaranty Savings and Loan Association. The Office of Independent Counsel's ("OIC") investigation dragged on slowly¹² and inconclusively, without any charges being lodged against either the President or Mrs. Clinton. The Independent Counsel himself announced his resignation in February 1997 to become Dean of the Pepperdine Law School¹³ but, after a firestorm of media criticism,¹⁴ he backtracked and resumed his duties.¹⁵

¹²For example, the OIC did not issue its report on the 1993 death of Deputy White House Counsel Vincent Foster until October 10, 1997. It concluded, as had several other earlier (and speedier) investigations, that Foster's death was a suicide.

¹³See Labaton, "Special Counsel Intends to Leave Whitewater Case—White House Is Hopeful—Starr's Decision to Take Post in August Raises Questions About Status of Inquiry," *The New York Times* (Feb. 18, 1997) at A1; Galvin, "Clinton's Lucky Starr: Prober to Call It Quits—Ex-prosecutors Said They Think Starr's Decision Is a Sign That His Probe Will End With a Fizzle, Not a Bang," *The New York Post* (Feb. 18, 1997) at 3.

¹⁴See, e.g., Shapiro, "Starr Bails Out Of a Probe That's Adrift," *USA Today* (Feb. 19, 1997) at 2A; Safire, "The Big Flinch: Ken Starr Betrays His Trust," *The New York Times* (Feb. 20, 1997) at A33; Editorial, "Ken Starr's Flip-Flops," *The Washington Times* (Feb. 24, 1997) at A16. *The Washington Post* editorialized, "What Mr. Starr owes, before he goes anywhere, is a report on the propriety of the President's behavior. That's the subject he was hired to address," Editorial (Feb. 19, 1997) at A20, and it quoted James McKay, a former Independent Counsel, as stating: "I'm just amazed someone given a specific job to do leaves before it is completed. It's like the captain jumping off the ship before everyone else gets off," Schmidt, "Some Starr Allies Say Departure Means No Clinton Charges" (Feb. 19, 1997) at A7. *The New York Times* asserted that the Independent Counsel's decision reflected "a selfish indifference to [his] civic obligations"; he "never fully appreciated the gravity of [his] role," "should not have taken [the job] unless [he] were willing to see it through," and was "behaving as if [he] had no greater responsibility than to tend to [his] career." Editorial, "Just a Minute, Mr. Starr" (Feb. 19, 1997) at A26.

¹⁵"Starr seemed unprepared for and taken aback by the furor his departure announcement has generated," Schmidt, "Starr Appears to Waver on Timing of Departure," *The Washington Post* (Feb. 20, 1997) at A1.

Without any expansion of his jurisdiction, Mr. Starr then began to conduct an investigation into rumors of extramarital affairs involving the President. In the Spring of 1997, Arkansas state troopers who had once been assigned to the Governor's security detail were interviewed, and "[t]he troopers said Starr's investigators asked about 12 to 15 women by name, *including Paula Corbin Jones*. . . ." Woodward & Schmidt, "Starr Probes Clinton Personal Life," *The Washington Post* (June 25, 1997) at A1 (emphasis added). "The nature of the questioning marks a sharp departure from previous avenues of inquiry in the three-year old investigation. . . . Until now, . . . what has become a wide-ranging investigation of many aspects of Clinton's governorship has largely steered clear of questions about Clinton's relationships with women. . . ." ¹⁶ One of the most striking aspects of this new phase of the Whitewater investigation was the extent to which it focused on the Paula Jones case. One of the troopers interviewed declared, "They asked me about Paula Jones, all kinds of questions about Paula Jones, whether I saw Clinton and Paula together and how many times." ¹⁷

At his testimony before this Committee on November 19, 1998, Mr. Starr conceded that his agents had conducted these interrogations and acknowledged that he had not sought expansion of his jurisdiction from the Attorney General or the Special Division of the Court of Appeals,¹⁸ but he contended that these inquiries were somehow relevant to his Whitewater investigation: "we were, in fact, interviewing, as good prosecutors, good investigators do, individuals who would have information that may be relevant to our inquiry about the President's involvement in Whitewater, in Madison Guaranty Savings and Loan and the like."¹⁹ However, the OIC was obviously engaged in an effort to gather embarrassing information concerning the President. Indeed, a recent article in the New York Times Magazine notes that Deputy Independent Counsel Jackie Bennett was "known among fellow prosecutors as the office expert on the President's sex life long before anyone had heard of Monica Lewinsky."²⁰

B. THE PAULA JONES LITIGATION

In January 1998, the OIC finally succeeded in transforming its investigation from one focused on long-ago land deals and loans in Arkansas into one involving a different topic (sex) and more recent events in Washington, D.C. The Lewinsky investigation grew out of the pretrial discovery proceedings in the civil suit Ms. Paula Corbin Jones had filed against the President in May 1994, making certain allegations about events three years earlier when the President was Governor of Arkansas. Discovery had been stayed until the Supreme Court's decision on May 27, 1997, denying Presi-

¹⁶ *Ibid.* Trooper Roger Perry, a 21-year veteran of the Arkansas state police, stated that he "was asked about the most intimate details of Clinton's life." "I was left with the impression that they wanted me to show he was a womanizer. . . . All they wanted to talk about was women." *Ibid.* (ellipsis in original).

¹⁷ *Ibid.*

¹⁸ Transcript of November 19, 1998 Hearing at 377-378.

¹⁹ *Ibid.* at 378.

²⁰ Winerip, "Ken Starr Would Not Be Denied," *The New York Times Magazine* (Sept. 6, 1998) at 64.

dential immunity.²¹ Shortly thereafter, Ms. Jones selected a new spokesperson, Ms. Susan Carpenter-McMillan, and retained new counsel affiliated with the conservative Rutherford Institute,²² who began a public relations offensive against the President. “I will never deny that when I first heard about this case I said, ‘Okay, good. We’re gonna get that little slimeball,’ said Ms. Carpenter-McMillan, a staunch Republican.”²³ While Ms. Jones’ previous attorneys, Messrs. Gilbert Davis and Joseph Cammarata, had largely avoided the media, public personal attacks now became the order of the day as the Jones civil suit became a partisan vehicle to try to savage the President.²⁴ Ms. Jones’ husband, Steve, even announced his intention to use judicial process to obtain and disseminate pejorative personal information concerning the President:

In a belligerent mood, Steve [Jones] warned that he was going to use subpoena power to reconstruct the secret life of Bill Clinton. Every state trooper used by the governor to solicit women was going to be deposed under oath. “We’re going to get names; we’re going to get dates; we’re going to do the job that the press wouldn’t do,” he said. “We’re going to go after Clinton’s medical records, the raw documents, not just opinions from doctors, . . . we’re going to find out everything.”²⁵

As is now well known, this effort led ultimately to the Jones lawyers being permitted to subpoena various women, to determine their relationship, if any, with the President, allegedly for the purpose of determining whether they had information relevant to the sexual harassment charge. Among these women was Ms. Lewinsky.

By mid-January 1998, Ms. Tripp had brought to the attention of the OIC certain information she believed she had about Ms. Lewinsky’s involvement in the *Jones* case and, as noted above, the OIC investigation then began to reach formally into the *Jones* case. The OIC met with Ms. Tripp through the week of January 12, and with her cooperation taped Ms. Lewinsky discussing the *Jones* case and the President. During the week, Ms. Tripp alerted the OIC that she had been taping Ms. Lewinsky in violation of Maryland law, and the OIC promised Ms. Tripp immunity from federal prosecution, and assistance in protecting her from state prosecution, in exchange for her cooperation. The OIC formalized that agreement in writing on Friday, January 16, after it had received jurisdiction to do so from the Attorney General.

²¹ *Clinton v. Jones*, 526 U.S. 681 (1997).

²² Ms. Jones was described as having “accepted financial support of a Virginia conservative group,” which intended to “raise \$100,000 or more on Jones’s behalf, although the money will go for expenses and not legal fees.” “Jones Acquires New Lawyers and Backing,” *The Washington Post* (October 2, 1998) at A1. Jones’ new law firm, the Dallas-based Rader, Campbell, Fisher and Pyke, had “represented conservatives in antiabortion cases and other causes.” *Ibid.* See also “Dallas Lawyers Agree to Take on Paula Jones’ Case”—Their Small Firm Has Ties to Conservative Advocacy Group,” *The Los Angeles Times* (Oct. 2, 1997) (Rutherford Institute a “conservative advocacy group,” a “conservative religious-rights group”).

²³ “Cause Celebre: An Antiabortion Activist Makes Herself the Unofficial Mouthpiece for Paula Jones,” *The Washington Post* (July 23, 1997) at C1. Ms. Carpenter-McMillan, “a cause-oriented, self-defined ‘conservative feminist,’” described her role as “flaming the White House” and declared “Unless Clinton wants to be terribly embarrassed, he’d better cough up what Paula needs. Anybody that comes out and testifies against Paula better have the past of a Mother Teresa, because our investigators will investigate their morality.” “Paula Jones’ ‘Team Not All About Teamwork,’” *USA Today* (Sept. 29, 1997) at 4A.

²⁴ After Ms. Jones’ new team had been in action for three months, one journalist commented: “In six years of public controversy over Clinton’s personal life, what is striking in some ways is how little the debate changes. As in the beginning, many conservatives nurture the hope that the past will be Clinton’s undoing. Jones’s adviser, Susan Carpenter-McMillan, acknowledged on NBC’s ‘Meet the Press’ yesterday that her first reaction when she first heard Jones’s claims about Clinton was, ‘Good, we’re going to get that little slime ball.’ (Harris, “Jones Case Tests Political Paradox,” *The Washington Post* (Jan. 19, 1998) at A1.)

²⁵ Evans-Pritchard, *The Secret Life of Bill Clinton* 363 (1997).

The President's deposition in the *Jones* case was scheduled to take place the next day, on Saturday, January 17. As we now know, the night before that deposition Ms. Tripp had briefed the lawyers for Ms. Jones on her perception of the relationship between Ms. Lewinsky and the President—doing so based on confidences Ms. Lewinsky had entrusted to her.²⁶ (She was permitted to do so even though, having received immunity from the OIC, the OIC could have barred her from talking to any one about Ms. Lewinsky but failed to do so.) At the deposition the next day, the President unexpectedly was asked numerous questions about Ms. Lewinsky, even before he was questioned about Ms. Jones.

The *Jones* case, of course, was not about Ms. Lewinsky. She was a peripheral player and, since her relationship with the President was concededly consensual, an irrelevant one. Shortly after the President's deposition, Chief Judge Wright ruled that evidence pertaining to Ms. Lewinsky would not be admissible at the *Jones* trial because "it is not essential to the core issues in this case."²⁷ The Court also ruled that, given the allegations at issue in the *Jones* case, the Lewinsky evidence "might be inadmissible as extrinsic evidence" under the Federal Rules of Evidence because it involved merely the "specific instances of conduct" of a witness.²⁸

C. THE PRESIDENT'S GRAND JURY TESTIMONY ABOUT MS. LEWINSKY

On August 17, 1998, the President specifically acknowledged to the grand jury that he had had a relationship with Ms. Lewinsky involving "improper intimate contact." He described how the relationship began, and how it had ended early in 1997—long before any public attention or scrutiny. He acknowledged this relationship to the grand jury, and he explained how he had tried to get through the deposition in the *Jones* case months earlier without admitting what he had had to admit to the grand jury—an improper relationship with Ms. Lewinsky. He further testified that the "inappropriate encounters" with Ms. Lewinsky had ended, at his insistence, in early 1997, and he stated: "I regret that what began as a friendship came to include this conduct, and I take full responsibility for my actions." *Id.* at 461. He declined to describe, because of personal privacy and institutional dignity considerations, certain specifics about his conduct with Ms. Lewinsky,²⁹ but he indicated his willingness to answer,³⁰ and he did answer, the other questions put to him about his relationship with her. No one who watched the videotape of this grand jury testimony had any doubt that the President was admitting to an improper physical relationship with Ms. Lewinsky.

²⁶ Baker, "Linda Tripp Briefed Jones Team on Tapes: Meeting Occurred Before Clinton Deposition," *The Washington Post* (Feb. 14, 1998) at A1.

²⁷ Order, at 2, *Jones v. Clinton*, No. LR-C-94-290 (E.D. Ark.) (Jan. 29, 1998).

²⁸ *Ibid.*

²⁹ "While I will provide the grand jury whatever other information I can, because of privacy considerations affecting my family, myself, and others, and in an effort to preserve the dignity of the office I hold, this is all I will say about the specifics of these particular matters." App. at 461.

³⁰ "I will try to answer, to the best of my ability, other questions including questions about my relationship with Ms. Lewinsky, questions about my understanding of the term 'sexual relations,' as I understood it to be defined at my January 17th, 1998 deposition; and questions concerning alleged subornation of perjury, obstruction of justice, and intimidation of witnesses." App. at 461.

III. THE CONSTITUTION REQUIRES PROOF OF OFFICIAL MISCONDUCT FOR IMPEACHMENT

To date, the Judiciary Committee has declined to articulate or adopt standards of impeachable conduct. Its inquiry has proceeded and (it appears) its vote will occur with no consensus among Committee members as to the constitutional meaning of an impeachable act. That is regrettable. For even if the constitutional standard against which the Referral must be measured lacks the precision of a detailed statute, it nonetheless has a determined and limited content. The Committee's failure to define the applicable standard has necessarily created the perception that an *ad hoc* "standard" is being devised to fit the facts. A constitutional standard does in fact exist, and were the Committee to confront the question directly, it would be evident that the Constitution's rigorous showing has not been made here.

A. UNDER THE CONSTITUTION THE CONDUCT ALLEGED IN THE REFERRAL DOES NOT REACH THE LEVEL OF "HIGH CRIMES AND MISDEMEANORS"

The Constitution provides that the President shall be removed from office only upon "Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." U.S. Const. Art. II, § 4. The legal question confronting the Committee is whether the acts of the President alleged in the Starr Referral could conceivably amount to "high Crimes and Misdemeanors."

The answer is that they could not. The syntax of the Constitution's formulation "Treason, Bribery *or other* high Crimes and Misdemeanors" (emphasis added) strongly suggests that, to be impeachable offenses, high crimes and misdemeanors must be of the seriousness of "Treason" and "Bribery." Yet the Referral alleges nothing remotely similar in gravity to those high crimes.

Moreover, both the historical background of the "high Crimes and Misdemeanors" concept and the Constitution itself make clear that the conduct alleged does not constitute an impeachable offense. To the contrary, cognizant that the impeachment process upsets the electoral will of the people, the Framers made the standard of impeachable offenses an especially high one, requiring a showing of injury to our very system of government.

1. *Historical Background of "High Crimes and Misdemeanors"*

The English precedents illustrate that impeachment was understood to apply only to fundamental offenses against the system of government. In English practice, the term "high crimes and misdemeanors" had been applied to offenses, the common elements of which were their severity and the fact that the *wrongdoing was directed against the state*.³¹ The English cases included misappropriation of public funds, interfering in elections, accepting bribes, and various forms of corruption. *Ibid.* These offenses all affected the discharge of public duties by public officials. In short, under the

³¹See Raoul Berger, *Impeachment: The Constitutional Problems* 67-73 (1973).

English practice, “the critical element of injury in an impeachable offense was *injury to the state*.”³²

The notion that “injury to the state” was the hallmark of the impeachable offense was also shared by the Staff of the Impeachment Inquiry when it researched the issue in connection with the investigation of President Richard Nixon in 1974. In early English impeachments, the Staff concluded, “the thrust of the charge was damage to the state. . . . Characteristically, impeachment was used in individual cases to reach offenses, as perceived by Parliament, *against the system of government*.”³³

The constitutional and ratification debates confirm that impeachment was limited to only the gravest political wrongs. The Framers plainly intended the impeachment standard to be a high one. They rejected a proposal that the President be impeachable for “mal-administration,” for, as James Madison pointed out, such a standard would “be equivalent to a tenure during the pleasure of the Senate.”³⁴ The Framers plainly did not intend to permit Congress to debilitate the Executive by authorizing impeachment for something short of the most serious harm to the state. In George Mason’s apt language, impeachment was thought necessary to remedy “great and dangerous offenses” not covered by “Treason” or “Bribery” such as “[a]ttempts to subvert the Constitution.”³⁵

That is why, at the time of the ratification debates, Alexander Hamilton described impeachment as a “method of National Inquest into the conduct of public men.”³⁶ No act touches more fundamental questions of constitutional government than does the process of Presidential impeachment. No act more directly affects the public interest. No act presents the potential for greater injustice—injustice both to the Chief Executive and to the people who elected him—and the Framers were fully aware of this.

The specific harms the Framers sought to redress by impeachment are far more serious than those alleged in the Starr Referral. During the ratification debates, a number of the Framers addressed the Constitution’s impeachment provisions. The following is a list of wrongs they believed the impeachment power was intended to address:

- receipt of emoluments from a foreign power in violation of Article I, section 9;³⁷
- summoning the representatives of only a few States to ratify a treaty;³⁸

³²Gerhardt, *The Constitutional Limits to Impeachment and Its Alternatives*, 68 Tex. L. Rev. 1, 82 (1989) (emphasis added). In fact, the first draft of what became Article II Section 4’s impeachment provision actually set the standard of impeachment, in addition to treason and bribery, as “other high crimes and misdemeanors *against the State*.” 2 Farrand, *The Records of the Federal Convention of 1787* 550 (Rev. ed. 1966) (emphasis added). That phrase was ultimately deleted, however, by the Committee on Style and Arrangement, which was charged with making only such changes as did *not* affect the meaning of the original language.

³³*Impeachment of Richard M. Nixon, President of the United States*, Report by the Staff of the Impeachment Inquiry, House Comm. on the Judiciary, 93d Cong. 2d Sess. at 5 (Feb. 1974) (hereinafter “*Impeachment Inquiry*”) (emphasis added).

³⁴2 Farrand, *The Records of the Federal Convention of 1787* 550 (Rev. ed. 1966).

³⁵*Ibid.*

³⁶The Federalist No. 65 at 331 (Gary Wills ed. 1982).

³⁷Edmund Randolph, 3 Elliot, *The Debate in the Several State Conventions on the Adoption of the Federal Constitution* 486 (reprint of 2d ed.) (Virginia Convention).

³⁸James Madison, 3 Elliot at 500 (Virginia Convention).

concealing information from or giving false information to the Senate so as to cause it to take measures it otherwise would not have taken which were injurious to the country;³⁹ general failure to perform the duties of the Executive.⁴⁰

Impeachment provisions in a number of late eighteenth century state constitutions reaffirm that the Framers' generation believed that impeachment's purpose was redress of *official* wrongdoing. The New Jersey Constitution's impeachment provision for "misbehavior" was interpreted to permit impeachment not for personal wrongdoing but for acts by public officials performed in their public capacity.⁴¹ Delaware's first Constitution authorized impeachment for "offending against the state by maladministration, corruption, or other means, by which the safety of the commonwealth may be endangered."⁴² And Virginia's Constitution of 1776 provided for impeachment of those public officers who "offend[] against the state, either by maladministration, corruption or other means, by which the safety of the State may be endangered."⁴³

The history on which they relied, the arguments they made in Convention, the specific ills they regarded as redressable, and the State backgrounds from which they emerged—all these establish that the Framers believed that impeachment must be reserved for only the most serious forms of wrongdoing. They believed, in short, that impeachment "reached offenses against the government, and especially abuses of constitutional duties."⁴⁴

The Referral alleges no wrongs of that magnitude.

2. *The Framers Believed That Impeachment Redresses Wrongful Public Conduct*

The remedy of impeachment was designed only for those very grave harms not otherwise politically redressable. As James Wilson wrote, "our President . . . is amenable to [the laws] in his private character as a citizen, and in his public character by impeachment."⁴⁵

That is why Justice Story described the harms to be reached by impeachment as those "offensive acts which do not properly belong to the judicial character in the ordinary administration of justice, and are far removed from the reach of municipal jurisprudence."⁴⁶

For these reasons, impeachment is limited to certain forms of potential wrongdoing only, and it is intended to redress only certain kinds of harms. Again, in Hamilton's words:

The subjects of [the Senate's impeachment] jurisdiction are those offenses which proceed from the misconduct of public men, or in other words from the abuse of violation of some public trust. They are of a nature which may with peculiar propriety be denominated Political, as they relate chiefly to injuries done to the society itself.⁴⁷

³⁹ James Iredell, 4 Elliot at 127 (North Carolina Convention).

⁴⁰ Abraham Baldwin (Georgia), 1 Annals of Cong. 535–36 (debates on the President's removal power).

⁴¹ N.J. Const., Art. XII (1776); Hoffer & Hull, *Impeachment in America 1635–1805* 80 (1984).

⁴² Del. Const., Art. XXIII.

⁴³ See Hoffer & Hull at 70; Va. Const. of 1776, ¶15.

⁴⁴ Impeachment Inquiry at 14–15.

⁴⁵ 2 Elliot at 480 (emphasis in original).

⁴⁶ 2 Story, *Commentaries on the Constitution of the United States* §762 at 234 (reprint of 1st ed. 1833).

⁴⁷ Federalist 65 at 330–31.

Early commentators on the Constitution are in accord on the question of impeachment's intended purpose. In Justice James Wilson's words, impeachments are "proceedings of a political nature . . . confined to political characters" charging only "political crimes and misdemeanors" and culminating only in "political punishments."⁴⁸ And as Justice Story put the matter, "the [impeachment] power partakes of a political character, as it respects injuries to the society in its political character."⁴⁹ In short, impeachment was not thought to be a remedy for private wrongs—or even for most public wrongs. Rather, the Framers "intended that a president be removable from office for the commission of great offenses against the Constitution."⁵⁰ Impeachment therefore addresses public wrongdoing, whether denominated a "political crime[] against the state,"⁵¹ or "an act of malfeasance or abuse of office,"⁵² or a "great offense[] against the federal government."⁵³ Ordinary civil and criminal wrongs can be addressed through ordinary judicial processes. And ordinary political wrongs can be addressed at the ballot box and by public opinion. Impeachment is reserved for the most serious public misconduct, those aggravated abuses of executive power that, given the President's four-year term, might otherwise go unchecked.

Private misconduct, or even public misconduct short of an offense against the state, is not redressable by impeachment because that solemn process, in Justice Story's words, addresses "offences which are committed by public men in violation of their public trust and duties."⁵⁴ Impeachment is a political act in the sense that its aims are public; it attempts to rein in abuses of the public trust committed by public officeholders in connection with conduct in public office. The availability of the process is commensurate with the gravity of the harm. As one scholar has put it, "[t]he nature of [impeachment] proceedings is dictated by the harms sought to be redressed—the misconduct of public men' relating to the conduct of their public office—and the ultimate issue to be resolved—whether they have forfeited through that conduct their right to continued public trust."⁵⁵

3. *Our Constitution's Structure Does Not Permit Impeachment for Reasons of the Sort Alleged in the Referral*

a. Impeachment Requires a Very High Standard Because Ours Is a Presidential and Not a Parliamentary System

Ours is a Constitution of separated powers. In that Constitution, the President does not serve at the will of Congress, but as the di-

⁴⁸ Wilson, *Works* 426 (R. McCloskey, ed. 1967).

⁴⁹ Story, *Commentaries on the Constitution* §744. And as a contemporary scholar has expressed it, "[c]ognizable 'high Crimes and Misdemeanors' in England . . . generally concerned perceived malfeasance—which may or may not be proscribed by common law or statute—that damaged the state or citizenry in their political rights." O'Sullivan, *The Interaction Between Impeachment and the Independent Counsel Statute*, 86 Geo. L.J. 2193, 2210 (1998) (emphasis added).

⁵⁰ Labovitz, *Presidential Impeachment* at 94.

⁵¹ Berger, *Impeachment* at 61.

⁵² Rotunda, *An Essay on the Constitutional Parameters of Federal Impeachment*, 76 Ky. L.J. 707, 724 (1987/1988).

⁵³ Gerhardt, 68 Tex. L. Rev. at 85.

⁵⁴ Story, *Commentaries* §744 (emphasis added).

⁵⁵ O'Sullivan, 86 Geo. L.J. at 2220.

rectly elected,⁵⁶ solitary head of the Executive Branch. The Constitution reflects a judgment that a strong Executive, executing the law independently of legislative will, is a necessary protection for a free people.

These elementary facts of constitutional structure underscore the need for a very high standard of impeachable offenses. It was emphatically not the intention of the Framers that the President should be subject to the will of the dominant legislative party. Our system of government does not permit Congress to unseat the President merely because it disagrees with his behavior or his policies. The Framers' decisive rejection of parliamentary government is one reason they caused the phrase "Treason, Bribery or other high Crimes and Misdemeanors" to appear in the Constitution itself. They chose to specify those categories of offenses subject to the impeachment power, rather than leave that judgment to the unfettered whim of the legislature.

Any just and proper impeachment process must be reasonably viewed by the public as arising from one of those rare cases when the Legislature is compelled to stand in for all the people and remove a President whose continuation in office threatens grave harm to the Republic. Impeachment for wrongdoing of lesser gravity involves a legislative usurpation of a power belonging only to the people (the power to choose and "depose" Presidents by election and a Legislative encroachment on the power of the Executive.

The current process appears bent on "mangling the system of checks and balances that is our chief safeguard against abuses of public power."⁵⁷ Impeachment of the President on the grounds alleged in the Referral would ignore this intentionally imposed limit on legislative power and would thereby do incalculable damage to the institution of the Presidency. Whether "successful" or not, the current drive "will leave the Presidency permanently disfigured and diminished, at the mercy as never before of the caprices of any Congress."⁵⁸ The undefined, but broad and lenient, standard under which the Committee is implicitly proceeding converts the impeachment power into something other than the drastic removal power of last resort intended by the Framers. This new impeachment weapon would be a permanent, extra-constitutional power of Congress, a poison arrow aimed permanently at the heart of the Presidency. The inevitable effect of such a threat would be the weakening of that Office and an improper subservience of the President to the Congress, that was wholly unintended by the Framers.

That is not the impeachment power enshrined in the Constitution and defined by two hundred years of experience. The Constitution permits a single justification for impeachment—a demonstrated need to protect the people themselves.

⁵⁶ Of course, that election takes place through the mediating activity of the Electoral College. See U.S. Const. Art. II, § 1, cl. 2–3 and Amend. XII.

⁵⁷ Statement of Historians in Defense of the Constitution (Oct. 28, 1998); see also Schmitt, "Scholars and Historians Assail Clinton Impeachment Inquiry," *The New York Times* (Oct. 19, 1998) at A18.

⁵⁸ Statement, *ibid.*

b. Impeachment Requires a Very High and Very Clear Standard Because It Nullifies the Popular Will

The Framers made the President the sole nationally elected public official, responsible to all the people. He is the only person whose mandate is country-wide, extending to all citizens, all places, and all interests. He is the people's choice.

Therefore, when the Congress raises the issue of impeachment, the House (and ultimately the Senate) confront this inescapable question: is the alleged misconduct so profoundly serious, so malevolent, that it justifies undoing the people's decision? Is the wrong alleged of a sort that not only demands removal of the President before the ordinary electoral cycle can do its work, but also justifies the national trauma that accompanies the impeachment process itself?

The wrongdoing alleged here does not remotely meet that standard.

B. AMERICAN PRESIDENTIAL IMPEACHMENT PRACTICE AND CONTEMPORARY SCHOLARSHIP CONFIRM THAT IMPEACHMENT IS ONLY FOR POLITICAL OFFENSES AGAINST THE STATE ITSELF, NOT FOR PRIVATE WRONGS

1. Prior Impeachment Proceedings Against American Presidents

Three American Presidents have been the subject of impeachment proceedings. Each was impeached (or threatened with impeachment) for allegedly wrongful *official* conduct and not for alleged misdeeds unrelated to the exercise of public office.

John Tyler. In 1841, President Tyler succeeded William Henry Harrison after the latter's death in office. He immediately ran into political differences with the Whig majority in Congress. After Tyler vetoed a Whig-sponsored tariff bill, a Whig Congressman offered a resolution of impeachment against President Tyler. The resolution proffered nine impeachment articles, each alleging high crimes and misdemeanors constituting crimes against the government in the performance of official duties. The allegations included withholding assent to laws indispensable to the operation of government and assuming to himself the whole power of taxation, abuse of the appointment and removal power, and abuse of the veto power.⁵⁹

The resolution was rejected. But the fundamental premise of each charge was that the President had committed crimes *against the United States* in the exercise of official duties.

Andrew Johnson. President Johnson is, of course, the only president actually to have been impeached. President Johnson ran afoul of the Reconstruction Congress after the death of President Lincoln. After President Johnson notified Secretary of War Stanton that he was removed from office, the Congress voted an impeachment resolution in 1868 based on the President's supposed violation of the Tenure of Office Act. Ultimately, eleven articles were adopted against him and approved by the House.⁶⁰

⁵⁹ See Rehnquist, *Grand Inquests: The Historical Impeachments of Justice Samuel Chase and President Andrew Johnson* 256–58 (1992).

⁶⁰ *Id.* at 202–216.

As in the case of President Tyler, all the allegations concerned allegedly wrongful official conduct said to be *harmful to the processes of government*. The leading House manager in the Senate trial was Rep. Benjamin Butler, who defined impeachable offenses as follows: “We define, therefore, an impeachable high crime and misdemeanor to be *one in its nature or consequences subversive of some fundamental or essential principle of government*, or highly prejudicial to the public interest. . . .”⁶¹

On May 26, 1868, President Johnson was acquitted by a single vote.⁶² Although the vote was overwhelmingly partisan, seven Republican Senators broke with the party and voted for acquittal. Sen. William Pitt Fessenden was one of those seven. He did not vote for impeachment because, as he put it, an impeachable offense must be “of such a character to commend itself at once to the minds of all right thinking men, as beyond all question, an adequate cause for impeachment. It should leave no reasonable ground of suspicion upon the motives of those who inflict the penalty.”⁶³

Richard Nixon. Five articles of impeachment were proposed against then-President Nixon by this Committee in 1974. Three were approved. Two were not.⁶⁴ As with the charges against Presidents Tyler and Johnson, the approved articles alleged official wrongdoing. Article I charged President Nixon with “using the powers of his high office [to] engage[] . . . in a course of conduct or plan designed to delay, impede and obstruct” the Watergate investigation.⁶⁵ Article II described the President as engaging in “repeated and continuing abuse of the powers of the Presidency in disregard of the fundamental principle of the rule of law in our system of government” thereby “us[ing] his power as President to violate the Constitution and the law of the land.”⁶⁶ Article III charged the President with refusing to comply with Judiciary Committee subpoenas in frustration of a power necessary to “preserve the integrity of the impeachment process itself and the ability of Congress to act as the ultimate safeguard against improper Presidential conduct.”⁶⁷

The precedents speak clearly. The allegation against President Tyler and the articles actually approved against Presidents Johnson and Nixon all charged serious misconduct amounting to misuse of the authority of the Presidential office. As Professor Sunstein expressed it in his testimony before this body’s Subcommittee on the Constitution, American presidential impeachment proceedings have targeted “act[s] by the President, that amount[] to large-scale abuse of distinctly Presidential authority.”⁶⁸ The Referral contains nothing of the kind.

⁶¹ *Trial of Andrew Johnson*, v.1, 88 (March 30, 1868) (emphasis added).

⁶² Cong. Globe (Supp.) 412 (May 26, 1868).

⁶³ Congressional Quarterly: *Impeachment and the U.S. Congress*, March 1974.

⁶⁴ See discussion of the Income Tax Count against President Nixon in Part III.C.2, *infra*.

⁶⁵ *Impeachment of Richard M. Nixon, President of the United States*, Report of the Comm. on the Judiciary, 93rd Cong., 2d Sess., H. Rep. No. 93–1305 (Aug. 20, 1974) (hereinafter “*Nixon Report*”) at 133.

⁶⁶ *Nixon Report* at 180.

⁶⁷ *Id.* at 212–13.

⁶⁸ Statement of Cass R. Sunstein to the House Subcommittee on the Constitution of the House Judiciary Committee, dated November 9, 1998, at 15.

2. *Contemporary Views Confirm That Impeachment Is Not Appropriate Here*

a. *Contemporary Scholarship Confirms That Impeachment Is Appropriate for Offenses Against Our System of Government*

Impeachable acts need not be criminal acts. As Professor Black has noted, it would probably be an impeachable act for a President to move to Saudi Arabia so he could have four wives while proposing to conduct the Presidency by mail and wireless from there; or to announce and adhere to a policy of appointing no Roman Catholics to public office; or to announce a policy of granting full pardons, in advance of indictment or trial, to federal agents or police who killed anyone in the line of duty in the District of Columbia.⁶⁹ None of these acts would be crimes, but all would be impeachable. This, because they are all “serious assaults on the integrity of government.”⁷⁰ And all of these acts are public acts having public consequences.

Holders of public office should not be impeached for conduct (even criminal conduct) that is essentially private. That is why scholars and other disinterested observers have consistently framed the test of impeachable offenses in terms of some fundamental attack on our system of government, describing impeachment as being reserved for:

- “offenses against the government”;⁷¹
- “political crimes against the state”;⁷²
- “serious assaults on the integrity of the processes of government”;⁷³
- “wrongdoing convincingly established [and] so egregious that [the President’s] continuation in office is intolerable”;⁷⁴
- “malfeasance or abuse of office,”⁷⁵ bearing a “functional relationship” to public office;⁷⁶
- “great offense[s] against the federal government”;⁷⁷
- “acts which, like treason and bribery, undermine the integrity of government.”⁷⁸

b. *Recent Statements by Historians and Constitutional Scholars Confirm that No Impeachable Offense Is Present Here*

In a recent statement, 400 historians warned of the threat to our constitutional system posed by these impeachment proceedings. The Framers, they wrote, “explicitly reserved [impeachment] for high crimes and misdemeanors *in the exercise of executive power.*”⁷⁹ Impeachment for anything short of that high standard would have “the most serious implications for our constitutional order.”⁸⁰

⁶⁹ Black, *Impeachment* at 34–35.

⁷⁰ *Id.* at 38.

⁷¹ Labovitz, *Presidential Impeachment* at 26.

⁷² Berger, *Impeachment* at 61.

⁷³ Black, *Impeachment* at 38–39.

⁷⁴ Labovitz, *Presidential Impeachment* at 110.

⁷⁵ Rotunda, 76 Ky. L.J. at 726.

⁷⁶ *Ibid.*

⁷⁷ Gerhardt, 68 Tex. L. Rev. at 85.

⁷⁸ *New York Bar Report* at 18.

⁷⁹ Statement of Historians in Defense of the Constitution (Oct. 28, 1998) (emphasis added).

⁸⁰ *Ibid.*

That view accords with the position expressed by 430 legal scholars and communicated by letter to the House leadership and the leadership of this Committee.⁸¹ The legal scholars' letter underscores that high crimes and misdemeanors must be of a seriousness comparable to "treason" and "bribery" that are distinguished by a "grossly derelict exercise of official power." That standard, as the law professors note, is simply not met here even on the facts alleged. "If the President committed perjury regarding his sexual conduct, this perjury involved no exercise of Presidential power as such."⁸² In other words, "making false statements about sexual improprieties is not a sufficient basis to justify the trial and removal from office of the President of the United States."⁸³ To continue an impeachment inquiry under such circumstances would pose a heavy cost to the Presidency with no return to the American people.

Thus, as Professor Michael Gerhardt summarized the matter in his recent testimony before a subcommittee of this body, there is "widespread recognition [of] a paradigmatic case for impeachment."⁸⁴ In such a case, "*there must be a nexus between the misconduct of an impeachable official and the latter's official duties.*"⁸⁵ The Referral presents no such case.

C. RELEVANT HISTORICAL PRECEDENTS DEMONSTRATE THAT NO
IMPEACHABLE OFFENSE HAS BEEN ALLEGED HERE

1. Alexander Hamilton

That impeachment was reserved for serious public wrongdoing of a serious political nature was no mere abstraction to the authors of the Constitution. The ink on the Constitution was barely dry when Congress was forced to investigate wrongdoing by one of the Framers. In 1792–93, Congress investigated then-Secretary of the Treasury Alexander Hamilton for alleged financial misdealings with James Reynolds, a convicted securities swindler.⁸⁶ Secretary Hamilton was interviewed by members of Congress, including the House Speaker and James Monroe, the future President. He admitted to making secret payments to Mr. Reynolds, whose release from prison the Treasury Department had authorized. Mr. Hamilton acknowledged that he had made the payments but explained that he had committed adultery with Reynolds wife; that he had made payments to Mr. Reynolds to cover it up; that he had had Mrs. Reynolds burn incriminating correspondence; and that he had promised to pay the Reynolds' travel costs if they would leave town.⁸⁷

The Members of Congress who heard Secretary Hamilton's confession concluded that the matter was private, not public; that as a result no impeachable offense had occurred; and that the entire matter should remain secret. Although President Washington,

⁸¹Letter of 430 Law Professors to Messrs. Gingrich, Gephardt, Hyde and Conyers (released Nov. 6, 1998).

⁸²*Id.* at 3.

⁸³*Ibid.*

⁸⁴Statement of Professor Michael J. Gerhardt Before the House Subcommittee on the Constitution of the House Judiciary Committee Regarding the Background and History of Impeachment, dated November 9, 1998, at 13.

⁸⁵*Ibid.* (emphasis added).

⁸⁶See generally Rosenfeld, "Founding Fathers Didn't Flinch," *Los Angeles Times* (Sept. 18, 1998) at A11.

⁸⁷*Ibid.*

Vice-President Adams, Secretary of State Jefferson and House Minority leader James Madison (two of whom had signed the Constitution) all eventually became aware of the affair, they too maintained their silence. And even after the whole matter became public knowledge some years later, Mr. Hamilton was appointed to the second highest position in the United States Army and was speedily confirmed by the Senate.⁸⁸

It is apparent from the Hamilton case that the Framers did not regard private sexual misconduct as creating an impeachable offense. It is also apparent that efforts to cover up such private behavior, including even paying hush money to induce someone to destroy documents, did not meet the standard. Neither Hamilton's very high position, nor the fact that his payments to a securities swindler created an enormous "appearance" problem, were enough to implicate the standard. These wrongs were real, and they were not insubstantial, but to the Framers they were essentially private and therefore not impeachable.

Some have responded to the argument that the conduct at issue in the Referral is private by contending that the President is charged with faithfully executing the laws of the United States and that perjury would be a violation of that duty. That argument, however, proves far too much. Under that theory, any violation of federal law would constitute an impeachable offense, no matter how minor and no matter whether it arose out of the President's private life or his public responsibilities. Lying in a deposition in a private lawsuit would, for constitutional purposes, be the equivalent of lying to Congress about significant conduct of the Executive Branch—surely a result those advocates do not contemplate. More importantly, as the next section demonstrates, we know from the bipartisan defeat of the tax fraud article against President Nixon that the "faithfully execute" theory has been squarely rejected.

2. The Failure of the Proposed Article of Impeachment Against President Nixon Alleging Fraudulent Tax Filings

As previously indicated, this Committee's investigation of President Nixon in 1973–74 had to confront the question of just what constitutes an "impeachable offense." That investigation resulted in the Committee's approval of three articles of impeachment alleging misuse of the Presidential Office and rejection of two others. Those decisions constitute part of the common law of impeachment, and they stand for the principle that abuse of the Presidential Office is at the core of the notion of impeachable offense.

That conclusion was no happenstance. It resulted from a concordance among Committee majority and minority views as to the standard of impeachable offenses. One of the first tasks assigned to the staff of the Judiciary Committee when it began its investigation of President Nixon was to prepare a legal analysis of the grounds for impeachment of a President. The staff concluded that:

Impeachment is a constitutional remedy addressed to serious offenses against the system of government. . . . It is not controlling whether treason and bribery are criminal. More important, they are constitutional wrongs that subvert the structure of government, or undermine the integrity of office and even the Constitution itself, and thus are 'high' offenses in the sense that word was used in English impeach-

⁸⁸ *Ibid.*

ments. . . . The emphasis has been on the significant effects of the conduct—undermining the integrity of office, disregard of constitutional duties and oath of office, arrogation of power, abuse of the governmental process, adverse impact on the system of government. . . . Because *impeachment* of a President is a grave step for the nation, *it is to be predicated only upon conduct seriously incompatible with either the constitutional form and principles of our government or the proper performance of constitutional duties of the president office.*⁸⁹

A memorandum setting forth views of certain Republican Members similarly emphasized the necessarily serious and public character of any alleged offense:

It is not a fair summary . . . to say that the Framers were principally concerned with reaching a course of conduct, whether or not criminal, generally inconsistent with the proper and effective exercise of the office of the presidency. *They were concerned with preserving the government from being overthrown by the treachery or corruption of one man. . . . [I]t is our judgment, based upon this constitutional history, that the Framers of the United States Constitution intended that the President should be removable by the legislative branch only for serious misconduct dangerous to the system of government established by the Constitution.*⁹⁰

Notwithstanding their many differences, the Judiciary Committee investigating President Nixon was in substantial agreement on the question posed here: an impeachable wrong is an offense against our very system, a constitutional evil subversive of the government itself.

Against that backdrop, it is clear that the Committee's vote *not to approve* a proposed tax-fraud type article was every bit as significant a precedent as the articles it did approve. The proposed article the Committee ultimately declined to approve charged that President Nixon both "knowingly and fraudulently failed to report certain income and claimed deductions [for 1969–72] on his Federal income tax returns which were not authorized by law."⁹¹ The President had signed his returns for those years under penalty of perjury,⁹² and there was reason to believe that the underlying facts would have supported a criminal prosecution against President Nixon himself.⁹³ Yet the article was not approved. And it was not approved because the otherwise conflicting views of the Committee majority and minority were in concord: submission of a false tax return was not so related to exercise of the Presidential Office as to trigger impeachment.

Thus, by a bipartisan vote greater than a 2–1 margin, the Judiciary Committee rejected the tax-evasion article.⁹⁴ Both Democrats and Republicans spoke against the idea that tax evasion constituted an impeachable offense. Congressman Railsback (R–IL) opposed the article saying that "there is a serious question as to whether something involving his personal tax liability has any-

⁸⁹ *Impeachment Inquiry* at 26 (emphasis added).

⁹⁰ *Nixon Report* at 364–365 (Minority Views of Messrs. Hutchinson, Smith, Sandman, Wiggins, Dennis, Mayne, Lott, Moorhead, Maraziti and Latta) (final emphasis added).

⁹¹ *Nixon Report* at 220. The President was alleged to have failed to report certain income, to have taken improper tax deductions, and to have manufactured (either personally or through his agents) false documents to support the deductions taken.

⁹² Given the underlying facts, that act might have provided the basis for multiple criminal charges; conviction on, for example, the tax evasion charge, could have subjected President Nixon to a 5-year prison term.

⁹³ See *Nixon Report* at 344 ("the Committee was told by a criminal fraud tax expert that on the evidence presented to the Committee, if the President were an ordinary taxpayer, the government would seek to send him to jail") (Statement of Additional Views of Mr. Mezvinsky, *et al.*).

⁹⁴ *Nixon Report* at 220.

thing to do with [the] conduct of the office of the President.”⁹⁵ Congressman Owens (D–UT) stated that, even assuming the charges were true in fact, “on the evidence available, these offenses do not rise, in my opinion, to the level of impeachment.”⁹⁶ Congressman Hogan (R–MD) did not believe tax evasion an impeachable offense because the Constitution’s phrase “high crime signified a crime against the system of government, not merely a serious crime.”⁹⁷ And Congressman Waldie (D–CA) spoke against the article, saying that “there had not been an enormous abuse of power,” notwithstanding his finding “the conduct of the President in these instances to have been shabby, to have been unacceptable, and to have been disgraceful even.”⁹⁸

These voices, and the overwhelming vote against the tax evasion article, underscore the fact that the 1974 Judiciary Committee’s judgment was faithful to its legal conclusions. It would not (and did not) approve an article of impeachment for anything short of a fundamental offense against our very system of government. In the words of the Nixon Impeachment Inquiry Report:

Because impeachment of a President is a grave step for the nation, it is to be predicated only upon conduct seriously incompatible with either the constitutional form and principles of our government or the proper duties of the presidential office.⁹⁹

This Committee should observe no less stringent a standard. If this Committee is faithful to its predecessor, it will conclude that the Referral’s allegations (and the perjury allegations in particular) do not satisfy the high threshold required to approve articles of impeachment.

IV. THE CONSTITUTION REQUIRES CLEAR AND CONVINCING EVIDENCE TO APPROVE ARTICLES OF IMPEACHMENT

Even if a Member of Congress should conclude that “high Crimes and Misdemeanors” have actually and properly been alleged, that conclusion alone is not sufficient to support an article of impeachment. In addition, the Member must conclude that the allegations against the President have been established by “clear and convincing” evidence. This is a legal term of art requiring evidence greater than in the ordinary civil case. The suggestion that a vote for impeachment of a democratically elected President represents no more, and requires no more, than the threshold showing necessary for a grand jury indictment reflects a serious disregard for the significance of this process.

A. THIS COMMITTEE SHOULD APPLY THE SAME CLEAR AND CONVINCING STANDARD OBSERVED BY ITS PREDECESSOR IN THE WATERGATE PROCEEDINGS

This Committee should follow the lead of its predecessor in the Watergate proceedings. Twenty-four years ago, this Committee confronted the very same question presented here: what threshold of

⁹⁵ *Debate on Articles of Impeachment: Hearings on H. Res. 803 Before the House Comm. on the Judiciary*, 93d Cong. 2d Sess., 524 (1974).

⁹⁶ *Id.* at 549.

⁹⁷ *Id.* at 541 (quoting with approval conclusion of *Impeachment Inquiry*).

⁹⁸ *Id.* at 548.

⁹⁹ *Impeachment Inquiry* at 27.

proof is required to approve articles of impeachment? Then, it was the consensus of all parties—majority and minority counsel, as well as the attorney for the President—that approval of an article must rest on clear and convincing evidence.

In the Watergate hearings, the President’s counsel, Mr. St. Clair, put the threshold-of-proof question in this way:

I think the American people will expect that this committee would not vote to recommend any articles of impeachment unless this committee is satisfied that *the evidence to support it is clear, is clear and convincing*. Because anything less than that, in my view, is going to result in recriminations, bitterness, and divisiveness among our people.¹⁰⁰

Majority counsel to this Committee, Mr. Doar, concurred that the clear-and-convincing measure was the appropriate gauge:

Mr. St. Clair said to you you must have clear and convincing proof. *Of course there must be clear and convincing proof* to take the step that I would recommend this committee to take.¹⁰¹

Emphasizing the political nature and consequences of impeachment, Mr. Doar reiterated that “as a practical matter, proof must be clear and convincing.”¹⁰²

Minority counsel, Mr. Garrison, told the Committee that “when a member of the committee or a Member of the House votes to impeach, he should do so having made a judgment that the evidence convinces him that the President should be removed from office.”¹⁰³ And in their “Standard of Proof for Impeachment by the House” section of the Impeachment Inquiry, the Republican authors of the Minority Views formulated the standard as follows:

On balance, it appears that prosecution [of articles of impeachment by the House] is warranted if the prosecutor believes that the guilt of the accused is demonstrated by *clear and convincing evidence*. . . .

[W]e therefore take the position that a vote of *impeachment is justified if, and only if, the charges embodied in the articles are proved by clear and convincing evidence*. Our confidence in this proposition is enhanced by the fact that both the President’s Special Counsel and the Special Counsel to the Committee independently reached the same conclusion.¹⁰⁴

Finally, this Committee expressly found clear and convincing evidence supporting the obstruction-of-justice and abuse-of-power charges against President Nixon.¹⁰⁵ *See, e.g., Impeachment Inquiry* at 33 (“[t]his report. . . contains clear and convincing evidence that the President caused action. . . to cover up the Watergate break-in”); *id.* at 136 (“[t]he Committee finds, based upon of [sic] clear and convincing evidence, that th[e] conduct[] detailed in the foregoing pages of this report constitutes ‘high crimes and misdemeanors’”); *id.* at 141 (“[t]he Committee finds clear and convincing evidence that a course of conduct was carried out [by President

¹⁰⁰ Statement of James St. Clair, *III Impeachment Inquiry Hearings on H. Res. 803 Before the House Comm. on the Judiciary*, 932 Cong., 2d Sess., 1889 (1974). (emphasis added).

¹⁰¹ Statement of John Doar, *id.* at 1927 (emphasis added).

¹⁰² *Ibid.*

¹⁰³ Statement of Samuel Garrison, III, *id.* at 2040.

¹⁰⁴ *Impeachment Inquiry* (Minority Views of Messrs. Hutchinson, Smith, Sandman, Wiggins, Dennis, Mayne, Lott, Moorhead, Maraziti, and Latta) at 381 (emphasis added).

¹⁰⁵ The third Watergate article of impeachment, based on President Nixon’s refusal to comply with this Committee’s subpoenas, was based on “undisputed facts,” *Impeachment Inquiry* at 213, so there was no need to articulate or apply an evidentiary standard to the factfinding process on which that article was based.

Nixon and his subordinates] to violate the constitutional rights of citizens”).¹⁰⁶

B. THE CLEAR AND CONVINCING STANDARD IS COMMENSURATE WITH THE GRAVE CONSTITUTIONAL POWER VESTED IN THE HOUSE

As the Watergate precedent indicates, this Committee should not approve an article of impeachment for which the record evidence, taken as a whole, is anything less than clear and convincing. Put differently, each member must have a firm conviction, clearly and convincingly grounded in record evidence, that the President is guilty of the wrongdoing alleged. As former Attorney General Elliott Richardson warned on December 1, “[a] vote to impeach is a vote to remove. If members of the Committee believe that should be the outcome, they should vote to impeach. If they think that is an excessive sentence, they should not vote to impeach because if they do vote to impeach the matter is out their hands, and if the Senate convicts, out of its hands.”¹⁰⁷

This clear-and-convincing standard is not the highest degree of proof known to our law,¹⁰⁸ but the substantial showing it demands is commensurate with the gravity of impeachment itself. Exercise of the House’s accusatory impeachment power is itself an act that weakens the Presidency. Unlike the grand juror’s vote to indict, which affects a sole individual, affirmative votes on articles of impeachment jeopardize an entire branch of our national government and threaten the political viability of the single person (except for the Vice President) elected by the entire electorate. The clear-and-convincing requirement ensures that this momentous step is not lightly taken. Lower standards (probable cause or apparent preponderance of the evidence) are simply not demanding enough to justify the fateful step of an impeachment trial. They pose a genuine risk of subjecting the President, the Senate, and most of all the people who elected the President to a trial “on the basis of one-sided or incomplete information or insufficiently persuasive evidence.”¹⁰⁹ Moreover, those lower standards would be particularly inappropriate here, where this Committee has itself neither independently investigated the evidence nor heard from a single witness with first-hand knowledge of such facts. The respected impeachment scholar Michael Gerhardt has declared: “This idea that all [this Committee] need[s] to have is probable cause is in my mind ahistorical I do think that members, at least historically, have demanded more in terms of the kind of evidence that has to exist to initiate formal impeachment proceedings against the President and also to trigger a trial.”¹¹⁰

Exercise of the impeachment power by the House is a matter of the utmost seriousness. No member of this Committee or of the

¹⁰⁶ Representative Caldwell Butler (R-Va.) explicitly applied the clear and convincing standard when he announced in Committee he would vote for impeachment. “Butler said . . . [t]he evidence was ‘clear, direct, and convincing’—St. Clair’s words—that Richard Nixon had abused power.” Kutler, *the Wars of Watergate* 522 (1990).

¹⁰⁷ Marcus, “Panel Unclear About Impeachment Role,” *The Washington Post* (Dec. 6, 1996) at A8.

¹⁰⁸ In criminal cases, proof beyond a reasonable doubt is required to convict. *In re Winship*, 397 U.S. 358, 363–64 (1970).

¹⁰⁹ Labovitz, *Presidential Impeachment* at 192.

¹¹⁰ Marcus, “Panel Unclear About Impeachment Role,” *The Washington Post* (Dec. 6, 1996) at A8.

House as a whole should approve articles of impeachment unless that member is personally persuaded that a high crime or misdemeanor has been proven to have occurred by clear and convincing evidence.¹¹¹ The precedent created in the Watergate proceedings could not be clearer. To break with that precedent and proceed on something less demanding would properly be viewed as a partisan effort to lower the impeachment bar. The President, the Constitution, and the American people deserve more. Proof by clear and convincing evidence, and nothing less, is necessary to justify each member's affirmative vote for articles of impeachment.

V. THE COMMITTEE SHOULD NOT RELY ON THE REFERRAL'S ACCOUNT OF THE EVIDENCE

The Committee is now in the process of completing its deliberations on this question of the utmost national gravity: whether to approve articles of impeachment against the President of the United States. Voting in favor of such articles would commence the somber process of annulling the electoral choice of the people of this country. Before analyzing, in the next three sections, with as much specificity as possible the charges the Committee apparently is considering, it is appropriate to examine the evidentiary record that serves as the basis for these grave judgments.

The record here is strikingly different from that on which the Committee acted twenty-four years ago in the Watergate proceedings. There, over several months of investigation, the Committee examined numerous fact witnesses and obtained and analyzed documents and other evidence; while it received a transmission of testimony and documents from the Watergate grand jury, it made its own independent evaluation of the evidence it had gathered. *See Nixon Report* at 9 (Judiciary Committee received statements of information from inquiry staff in which "a deliberate and scrupulous abstention from conclusions, even by implication, was observed").¹¹²

Here, however, the Committee is almost wholly relying on the work of the Independent Counsel. Neither the Committee, its staff, nor counsel for the President have had the opportunity to confront the witnesses who have appeared before the OIC's grand jury: to cross-examine them, assess their credibility, and elicit further information that might affect the testimony the witnesses gave. Indeed, the very genesis of this impeachment inquiry differs radically from the Watergate proceedings. Twenty-four years ago, this Committee itself made a decision to embark upon an impeachment inquiry.¹¹³ In the present case, however, this inquiry was generated by the judgment of *Mr. Starr* that *he* had identified "substantial and credible information . . . that may constitute grounds for impeachment." 28 U.S.C. § 595(c).

The Referral represents Mr. Starr's effort to support that conclusion. The grand jury never authorized the transmission of or even

¹¹¹ Thus, a member would act in derogation of a solemn constitutional duty if he or she approved an article of impeachment without having concluded that the President had been shown, by clear and convincing evidence, to have performed an impeachable act. The House has its own independent constitutional obligation to weigh the evidence presented. It is not a matter of merely voting for the article on the theory that the Senate will determine the truth.

¹¹² See also Kutler, *The Wars of Watergate* 477-89 (1990); Labovitz, *Presidential Impeachment* at 189.

¹¹³ *Id.* at 471.

reviewed the Referral, November 19, 1998 Testimony at 324–25 (Testimony of Mr. Starr) and, while Mr. Starr declined to address the question in his public testimony, we do not believe that the Referral itself was ever presented for substantive approval to Chief Judge Johnson or the Special Division of the Court of Appeals for the Purpose of Appointing Independent Counsels.¹¹⁴ Instead, the Referral reflects Mr. Starr’s own version of the vast amount of evidence gathered by the grand jury and the conclusions he draws from that evidence.

Unlike the impartial presentation to the Watergate committee from Special Prosecutor Jaworski, the Referral is a document advocating impeachment. It sets forth Mr. Starr’s best case for impeachment, not a neutral presentation of the facts. It reflects a careful selection and presentation of the evidence designed to portray the President in the worst possible light. It is being presented as a good faith summary of reliable evidence when it is in fact nothing of the kind. While we will address the specific allegations of perjury, obstruction of justice, and abuse of office (as best we can discern them) in the next sections, it is appropriate here to sketch out the untested nature of the underlying evidence, the material omissions in the Referral, and the indications of bias and overreaching that have characterized the OIC’s investigation. To demonstrate this is not to make an irrelevant *ad hominem* attack on the Independent Counsel but to point out how unreliable is the record before this Committee, and the caution and skepticism with which the narrative and conclusions of the Referral must therefore be viewed.

A. THE INFORMATION PRESENTED TO THE COMMITTEE IN THE REFERRAL HAS NOT BEEN SUBJECTED TO THE MOST BASIC ADVERSARIAL TESTING

The Referral is based on grand jury information and as such has not been subjected to cross-examination—the adversarial testing our system of justice employs for assessing the reliability of evidence. As the Supreme Court has stated, “Cross-examination is ‘the principal means by which the believability of a witness and the truth of his testimony are tested.’” *Kentucky v. Stincer*, 482 U.S. 730, 736 (1987) (citations omitted). Absent such testing, it is extremely difficult to make necessary judgments about the credibility of grand jury witnesses and the weight to be given their testimony.

B. THE REFERRAL DIFFERS VASTLY FROM THE PRECEDENT OF THE WATERGATE “ROAD MAP”

Instead of transmitting to the Committee the information gathered by the OIC, Mr. Starr chose to give it his own spin. Had he sat across the table from the witnesses, it might have been that he based his judgments on such scrutiny. Since he did not, the grounds on which he credited some evidence and rejected other evi-

¹¹⁴We are not privy to all of the relevant documentation, but it appears that Mr. Starr secured from the Special Division in early July a general authorization to disseminate grand jury information in a referral which would later be drafted and submitted to Congress. App. at 10 (July 7, 1998 Order of Special Division). The OIC also apparently “advised” Chief Judge Johnson that it was submitting the Referral, Ref. at 4 n.18, but as we point out in the text above, this is quite a different procedure from the careful review that Chief Judge Sirica performed in 1974 before the Watergate grand jury information was submitted to this Committee.

dence are unknown. The decision to proceed in this way was a sharp departure from Special Prosecutor Leon Jaworski's submission to Congress of "a simple and straightforward compilation of information gathered by the Grand Jury, and no more." *In re Report and Recommendation of June 5, 1972 Grand Jury*, 370 F. Supp. 1219, 1226 (D.D.C. 1974).¹¹⁵ As drafted, the Referral impedes the search for truth by cherry-picking the evidence and presenting (as we demonstrate in the next sections) a deeply misleading portrait of the record.

C. THE RESULTING REFERRAL OMITTED A WEALTH OF DIRECTLY RELEVANT EXCULPATORY EVIDENCE

The Referral repeatedly and demonstrably omitted or mischaracterized directly relevant evidence that exonerates the President of the very allegations leveled by the OIG. For example:

The concealment-of-gifts-accusation. The Referral claims that the President and Ms. Lewinsky "discussed" concealing gifts at their December 28 visit, and that the President therefore orchestrated the pick-up of those gifts. The Referral ignores evidence to the contrary, such as: Asked if President Clinton discussed concealment with her, Ms. Lewinsky said, "[H]e really didn't—he didn't really discuss it." App. at 1122 (8/20/98 grand jury testimony of Ms. Lewinsky). As to who first conceived of the idea of involving Ms. Currie, the Referral omitted the key passage:

"A Juror: Now, did you bring up Betty's name or did the President bring up Betty's name?"

[Ms. Lewinsky]: I think I brought it up. The President wouldn't have brought up Betty's name because he really didn't—he didn't really discuss it."

App. at 1122 (8/20/98 grand jury testimony of Ms. Lewinsky). And as to who broached the idea of actually picking up the gifts, the Referral again omitted this important testimony by Ms. Currie:

Q. . . . Just tell us from moment one how this issue first arose and what you did about it and what Ms. Lewinsky told you.

A. The best I remember it first arose with a conversation. I don't know if it was over the telephone or in person. I don't know. *She asked me if I would pick up a box.* She said Isikoff had been inquiring about gifts.

Supp. at 582 (5/6/98 grand jury testimony of Ms. Currie) (emphasis added).

The jobs-for-silence-accusation. The allegation that the President obstructed justice by procuring a job for Ms. Lewinsky in exchange for silence or false testimony rests on the Referral's account of Ms. Lewinsky's job search that simply excluded the contradictory evidence. Both Ms. Lewinsky and Mr. Jordan flatly denied that the job assistance had anything at all to do with Ms. Lewinsky's testimony:

"I was never promised a job for my silence." App. at 1161 (8/20/98 grand jury testimony of Ms. Lewinsky).

"As far as I was concerned, [the job and the affidavit] were two very separate matters." Supp. at 1737 (3/5/98 grand jury testimony of Vernon Jordan).

Q. Did [Ms. Lewinsky] ever directly indicate to you that she wanted her job in New York before she could finish [her affidavit] up with Mr. Carter?

¹¹⁵ The Jaworski report was "[o]nly 55 pages long, . . . set forth the relevant evidence without any commentary, made no conclusions about whether the President had committed ordinary crimes or impeachable offenses, and contained a single piece of evidence on each page." Jeffrey Rosen, "Starr Crossed," *The New Republic* (Dec. 14, 1998).

A. Unequivocally, no.

Q. . . . Is there anything about the way she acted when speaking with you . . . that, as you sit here now, makes you think that perhaps she was attempting not to finalize whatever she was doing with Mr. Carter until she had a job in New York?

A. Unequivocally, indubitably, no.

Supp. at 1827 (5/5/98 grand jury testimony of Vernon Jordan). And as to the circumstantial evidence, we demonstrate in Part VI.B.2 that the Referral omitted a host of probative and exculpatory facts that negate the existence of any improper quid pro quo.

The influencing-Betty-Currie-accusation. The Referral asserts that the President's January 18 conversation was an attempt to influence Ms. Currie's testimony. But the Referral omitted Ms. Currie's clear testimony that this discussion did no such thing:

Q. Now, back again to the four statements that you testified the President made to you that were presented as statements, did you feel pressured when he told you those statements?

A. *None whatsoever.*

Q. Did you feel any pressure to agree with your boss?

A. *None.*

Supp. at 668 (7/22/98 grand jury testimony of Ms. Currie) (emphasis added).

Q. You testified with respect to the statements as the President made them, and, in particular, the four statements that we've already discussed. You felt at the time that they were technically accurate? Is that a fair assessment?

A. That's a fair assessment.

Q. But you suggested that at the time. Have you changed your opinion about it in retrospect?

A. I have not changed my opinion, no.

Supp. at 667 (7/22/98 grand jury testimony of Ms. Currie).

The false-affidavit-accusation. The OIC accused the President of obstructing justice by suggesting that Ms. Lewinsky file an affidavit that he knew would be false. Ref. at 173. However, the OIC inexplicably never once quoted Ms. Lewinsky's repeated, express denials that anyone had told or encouraged her to lie:

"Neither the Pres[ident] nor Mr. Jordan (or anyone on their behalf) asked or encouraged Ms. L[ewinsky] to lie." App. at 718 (2/1/98 Proffer).

"I think I told [Tripp] that—you know, at various times the President and Mr. Jordan had told me I had to lie. That wasn't true." App. at 942 (8/6/98 grand jury testimony of Ms. Lewinsky).

"I think because of the public nature of how this investigation has been and what the charges aired, that I would just like to say that no one ever asked me to lie and I was never promised a job for my silence." App. at 1161 (8/20/98 grand jury testimony of Ms. Lewinsky).

"Neither the President nor Jordan ever told Lewinsky that she had to lie." App. at 1398 (7/27/98 FBI Form 302 Interview of Ms. Lewinsky).

"Neither the President nor anyone ever directed Lewinsky to say anything or to lie. . ." App. at 1400 (7/27/98 FBI Form 302 Interview of Ms. Lewinsky).

The denying-knowledge-of executive-privilege-accusation. The Referral states that the President deceived the public by feigning ignorance of the executive privilege litigation. According to the Referral, while in Africa, the President "was asked about the assertion of Executive Privilege, he responded 'You should ask someone who knows.' He also stated, 'I haven't discussed that with the lawyers. I don't know.'"

To achieve the desired effect, the Referral first misstates the actual question posed. This is the actual exchange:

Q. Mr. President, we haven't yet had the opportunity to ask you about your decision to invoke executive privilege, sir. Why shouldn't the American people see that as an effort to hide something from them?

The PRESIDENT. Look, that's a question that's being answered back home by the people who are responsible to do that. I don't believe I should be discussing that here.

Q. Could you at least tell us why you think the first lady might be covered by that privilege, why her conversation might fall under that?

The President. All I know is—I saw an article about it in the paper today. I haven't discussed it with the lawyers. I don't know. You should ask someone who does.¹¹⁶

The foregoing are just examples of a technique employed throughout the Referral, which systematically omits or mischaracterizes material evidence that would have undermined its allegations.

D. MR. STARR'S CONDUCT IN THE LEWINSKY INVESTIGATION HAS BETRAYED A BIAS THAT HELPS EXPLAIN THE LACK OF NEUTRALITY IN THE REFERRAL

Mr. Starr's conduct in the Lewinsky investigation has demonstrated a bias against the President. Understanding that bias is critical to evaluating the Referral—to inform a proper weighing of the judgments Mr. Starr has made in selecting the evidence, presenting the evidence, and drawing conclusions from it.

Mr. Starr actively sought jurisdiction in the Lewinsky matter, despite his representations to the contrary

After four years of fruitless investigation of the President and Mrs. Clinton on a variety of topics generically referred to in the news media as "Whitewater," the Starr investigation was at a standstill in early 1998 (the Independent Counsel himself had sought to resign in 1997). However, a telephone call from Ms. Tripp with allegations of obstruction and witness tampering in the Paula Jones case (which turned out to be false) offered Mr. Starr a dramatic way to vindicate his long, meandering, and costly investigation. Mr. Starr seized his chance energetically, promising Ms. Tripp immunity and using her to surreptitiously tape Ms. Lewinsky even before he made his request for jurisdiction to the Department of Justice.

Mr. Starr misrepresented how far he was willing to go in his attempts to obtain evidence against the President

The fervor with which Mr. Starr has pursued President Clinton is manifest in his denial, under oath, that his agents sought on January 16th to have Ms. Lewinsky wear a wire to surreptitiously record the President and Mr. Jordan. *See, e.g.*, Transcript of November 19, 1998 Hearing at 286 (testimony of Mr. Starr). Mr. Starr's vehement denials notwithstanding, the evidence the OIC submitted with the Referral runs very much contrary to his version of the facts. Ms. Lewinsky's testimony plainly contradicts Mr. Starr's account, *see* App. at 1147 ("they told me that . . . I'd have to place calls or wear a wire to see—to call Betty and Mr. Jordan and possibly the President"); *id.* at 1159 ("I didn't allow him [Presi-

¹¹⁶White House Press Release: Remarks by the President in Photo Opportunity with President Museveni of Uganda (March 21, 1998).

dent Clinton] to be put on tape that night”), as does statements by her attorneys, *Time* (Feb. 16, 1998) at 49, and an interview memorandum of an FBI agent working for Mr. Starr himself, see App. at 1379 (1/16/98 FBI 302 Form Interview of Ms. Lewinsky). It is evident that Mr. Starr wanted Ms. Lewinsky to help set up the President or those close to him, but denied doing so in an effort to maintain a semblance of impartiality.

Mr. Starr gave immunity to anyone he thought could help him go after the President

He granted immunity to one witness who had admitted engaging in illegal activity over a period of several months (Ms. Tripp), and another witness who was, as he stated, “a felon in the middle of committing another felony” (Ms. Lewinsky), Transcript of November 19, 1998 Hearing at 140 (testimony of Mr. Starr), all in an effort to gather information damaging to the President.

The OIC leaked grand jury information hurtful to the President

The OIC investigation has been characterized by a flagrant and highly prejudicial (to the President) campaign of grand jury leaks. Mr. Starr and his office have been ordered by Chief Judge Johnson to “show cause” why they should not be held in contempt in light of “serious and repetitive prima facie violations of Rule 6(e).” Order (September 25, 1998) at 20. Leaks are significant not simply because they are illegal, but also because the leaks themselves were often inaccurate and represented an effort to use misinformation to put pressure on the President. For example, early leaks discussed the OIC’s view that the “talking points” were an effort to obstruct justice coming out of the White House:

[S]ources in Starr’s office have told NBC News that the information Lewinsky’s lawyers were offering was simply not enough. . . . Sources in Starr’s office and close to Linda Tripp say they believe the instructions (or talking points) came from the White House. If true, that could help support a case of obstruction of justice.

NBC Nightly News (Feb. 4, 1998) (emphasis added). The Referral barely mentions the “Talking Points” and makes no allegation that the President in fact had anything to do with this document.¹¹⁷

The flaws in the Referral and the evidentiary record before the Committee are not academic. They reveal in concrete terms the weaknesses of the charges of perjury, obstruction of justice, and abuse of office that have been presented to the Committee. These charges are addressed in detail in the sections that follow.

¹¹⁷The absence of the “Talking Points” from the Referral is particularly striking given that that document was considered to be “the backbone of the independent counsel’s inquiry into whether anyone lied or obstructed justice over Ms. Lewinsky’s relationship with the President.” *The New York Times* (June 11, 1998). As emphasized by OIC press spokesman Charles Bakaly:

TIM RUSSETT: How important is it that we find out who is the author of those talking points?

CHARLES BAKALY: Well, in the grant of jurisdiction that the special division of the D.C. Circuit Court of Appeals gave to Judge Starr after the request of the Attorney General, *that was the key mandate to look into*, those kinds of issues of subornation of perjury and obstruction of justice.

NBC *Meet the Press* (July 5, 1998) (emphasis added). The document was also described as “the only known physical evidence of witness tampering,” *Chicago Tribune* (April 3, 1998), and the “smoking gun,” NBC News (Jan. 22, 1998).

IV. THE PRESIDENT DID NOT COMMIT PERJURY

Will Rogers is reported to have said of a contemporary: "It's not what he doesn't know that bothers me, it's what he knows for sure that just ain't so." Defending what the President actually said under oath is much easier than defending phantom allegations based on what some *claim* the President said. In analyzing the allegation of perjury, we urge the Committee and the Congress to focus only on what is actually in the record, not on popular mythology, conventional (but incorrect) wisdom, or political spin.

For example, it has variously been asserted that in the grand jury the President denied that he had a "sexual relationship" with Ms. Lewinsky and that he broadly reaffirmed his earlier deposition testimony. In fact, in the grand jury, the President admitted to an "inappropriate intimate relationship" with Ms. Lewinsky that was physical in nature. In other words, any consideration of charges of perjury requires a focused look at the actual statements at issue. Again, we ask the Committee: Please, do not assume the conventional wisdom. Look, instead, at the actual record.

A. ELEMENTS OF PERJURY

Given the difficulties of testifying under oath with precision, proof of perjury requires meeting a very high standard. A vast range of testimony that is imprecise, unresponsive, vague, and literally truthful, even if it is not completely forthcoming, simply is not perjury. The law is aware of human foibles and shortcomings of memory. Dissatisfaction with the President's answers because they may be narrow, "hair splitting," or formalistic does not constitute grounds for alleging perjury.

Perjury requires proof that a defendant, while under oath, knowingly made a false statement as to material facts.¹¹⁸ See, e.g., *United States v. Dunnigan*, 507 U.S. 87, 94 (1993). The "knowingly" requirement is a high burden: the government must prove the defendant had a subjective awareness of the falsity of his statement at the time he made it. See, e.g., *United States v. Dowdy*, 479 F.2d 213, 230 (4th Cir. 1973); *United States v. Markiewicz*, 978 F.2d 786, 811 (2d Cir. 1992). Moreover, it is (of course) clear that a statement must be false in order to constitute perjury. It is equally beyond debate that certain types of answers are not capable of being false and are therefore by definition non-perjurious, no matter how frustrating they may be to the proceeding in which they are given: literally truthful answers that imply facts that are not true, see, e.g., *United States v. Bronston*, 409 U.S. 352, 358 (1973); truthful answers to questions that are not asked, see, e.g., *United States v. Corr*, 543 F.2d 1042, 1049 (2d Cir. 1976); and answers that fail to correct misleading impressions, see, e.g., *United States v. Earp*, 812 F.2d 917, 919 (4th Cir. 1987). The Supreme Court has made abundantly clear that it is not relevant for perjury purposes whether the witness intends his answer to mislead, or indeed in-

¹¹⁸ There are two basic federal perjury statutes: 18 U.S.C. § 1621 and 18 U.S.C. § 1623. Section 1621 applies to all material statements or information provided under oath "to a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered," Section 1623, in contrast, applies only to testimony given before a grand jury and other court proceedings. Although there are differences between the two statutes, the four basic elements of each are substantially the same.

tends a “pattern” of answers to mislead, if the answers are truthful or literally truthful.

In explaining the law of perjury, the Supreme Court and numerous lower federal courts have set forth four clear standards. These core principles, discussed below in some detail, must inform the Committee’s analysis here. *First*, the mere fact that recollections differ does not mean one party is committing perjury. Few civil cases arise where testimony about events is not in conflict—even as to core matters at the heart of a case. When one party wins a case, the other is not routinely indicted for perjury. Common sense and the stringent requirements of perjury law make clear that much more is needed. *Second*, a perjury conviction under 18 U.S.C. § 1621 cannot rest solely on the testimony of a single witness and, at the very least as a matter of practice, no reasonable prosecutor would bring any kind of perjury case based on the testimony of one witness without independent corroboration—especially if the witness is immunized, or is of questionable credibility. As the Supreme Court has made clear, a perjury case “ought not to rest entirely upon ‘an oath against an oath.’” *United States v. Weiler*, 323 U.S. 606, 608–09 (1945). *Third*, answers to questions under oath that are literally true but unresponsive to the questions asked do not, as a matter of law, fall under the scope of the federal perjury statute. That is so even if the witness intends to mislead his questioner by his answer and even if the answer is false by “negative implication.” And *fourth*, answers to questions that are fundamentally ambiguous cannot, as a matter of law, be perjurious.

B. CONTRADICTORY TESTIMONY FROM TWO WITNESSES DOES NOT
INDICATE THAT ONE HAS COMMITTED PERJURY

1. It Must Be Proven that a Witness Had the Specific Intent to Lie

The “knowingly” element of perjury is not satisfied by the mere showing that the testimony of two witnesses differs, or that the testimony of a witness is, in fact, not correct. Rather, it must be proven that a witness had a subjective awareness that a statement was false at the time he provided it. *See, e.g., United States v. Dowdy*, 479 F.2d 213, 230 (4th Cir. 1973); *United States v. Markiewicz*, 978 F.2d 786, 811 (2d Cir. 1992). This is an extremely high standard. That standard is not satisfied when incorrect testimony is provided as a result of confusion, mistake, faulty memory, carelessness, misunderstanding, mistaken conclusions, unjustified inferences testified to negligently, or even recklessness. *See, e.g., Dunnigan*, 507 U.S. at 94; *United States v. Dean*, 55 F.3d 640, 659 (D.C. Cir. 1995); *see also* Department of Justice Manual, 1997 Supplement, at 9–69.214. As Professor Stephen A. Saltzburg testified to this Committee on December 1, 1998, “American judges and lawyers . . . know that [perjury] is a crime that we purposely make difficult to prove. We make it difficult to prove because we know that putting any person under oath and forcing that person to answer ‘under penalty of perjury’ is a stressful experience. . . . Honest mistakes are made, memories genuinely fail, nervous witnesses say one thing and in their minds hear themselves saying something different, and deceit in answers to questions about relatively trivial matters that could not affect the outcome of a proceeding but that

intrude deeply into the most private areas of a witness's life causes little harm." Perjury Hearing of December 1, 1998 (Statement of Professor Stephen A. Saltzburg at 1). Indeed, Mr. Starr has recognized that people who have experienced the same event—even the same significant event—may emerge with conflicting recollections, and that that does not necessarily mean one of them is committing perjury:

Mr. LOWELL. . . . do you not think it would have been a less distorted picture, to use your words, to know that when [Ms. Lewinsky] left the room, she was followed by agents, and that she swore under an oath that she, quote, "felt threatened that when she left, she would be arrested," end quote? Don't you think that completes the picture a little bit?

Mr. STARR. *I think her perception was incorrect.*

Transcript of November 19, 1998 Hearing at 139 (emphasis added).

Mr. STARR . . . we talked at a high level of generality, as I understand it, not in a person-specific way, with respect to what a cooperating witness would do.

Representative DELAHUNT. You realize that Ms. Lewinsky's testimony contradicts you.

Mr. STARR. *I am aware that there may be other perceptions, but that is what we, in fact, asked.*

Id. at 288 (emphasis added). The OIC's press spokesman Charles Bakaly, appearing on a television program immediately after Mr. Starr's testimony, attempted to explain this conflict between Ms. Lewinsky's sworn testimony and Mr. Starr's sworn testimony this way: "Well, you know, again, *people have different versions of things.*" ABC *Nightline*, November 19, 1998 (emphasis added). The law, in short, gives ample breathing space to conflicting testimony or recollection before leaping to allegations of perjury.

2. A Perjury Case Must Not Be Based Solely Upon the Testimony of a Single Witness

In a perjury prosecution under 18 U.S.C. § 1621, the falsity of a statement alleged to be perjurious cannot be established by the testimony of just one witness. This ancient common law rule, referred to as the "two-witness rule," has survived repeated challenges to its legitimacy and has been judicially recognized as the standard of proof for perjury prosecutions brought under § 1621. *See, e.g., Weiler v. United States*, 323 U.S. 606, 608–610 (1945) (discussing the history and policy rationales of the two-witness rule); *United States v. Chaplin*, 25 F.3d 1373, 1377–78 (7th Cir. 1994) (two-witness rule applies to perjury prosecutions). The Department of Justice recognizes the applicability of the two-witness rule to perjury prosecutions brought under § 1621. *See* Department of Justice Manual, 1997 Supplement, at 9–69.265.

The crux of the two-witness rule is that "the falsity of a statement alleged to be perjurious must be established either by the testimony of *two independent witnesses*, or by one witness *and independent corroborating evidence* which is inconsistent with the innocence of the accused." Department of Justice Manual, 1997 Supplement, at 9–69.265 (emphasis in original). The second witness must give testimony independent of the first which, if believed, would "prove that what the accused said under oath was false." *Id.*; *United States v. Maultsch*, 596 F.2d 19, 25 (2d Cir. 1979). Alternatively, the independent corroborating evidence must be inconsistent with the innocence of the accused and "of a quality to assure

that a guilty verdict is solidly founded.” Department of Justice Manual, 1997 Supplement, at 9–69.265; *United States v. Forrest*, 639 F.2d 1224, 1226 (5th Cir. 1981). It is therefore clear that a perjury conviction under § 1621 cannot lie where there is no independent second witness who corroborates the first, or where there is no independent evidence that convincingly contradicts the testimony of the accused.

Section 1623 does not literally incorporate the “two-witness rule,” but it is nonetheless clear from the case law that perjury prosecutions under this statute require a high degree of proof, and that prosecutors should not, as a matter of reason and practicality, even try to bring perjury prosecutions based solely on the testimony of a single witness. In *Weiler v. United States*, 323 U.S. 606, 608–09 (1945), the Supreme Court observed that “[t]he special rule which bars conviction for perjury solely upon the evidence of a single witness is deeply rooted in past centuries.” The Court further observed that “equally honest witnesses may well have differing recollections of the same event,” and hence “a conviction for perjury ought not to rest entirely upon “an oath against an oath.”” *Id.* at 609 (emphasis added). Indeed, the common law courts in seventeenth-century England required the testimony of two witnesses as a precondition to a perjury conviction, when the testimony of a single witness was in almost all other cases sufficient. *See Chaplin*, 25 F.3d at 1377 (citing Wigmore on Evidence §2040(a) at 359–60 (Chadbourne rev. 1978)). The common law courts actually adopted the two-witness rule from the Court of Star Chamber, which had followed the practice of the ecclesiastical courts of requiring two witnesses in perjury cases. *Id.* The English rationale for the rule is as resonant today as it was in the seventeenth century: “[I]n all other criminal cases the accused could not testify, and thus one oath for the prosecution was in any case something as against nothing; but on a charge of perjury the accused’s oath was always in effect evidence and thus, if but one witness was offered, there would be merely . . . an oath against an oath.” *Id.* And, as noted above, no perjury case should rest merely upon “an oath against an oath.” As a practical matter, the less reliable the single witness, the more critically the independent corroboration is required.

C. “LITERAL TRUTH” AND NON-RESPONSIVE ANSWERS DO NOT CONSTITUTE PERJURY

A third guiding principle is that literal truth, no matter how frustrating it may be, is not perjury. In *United States v. Bronston*, 409 U.S. 352 (1973), the leading case on the law of perjury, the Supreme Court addressed “whether a witness may be convicted of perjury for an answer, under oath, that is literally true but not responsive to the question asked and arguably misleading by negative implication.” *Id.* at 352. The Court directly answered the question “no.” It made absolutely clear that a literally truthful answer cannot constitute perjury, no matter how much the witness may have intended by his answer to mislead.

Bronston involved testimony taken under oath at a bankruptcy hearing. At the hearing, the sole owner of a bankrupt corporation was asked questions about the existence and location of both his

personal assets and the assets of his corporation. The owner testified as follows:

Q: Do you have any bank accounts in Swiss banks, Mr. Bronston?

A: No, sir.

Q: Have you ever?

A: The company had an account there for about six months in Zurich.

Q: Have you any nominees who have bank accounts in Swiss banks?

A: No, sir.

Q: Have you ever?

A: No, sir.

Id. at 354. The government later proved that Bronston did in fact have a personal Swiss bank account that was terminated prior to his testimony. The government prosecuted Bronston “on the theory that in order to mislead his questioner, [Bronston] answered the second question with literal truthfulness but unresponsively addressed his answer to the company’s assets and not to his own—thereby implying that he had no personal Swiss bank account at the relevant time.” *Id.* at 355.

The Supreme Court unanimously rejected this theory of perjury. It assumed for purposes of its holding that the questions referred to Bronston’s personal bank accounts and not his company’s assets. Moreover, the Court stated, Bronston’s “answer to the crucial question was not responsive,” and indeed “an implication in the second answer to the second question [is] that there was never a personal bank account.” *Id.* at 358. The Court went so far as to note that Bronston’s answers “were not guileless but were shrewdly calculated to evade.” *Id.* at 361. However, the Court emphatically held that implications alone do not rise to the level of perjury, and that Bronston therefore could not have committed perjury. “[W]e are not dealing with casual conversation and the statute does not make it a criminal act for a witness to willfully state any material matter that implies any material matter that he does not believe to be true.” *Id.* at 357–58. The Court took pains to point out the irrelevance of the witness’s intent: “A jury should not be permitted to engage in conjecture whether an unresponsive answer, true and complete on its face, was intended to mislead or divert the examiner.” *Id.* at 359.

The Supreme Court in *Bronston* provided several rationales for its holding that literally true, non-responsive answers are by definition non-perjurious, regardless of their implications. First, the Court noted that the burden always rests squarely on the interrogator to ask precise questions, and that a witness is under no obligation to assist the interrogator in that task. The Court “perceive[d] no reason why Congress would intend the drastic sanction of a perjury prosecution to cure a testimonial mishap that could readily have been reached with a single additional question by counsel alert—as every counsel ought to be—to the incongruity of petitioner’s unresponsive answer.” *Id.* at 359. Moreover, the Court noted that because of the adversarial process, perjury is an extraordinary and unusual sanction, since “a prosecution for perjury is not the sole, or even the primary safeguard against errant testimony.” *Id.* at 360. The perjury statute cannot be invoked “simply because a wily witness succeeds in derailing the questioner—so long as the witness speaks the literal truth.” *Id.*

Bronston is just one of scores of cases across the federal circuits that make clear that the definition of perjury must be carefully limited because perjury prosecutions are dangerous to the public interest since they “discourage witnesses from appearing or testifying.” *Id.* at 359.¹¹⁹ For instance, in *United States v. Earp*, 812 F.2d 917 (4th Cir. 1987), the defendant, a member of the Ku Klux Klan, had stood guard during the attempted burning of a cross on the lawn of an interracial couple, and further evidence demonstrated that he had personally engaged in other attempts to burn crosses. During questioning before a grand jury, however, he denied ever having burned crosses on anyone’s lawn. He was convicted of perjury, but the United States Court of Appeals for the Fourth Circuit reversed his conviction, because “like the witness in *Bronston*, [the defendant’s] answers were literally true although his second answer was unresponsive.” *Id.* at 919. That is, the defendant had not actually succeeded in his cross-burning attempts, so it was literally true that he had never burned crosses on anyone’s lawn. The court noted that “while he no doubt knew full well that he had on that occasion tried to burn a cross, he was not specifically asked either about any attempted cross burnings.” *Id.* Every federal court of appeals in the nation concurs in this reading of *Bronston*.¹²⁰

D. FUNDAMENTALLY AMBIGUOUS QUESTIONS CANNOT PRODUCE PERJURIOUS ANSWERS

A fourth guiding principle is that ambiguous questions cannot produce perjurious answers. When a question or a line of questioning is “fundamentally ambiguous,” the answers to the questions posed are insufficient as a matter of law to support a perjury conviction.” *See, e.g., United States v. Finucan*, 708 F.2d 838, 848 (1st Cir. 1983); *United States v. Lighte*, 782 F.2d 367, 375 (2d Cir. 1986); *United States v. Tonelli*, 577 F.2d 194, 199 (3d Cir. 1978); *United States v. Bell*, 623 F.2d 1132, 1337 (5th Cir. 1980); *United States v. Wall*, 371 F.2d 398, 400 (6th Cir. 1967); *United States v. Williams*, 552 F.2d 226, 229 (8th Cir. 1977). In other words, when there is more than one way of understanding the meaning of a question, and the witness has answered truthfully as to his under-

¹¹⁹ While *Bronston* involved a perjury conviction under the general perjury statute, 18 U.S.C. § 1621, lower federal courts have uniformly relied on it in reviewing perjury convictions under § 123(a), which makes it unlawful to make any false material declaration “in any proceeding before or ancillary to any court or grand jury of the United States.” *See e.g., United States v. Porter*, 994 F.2d 470, 474n.7 (8th Cir. 1993), *United States v. Reversion Martinez*, 836 F.2d 684, 689 (1st Cir. 1988), *United States v. Lighte*, 782 F.2d 367, 372 (2d Cir. 1985).

¹²⁰ *See also United States v. Finucan*, 708 F.2d 838, 847 (1st Cir. 1983) (intent to mislead is insufficient to support conviction for perjury); *United States v. Lighte*, 782 F.2d 367, 374 (2d Cir. 1986) (literally true answers by definition non-perjurious even if answers were designed to mislead); *United States v. Tonelli*, 577 F.2d 194, 198 (3d Cir. 1978) (perjury statute is not to be invoked because a “wily witness succeeds in derailing the questioner”); *United States v. Abrams*, 947 F.2d 1241, (5th Cir. 1991) (unambiguous and literally true answer is not perjury, even if there was intent to mislead); *United States v. Eddy*, 737 F.2d 564, (6th Cir. 1984) (“An ‘intent to mislead’ or ‘perjury by implication’ is insufficient to support a perjury conviction.”), *United States v. Williams*, 536 F.2d 1202, 1205 (7th Cir 1976) (literally true statement cannot form basis of perjury conviction even if there was intent to mislead); *United States v. Robbins*, 997 F.2d 390, 394 (8th Cir. 1993), *United States v. Boone*, 951 F.2d 1526, 1536 (9th Cir. 1991) (literally true statement is not actionable); *United States v. Larranaga*, 787 F.2d 489, 497 (10th Cir. 1986) (no perjury where answer literally truthful and prosecutor’s questioning imprecise); *United States v. Shotts*, 145 F.3d 1289, 1297 (11th Cir. 1998) (“An answer to a question may be non-responsive, or may be subject to conflicting interpretations, or may even be false by implication. Nevertheless, if the answer is literally true, it is not perjury.”); *United States v. Dean*, 55 F.3d 640, 662 (D.C. Cir. 1995) (perjury charge cannot be based upon evasive answers or even misleading answers so long as such answers are literally true).

standing, he cannot commit perjury. Many courts have emphasized that “defendants may not be assumed into the penitentiary” by “sustain[ing] a perjury charge based on [an] ambiguous line of questioning.” *Tonelli*, 577 F.2d at 199.

United States v. Lattimore, 127 F. Supp. 405 (D.D.C. 1955), is the key case dealing with ambiguous questions in the perjury context. In *Lattimore*, a witness was questioned before the Senate Internal Security Subcommittee about his ties to the Communist party. He was asked whether he was a “follower of the Communist line,” and whether he had been a “promoter of Communist interests.” He answered “no” to both questions, and was subsequently indicted for committing perjury. The United States District Court for the District of Columbia found that the witness could not be indicted on “charges so formless and obscure as those before the Court.” *Id.* at 413. The court held that “‘follower of the Communist line’ is not a phrase with a meaning about which men of ordinary intellect could agree, nor one which could be used with mutual understanding by a questioner and answerer unless it were defined at the time it were sought and offered as testimony.” *Id.* at 110. As the court explained further:

[The phrase] has no universally accepted definition. The Government has defined it in one way and seeks to impute its definition to the defendant. Defendant has declined to adopt it, offering a definition of his own. It would not necessitate great ingenuity to think up definitions differing from those offered either by the Government or defendant. By groundless surmise only could the jury determine which definition defendant had in mind.

Id. at 109.

Many other cases stand for the proposition that a witness cannot commit perjury by answering an inherently ambiguous question. For instance, in *United States v. Wall*, 371 F.2d 398 (6th Cir. 1967), a witness was asked whether she had “been on trips with Mr. X,” and she answered “no.” The government could prove that in fact the witness, who was from Oklahoma City, had been in Florida with “Mr. X.” However, the government could not prove that the witness had traveled from Oklahoma City to Florida with “Mr. X.” The court noted (and the government conceded) that the phrase “been on trips” could mean at least two different things: “That a person accompanied somebody else travelling with, or it can mean that they were there at a particular place with a person.” The court then stated that “[t]he trouble with this case is that the question upon which the perjury charge was based was inarticulately phrased, and, as admitted by the prosecution, was susceptible of two different meanings. In our opinion, no charge of perjury can be based upon an answer to such a question.” *Id.* at 399–400.

Similarly, in *United States v. Tonelli*, 577 F.2d 194 (3d Cir. 1978), the defendant answered negatively a question whether he had “handled any pension fund checks.” The government then proved that the defendant had actually handled the transmission of pension fund checks by arranging for others to send, mail, or deliver the checks. The government charged the defendant with perjury. The court held that perjury could not result from the government’s ambiguous question. The court explained:

It is clear that the defendant interpreted the prosecutor’s questions about ‘handling’ to mean ‘touching’ . . . To sustain a perjury charge based on the ambiguous line of questioning here would require us to assume [defendant] interpreted ‘handle’

to include more than ‘touching.’ The record will not allow us to do so and as the Court of Appeals for the Fifth Circuit has observed ‘[e]specially in perjury cases defendants may not be assumed into the penitentiary.’

Id. at 199–200.

United States v. Bell, 623 F.2d 1132, 1137 (5th Cir. 1980), is yet another example of this doctrine. In *Bell*, a witness was asked before a grand jury, “Whether personal or business do you have records that are asked for in the subpoena,” and the witness answered, “No, sir, I do not.” It was later established that the witness’s files clearly contained relevant records. Nonetheless, the court held that the question was ambiguous, and therefore incapable of yielding a perjurious answer. The witness interpreted the question to ask whether he had brought the records with him that day, and not whether he had any records anywhere else in the world.¹²¹

E. IT IS EXPECTED AND PROPER FOR A WITNESS TO BE CAUTIOUS
WHEN UNDER OATH

Every lawyer knows that in preparing a witness for a deposition one important task is to counsel the witness to be cautious in answering questions under oath, not to guess or give an answer as to which the witness is not sure, and not to volunteer information to opposing counsel that is not specifically sought by the question. For example, one legal text advises, “[C]ounsel will want to drill the deponent to answer questions as she would at the deposition: short and to the point, with nothing volunteered.”¹²² Lawyers are advised they should instruct a client: “If you do not know or do not remember, say that. You do not get extra points by guessing. If you are pretty sure of the answer but not 100% sure, say that. . . . You do not get extra points for giving perfectly clear and complete answers. Normally if there is some ambiguity in your answer, that will be a problem for the opposing party, not for you.” *Id.* at 222. As Mr. Starr testified to the Judiciary Committee at one point, “I have to be careful of what I say, because of not having universal facts.” Transcript of November 19, 1998 Hearing at 386. And Mr. Starr declined repeatedly to answer questions under oath, stating on numerous occasions that he would have to “search his recollection,” and qualifying many of the answers he did give with such phrases as “to the best of my recollection” and “if my recollection serves me.” *See, e.g.*, Transcript of November 19, 1998 Hearing at 107 (“But the letter, *if my recollection serves me*, goes to the circumstances with respect to the events of the evening of January

¹²¹ Many other cases as well hold that ambiguous questions cannot produce perjurious answers. *See, e.g., Lighte*, 782 F.2d at 376 (questions fundamentally ambiguous because of imprecise use of “you,” “that,” and “again”); *United States v. Farmer*, 137 F.3d 1265, 1270 (10th Cir. 1998) (question “Have you talked to Mr. McMahon, the defendant about your testimony here today?” ambiguous because phrase “here today” could refer to “talked” or to “testimony”; conviction for perjury could not result from the question); *United States v. Ryan*, 828 F.2d 1010, 1015–17 (3d Cir. 1987) (loan application question asking for “Previous Address (last 5 years)” fundamentally ambiguous because unclear whether “address” refers to residence or mailing address, and “previous” could mean any previous address, the most recent previous address, or all previous addresses; based on ambiguity, perjury cannot result from answer to question); *United States v. Markiewicz*, 978 F.2d 786, 809 (2d Cir. 1992) (question “[D]id you receive any money that had been in bingo hall” ambiguous, and incapable of producing perjurious answer, when it did not differentiate between witness’s personal and business capacities). *See also United States v. Manapat*, 928 F.2d 1097, 1099 (11th Cir. 1991); *United States v. Eddy*, 737 F.2d 564, 565–71 (6th Cir. 1984); *United States v. Hilliard*, 31 F.3d 1509 (10th Cir. 1994).

¹²² Dennis R. Suplee and Diana S. Donaldson, *The Deposition Handbook* at 161 (2d ed.).

16th.”) (emphasis added); *Id.* at 122 (“ . . . But they were only conversations, and it never ripened—I’m talking about with Mr. Davis—and it never ripened into an arrangement, an agreement, to *the best of my recollection*, to do anything because of the circumstances that then occurred.”) (emphasis added); *Id.* at 247 (“I’m *unable to answer that question* without—you know, I will have to approach—you’re saying any information relating to any—and *I would have to search my recollection*. I’ve prepared today for questions that go to this referral. So *I will have to search my recollection*.”) (emphasis added); *Id.* at 343 (“With respect to the travel office *I would frankly have to search my recollection* to see exactly where we were and when we were there.”) (emphasis added); *Id.* at 358 (“We discussed with Sam [Dash] a variety of issues. *I would have to search my recollection* with respect to any specific observations that Sam gave us with respect to this.”) (emphasis added). This is what a well-prepared witness does when testifying under oath. No amount of pressure should force a witness to assert recall where there is none, or to answer a question not asked. A failure to do so is neither remarkable nor criminal.

F. SPECIFIC CLAIMS OF PERJURY

With these principles in mind, it is apparent that there is no basis for a charge of perjury here, either with respect to the President’s Jones deposition or his subsequent grand jury testimony.

1. Civil Deposition of January 17, 1998

a. Nature of Relationship

The primary allegation of perjury arising from President Clinton’s deposition testimony of January 17, 1998, appears to be that he lied under oath about the nature of his relationship with Ms. Lewinsky when he denied in that civil case that he had a “sexual affair,” a “sexual relationship,” or “sexual relations” with Ms. Lewinsky. *See* Ref. at 131; Schippers Presentation at 25. In the deposition, President Clinton asserted: (1) that he did not have a “sexual affair” with Ms. Lewinsky within the *undefined* meaning of that term, Dep. at 78; (2) that Ms. Lewinsky was correct in her statement that she did not have a “sexual relationship” with the President within the *undefined* meaning of that term, *id.* at 204; and (3) that he did not have “sexual relations” with Ms. Lewinsky *as that term was defined by the Jones lawyers and limited by Judge Wright, ibid.* The allegation that President Clinton perjured himself with respect to any of these deposition statements is without merit.

First, it is by now more than clear that the *undefined* terms “sexual affair,” “sexual relations” and “sexual relationship” are at best ambiguous, meaning different things to different people, and that President Clinton’s belief that the terms refer to sexual intercourse is supported by courts, commentators, and numerous dictionaries—a point ignored in the Referral and Mr. Schippers’ presentation to the Committee despite the obvious problem with premising a perjury claim on such ambiguous terms. As one court has stated, “[i]n common parlance the terms “sexual intercourse” and “sexual relations” are often used interchangeably.” *J.Y. v. D.A.*, 381 N.E.2d

1270, 1273 (Ind. App. 1978). Dictionary definitions make the same point. For example,

- Webster's Third New International Dictionary (1st ed. 1981) at 2082, defines "sexual relations" as "coitus;"
- Random House Webster's College Dictionary (1st ed. 1996) at 1229, defines "sexual relations" as "sexual intercourse; coitus;"
- Merriam-Webster's Collegiate Dictionary (10th ed. 1997) at 1074, defines "sexual relations" as "coitus;"
- Black's Law Dictionary (Abridged 6th ed. 1991) at 560, defines "intercourse" as "sexual relations;" and
- Random House Compact Unabridged Dictionary (2d ed. 1996) at 1755, defines "sexual relations" as "sexual intercourse; coitus."

The President's understanding of these terms, which is shared even by several common dictionaries, could not possibly support a prosecution for perjury. How would a prosecutor prove these dictionaries "wrong?"¹²³

Irrespective of the view that "sexual relations" means intercourse, the evidence is indisputable that this is indeed what President Clinton believed. Perjury requires more than that a third party believes President Clinton was wrong about the meaning of these terms (a point on which the allegation plainly founders); it also requires proof that President Clinton *knew* he was wrong and *intentionally* lied about it. But the evidence demonstrates that the President honestly held that belief well before the *Jones* deposition. The genuineness of President Clinton's beliefs on this subject is even supported by the OIC's account of Ms. Lewinsky's testimony during an interview with the FBI:

[A]fter having a relationship with him, Lewinsky deduced that the President, in his mind, apparently does not consider oral sex to be sex. Sex to him must mean intercourse.

App. at 1558 (8/19/98 FBI 302 Form Interview of Ms. Lewinsky).

And finally, Ms. Lewinsky herself took the position that her contact with the President did not constitute "sex" and reaffirmed that position even after she had received immunity and began cooperating with the OIC. For example, in one of the conversations surreptitiously taped by Ms. Tripp, Ms. Lewinsky explained to Ms. Tripp that she "didn't have sex" with the President because "[h]aving sex is having intercourse." Supp. at 2664; *see also* Supp. at 1066 (grand jury testimony of Neysa Erbland stating that Ms. Lewinsky had said that the President and she "didn't have sex"). Ms. Lewinsky reaffirmed this position even after receiving immunity, stating in an FBI interview that "her use of the term 'having sex' means having intercourse. . . ." App. at 1558 (8/19/98 FBI 302 Form Interview of Ms. Lewinsky). Likewise, in her original proffer to the OIC, she wrote, "Ms. L[ewinsky] was comfortable signing the affidavit with regard to the "sexual relationship" because she could justify to herself that she and the Pres[ident] did not have sexual intercourse." App. at 718 (2/1/98 Proffer). In short, the evidence supports only the conclusion that the President's responses with respect to these undefined terms were truthful and at worst good

¹²³ For the same reason as that set forth herein, the allegation by Mr. Schippers that the President's sworn answers to interrogatories—in which he denied a "sexual relationship"—were false is without merit.

faith responses to indisputably ambiguous questions.¹²⁴ The Referral and the Committee have adduced no evidence to the contrary.

Second, the President's statement in his deposition that he had not had "sexual relations" with Ms. Lewinsky *as that term was defined by the Jones lawyers and substantially narrowed by Judge Wright* also is correct. Neither the OIC in its Referral nor Mr. Schippers in his presentation to the Committee laid out the sequence of events that led to the limited definition of "sexual relations" which was ultimately presented to President Clinton and which he was required to follow. At the deposition, the Jones attorneys presented a broad, three-part definition of the term "sexual relations" to be used by them in the questioning. Judge Wright ruled that two parts of the definition were "too broad" and eliminated them. Dep. at 22. The President, therefore, was presented with the following definition (as he understood it to have been amended by the Court):¹²⁵

DEFINITION OF SEXUAL RELATIONS

For the purposes of this deposition, a person engages in "sexual relations" when the person knowingly engages in or causes—

(1) contact with the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to arouse or gratify the sexual desire of any person;

(2) ~~contact between any part of the person's body or an object and the genitals and anus of another person;~~
or

(3) ~~contact between the genitals or anus of the person and any part of another person's body.~~

~~"Contact" means intentional touching, either directly or through clothing.~~

This definition substantially narrowed the meaning of the term as it was used by the Jones lawyers. It rendered an overly broad definition bizarrely narrow and contorted. But despite that narrowing, and the resulting peculiarity of what was and was not covered, the Jones lawyers chose to stick with it rather than ask direct questions, *see* Dep. at 23, as they were invited to do by the President's counsel. Dep. at 25. When they asked the President about "sexual relations" with Ms. Lewinsky in the deposition, they did so with explicit reference to this definition. *See* Dep. at 78 ("And so the record is completely clear, have you ever had sexual relations with Monica Lewinsky, *as that term is defined in Deposition Exhibit 1, as modified by the Court?*") (emphasis added).

It is plain that this narrow definition did not include certain physical acts—an interpretation shared by many commentators, journalists, and others. *See, e.g.,* Perjury Hearing of December 1, 1998 (Statement of Professor Stephen A. Saltzburg at 2) ("That def-

¹²⁴ For the sake of clarity, it should be understood that the President's affirmation of paragraph eight of Ms. Lewinsky's affidavit, Dep. at 204, was made many hours after his counsel, Mr. Bennett, characterized the affidavit as "saying there is absolutely no sex of any kind." Dep. at 54.

¹²⁵ Counsel for Ms. Jones stated, "Mr. President, in light of the Court's ruling, you may consider subparts two and three of the Deposition Exhibit 1 [the definition of sexual relations] to be stricken, and so when in my questions I use the term 'sexual relations,' sir, *I'm talking only about part one in the definition of the body.*" Dep. at 23 (emphasis added).

inition defined certain forms of sexual contact as sexual relations but, for reasons known only to the Jones lawyers, limited the definition to contact with any person for the purpose of gratification.”); MSNBC Internight, August 12, 1998 (Cynthia Alksne) (“[W]hen the definition finally was put before the president, it did not include the receipt of oral sex”); “DeLay Urges a Wait For Starr’s Report,” *The Washington Times* (August 31, 1998) (“The definition of sexual relations, used by lawyers for Paula Jones when they questioned the president, was loosely worded and may not have included oral sex”); “Legally Accurate,” *The National Law Journal* (August 31, 1998) (“Given the narrowness of the court-approved definition in [the *Jones*] case, Mr. Clinton indeed may not have perjured himself back then if, say, he received oral sex but did not reciprocate sexually”). This interpretation may be confusing to some. It may be counter-intuitive. It may lead to bizarre answers. But it certainly was not objectively wrong. And it was not the President’s doing.

Moreover, the Jones lawyers had the opportunity to ask questions which would have elicited details about the President’s relationship with Ms. Lewinsky but chose not to develop the issue. As an alternative to relying on the definition provided by the Jones lawyers, the President’s counsel invited the Jones lawyers to “ask the President what he did, [and] what he didn’t do. . . .” Dep. at 21. The Jones lawyers ignored the invitation and stuck with their definition even as it was limited. As the Supreme Court has explained, “[i]f a witness evades, it is the lawyer’s responsibility to recognize the evasion and to bring the witness back to the mark, to flush out the whole truth with the tools of adversary examination.” *Bronston v. United States*, 409 U.S. 352, 358–59 (1973).¹²⁶

b. Being Alone with Ms. Lewinsky

President Clinton’s deposition testimony regarding whether he was alone with Ms. Lewinsky at various times and places does not constitute perjury. The fundamental flaw in the charge is that it is based on a mischaracterization of the President’s testimony—the President did not testify that he was never alone with Ms. Lewinsky.

Both the Starr Referral and Mr. Schippers’ presentation to the Committee start from the incorrect premise that the President testified that he was never alone with Ms. Lewinsky. *See* Ref. at 154 (“[T]he President lied when he said “I don’t recall” in response to the question whether he had ever been alone with Ms. Lewinsky.”);¹²⁷ Schippers Presentation at 29 (“[T]he President may have given false testimony under oath . . . regarding his statement that he could not recall being alone with Monica Lewinsky.”). In fact, the President did not deny that he had been alone with Ms. Lewinsky. For example, the President answered “yes” to the ques-

¹²⁶A specific allegation is made with respect to a difference between the President’s and Ms. Lewinsky’s recollection of the precise nature of the physical contact in their admittedly inappropriate intimate relationship. That issue is addressed below in the context of the allegation that the President committed perjury in his August 17 grand jury testimony. *See* Section VI.F.2 *infra*.

¹²⁷The Referral’s mischaracterization of the President’s testimony appears to come from Mr. Starr’s transformation of a question about being alone with Ms. Lewinsky in *the Oval Office*, Dep. at 52 into being alone more generally.

tion “your testimony is that it was possible, then, that you were alone with her . . . ?”. Dep. at 53.¹²⁸

Whatever confusion or incompleteness there may have been in the President’s testimony about when and where he was alone with Ms. Lewinsky cannot be charged against the President. The Jones lawyers failed to follow up on incomplete or unresponsive answers. They were free to ask specific follow-up questions about the frequency or locale of any physical contact, but they did not do so. This failure cannot be used to support a charge of perjury. *Bronston*, 409 U.S. at 360.

c. “Minimizing” Gifts that Were Exchanged

A separate perjury charge is based on the assertion that in his deposition the President “minimized” the number of gifts he exchanged with Ms. Lewinsky. Ref. at 151; Schippers Presentation at 29. Again, the evidence simply does not support this allegation. To start with, even the charge of “minimizing” the number of gifts concedes the only potentially material issue—the President acknowledged that he did exchange gifts with Ms. Lewinsky. There is not much that is safe from a perjury prosecution if mere “minimization” qualifies for the offense.

As weak as the “minimization” charge is, it is also wrong. A fair reading of the President’s deposition testimony makes clear that, when asked about particular gifts, the President honestly stated his recollection of the particular item. See Dep. at 75 (“Q. Do you remember giving her an item that had been purchased from The Black Dog store at Martha’s Vineyard? A. I do remember that . . .”). Moreover, when the President could not recall the precise items that he had exchanged, he asked the Jones lawyers to tell him so that he could confirm or deny as the facts required.¹²⁹ See *ibid.*

In essence, this allegation is yet another complaint that President Clinton was not more forthcoming (or that he did not have a more precise memory on these issues), which is plainly not a ground for alleging perjury.

d. Conversations with Ms. Lewinsky About Her Involvement in the Jones Case

Both the Referral and Mr. Schippers’ presentation allege perjury in the *Jones* deposition with respect to President Clinton’s con-

¹²⁸In his grand jury testimony the President stated that he had been alone with Ms. Lewinsky. See, e.g., App. at 481. The term “alone” is vague unless a particular geographic space is identified. For example, Ms. Currie testified that “she considers the term alone to mean that no one else was in the entire Oval Office area,” Supp. at 534–35 (1/24/98 FBI Form 302 Interview of Ms. Currie; see also Supp. at 665 (7/22/98 grand jury testimony of Ms. Currie) (“I interpret being ‘alone’ as alone . . . [W]e were around, so they were never alone.”). Ms. Currie also acknowledged that the President and Ms. Lewinsky were “alone” on certain occasions if alone meant that no one else was in the same room. Supp. at 552–53 (1/27/98 grand jury testimony of Ms. Currie).

¹²⁹The videotape of the President’s January 17 deposition makes clear that the cold transcript can be somewhat misleading. When the President is asked, “Well, have you ever given any gifts to Monica Lewinsky?”, the transcript records his response as, “I don’t recall. Do you know what they were?” Dep. at 75. The videotape reveals the President’s response, however, was run-on sentence, as though the punctuation were omitted, for the real communicative gist of his quoted response (as it appears on the videotape) was, “Yes—I know there were some—please help remind me.” In succeeding questions, the President states that he “could have” given her a hat pin and a book, does not believe he gave her a “gold broach,” and does recall giving her some Black Dog memorabilia. Dep. at 75–76.

versations with Ms. Lewinsky about her involvement in the *Jones* case. *See* Ref. at 160; Schippers Presentation at 32. Specifically, it is alleged that the President committed perjury in his deposition when he failed to (1) acknowledge that he knew that Ms. Lewinsky had been subpoenaed at the time he had last seen and spoken to her; and (2) acknowledge that he had spoken to Ms. Lewinsky about the possibility that she would testify in the *Jones* case. *Ibid.* Once again, the charge of false testimony is based on a wholly inaccurate reading of the President's deposition. The President acknowledged that he knew that Ms. Lewinsky had been subpoenaed, that he was not sure when was the last time he had seen and spoken with her (but that it was sometime around Christmas), and that he had discussed with her the possibility that she would have to testify.

(1) The allegation that the President denied knowing that Ms. Lewinsky had been subpoenaed the last time he spoke to her illustrates the problem of taking selected pieces of testimony out of context. Messrs. Starr and Schippers isolate the following exchange in the deposition:

Q. Did she tell you she had been served with a subpoena in this case?
A. No. I don't know if she had been.

Dep. at 68. From this incomplete excerpt, they claim that the President perjured himself by denying that he knew that Ms. Lewinsky had been subpoenaed the last time he had spoken with her. *See* Ref. at 163.

The charge is unsupported by the evidence. First, the testimony immediately following this exchange demonstrates both that the President was not hiding that he knew Ms. Lewinsky had been subpoenaed by the time of the deposition and that the Jones lawyers were well aware that this was the President's position:

Q. Did anyone other than your attorneys ever tell you that Monica Lewinsky had been served with a subpoena in this case?
A. I don't think so.

* * * * *

A. Bruce Lindsey, I think Bruce Lindsey told me that she was, I think maybe that's the first person [who] told me she was. I want to be as accurate as I can.

Q. Did you talk to Mr. Lindsey about what action, if any, should be taken as a result of her being served with a subpoena?
A. No.

Dep. at 68–70. It is evident from the complete exchange on this subject that the President was not generally denying that he knew that Ms. Lewinsky had been subpoenaed in the *Jones* case.¹³⁰ The questions that the Jones lawyers were asking the President also make clear that this is what they understood the President's testimony to be.

Second, the President's testimony cannot fairly be read as an express denial of knowledge that Ms. Lewinsky had been subpoenaed the last time he had spoken to her before the deposition. Most importantly, the President was not asked whether he knew that Ms. Lewinsky had been subpoenaed *on December 28th*, which was the last time he had seen her. When the President answered the ques-

¹³⁰It also is not clear why he would want to deny such knowledge, since parties to a lawsuit generally and properly are aware of the witnesses in the case.

tion, “Did she tell you she had been served with a subpoena in this case?”, he plainly was not thinking about December 28th. To the contrary, the President’s testimony indicates that he was totally confused about the dates of his last meetings with Ms. Lewinsky, and he made that abundantly clear to the Jones lawyers:

Q. When was the last time you spoke with Monica Lewinsky?

A. I’m trying to remember. Probably sometime before Christmas. She came by to see Betty sometime before Christmas. And she was there talking to her, and I stuck my head out, said hello to her.

Q. Stuck your head out of the Oval Office?

A. Uh-huh, Betty said she was coming by and talked to her, and I said hello to her.

Q. Was that shortly before Christmas or—

A. I’m sorry, I don’t remember. Been sometime in December, I think, and I believe—that may not be the last time. I think she came to one of the, one of the Christmas parties.

Dep. at 68 (emphasis added). His statement that he did not know whether she had been subpoenaed directly followed this confused exchange and was not tied to any particular meeting with her. By that time it is totally unclear what date the answer is addressing.

The Referral ignores this confusion by selectively quoting the President as testifying “that the last time he had spoken to Ms. Lewinsky was in December 1997 . . . ‘probably sometime before Christmas.’” Ref. at 163 (quoting Dep. at 68).¹³¹ Given his confusion, which the Jones lawyers made no attempt to resolve, it is difficult to know what was being said, much less to label it false and perjurious.

(2) The claim that President Clinton did not acknowledge speaking with Ms. Lewinsky about whether she might have to testify similarly is not a fair or accurate reading of the deposition. In response to the question, “Have you ever talked to Ms. Lewinsky about the possibility that she might have to testify in this lawsuit?”, the President’s answer did not end with the statement “I’m not sure.” Instead, the President continued with the statement “and let me tell you why I’m not sure,” at which point he described his recollection of having spoken with Ms. Lewinsky about how Ms. Jones’ lawyers and the Rutherford Institute were going to call every woman to whom he had ever talked. *Ibid.* It is evident the President’s answer referred to the time period *before* Ms. Lewinsky was on a witness list—*i.e.*, when her participation was still a “possibility” only. Indeed, Ms. Lewinsky confirmed the accuracy of the President’s recollection of this conversation in her testimony, a fact that also is missing from the Referral. *See* App. at 1566 (8/24/98 FBI 302 Form Interview of Ms. Lewinsky) (“LEWINSKY advised CLINTON may have said during this conversation that every woman he had ever spoken to was going to be on the witness list.”).

Thus, the President *did* in fact accurately describe a conversation with Ms. Lewinsky about potential testimony. That the Jones lawyers failed to follow-up with questions that would elicit whether that was the *only* conversation, or whether there were additional conversations once Ms. Lewinsky was on the witness list and her testimony was no longer a mere possibility, is not perjury. It is

¹³¹ In fact, Ms. Lewinsky did come to the White House for a Christmas party on December 5, 1997, well before she was subpoenaed. *See* App. at 125 (OIC log of Ms. Lewinsky’s visits); App. at 3140 (photo of Ms. Lewinsky at Christmas party).

simply a confused deposition record that could have been clarified contemporaneously.

e. Conversations with Mr. Jordan About Ms. Lewinsky

The pattern of mischaracterizing the President's deposition testimony to construct a perjury charge is repeated in a final perjury allegation regarding the President's deposition answers to questions about conversations with Mr. Jordan about Ms. Lewinsky. The Referral alleges that the President was "asked during his civil deposition whether he had talked to Mr. Jordan about Ms. Lewinsky's involvement in the *Jones case*" and that he "stated that he knew Mr. Jordan had talked to Ms. Lewinsky about her move to New York, but stated that he did not recall whether Mr. Jordan had talked to Ms. Lewinsky about her involvement in the *Jones case*." Ref. at 186; *see also* Schippers Presentation at 40. The problem with this allegation is that President Clinton was never asked "whether he had talked to Mr. Jordan about Ms. Lewinsky's involvement in the *Jones case*," and he did not deny doing so.

In support of the charge, the Referral quotes the following exchange from the President's deposition about who told the President that Ms. Lewinsky had been subpoenaed:

Q. Did anyone other than your attorneys ever tell you that Monica Lewinsky had been served with a subpoena in this case?

A. I don't think so.

Ref. at 186 (emphasis added in Referral). This exchange does not address whether the President spoke with Mr. Jordan about Ms. Lewinsky's involvement in the *Jones* suit. And the excerpt is itself misleading. The Referral omits the President's next answer, even though it is obvious from the text, and the OIC was told by the President in his grand jury testimony, App. at 518–19, that this answer was intended to finish the President's response to the previous question:

A. Bruce Lindsey, I think Bruce Lindsey told me that she was, I think maybe that's the first person told me she was. I want to be as accurate as I can.

Plainly, the President was not testifying that no one other than his attorneys had told him that Ms. Lewinsky had been subpoenaed. The *Jones* lawyers did not pursue this by asking logical follow-up questions, such as whether, if Mr. Lindsey was the first person were there others, or whether Mr. Jordan had subsequently shared that information with him. The bottom line is that President Clinton did not deny, in the quoted passage or elsewhere, knowing that Mr. Jordan had spoken to Ms. Lewinsky about the *Jones* matter.

Nor do the other two cited passages of the President's deposition testimony help the OIC's case. In response to a question about whether in the two weeks before January 17 anyone had reported to him that they had had a conversation *with Ms. Lewinsky* about the *Jones case*, the President replied "I don't believe so." Dep. at 72. The President was not questioned specifically about whether he had ever spoken to Mr. Jordan or anyone else about Ms. Lewinsky's involvement in the *Jones case*. The President's response, accordingly, did not rule out all conversations with Mr. Jordan about Ms. Lewinsky's involvement in the case, as the Referral suggests, but only in the two-week period prior to the deposition

and only conversations relaying accounts of conversations *with* Ms. Lewinsky. Even conversations with Mr. Jordan about her involvement in the case would not have been covered. The Referral does not identify any reports to the President about any conversation that Mr. Jordan had with Ms. Lewinsky in that time period—instead, it recounts only that, ten days before the deposition, Mr. Jordan may have told the President that the affidavit was signed. *See* Ref. at 187.

Finally, the President's answer to the question whether it had been reported to him that Mr. Jordan had "*met* with Monica Lewinsky and talked about [the *Jones*] case," Dep. at 72 (emphasis added), obviously cannot be read to support this charge of perjury. In response to this question, the President acknowledged that he knew that Mr. Jordan and Ms. Lewinsky had met. The President's further response—that he believed Mr. Jordan met with Ms. Lewinsky to give her advice about her move to New York was fully accurate. Again, the President was not asked whether he was aware that Mr. Jordan had *talked* to Ms. Lewinsky about her involvement in the *Jones* case. Since he was not asked the question, it is implausible to suggest that he lied in the answer.

2. Grand Jury Testimony of August 17, 1998

Proponents of impeachment repeatedly contend in the most general terms that President Clinton committed perjury in the grand jury on August 17, 1998. When this allegation is framed in specific terms, it is often based on the false belief that President Clinton denied in the grand jury having had any sexual contact with Ms. Lewinsky. For example, in the Committee's perjury hearing held last week, Chairman Hyde discounted the Referral's charge that President Clinton had lied to the grand jury about the commencement date of his relationship with Ms. Lewinsky and then stated, "I don't rank that up with lying to the grand jury, saying he didn't have a sexual relationship." Remarks of Chairman Hyde at Perjury Hearing of December 1, 1998; *see also* Statement of Judge Charles Wiggins at 2 ("the President was called as a witness before the grand jury and he repeated his story that he did not have a sexual relationship with Monica Lewinsky. Subsequently the President acknowledged that his story was false or misleading and that he in fact had such a relationship with Ms. Lewinsky.")

These accounts of President Clinton's grand jury testimony are not accurate. In his August 17, 1998 grand jury testimony, President Clinton acknowledged that he had engaged in "inappropriate intimate contact" with Ms. Lewinsky. Section II.C, *supra*. He also acknowledged that his conduct was "wrong." *Ibid.* What the President denied in the grand jury was having "sexual relations" with Ms. Lewinsky only as that term was defined by the Jones lawyers and substantially restricted by Judge Wright. He did not go into the details of those encounters because of privacy considerations, although he did testify that they did not involve either sexual intercourse or "sexual relations" as defined at the *Jones* deposition after Judge Wright struck two-thirds of it. Ms. Lewinsky, on the other hand, was forced by the OIC to describe in graphic detail her

recollection of these encounters. *See* Schippers Presentation at 27.¹³²

This simply is not a case of perjury. In addition to the inconsequential subject matter of the allegation—the precise nature of the admitted physical contact between the President and Ms. Lewinsky—the factual record would not support a prosecution for perjury. That record is one essentially of “oath against oath,” a formula that centuries of common law jurisprudence has rejected as the basis for perjury. As the Supreme Court has stated, “equally honest witnesses may well have differing recollections of the same event,” and hence “a conviction for perjury ought not to rest entirely upon ‘an oath against an oath.’” *United States v. Weiler*, 323 U.S. 606, 609 (1945); *see also Griswold v. Hazard*, 141 U.S. 260, 280 (1891) (Harlan, J.) (“The difference in recollection of gentlemen . . . often happens, without any reason to suspect that any of them would intentionally deviate from the line of absolute truth.”). Mr. Starr admitted in his testimony before the Judiciary Committee on November 19, 1998, that the OIC credited Ms. Lewinsky’s testimony only where there was corroboration. Transcript of November 19, 1998 Hearing at 235–36. On the narrow point at issue here, however, there can be no independent corroboration.¹³³

In sum, the facts do not support a perjury count based on the President’s grand jury testimony. It is hard to imagine how what is at most a difference of recollection over the precise details of the admitted physical contact between President Clinton and Ms. Lewinsky could be considered grounds for a perjury charge, much less grounds for impeachment.

VII. THE PRESIDENT DID NOT OBSTRUCT JUSTICE

A. THE ELEMENTS OF OBSTRUCTION OF JUSTICE

The term “obstruction of justice” usually refers to violations of 18 U.S.C. § 1503, the “Omnibus Obstruction Provision,” which prohibits the intimidation of and retaliation against grand and petit jurors and judicial officers and contains a catch-all clause making it unlawful to “influence, obstruct, or impede the due administration of justice.” It may also refer to 18 U.S.C. § 1512, which pro-

¹³²Mr. Schippers analyzed the Referral and cited a discrepancy between the testimony of President Clinton and Ms. Lewinsky over the precise nature of the physical contact involved in their relationship as the basis for an allegation that President Clinton perjured himself before the grand jury. Schippers Presentation at 27. Mr. Starr, in his Referral, advocated two additional bases: first, explaining his deposition testimony as based on his belief that the terms “sexual relationship” “sexual affair,” and “sexual relations” required intercourse; and second, testifying that he recalled his inappropriate relationship with Ms. Lewinsky beginning early in 1996, rather than in mid-November of 1995 as Ms. Lewinsky recalled. As Mr. Schippers evidently concluded, these alternative claims have no merit. One need look no further than the common dictionary definition of terms such as “sexual relations” to find the President’s views validated, *see supra* at Section VI.F.1a, and it is not credible to believe that the slim difference between the President’s and Ms. Lewinsky’s recollections of the commencement date of their relationship (mid-November 1995 as opposed to early 1996) was in any way material to the grand jury’s investigation whatsoever. As Chairman Hyde himself stated in reference to this latter allegation, “It doesn’t strike me as a terribly serious count.” Remarks of Chairman Hyde at Perjury Hearing of December 1, 1998.

¹³³Ms. Lewinsky’s statements to her friends about the nature of the contact between herself and the President do not constitute independent corroboration. These statements obviously are not independent as they were made by Ms. Lewinsky. They also appear to be inconsistent, a fact which is even noted, albeit quietly, in Mr. Starr’s Referral. *See Ref.* at 17 n.39 (noting conflicting accounts of oral sex); *see also Supp.* at 1083 (statement by Kathleen Estep that Ms. Lewinsky told her that President Clinton was brought to her apartment by the Secret Service at 2 a.m.).

scribes intimidating, threatening, or corruptly persuading, through deceptive conduct, a person in connection with an official proceeding.

For a conviction under § 1503, the government must prove that there was a pending judicial proceeding, that the defendant knew of the proceeding, and that the defendant acted “corruptly” with the specific intent to obstruct or interfere with the proceeding or due administration of justice. *See, e.g., United States v. Bucey*, 876 F.2d 1297, 1314 (7th Cir. 1989); *United States v. Smith*, 729 F. Supp. 1380, 1383–84 (D.D.C. 1990). Thus, if a defendant is unaware of a pending grand jury proceeding, he cannot be said to have obstructed it in violation of § 1503. *See, e.g., United States v. Brown*, 688 F.2d 1391, 1400 (9th Cir. 1992). Perhaps more significant is the “acting corruptly” element of the offense. Some courts have defined this term as acting with “evil and wicked purposes,” *see United States v. Banks*, 942 F.2d 1576, 1578 (11th Cir. 1991), but at the very least to “act corruptly” under the statute, a defendant must have acted with the specific intent to obstruct justice. *See United States v. Moon*, 718 F.2d 1219, 1236 (2d Cir. 1983); *United States v. Bashaw*, 982 F.2d 168, 170 (6th Cir. 1992); *United States v. Anderson*, 798 F.2d 919, 928 (7th Cir. 1986); *United States v. Rasheed*, 663 F.2d 843, 847 (9th Cir. 1981). That is, it is not enough to prove that the defendant knew that a result of his actions might be to impede the administration of justice, if that was not his intent.

It is critical to note which actions cannot fall under the ambit of § 1503. First, false statements or testimony alone cannot sustain a conviction under § 1503. *See United States v. Thomas*, 916, F.2d 647, 652 (11th Cir. 1990); *United States v. Rankin*, 870 F.2d 109, 111 (3d Cir. 1989).¹³⁴ Moreover, § 1503 does not apply to a party’s concealing or withholding discoverable documents in civil litigation.¹³⁵ Most cases that have found § 1503 applicable to civil cases do not involve the production or withholding of documents. *See United States v. London*, 714 F.2d 1558 (11th Cir. 1983) (attorney forged court order and attempted to enforce it), cited in *Richmark*, 730 F. Supp. at 1532; *Sneed v. United States*, 298 F. 911 (5th Cir. 1924) (influencing juror in civil case); cited in *Richmark*, 730 F. Supp at 1532. While § 1503 can apply to concealment of subpoenaed documents in a grand jury investigation, the defendant must have knowledge of the pending grand jury investigation, must know that the particular documents are covered by a subpoena, and must willfully conceal or endeavor to conceal them from the

¹³⁴ For instance, in *United States v. Wood*, 6 F.3d 692, 697 (10th Cir. 1993), the United States Court of Appeals for the Tenth Circuit found that a defendant’s false statements to the Federal Bureau of Investigation during a grand jury investigation did not violate § 1503, because they did not have the natural and probable effect of impeding the due administration of justice.

¹³⁵ *See, e.g., Richmark v. Timber Falling Consultants*, 730 F. Supp. 1525, 1532 (D. Ore. 1990) (because of the remedies afforded by the Federal Rules of Civil Procedure, § 1503 does not cover party discovery in civil cases, and “[t]he parties have not cited and the court has not found any case in which a person was charged with obstruction of justice for concealing or withholding discovery in a civil case”) *See also United States v. Lundwall*, 1 F. Supp. 2d 249, 251–54 (S.D.N.Y. 1998) (noting that “[c]ases involving prosecutions for document destruction during civil pre-trial discovery are notably absent from the extensive body of reported § 1503 case law,” and that “there are a great many good reasons why federal prosecutors should be reluctant to bring criminal charges relating to conduct in ongoing civil litigation,” but concluding that systematic destruction of documents sought during discovery should satisfy § 1503).

grand jury with the specific intent to interfere with its investigation. See *United States v. McComb*, 744 F.2d 555 (7th Cir. 1984).

Section 1512 specifically applies to “witness tampering.” To obtain a conviction under § 1512, the government must prove that a defendant knowingly engaged in intimidation, physical force, threats, misleading conduct, or corrupt persuasion with intent to influence, delay, or prevent testimony or cause any person to withhold objects or documents from an official proceeding. It is clear that a defendant must also be aware of the possibility of a proceeding and his efforts must be aimed specifically at obstructing that proceeding, whether pending or not; § 1512 does not apply to defendants’ innocent remarks or other acts unintended to affect a proceeding. See *United States v. Wilson*, 565 F. Supp. 1416, 1431 (S.D.N.Y. 1983).

Moreover, it is important to define the terms “corruptly persuade” and “misleading conduct,” as used in § 1512. The statute itself explains that “corruptly persuades” does not include “conduct which would be misleading conduct but for a lack of a state of mind.” 18 U.S.C. § 1515(a)(6). It is also clear from the case law that “misleading conduct” does not cover scenarios where the defendant urged a witness to give false testimony without resorting to coercive or deceptive conduct. See, e.g., *United States v. Kulczyk*, 931 F.2d 542, 547 (9th Cir. 1991) (no attempt to mislead; witnesses knew defendant was asking them to lie); *United States v. King*, 762 F.2d 232, 237 (2d Cir. 1985) (defendant who attempts to persuade witness to lie but not to mislead trier of fact does not violate § 1512).

Subornation of perjury is addressed in 18 U.S.C. § 1622. The elements of subornation are that the defendant must have persuaded another to perjure himself, and the witness must have actually committed perjury. See, e.g., *United States v. Hairston*, 46 F.3d 361, 376 (4th Cir. 1995), *rev’d on other grounds*, 361 U.S. 529 (1960). If actual perjury does not occur, there is simply no subornation. See *id.* at 376 (reversing conviction for subornation because of conclusion that, in applying *Bronston*, witness did not commit perjury due to his literally truthful testimony). Moreover, § 1622 requires that the defendant know that the testimony of witness will be perjurious—*i.e.*, knowing and willful procurement of false testimony is a key element of subornation of perjury. See *Rosen v. NLRB*, 735 F.2d 564, 575 n.19 (D.C. Cir. 1984) (“a necessary predicate of the charge of subornation of perjury is the suborner’s belief that the testimony sought is in fact false”).

B. SPECIFIC CLAIMS OF OBSTRUCTION

The Referral alleges various actions that it claims amount to obstruction of justice. Evidence that is contained in the Appendices and Supplements—although omitted from the Referral—thoroughly undermines each of these claims.

1. *There Is No Evidence that the President Obstructed Justice in Connection with Gifts Given to Ms. Lewinsky*

“The President and Ms. Lewinsky met and discussed what should be done with the gifts subpoenaed from Ms. Lewinsky.” (Independent Counsel Kenneth Starr 11/19/98 Statement Before

the Committee on the Judiciary U.S. House of Representatives at 15.)

[H]e really didn't—he really didn't discuss it.” (Monica Lewinsky's 8/20/98 grand jury testimony. App. at 1122.)

The Referral claims that President Clinton endeavored to obstruct justice by engaging in a pattern of activity to conceal evidence, particularly gifts, regarding his relationship with Monica Lewinsky. Ref. at 165. *See also* Schippers Presentation at 34–35.

The Appendices and Supplements contain a wealth of information contradicting this claim. Upon review, it is clear that the full record simply does not support an obstruction-by-gift-concealment charge at all.

First, among Ms. Lewinsky's ten different accounts of the meeting at which she and the President allegedly “discussed” concealing gifts, the Referral selectively and prejudicially chooses to cite the version most hurtful to the President (without disclosing the existence of other, exculpatory accounts of the same events). Second, the Referral omits other relevant statements by Ms. Lewinsky that would place the OIC's account in a sharply different light. Third, the Referral suppresses uncontested statements made by the President and by Ms. Betty Currie that contradict the OIC's concealment theory. Fourth, the Referral appropriates for itself the role of factfinder and—by misleading characterizations of testimony—attempts to deceive the Committee into adopting Ms. Lewinsky's version of events where it appears to conflict with Ms. Currie's version. Finally, the Referral suppresses the OIC's doubts about its own theory—doubts manifest in grand jury questioning but not acknowledged in the Referral itself.

Two events form the core of the OIC's allegation that the President orchestrated the concealment of gifts he had given Ms. Lewinsky. The first is Ms. Lewinsky's December 28, 1997, early morning meeting with the President. The second is Ms. Currie's receipt of a box of gifts from Ms. Lewinsky, supposedly on the afternoon of that day.

The Referral presents these events in a manner that is grossly one-sided and deeply prejudicial to the President.

a. Ms. Lewinsky's December 28 Meeting with the President

On December 28, 1997, Ms. Lewinsky came to the White House and met with the President to pick up her holiday gifts. According to Ms. Lewinsky, that was the only occasion on which an issue of the gifts' relation to her subpoena was raised. *See* App. at 1130 (8/20/98 grand jury testimony of Ms. Lewinsky); *see also* App. at 1338 (8/26/98 deposition of Ms. Lewinsky).

Ms. Lewinsky was asked several times by the OIC about her December 28, 1997, meeting with the President, and in particular about discussions she may have had with the President about gifts she had received from him. In response, Ms. Lewinsky made at least ten distinct statements¹³⁶ during the course of her original proffer, interviews, grand jury testimony and deposition. Although the OIC claims that there was a discussion between Ms. Lewinsky

¹³⁶Ms. Lewinsky herself explicitly made nine such statements and the tenth (number 8 in the sequence listed above in the text) was made by a juror restating Ms. Lewinsky's earlier statement. Ms. Lewinsky appeared to agree with, and did not correct, that restatement.

and the President on this subject,¹³⁷ the actual testimony does not support the OIC's contention.

Ms. Lewinsky's statements are set forth below, listed in the order in which they were given, from earliest to latest in time:

1. Proffer (2/1/98): "Ms. L then asked if she should put away (outside her home) the gifts he had given her, or maybe, give them to someone else." App. at 715.

2. Lewinsky 7/27/98 Interview Statement: "LEWINSKY expressed her concern about the gifts that the President had given LEWINSKY and specifically the hat pin that had been subpoenaed by PAULA JONES. The President seemed to know what the JONES subpoena called for in advance and did not seem surprised about the hat pin. The President asked LEWINSKY if she had told anyone about the hat pin and LEWINSKY denied that she had, but may have said that she gave some of the gifts to FRANK CARTER. . . . LEWINSKY asked the President if she should give the gifts to someone and the President replied 'I don't know.'" App. at 1395.

3. Lewinsky 8/1/98 Interview Statement: "LEWINSKY said that she was concerned about the gifts that the President had given her and suggested to the President that BETTY CURRIE hold the gifts. The President said something like, 'I don't know,' or 'I'll think about it.' The President did not tell LEWINSKY what to do with the gifts at that time." App. at 1481.

4. Lewinsky 8/6/98 Grand Jury Testimony: "[A]t some point I said to him, 'Well, you know, should I—maybe I should put the gifts away outside my house somewhere or give them to someone, maybe Betty.' And he sort of said—I think he responded, 'I don't know' or 'Let me think about that.' And left that topic." App. at 872.

5. Lewinsky 8/13/97 Interview Statement: "During their December 28, 1997 meeting, CLINTON did not specifically mention which gifts to get rid of." App. at 1549.

6. Lewinsky 8/20/98 Grand Jury Testimony: "It was December 28th and I was there to get my Christmas gifts from him. . . . And we spent maybe about five minutes or so, not very long, talking about the case. And I said to him, 'Well do you think' . . . And at one point, I said, 'Well, do you think I should—' I don't think I said 'get rid of,' I said, 'But do you think I should put away or maybe give to Betty or give to someone the gifts?' And he—I don't remember his response. I think it was something like, 'I don't know,' or 'Hmm,' or—there really was no response." App. at 1121–22.

7. Lewinsky 8/20/98 Grand Jury Testimony: "A JUROR: Now, did you bring up Betty's name [at the December 28 meeting during which gifts were supposedly discussed] or did the President bring up Betty's name? THE WITNESS: I think I brought it up. The President wouldn't have brought up Betty's name because he really didn't—he really didn't discuss it . . ." App. at 1122.

8. Lewinsky 8/20/98 Grand Jury Testimony: "A JUROR: You had said that the President had called you initially to come get your Christmas gift, you had gone there, you had a talk, et cetera, and

¹³⁷Independent Counsel Kenneth Starr (Nov. 19, 1998) Statement Before the Committee on the Judiciary U.S. House of Representatives at 15.

there was no—you expressed concern, the President really didn't say anything." App. at 1126.

9. Lewinsky 8/24/98 Interview Statement: "LEWINSKY advised that CLINTON was sitting in the rocking chair in the Study. LEWINSKY asked CLINTON what she should do with the gifts CLINTON had given her and he either did not respond or responded 'I don't know.'" LEWINSKY is not sure exactly what was said, but she is certain that whatever CLINTON said, she did not have a clear image in her mind of what to do next." App. at 1566.

10. Lewinsky 9/3/98 Interview Statement: "On December 28, 1997, in a conversation between LEWINSKY and the President, the hat pin given to LEWINSKY by the President was specifically discussed. They also discussed the general subject of the gifts the President had given Lewinsky. However, they did not discuss other specific gifts called for by the PAULA JONES subpoena. LEWINSKY got the impression that the President knew what was on the subpoena." App. at 1590.

These statements contain certain striking inconsistencies with the version of events presented by the OIC—that the President and Ms. Lewinsky "met and discussed what should be done with the gifts subpoenaed from Ms. Lewinsky":

- In none of the statements did the President initiate a discussion relating to concealment of gifts.
- In none of the statements did the President tell Ms. Lewinsky to conceal gifts.
- In none of the statements did the President suggest to Ms. Lewinsky that she conceal gifts.
- In none of the statements is the President alleged to have mentioned any gift other than a hat pin.

The statements also display numerous internal inconsistencies and anomalies that are significant in light of the charge and that caution against selecting any particular one:

- In seven of the ten statements (numbers 1, 5, 6, 7, 8, 9 and 10) the President either did not respond at all to Ms. Lewinsky's concealment concerns or was described by Ms. Lewinsky as having given "no response" or "didn't really say anything" about what to do with the subpoenaed gifts.
- In two statements (numbers 6 and 9), Ms. Lewinsky described the President *as both responding* to her concealment comments ("saying something like 'I don't know' or 'Hmm,'" 6; "responded 'I don't know,'" 9) *and as not responding* (there really was no response," 6; "he . . . did not respond," 9).
- In five of the ten statements (numbers 2, 3, 4 and 6 and 9) the President responded "I don't know" to a Lewinsky suggestion that she give someone the gifts.
- In two of the ten statements (numbers 3 and 4), the President was made to appear to contemplate further thought by saying in response to a suggestion of possible action that he will "think about it" or "Let me think about that."
- In one statement (number 6), Ms. Lewinsky said that "I don't remember his response" to her suggestion that she conceal gifts.
- In Ms. Lewinsky's *first* statement (the 2/1/98 Proffer), she did not describe the President as having made any response to her suggestion of possible action or as having mentioned Ms. Currie.

- In Ms. Lewinsky's *final* statement (her 9/3/98 interview), she described no statement by the President whatsoever pertaining to any possible action with respect to the gifts.

With all these statements to draw on, the Starr Referral relied on number 4 above as if it were Ms. Lewinsky's only statement on the matter and thus characterized this pivotal conversation as follows: According to Ms. Lewinsky, she and the President discussed the possibility¹³⁸ of moving some of the gifts out of her possession:

[A]t some point I said to him, "Well, you know, should I—maybe I should put the gifts away outside my house somewhere or give them to someone, maybe Betty." And he sort of said—I think he responded "I don't know" or "Let me think about that." And [we] left that topic.

Ref. at 166 (quoting App. at 872 (8/6/98 grand jury testimony of Ms. Lewinsky)). In making the above statement the centerpiece of the President's supposed assent to engage in concealment, the OIC selected one¹³⁹ of only two (of Ms. Lewinsky's ten) accounts in which the President's alleged comments might support the inference that he was even contemplating further thought (though not action) in response to Ms. Lewinsky's suggestion.

In so doing, the Referral failed to inform Congress that, in more than two-thirds of the different accounts given by Ms. Lewinsky, Ms. Lewinsky either described no response by the President at all or described his comment as "no response" or "didn't really say anything."¹⁴⁰ In other words, to the best of Ms. Lewinsky's recollection he evidenced *no* intent to give the subject any thought. The OIC also failed to acknowledge that in one of her accounts, Ms. Lewinsky stated that she did not really remember the President's response. The OIC did not tell Congress that in several accounts, Ms. Lewinsky reported that the President both did and did not respond to her suggestion. The OIC did not tell Congress that the only person ever to link Betty Currie's name with the idea of concealment (and that in only three of her ten accounts) in the December 28 conversation was Ms. Lewinsky herself. The OIC did not tell Congress that in *none*—not one—of Ms. Lewinsky's accounts did the President *initiate* discussion relating to concealment of gifts. The OIC did not tell Congress that in none of Ms. Lewinsky's accounts did the President ask or tell Ms. Lewinsky to conceal gifts. The OIC did not tell Congress that in none of Ms. Lewinsky's accounts does the President suggest to Ms. Lewinsky that she conceal gifts. The OIC did not tell Congress that in only two of Ms. Lewinsky's ten accounts was there even the suggestion that the President wanted even to "think about it." And finally, the OIC did not tell Congress that in Ms. Lewinsky's earliest and latest accounts of the December 28, 1997 meeting, she never mentioned any statement by the President suggesting any concealment of gifts from the *Jones* subpoena. Instead the OIC simply picked the one

¹³⁸This statement contains a subtle, but important (and illustrative) distortion. *Ms. Lewinsky* might possibly be said to have "discussed" concealment of the gifts (at least in some of her accounts of the December 28 meeting). But there is *no evidence* that the President himself ever "discussed" concealment.

¹³⁹Number 4 above.

¹⁴⁰The Referral's concealment discussion (Ref. at 165–172) makes but a single mention of any of Ms. Lewinsky's other accounts of the December 28 conversation. See Ref. at 166 n.226 (quoting App. at 1122 (8/20/98 grand jury testimony Ms. Lewinsky) (number 6 in the list above)).

account it liked best, misrepresented it, and presented it as though it were the whole truth.

Those omissions and the resulting account of this “concealment” meeting result in a skewed version of events that professional prosecutors would not condone. Yet the Starr Referral not only presents a distorted picture of the evidence, it recommends that this Committee vote to impeach the President of the United States on this demonstrably thin record.

b. Betty Currie’s Supposed Involvement in Concealing Gifts

The other incident said to support the obstruction-by-concealment theory was Ms. Currie’s receipt of a box of gifts from Ms. Lewinsky. Again, to support its position the Starr Referral presents a highly selective and deceptively one-sided account of the evidence. That account is distinguished by: (1) minimization of evidence favorable to the President concerning the origin of the idea of picking up gifts; (2) an outright falsehood as to the *date* of the gift pickup—a falsehood obviously intended to suggest deep Presidential involvement in the events; and (3) a deceptive attempt to elevate the Referral’s theory through misleading and improper bolstering of one witness’s credibility.

(1) *Whether Gifts Were Picked Up at the Suggestion of Ms. Lewinsky or the President.* Mr. Starr takes the position that the President told or suggested to Ms. Currie that she contact Ms. Lewinsky and pick up the gifts. Ref. at 167. But the President twice denied ever telling Ms. Currie to contact Ms. Lewinsky about the gifts. App. at 502 (President’s 8/17/98 grand jury testimony); App. at 565–66 (same). Ms. Currie herself has repeatedly said that it was Ms. Lewinsky (not the President) who asked her to pick up the gifts. Supp. at 581 (5/6/98 grand jury testimony of Betty Currie); Supp. at 582 (same); Supp. at 706 (7/22/98 grand jury testimony of Betty Currie); Supp. at 531 (1/24/98 FBI Form 302 Interview of Betty Currie). In short, the only two parties who could possibly have direct knowledge of such an instruction by the President have denied it.

Ms. Lewinsky stated that Ms. Currie told her that the President had told her to contact Ms. Lewinsky. See App. at 715 (2/1/98 Proffer): “Ms. Currie called Ms. L later that afternoon and said that the Pres. had told her Ms. L wanted her to hold onto something for her.”¹⁴¹ But this statement was contradicted by Ms. Currie’s repeated statements that Ms. Lewinsky called her and asked her to pick up the gifts because people were asking “questions about stuff she had gotten.” Supp. at 557 (1/27/98 grand jury testimony of Ms. Currie). The Referral does acknowledge one occasion on which Ms. Currie contradicted Ms. Lewinsky on this point, see Ref. at 167 (citing Supp. at 557 (1/27/98 grand jury testimony of Ms. Currie)):

Q. Did Ms. Lewinsky tell you why she wanted to give you this box of items?

A. I think she was just getting concerned. I think people were asking questions about stuff she had gotten.

But the Referral fails to quote Ms. Currie’s *repeated* contradicting of Ms. Lewinsky on this point. First, in her January 24 interview

¹⁴¹ See also App. at 874 (8/6/98 grand jury testimony of Ms. Lewinsky); App. at 1127 (8/20/98 grand jury testimony of Ms. Lewinsky).

Ms. Currie said that: LEWINSKY called CURRIE and advised she had to return all the gifts CLINTON had given LEWINSKY as there was talk going around about the gifts.” Supp. at 531 (1/24/98 FBI 302 Form Interview of Ms. Currie). Then, before the grand jury:

Q. What exactly did Monica say when—

A. The best I remember she said that she wanted me to hold these gifts—hold this—she may have said gifts, I’m sure she said gifts, box of gifts—I don’t remember—because people were asking questions. And I said, “Fine.”

Supp. at 581 (5/6/98 grand jury testimony of Ms. Currie). And then again before the grand jury:

Q. . . . Just tell us from moment one how this issue first arose and what you did about it and what Ms. Lewinsky told you.

A. The best I remember it first arose with a conversation. I don’t know if it was over the telephone or in person. I don’t know. She asked me if I would pick up a box. She said Isikoff had been inquiring about gifts.

Supp. at 582 (5/6/98 grand jury testimony of Ms. Currie). This fact—that Ms. Currie early on and then thereafter repeatedly insisted that Ms. Lewinsky raised the issue of the gifts—is not to be found in the Referral.

The Referral also omits Ms. Lewinsky’s own testimony that it was she, and not the President, who first raised the prospect of Ms. Currie’s involvement.

A JUROR: Now, did you bring up Betty’s name or did the President bring up Betty’s name?

[Ms. LEWINSKY]: I think I brought it up. The President wouldn’t have brought up Betty’s name because he really didn’t—he didn’t really discuss it. . . .

App. at 1122 (8/20/98 grand jury testimony of Ms. Lewinsky); see also App. at 1481 (8/1/98 FBI Form 302 Interview of Ms. Lewinsky) (“LEWINSKY . . . suggested to the President that Betty Currie hold the gifts.”) This fundamental and important fact—that Ms. Lewinsky herself testified that the idea of Ms. Currie’s involvement originated with Ms. Lewinsky (and not with the President)—is nowhere to be found in the Referral’s obstruction discussion.

Finally, as to whether Ms. Currie ever spoke of gifts to the President after she had picked up the gifts, the President denied ever speaking with Ms. Currie and as to Ms. Currie, she recalled only one circumstance relevant to this issue. In the course of questioning Ms. Currie about a January 21, 1998 telephone call she received from the President, a juror (*not the OIC*) put the following question to Ms. Currie:

A JUROR: During this conversation with the President, did you discuss the fact that you had a box of Monica’s belongings under your bed?

THE WITNESS: I’m sure not.

BY [THE OIC]: Why didn’t you tell him that.

A. I didn’t see any reason to. . . .

Supp. at 705 (7/22/98 grand jury testimony of Ms. Currie). This exchange, and the fact that Ms. Currie stated her recollection with palpable certainty, are also entirely missing from the Referral.

In view of the foregoing distortions and omissions, no fair-minded factfinder could conclude from the evidence that the President instructed Ms. Currie to retrieve gifts from Ms. Lewinsky.¹⁴²

¹⁴²The Referral’s further musings on the subject of the gifts, Ref. at 170–71, are based on conjecture, not evidence. See, e.g., Ref. at 170. (“[m]ore generally, the person making the extra

(2) *Whether Gifts Were Picked Up on December 28.* The Referral implies that the President told Ms. Currie to retrieve the gifts on Sunday, December 28, 1997, Ref. at 166 (and that she in fact retrieved the gifts on December 28), the same day he supposedly discussed the gifts issue at a morning meeting with Ms. Lewinsky. Ref. at 167. The plain purpose of this allegation is to suggest prompt action by the President to effectuate a concealment plan supposedly hatched with Ms. Lewinsky at that morning's visit.

In support of that theory, the Referral makes the following assertion: According to both Ms. Currie and Ms. Lewinsky, Ms. Currie drove to Ms. Lewinsky's home [to pick up the box of gifts] later on December 28. Ref. at 167 & n.237. This assertion—that “[a]ccording to . . . Ms. Currie” she picked up gifts on December 28—is not true. The Referral's (only) authority is page 108 of Ms. Currie's May 6, 1998 grand jury testimony. That page of transcript reads as follows:

- A. . . . [108] I drove to her—outside of her residence and picked up the box.
 Q. How many times had you been to her residence before?
 A. Twice. I took her home one day after work, but never inside her residence. I just dropped her off in front of the Watergate. And then when I picked up the box. So twice, that I remember, just twice.
 Q. Did you go with anyone to pick up the box?
 A. It was after work and I was by myself.
 Q. So it would be fair to say it was pretty important to pick it up.
 A. I wouldn't say that.
 Q. And it was the only other time you'd ever been to her apartment.
 A. I could have picked it up probably any time, but I was—she called me and asked me to come by on my way home and pick it up.
 Q. And then what did you do with it?
 A. Put it under my bed?
 Q. What was the occasion when you took Monica home?
 A. What was the occasion?
 Q. Yes.
 A. After one of her meetings. The best I remember, if she was leaving and I was leaving at the same time, I'd offer [109] to give her a ride home.

Supp. at 581 (5/6/98 grand jury testimony of Ms. Currie). Nowhere on that page or anywhere else does Ms. Currie say that she picked up the gifts on December 28.

This was no mere typographical error. For in Ms. Currie's first interview with the OIC, she recalled that Ms. Lewinsky called her to pick up the gifts sometime *in December*. Supp. at 531 (1/24/98 FBI Form 302 Interview of Ms. Currie). And just a few pages earlier in her grand jury testimony, Ms. Currie told the grand jury that her best estimate was that she had retrieved the gifts “a couple weeks” after Ms. Lewinsky's December 28 visit to the President. Supp. at 581 (5/6/98 grand jury testimony of Ms. Currie). Additionally, in her first (late-January 1998) appearance before the grand jury, Ms. Currie's best recollection was that the gifts were picked up *sometime within the previous six months*. Supp. at 556–57 (1/27/98 grand jury testimony of Ms. Currie). Finally, Ms. Currie told the grand jury that she picked up the gifts on a workday, Supp. at 582, and December 28 was a Sunday. Although Ms. Currie never pinpointed a date, the record is clear that—contrary to the Referral's false assertion—she never placed the date of the gift pickup on December 28.

effort [here, picking up the gifts] . . . is ordinarily the person requesting the favor”). As to the Referral's credibility judgments, see Part V.B.1.b.3 below.

The Referral's deceptive attempts to bind Ms. Currie to its version of events—effected by misstatement and omission—are significant. They are explainable only by a willful attempt to bend the facts to fit the Referral's theory. Other than Ms. Lewinsky's own (as shown below, uncertain) accounts, the notion that the gifts were picked up on December 28 has no foundation in the record.

(3) *The Referral's Deceptive Attempt to Bolster the Credibility of One Witness to the Detriment of Others Is Improper.* The Referral usurps the role of the fact-finder and substitutes its judgment for Congress' by resolving evidentiary conflicts in favor of Ms. Lewinsky's recollection and against Ms. Currie's where that resolution hurts the President. The Referral states that Ms. Currie's memory of the crucial conversation “generally has been hazy and uncertain,” Ref. at 170, while Ms. Lewinsky's testimony “is consistent and unequivocal.” Ref. at 169. The statement that Ms. Lewinsky's testimony was consistent and unequivocal is just not true. Indeed, Ms. Lewinsky actually told the grand jurors at one point that she could not remember Ms. Currie saying that the President told her to call about the gifts:

A JUROR: At the top of page 7 [of the 2/1/98 Proffer, App. 715], where you say in your proffer that when Ms. Currie called later that afternoon she said, at least I think you mean that she said that the President had told her Ms. L wanted her to hold on to something for her. *Do you remember Betty Currie saying that the President had told her to call?*

THE WITNESS: Right now. I don't. *I don't remember.* . . .

App. at 1141 (8/20/98 grand jury testimony of Ms. Lewinsky) (emphasis added). The Referral's assertion to the contrary—that “Ms. Lewinsky's testimony on the issue is consistent and unequivocal”—is utterly untrue. Ms. Lewinsky simply did not have the unwavering conviction the Referral attributes to her.

Indeed Ms. Lewinsky's testimony concerning her February 1, 1998 proffer (which was not, as the OIC characterizes it, “testimony,” Ref. at 169) was fraught with uncertainty. As Ms. Lewinsky herself told the grand jury:

The other thing, and this is something that I was thinking about this morning in relation to the proffer, that I had written this proffer obviously being truthful, but I think that *when I wrote this*, it was my understanding that this was to bring me to the step of getting an immunity agreement, and so I think that sometimes to—that *I didn't know this was going to become sort of this staple document*, I think, for everything, and so there are things that can be misinterpreted from in here, even from me re-reading it, the conditions—some of the conditions maybe under which I wrote it.

App. at 1141 (8/20/98 grand jury testimony of Ms. Lewinsky) (emphasis added). Yet neither the Referral, nor any of its supporting materials, reflect any effort by the OIC to have Ms. Lewinsky clarify the “things that can be misinterpreted” in her proffer. Nor did the Referral inform the House of Ms. Lewinsky's own doubts about the February 1 proffer.

The Referral then aggravates its own deceptions and omissions still further by twice quoting a statement of Ms. Currie to the effect that “[Ms. Lewinsky] may remember better than I. I don't remember.” Ref. at 167, 170. That quotation is thoroughly misleading in view of the foregoing statements by Ms. Lewinsky (omitted from the Referral) which made clear that her memory was certainly no better than Ms. Currie's.

Finally, the OIC's account of the differences in Ms. Currie's and Ms. Lewinsky's recollections is aggravated by another, very curious fact. As the Referral once mentions, and as Ms. Currie repeatedly stated, Ms. Lewinsky had said that she "was uncomfortable retaining the gifts" not because the President asked her to conceal them from Paula Jones' lawyers, but "because people were asking questions about the stuff she had gotten." Ref. at 167 and citations in Part VI.B.1.b.1, above. That statement presents a rather different explanation than the one offered up in the Referral. Yet neither the Referral, nor 3183 pages of Appendices, nor 4610 pages of Supplement contain any evidence that Ms. Lewinsky has ever contradicted Ms. Currie's account of that statement. The absence of contradictory evidence is itself a significant piece of evidence supportive of the view that Ms. Currie's recollection is the correct one.

But the importance of this runs much deeper. Notwithstanding that she testified twice before the grand jury, was deposed once, and was interviewed by the OIC at least 18 different times,¹⁴³ Ms. Lewinsky was apparently never asked whether she ever stated to Ms. Currie that people were asking questions about the President's gifts. Indeed, in all the time following Ms. Currie's January 27 testimony, the OIC apparently never asked Ms. Lewinsky to reconcile the basic tensions in the conflicting accounts. Rather than attempting to determine the truth of this important issue, the OIC preferred to leave this crucial difference unexplored and then argue the relative credibility of the witnesses to Congress and conclude without reason that Ms. Lewinsky's recollection "makes more sense." In view of the OIC's statutory duty to provide any "substantial and credible information" pertaining to impeachment, the insidious refusal to elicit direct evidence on this sensitive point is extraordinary—and wholly unfair.

c. The Referral Suppresses Other Evidence Casting Doubt on Its Concealment-of-Gifts Obstruction Theory

The Referral says, and it is not disputed, that the President gave Ms. Lewinsky a number of gifts during their December 28, 1997 meeting. Ref. at 166. This fact alone obviously undermines the Referral's theory that he sought to conceal gifts to her on that same day. The Referral goes on to say that Ms. Lewinsky was "asked why the President gave her more gifts on December 28 when he understood she was under an obligation to produce gifts in response to the subpoena." *Ibid.* But the actual question posed was this: "What do you think the President was thinking when he is giving you gifts when there's a subpoena covering the gifts? I mean, does he think in any way, shape or form that you're going to be turning these gifts over?" App. at 886 (8/6/98 grand jury testimony of Ms. Lewinsky).

In response, the Starr Referral inserted Ms. Lewinsky's speculation about why the President may have given her the gifts, quoting from her August 6 testimony, and adding a certain emphasis:

You know, I can't answer what [the President] was thinking, but to me, it was—there was never a question in my mind and I—from everything he said to me, I never questioned him, that we were never going to do anything but keep this pri-

¹⁴³Summaries of Ms. Lewinsky's 18 different interviews with the OIC appear at App. at 1389–1603.

vate, so that meant deny it and that meant do—take whatever appropriate steps needed to be taken, you know for that to happen.

Ref. at 166 (quoting App. at 886–87 (8/6/98 grand jury testimony of Ms. Lewinsky) (emphasis added by OIC)).

This explanation of the December 28 gift-giving is severely unfair. First, the addition of the emphasis suggests that the President had explained to Ms. Lewinsky that gifts, including gifts given on December 28, were going to be concealed. There is no support for this, and as we have established above, all the evidence is to the contrary.

Second, the OIC’s account relies on Ms. Lewinsky’s speculation when the President’s own testimony was available. In that testimony, given before the grand jury on August 17, the President—responding to questions about the December 28 meeting—stated that “this gift business . . . didn’t bother me,” App. at 496, and that “I wasn’t troubled by this gift issue,” App. at 497. The President went on to say that he “fe[lt] comfortable giving [Ms. Lewinsky] gifts in the middle of discovery in the Paula Jones case” because “there was no existing improper relationship at that time” and that he “wasn’t worried about it [and] thought it was an all right thing to do.” App. at 498. The Referral obscures these direct statements in favor of Ms. Lewinsky’s speculation.

Strikingly absent from the Referral is any discussion of the fact that, under its own misleading theory, the President was both giving gifts and taking them back on the very same day. The Referral makes no effort to explain this dramatic anomaly and does not convey to Congress any sense of the fact that such behavior is—and must seem—very odd under the Referral’s theory.

That omission is all the more conspicuous in view of the OIC’s questions and comments on this issue during the President’s and Ms. Lewinsky’s grand jury testimony. Sensing the difficulty for its own theory, the OIC asked: “Mr. President, if your intent was, as you earlier testified, that you didn’t want anybody to know about this relationship you had with Ms. Lewinsky, why would you feel comfortable giving her gifts in the middle of discovery in the Paula Jones case?” App. at 498. The President answered that he was not troubled by the gifts because at the time he gave them there was no improper relationship. App. at 498. No mention of this exchange appears in the Referral.

Again, during Ms. Lewinsky’s first grand jury appearance the OIC prosecutor remarks: “Although, Ms. Lewinsky, I think what is sort of—*it seems a little odd* and, I guess really the grand jurors wanted your impression of it, *was on the same day that you’re discussing basically getting the gifts to Betty to conceal them, he’s giving you a new set of gifts.*” App. at 887–88 (emphasis added).¹⁴⁴ And again, no mention is made in the Referral of the fact that the OIC and the grand jurors regarded it as “odd” that there was gift-giving on the same day the President allegedly caused his gifts to be recovered. A fair prosecutor would have acknowledged this “oddity” and reported the President’s answers to this “oddity,” answers

¹⁴⁴Ms. Lewinsky replies, “You know, I have come recently to look at that as sort of a strange situation. . . .” App. at 888.

which resolve the apparent “oddity,” and undermine the prosecutor’s theory. The OIC did neither.

The Referral concludes that “[g]iven his desire to conceal the relationship, it makes no sense that the President would have given Ms. Lewinsky more gifts on the 28th unless he and Ms. Lewinsky understood that she would not produce all of her gifts in response to her subpoena.” Ref. at 171. This statement is directly contrary to the only available evidence touching on this issue—namely the President’s own testimony that he simply was not troubled by the gifts. App. at 494–98. The OIC has suppressed relevant direct evidence and then asked Congress to draw negative inferences from circumstantial theorizing.

Ultimately, the Referral’s failure to include or even refer to the President’s directly material testimony in the “impeachable acts” discussion of supposed “concealment” of gifts has no legitimate explanation. The obstruction-by-gift-concealment charge rests on an unjustifiable six-prong strategy unworthy of any fair prosecutor. The Referral first presents a highly argumentative and one-sided account of disputed facts. Second, it flatly misrepresents certain key dates and events in an effort to heighten that prejudicial effect. Third, it suppresses numerous facts contradicting the Referral’s concealment theory. Fourth, the Referral artificially engineers the impression that one witness is more credible than the other—in stark defiance of record facts and in the apparent hope that its sophistries would go unnoticed by the factfinder. Fifth, the Referral suggests a false clarity about important evidentiary issues which are in fact fundamentally ambiguous. The Referral’s authors clearly chose to leave these ambiguities unexplored where honest investigation would have resolved them. Finally, the Referral suppresses record evidence reflecting its authors’ own doubts about the theory advanced.

Impeachment on such distorted “evidence” of obstruction as the Referral presents would be a travesty.

2. The President Did Not Obstruct Justice in Connection With Ms. Lewinsky’s Job Search

a. The Direct Evidence Contradicts the Referral’s Jobs—Obstruction Theory and the Referral Presents a Misleading Picture Based on Carefully Selected Circumstantial Evidence

The OIC alleges that the President “endeavored to obstruct justice by helping [Ms.] Lewinsky obtain a job in New York at a time when she would have been a witness against him were she to tell the truth during the *Jones* case.” Ref. at 181. To support this claim, the OIC has created a wholly misleading chronology of events that omits crucial facts, presents only partial accounts of others, and places artificial weight on selected events occurring in late December 1997 and early January 1998. The OIC’s account relies almost exclusively on the testimony of one witness yet conceals that witness’ contradictory statements. The effect is to try to create a sense that Ms. Lewinsky’s interest in a New York job arose in reaction to her involvement in the *Jones* suit and that the President’s ef-

forts to help her were excessive and performed with intent somehow to buy her silence, when the actual evidence is to the contrary.

There is no direct evidence that the President or Mr. Jordan assisted Ms. Lewinsky with her job search in exchange for silence or false testimony. Indeed, all the direct evidence is to the contrary. As Ms. Lewinsky unequivocally stated: “[N]o one ever asked me to lie and I was never promised a job for my silence.” App. at 1161 (8/20/98 grand jury testimony of Ms. Lewinsky). Mr. Jordan’s testimony was also clear and unequivocal:¹⁴⁵ “As far as I was concerned, [the job and the affidavit] were two very separate matters.” Supp. at 1737 (3/5/98 grand jury testimony of Vernon Jordan).¹⁴⁶ The Referral must therefore resort to selective citation to circumstantial evidence to try to make its case. But, as we establish in detail below, the circumstantial “evidence” does not support the notion that a job was procured for Ms. Lewinsky in an effort to obstruct justice in the *Jones* litigation. It supports the direct evidence to the contrary.

The Referral poses the job-search issue as “whether the President’s efforts in obtaining a job for Ms. Lewinsky were to influence her testimony or simply to help an ex-intimate without concern for her testimony.” Ref. at 185. Mr. Starr acknowledges that there is no direct evidence that the President assisted Ms. Lewinsky in obtaining a job in exchange for her lying or remaining silent. Ref. at 185 n.361. The OIC also acknowledges that the “case” is entirely circumstantial; rests on an interpretation of selected circumstances it describes as “key events.” Ref. at 181. The centerpiece of the charge is the notion that the President employed Mr. Vernon Jordan to place Ms. Lewinsky in an out-of-town job so as to induce Ms. Lewinsky either to leave town, to file a false affidavit, or to remain silent in such a way as to obstruct justice in the *Jones* case.¹⁴⁷

Here is the Referral’s key passage, a chronology manifestly constructed to create a false impression of obstruction:

On January 5, 1998, Ms. Lewinsky declined the United Nations job. On January 7, 1998, Ms. Lewinsky signed the affidavit denying the relationship with President Clinton (she had talked on the phone to the President on January 5 about it). Mr. Jordan informed the President of her action.

¹⁴⁵From his standpoint, Mr. Jordan’s assistance to Ms. Lewinsky was not in the least unusual. Mr. Jordan testified repeatedly that he is often asked to help people get jobs and often provides such help. See Supp. at 1707 (3/3/98 grand jury testimony of Vernon Jordan) (Mr. Jordan is “asked frequently by people to help . . . get jobs”); *id.* at 1711–12 (noting referring of other individuals for jobs at Revlon, Young & Rubicam, American Express and other companies and stating “to the extent you think [assisting Ms. Lewinsky was] out of the ordinary, it is not out of the ordinary, given what I do”); see also January 22, 1998 Statement of Vernon Jordan: (“For many years now . . . I am consulted by individuals, young and old, male and female, black and white, Hispanic and Asian, rich and poor, cabinet members and secretaries, for assistance.”).

¹⁴⁶See also Supp. at 1827 (5/5/98 grand jury testimony of Vernon Jordan):

Q. Did [Ms. Lewinsky] ever directly indicate to you that she wanted her job in New York before she could finish [her affidavit] up with Mr. Carter?

A. Unequivocally, no.

Q. . . . Is there anything about the way she acted when speaking to you that, as you sit here now, makes you think that perhaps she was attempting not to finalize whatever she was doing with Mr. Carter until she had a job in New York?

A. Unequivocally, indubitably, no.

¹⁴⁷As we will establish below, the omitted facts are flatly at odds with that theory. Had the President intended to ensure Ms. Lewinsky’s silence concerning their relationship, it was surely within his power—at any time—to secure a job for Ms. Lewinsky at the White House. It appears from the record that she desperately wanted such a position. Given Ms. Lewinsky’s repeatedly expressed desire for such a job, any jobs-for-silence scheme could have been readily implemented by giving her a White House position. No such position was ever offered, because there was never an effort to silence or buy off Ms. Lewinsky.

The next day, on January 8, 1998, Ms. Lewinsky interviewed with MacAndrews & Forbes, a company recommended by Vernon Jordan. The interview went poorly. Mr. Jordan then called Ronald Perelman, the Chairman of the Board of MacAndrews & Forbes. Mr. Perelman said Ms. Lewinsky should not worry, and that someone would call her back for another interview. Mr. Jordan relayed this message to Ms. Lewinsky, and someone called back that day.

Ms. Lewinsky interviewed again the next morning, and a few hours later received an informal offer for a position. She told Mr. Jordan of the offer, and Mr. Jordan then notified President Clinton with the news: "*Mission accomplished.*"

Ref. at 183–84 (footnotes omitted) (emphasis in original). As we will show, this passage is woefully misleading. In fact, the timing of Ms. Lewinsky's January 8th interview had nothing to do with the *Jones* matter. And the fact of Mr. Jordan's January 8 call to Mr. Perelman was never communicated to the Revlon executive who scheduled Ms. Lewinsky's January 9 interview and who decided to hire her that very day.

Indeed, closer inspection of the evidence contained in the appendices and supplements gives the lie to the Referral's theory and makes the following facts absolutely clear:

- Ms. Lewinsky's desire to leave Washington arose long before her involvement in the *Jones* case;
- The President provided Ms. Lewinsky with only modest assistance;
- The job assistance provided by friends and associates of the President was in no way unusual;
- No pressure was applied to obtain Ms. Lewinsky a job;
- There was no timetable for Ms. Lewinsky's job search, let alone any timetable linked to her involvement in the *Jones* case; and
- None of Ms. Lewinsky's job-searching and job-obtaining measures were in any way linked to her involvement in the *Jones* case.

When the events leading up to Ms. Lewinsky's job offer are reconstructed in fuller detail,¹⁴⁸ when the one-sidedness of the Referral's

¹⁴⁸In addition to the many relevant facts omitted from the Referral altogether, see Part V.C., *infra*, the Referral also contains its own misleading "editing" of events it does include. For instance, the Referral includes a number of exculpatory facts in its Narrative section, but then, when it sets forth what it calls "substantial and credible evidence" of wrongdoing, it omits them from its so-called summary of "key events and dates." Ref. 181. The following is just a sampling of facts the Referral's authors did not regard as "key events" deserving consideration in the accusatory part of the Referral:

- That throughout the first half of 1997, Ms. Lewinsky had been hoping to return to a job in the White House and that she had not succeeded in doing so; App. at 564 (President's 8/17/98 grand jury testimony);
- That the idea of a job at the United Nations *originated* with Ms. Lewinsky, not the President; see App. at 788 (8/6/98 grand jury testimony of Ms. Lewinsky) (in July 3 letter, "I said in New York at the United Nations");
- That Ms. Lewinsky's resolve to leave Washington was cemented by remarks reported to her by Ms. Tripp on October 6, 1997 and that those remarks, by a Tripp acquaintance, "were 'the straw that broke the camel's back.'" App. at 1460 (7/31/98 FBI Form 302 Interview of Ms. Lewinsky);
- That before she ever had had the October discussion with the President about a job, she had discussed with Ms. Tripp whether Mr. Jordan would help with her job search; App. at 823–24 (8/6/98 grand jury testimony of Ms. Lewinsky);
- That Ms. Lewinsky first expressed a need for a White House reference on October 11, and that she suggested that Mr. John Hillely was the appropriate person to provide the reference because he had at one time been her supervisor; App. at 1544–45 (8/13/98 FBI Form 302 Interview of Ms. Lewinsky);
- That Ms. Lewinsky needed the reference not for any improper motive but because she had worked at the White House in the Office of Legislative Affairs; App. at 934–35 (8/6/98 grand jury testimony of Ms. Lewinsky). Mr. Hillely was the appropriate person to provide the reference

Continued

account is recognized, and when its crucial omissions are exposed, it becomes plain that there was no impropriety and no obstruction of justice in connection with her job search. The case for obstruction simply evaporates.

b. A More Complete Narrative of Events

Ms. Lewinsky worked in the White House from late 1995 until early April 1996. In early April, she was advised by Mr. Tim Keating that she was being transferred from the White House to the Pentagon; Mr. Keating told her that she might be able to return to the White House after the November 1996 election. App. at 1503–04 (8/3/98 FBI Form 302 Interview of Ms. Lewinsky). Following the 1996 election, Ms. Lewinsky tried for months throughout 1997 to get a job in the White House or in the Old Executive Office Building. During that period, the President told her that Mr. Bob Nash and later Ms. Marsha Scott were the people who could help her get a job in the White House. App. at 1458 (7/31/98 FBI Form 302 Interview of Ms. Lewinsky). Ms. Lewinsky wrote to and met several times with Ms. Scott in 1997 about a White House job. App. at 1458–59 (7/31/98 FBI Form 302 Interview of Ms. Lewinsky). The President was aware of Ms. Lewinsky’s continuing efforts to work in the White House. App. at 564–65 (President’s 8/17/98 grand jury testimony). While still hoping for a White House job, Ms. Lewinsky began to think about working in New York. Ultimately, Ms. Lewinsky was never offered another White House job, and when (in early October 1997) it became clear to her that she would not be offered one, she turned her focus entirely to New York.

On July 3, 1997, Ms. Lewinsky notified the President that she was thinking of moving to New York. App. at 1414 (7/29/98 FBI 302 Interview of Ms. Lewinsky). She told him of her interest in a United Nations job and explicitly asked for his help in getting a position in New York. App. at 788 (8/6/98 grand jury testimony of Ms. Lewinsky). Ms. Lewinsky again raised the prospect of moving to New York in a September 2, 1997 e-mail message to a friend. App. at 2811. According to Ms. Lewinsky, by October 6, 1997, she was “mostly resolved to look for a job in the private sector in New York.” App. at 1544 (8/13/98 FBI Form 302 Interview of Ms. Lewinsky). On October 9th or 11th, Ms. Lewinsky asked the President if Mr. Vernon Jordan might be able to assist her with her New York job search, App. at 822–24 (8/6/98 grand jury testimony of Ms. Lewinsky); 1079 (8/20/98 grand jury testimony of Ms. Lewinsky). The idea of obtaining Mr. Jordan’s assistance may have originated with Ms. Tripp. App. at 822–24 (8/6/98 grand jury testimony of Ms. Lewinsky).

Ms. Lewinsky believed that her discussions with the President about a job were “part of her relationship with” the President. App. at 1461 (7/31/98 FBI Form 302 Interview). According to Ms. Lewinsky, she prepared a list of jobs she was interested in the private sector in New York. App. at 824 (8/6/98 grand jury testimony

because he had been her boss there during the latter part of her tenure at the White House. *Ibid.*

The omission of each of these facts from the accusatory portion of the Referral artificially bolsters the theory of the Referral by creating the effect that Ms. Lewinsky’s job search occurred mostly in December and January.

of Ms. Lewinsky); App. at 1585. In early November, Ms. Lewinsky met with Mr. Jordan who agreed to help her at that time. App. at 824 (8/6/98 grand jury testimony of Ms. Lewinsky). All of these events took place long before Ms. Lewinsky's name ever appeared on any witness list in the *Jones* matter. Indeed, it could not be clearer that Ms. Lewinsky's wish to move to New York and her efforts to involve the President and others in that search antedated and were unrelated to the *Jones* matter.

As to the actual job interviews and offers Ms. Lewinsky later obtained, no relevant circumstances reflect any attempt to obstruct justice. A fuller account of Ms. Lewinsky's job search makes this absolutely plain.

(1) *The United Nations Job*. Ms. Lewinsky interviewed for and was ultimately offered a job at the United Nations. That job interview was arranged by Mr. John Podesta acting at the behest of Ms. Betty Currie. Supp. at 3404 (4/30/98 grand jury testimony of Bill Richardson). Ms. Currie testified that she was acting on her own in undertaking these efforts. Supp. at 592 (5/6/98 grand jury testimony of Betty Currie). In the course of a casual conversation with Ambassador Richardson, Mr. Podesta suggested that Ambassador Richardson interview a former White House employee who was moving to New York. Supp. at 3395 (1/28/98 FBI Form 302 Interview of Bill Richardson). It was not uncommon for Ambassador Richardson to interview persons on a courtesy basis. Supp. at 3418 (4/30/98 grand jury testimony of Bill Richardson). He was impressed with Ms. Lewinsky's resume. Supp. at 3411 (4/30/98 grand jury testimony of Bill Richardson). Ambassador Richardson never spoke to the President about Ms. Lewinsky. He never spoke to Mr. Jordan about Ms. Lewinsky. Supp. at 3422 (4/30/98 grand jury testimony of Bill Richardson). Ambassador Richardson felt no pressure to hire Ms. Lewinsky. Supp. at 3423 (4/30/98 grand jury testimony of Bill Richardson). Ms. Lewinsky was interviewed on October 31, 1997, long before her name appeared on the witness list in the *Jones* case. Supp. at 3718 (5/27/98 grand jury testimony of Mona Sutphen).

She was offered a job at the U.N. and ultimately refused it. There is no evidence that the job offer was related to the *Jones* case and no suggestion that she was coerced or even encouraged to take it. Moreover, there is no evidence that the U.N. job interview and subsequent offer were part of any effort to silence Ms. Lewinsky, or induce her to leave Washington, or cause her to lie in connection with the *Jones* case.

(2) *Private Sector Efforts*. Ms. Lewinsky obtained help in finding a private-sector job from several sources. In late October-early November 1997, Ms. Lewinsky informed her then-boss at the Pentagon, Mr. Kenneth Bacon, that she wanted to seek employment in New York. Supp. at 11 (2/26/98 FBI Form 302 Interview of Kenneth Bacon). This was well before her name appeared on the witness list in the *Jones* case. She told Mr. Bacon that her mother was moving to New York and that she wanted to work in public relations. *Id.* Mr. Bacon then had a conversation with Mr. Howard Paster, the Chairman and CEO of Hill & Knowlton about Ms. Lewinsky's job search. Mr. Paster said that Ms. Connie Chung may have been looking for a researcher. *Id.* On November 24, 1997, Mr.

Bacon wrote to Mr. Paster enclosing Ms. Lewinsky's resume and thanking him for his willingness to talk to Ms. Chung about Ms. Lewinsky. *Id.* Mr. Bacon's involvement reflects several fundamental facts concerning Ms. Lewinsky's search for a New York job: (1) the effort was initiated *by her*; (2) the effort predated the relevant period in the *Jones* matter; and (3) the effort proceeded on multiple fronts—with, as we will see, only very limited involvement by the President.

At the heart of the Referral's obstruction charge is the notion that the President used Mr. Jordan to obtain a job for Ms. Lewinsky in New York in order to silence her or induce her to lie in the *Jones* case. However, the person who contacted Mr. Jordan on Ms. Lewinsky's behalf was Ms. Currie. Supp. at 592–93 (5/6/98 grand jury testimony of Betty Currie); Supp. at 1704 (3/3/98 grand jury testimony of Vernon Jordan); *see also* Supp. at 1755 (3/5/98 grand jury testimony of Vernon Jordan). Ms. Currie took an active role with Mr. Jordan. They were old friends, and she felt comfortable approaching him to help Ms. Lewinsky. Supp. at 592–94 (5/6/98 grand jury testimony of Betty Currie).

The Referral says that Mr. Jordan contacted people from three private companies with recommendations for Ms. Lewinsky. Ref. at 93. Those people were Mr. Peter Georgescu, the Chairman and CEO of Young & Rubicam (the parent of Burson-Marsteller); Ms. Ursula Fairbairn, the Executive Vice President of Human Resources at American Express; and Mr. Richard Halperin, the Executive Vice President and Special Counsel at MacAndrews & Forbes, the parent company of Revlon. Ms. Lewinsky applied for positions with all three companies. As the record makes clear, neither the President nor Mr. Jordan put any pressure on these companies to hire Ms. Lewinsky or tried to engineer the timing of her hiring to coincide with activity in the *Jones* case.

Burson Marsteller. Mr. Jordan telephoned Mr. Georgescu in early December 1997, asking him to take a look at a young White House person for a job. Mr. Jordan did not, in Mr. Georgescu's words, engage in a "sales pitch" about Ms. Lewinsky. Supp. at 1222 (3/25/98 FBI Form 302 Interview of Peter Georgescu). Mr. Georgescu told Mr. Jordan that the company "would take a look at Ms. Lewinsky in the usual way," Supp. at 1219 (1/29/98 FBI Form 302 Interview of Peter Georgescu), and that his own involvement would be "arm's length," Supp. at 1222 (3/25/98 FBI Form 302 Interview of Peter Georgescu). After Mr. Georgescu set up the initial interview, Ms. Lewinsky would be "on [her] own from that point." *Ibid.* Ms. Lewinsky then interviewed with a Ms. Celia Berk of Burson-Marsteller. According to Ms. Berk, her company's actions in Ms. Lewinsky's interviewing process were handled "by the book." Supp. at 111 (3/31/98 FBI Form 302 Interview of Celia Berk). Ms. Lewinsky's "recruitment process," she said, "was somewhat accelerated, but it went through the normal stops." *Ibid.* Burson-Marsteller never offered Ms. Lewinsky a job.

American Express. The person Mr. Jordan spoke with at American Express was Ms. Ursula Fairbairn, the head of Human Resources. Ref. 93. According to Ms. Fairbairn, there was nothing unusual for board members or company officers to recommend talented people for work at American Express. Supp. at 1087 (1/29/

98 FBI Form 302 Interview of Ursula Fairbairn). Indeed Mr. Jordan had recently made another employment recommendation to Ms. Fairbairn at American Express. Supp. at 1087 (1/29/98 FBI Form 302 Interview of Ursula Fairbairn). Ms. Fairbairn felt that no pressure was exerted by Mr. Jordan. Supp. at 1087 (1/29/98 FBI Form 302 Interview of Ursula Fairbairn).

The person Ms. Lewinsky interviewed with was an American Express official in Washington named Mr. Thomas Schick. Ref. at 95. According to Mr. Schick, he never talked to Mr. Jordan at any time during this process. He also said that he felt absolutely no pressure to hire Ms. Lewinsky. Supp. at 3521 (1/29/98 FBI Form 302 Interview of Thomas Schick). Ms. Lewinsky interviewed with Mr. Schick on December 23, 1997. According to Ms. Lewinsky's account of that interview, she was told that she lacked the qualifications necessary for the position. App. at 1480 (8/1/98 FBI Form 302 Interview of Ms. Lewinsky). Ms. Lewinsky was never offered a job at American Express. Supp. at 1714 (3/3/98 grand jury testimony of Vernon Jordan).

MacAndrews & Forbes/Revlon. The person Mr. Jordan first contacted at MacAndrews & Forbes was an Executive Vice President named Mr. Richard Halperin. Ref. at 93. It was not unusual for Mr. Jordan to call him with an employment recommendation. Supp. at 1281 (1/26/98 FBI Form 302 Interview of Richard Halperin); *see also* Supp. at 1294 (4/23/98 grand jury testimony of Richard Halperin) (same). In fact, Mr. Jordan had recommended at least three other persons besides Ms. Lewinsky to MacAndrews & Forbes. Supp. at 1746–47 (3/5/98 grand jury testimony of Vernon Jordan). On this occasion, Mr. Jordan told Mr. Halperin that Ms. Lewinsky was bright, energetic and enthusiastic and encouraged him to meet with Ms. Lewinsky. Supp. at 1286 (3/27/98 Interview of Richard Halperin). Mr. Halperin did not think there was anything unusual about Mr. Jordan's request. *Id.* In Mr. Jordan's telephone call, Mr. Halperin testified that Mr. Jordan did not "ask [Halperin] to work on any particular kind of timetable," Supp. at 1294 (4/23/98 grand jury testimony of Richard Halperin), and Mr. Halperin said that "there was no implied time constraint or requirement for fast action." Supp. at 1286 (3/27/98 FBI Form 302 Interview of Richard Halperin).

Ms. Lewinsky interviewed with Mr. Halperin on December 18, 1997, in New York. Supp. at 1282 (1/26/98 FBI Form 302 Interview of Richard Halperin). At the end of the Lewinsky interview, Mr. Halperin thought Ms. Lewinsky would be "shipped to Revlon" for consideration of opportunities there. Supp. at 1287 (3/27/98 FBI Form 302 Interview of Richard Halperin). Earlier that week, Mr. Halperin had sent Ms. Lewinsky's resume to Mr. Jaymie Durnan of MacAndrews & Forbes for his consideration. *Ibid.*

Mr. Durnan became aware of Ms. Lewinsky in mid-December 1997. Supp. at 1053 (3/27/98 FBI Form 302 Interview of Jaymie Durnan). At that time, he reviewed her resume and decided to interview her after the first of the year. *Ibid.* (He was going on vacation the last two weeks of December.) *Ibid.* When he returned from vacation, he had his assistant schedule an interview with Ms. Lewinsky for January 7, 1998, but, because of scheduling problems, he rescheduled the interview for the next day January 8, 1998.

Supp. at 1049 (1/26/98 FBI Form 302 Interview of Jaymie Durnan). Mr. Durnan's decision to interview Ms. Lewinsky was made independently of the decision by Mr. Halperin to interview her. Indeed, only when Mr. Durnan interviewed Ms. Lewinsky in January did he discover that she had had a December interview with Mr. Halperin. *Ibid.*

Ms. Lewinsky interviewed with Mr. Durnan on the morning of January 8th. Mr. Durnan thought she was impressive for entry level work. Supp. at 1049 (1/26/98 FBI Form 302 Interview of Jaymie Durnan). After that interview, Mr. Durnan concluded that Ms. Lewinsky would have "fit in" at the parent company (MacAndrews & Forbes), but that there was nothing available at the time that matched her interest. He also thought she might be suitable for MacAndrews & Forbes' subsidiary Revlon. Supp. at 1054 (3/27/98 FBI Form 302 Interview of Jaymie Durnan). He decided to send her resume to Revlon. He left a message for Ms. Allyn Seidman (Senior VP of Corporate Communications) at Revlon and forwarded Ms. Lewinsky's resume to her. Supp. at 1049-50 (1/26/98 FBI Form 302 Interview of Jaymie Durnan).

That same day, Mr. Jordan spoke to Mr. Ronald Perelman, CEO of MacAndrews & Forbes, by telephone and mentioned to Mr. Perelman that Ms. Lewinsky had interviewed with MacAndrews & Forbes. However, Mr. Jordan made no specific requests and did not ask Mr. Perelman to intervene. Supp. at 3273 (1/26/98 FBI Form 302 Interview of Ronald Perelman); Supp. at 3276 (3/27/98 FBI Form 302 Interview of Ronald Perelman). Later that day, Mr. Durnan spoke to Mr. Perelman, who mentioned that he had had a call from Mr. Jordan about a job candidate. Mr. Perelman simply told Mr. Durnan "let's see what we can do," and Mr. Perelman later told Mr. Jordan that they would do what they could. Mr. Jordan expressed no time constraint to Mr. Perelman. *Ibid.*

By the time Mr. Perelman spoke to Mr. Durnan, Mr. Durnan had already passed on Ms. Lewinsky's resume to Ms. Seidman at Revlon. Supp. at 1049-50 (1/26/98 FBI Form 302 Interview of Jaymie Durnan). After speaking with Mr. Perelman, Mr. Durnan actually spoke to Ms. Seidman about Ms. Lewinsky for the first time. Supp. at 1054-55 (3/27/98 FBI Form 302 Interview of Jaymie Durnan). Upon speaking to Ms. Seidman about Ms. Lewinsky, Mr. Durnan did not tell Ms. Seidman that CEO Perelman had expressed an interest in Lewinsky. Supp. at 1055 (3/27/98 FBI Form 302 Interview of Jaymie Durnan). Rather, he simply told Ms. Seidman that if she liked Ms. Lewinsky, she should hire her. Supp. at 1050 (1/26/98 FBI Form 302 Interview of Jaymie Durnan).

According to Mr. Durnan, Mr. Perelman never said or implied that Ms. Lewinsky had to be hired. Indeed, Mr. Durnan concluded that Ms. Lewinsky's hiring was not mandatory. Supp. at 1055 (3/27/98 FBI Form 302 Interview of Jaymie Durnan). According to Ms. Seidman, Mr. Durnan told Ms. Seidman that he thought she should interview Ms. Lewinsky because he thought she was a good candidate. Supp. at 3634 (4/23/98 grand jury testimony of Allyn Seidman). In fact, there is nothing in the record to suggest that Ms. Seidman even knew that Mr. Perelman had any interest at all in Ms. Lewinsky. Supp. at 3643 (4/23/98 grand jury testimony of Allyn Seidman). And there's no evidence that Mr. Perelman in-

structed or suggested to Ms. Seidman that she conduct that interview. Supp. at 3642 (4/23/98 grand jury testimony of Allyn Seidman). Having seen his name in Ms. Lewinsky's application materials, Ms. Seidman was aware that Ms. Lewinsky had some connection with Mr. Jordan, but there is no evidence that Ms. Seidman was aware of Mr. Jordan's January 8th call to Mr. Perelman. Supp. at 3643 (4/23/98 grand jury testimony of Allyn Seidman).

In fact, the next day when Ms. Seidman interviewed Ms. Lewinsky, she liked her so well she decided to hire her that very day. Supp. at 3643 (4/23/98 grand jury testimony of Allyn Seidman). And when Ms. Seidman decided to hire Ms. Lewinsky, there is no evidence that Mr. Perelman or Mr. Durnan or Mr. Halperin told her to do that. Supp. at 3643 (4/23/98 grand jury testimony of Allyn Seidman). The decision to hire Ms. Lewinsky was made by Ms. Seidman completely unaware of Mr. Jordan's January 8 telephone call.

c. The Referral Falsely Suggests Obstruction by Suppressing Crucial Facts

As the foregoing narrative establishes, there was a great deal more to Ms. Lewinsky's job search than the Referral acknowledges. Indeed, the events of December and January (upon which the Referral's obstruction theory places such reliance) assume quite a different cast when the details are filled in. It becomes clear that the Referral has completely suppressed a host of pertinent facts, every one of them relevant to the question whether Ms. Lewinsky's job was procured at a crucial time in the *Jones* case in exchange for a false affidavit or to buy her silence. Among those set forth in the above narrative, those omitted facts include the following:

- That Ms. Lewinsky believed that her discussions with the President about a job were "part of her relationship with" the President. App. at 1461 (7/31/98 FBI Form 302 Interview).
- That Ms. Lewinsky raised the prospect of moving to New York in a September 2, 1997 e-mail message to a friend. App. at 2811;
- That the idea of obtaining Mr. Jordan's assistance may have originated with Ms. Tripp. App. at 822-24 (8/6/98 grand jury testimony of Ms. Lewinsky);
- That Ms. Lewinsky was simultaneously pursuing New York jobs through avenues other than the President and his associates, Supp. at 11 (2/26/98 FBI Form 302 Interview of Kenneth Bacon);
- That those efforts occurred well before her name appeared on the witness list in the *Jones* case, Supp. at 11 (2/26/98 FBI Form 302 Interview of Kenneth Bacon);
- That Mr. Jordan put no pressure on Mr. Peter Georgescu of Young & Rubicam/Burson Marsteller and that Mr. Georgescu told Mr. Jordan that the company "would take a look at Ms. Lewinsky in the usual way." Supp. at 1219 (1/29/98 FBI Form 302 Interview of Peter Georgescu), that Mr. Georgescu's involvement would be "arm's length," and that after he set up the initial interview, Ms. Lewinsky would be "on [her] own from that point," Supp. at 1222 (3/25/98 FBI Form 302 Interview of Peter Georgescu);
- That Ms. Lewinsky's interview with a Ms. Celia Berk of Burson-Marsteller was handled "by the book", Supp. at 111 (3/31/

98 FBI Form 302 Interview of Celia Berk), and that it “went through the normal stops.” *Ibid.*;

- That Burson-Marsteller never offered Ms. Lewinsky a job;
- That Ms. Lewinsky’s initial contact with American Express was not extraordinary because according to Ms. Ursula Fairbairn, there was nothing unusual for board members or company officers to recommend talented people for work at American Express, Supp. at 1087 (1/29/98 FBI Form 302 Interview of Ursula Fairbairn);
- That Mr. Jordan had recently made another employment recommendation to Ms. Fairbairn at American Express, Supp. at 1087 (1/29/98 FBI Form 302 Interview of Ursula Fairbairn);
- That Ms. Fairbairn felt that no pressure was exerted by Mr. Jordan, Supp. at 1087 (1/29/98 FBI Form 302 Interview of Ursula Fairbairn);
- That the person Ms. Lewinsky interviewed with at American Express, an official named Mr. Thomas Schick, never talked to Mr. Jordan at any time during this process, Supp. at 3521 (1/29/98 FBI Form 302 Interview of Thomas Schick);
- That Mr. Schick stated that he felt absolutely no pressure to hire Ms. Lewinsky, Supp. at 3521 (1/29/98 FBI Form 302 Interview of Thomas Schick);
- That during Ms. Lewinsky’s interview with Mr. Schick on December 23, 1997, she was told that she lacked the qualifications necessary for the position, App. 1480 (8/1/98 FBI Form 302 Interview of Ms. Lewinsky);
- That Ms. Lewinsky was never offered a job at American Express;
- That the person Mr. Jordan first contacted at MacAndrews & Forbes/Revlon was an Executive Vice President named Mr. Richard Halperin who said that it was not unusual for Mr. Jordan to call him with an employment recommendation, Supp. at 1281 (1/26/98 FBI Form 302 Interview of Richard Halperin), and that he did not think there was anything unusual about Mr. Jordan’s request, Supp. at 1286 (3/27/98 FBI Form 302 Interview of Richard Halperin);
- That in Mr. Jordan’s call to Mr. Halperin, Mr. Jordan did not “ask [Halperin] to work on any particular kind of timetable,” Supp. at 1294 (4/23/98 grand jury testimony of Richard Halperin), and that “there was no implied time constraint or requirement for fast action,” Supp. at 1286 (3/27/98 FBI Form 302 Interview of Richard Halperin);
- That Ms. Lewinsky’s interview with Mr. Halperin was scheduled for December 18, 1997 in New York at her request, Supp. at 1282 (1/26/98 FBI Form 302 Interview of Richard Halperin);
- That earlier that week, Mr. Halperin, with no input from Mr. Jordan or MacAndrews and Forbes CEO Ronald Perelman, had sent Ms. Lewinsky’s resume to Jaymie Durnan for his consideration, *Ibid.*;
- That Mr. Durnan became aware of Ms. Lewinsky in mid-December 1997, Supp. at 1053 (3/27/98 FBI Form 302 Interview of Jaymie Durnan), and that at that time, he reviewed her resume and decided to interview her after the first of the year, *Ibid.*;
- That when Mr. Durnan returned from vacation, he had his assistant schedule an interview with Ms. Lewinsky for January 7,

1998, but, because of scheduling problems, he rescheduled the interview for the next day January 8, 1998, Supp. at 1049 (1/26/98 FBI Form 302 Interview of Jaymie Durnan);

- That Mr. Durnan's decision to interview Ms. Lewinsky was made independently of the decision by Mr. Halperin to interview her;

- That when Ms. Lewinsky interviewed with Mr. Durnan on the morning of January 8th, Mr. Durnan thought she was impressive for entry level work, Supp. at 1049 (1/26/98 FBI Form 302 Interview of Jaymie Durnan);

- That Mr. Durnan concluded that Ms. Lewinsky would have "fit in" at the parent company (MacAndrews & Forbes Holdings) but that there was nothing available at the time that matched her interest and so, for that reason, he referred her to Revlon, thinking she might be suitable for that company, Supp. at 1054 (3/27/98 FBI Form 302 Interview of Jaymie Durnan). He decided to send her resume to Revlon;

- That, as the Referral makes so much of, Mr. Jordan did speak to CEO Ronald Perelman on January 8, 1998, but that Mr. Jordan made no specific requests and did not ask Mr. Perelman to intervene, Supp. at 3273 (1/26/98 FBI Form 302 Interview of Ronald Perelman); Supp. at 3276 (3/27/98 FBI Form 302 Interview of Ronald Perelman);

- That in that call, Mr. Jordan did not say that there was any time constraint involved in considering Ms. Lewinsky for a job, Supp. at 3276 (3/27/98 FBI Form 302 Interview of Ronald Perelman);

- That on that same day, Mr. Perelman spoke to Mr. Durnan about Ms. Lewinsky, but he simply told Mr. Durnan "let's see what we can do," *Ibid.*, and later told Mr. Jordan only that they would do what they could, *Ibid.*;

- That at the time Mr. Perelman spoke to Mr. Durnan, Mr. Durnan had already passed Ms. Lewinsky's resume over to Ms. Allyn Seidman (Senior VP Corporate Communications) at Revlon, Supp. at 1049-50 (1/26/98 FBI Form 302 Interview of Jaymie Durnan);

- That upon first speaking to Ms. Seidman about Ms. Lewinsky, *Mr. Durnan did not tell Ms. Seidman that CEO Perelman had expressed an interest in Lewinsky.* Supp. at 1055 (3/27/98 FBI Form 302 Interview of Jaymie Durnan). Rather, *he simply told Ms. Seidman that if she liked ML, she should hire her,* Supp. at 1050 (1/26/98 FBI Form 302 Interview of Jaymie Durnan);

- That Mr. Perelman never said or implied that Ms. Lewinsky had to be hired and that Mr. Durnan concluded that Ms. Lewinsky's hiring was not mandatory, Supp. at 1055 (3/27/98 FBI Form 302 Interview of Jaymie Durnan);

- That according to Ms. Seidman, Mr. Durnan told Ms. Seidman that he thought she should interview Ms. Lewinsky because he thought she was a good candidate, Supp. at 3634 (4/23/98 grand jury testimony of Allyn Seidman);

- That according to Ms. Seidman, when she interviewed Ms. Lewinsky, she liked her a great deal and so decided to hire her that very day, Supp. at 3643 (4/23/98 grand jury testimony of Allyn Seidman);

- And that when Ms. Seidman decided to hire Ms. Lewinsky, there is no evidence that Mr. Perelman or Mr. Durnan or Mr. Halperin told her to do that, Supp. at 3643 (4/23/98 grand jury testimony of Allyn Seidman).

Every one of the foregoing facts is relevant to the case for obstruction of justice. Every one of them suggests that there was no obstruction. And every one of them is missing from the Referral.

d. The Referral Omits Ms. Lewinsky's Own Statement of Her Reason for Seeking the President's Help in Obtaining A New York Job

Ms. Lewinsky expressly told the OIC that her principal reason for moving to New York was her understanding—growing throughout 1997 and confirmed on October 6, 1997—that she would never work in the White House again:

“LEWINSKY advised that the main reason she looked for a job in New York was because TRIPP said that ‘KATE at NSC’ said LEWINSKY would never get a job in the White House . . .” LEWINSKY advised TRIPP told LEWINSKY this in an October 6, 1997 telephone call. App. at 1419–20 (7/29/98 FBI Form 302 Interview of Ms. Lewinsky).

Despite the fact that Ms. Lewinsky stated that this was her “main reason for look[ing] for a job in New York,” that statement is nowhere to be found in the Referral. And despite the fact that she apparently reached this decision on October 6, 1997, that fact too is not part of the Referral’s chronology of “key events.” These two facts sharply undermine the OIC’s insistence that the President’s assistance to Ms. Lewinsky in obtaining a job in New York was motivated by an intent to obstruct justice in the *Jones* case’s December-January discovery proceedings, but they are missing from the Referral.

e. The Referral Leaves Out Direct Evidence Contradicting the Notion that Ms. Lewinsky's Job Was Procured in Exchange for Silence or for a False Affidavit

The OIC’s chronology of key events plainly intends to suggest that Ms. Lewinsky’s *Jones* affidavit was signed in exchange for a New York job. What the chronology omits are the following statements made by Ms. Lewinsky showing that *there simply was no job-for-affidavit deal of any kind*:

“[t]here was no agreement with the President, JORDAN, or anyone else that LEWINSKY had to sign the *Jones* affidavit before getting a job in New York. LEWINSKY never demanded a job from JORDAN in return for a favorable affidavit. Neither the President nor JORDAN ever told LEWINSKY that she had to lie.” App. at 1398 (7/27/98 FBI Form 302 Interview of Ms. Lewinsky); and that *the only person who suggested that she sign the affidavit in exchange for a job was Ms. Tripp*: “TRIPP told LEWINSKY not to sign the affidavit until LEWINSKY had a job.” App. at 1493 (8/2/98 FBI Form 302 Interview of Ms. Lewinsky);

Ms. Tripp made Ms. Lewinsky promise her not to sign an affidavit without first telling Jordan “no job, no affidavit.” App. at 900 (8/6/98 grand jury testimony of Ms. Lewinsky);

Ms. Tripp said to Ms. Lewinsky: “Monica, promise me you won’t sign the affidavit until you get the job. Tell Vernon you won’t sign the affidavit until you get the job because if you sign the affidavit before you get the job they’re never going to give you the job.” App. at 902 (8/6/98 grand jury testimony of Ms. Lewinsky);

Ms. Lewinsky reiterated that, “as I mentioned earlier, she [Tripp] made me promise her that I wouldn’t sign the affidavit until I got the job.” App. at 933 (8/6/98 grand jury testimony of Ms. Lewinsky);

“I [Ms. Lewinsky] told Mr. Jordan I wouldn’t sign the affidavit until I got a job. That was definitely a lie, based on something Linda had made me promise her on January 9th.” App. at 1134 (8/20/98 grand jury testimony of Ms. Lewinsky).

Five distinct statements by Ms. Lewinsky make Ms. Tripp the sole source of the job-for-affidavit notion which the OIC holds out as the heart of the obstruction case. Ms. Lewinsky’s recitation of Ms. Tripp’s statements are the only direct evidence contained in the appendices bearing on that idea. *Yet these statements are nowhere to be found in the Referral.*

f. The Referral Suppresses Directly Exculpatory Statements of Ms. Lewinsky

Finally, the OIC’s chronology of key events fails to include the following three statements of Ms. Lewinsky bearing directly on the core of this issue. The first was made in Ms. Lewinsky’s original proffer on February 1, 1998:

“Neither the Pres[ident] nor Mr. Jordan (or anyone on their behalf) asked or encouraged me to lie.” App. at 718.

The second was made in her very first interview with the OIC:

[t]here was no agreement with the President, JORDAN, or anyone else that LEWINSKY had to sign the Jones affidavit before getting a job in New York. LEWINSKY never demanded a job from JORDAN in return for a favorable affidavit. Neither the President nor JORDAN ever told LEWINSKY that she had to lie.

App. at 1398 (7/27/98 FBI Form 302 Interview of Ms. Lewinsky). The third was made at the close of Ms. Lewinsky’s grand jury testimony in response to a question from a grand juror:

Q. Monica, is there anything that you would like to add to your prior testimony . . . anything that you think needs to be amplified on or clarified?

A. . . . I would just like to say that no one ever asked me to lie and I was never promised a job for my silence.

App. at 1161 (8/20/98 grand jury testimony of Ms. Lewinsky).

From initial proffer to the last minutes of her grand jury appearance, the testimony of Ms. Lewinsky (the OIC’s principal witness) has been clear and consistent on this obstruction issue: she was never asked or encouraged to lie or promised a job for silence or for a favorable affidavit.

g. Conclusion

There was no obstruction of justice in connection with Ms. Lewinsky’s job search. That search was undertaken long before her involvement in the *Jones* case was known to anyone. It involved individuals other than the President and his friends. It resulted in several dead ends. It was not conducted according to any timetable,

explicit or tacit. It was completed without pressure of any kind and without reference to the *Jones* case.

The Referral's insinuations to the contrary are just that. When the omissions and falsely suggestive juxtapositions are examined, the truth becomes clear: The jobs-based obstruction charge lacks even the most basic circumstantial support.

3. *The President Did Not Have an Agreement or Understanding with Ms. Lewinsky to Lie Under Oath*

The Committee appears to be considering an article of impeachment concerning the assertion in the Referral that President Clinton and Ms. Lewinsky had an understanding or agreement that they would lie under oath in the *Jones* case about their relationship. Ref. at 173; see also Schippers Presentation at 13 ("the two agreed that they would employ the same cover story in the *Jones* case"). Both the Starr Referral and the Majority's presentation simply ignore the fact that neither Ms. Lewinsky nor the President testified that they had any such agreement regarding their testimony in the *Jones* case. To the contrary, Ms. Lewinsky stated repeatedly that she was neither asked nor encouraged to lie, by the President or anyone else on his behalf. And Ms. Lewinsky never testified that the President ever discussed with her in any way the substance or content of his own testimony. There simply was no such agreement, and neither the OIC nor the majority have cited any testimony by either of the supposed conspirators that supports one. This allegation of obstruction of justice attempts to rest solely on the shaky basis that the President and Ms. Lewinsky attempted to conceal the improper nature of their relationship while it was on-going.

In the Referral, Mr. Starr inexplicably never once quotes Ms. Lewinsky's repeated, express denials that anyone had told her to lie in the *Jones* case and therefore does not even attempt to reconcile them with his theory of obstruction:

- "Neither the Pres[ident] nor Mr. Jordan (or anyone on their behalf) asked or encouraged Ms. L[ewinsky] to lie." App. at 718 (2/1/98 Proffer).

- "I think I told [Tripp] that—you know at various times the President and Mr. Jordan had told me I had to lie. That wasn't true." App. at 942 (Ms. Lewinsky's 8/6/98 grand jury testimony).

- "I think because of the public nature of how this investigation has been and what the charges aired, that I would just like to say that no one ever asked me to lie and I was never promised a job for my silence." App. at 1161 (Ms. Lewinsky's 8/20/98 grand jury testimony).

- "Neither the President nor Jordan ever told Lewinsky that she had to lie." App. at 1398 (7/27/98 FBI Form 302 Interview of Ms. Lewinsky).

- "Neither the President nor anyone ever directed Lewinsky to say anything or to lie . . ." App. at 1400 (7/27/98 FBI Form 302 Interview of Ms. Lewinsky).

The Referral alleges that during the course of their admittedly improper relationship, the President and Ms. Lewinsky concealed the nature of their relationship from others. This is hardly a remarkable proposition. The use of "cover stories" to conceal such a

relationship, apart from any proceeding, is, however unpraiseworthy, not unusual and certainly not an obstruction of justice. Ms. Lewinsky's explicit testimony clearly indicates that the conversations she said she had with the President about denying the relationship had occurred long before her involvement in the *Jones* case. The following exchange occurred between Ms. Lewinsky and a grand juror:

Q. Is it possible that you had these discussions [about denying the relationship] after you learned that you were a witness in the Paula Jones case?

A. I don't believe so. No.

Q. Can you exclude that possibility?

A. I pretty much can. . . .

App. at 1119 (8/20/98 grand jury testimony of Ms. Lewinsky).

The Starr Referral cites only one specific statement that Ms. Lewinsky claims the President made to her regarding the substance of her testimony. Ms. Lewinsky testified that "At some point in the conversation, and I don't know if it was before or after the subject of the affidavit came up, [the President] sort of said, 'You know, you can always say you were coming to see Betty or that you were bringing me letters.'" App. at 843 (8/6/98 grand jury testimony of Ms. Lewinsky). As an initial matter, the President stated in his grand jury testimony that he did not recall saying anything like that in connection with Ms. Lewinsky's testimony in the *Jones* case:

Q. And in that conversation, or in any conversation in which you informed her she was on the witness list, did you tell her, you know, you can always say that you were coming to see Betty or bringing me letters? Did you tell her anything like that?

A. I don't remember. She was coming to see Betty. I can tell you this. I absolutely never asked her to lie.

App. at 568. The President testified that he and Ms. Lewinsky "might have talked about what to do in a non-legal context at some point in the past," but that he had no specific memory of that conversation. App. at 569.

Even if that conversation did take place, neither of those two ambiguous statements would be false, and neither statement was ever made by Ms. Lewinsky in the *Jones* case. Ms. Lewinsky stated on several occasions that the so-called "cover stories" were not false. In her handwritten proffer, Ms. Lewinsky stated that the President told her if anyone asked her about her visits to the Oval Office, that she could say "she was bringing him letters (when she worked in Legislative Affairs) or visiting Betty Currie (after she left the White House)." App. at 709 (2/1/98 Proffer). Ms. Lewinsky expressly told the OIC: "*There is truth to both of these statements.*" App. at 709 (2/1/98 Proffer) (emphasis added). Ms. Lewinsky also said that this conversation took place "*prior to the subpoena* in the Paula Jones case." App. at 718 (2/1/98 Proffer) (emphasis added). Ms. Lewinsky alleged that the President mentioned these explanations again after the President told her she was on the witness list and reiterated that "[n]either of those statements [was] untrue." App. at 712 (2/1/98 Proffer) (emphasis added). Ms. Lewinsky also stated in her proffer that "[t]o the best of Ms. L's memory, she does not believe they discussed the content of any deposition that Ms. L might be involved in at a later date." App. at 712 (2/1/98 Proffer).

Ms. Lewinsky testified to the grand jury that she did bring papers to the Oval Office and that on some occasions, she visited the Oval Office *only* to see Ms. Currie:

Q. Did you actually bring [the President] papers at all?

A. Yes.

Q. All right. And tell us a little about that.

A. It varied. Sometimes it was just actual copies of letters. . . .

App. at 774–75 (8/6/98 grand jury testimony of Ms. Lewinsky).

“I saw Betty on every time that I was there . . . most of the time my purpose was to see the President, but there were some times when I did just go see Betty but the President wasn’t in the office.

App. at 775 (8/6/98 grand jury testimony of Ms. Lewinsky).

Mr. Starr and the Schippers’ presentation ignore Ms. Lewinsky’s assertion that the so-called “cover stories” were literally true, attempting instead to build an obstruction case on the flimsy assertions that (1) her White House job never *required* her to deliver papers for the President’s signature; and (2) her *true* purpose in visiting the Oval Office was to see the President, and not Ms. Currie. Ref. at 176–77. In other words, the OIC suggests that these responses might have been misleading. But literal truth is a critical issue in perjury and obstruction cases, as is Ms. Lewinsky’s belief that the statements were, in fact, literally true.

4. *The President Did Not Obstruct Justice by Suggesting Ms. Lewinsky Could File an Affidavit*

The Starr Referral alleges that President Clinton endeavored to obstruct justice based on Ms. Lewinsky’s testimony that the President told her, “Well maybe you can sign an affidavit” in the *Jones* case. See App. at 843; Ref. at 173. The President never told Ms. Lewinsky to file a false affidavit or otherwise told her what to say in the affidavit—indeed the OIC makes no contention that the President ever told Ms. Lewinsky to file a *false* affidavit. But a suggestion that perhaps she could submit written testimony in lieu of a deposition, *if* he made it, is hardly improper—let alone an obstruction of justice. The President was aware that other potential deponents in the *Jones* case had filed affidavits in an attempt to avoid the expense, burden, and humiliation of testifying in the *Jones* case, and that there was a chance that doing so might enable Ms. Lewinsky to avoid testifying. Even if the affidavit did not disclose every possible fact regarding their relationship, since the *Jones* case concerned allegations of nonconsensual sexual solicitation, a truthful albeit limited affidavit *might* have allowed her to have avoided giving a *Jones* deposition.

The President’s testimony overwhelmingly indicates that he had no intention that Ms. Lewinsky file a false affidavit—and no testimony to the contrary has been presented. *No fewer than eight times* in his testimony to the grand jury, the President explained that he thought she could and would execute a truthful affidavit that would establish she was not relevant to the *Jones* case:

• “Q. Did you talk with Ms. Lewinsky about what she meant to write in her affidavit?”

A. I didn’t talk to her about her definition. I did not know what was in this affidavit before it was filled out specifically. I did not know what words were used specifically before it was filled out, or what meaning she gave to them. But I’m just telling you that it’s certainly true what she says here, that we didn’t have—there was no

employment, no benefit in exchange, there was nothing having to do with sexual harassment. And if she defined sexual relationship in the way that I think most Americans do, meaning intercourse, then she told the truth.” App. at 474.

- “You know, I believed then, I believe now, that Monica Lewinsky could have sworn out an honest affidavit, that under reasonable circumstances, and without the benefit of what Linda Tripp did to her, would have given her a chance not to be a witness in this case.” App. at 521.

- which, under reasonable circumstances with fair-minded, non-politically oriented people, would result in her being relieved of the burden to be put through the kind of testimony that, thanks to Linda Tripp’s work with you and with the Jones lawyers, she would have been put through. I don’t think that’s dishonest, I don’t think that’s illegal.” App. at 529.

- “But I also will tell you that I felt quite comfortable that she could have executed a truthful affidavit, which would not have disclosed the embarrassing details of the relationship that we had had, which had been over for many, many months by the time this incident occurred.” App. at 568–69.

- “I said I thought this could be a truthful affidavit. And when I read it, since that’s the way I would define it, since—keep in mind, she was not, she was not bound by this sexual relations definition, which is highly unusual; I think anybody would admit that. When she used a different term, sexual relationship, if she meant by that what most people meant by it, then that is not an untruthful statement.” App. at 474–75.

- “I believe that the common understanding of the term, if you say two people are having a sexual relationship, most people believe that includes intercourse. So, if that’s what Ms. Lewinsky thought, then this is a truthful affidavit. I don’t know what was in her mind. But if that’s what she thought, the affidavit is true.” App. at 475.

- “Q. Did you tell her to tell the truth?

“A. Well, I think the implication was she would tell the truth. I’ve already told you that I felt strongly that she could issue, that she could execute an affidavit that would be factually truthful, that might get her out of having to testify. Now, it obviously wouldn’t if the Jones people knew this, because they knew that if they could get this and leak it, it would serve their larger purposes, even if the judge ruled that she couldn’t be a witness in the case. The judge later ruled she wouldn’t be a witness in the case. The judge later ruled the case had no merit.

So, I knew that. And did I hope she’d be able to get out of testifying on an affidavit? Absolutely. Did I want her to execute a false affidavit? No, I did not.” App. at 571.

- “I believe at the time that she filled out this affidavit, if she believed that the definition of sexual relationship was two people having intercourse, then this is accurate. And I believe that is the definition that most ordinary Americans would give it.

If you said Jane and Harry have a sexual relationship, and you’re not talking about people being drawn into a lawsuit and being given definitions, and then a great effort to trick them in some way, but you are just talking about people in ordinary conversations, I’ll bet the grand jurors, if they were talking about two people they know, and said they have a sexual relationship, they meant they were sleeping together; they meant they were having intercourse together.” App. at 473.

There is simply no evidence that contradicts the President’s stated intention that the affidavit be limited but truthful. In other words, there is simply no evidence that the President had any “corrupt” intent, which is a requisite element of obstruction of justice.

Ms. Lewinsky’s repeated statements that she was not asked or encouraged to lie similarly negate the allegation that the President asked or encouraged her to file a false affidavit, and yet Mr. Starr omitted these statements from his Referral:

- “Neither the Pres[ident] nor Mr. Jordan (or anyone on their behalf) asked or encouraged Ms. L[ewinsky] to lie.” App. at 718 (2/1/98 Proffer).

“I think I told [Tripp] that—you know at various times the President and Mr. Jordan had told me I had to lie. That wasn’t true.” App. at 942 (8/6/98 grand jury testimony).

- “I think because of the public nature of how this investigation has been and what the charges aired, that I would just like to say that no one ever asked me to lie and I was never promised a job for my silence.” App. at 1161 (8/20/98 grand jury testimony).

- “Neither the President nor Jordan ever told Lewinsky that she had to lie.” App. at 1398 (7/27/98 FBI Form 302 Interview of Ms. Lewinsky).
- “Neither the President nor anyone ever directed Lewinsky to say anything or to lie . . .” App. at 1400 (7/27/98 FBI 302 Form Interview of Ms. Lewinsky).

Furthermore, Ms. Lewinsky states that she believed, when she executed the affidavit, that it was accurate given what she believed to be the definition of a “sexual relationship”:

- “Ms. L[ewinsky] was comfortable signing the affidavit with regard to the sexual relationship because she could justify to herself that she and the Pres[ident] did not have sexual intercourse.” App. at 718 (2/1/98 Proffer).
- “Lewinsky said her use of the term “having sex” means having intercourse . . .” App. at 1558 (8/19/98 FBI 302 Form Interview of Ms. Lewinsky).
- “I never even came close to sleeping with [the President] . . . We didn’t have sex . . . Having sex is having intercourse . . . Having sex is having intercourse. That’s how most people would—” Supp. at 2664 (Linda Tripp tape of a conversation between Ms. Lewinsky and Ms. Tripp).¹⁴⁹

Moreover, Ms. Lewinsky told the OIC that she believed the President himself made such a distinction: “After having a relationship with him, Lewinsky deduced that the President, in his mind, apparently does not consider oral sex to be sex. Sex to him must mean intercourse.” App. at 1558 (8/19/98 FBI 302 Form Interview of Ms. Lewinsky).

In short, the President never told Ms. Lewinsky what to say in the affidavit, he knew that Ms. Lewinsky had her own lawyer to protect her interests, and he expressly declined the opportunity to review the content of the affidavit, according to Ms. Lewinsky, *see* App. at 1489 (8/2/98 FBI Form 302 Interview of Ms. Lewinsky). The President repeatedly testified that he did not intend Ms. Lewinsky to file a false affidavit, and the above-referenced statements of Ms. Lewinsky indicate that, at the time she executed it, she believed her affidavit was literally true.

The OIC’s allegation depends on the argument that it somehow was an obstruction of justice to fail to ensure that Ms. Lewinsky volunteered in her affidavit all information that the *Jones* lawyers might have used to attack the President in their politically motivated lawsuit. There simply is no such duty under the law, nor does the OIC cite any basis for such a duty. Civil litigation is based upon an *adversarial* process of determining truth, and a party is under no affirmative obligation to assist an opponent in every way it can.

The OIC also claims that the President obstructed justice by allegedly suggesting a misleading answer to a hypothetical question posed to him by Ms. Lewinsky. Ref. at 178. Ms. Lewinsky told the grand jury that in a phone conversation with the President on January 5, she told him that Mr. Carter had asked her some sample questions that she was unsure of how to answer. App. at 912–13 (8/6/98 grand jury testimony of Ms. Lewinsky). One of the questions was how she got her job at the Pentagon. *Id.* Ms. Lewinsky told the grand jury that “when I told him the questions about my job at the Pentagon, he said, “Well, you could always say that the people in Legislative Affairs got it for you or helped you get it.” *And there was a lot of truth to that.* I mean, it was a generality,

¹⁴⁹A friend of Ms. Lewinsky’s also testified that she believed that Ms. Lewinsky did not lie in her affidavit based on her understanding that when Ms. Lewinsky referred to “sex” she meant intercourse. Supp. at 4597 (6/23/98 grand jury testimony of Ms. Dale Young).

but that was—I said ‘Well that’s a good idea. Okay.’” App. at 917 (8/6/98 grand jury testimony of Ms. Lewinsky) (emphasis added). In her written proffer, Ms. Lewinsky also told the OIC that the President told her she could say “The people in Legislative Affairs helped you.” App. at 717 (2/1/98 Proffer). She also stated, “this is, in fact, part of the truth—but not the whole truth.” *Id.* A third time, “Lewinsky advised [the OIC] that that explanation was true, but it was not the entire truth.” App. at 1489 (8/2/98 FBI Form 302 Interview of Ms. Lewinsky).

The OIC claims that this conversation recounted by Ms. Lewinsky was an obstruction of justice because the President encouraged Ms. Lewinsky to file a false affidavit. This conclusion ignores the fact that the conversation recounted by Ms. Lewinsky had nothing to do with her affidavit. But that is only the first problem with the OIC’s claim. The Referral also failed to include any of Ms. Lewinsky’s three separate statements that what the President allegedly had told her to say had “a lot of truth” to it. And, in claiming that that story was misleading because Ms. Lewinsky “in fact had been transferred because she was around the Oval Office too much,” Ref. at 178, the OIC ignored the fact that the question asked was not why Ms. Lewinsky was transferred out of the White House but rather how she got her job at the Pentagon.

Finally, the OIC suggests that the President was “knowingly responsible” for a misstatement of fact to a federal judge because he failed to correct a statement made by his lawyer to the court in the *Jones* deposition. The President testified to the grand jury that the lawyers’ argument at the start of the deposition “passed [him] by.” There is of course no legal obligation imposed on a client to listen to every word his attorney says, and there is no evidence that the President focused on or absorbed his attorney’s remark. Without any evidence whatsoever, the OIC asserts that the President knew what was said, knew he was somehow responsible for it, knew it was incorrect, and ignored a duty to correct it. Yet, again, this is a wholly unsupported allegation of obstruction of justice.

5. The President Did Not Attempt To Influence Betty Currie’s Testimony

The OIC charges that President Clinton obstructed justice and improperly attempted to influence a witness when he spoke with Ms. Currie the day after his deposition in the *Jones* case. The OIC’s claims are the product of extraordinary overreaching and pejorative conjecture—a transparent attempt to draw the most negative inference possible about lawful conduct.

The President’s actions could not as a matter of law give rise to either charge because Ms. Currie was not a witness in any proceeding at the time he spoke with her; there was no reason to suspect she would play any role in the *Jones* case; her name had not appeared on any of the *Jones* witness lists; she had not been named as a witness in the *Jones* case; and the discovery period in the case was down to its final days. Nor did the President have any reason to suspect that the OIC had embarked on a wholly new phase of its four-year investigation, one in which Ms. Currie would later be called by the OIC as a witness. To obstruct a proceeding or tamper with a witness, there must be both a proceeding and a witness.

Here, there was (as far as the President knew) neither. Furthermore, Ms. Currie testified that she felt no pressure to agree with the questions that the President asked her. Despite the Referral's suggestion to the contrary, there was no reason the President should not have spoken with Ms. Currie about Ms. Lewinsky.

Indeed, it is hardly surprising that the President would have reached out to Ms. Currie after the deposition. As he knew, Ms. Currie was Ms. Lewinsky's friend. The President had just faced unexpected, detailed, and hostile questioning from fierce political opponents in the *Jones* case about Ms. Lewinsky. He was obviously puzzled at being asked such precise, and in some cases such bizarrely inaccurate, questions about a past secret relationship. The President also explained that he was expecting media questions, based on the Drudge Report indicating that Newsweek was pursuing the story of his relationship with Ms. Lewinsky. The President testified:

I do not remember how many times I talked to Betty Currie or when. I don't. I can't possibly remember that. I do remember, when I first heard about this story breaking, trying to ascertain what the facts were, trying to ascertain what Betty's perception was. I remember that I was highly agitated, understandably, I think.

App. at 593. He had no one to whom he could talk freely about the relationship, but he nonetheless had a desire to find out what might have transpired with Ms. Lewinsky (e.g., was she—to Ms. Currie's knowledge—aiding his opponents in the *Jones* case?) and to test whether his recollection was accurate, since he had not anticipated or prepared for such detailed questions.

The President explained to the grand jury, “[W]hat I was trying to determine was whether my recollection was right and that she was always in the office complex when Monica was there. . . . I was trying to get the facts down. I was trying to understand what the facts were. . . . I was trying to get information in a hurry. I was downloading what I remembered.” App. at 507–08. It was his belief that Ms. Currie was unaware that he had engaged in improper activity with Ms. Lewinsky, since she had not been in the White House complex when Ms. Lewinsky had visited on weekends in 1995–96, and he wanted to reassure himself that that was so. He also recalled that in 1997, after the improper relationship ended, he had asked Ms. Currie to try always to be present when Ms. Lewinsky visited. He wanted to inquire whether that was also Ms. Currie's recollection. The President testified “I was not trying to get Betty Currie to say something that was untruthful. I was trying to get as much information as quickly as I could.” App. at 508.

Ms. Currie was also asked about this conversation with the President in the grand jury, and her testimony supports the President's assertion that he was merely trying to gather information. First, Ms. Currie stated in her first interview with the OIC that “Clinton then mentioned some of the questions he was asked at his deposition. Currie advised the way Clinton phrased the queries, they were both statements and questions at the same time.” Supp. at 534 (1/24/98 FBI Form 302 Interview of Ms. Currie). The interview further reflects that “Currie advised that she responded ‘right’ to each of the statements because as far as she knew, the state-

ments were basically right . . .” *Id.* Ms. Currie was asked in the grand jury:

Q. You testified with respect to the statements as the President made them, and, in particular, the four statements that we’ve already discussed. You felt at the time that they were technically accurate? Is that a fair assessment of your testimony?

A. That’s a fair assessment.

Q. But you suggested that at the time. Have you changed your opinion about it in retrospect?

A. I have not changed my opinion, no.

Supp. at 667 (7/22/98 grand jury testimony of Ms. Currie).

Q. Now, back again to the four statements that you testified the President made to you that were presented as statements, did you feel pressured when he told you those statements?

A. *None whatsoever.*

Q. What did you think, or what was going through your mind about what he was doing?

A. At that time I felt that he was—I want to use the word shocked or surprised that this was an issue, and he was just talking.

Q. That was your impression that he wanted you to say—because he would end each of the statements with “Right?,” with a question.

A. I do not remember that he wanted me to say “Right.” He would say “Right” and I could have said, “Wrong.”

Q. But he would end each of those questions with a “Right?” and you could either say whether it was true or not true?

A. Correct.

Q. Did you feel any pressure to agree with your boss?

A. *None.*

Supp. at 668 (7/22/98 grand jury testimony of Ms. Currie) (emphasis added). Ms. Currie also testified, “I said ‘Right’ to him because I thought they were correct, ‘Right, you were never alone with Monica.’ . . .” Supp. at 665 (7/22/98 grand jury testimony of Ms. Currie).

Ms. Currie’s testimony supports the President’s assertion that he was looking for information as a result of his deposition. Neither the testimony of Ms. Currie nor that of the President—the only two participants in this conversation—supports the inference that the conversation had an insidious purpose. Furthermore, at the time he discussed Ms. Lewinsky with Ms. Currie, Ms. Currie was not expected to be, nor was she, a witness. When the President became aware that the OIC was investigating his relationship with Ms. Lewinsky, he repeatedly told Ms. Currie to tell the truth: “I said, Betty, just don’t worry about me. Just relax, go in there, and tell the truth.” App. at 591. The President told the grand jury:

And then I remember when I knew she was going to have to testify to the grand jury, and I, I felt terrible because she had been through this loss of her sister, this horrible accident Christmas that killed her brother, and her mother was in the hospital. I was trying to do—to make her understand that I didn’t want her to, to be untruthful to the grand jury. And if her memory was different than mine, it was fine, just go in there and tell them what she thought. So, that’s all I remember.

App. at 593. And when questioned by the OIC shortly thereafter, Ms. Currie in fact recounted what she knew about Ms. Lewinsky, unaffected by the conversation at issue. Neither participant in the conversation intended that it affect her testimony, and it did not. Again, the charge is without merit.

6. *The President Did Not Attempt To Influence the Testimony of "Potential" Grand Jury Witnesses Through His Denials*

The Referral also alleges that the President endeavored to obstruct justice by denying to several of his aides that he had a sexual relationship with Ms. Lewinsky. Ref. at 197. The statements made to the Presidential aides (Messrs. John Podesta, Erksine Bowles, Harold Ickes, and Sidney Blumenthal) cited in the Referral were made either on the day the Lewinsky story broke (January 21, 1998) or within a few days of that date. Those statements were concurrent in time with the President's repeated public statements to the country denying "sexual relations" with Ms. Lewinsky and were virtually identical in substance. Having made this announcement to the whole country on television, it is simply absurd to believe that he was somehow attempting to corruptly influence the testimony of aides when he told them virtually the same thing at the same time.

The Supreme Court has stated that in order to constitute obstruction of justice, actions must be taken "with an intent to influence judicial or grand jury proceedings." *United States v. Aguilar*, 515 U.S. 592, 599 (1995). There is no evidence that the President had the intent to do so when he made the alleged statements to these four individuals. The President spoke with the individuals regarding the allegations that had been made against him because of the long-standing professional and personal relationships that he shared with them and the responsibility that he felt to address the concerns that he assumed they would have after hearing such allegations. There is simply no evidence that he spoke with them for any other reason, and certainly not that he spoke with them intending to obstruct any proceeding.

The mere repetition of a public denial to these aides could not possibly affect the grand jury process. The testimony elicited from these aides in the grand jury regarding the President's statements was hearsay. The aides were not witnesses to any sexual activity, and they had no first-hand knowledge pertinent to the denials. The President *never* attempted to influence their testimony regarding their own personal knowledge or observations. Any testimony about the President's remarks was merely cumulative of the President's own nationally broadcast statements. The suggestion that the President violated section 1503's prohibition on "influenc[ing], obstruct[ing], or imped[ing] the due administration of justice" is groundless.

Furthermore, the Referral cites no evidence, and there is none, for the assertion that the President *knew* these individuals were going to be grand jury witnesses at that very early stage of the investigation. The Referral does not allege that any of them were under subpoena when the statements were made—indeed they were not. The Referral cites the President's testimony that he knew it was possible that if he provided people with factual details surrounding the allegations that had been made that they might be called as witnesses. But his point was that he did not want to make them into witnesses through admissions, not that he believed they would be. As the Supreme Court has made clear, the possibility that one may or may not be a witness is simply insufficient to establish obstruction in this context. "[I]f the defendant lacks

knowledge that his actions are likely to affect the judicial proceeding, he lacks the requisite intent to obstruct.” *United States v. Aguilar, supra*, 515 U.S. at 599 (emphasis added). Because of this requirement, the Supreme Court has held that false statements made to an individual who merely has the potential to be a witness, even if the individual is a federal investigative or law enforcement agent, do not constitute obstruction of justice: “We do not believe that uttering false statements to an investigating agent who might or might not testify before a grand jury is sufficient to make out a violation of the catchall provision of § 1503 [of the obstruction of justice statute].” *Id.* at 600. Thus, the Referral fails to allege the most essential elements of obstruction.

Nor is there evidence that the President’s statements constituted “witness tampering” in violation of section 1512. To make out such a violation, the government must show that the behavior knowingly occurred through one of the specific means set forth in the statute: intimidation, physical force, threats, misleading conduct or corrupt persuasion—with intent to influence testimony in a legal proceeding. None of those requisite means is present or even alleged in the Starr Referral. The efforts must be aimed specifically at obstructing a known legal proceeding. *See United States v. Wilson*, 565 F. Supp. 1416, 1431 (S.D.N.Y. 1983). As explained above, any statements made to those individuals were made for reasons wholly separate from and unrelated to any legal proceedings. Again, there is simply no evidence that when the President repeated to aides substantially the same statement he made to the whole country that he had any thought whatsoever of the grand jury proceedings, let alone the corrupt intent to influence the grand jury through the testimony of Presidential aides who were not even witnesses at that time. Under the Referral’s theory, the OIC could have subpoenaed to the grand jury any citizen who heard the President’s denial and thus have created a new violation of law.

In sum, the President’s statements to his aides could not have obstructed justice as a matter of law. Their legal duty was to answer the prosecutor’s questions and to tell the truth honestly as they knew it, and the President’s comments in no conceivable way affected that duty.

The OIC suggests that the President’s delay in acknowledging a relationship with Ms. Lewinsky somehow contributed to an obstruction of justice because it affected how the prosecutors would conduct the investigation. This claim is unfounded, as a matter of law. The President had no legal obligation to appear before the grand jury absent compulsion and every reason not to do so, given the OIC’s tactics, illegal leaking, and manifest intent to cause him damage.

VIII. THE PRESIDENT DID NOT ABUSE POWER

The Independent Counsel’s allegation that the President’s assertions of privilege constituted an abuse of power is baseless and disingenuous. As the Framers recognized, impeachment is justified only for “the abuse or violation of some public trust.”¹⁵⁰ The record is devoid of any such improper conduct, a conclusion that Mr.

¹⁵⁰ Federalist 65 at 331.

Schippers apparently also reached as demonstrated by his not including an abuse of office charge in his presentation to the Committee. To the contrary, the record demonstrates that the White House acted at all times based upon a good faith belief that its narrow assertions of privilege were appropriate and its claims were well founded in existing law. The OIC misstates the record with respect to the litigation over privilege and entirely omits reference to the occasions when the White House privilege claims were vindicated.

From the inception of the Lewinsky investigation, the OIC's objective was clear—to send Congress information that it believed constituted grounds for impeachment. Public commentators and members of Congress alike raised the issue of impeachment within days of the investigation becoming public.¹⁵¹ Indeed, Congressman Barr had already introduced a resolution on impeachment even before the Lewinsky investigation began.¹⁵² Thus, from the outset, the White House reasonably viewed impeachment proceedings as an imminent possibility. With that in mind, the President consulted with his lawyers and senior staff, and they consulted among themselves, about political and strategic issues with the expectation that these conversations were, and would remain, confidential.¹⁵³ The President had every right and institutional obligation to seek to preserve the confidentiality of these strategic deliberations.

At no time was executive privilege asserted with any intention of preventing White House staff from providing the grand jury with the facts surrounding the President's relationship with Ms. Lewinsky. Rather, it was asserted to protect the confidentiality of conversations dealing with the President's official functions as he carried out his duties under the very real threat of impeachment. These conversations included discussions about whether and to what extent privileges should be asserted. White House Counsel consistently attempted to ensure that the OIC had all of the information necessary to complete its investigation. Because the OIC adopted the wholly untenable and absolutist position that no executive privilege existed whatsoever with respect to its investigation, the White House had no choice but to assert privilege as narrowly as possible and allow the courts to uphold precedent and resolve the legal dispute between the White House and the OIC.

In short, White House claims of privilege have always reflected a fundamental and good faith disagreement over legal questions. The sole reason for the assertion of privilege was to protect this President and future Presidents from unwarranted intrusions into confidential communications among senior staff.

¹⁵¹ See, e.g., "Bryant Suggests Clinton Should Consider Stepping Aside," *Gannett News Service* (January 27, 1998); "President Imperiled As Never Before," *The Washington Post* (January 22, 1998); "Clinton Accused: Guide to Impeachment," *The Independent* (January 23, 1998) at 8.

¹⁵² H. Res. 304, 105th Cong., 1st Sess. (November 5, 1997). See "17 in House Want Clinton Impeached," *The Washington Times* (November 6, 1997) at A3.

¹⁵³ Declaration of Charles F.C. Ruff (hereinafter, "Ruff Dec."), at ¶ 19–22, 53 (dated March 17, 1998), filed in *In re Sealed Case*, Misc. No. 98–95 (D.D.C.); *United States v. Nixon*, 418 U.S. 683, 708 (1974).

A. THE PRESIDENT PROPERLY ASSERTED EXECUTIVE PRIVILEGE TO PROTECT THE CONFIDENTIALITY OF COMMUNICATIONS WITH HIS STAFF

It is indisputable that the President of the United States, if he is to perform his constitutionally assigned duties, must be able to obtain the most candid, forthright, and well-informed advice from a wide range of advisors on an even wider array of subjects on a daily basis. Only last year, the United States Court of Appeals for the District of Columbia Circuit reaffirmed that principle, emphasizing the importance of preserving the confidentiality of presidential communications “to ensure that presidential decision-making is of the highest caliber, informed by honest advice and full knowledge.” *In re Sealed Case*, 121 F.3d 729, 750 (D.C. Cir. 1997). The subjects over which the President is entitled to receive confidential advice include national security interests but—contrary to the unsupported view of the OIC—are not limited to issues of national security.¹⁵⁴ Under these well-established principles, the OIC’s apparent belief that the assertion of executive privilege over discussions about political and strategic decisions in the face of impending impeachment proceedings is *per se* an abuse of power is ludicrous. Indeed, Chief Judge Johnson upheld the White House’s claim that the communications over which it was asserting privilege were presumptively privileged and thus required the OIC to make a showing of need sufficient to overcome the privilege.¹⁵⁵ Although she ultimately determined that the OIC had made that showing, Chief Judge Johnson never suggested in any way that the President’s assertion of executive privilege was groundless, improper, made in bad faith, or in any way an “abuse of power.”

1. *The White House Made Every Effort at Accommodation and Ultimately Asserted the Privilege as Narrowly as Possible*

From the outset, the White House Counsel believed that the OIC’s invasion of the President’s confidential communications with his advisors was both inappropriate and unnecessary. Counsel reasonably relied upon the long-standing principle that a President is entitled to receive the frank, candid, and confidential advice that is essential to the execution of his constitutional, official, statutory, and other duties.¹⁵⁶ Nevertheless, White House Counsel recognized its obligation to try to reach an accommodation with the OIC, as it had on numerous other occasions in this and other Independent Counsel investigations as well as Congressional inquiries. Thus, the White House attempted in good faith to initiate a process by which the OIC could obtain all of the information it deemed necessary for a prompt resolution to its investigation, without unnecessarily intruding into the domain of confidential presidential communications. This is precisely the process in which the White House attempted to engage when the OIC subpoenaed Bruce Lindsey, Assistant to the President and Deputy Counsel.¹⁵⁷

Prior to Mr. Lindsey’s grand jury appearance, White House Counsel met with the OIC on February 3, 1998, to discuss ways in

¹⁵⁴*In re Grand Jury Proceedings*, 5 F. Supp.2d 21 (D.D.C. 1998); see also *United States v. Nixon*, 418 U.S. 683, 711 (1974); *In re Sealed Case*, 121 F.3d 729, 745, 750–52 (D.C. Cir. 1997).

¹⁵⁵*In re Grand Jury Proceedings*, 5 F. Supp.2d at 28–29.

¹⁵⁶*United States v. Nixon*, 418 U.S. at 711; *In re Sealed Case*, 121 F.3d at 750.

¹⁵⁷Ruff Dec. at ¶ 31.

which to ensure the OIC received all of the information it needed without unnecessarily encroaching upon areas subject to executive privilege.¹⁵⁸ At that time and subsequently, the White House made clear that no factual information regarding the President's relationship with Ms. Lewinsky would be withheld on the basis of privilege. Unfortunately, the OIC refused all efforts to devise a workable compromise—insisting on an absolutist position that no privilege applied.¹⁵⁹ The White House sought to protect internal discussions about how to handle press inquiries, what political strategies to consider, and how to advise the President concerning available political strategies.¹⁶⁰ The White House also sought to protect the discussions about legal strategy, *i.e.*, whether and to what extent to assert various privileges, and the political consequences of such strategies.¹⁶¹ None of this information was critical to the OIC's understanding of the President's relationship with Ms. Lewinsky or any of the factual allegations it was investigating. Rather, the discussions related to the President's capacity to govern in the face of an ongoing investigation—to pursue his legislative agenda, to ensure the continued leadership of the United States in the world community, and to maintain the confidence and support of the people who elected him.¹⁶²

Despite the admittedly private nature of the Lewinsky allegations, the White House Counsel's Office was faced with strategic decisions involving official duties of the Presidency. For example, advisors had to deliberate among themselves and provide advice to the President about responses to the daily press inquiries, the State of the Union Address which was to be given within days of the public disclosure of the investigation, and the visit by Prime Minister Blair with its accompanying press conference.¹⁶³ While these deliberations were important to the functioning of the Presidency and illustrated the President's need for candid advice, they were not relevant to the OIC's investigation. The OIC's concerted effort to learn about the internal deliberations of White House Counsel and other advisors on political and legal strategy—whether to assert privilege or not, how to handle the voluminous media inquiries, whether to refer to the Lewinsky matter during the State of the Union, and how to assure foreign leaders that the leadership of the country would be stable—does not render the substance of those deliberations relevant.

Shortly after this meeting with the OIC on February 3, the White House reiterated its willingness to ensure that any facts—as opposed to internal deliberations—would be made available to the OIC.¹⁶⁴ On March 4, the White House again proposed to allow senior advisors to testify about any factual information they had about the Lewinsky matter, *including any information the President had communicated to them. Id.* The only communication with non-attorneys sought to be protected were strategic deliberations and discussions. *Id.* The OIC flatly rejected this and all other over-

¹⁵⁸ *Id.*, at ¶¶ 31–33.

¹⁵⁹ *Id.*, at ¶ 37.

¹⁶⁰ *Id.*, at ¶¶ 29–30.

¹⁶¹ *Id.*, at ¶¶ 26–30.

¹⁶² *Id.*, at ¶¶ 19–25.

¹⁶³ *Id.*, at ¶¶ 23–25.

¹⁶⁴ *Id.*, at ¶¶ 45–51.

tures aimed at resolving the sensitive issue of executive privilege. *Id.*

White House Counsel had hoped to resolve potential privilege issues related to Mr. Lindsey and other senior advisors by asking the OIC to describe with particularity possible areas of inquiry so that counsel could determine whether they would implicate privileged information.¹⁶⁵ Given Mr. Lindsey's role as a key advisor and counsel to the President on a variety of issues, as well as his service as an intermediary between the President and his private counsel, the White House was justified in raising its concerns with the OIC.¹⁶⁶ As noted, however, the OIC flatly rejected the request.¹⁶⁷ The OIC had no interest in resolving the issues of privilege with the White House by a reasonable compromise.

Instead, the OIC filed motions to compel the testimony of Mr. Lindsey and other senior staff. *Id.* In the face of this absolutist position by the OIC, White House Counsel believed it had no choice but to proceed to seek a judicial resolution of the executive privilege claims. This decision was not made lightly, but was made with full recognition that it would not be politically popular and would subject the White House to accusations of delay. Nevertheless, because of the grave institutional concerns, *i.e.*, to protect the ability of this President and future Presidents to receive confidential advice, White House Counsel felt obligated to recommend that the President assert privilege over a few narrow conversations. Thus, White House Counsel notified the President of the privilege issues, explained the OIC's unwillingness to engage in the traditional accommodation process, and recommended that he invoke the presidential communications privilege to protect the institutional needs of the Presidency. The President accepted this recommendation and authorized the Counsel to assert the privilege.¹⁶⁸ Thus, contrary to the OIC's allegations, the President's decision was not made on his own initiative to delay the investigation, but was made on the recommendation of counsel to protect the Presidency as an institution.

It is important to note that the scope of the assertion was narrow: these communications ultimately involved the limited testimony of only three senior Counsel's Office lawyers. Each testified fully with respect to issues that did not implicate confidential advice and decision-making. Many current and former White House staff members, including many senior advisors, testified without asserting any privilege whatsoever. The ensuing litigation on executive privilege was based on principles that were critical to the institution of the Presidency.

2. *The Court's Ruling Upholding the White House's Assertion of Executive Privilege Squarely Rebuts the OIC's Abuse of Power Claim*

Despite the narrowness of the privilege asserted by the White House, the OIC took the position that executive privilege was inapplicable in the face of a grand jury subpoena because the discussions the OIC sought related in some way to the President's per-

¹⁶⁵ *Id.*, at ¶ 32.

¹⁶⁶ *Id.*, at ¶ 41.

¹⁶⁷ *Id.*, at ¶ 51.

¹⁶⁸ *Id.*, at ¶ 56.

sonal conduct. The OIC argued, therefore, that it did not have to demonstrate *any need* for the information and that it was entitled to immediate and full disclosure of all strategic and political communications.¹⁶⁹ This position, which was squarely at odds with decisions of the Supreme Court and the D.C. Circuit, was rejected by Chief Judge Johnson.

She upheld the White House's claim that the communications over which it was asserting privilege were indeed presumptively privileged and flatly rejected the OIC's absolutist position. *In re Grand Jury Proceedings*, 5 F. Supp.2d 21, 25–27 (D.D.C. 1998). Having found that the communications were presumptively privileged, the Court required the OIC to make a showing of need sufficient to overcome the privilege. *Id.* at 28–29. After reviewing the OIC's factual proffer, the Court concluded that the OIC had met its burden with respect to the areas identified to the Court. At no time, however, did the Court suggest that the President's assertion of executive privilege was groundless, improper, made in bad faith, or in any way an abuse of power.¹⁷⁰

We respectfully suggest that the White House's claim of executive privilege furnishes no ground for impeachment. The facts the OIC selectively omits from the Referral, as recounted above, unequivocally support the legitimacy of the White House's decision to raise the issue of executive privilege. The OIC not only continues to *reiterate* its claim that executive privilege is inapplicable in a grand jury context but also *omits* the critical fact that Judge Johnson validated the White House's assertion of the privilege and required the OIC to demonstrate a sufficient showing of need before it obtained the information.

B. THE PRESIDENT WAS ENTITLED TO ASSERT ATTORNEY-CLIENT PRIVILEGE TO PROTECT THE RIGHT OF PRESIDENTS TO REQUEST AND RECEIVE CONFIDENTIAL AND CANDID LEGAL ADVICE FROM WHITE HOUSE COUNSEL

Impeachment is, of course, the ultimate threat to a President's constitutional status. It is hardly surprising, therefore, that the President would need to consult with his staff to discuss how to address that threat. Because impeachment implicates the interests of the President in his official capacity as opposed to his personal capacity, he must rely on Counsel's Office lawyers to advise him. White House Counsel took the position that, in the impeachment context, the government attorney-client privilege should apply to communications between the President or his advisors and the Counsel's Office on matters relating to his official duties. This advice was based on sound policy: without an assurance of confidentiality, the President's access to official legal advice suffers because both he and his lawyers necessarily avoid communicating candidly if their discussions may be disclosed. It is hardly "abuse of office"

¹⁶⁹ *Cf.*, *In re Sealed Case*, 121 F.3d at 744–45 (explaining need requirement set forth in *United States v. Nixon*).

¹⁷⁰ The Court of Appeals in dicta also validated the appropriateness of the executive privilege claim, although the White House appeal was limited to the attorney-client privilege issue and did not include the executive privilege claim. *See In re Lindsey*, 158 F.3d 1263, 1277 (D.C. Cir. 1998) ("information gathered in preparation for impeachment proceedings and conversations regarding strategy are presumably covered by executive, not attorney-client, privilege").

for a President to follow advice based on a well-founded interpretation of law and important institutional considerations.

1. The Governmental Attorney-Client Privilege Claim Was Grounded in the Law of the D.C. Circuit and the Supreme Court

The OIC challenged sound legal authority recognizing the attorney-client privilege in the governmental context and sought to compel access to all confidential communications between the President and his government lawyers. The White House Counsel's decision to assert the governmental attorney-client privilege was based upon a careful consideration of the applicable law, the likelihood of impeachment proceedings, and the important ethical and institutional obligations of the Counsel's Office to the Office of the President.

For centuries, the law has recognized that the attorney-client privilege is absolute in protecting the confidentiality of attorney-client communications. The D.C. Circuit has also upheld the attorney-client privilege in the context of confidential communications between government lawyers and the government officials they represented. *See, e.g., Mead Control, Inc. v. Dept. of the Air Force*, 566 F.2d 242 (D.C. Cir. 1977). Courts recognize that a government official, like every other citizen, must be able to provide information to and seek advice from government lawyers without fear of public disclosure to ensure well-advised and fully-informed decision-making.

A recent Supreme Court case, which was decided during the courts' consideration of the White House's privilege claims, rejected the OIC's sweeping attack on the attorney-client privilege and further supported the White House's position. In *Swidler & Berlin v. United States*, __ U.S. __, 1998 U.S. Lexis 4214, *7 (1998), the OIC argued that the personal attorney-client privilege should automatically give way to the needs of a criminal investigation. The Court rejected the OIC's position and found "no case authority for the proposition that the privilege applies differently in a criminal and civil context," *id.* at *7, thus supporting the principle that the privilege remains absolute in a grand jury context. Accordingly, the President's position with respect to the absolute nature of governmental attorney-client privilege had a substantial legal basis.

2. The Courts' Rulings Squarely Rebut the OIC's Claims of Abuse of Power

The rulings of both the District Court and Court of Appeals belie any notion that the claim of attorney-client privilege was an abuse of power. The District Court rejected the OIC's position that government attorneys and clients are not entitled to have confidential communications. *In re Grand Jury Proceedings*, 5 F.Supp.2d 21, 31-32 (D.D.C. 1998). To the contrary, the Court held that such conversations are covered by the attorney-client privilege. *Ibid.* Performing a need analysis similar to that which it employed with respect to the executive privilege claim, the Court balanced the President's interests against those of the grand jury and ultimately determined that the grand jury was entitled to the information. *Id.* at 32-39. Thus, despite the fact that the Court ultimately ruled in

favor of the OIC, the Court never suggested—or even hinted—that the privilege claim was anything but legitimate.

On appeal, a sharply divided D.C. Circuit ruled that the President had an attorney-client privilege with White House Counsel in the civil context, but not in response to a grand jury subpoena. *In re Lindsey*, 158 F.3d 1263, 1271–78 (D.C. Cir. 1998). Judge Tatel dissented, finding that the Court’s opinion did not account for “the unique nature of the Presidency, its unique need for confidential legal advice, or the possible consequences of abrogating the attorney-client privilege for a President’s ability to obtain such advice.” *Id.* at 1286. Judge Tatel’s recognition of the validity of the privilege demonstrates that the President’s position was not frivolous and necessarily negates any claim that the President abused the power of his Office by advancing such a claim. This point is brought home by Justice Breyer’s dissent from the denial of certiorari, joined by Justice Ginsburg, that “[t]he divided decision of the Court of Appeals makes clear that the question presented by this petition has no clear legal answer and is open to serious legal debate.” *Office of the President v. Office of Independent Counsel*, No. 98–316, 67 U.S.L.W. 3321 (Nov. 10, 1998).

One further point is worth noting. Conspicuously absent from the Referral is any mention of the President’s personal attorney-client privilege claim concerning the communications that Mr. Lindsey had with the President’s private counsel, Robert Bennett. The White House argued that these communications were covered by the President’s personal attorney-client privilege because Mr. Lindsey was acting as an intermediary between the President and Mr. Bennett—a position rejected by the OIC. *In re Lindsey*, 158 F.3d at 1279–80.

The Court of Appeals rejected the OIC’s position. The Court recognized the “tradition of federal courts’ affording ‘the utmost deference to Presidential responsibilities.’” *Id.* at 1280 (quoting *Clinton v. Jones*, 117 S. Ct. 1636, 1652 (1997)). The Court also acknowledged “the President’s undisputed right to have an effective relationship with personal counsel, consonant with carrying out his official duties.” *Id.* at 1282. Given the “unavoidable, virtually full-time demands of the office [of the President],” *id.* at 1280, the Court found that the President’s use of Mr. Lindsey as an intermediary was “at least reasonably necessary.” *Ibid.* Thus, the Court held that “while acting in this capacity [Mr. Lindsey’s] communications came within the President’s personal attorney-client privilege.” *Ibid.* The Court remanded the case to the District Court so it could determine in which instances Mr. Lindsey was serving as an intermediary so that he could claim privilege, on the President’s behalf, over those communications.

C. THE PRIVILEGE LITIGATION DID NOT DELAY THE OIC’S INVESTIGATION

The OIC also claims that the invocation of privilege was intended to delay its investigation. Ref. at 207 n.473. If delay occurred, the OIC has only itself to blame. First, the procedural history recounted above establishes that the White House attempted to reach a reasonable accommodation before any witnesses testified. The OIC rejected that offer, choosing instead to litigate these issues.

Throughout the litigation, the Office of the President frequently sought to avoid any delay by proposing and/or agreeing to expedited briefing schedules involving privilege litigation, and the courts ruled swiftly.

Second, privilege claims were advanced only as to a narrow portion of the testimony of three witnesses. The OIC originally filed motions to compel the testimony of two senior staff members and one Counsel's Office lawyer. The litigation only temporarily postponed the testimony of the two senior staff members; they both appeared and testified fully. The privilege assertions ultimately involved the testimony of only three senior Counsel's Office lawyers. Each of these individuals testified at length regarding any facts they may have possessed about their knowledge of the President's relationship with Ms. Lewinsky. Moreover, the questions as to which they asserted privilege were narrow in scope.

Finally, independent of any litigation, substantial delay in the overall investigation has been self-inflicted. The OIC has called presidential advisors before the grand jury as many as six times, sometimes for only one- or two-hour sessions. Some witnesses appeared to testify only to wait for hours and then be told to return on another day.

The OIC also has expended substantial time and effort exploring irrelevant subjects, such as White House contacts with the press or matters of personal opinion. For example, the OIC asked Mr. Lindsey, "[W]hat do you think about learning that the President lied to you personally about this matter?" When Mr. Lindsey questioned the relevance of an inquiry into his personal feelings, the OIC lawyer persisted and asked, "So are you just too embarrassed to answer the question, sir?" Supp. at 2447 (8/28/98 grand jury testimony of Bruce Lindsey). Such lines of inquiry serve no legitimate purpose and appear designed simply to create a confrontation or embarrass and humiliate a witness.

Another aspect of the OIC's allegation is its claim that the President misused his presidential prerogative by asserting and then withdrawing privilege claims in order to delay the investigation. Ref. at 206-209. The OIC specifically cites to the privilege claim raised, and subsequently withdrawn, relating to the testimony of Nancy Hernreich, Director of Oval Office Operations, as a basis for this contention. Transcript of November 19, 1998 Hearing at 197-98. The OIC argues that an executive privilege claim with respect to Ms. Hernreich was illegitimate because she "does have an important function at the White House; she manages the Oval Office operations . . . [B]ut that is not the kind of function that the principle of executive privilege was meant to protect." *Id.* at 198. This contention is both legally and factually incorrect.

First, an individual's title or job description does not determine whether her communications fall within executive privilege. As set forth in the Court of Appeals decision in *In re Sealed Case*, virtually any individual who participates in the deliberative process can take part in a communication or provide information that becomes subject to executive privilege; *e.g.*, the information provided by a paralegal that becomes part an advisor's recommendation. *In re Sealed Case*, 121 F.3d at 752-53. Thus, neither Ms. Hernreich's

role nor her title precludes her conversations from being subject to executive privilege.

Moreover, the OIC disregards the unique events surrounding this privilege claim. Ms. Hernreich was one of the first individuals subpoenaed by the OIC whose testimony would potentially raise privilege concerns. Because the OIC refused to describe the areas of inquiry with respect to Ms. Hernreich, the White House was unable to give her any guidance in advance of her testimony. Thus, at her first grand jury appearance, Ms. Hernreich took the precautionary step of preserving the privilege. Subsequently, the White House voluntarily and unilaterally narrowed the scope of the communications over which privilege was being asserted and offered to allow Ms. Hernreich, along with other non-lawyer advisors, to testify fully about any factual information she possessed.¹⁷¹

On March 6, some ten days after Ms. Hernreich's appearance, and without notice to the White House, the OIC filed its motion to compel her testimony, despite the fact that the White House had already informally indicated to the OIC that no privilege would be asserted with respect to her testimony. On March 17, in response to the OIC's motion (and before the Court had ruled on the issue), the White House formally withdrew its privilege claims with respect to Ms. Hernreich's testimony. At that point, Ms. Hernreich could have testified before the grand jury about those communications. Yet, the OIC waited *two full months* before requesting Ms. Hernreich to return to the grand jury. Such conduct by the OIC illustrates the hollowness of the OIC's claim of delay caused by the President.

D. MR. STARR MISREPRESENTS THE RECORD TO CLAIM THAT THE PRESIDENT DECEIVED THE AMERICAN PUBLIC ABOUT THE EXECUTIVE PRIVILEGE LITIGATION

The OIC attempts to buttress its abuse of power claim by arguing that the President deceived the American public by feigning ignorance of the executive privilege litigation. The OIC bases its contention upon the following statement in its Referral:

On March 24, while the President was traveling in Africa, he was asked about the assertion of Executive Privilege. He responded, "You should ask someone who knows." He also stated, "I haven't discussed that with the lawyers. I don't know."

Ref. at 156; Transcript of November 19, 1998 Hearing at 611-62. The OIC completely misstates the question posed to the President and, by carefully selecting a portion of the President's answer, takes his response entirely out of context. The actual exchange follows, with the omitted portion in bold:

Q. Mr. President, we haven't yet had the opportunity to ask you about your decision to invoke executive privilege, sir. Why shouldn't the American people see that as an effort to hide something from them?

The President. Look, that's a question that's being asked and answered back home by the people who are responsible to do that. I don't believe I should be discussing that here.

Q. Could you at least tell us why you think the First Lady might be covered by that privilege, why her conversation might fall under that?

¹⁷¹ Ruff Dec., Exhibit 6.

The President. All I know is—I saw an article about it in the paper today. I haven't discussed it with the lawyers. I don't know. You should ask someone who does.¹⁷²

The full question and answer establish that the President was *not* being asked about "the assertion of Executive Privilege," but about the very narrow issue of the privilege vis-à-vis the First Lady, which was one of the many press rumors in circulation when the story broke.

As the OIC well knows, at this time, the OIC had refused to describe the areas of its inquiry to determine which, if any, raised privilege concerns. Consequently, the White House Counsel's discussion with the President about possible privilege claims was limited to possible issues that might arise during a witness's testimony and did not identify particular individuals who might claim privilege. Thus, the President could not possibly have known what conversations the First Lady participated in, if any, which might have fallen within the scope of executive privilege.

E. THE PRESIDENT'S DECISION NOT TO TESTIFY BEFORE THE GRAND JURY VOLUNTARILY WAS NOT AN ABUSE OF POWER

The OIC also contends that it was an abuse of power for the President, at a time when both his personal and official interests were at stake, not to volunteer to testify before the grand jury until August. Ref. at 159–61. This claim is wholly unfounded.

The OIC apparently believes that any government official who is the subject of a criminal investigation must immediately testify or risk impeachment. Because he was initially invited to appear voluntarily, the President had the right to decide the timing of his testimony. It became clear early in the OIC's investigation that this was not a run-of-the-mill grand jury investigation but was instead a focused effort to target the President himself. The President's decision to decline invitations to testify was entirely appropriate, given the nature of the OIC's investigation.

F. FALSE PUBLIC DENIALS ABOUT AN IMPROPER RELATIONSHIP DO NOT CONSTITUTE AN ABUSE OF OFFICE

President Clinton has acknowledged that he misled the American public when he denied having an improper relationship with Lewinsky. However, his public denial of this relationship does not warrant impeachment. A comparison to Watergate is illuminating, for false statements allegedly made by President Nixon were an important part of that inquiry.

Twenty-four years ago, Chairman Rodino stated that the Judiciary Committee's approach during the Nixon inquiry would be to consider "whether or not serious abuses of power or violations of the public trust have occurred, and if they have, whether under the Constitution, they are grounds for impeachment"¹⁷³ The Watergate impeachment investigation focused on whether President Nixon's allegedly false public statements rose to the level of abuse of power, but the subject matter was quite different. President Nixon's statements related to official matters of state and were allegedly part

¹⁷² White House Press Release: Remarks by the President in Photo Opportunity with President Museveni of Uganda, 1 (March 24, 1998).

¹⁷³ Cong. Record 2350, February 6, 1974.

of a comprehensive scheme to undermine the political process and to obstruct justice by encouraging and condoning perjury by senior members of his administration, paying hush money to criminal defendants, and using the CIA to thwart the FBI investigation. This Committee finally charged that his false statements were calculated to lull the public into believing that the administration was adequately investigating alleged governmental wrongdoing—in other words, he lied about his official actions.

President Clinton's misleading public denial of an improper relationship with Ms. Lewinsky, although admittedly wrong, is not such an abuse of power. President Clinton did not misuse the FBI, conceal governmental law-breaking, or misuse the official powers of the President. To the contrary, the underlying conduct addressed by his public statements was indisputably private.

1. Subjecting a President to Impeachment Would Disrupt Our Constitutional Government

To consider the President's misleading public denials of an improper relationship impeachable would radically lower the constitutional bar to impeachment. For better or worse, allegations of public untruthfulness by Presidents—often on important matters of state—have been levelled at most Presidents. President Reagan faced accusations about his truthfulness regarding Iran-Contra. President Bush confronted similar charges, with *The New York Times* characterizing his statements on the subject as “incredible.”¹⁷⁴ President Johnson faced a “credibility gap” regarding his statements about the Viet Nam war. President Kennedy lied about the Bay of Pigs, and President Eisenhower lied about Gary Powers and the U2 incident. And many have suggested that Presidents Wilson and Franklin Roosevelt were less than fully candid about the prospective involvement of the United States in World Wars I and II. These examples demonstrate how dangerous it would be to make it an impeachable offense to lie to the public. All of these alleged misstatements related to public policy. If they were in fact untrue, they denied the public and Congress an opportunity to exercise their democratic prerogative to affect those policies. Accordingly, if false public statements are to satisfy the constitutional standard for impeachment, it is difficult to conceive of a single Presidency in the last century that would not have been subject to potential impeachment proceedings.

In hotly contested policy disputes, accusations often fly regarding the truthfulness of a President's statements. Such accusations may or may not be justified. But to devalue the impeachment currency by making lack of truthfulness, real or perceived, an impeachable offense would potentially inflate many policy disagreements into impeachment inquiries.

This danger is compounded by the inevitable uncertainty regarding the type of statements that would be penalized. Would it be impeachable to promise to take an action before an election, such as raising taxes or staying out of war, and then to reverse position after the election? Or to fail to disclose a physical infirmity? Would all Presidential untruths be impeachable?

¹⁷⁴ Editorial, “What the President Knew,” *The New York Times* (Oct. 19, 1992) at A16.

Surely misstatements about public policy are more significant than misstatements about private indiscretions. False public statements about sexual indiscretions or other personal activities simply do not affect policymaking and do not implicate the powers of the presidency.

2. *The President's Denial of an Improper Relationship Is Not Comparable to President Nixon's Denials of Involvement in the Watergate Burglary and Cover-up*

President Clinton's conduct differs markedly from the gross abuses of power alleged by this Committee to have been committed by President Nixon. The charges against President Nixon were based upon his public misstatements involving official misconduct. One of the nine means by which this Committee asserted that President Nixon had violated his Oath of Office was by—

Making false or misleading public statements for the purpose of deceiving the people of the United States into believing that a thorough and complete investigation had been conducted with respect to allegations of misconduct on the part of personnel of the executive branch of the United States and personnel of the Committee for the Re-election of the President, and that there was no involvement of such personnel in such misconduct.¹⁷⁵

For more than two years, President Nixon repeatedly denied any personal or White House involvement in or responsibility for (1) the burglary of the DNC headquarters to obtain political intelligence regarding the Presidential election, (2) the subsequent cover-up, involving misuse of law enforcement, and (3) the scope of other illegal activities involving presidential powers carried out by and for the former President.¹⁷⁶ The first such false statement was made on June 22, 1972, when Nixon publicly characterized as accurate his Press Secretary's statement that "The White House has no involvement whatever in this particular incident" (referring to the Watergate break-in).¹⁷⁷

More than two months later, on August 29, 1972, the President held another press conference, during which he discussed the various pending investigations. In attempting to persuade the public that no special prosecutor was necessary, the President stated:

The other point I should make is that these investigations, the investigation by the GAO, the investigation by the FBI, by the Department of Justice, have, at my direction had the total cooperation of the—not only the White House—but also of all agencies of the Government. In addition to that, within our own staff, under my direction, Counsel to the President, Mr. Dean, has conducted a complete investigation of all leads which might involve any present members of the White House Staff or anybody in the Government. I can say categorically that this investigation indicates that no one in the White House Staff, no one in this Administration, presently employed was involve in this very bizarre incident. . . . I think under these circumstances we are doing everything we can to take this incident and to investigate it and not to cover it up.¹⁷⁸

¹⁷⁵*Nixon Report* at 2.

¹⁷⁶*Nixon Report* at 27-34.

¹⁷⁷*Nixon Report* at 27, 47.

¹⁷⁸*Nixon Report* at 27.

At the time he made this statement, the President knew that Mr. Dean had conducted no investigation, had not concluded that members of the White House or administration were beyond suspicion, and in fact was working to thwart the FBI's investigation.¹⁷⁹ In other words, President Nixon used his Presidential powers to conceal governmental law-breaking.

This Committee's investigation ultimately revealed¹⁸⁰ that President Nixon engaged in an elaborate cover-up scheme that included using his secret intelligence operation to pay both for illegal activities and subsequent blackmail money for the cover-up. On March 21, 1973, President Nixon urged the paying of hush money to Mr. E. Howard Hunt, and instructed Administration witnesses on how to commit perjury.¹⁸¹ He also used people within the Justice Department to give him information about what was transpiring within the grand jury, then passed that information along to Messrs. Haldeman and Ehrlichman, whom he knew to be targets of the investigation, in violation of Rule 6(e) of the Federal Rules of Criminal Procedure.¹⁸² He used his "plumbers" group to subvert the IRS and CIA, authorized illegal intelligence gathering activities, attempted to use CIA funds to pay off the Watergate burglars, directly interfered with the Justice Department's ITT investigation, and ordered the FBI to interfere with the Watergate Special Prosecution Force by sealing the WSPF offices after the Saturday Night Massacre. He also pressured the CIA to interfere with the FBI's investigation of the Watergate break-in—a conversation captured on tape. And he used the IRS to investigate his "enemies" and the FCC to try to take away the broadcasting licenses of press organizations investigating him.¹⁸³

These plain abuses of power cannot be equated with President Clinton's attempt to keep a private indiscretion secret. Unlike the series of lies told by President Nixon, President Clinton's denials bore no relationship to his use of the powers of the presidency. They did not deal with policy or governmental action but were designed to protect himself and his family from embarrassment caused by a purely personal indiscretion. Whereas President Nixon used governmental agencies including the CIA and FBI to thwart the investigation into his lies, President Clinton did nothing of the sort. Thus, while the pervasive and persistent lies of President Nixon to the American public about the nature and extent of official law enforcement activities could reasonably have been viewed as affecting the nature of our Constitutional government and thus warranting impeachment, President Clinton's denial of a private indiscretion cannot.

IX. CONCLUSION

Short of committing force of arms in defense of the Nation, the Framers of the Constitution did not contemplate a more solemn or awesome responsibility than the impeachment of the President. The Framers rejected amorphous and vague standards such as

¹⁷⁹ *Nixon Report* at 59–60.

¹⁸⁰ *Nixon Report* at 3–4.

¹⁸¹ *Nixon Report* at 98–99.

¹⁸² *Nixon Report* at 103.

¹⁸³ *Nixon Report* at 161–70, 177–79.

“maladministration” or “corruption” in favor of “Treason, Bribery or other High Crimes and Misdemeanors,” which has always been taken to mean offenses against the constitutional system itself. Indeed, Benjamin Franklin once referred to impeachment as the constitutional alternative to assassination. So it is with the utmost gravity that we submit this brief. We believe a careful and fair review of the real record of this case—not the political attacks, but the real record—cannot justify the impeachment of the President.

Once again, we rely on the judgment of the House, as did the Framers, to separate fact from myth, the record from the rhetoric, and the sinful from the impeachable. On behalf of the President, we thank the Committee for reviewing this brief.

Finally, we conclude where the President asked us to begin: by conveying to you his profound and personal sense of contrition. Let nothing in this brief, nothing in our defense, nothing in your analysis of the facts or our arguments on the law confuse the reality that what the President did was wrong. For his wrongs he has admitted his regret, and he has sought the forgiveness of his family, friends, and fellow Americans.

The sole duty, the solemn obligation of the House is not to sit in judgment of the morality of the President’s conduct, but rather to decide whether or not you will call upon the Senate to remove from office the duly elected President of the United States. On that issue, and that issue alone, we believe there is no cause—on the facts, on the law, or under the Constitution—to overturn the national election and impeach the President.

Respectfully submitted,

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December 8, 1998.

**DOCUMENTARY APPENDIX TO
SUBMISSION BY COUNSEL FOR PRESIDENT CLINTON
TO THE COMMITTEE ON THE JUDICIARY OF THE
UNITED STATES HOUSE OF REPRESENTATIVES**

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STATEMENT

When I was alone with Ms. Lewinsky on certain occasions in early 1996 and once in early 1997, I engaged in conduct that was wrong. These encounters did not consist of sexual intercourse; they did not constitute "sexual relations" as I understood that term to be defined at my January 17, 1998, deposition; but they did involve inappropriate intimate contact. These inappropriate encounters ended, at my insistence, in early 1997. I also had occasional telephone conversations with Ms. Lewinsky that included inappropriate sexual banter.

I regret that what began as a friendship came to include this conduct. I take full responsibility for my actions.

While I will provide the grand jury whatever other information I can, because of privacy considerations affecting my family, myself, and others, and in an effort to preserve the dignity of the Office I held, this is all I will say about the specifics of these particular matters. I will try to answer to the best of my ability other questions, including questions about my relationship with Ms. Lewinsky, questions about my understanding of the term "sexual relations" as I understood that term to be defined at my January 17, 1998, deposition, and questions concerning alleged subornation of perjury, obstruction of justice, and intimidation of witnesses.

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SECTION: WHITE HOUSE BRIEFING

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HEADLINE: REMARKS BY PRESIDENT BILL CLINTON
AT RELIGIOUS LEADERS' BREAKFAST
ALSO SPEAKING: VICE PRESIDENT AL GORE
THE WHITE HOUSE, THE STATE DINING ROOM
WASHINGTON, D.C.

BODY:

(Prolonged applause.)

VICE PRESIDENT GORE: Ladies and gentlemen, on behalf of the president and the first lady, it is my honor to welcome all of you to the White House and to this annual gathering. Every year at this time we look forward to this opportunity to meet with leaders of all faiths and rededicate ourselves to our common purposes, in our faith and trust in God.

I would like to, before presenting the president, on his behalf and behalf of the first lady, acknowledge some of the Cabinet members who are here: Secretary of Labor Alexis Herman, Secretary of HHS Donna Shalala, Secretary of HUD Andrew Cuomo, Secretary of Transportation Rodney Slater, OMB Director Jack Lew, and Chief of Staff Erskine Bowles.

We -- one of the reasons we all look forward to this is that this is kind of the beginning of the school year, and for many families, that's kind of the beginning of the year, in some sense. And it's the end of the summer period. And so it always has the feeling of an ending and a beginning. And these sessions have always been very interesting and enjoyable and healing. And without any further ado, I have the honor of presenting the person who is at the heart of all the manifest progress that we have seen in the United States of America for the last five and a half years.

Along with the colleagues I mentioned in the Cabinet, I have had the honor of working with President Clinton on a sweeping agenda for change in America. I've stood with him as he has led this nation, and on a personal note, I would like to tell you that he is not only a great president, he has been a great friend. It is, therefore, a privilege as well as an honor for me to present to you the president of the United States, William Jefferson Clinton. (Applause.)

PRESIDENT CLINTON: Thank you very much. Thank you. Thank you. (Off mike greeting to someone on dais.) Thank you. Thank you very much. Thank you. Thank you very much, ladies and gentlemen. Welcome to the White House and to this day to which Hillary and the vice president and I look forward so much every year. This is always an important day for our country, for the reasons that the vice president said; it is an unusual and, I think, unusually important day today.

I may not be quite as easy with my words today as I have been in years past.

And I was up rather late last night thinking about and praying about what I ought to say today. And rather unusually for me, I actually tried to write it down. So if you will forgive me, I will do my best to say what it is I want to say to you, and I may have to take my glasses out to read my own writing. First, I want to say to all of you that, as you might imagine, I have been on quite a journey these last few weeks to get to the end of this, to the rock-bottom truth of where I am and where we all are. I agree with those who have said that in my first statement after I testified, I was not contrite enough. I don't think there is a fancy way to say that I have sinned. It is important to me that everybody who has been hurt know that the sorrow I feel is genuine: first, and most important, my family; also my friends; my staff; my cabinet; Monica Lewinsky and her family, and the American people. I have asked all for their forgiveness. But I believe that to be forgiven, more than sorrow is required -- at least two more things.

First, genuine repentance. A determination to change and to repair breaches of my own making. I have repented. Second, what my Bible calls a broken spirit. An understanding that I must have God's help to be the person that I want to be. A willingness to give the very forgiveness I seek. A renunciation of the pride and the anger which cloud judgment, lead people to excuse and compare and to blame and complain.

Now, what does all this mean, for me and for us? First, I will instruct my lawyers to mount a vigorous defense, using all available appropriate arguments, but legal language must not obscure the fact that I have done wrong. Second, I will continue on the path of repentance, seeking pastoral support and theirs (sic) of other -- and that of other caring people, so that they can hold me accountable for my own commitment.

Third, I will intensify my efforts to lead our country and the world toward peace and freedom, prosperity and harmony, in the hope that, with a broken spirit and a still strong heart, I can be used for greater good, for we have many blessings and many challenges, and so much work to do.

In this, I ask for your prayers and for your help in healing our nation.

And though I cannot move beyond or forget this -- indeed, I must always keep it as a caution light in my life -- it is very important that our nation move forward.

I am very grateful for the many, many people, clergy and ordinary citizens alike, who have written me with wise counsel. I am profoundly grateful for the support of so many Americans who somehow, through it all, seem to still know that I care about them a great deal, that I care about their problems and their dreams. I am grateful for those who have stood by me and who say that in this case and many others the bounds of privacy have been excessively and unwisely invaded. That may be. Nevertheless, in this case, it may be a blessing, because I still sinned. And if my repentance is genuine and sustained and if I can maintain both a broken spirit and a strong heart, then good can come of this for our country as well as for me and my family. (Applause.)

I -- the children of this country, the children of this country can learn in a profound way that integrity is important and selfishness is wrong. But God can change us and make us strong at the broken places.

I want to embody those lessons for the children of this country, for that little boy in Florida who came up to me and said that he wanted to grow up and be

Federal News Service, SEPTEMBER 11, 1998

president and to be just like me. I want the parents of all the children in America to be able to say that to their children.

A couple of days ago, when I was in Florida, a Jewish friend of mine gave me this liturgy book called "Gates of Repentance." And there was this incredible passage from the Yom Kippur liturgy. I would like to read it to you.

"Now is the time for turning. The leaves are beginning to turn from green to red to orange. The birds are beginning to turn and are heading once more toward the South. The animals are beginning to turn to storing their food for the winter. For leaves, birds, and animals, turning comes instinctively. But for us, turning does not come so easily. It takes an act of will for us to make a turn. It means breaking old habits. It means admitting that we have been wrong, and this is never easy. It means losing face. It means starting all over again, and this is always painful. It means saying, 'I am sorry.' It means recognizing that we have the ability to change. These things are terribly hard to do.

But unless we turn, we will be trapped forever in yesterday's ways. Lord, help us to turn from callousness to sensitivity; from hostility to love; from pettiness to purpose; from envy to contentment; from carelessness to discipline; from fear to faith. Turn us around, oh, Lord, and bring us back toward you. Revive our lives as at the beginning, and turn us toward each other, Lord, for in isolation, there is no life."

I thank my friend for that. I thank you for being here. I ask you to share my prayer that God will search me and know my heart, try me and know my anxious thoughts, see if there is any hurtfulness in me, and lead me toward the life everlasting.

I ask that God give me a clean heart. Let me walk by faith and not sight. I ask once again to be able to love my neighbor, all my neighbors, as myself, to be an instrument of God's peace, to let the words of my mouth and the meditations of my heart and, in the end, the work of my hands be pleasing. This is what I wanted to say to you today. Thank you. God bless you.

(Sustained applause.)

Thank you. Bless you. Thank you.

I would -- (sustained applause) -- thank you. Thank you. Thank you. Thank you. Thank you very much.

I would like to ask Reverend Gerald Mann (sp) now to lead us in a prayer, and then we can sit down and enjoy our breakfasts.

Gerald.

END

LANGUAGE: ENGLISH

LOAD-DATE: September 12, 1998

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION.

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS

JAN 29 1998

JAMES W. MCCORMACK, CLERK
By: *[Signature]*
DEPUTY CLERK

PAULA CORBIN JONES,

Plaintiff,

vs.

No. LR-C-94-290

WILLIAM JEFFERSON CLINTON
and DANNY FERGUSON,

Defendants.

ORDER

Before the Court is a motion by the United States, through the Office of the Independent Counsel ("OIC"), for limited intervention and a stay of discovery in the case of *Jones v. Clinton*, No. LR-C-94-290 (E.D.Ark.). The Court held a telephone conference on this motion on the morning of January 29, 1998, during which the views of counsel for the plaintiff, counsel for the defendants, and the OIC were expressed. Having considered the matter, the Court hereby grants in part and denies in part OIC's motion.

In seeking limited intervention and a stay of discovery, OIC states that counsel for the plaintiff, in a deliberate and calculated manner, are shadowing the grand jury's investigation of the Monica Lewinsky matter. Motion of OIC, at 2. OIC states that "the pending criminal investigation is of such gravity and paramount importance that this Court would do a disservice to the Nation if it were to permit the unfettered - and extraordinarily aggressive - discovery

efforts currently underway to proceed unabated." *Id.* at 3.¹ OEC's motion comes with less than 48 hours left in the period for conducting discovery, the cutoff date being January 30, 1998. Given the timing of OEC's motion and the possible impact that this motion could have on the proceedings in this matter, the Court is required to rule at this time on the admissibility of evidence concerning Monica Lewinsky.

Rule 403 of the Federal Rules of Civil Procedure provides that evidence, although relevant, "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." This weighing process compels the conclusion that evidence concerning Monica Lewinsky should be excluded from the trial of this matter.

The Court acknowledges that evidence concerning Monica Lewinsky might be relevant to the issues in this case. This Court would await resolution of the criminal investigation currently underway if the Lewinsky evidence were essential to the plaintiff's case. The Court determines, however, that it is not essential to the core issues in this case. In fact, some of this evidence might even be inadmissible as extrinsic evidence under Rule 608(b) of the Federal Rules of Evidence. Admitting any evidence of the Lewinsky matter would frustrate the timely resolution of this case and would undoubtedly cause undue expense and delay.

This Court's ruling today does not preclude admission of any other evidence of alleged improper conduct occurring in the White House.

¹ For the record, counsel for the plaintiff takes great issue with OEC's characterization of their discovery efforts.

In addition, and perhaps more importantly, the substantial interests of the Presidency militate against any undue delay in this matter that would be occasioned by allowing plaintiff to pursue the Monica Lewinsky matter. Under the Supreme Court's ruling in *Citron v. Jones*, 117 S.Ct. 1636, 1651 (1997), "[t]he high respect that is owed to the Office of the Chief Executive ... is a matter that should inform the conduct of the entire proceeding, including the timing and scope of discovery." There can be no doubt that a speedy resolution of this case is in everyone's best interests, including that of the Office of the President, and the Court will therefore direct that the case stay on course.

One final basis for the Court's ruling is the integrity of the criminal investigation. This Court must consider the fact that the government's proceedings could be impaired and prejudiced were the Court to permit inquiry into the Lewinsky matter by the parties in this civil case. See, e.g., *Ardlen Way Associates v. Ivan F. Boesky*, 660 F.Supp. 1494 (S.D.N.Y. 1987). In that regard, it would not be proper for this Court, given that it must generally yield to the interests of an ongoing grand jury investigation, to give counsel for the plaintiff or the defendants access to witnesses' statements in the government's criminal investigation. See Fed.R.Crim.P. 16(a)(2), which generally prohibits the discovery of government witnesses. That being so, and because this case can in any event proceed without evidence concerning Monica Lewinsky, the Court will exclude evidence concerning her from the trial of this matter.

In sum, the plaintiff and defendants may not continue with discovery of those matters that concern Monica Lewinsky. In that regard, OBC's motion for limited intervention and stay of discovery is granted. Further, any evidence concerning Ms. Lewinsky shall be excluded.

from the trial of this matter. With respect to matters that do not involve Monica Lewinsky, OIC's motion is denied and the parties may continue with discovery. Because the telephone conference underlying today's ruling involved a discussion of discovery matters, the transcript of the conference shall remain under seal in accordance with the Court's Confidentiality Order on Consent of all Parties.

IT IS SO ORDERED this 29th day of January 1998.


UNITED STATES DISTRICT JUDGE

The Honorable Newt Gingrich, Richard Gephardt, Henry Hyde and John Conyers; Speaker of the House, House Minority Leader, Chair of the Judiciary Committee, Ranking Member of the House Judiciary Committee
United States House of Representatives
Washington, D.C.

Dear Mr. Speaker Mr. Gephardt, Mr. Hyde and Mr. Conyers:

Did President Clinton commit "high Crimes and Misdemeanors" warranting impeachment under the Constitution? We, the undersigned professors of law, believe that the misconduct alleged in the report of the Independent Counsel, and in the statement of Investigative Counsel David Schippers, does not cross that threshold.

We write neither as Democrats nor as Republicans. Some of us believe that the President has acted disgracefully, some that the Independent Counsel has. This letter has nothing to do with any such judgments. Rather, it expresses the one judgment on which we all agree: that the allegations detailed in the Independent Counsel's referral and summarized in Counsel Schippers's statement do not justify presidential impeachment under the Constitution.

No existing judicial precedents bind Congress's determination of the meaning of "high Crimes and Misdemeanors." But it is clear that Members of Congress would violate their constitutional responsibilities if they sought to impeach and remove the President for misconduct, even criminal misconduct, that fell short of the high constitutional standard required for impeachment.

The President's independence from Congress is fundamental to the American structure of government. It is essential to the separation of powers. It is essential to the President's ability to discharge such constitutional duties as

vetoing legislation that he considers contrary to the nation's interests. And it is essential to governance whenever the White House belongs to a party different from that which controls the Capitol. The lower the threshold for impeachment, the weaker the President. If the President could be removed for any conduct of which Congress disapproved, this fundamental element of our democracy – the President's independence from Congress – would be destroyed. It is not enough, therefore, that Congress strongly disapprove of the President's conduct. Under the Constitution, the President cannot be impeached unless he has committed "Treason, Bribery, or other high Crimes and Misdemeanors."

Some of the charges raised against the President fall so far short of this high standard that they strain good sense: for example, the charge that the President repeatedly declined to testify voluntarily or pressed a debatable privilege claim that was later judicially rejected. Such litigation "offenses" are not remotely impeachable. With respect, however, to other allegations, careful consideration must be given to the kind of misconduct that renders a President constitutionally unfit to remain in office.

Neither history nor legal definitions provide a precise list of high crimes and misdemeanors. Reasonable people have differed in interpreting these words. We believe that the proper interpretation of the Impeachment Clause must begin by recognizing treason and bribery as core or paradigmatic instances, from which the meaning of "other high Crimes and Misdemeanors" is to be extrapolated. The constitutional standard for impeachment would be very different if different offenses had been specified. The clause does not read, "Treason, Felony, or other Crime" (as does Article IV, Section 2 of the Constitution), so that any violation of a criminal statute would be impeachable. Nor does it read, "Arson, Larceny, or other high Crimes and Misdemeanors," implying that any serious crime, of whatever nature, would be impeachable. Nor does it read, "Adultery, Fornication, or other high Crimes and Misdemeanors," implying that any conduct deemed to reveal serious moral lapses might be an impeachable offense.

When a President commits treason, he exercises his executive powers, or uses information obtained by virtue of his executive powers, deliberately to aid an enemy. When a President is bribed, he exercises or offers to exercise his executive powers in exchange for corrupt gain. Both acts involve the criminal

exercise of presidential powers, converting those lawful powers into an instrument either of enemy interests or of purely personal gain. We believe that the critical, distinctive feature of treason and bribery is grossly derelict exercise of official power (or, in the case of bribery to obtain or retain office, gross criminality in the pursuit of official power). Non- indictable conduct might rise to this level. For example, a President might be properly impeached if, as a result of drunkenness, he recklessly and repeatedly misused executive authority.

Much of the misconduct of which the President is accused does not involve the exercise of executive powers at all. If the President committed perjury regarding his sexual conduct, this perjury involved no exercise of presidential power as such. If he concealed evidence, this misdeed too involved no exercise of executive authority. By contrast, if he sought wrongfully to place someone in a job at the Pentagon, or lied to subordinates hoping they would repeat his false statements, these acts could have involved a wrongful use of presidential influence, but we cannot believe that the President's alleged conduct of this nature amounts to the grossly derelict exercise of executive power sufficient for impeachment.

Perjury and obstructing justice can without doubt be impeachable offenses. A President who corruptly used the Federal Bureau of Investigation to obstruct an investigation would have criminally exercised his presidential powers. Moreover, covering up a crime furthers or aids the underlying crime. Thus a President who committed perjury to cover up his subordinates' criminal exercise of executive authority would also have committed an impeachable offense. But making false statements about sexual improprieties is not a sufficient constitutional basis to justify the trial and removal from office of the President of the United States.

It goes without saying that lying under oath is a very serious offense. But even if the House of Representatives had the constitutional authority to impeach for any instance of perjury or obstruction of justice, a responsible House would not exercise this awesome power on the facts alleged in this case. The House's power to impeach, like a prosecutor's power to indict, is discretionary. This power must be exercised not for partisan advantage, but only when circumstances genuinely justify the enormous price the nation will pay in governance and stature if its President is put through a long, public,

voyeuristic trial. The American people understand this crime. They demonstrate the political wisdom that has held the Constitution in place for two centuries when, even after the publication of Mr. Starr's report, with all its extraordinary revelations, they oppose impeachment for the offenses alleged therein.

We do not say that a "private" crime could never be so heinous as to warrant impeachment. Congress might responsibly take the position that an individual who by the law of the land cannot be permitted to remain at large, need not be permitted to remain President. But if certain crimes such as murder warrant removal of a President from office because of their unspeakable heinousness, the offenses alleged in the Independent Counsel's report or the Investigative Counsel's statement are not among them. Short of heinous criminality, impeachment demands convincing evidence of grossly derelict exercise of official authority. In our judgment, Mr. Starr's report contains no such evidence.

Sincerely,

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Note: Institutional affiliations for purposes of identification only.

Jed Rubenfeld
Yale Law School

Jed Rubenfeld is Professor of Law at Yale University. He is one of the nation's leading scholars of constitutional law, the author of numerous important articles on various constitutional law subjects. He is a leading authority on the right to privacy, constitutional interpretation, and the law of takings.

Statement by Jed Rubenfeld

The letter in your hands which we delivered to Congress today, is a historic document. It marks the first time in our history, to my knowledge, that 430 law professors have publicly agreed about anything. You couldn't get 400 law professors to agree on a 3-page analysis of a glass of water, much less a matter of profound national importance.

But we have agreed on a 3-page, detailed analysis of presidential impeachment, and we have agreed on its conclusion: that the allegations contained in Starr Report don't justify impeachment under the United States Constitution.

This is a totally non-partisan letter. We are a totally non-partisan group. We are from all over the country, from the East Coast to the West, from Texas to Chicago, and from the heartland. Some of us take a more conservative approach to constitutional law, some a more liberal approach. Some are pretty famous, among the most prominent constitutional law scholars in the country; some are more reserved, rarely taking public positions; some are well-known to Congress, like both Professor Bloch of Georgetown, who has been asked to testify next week, and Professor Laycock of Texas, who has often testified before Congress in favor of matters strongly supported by the Republican party.

The point is this. You can say that President Clinton acted absolutely disgracefully; you can say that the Independent Counsel did. This letter puts all that aside. It concerns law. It describes the high threshold that must be crossed before impeachment is constitutionally warranted, and it concludes that the allegations contained in the Starr Report just don't cross that threshold. The letter testifies to the remarkable degree of scholarly consensus on this point, and the House Judiciary Committee will now be aware of that consensus when it meets on Monday.

What is the basis of the letter's conclusion? I won't bore you with all the legal details. But here is the main thrust.

Everyone knows that the Constitution authorizes impeachment only for "high Crimes and Misdemeanors." So we need to know what counts as a high crime or misdemeanor. But people often forget the words that come before that phrase. They forget that the Constitution gives core examples of what is meant by "high Crimes and Misdemeanors." The Constitution allows

impeachment only for "Treason, Bribery and other High Crimes and Misdemeanors." The words "Treason" and "Bribery" are crucial here. It would be very different, for example, if the Constitution said that a President could be impeached for "Adultery, Fornication or other High Crimes and Misdemeanors." Then any crime deemed to be of moral turpitude might be impeachable. Or if the Constitution said, "fraud, larceny and other high crimes and misdemeanors," then any significant criminal offense might be impeachable. But treason and bribery are the examples given.

Treason and bribery are core cases of the gross abuse of official power. A President who commits treason uses the awesome power of his office to aid an enemy. A President who takes a bribe uses those powers for personal gain. The general meaning is this: it takes a grossly derelict misuse of official power to warrant impeachment. Now some purely private crimes are so heinous that a person who commits them has to be removed from society, automatically forfeiting all rights. But if some crimes such as murder require impeachment and imprisonment because of their unspeakable heinousness alone, the allegations in the Starr Report really aren't in that category.

Two examples. When Congressmen discovered that Alexander Hamilton had had an adulterous affair, that he had lied about it, and that he was paying blackmail because of it, they did not impeach. Why? Because the crime did not involve the misuse of his official powers. He was paying the blackmail out of his own pocket. No evidence of any gross misuse of power was found. Or again, when Congressmen were drawing up articles of impeachment against President Nixon, they found solid evidence that he had lied -- just lied -- on a tax return, criminally defrauding the government of a very large amount of money. But they left that offense out of the articles of impeachment. Why? Tax fraud is a form of crime against the government, isn't it? Lying on a tax report is a crime, isn't it. Again, we are told that they left out this charge because it did not involve any gross abuse of the President's official power.

In other words, our conclusion is that impeachment, to be constitutionally justified, demands either grossly heinous criminality or grossly derelict misuse of official power. And in our judgment, the Starr Report just doesn't contain evidence of this sort.

Why is there so high a constitutional standard for impeachment? Impeachment inflicts a tremendous constitutional price on the nation. The biggest short-term cost is the incapacitation of the government for a substantial period of time. But the long-term price is higher. Just think what will happen if this President is impeached on the basis of these allegations. The next time the Democrats control Congress and a Republican is President, what would the Democrats do? Probably they would look for a way to spend \$30 million trying to uncover dirt in the private life of the President and his Cabinet, and if they found dirt, they'd probably threaten impeachment -- of the President or his officers.

The men who wrote the Constitution understood the price the nation would pay if impeachment became a tool of mere partisan politics. That's why the Constitution authorizes impeachment only for "high Crimes and Misdemeanors." In plain English: lying about a sexual affair, serious though that may be, even potentially a violation of criminal statutes, lying about a sexual affair

just isn't enough, under our Constitution, to justify impeaching the elected President of the United States.

And the American people seem to know this. I would say they've shown considerable constitutional wisdom throughout this shameful affair, more than some politicians. You might say that our letter, in essence, explains the legal basis, the constitutional basis, for what the American people already seem to know.

Susan Low Bloch
Georgetown University Law Center

I would like to start by emphasizing how unusual it is to get more than 400 law professors to agree on anything, much less to sign a 4 page letter of legal analysis that they did not personally draft. In fact, I believe we could have gotten more signatures if we had had more time to circulate the letter and been more systematic in our efforts to contact colleagues. The reality is that we are novices at this and have full time obligations at our law schools.

But notwithstanding these limitations, we were able to get the signatures of more than 430 law professors from all parts of the country who have different political views, differing views about President Clinton, and diverse approaches to legal philosophy. We have law professors from every major law school and many smaller ones. The list includes some of the most well-respected scholars of constitutional law, including Laurence Tribe from Harvard Law School, John Hart Ely, former Dean of Stanford University Law School, Ronald Dworkin from New York University Law School, Cass Sunstein from the University of Chicago Law School, Kenneth Karst from UCLA, Martha Minow from Harvard, Bruce Ackerman from Yale, Geoffrey Stone from the University of Chicago.

So to me the important question is why were we able to get the agreement of so many usually contentious, difficult to unite, law professors. Why, notwithstanding the divergent legal philosophies, differing political opinions as to President Clinton, and general tendency toward being idiosyncratic, did these 430 plus law professors sign this letter? The answer is simple. We all agree that the process underway is constitutionally flawed, that the actions alleged to have been committed by President Clinton do not warrant impeachment under the Constitution, and that dangerous precedents are being set.

Specifically, we agree on several fundamental points:

First, we all feel strongly that the impeachment process, especially when used against the President of the United States, is enormously powerful and disruptive, and should be initiated only when clearly warranted. Impeaching and removing a president undermines the vote of the electorate of the country and should be invoked prudently and cautiously. Both the constitutional text and the history

behind the text suggest that the ability to impeach a president was designed to deal principally with serious abuses of official power that undermine the constitutional scheme. It was definitely not to be a punishment or a substitute for criminal prosecution. The Constitution makes it clear that even after impeachment and removal from office, one can still be criminally prosecuted.

Second, we believe that the precedent to be set by this House of Representatives will be enormously important. The House's decision whether to impeach, like a prosecutor's decision whether to indict, is discretionary. If the House relaxes the standard as to what is an impeachable offense or exercises its discretionary powers irresponsibly, it will weaken the office of the presidency for the foreseeable future. After President Andrew Johnson was impeached in the 1860s, the office of the presidency was enormously weakened, notwithstanding the fact that President Johnson was ultimately not convicted by the Senate and remained in office. Merely subjecting the President to this process, especially when it was a political, partisan process, was enormously damaging to the office.

In view of this understanding of the constitutional definition of impeachment and the House's constitutional responsibilities, the law professors signing this letter have concluded that the alleged misconduct of the president, while unfortunate and inappropriate, does not warrant impeachment under the Constitution. Notwithstanding our different approaches to politics, to President Clinton, and to legal philosophy, the signatories to this letter united because we fear that if the House decides to impeach President Clinton for the conduct alleged in the Starr Referral, it will lower the bar for what warrants impeachment, will make future presidents too beholden to the Congress, will move us precariously, and unconstitutionally, toward a parliamentary system, and will dangerously weaken the office of the presidency for the foreseeable future.

In short, because we are all profoundly committed to our constitutional system and because we believe that impeaching the president for the acts alleged in the Starr referral would establish a dangerous precedent and would seriously threaten the system, we felt compelled, notwithstanding our idiosyncracies, to join together and to sign this letter. We earnestly hope that the members of the House Judiciary Committee hear our plea and respect our concerns.

Douglas Laycock
University of Texas

Douglas Laycock holds the Alice McKern Young Regents Chair in Law at The University of Texas. He has taught constitutional law for many years, and he has published on a wide range of constitutional topics. He is one of the nation's leading authorities on the law of religious liberty and also on the law of judicial remedies. He has frequently testified before Congressional committees on constitutional issues, often in support of proposals with broad support from Republicans as well as Democrats.

Statement by Douglas Laycock

Impeachment and removal of the President of the United States is the ultimate Congressional check on abuse of Presidential power. Any serious attempt at impeachment brings most other Congressional and White House functions to a halt. Actual removal of the President undoes the choice of the American people in the most important election we hold. Impeachment must be reserved for official abuses proportionate to the costs and gravity of its use.

The recommended impeachment of President Nixon is instructive on the central issue facing the House Judiciary Committee today. In 1974, that Committee concluded: "Not all Presidential misconduct is sufficient to constitute grounds for impeachment. . . . Because impeachment of the President is a grave step for the nation, it is to be predicated only upon conduct seriously incompatible with either the constitutional form and principles of our government or the proper performance of constitutional duties of the Presidential office." Report of the House Committee on the Judiciary, Impeachment of Richard M. Nixon, President of the United States 112-13 (New York Times ed. 1975).

The Articles of Impeachment against President Nixon charged a pattern of repeated misuse of law enforcement powers to harass and intimidate other participants in the democratic process. The charges that he concealed his misconduct were that he concealed this *official* misconduct.

The Committee voted down a proposed Article of Impeachment based on criminal tax fraud, in part because of the view that such personal misconduct "was not the type of abuse of power at which the remedy of impeachment is directed." *Id.* at 320. The minority who voted for this Article did not dispute that judgment. Instead, they argued that the President "took advantage of his office to avoid paying his proper taxes." *Id.* at 463. No member of the Committee argued that personal misconduct should be a basis for impeachment.

What is charged against President Clinton is personal misconduct and lying to conceal that personal misconduct. Perjury is the most serious charge, but it is perjury about a personal matter, not about his conduct of the office. None of the charges against him are nearly so serious as the tax fraud that was *not* charged against President Nixon. None of the charges against President Clinton approach the constitutional standard of "Treason, Bribery, or other high Crimes and Misdemeanors."

The Lewinsky investigation revealed wrongful conduct in the President's personal capacity. For any other American caught in such a situation, even the perjury would have been dealt with in the civil litigation. Only in the rarest of circumstances would civil perjury, on a collateral matter of dubious relevance to the underlying lawsuit, become the subject of a major criminal investigation. The question is not whether the President did something wrong, but of what is the appropriate and proportionate constitutional response. Penalizing personal misconduct is not the purpose of the power to impeach the President, and the House has historically refused to impeach Presidents for personal misconduct. Invocation of the impeachment power here, on the allegations that have been reported, is an abuse of the constitutional authority of the House of Representatives.

FOR IMMEDIATE RELEASE WEDNESDAY, OCTOBER 28
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NOTED AUTHOR, HISTORIAN STEPHEN AMBROSE JOINS COLLEAGUES TO DECRY
UNNECESSARY IMPEACHMENT PROCEEDINGS

Joins Arthur M. Schlesinger, Jr., C. Vann Woodward, More Than 400 Leading Historians and Constitutional Scholars To Warn of Constitutional Threat in Clinton Investigation

WASHINGTON, D.C. Noted author and historian Stephen Ambrose joined two of America's most prominent historians and 400 of their colleagues today in issuing a statement warning of a grave threat to the constitution if the House impeachment hearings go forward.

Earlier today C. Vann Woodward, dean of American historians, and Arthur M. Schlesinger, Jr., the nation's pre-eminent scholar on the presidency, held a press conference in Washington to criticize the recent decision by the House of Representatives to conduct an open-ended impeachment investigation of President Clinton.

These prominent historians say the impeachment theory underlying Congress' actions lacks historical precedent and foundation, and could permanently cripple the office of the presidency.

Woodward and Schlesinger issued a statement, signed by more than 400 historians, that calls on the American people to oppose the impeachment proceedings. Signators include such well known scholars as Doris Kearns Goodwin, Garry Wills, Henry Louis Gates, Jr. of Harvard University, Hendrik Hartog of Princeton University and Winthrop D. Jordan of the University of Mississippi, as well as scholars and professors from more than 130 other institutions across the country.

* * *

HISTORIANS IN DEFENSE OF THE CONSTITUTION

As historians as well as citizens, we deplore the present drive to impeach the President. We believe that this drive, if successful, will have the most serious implications for our constitutional order.

Under our Constitution, impeachment of the President is a grave and momentous step. The Framers explicitly reserved that step for high crimes and misdemeanors in the exercise of executive power. Impeachment for anything else would, according to James Madison, leave the President to serve "during pleasure of the Senate," thereby mangling the system of checks and balances that is our chief safeguard against abuses of public power.

Although we do not condone President Clinton's private behavior or his subsequent attempts to deceive, the current charges against him depart from what the Framers saw as grounds for impeachment. The vote of the House of Representatives to conduct an open-ended inquiry creates a novel, all-purpose search for any offense by which to remove a President from office.

The theory of impeachment underlying these efforts is unprecedented in our history. The new processes are extremely ominous for the future of our political institutions. If carried forward, they will leave the Presidency permanently disfigured and diminished, at the mercy as never before of the caprices of any Congress. The Presidency, historically the center of leadership during our great national ordeals, will be

crippled in meeting the inevitable challenges of the future.

We face a choice between preserving or undermining our Constitution. Do we want to establish a precedent for the future harassment of presidents and to tie up our government with a protracted national agony of search and accusation? Or do we want to protect the Constitution and get back to the public business?

We urge you, whether you are a Republican, a Democrat, or an Independent, to oppose the dangerous new theory of impeachment, and to demand the restoration of the normal operations of our federal government.

Co-Sponsors:

Arthur M. Schlesinger Jr., City University of New York
Sean Wilentz, Princeton University
C. Vann Woodward, Yale University

Signatories:

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Robert H. Abzug, University of Texas, Austin
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PERSPECTIVES ON WHITE HOUSE SCANDAL

Founding Fathers Didn't Flinch



Alexander Hamilton's misstep was deemed a private matter that didn't affect his service to the nation.

RICHARD N. ROSENFELD

America's Founding Fathers made it clear that a high federal officer's illicit, even criminal, sexual activities as well as bribery, conspiracy and lying to hide them from public view were neither impeachable offenses under the U.S. Constitution nor even a disqualification from appointment to high government office.

During the winter of 1792-93, the U.S. Congress was investigating alleged financial misdealings of Alexander Hamilton, the most prominent member of George Washington's Cabinet and the first secretary of the Treasury of the United States. Three members of Congress, including House Speaker F.A.C. Muhlenberg and future U.S. President James Monroe, interviewed Hamilton concerning secret payments that Hamilton had made to James Reynolds, a convicted securities swindler whose release from prison Hamilton's Treasury department had allowed.

In his interview with members of Congress, Hamilton was forced to admit the payments to Reynolds but characterized them as bribes to prevent public disclosure of adultery Hamilton had committed with Reynolds' wife, Maria. That adultery included licentious encounters not only in the Reynolds marital bed while James was away but also in Hamilton's own marital bed while his wife Betsy and their children were visiting Hamilton's father-in-law.

Paying for Reynolds' silence was only part of the cover-up; Hamilton had Mrs. Reynolds burn incriminating correspondence and promised to pay for the Reynolds' travel costs if only the Reynolds would get out of town.

When Muhlenberg and Monroe (as well as the other members of Congress) heard Hamilton's confession, they decided the matter was private, not public, and that no impeachable offense had occurred. They agreed (conspired) with Hamilton and among themselves to keep the sexual relations, the hush money and all the rest a secret. Although President Wash-

ington, Vice President John Adams, Secretary of State Thomas Jefferson, House Minority Leader James Madison and other leaders all became aware of Hamilton's confession, his misconduct remained undisclosed until he was well out of office.

In 1797, Hamilton's secret finally became public knowledge after John Beckley, a disgruntled former clerk of the House of Representatives, leaked the story to James Thomson Callender, a muckraking journalist. The whole nation then learned of Hamilton's misdeeds in office. So what was the denouement?

On July 18, 1798, the very next year, then-President Adams and former President Washington nominated Hamilton to be inspector general of the new U.S. Army, second in command only to Washington himself.

'In overlooking Hamilton's private sexual misconduct . . . the Founders were practicing what they preached at the federal Constitutional Convention.'

With Monroe, Jefferson, Madison and other Founding Fathers still maintaining their respectful silence, the U.S. Senate quickly confirmed this confessed adulterer and briber to occupy, for a second time, one of the highest positions in the new federal government of the United States.

In overlooking Hamilton's private sexual misconduct as well as his efforts to cover it up, the Founders were practicing what they preached at the Constitutional Convention when, on Sept. 8, 1787, members unanimously declared that, for purposes of impeachment, they intended "high crimes and misdemeanors" to be actions "against the United States."

Richard N. Rosenfeld is the author of "American Avarice: A Democratic-Republican Returns: The Suppressed History of Our Nation's Beginnings and the Heroic Newspaper That Tried to Report It" (St. Martin's Press, 1987).

Sunday, November 22, 1998

THE NATION, HIGH CRIMES
It Depends on How You Define 'Murder'
 By SEAN WILENTZ

RELATED

POLITICS & POLLS

WASHINGTON—Now that independent counsel Kenneth W. Starr has made his best case for the impeachment of President Bill Clinton, the House Judiciary Committee must struggle over a difficult question: Do Starr's charges rise to the Constitution's standards of "high crimes and misdemeanors"? Starr's critics assert that even if his accusations about perjury and obstruction of justice are true, they are not impeachable offenses, because they relate to private matters unconnected to Clinton's exercise of his executive powers. Starr and his defenders reply that the critics' standards for impeachment are too narrow and would permit a president guilty of all sorts of monstrous private offenses, including murder, to escape impeachment. "Virtually everyone agrees," Starr told the Judiciary Committee on Thursday, "that serious crimes such as murder and rape would be impeachable, even though they do not involve official duties."

No one, apart from a few conspiracy nuts, has accused Clinton of murder, so Starr and his defenders' point comes across as a bit academic. Speaking as one of Starr's critics, I would hope that any president charged with murder would be impeached. The trouble is, the one historical precedent we have points the other way. Incredibly, the Constitution's framers may well have thought that an executive charged with murder could escape impeachment. Or so it would seem from the example of the most notorious killing in early American political history: Vice President Aaron Burr's shooting of the former secretary of the Treasury, Alexander Hamilton.

In the summer of 1804, Burr was incensed at reports that Hamilton had insulted him, and he challenged his longtime political foe to a duel. The two met at Weehawken, N.J., across the Hudson River from Manhattan, on July 11, and, as every schoolchild knows, Burr felled Hamilton with a single shot. Hamilton's associates rowed what was left of their man back to New York, where he died the next afternoon. Burr, after returning to his own Manhattan estate, was stunned when news of Hamilton's death provoked shock and outrage from every political quarter. Fearing legal reprisals, he traveled south to hide out until the public fury died down.

By the time he reached his friend Pierce Butler's plantation in South Carolina, Burr was officially a fugitive from justice. In New York, which had outlawed dueling, he was charged with murder, though the charge was soon dropped. (Hamilton had died in New York, but he had been shot in another state, so the court substituted a misdemeanor charge against Burr for having unarmed and sent a challenge.) A Bergen County, N.J., court, meanwhile, handed down and stuck by a charge of murder.

though it was powerless to seek Burr's extradition. After several weeks down south, where the code duello thrived and where anti-Hamiltonians considered Burr something of a hero, the vice president learned the clamor against him had abated. But instead of returning to Manhattan, which meant crossing New Jersey and risking arrest, Burr traveled to Washington, where, unimpeded, he strode up Capitol Hill and assumed his official vice-presidential duties as presiding officer in the U.S. Senate.

"This is, I believe, the first time that ever a vice president appeared in the Senate the first day of a session," the astonished New Hampshire Federalist William Plumer wrote. "It certainly is the first time, and God grant it may be the last, that ever a man, so justly charged with such an infamous crime, presided in the American Senate." Yet, neither Plumer nor, as far as I can determine, anyone else moved to impeach Burr, who peaceably served out the remainder of his term as vice president, hobnobbing with President Thomas Jefferson, Secretary of State James Madison and other worthies. There was an impeachment trial during that session of the Senate, one that led to an acquittal, but it involved the Federalist Supreme Court Justice Samuel Chase, for his alleged persecution of Jefferson's supporters. Who presided over Chase's trial? Vice President Burr.

The legal charges against Burr eventually faded away and were forgotten. He would go on to even greater infamy for attempting to set up a country of his own in the nation's western territories, for which he was tried for treason. By then, however, he had set the precedent relevant to our current distemper.

There was, to be sure, no national consensus in 1804 about whether killing someone in a duel constituted murder. Still, an American court charged Burr with that terrible crime. Under the Constitution, the grounds for impeaching a president and a vice president are identical. If, then, a vice president, surrounded by many of the Constitution's framers, could be charged with murder and escape impeachment, why are we considering impeaching a president who has been accused—not by a court but by an independent counsel—with lying under oath and other crimes connected to covering up his love life? Somewhere, the shade of Burr, himself a notorious ladies' man, is laughing his head off.

Sean Wilentz, a Professor of American History at Princeton University, is spending this year as a Fellow at the Woodrow Wilson International Center for Scholars

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IN RE REPORT & RECOMMENDATION OF JUNE 5, 1972 GRAND JURY 1219

Cite as 370 F.Supp. 1219 (1974)

points through the Kansas City gateway. Plaintiffs' argument ultimately boils down to the weight of evidence presented by applicant. As our court has stated before, the weight of evidence is for the Commission rather than the courts. *State Corporation Commission v. United States*, 216 F.Supp. 376 (D.Kan.1963), *aff'd per curiam*, 375 U.S. 15, 84 S.Ct. 60, 11 L.Ed.2d 39.

[8] We find the Commission's findings are based on substantial evidence and we perceive no error of law. The action seeking to set aside and enjoin enforcement of the Commission's order is therefore dismissed.



In re REPORT AND RECOMMENDATION OF JUNE 5, 1972 GRAND JURY CONCERNING TRANSMISSION OF EVIDENCE TO THE HOUSE OF REPRESENTATIVES.

Misc. No. 74-21.

United States District Court,
District of Columbia.
March 18, 1974.

Hearing was had on recommendation by grand jury that the Court deliver sealed grand jury report to the Committee on the Judiciary of the House of Representatives. The District Court, Sirica, Chief Judge, held that the report, consisting of a simple and straightforward compilation of information gathered by the grand jury, was within its authority to hand up; that delivery of the report to the Committee was proper where the same was material to the Committee's impeachment investigation involving the President of the United States, who did not object to release of the report to the Committee; that release was not prohibited by rule providing that persons may disclose matters

occurring before grand jury, "only when so directed by the court preliminarily to or in connection with a judicial proceeding"; and that release was not precluded by incidental references therein to third persons, some of whom were under indictment, since their trials would provide ample opportunity for response to such references, none of which went beyond the allegations in the indictment.

Ordered accordingly.

1. Grand Jury ⇐1

While in a general sense a federal grand jury is an agent or arm of the judiciary, grand jury, within certain bounds, may act independently of any branch of government.

2. Grand Jury ⇐34

Grand jury may pursue investigations on its own without the consent or participation of a prosecutor.

3. Grand Jury ⇐1

Grand jury's decision not to bring charges is unreviewable.

4. Indictment and Information ⇐33(1)

Grand jury may insist that prosecutors prepare whatever accusation it deems appropriate and may return a draft indictment even though the government attorney refuses to sign it.

5. Grand Jury ⇐25

Statute specifically conferring reporting powers on special grand juries is not probative of contention that grand juries lack such powers at common law. 18 U.S.C.A. § 3331 et seq.

6. Grand Jury ⇐42

Grand jury was acting within its authority in handing up a sealed report and recommending that it be submitted to the Committee on behalf of the Judiciary of the House of Representatives in connection with impeachment investigation by the latter body, where the report was a simple and straightforward compilation of information gathered by the grand jury and drew no accusatory conclusions, deprived no one of an official forum in which to respond, was not

a substitute for indictments which might properly issue, and contained no recommendation, advice or statements infringing on the prerogatives of other branches of government. U.S.C.A.Const. Amend. 5.

7. Grand Jury ¶42

When grand jury issues a report, its authority ends and judicial authority becomes exclusive in determining whether report shall be disclosed.

8. Grand Jury ¶42

United States ¶23(5)

Delivery to the Committee on the Judiciary of the House of Representatives, which was conducting impeachment investigation, of report by grand jury compiling information material to such investigation was appropriate where the report's subject was referred to in his public capacity, any prejudice to his legal rights would be minimal on balance with the public interest, subject would not be left without a forum in which to adjudicate any charges against him, and he did not object to delivery of the report; and delivery of the report to the Committee was not prohibited by rule stating that persons may disclose matters occurring before grand jury "only when so directed by the court preliminarily to or in connection with a judicial proceeding." Fed.Rules Crim.Proc. rule 6(e), 18 U.S.C.A.; U.S.C.A.Const. Amend. 5.

9. Grand Jury ¶41

Rule providing that persons may disclose matters occurring before the grand jury "only when so directed by the court preliminarily to or in connection with a judicial proceeding" was derived with only those cases in mind where disclosure question arises at or prior to trial, and does not enjoin courts from any disclosure of reports by a grand jury in any other circumstance. Fed.Rules Crim.Proc. rule 6(e), 18 U.S.C.A.

10. Grand Jury ¶41

Though interest in grand jury secrecy of encouraging free disclosure by those who possess information regarding crime continues to be applicable after re-

turn of indictment, a compelling need and the ends of justice may still mandate disclosure of matters occurring before the grand jury. Fed.Rules Crim.Proc. rule 6(e), 18 U.S.C.A.

11. Grand Jury ¶41

Delivery to the Committee on the Judiciary of the House of Representatives of grand jury report material to an impeachment investigation involving the President of the United States was not precluded by reference therein to other persons despite speculation that leak would occur and that resultant publicity would prejudice the rights of defendants against whom indictments were returned, where the President had not objected to release and other persons were involved only indirectly, and where persons under indictment would have opportunity at trial for response to any incidental references to them, which did not go beyond allegations in the indictment. Fed.Rules Crim.Proc. rule 6(e), 18 U.S.C.A.; U.S.C.A.Const. Amend. 5.

Leon Jaworski, Sp. Prosecutor, Philip A. Lacovara, Counsel to Sp. Prosecutor, Peter M. Kreindler, Executive Asst. to Sp. Prosecutor, Washington, D. C., for the Watergate Special Prosecution Force.

James D. St. Clair, Sp. Counsel to the President, Richard A. Hauser and John A. McCahill, Associate Counsel, Washington, D. C., for the President.

John Doar, Sp. Counsel, Washington, D. C., Albert E. Jenner, Jr., Minority Counsel, Chicago, Ill., for the House Committee on the Judiciary, House of Representatives.

William G. Hundley, Plato Cacheris, Washington, D. C., for John N. Mitchell.

John J. Wilson, Frank H. Strickler, Washington, D. C., for Harry R. Halde- man and John D. Ehrlichman.

Sidney Dickstein, Washington, D. C., for Colson.

David Bress, Thomas C. Green, Wash- ington, D. C., for Robert C. Mardian.

Jacob A. Stein, Edmund D. Campbell, Washington, D. C., for Parkinson.

IN RE REPORT & RECOMMENDATION OF JUNE 5, 1972 GRAND JURY 1221

Cite as 370 F.Supp. 1219 (1974)

John M. Bray, Washington, D. C., for Strachan.

OPINION

SIRICA, Chief Judge.

On March 1, 1974, in open court, the June 5, 1972 Grand Jury lodged with the Court a sealed Report. The materials comprised in that Report were filed by the Court and ordered held under seal pending further disposition. The materials were accompanied by a two-page document entitled *Report and Recommendation* which is in effect a letter of transmittal describing in general terms the Grand Jury's purpose in preparing and forwarding the Report and the subject matter of its contents. The transmittal memorandum further strongly recommends that accompanying materials be submitted to the Committee on the Judiciary of the House of Representatives for its consideration. The Grand Jury states it has heard evidence that it regards as having a material bearing on matters within the primary jurisdiction of the Committee in its current inquiry, and notes further its belief that it ought now to defer to the House of Representatives for a decision on what action, if any, might be warranted in the circumstances.

After having had an opportunity to familiarize itself with the contents of the Report, the Court invited all counsel who might conceivably have an interest in the matter, without regard to standing,

to state their positions concerning disposition.¹ The President's position, through counsel, is that he has no recommendation to make, suggesting that the matter is entirely within the Court's discretion.² He has requested that should the Report be released, his counsel have an opportunity to review and copy the materials.³ The House Judiciary Committee through its Chairman has made a formal request for delivery of the Report materials.⁴ The Special Prosecutor has urged on behalf of the Grand Jury that its Report is authorized under law and that the recommendation to forward the Report to the House be honored.⁵ Finally, attorneys for seven persons named in an indictment returned by the same June, 1972 Grand Jury on March 1, 1974, just prior to delivery of the Grand Jury Report,⁶ have generally objected to any disclosure of the Report, and in one instance recommended that the Report be expunged or returned to the Jury.⁷

Having carefully examined the contents of the Grand Jury Report, the Court is satisfied that there can be no question regarding their materiality to the House Judiciary Committee's investigation. Beyond materiality, of course, it is the Committee's responsibility to determine the significance of the evidence, and the Court offers no opinion as to relevance. The questions that must be decided, however, are twofold: (1) whether the Grand Jury has power to make reports and recommendations, (2) whether

1. The Special Prosecutor notified the Court shortly before delivery of the Report that the Grand Jury intended to take such action. The Court had opportunity only for a brief review of relevant authorities, and decided to receive and hold the Report under seal. The Court's first opportunity to peruse the Grand Jury materials came on Monday, March 4th, and a hearing was scheduled for Wednesday, March 6th, to include all those who might possibly have an interest in the matter.

The President's counsel has been permitted to review the two-page *Report and Recommendation*. Other counsel were offered a similar opportunity, but with one exception declined. See Transcript of Proceedings, March 6, 1974, Misc. 74-21 at pp. 63-66, 66-68, [hereinafter cited as Transcript].

2. Transcript at pp. 2, 3, 31, 32.

3. Letter to the Honorable John J. Sirica from James D. St. Clair dated March 7, 1974 and filed in Misc. No. 74-21.

4. Letter to the Honorable John J. Sirica from the Honorable Peter W. Radino, Jr., dated March 3, 1974, and filed in Misc. No. 74-21. See also Transcript at p. 30.

5. Memorandum of the United States on Behalf of the Grand Jury filed in Misc. No. 74-21 under seal. See also Transcript at pp. 68-65.

6. United States v. John N. Mitchell, et al., Criminal Case No. 74-110.

7. Letter to the Honorable John J. Sirica from John J. Wilson, Esq., dated March 4, 1974 and filed in Misc. No. 74-21. See also Transcript at pp. 4-21, 51-61, 90-102.

er the Court has power to disclose such reports, and if so, to what extent.

I.

Without attempting a thorough exposition, the Court, as a basis for its discussion, notes here some principal elements in the development and authority of the grand jury. Initially, the grand jury, or its forerunner, was employed to supply the monarch with local information regarding criminal conduct and was wholly a creature of the crown. As the grand jury gained institutional status, however, it began to act with a degree of independence, and in some cases refused to indict persons whom the state sought to prosecute.⁸ Thereafter it became common for grand juries to serve the dual function of both charging and defending. By virtue of the Fifth Amendment, grand jury prerogatives were given institutional status in the United States, and grand juries have ever since played a fundamental role in our criminal justice system.⁹

[1-4] The grand jury is most frequently characterized as an adjunct or arm of the judiciary. While such a characterization is in the general sense accurate, it must be recognized that within certain bounds, the grand jury may act independently of any branch of government. The grand jury may pursue investigations on its own without the consent or participation of a prosecu-

tor.¹⁰ The grand jury holds broad power over the terms of charges it returns,¹¹ and its decision not to bring charges is unreviewable. Furthermore, the grand jury may insist that prosecutors prepare whatever accusations it deems appropriate and may return a draft indictment even though the government attorney refuses to sign it.¹²

We come thus to the question of whether grand jury prerogatives extend to the presentation of documents that disclose evidence the jury has gathered but which do not indict anyone. The sort of presentment mentioned above, where government attorneys decline to start the prosecutorial machinery by withholding signature from a draft indictment, is in the correct sense such a report since grand jury findings are disclosed independent of criminal proceedings, and it appears that nowhere has grand jury authority for this practice been denied, particularly not in this Circuit.¹³ Nevertheless, where the jury's product does not constitute an indictment for reasons other than an absent signature, there is some disagreement as to its propriety.

It should be borne in mind that the instant Report is not the first delivered up by a grand jury, and that, indeed grand juries have historically published reports on a wide variety of subjects.¹⁴ James Wilson, a signer of both the Declaration of Independence and the Constitution and later an Associate Justice of

8. The most celebrated cases in England involved *ignoramus* returns to charges against Stephen Colledge [8 How.St.Tr. 550 (1681)] and the Earl of Shaftesbury [8 How.St.Tr. 759 (1681)]. In the United States, the grand jury action favoring Peter Zenger is equally prominent [Morris, Fair Trial 68-95 (1952)]. See also, Kuh, The Grand Jury "Presentment": Poul Blow or Fair Play, 55 Colum.L. Rev. 1103, 1107-09 (1955).

9. See generally *Bransburg v. Hayes*, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972) and *Hale v. Henkel*, 201 U.S. 43, 26 S.Ct. 370, 50 L.Ed. 652 (1906).

10. *United States v. Thompson*, 251 U.S. 407, 413-415, 40 S.Ct. 269, 64 L.Ed. 333 (1920); *Blair v. United States*, 250 U.S. 273, 282, 39 S.Ct. 468, 63 L.Ed. 979 (1919); *Hale v. Henkel*, *supra* note 9; *Frisbie v. United*

States, 157 U.S. 160, 163, 15 S.Ct. 536, 39 L.Ed. 657 (1895).

11. *Gaither v. United States*, 134 U.S.App.D.C. 154, 413 F.2d 1061, 1066 (1969).

12. *United States v. Cox*, 342 F.2d 167 (5th Cir.) cert. denied 381 U.S. 985, 85 S.Ct. 1767, 14 L.Ed.2d 700 (1965); *Gaither v. United States*, *supra* note 11; *In Re Miller*, 17 Fed. Cas. p. 295 (No. 9,552) (D.C.D.Ind.1878); *In Re Presentment of Special Grand Jury*, January 1969, 315 F.Supp. 662 (D.Md.1970); *United States v. Smyth*, 104 F.Supp. 283 (N. D.Cal.1952).

13. See *Gaither v. United States*, *supra* note 11.

14. See, 55 Colum.L.Rev., *supra* note 8 at 1109-1110 citing examples both in England and the American colonies.

IN RE REPORT & RECOMMENDATION OF JUNE 5, 1972 GRAND JURY 1223

Cite as 370 F.Supp. 1219 (1974)

the Supreme Court made these pertinent observations in 1791:

The grand jury are a great channel of communication, between those who make and administer the laws, and those for whom the laws are made and administered. All the operations of government, and of its ministers and officers, are within the compass of their view and research. They may suggest publick improvements, and the modes of removing publick inconveniences: they may expose to publick inspection, or to publick punishment, publick bad men, and publick bad measures.¹⁵

On this historical basis, with reliance as well upon principles of sound public policy, a number of federal courts have upheld and defined the general scope of grand jury reportorial prerogatives. In *In Re Presentment of Special Grand Jury Impaneled January, 1969*, 315 F.Supp. 662 (D.Md.1970), Chief Judge Thomsen received a "presentment" describing the course of an investigation by a Baltimore grand jury into possible corruption related to a federal construction project. The "presentment" also outlined indictments which the grand jury was prepared to return in addition to other indictments handed up with the "presentment," but noted that the United States Attorney had been directed not to sign them. The "presentment" was held under seal while interested parties argued its disposition, and was then released publicly in modified form. The grand jury's common law powers, Chief Judge Thomsen ruled, "include the power to make presentments, sometimes called reports, calling attention to certain actions of public officials, whether or not they amounted to a crime."¹⁶

15. *The Works of James Wilson*, ed. R. G. McCloskey, vol. II at 537 (1967).

16. 315 F.Supp. at 675. Chief Judge Thomsen quotes at length from the eloquent statement of New Jersey Chief Justice Vanderbilt regarding the reasons for allowing such presentments. *Id.*

17. 342 F.2d 167, 186 (5th Cir. 1965).

Chief Judge Thomsen also cited Judge Wisdom's concurring opinion in *United States v. Cox*, 342 F.2d 167 (5th Cir.) cert. denied 381 U.S. 935, 85 S.Ct. 1767, 14 L.Ed.2d 700 (1965), for the proposition that, whether used frequently or infrequently, there is no reason to suppose that the powers of our constitutional grand jury were intended to differ from those of its "English progenitor."¹⁷ In the *Cox* case four of the seven judges of the Fifth Circuit sitting *en banc* held that courts may order the United States Attorney to assist a grand jury by drafting "forms of indictment" according to the jury's wishes, while a different four-three combination ruled that the prosecutor could not be compelled to sign the presentment and thereby concur, on behalf of the executive branch, in prosecution. Judge Brown observed, without challenge from his brethren,

To me the thing [is] this simple: the Grand Jury is charged to report. It determines what it is to report. It determines the form in which it reports.¹⁸

[5] The Fifth Circuit recently had an opportunity to consider the specific question of grand jury reports, but was able to "pretermite the issue" as raised by a state court judge unfavorably mentioned in the report. In *In Re Grand Jury Proceedings*, 479 F.2d 458 (5th Cir. 1973). The court found that the portions of the report dealing with purely local affairs were of no concern to a federal grand jury and should be expunged. The remainder of the report was left intact, however, and Judge Ainsworth writing for the court observed, citing a lengthy footnote:

We point out . . . that there is persuasive authority and considerable

18. *Id.* at 184. See also 342 F.2d at 180 (opinion of Rives, Gwin & Bell, JJ.), and 342 F.2d at 189 (opinion of Wisdom, J.): "No one questions the jury's plenary power to inquire, to summon and interrogate witnesses, and to present either findings and a report or an accusation in open court by presentment."

historical data to support a holding that federal grand juries have authority to issue reports which do not indict for crime, in addition to their authority to indict and to return a no true bill.¹⁹

The Seventh Circuit, in an opinion by Judge Barnes, in *Matter of Application of Johnson et al.*, 484 F.2d 791, (7th Cir. 1973), recently upheld the authority of federal grand juries to issue reports. Chief Judge Robson of the Northern District of Illinois there permitted public distribution of a printed report based on the grand jury investigation into a confrontation between Chicago police and members of the Black Panther Party in which two persons were killed. Fifteen months after the report had been printed and distributed at the Government Printing Office, persons named in the report sought to have it expunged from court records. On appeal following denial of the motion, the

Circuit Court noted that any harm was an accomplished fact, but more importantly, that the appellants were not charged with illegal activity. The court stated plainly, "the grand jury had the authority to make the report."²⁰

The cases most often relied upon in denying reportorial powers are *Application of United Electrical, Radio & Machine Workers of America, et al.*, 111 F.Supp. 858 (S.D.N.Y.1953), and *Hammond v. Brown*, 323 F.Supp. 326 (N.D. Ohio), affirmed 450 F.2d 480 (6th Cir. 1971).²¹ Yet each of these decisions is careful to enumerate the factors militating against approval of the specific reports at issue and refrains from a blanket denial of reporting powers, although the *Hammond* court goes so far as to dub reports "as unnecessary as the human appendix."²² Of these opinions, only that of Judge Weinfeld in *United Electrical Radio and Machine Workers* speaks from a fact situation involving

19. 470 F.2d at 490 (footnote omitted).

Counsel for two of the defendants in *United States v. Mitchell, et al.*, CC 74-110, suggests that the action of Congress in specifically conferring reporting powers on special grand juries under 18 U.S.Code § 3331 et seq. is probative of the contention that grand juries lacked such powers at common law. This proposal, however, overlooks the fact that power to report was there made explicit simply to be certain that there could be no question in light of Judge Weinfeld's decision in *United Electrical* (111 F.Supp. 858). Congressman Poff, a sponsor of the bill creating special grand juries explained that since

... the precise boundaries of the reporting power have not been judicially delineated ... the authority to issue reports relevant to organized crime investigations has been specifically conferred upon the special grand juries created by this title. The committee does not thereby intend to restrict or in any way interfere with the right of regular Federal grand juries to issue reports as recognized by judicial custom and tradition. (Congressional Record, Vol. 116, part 26, 91st Cong., 2d Sess., October 7, 1970 at 35291.)

20. 484 F.2d at p. 797.

21. Counsel have cited a further federal decision in this Circuit, *Pozson v. Washington, Alexandria & Mt. Vernon R.R.*, 36 App.D.C.

350 (1911), as ruling that in the District of Columbia a regular federal grand jury "has no power other than to indict or ignore." That decision, however, involved a state grand jury, and ruled only as to "the practice in the State of Virginia." 36 App.D.C. at 369.

Within state judicial systems, the dissent in *Jones v. People*, 101 App.Div. 55, 92 N.Y.S. 275 (2d Dep't.), appeal dismissed 181 N.Y. 389, 74 N.E. 226 (1905) is often cited by courts rejecting grand jury reports, although the majority opinion which approved such reports in certain circumstances is apparently still the law in New York. For the proposition that state grand juries have legal authority to issue reports, Chief Justice Vanderbilt's opinion in *In Re Camden County Grand Jury*, 10 N.J. 23, 99 A.2d 416 (1952) has become a landmark. The author of the Note, *The Grand Jury as an Investigatory Body*, 74 Harv.L.Rev. 590, 595-96 (1961), suggests that a majority of state courts have disallowed reports unaccompanied by indictments, but have carved out exceptions for reports criticizing public officials, and for those which address general conditions and do not necessarily identify specific individuals. Consistent with federal decisions, the author further notes that state courts unanimously disallow reports made up solely of opinions and those which undertake to do nothing but advise the legislative or executive branches.

22. 323 F.Supp. 328, 351 (N.D. Ohio 1971).

IN RE REPORT & RECOMMENDATION OF JUNE 5, 1972 GRAND JURY 1221

Cite as 370 F.Supp. 1219 (1974)

a federal grand jury. In that case, petitioners, United Electrical and union officers, moved to expunge from court records the "presentment" of a 1962 grand jury in the Southern District of New York. The grand jury had investigated possible violations of perjury and conspiracy laws with reference to non-Communist affidavits filed with the National Labor Relations Board. Because leaks to newspapers revealed the names of persons referred to by the "presentment" or report, including petitioners, Judge Weinfeld treated the report as identifying its targets in derogatory contexts. The jury indicted no one, although its allegations could have been the basis for criminal proceedings. While recognizing that "reports of a general nature touching on conditions in the community . . . may serve a valuable function and may not be amenable to challenge,"²³ the court strongly disapproved of accusatory pronouncements which publicly condemn and yet bar their victim from a judicial forum in which to clear his name.

The widespread publication of the charges and the identification of petitioners as the offenders subjected them to public censure to the same degree as if they had been formally accused of perjury or conspiracy. At the same time it deprived them of the right to defend themselves and to have their day in a Court of Justice—their absolute right had the Grand Jury returned an indictment.

* * * * *

" . . . [I]f under the guise of a presentment, the grand jury simply accuse, thereby compelling the accused to stand mute, where the presentment would warrant indictment so that the accused might answer, the presentment may be expunged; . . ."

23. 111 F.Supp. 858, 869 (S.D.N.Y.1953). The court noted that at least 14 reports had been filed by grand juries in the Southern District of New York without challenge in the 16 years prior to its decision. 111 F. Supp. at 869.

24. *Id.* at 861, 867.

370 F.Supp.—774a

[Jones v. People] 92 N.Y.S. at page 277.²⁴

Judge Weinfeld also viewed the report in question as tantamount to an advisory opinion infringing upon matters exclusively within the province of another branch of government. The report recommended that the National Labor Relations Board "revoke the certification of the unions involved" and consider "including in each non-Communist affidavit a waiver by the signer of his Fifth Amendment privilege."²⁵

In *Hammond*, the court was also troubled about separation of powers problems and concluded that "a grand jury is without authority to issue a report that advises, condemns or commends, or makes recommendations concerning the policies and operation of public boards, public officers, or public authorities."²⁶ These petitioners sought to defeat Ohio state indictments in which a number of them were charged citing the prejudicial impact of a concurrent well-publicized report into which the grand jury had woven derogatory accusations against them. Among other things the jury stated that a group of 23 faculty members must share "responsibility for the tragic consequences of May 4, 1970" at Kent State University; it assigned major responsibility for the May, 1970 incident to "those persons who are charged with the administration of the University"; and it rendered "moral and social judgments on policies, attitudes, and conduct of the university administration, and some faculty and students."²⁷ *Hammond* relied upon Ohio law for the proposition that the grand jury lacked statutory authority to return a report of that kind in that case, noting further that common-law crimes and common-law criminal procedures were nonexistent in Ohio.²⁸

25. *Id.* at 860.

26. 323 F.Supp. 326, 345 (N.D. Ohio 1971).

27. *Id.* at 338.

28. *Id.* at 343-344.

The Report here at issue suffers from none of the objectionable qualities noted in *Hammond* and *United Electrical*. It draws no accusatory conclusions. It deprives no one of an official forum in which to respond. It is not a substitute for indictments where indictments might properly issue. It contains no recommendations, advice or statements that infringe on the prerogatives of other branches of government. Indeed, its only recommendation is to the Court, and rather than injuring separation of powers principles, the Jury sustains them by lending its aid to the House in the exercise of that body's constitutional jurisdiction. It renders no moral or social judgments. The Report is a simple and straightforward compilation of information gathered by the Grand Jury, and no more.

[6] Having considered the cases and historical precedents, and noting the absence of a contrary rule in this Circuit, it seems to the Court that it would be unjustified in holding that the Grand Jury was without authority to hand up this Report. The Grand Jury has obviously taken care to assure that its Report contains no objectionable features, and has throughout acted in the interests of fairness. The Grand Jury having thus respected its own limitations and the rights of others, the Court ought to respect the Jury's exercise of its prerogatives.

II.

[7] Beyond the question of issuing a report is the question of disclosure. It is here that grand jury authority ends and judicial authority becomes exclusive.²⁹

As Chief Judge Thomsen observed regarding disclosure, "Each case should

be decided on its own facts and circumstances."

The Court is the agency which must weigh in each case the various interests involved, including the right of the public to know and the rights of the persons mentioned in the presentment, whether they are charged or not. The Court should regulate the amount of disclosure, to be sure that it is no greater than is required by the public interest in knowing "when weighed against the rights of the persons mentioned in the presentment."³⁰

There, the "presentment" or report was publicly released in summarized form after the court had noted the rampant speculation about the report and had weighed "the public interest in disclosure" against "the private prejudice to the persons involved, none of whom are charged with any crime in the proposed indictment."³¹ Judge Ainsworth, in the 1973 Fifth Circuit case, posed the following criteria governing disclosure decisions:

. . . whether the report describes general community conditions or whether it refers to identifiable individuals; whether the individuals are mentioned in public or private capacities; the public interest in the contents of the report balanced against the harm to the individuals named; the availability and efficacy of remedies; whether the conduct described is indictable.³²

There, portions of a report relating to federal narcotics control were left in the public record. Chief Judge Bryan in *In Re Petition for Disclosure of Evidence*, 184 F.Supp. 38 (E.D.Va.1960), cited the public interest, a particularized need for information and traditional considerations of grand jury secrecy in

29. *In Re Grand Jury Proceedings*, 479 F.2d 458 (5th Cir. 1973); *In Matter of Application of Johnson et al.*, 484 F.2d 791, (7th Cir. 1973); *In Re Special Grand Jury Impaneled January, 1969*, 315 F.Supp. 682 (D.Md. 1970); *In Re Petition for Disclosure of Evidence*, 184 F.Supp. 38 (E.D.Va.1960). Or-

field, *The Federal Grand Jury*, 22 F.R.D. 343, 446-447 (1969).

30. 315 F.Supp. at 678.

31. *Id.* at 679.

32. 479 F.2d at 460 n. 2.

IN RE REPORT & RECOMMENDATION OF JUNE 5, 1972 GRAND JURY 1227

Cite as 370 F.Supp. 1219 (1974)

granting disclosure of a report to one agency and denying it to others. The Seventh Circuit Court of Appeals in the Chicago police—Black Panther report case considered, among other criteria, judicial discretion over grand jury secrecy, the public interest, and prejudice to persons named by the report.

[8] We begin here with the fact that the Grand Jury has recommended disclosure; not public dissemination, but delivery to the House Judiciary Committee with a request that the Report be used with due regard for the constitutional rights of persons under indictment. Where, as here, a report is clearly within the bounds of propriety, the Court believes that it should presumptively favor disclosure to those for whom the matter is a proper concern and whose need is not disputed. Compliance with the established standards here is manifest and adds its weight in favor of at least limited divulgence, overbalancing objections, and leading the Court to the conclusion that delivery to the Committee is eminently proper, and indeed, obligatory. The Report's subject is referred to in his public capacity, and, on balance with the public interest, any prejudice to his legal rights caused by disclosure to the Committee would be minimal. As noted earlier, the Report is not an indictment, and the President would not be left without a forum in which to adjudicate any charges against him that might employ

33. Rule 6(e) *Secrecy of Proceedings and Disclosure*. Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person ex-

cept in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons. (18 U.S.C., Federal Rules of Criminal Procedure, Rule 6.)

Report materials. The President does not object to release. The only significant objection to disclosure, is the contention that release of the Report beyond the Court is absolutely prohibited by Rule 6(e), Federal Rules of Criminal Procedure. The text of Rule 6(e) is set forth in the margin.³³ Counsel objecting to release draw particular attention to the statement "[persons may disclose matters occurring before the grand jury] only when so directed by the court preliminarily to or in connection with a judicial proceeding"

In their "Notes" accompanying Rule 6(e)³⁴ the Advisory Committee on Rules, responsible for drafting Federal Rules, explains the intent of that paragraph as follows:

1. This rule continues the traditional practice of secrecy on the part of members of the grand jury, *except when the court permits a disclosure*, *Schmidt v. United States*, 115 F.2d 394, C.C.A. 6th; *United States v. American Medical Association*, 26 F. Supp. 429, D.C.; *Cf. Atwell v. United States*, 162 F. 97, C.C.A. 4th; and see 18 U.S.C. former § 554(a)

[9] It is apparent from an analysis of the Advisory Committee's authorities that the "traditional practice of secrecy" there codified covers a rather narrow area.³⁵ At most, the cases cited estab-

34. 18 U.S.Code Ann., Rule 6, p. 234.

35. *Id.* (emphasis added.).

36. The *Schmidt* case cited was an appeal by two attorneys from a conviction of contempt for having authorized their clients, in a criminal case, to privately obtain the affidavits of grand jurors who had voted on their in-

lish only that secrecy must prevail during deliberations, and that any later disclosure will occur at the court's discretion. The phrase in the Rule, "preliminarily to or in connection with a judicial proceeding," evidently derived from the fact that the Advisory Committee had in mind only cases where the disclosure question arose at or prior to trial. It left the courts their traditional discretion in that situation and apparently considered no others. It affirmed judicial authority over persons connected with the grand jury in the interest of necessary secrecy without diminishing judicial authority to determine the extent of secrecy. The Court can see no justification for a suggestion that this codification of a "traditional practice" should act, or have been intended to act,

dictment, in violation of the jurors oath of secrecy. The affidavits were filed in an attempt to overturn the indictments. In its holding the court stated:

Logically the responsibility for relaxing the rule of secrecy and of supervising any subsequent inquiry should reside in the court, of which the grand jury is a part and under the general instructions of which it conducted its "judicial inquiry." It is a matter which appeals to the discretion of the court when brought to its attention . . . and we think it is sound procedural law. (115 F.2d at 397, citations omitted.)

In the *American Medical Association* case, indicted defendants sought court permission to obtain the affidavits of grand jurors in support of pleas in abatement and motions to quash. The court stated in its holding, "Neither indictment, arrest of the accused, nor expiration of the jury term will operate to release a juror from the oath of secrecy, as the defendants here contend. That can only be done by a court acting in a given case when in its judgment the ends of justice so require." 26 F.Supp. at 430 (citations omitted). In *Atwell v. United States*, the Fourth Circuit reversed the contempt conviction of a grand juror who had given statements regarding grand jury proceedings to defense counsel following indictments and dismissal of the grand jury. The court analyzed the jurors oath and held as follows:

This oath required him (a) diligently to inquire and true presentment make of all such matters and things as were given him in charge; (b) to present no one for envy, hatred, or malice; (c) to leave no one unrepresented for fear, favor, or affection, re-

to render meaningless an historically proper function of the grand jury by enjoining courts from any disclosure of reports in any circumstance.

Since its enactment, the cases interpreting Rule 6(e) have varied widely on its disclosure provision. It has been held that "judicial proceeding" refers only to a proceeding in a United States District Court.³⁷ Other courts balancing need for disclosure against benefits of secrecy have both granted and denied disclosure of matters before a grand jury to state officials.³⁸ Administrative proceedings have been found to fit within the Rule's terms,³⁹ and not to fit.⁴⁰

In the Second Circuit, Judge Learned Hand wrote that "the term 'judicial proceeding' includes any proceeding deter-

ward, or hope of reward; (d) the United States' counsel, his fellows', and his own to keep secret. It may well be said that the first three obligations of this oath relate to the positive duty required of the grand juror, while the latter relates to and defines the rule of conduct to be followed by him in the discharge of these positive duties. The first three are demanded by direct mandate of the law; the latter only by its policy, and solely in order that the first three may be more thoroughly and effectively performed. (162 F. at 99, emphasis added).

Former § 554(a) of Title 18, U.S. Code simply barred pleas or motions to abate or quash indictments on the ground that unqualified jurors voted whenever at least twelve qualified jurors concurred in the indictment. 18 U.S. Code § 554(a), 1946 edition.

37. *United States v. Downey*, 195 F.Supp. 581 (D.Ill.1961); *United States v. Crolich*, 101 F.Supp. 782 (D.Ala.1952).

38. Compare *In re Petition for Disclosure of Evidence*, *supra* note 26 with *In re Holovachka*, 317 F.2d 834 (7th Cir. 1963) and *Petition of Brooke*, 229 F.Supp. 377 (D. Mass.1964).

39. *Jachimowski v. Coniak*, 490 F.2d 894 (7th Cir. 1973), authorizing release of grand jury evidence for a police disciplinary investigation; *In re Grand Jury Investigation William H. Pfauver & Sons, Inc.*, 53 F.R.D. 464 (E.D.Pa.1971), permitting disclosure to agents of the Internal Revenue Service; *In Re Bullock*, 103 F.Supp. 639 (D.D.C.1962).

40. *In Re Grand Jury Proceedings*, 309 F.2d 440 (3rd Cir. 1962).

IN RE REPORT & RECOMMENDATION OF JUNE 5, 1972 GRAND JURY 1229

Cite as 370 F.Supp. 1219 (1974)

minable by a court, having for its object the compliance of any person, subject to judicial control, with standards imposed upon his conduct in the public interest, even though such compliance is enforced without the procedure applicable to the punishment of crime."⁴¹ He added, "an interpretation that should not go at least so far, would not only be in the teeth of the language employed, but would defeat any rational purpose that can be imputed to the rule."⁴² Matters occurring before the grand jury were thus made available for use in a disbarment proceeding. More recently in an opinion written by Chief Judge Friendly, the Second Circuit held that Rule 6(e) did not bar public disclosure of grand jury minutes, wholly apart from judicial proceedings, when sought by the grand jury witness.⁴³

This difficulty in application of Rule 6(e) to specific fact situations likely arises from the fact that its language regarding "judicial proceedings" can imply limitations on disclosure much more extensive than were apparently intended. As the *Biaggi* decision just cited implies, Rule 6(e) which was not intended to create new law, remains subject to the law or traditional policies that gave it birth. These policies are well established, and none of them would dictate that in this situation disclosure to the Judiciary Committee be withheld.

[10] In two well-known antitrust cases, *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 79 S.Ct. 1237, 3 L.Ed.2d 1323 (1959) and *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 78 S.Ct. 983, 2 L.Ed.2d 1077 (1958), the Supreme Court has listed in summary form the bases of grand jury secrecy:

41. *Doe v. Rosenberry*, 255 F.2d 118, 120 (2nd Cir. 1958).

42. *Id.*

43. *In Re Biaggi*, 478 F.2d 460 (2nd Cir. 1973). *Biaggi*, a New York City mayoral candidate at the time, wanted minutes released to answer charges made in the campaign that he had invoked his Fifth Amendment privilege as a witness before the grand jury.

(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before [the] grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammelled disclosures by persons who have information with respect to the commission of crimes; (5) to protect [the] innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.⁴⁴

Upon the return of an indictment, the first three and the fifth reasons for secrecy are rendered inapplicable. The interest represented by the fourth, encouraging free disclosure by those who possess information regarding crimes, must be protected, but as these and other cases have asserted⁴⁵ a compelling need and the ends of justice may still mandate release.

[11] Here, for all purposes relevant to this decision, the Grand Jury has ended its work. There is no need to protect against flight on anyone's part, to prevent tampering with or restraints on witnesses or jurors, to protect grand jury deliberations, to safeguard unaccused or innocent persons with secrecy. The person on whom the Report focuses, the President of the United States, has not objected to its release to the Committee. Other persons are involved only indirectly.

44. 366 U.S. at 681 n. 6, 78 S.Ct. at 986. See also 1 Wright, *Federal Practice and Procedure*, § 106 at 170 (1969).

45. See, e. g., *United States v. Necony-Vacuum Oil Co.*, 310 U.S. 150, 234, 60 S.Ct. 511, 849, 84 L.Ed. 1129 (1940): "But after the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it."

ly. Those persons who are not under indictment have already been the subject of considerable public testimony and will no doubt be involved in further testimony, quite apart from this Report. Those persons who are under indictment have the opportunity at trial for response to any incidental references to them. And although it has not been emphasized in this opinion, it should not be forgotten that we deal in a matter of the most critical moment to the Nation, an impeachment investigation involving the President of the United States. It would be difficult to conceive of a more compelling need than that of this country for an unswervingly fair inquiry based on all the pertinent information.

These considerations might well justify even a public disclosure of the Report, but are certainly ample basis for disclosure to a body that in this setting acts simply as another grand jury. The Committee has taken elaborate precautions to insure against unnecessary and inappropriate disclosure of these materials.⁴⁶ Nonetheless, counsel for the indicted defendants, some having lived for a considerable time in Washington, D. C., are not persuaded that disclosure to the Committee can have any result but prejudicial publicity for their clients. The Court, however, cannot justify non-disclosure on the basis of speculation that leaks will occur, added to the further speculation that resultant publicity would prejudice the rights of defendants in *United States v. Mitchell et al.* We have

no basis on which to assume that the Committee's use of the Report will be injudicious or that it will disregard the plea contained therein that defendants' rights to fair trials be respected.

Finally, it seems incredible that grand jury matters should lawfully be available to disbarment committees and police disciplinary investigations and yet be unavailable to the House of Representatives in a proceeding of so great import as an impeachment investigation. Certainly Rule 6(e) cannot be said to mandate such a result. If indeed that Rule merely codifies existing practice, there is convincing precedent to demonstrate that common-law practice permits the disclosure here contemplated. In 1811, the presentment of a county grand jury in the Mississippi Territory, specifying charges against federal territorial Judge Harry Toulmin, was forwarded to the House of Representatives for consideration in a possible impeachment action.⁴⁷ Following a committee investigation, the House found the evidence inadequate to merit impeachment and dismissed the matter. Though such grand jury participation appears not to have occurred frequently, the precedent is persuasive.⁴⁸ The Court is persuaded to follow the lead of Judges Hastings, Barnes and Sprecher speaking for the Seventh Circuit, Judges Friendly and Jameson of the Second Circuit, Judge Wisdom of the Fifth Circuit, and Judge Thomsen of the District of Maryland.⁴⁹ Principles of grand jury secrecy do not bar this disclosure.⁵⁰

46. See, *Procedures for Handling Impeachment Inquiry Material*, Committee on the Judiciary, House of Representatives, 93rd Cong., 2d Sess., February, 1974, House Committee Print, at 1, 2.

47. 3 Hinds' Precedents of the House of Representatives § 2468 at 995, 996 (1907).

48. In Dechler's words: "In the House of Representatives there are various methods of setting an impeachment in motion: . . . by charges transmitted from the legislature of a State . . . or from a grand jury . . ." Dechler, *Constitution, Jefferson's Manual, and Rules of the House of Repre-*

sentatives, H.R. Doc. 384, 92d Cong. 2d Sess., § 603 at 293.

49. In *Matter of Application of Johnson et al.*, *supra* at p. 1224. In *Re Biaggi*, *supra* note 43, *United States v. Cox*, *supra* note 12 (concurring opinion), and In *Re Presentment of Special Grand Jury Impaneled January, 1969*, *supra* at p. 1223, respectively.

50. The Court's holding renders unnecessary a consideration of Mr. Jenner's argument on behalf of the Committee that insofar as Rule 6(e) conflicts with the constitutional powers of impeachment, the Rule is *pro tanto* overridden. See Transcript at 32-39.

AKRON, CANTON & YOUNGSTOWN R. CO. v. UNITED STATES 1231

Cite as 370 F.Supp. 1231 (1974)

III.

Consistent with the above, therefore, the Court orders that the Grand Jury Report and Recommendation, together with accompanying materials be delivered to the Committee on the Judiciary, House of Representatives. The only individuals who object to such order are defendants in the United States v. Mitchell et al. case currently pending in this court. Their standing is dubious at best given the already stated facts that (1) their mention in the Report is incidental, (2) their trials will provide ample opportunity for response to such references, none of which go beyond allegations in the indictment, and (3) considerations of possible adverse publicity are both premature and speculative. Their ability to seek whatever appellate review of the Court's decision might be had, is therefore questionable. Nevertheless, because of the irreversible nature of disclosure, the Court will stay its order for two days from the date thereof to allow defendants an opportunity to pursue their remedies, if any, should they desire to do so.

The President's request to have counsel review the Report's contents has not received comment from the Committee counsel due to their feeling that such comment would be inappropriate.⁵¹ It is the Court's view that this request is more properly the Committee's concern, and it therefore defers to the Chairman for a response to the President's counsel.

Having ruled that the Recommendation of the Grand Jury and request of the House Judiciary Committee should be honored, the Court relinquishes its own control of the matter, but takes advantage of this occasion to respectfully request, with the Grand Jury, that the Committee receive, consider and utilize the Report with due regard for avoiding any unnecessary interference with the Court's ability to conduct fair trials of persons under indictment.

⁵¹ Letter to the Honorable John J. Sirica from John Deor, Esq., dated March 12, 1974, and filed in Misc. 74-21.

**AKRON, CANTON & YOUNGSTOWN
RAILROAD COMPANY, et al.**
Plaintiffs,

and

**Freight Forwarders Tariff Bureau,
Inc., et al., Intervening Plaintiffs,**

v.

UNITED STATES of America
and

Interstate Commerce Commission,
Defendants,

and

National Industrial Traffic League,
Intervening Defendant.

Civ. A. No. 73-1272-M.

United States District Court,
D. Maryland.

Jan. 14, 1974.

Action was brought by railroads and freight forwarders seeking a permanent injunction against enforcement of regulations of the Interstate Commerce Commission requiring freight carriers to transmit to subscribers copies of proposed new tariffs prior to the time that they are filed with the ICC. A three-judge District Court, James R. Miller, Jr., District Judge, held that although the Commission had had power to adopt and promulgate the regulations in question, it had not done so pursuant to the proper procedures when it failed to allow the carriers notice and hearing on the regulations prior to their adoption. Permanent injunction issued.

I. Commerce § 625, 26-11

As used in statute empowering Interstate Commerce Commission to adopt regulations prescribing form and manner in which tariffs shall be published, filed and posted, terms "published" and "posted" are essentially distinct, and term "published" was not limited to process of printing and distributing rate

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE: SEALED CASE. _____

Misc. No. 98-95

DECLARATION OF CHARLES F.C. RUFF

I, Charles F.C. Ruff, do hereby declare:

1. **Introduction**

1. I am Counsel to the President of the United States. I have held this position since February 10, 1997. Prior to that time, from 1995 to 1997, I served as Corporation Counsel to the District of Columbia. From 1982-95, I was a partner at the Washington, D.C. law firm of Covington & Burling. During that time, from 1989-90, I served as president of the District of Columbia Bar. I also served as United States Attorney for the District of Columbia from 1979-82. From 1975-77, I served as Watergate Special Prosecutor.

2. In my capacity as Counsel to the President, I provide legal advice to the President regarding a wide variety of matters relating to his constitutional, statutory, ceremonial, and other official duties and the effective functioning of the Executive Branch. At the President's direction, I review various matters that have legal implications and advise him on particular courses of conduct. Those matters include, among numerous others, the assertion of privileges in response to requests for materials and testimony, including executive privilege, attorney-client privilege, and attorney-work-product privilege.

3. The White House Counsel's Office, as a whole, provides confidential counsel to the President, in his official capacity, to the White House, as an institution, and to senior advisors, in

Declaration of Charles F.C. Ruff

Page 2

particular, about matters that affect the White House's interests, including investigative matters. To this end, the Counsel's Office receives confidential communications from and provides advice to current and former White House personnel about matters of institutional concern. These individuals provide this information to and solicit advice from our Office with the expectation and understanding that such communications will remain confidential.

II. The Jones Litigation

4. In May 1997, the Supreme Court held in *Clinton v. Jones* that the Constitution does not require a stay of private litigation involving the President until after his term. *Clinton v. Jones*, 117 S. Ct. 1636 (1997). Thus, the *Jones* litigation was permitted to proceed during the President's term, with the Court making particular note that the potential burdens that this litigation may place on the President need to be taken into account by the trial court. This decision requires the President to balance two competing demands on his time: (1) his need to defend the *Jones* lawsuit and (2) the absolute requirement that he devote his full time and attention to performing his duties as President.

5. From my experience as a defense attorney in private practice, a civil lawsuit involving these kinds of allegations and monetary claims requires a substantial time commitment by a client, especially during the discovery phase of the litigation. I also found that most of my individual clients, in addition to fulfilling their obligations as a litigant, have a genuine and important interest in being actively involved in the ongoing litigation, including participating in strategy discussions and decisions. This level of commitment necessarily places a substantial burden on a client's schedule.

6. The President, as the Chief Executive of our Nation, has extraordinary demands placed on his time. His schedule cannot accommodate the many demands of his office, independent of his personal and family responsibilities. In most instances, the many competing obligations

Declaration of Charles F.C. Ruff
Page 3

facing the President require him to rely on his advisors to meet with certain people, attend meetings, gather information and advise him on particular matters.

7. Thus, the progress of the *Jones* litigation concurrent with President's second term has placed additional obligations on the President's schedule that, under the law, he must fulfill despite the current demands of his office. Consequently, the President must look to his advisors to assist him in determining how he can fulfill the requirements of the lawsuit while not abandoning his duty to the American people.

8. The lawsuit has also spawned issues and the need for decisions (*e.g.*, discovery, the deposition of the President, and the possibility of a resolution of the litigation prior to trial) that affect the Presidency and the President's ability to perform his duties effectively. The President's advisors, who know the scope and weight of matters before the President at any given time, are best situated to advise the President as to how various aspects of the *Jones* litigation may affect the Presidency or official matters. Accordingly, presidential advisors need to know about and discuss those litigation-related issues or matters that may affect the office so that they can give the President informed advice as to how he should proceed.

9. The media's interest in the *Jones* litigation has generated inquiries in hundreds of official presidential press conferences and briefings by the President, his press secretary, and other White House staff, whether held here or in other countries. Indeed, the volume of *Jones*-related inquiries that the White House receives sometimes eclipses the inquiries generated by official White House policy matters. Therefore, presidential advisors need the ability to have informed, candid, and frank discussions about the *Jones* litigation to prepare the President for these inquiries.

Declaration of Charles F.C. Ruff
Page 4

III. The Expansion of the Office of Independent Counsel Starr's Jurisdiction

10. On January 16, 1998, at the request of the Attorney General, the Special Division conferred jurisdiction on the Office of Independent Counsel Kenneth Starr ("OIC") to investigate whether "Monica Lewinsky or any other individual" suborned perjury or committed other federal crimes.¹ The allegations surrounding the OIC's investigation involve the President during his tenure, the White House, and many White House employees.

11. Since that time, the OIC has served [redacted] subpoenas for documents on the White House or current White House employees containing more than [redacted] separate requests relating to the Lewinsky investigation and calling for expedited production. The OIC has also served at least [redacted] White House employees with subpoenas calling for their testimony before the grand jury. The OIC also has requested interviews from more than [redacted] White House employees.

12. Every day since January 21, 1998, the White House has received a flood of press inquiries related to the Lewinsky investigation, and the subject has been raised in virtually every White House press briefing and presidential press appearance.

IV. White House Cooperation with the OIC Investigation

13. Consistent with the practice of my predecessors, as Counsel to the President, I have endeavored to cooperate with the OIC by maintaining an open and constructive dialogue and by responding expeditiously to its requests. Indeed, the White House has responded in a timely fashion to the OIC's document subpoenas and has produced all responsive materials it has

¹ *Text of Reno's Petition for Starr*, ASSOCIATED PRESS NEWSDAY.COM, Jan. 29, 1998.

Declaration of Charles F.C. Ruff
Page 5

located, usually by the designated production date. To accomplish this task, the Counsel's Office circulated a directive to the entire Executive Office of the President's staff and, where appropriate, performed several targeted searches for information.

14. [REDACTED] White House staff members, other than Mr. Lindsey and Mr. Blumenthal, have been subpoenaed to testify before the grand jury regarding their knowledge of facts pertaining to the relevant time period surrounding the Lewinsky investigation. Others have been asked to submit voluntarily to an interview. I understand that all of these individuals have cooperated with the OIC, and none has asserted privilege over any information that they possess. In particular, the following individuals have provided testimony about their knowledge of this matter:

[REDACTED]

15. As explained more fully below, with respect to certain individuals subpoenaed to testify, I anticipated that their testimony might implicate confidential communications and information. In an effort to avoid any unnecessary delay in the investigation and needless confrontation, my staff notified the OIC that the issue might arise and discussed ways to reach a mutually agreeable accommodation prior to or following an individual's appearance.

V. Certain Information and Discussions Relating to the Lewinsky Investigation are Subject to Privilege

16. It is my understanding that this and prior administrations, Republican and Democratic, have recognized that, with respect to matters that relate to the President's performance of his duties and the functions of the Executive Branch, presidential advisors, and their staff, must be able to inquire into matters in detail, obtain input from all others with significant expertise in the area, and perform detailed analyses of all possible alternatives before deciding what advice and

Declaration of Charles F.C. Ruff
Page 6

information to provide the President. *In re Sealed Case*, 121 F.3d 729, 750 (D.C. Cir. 1997). The President has an important confidentiality interest in seeking and receiving advice – an interest that is constitutionally based “to the extent this interest relates to the effective discharge of a President’s powers.” *United States v. Nixon*, 418 U.S. 683, 711 (1974).

17. Moreover, we treat executive privilege as extending to communications among advisors and their staff, even if not communicated directly to President. *In re Sealed Case*, 121 F.3d at 751-52, and to communications in their entirety, not just the deliberative or advice portions, including pre-decisional, final, and post-decisional materials. *In re Sealed Case*, 121 F.3d at 745.

18. The Lewinsky investigation involves allegations regarding the President’s conduct toward a federal government employee during his tenure in office. This matter is inextricably intertwined with the daily presidential agenda, and thus has a substantial impact on the President’s ability to discharge his obligations. Accordingly, in the course of executing his duties, there have been discussions among advisors and the President involving the Lewinsky investigation, and these discussions have been held in confidence and treated as subject to privilege.

A. Discussion of Possible Proceedings by the House Judiciary Committee

19. Under Article II of the Constitution, Congress possesses the power to initiate proceeding against a sitting President that can ultimately result in his removal from office. Thus, even the mere speculation about such proceedings raises serious issues that a President and his advisors must address.

20. In November 1997, an impeachment resolution was introduced in the House of

Declaration of Charles F.C. Ruff

Page 7

Representatives. The resolution did not contain specific allegations regarding the President. Rather, it broadly claimed that there was considerable evidence developed from various "credible sources" that the President had engaged in conduct designed to obstruct the legitimate Executive Branch functions. See H. Res. 304, 105th Cong., 1st Sess. (Nov. 5, 1997).

21. Only days after the Special Division expanded the scope of the OIG's investigation, members of the House Judiciary Committee renewed their public discussions about the possibility of initiating proceedings against the President in light of the allegations arising from the Lewinsky investigation.² Weeks later, the press continued to report that many people "would like to see [the President] impeached or forced to resign."³ Congressman Robert Barr recently went so far as to state that "the Republican leadership is beginning to lay the groundwork . . . [for] impeachment proceedings . . ."⁴ Thus, the Lewinsky investigation not only relates to and affects the Presidency -- it also threatens it.

22. Statements by members of Congress and related reports have generated numerous inquiries, some directed at the President, about the possibility of impeachment proceedings.⁵

² *Bryant suggests Clinton should consider stepping aside*, GANNETT NEWS SERVICE, Jan. 27, 1998.

³ N. Gibbs, *Twin Perils of Love & War*, TIME, March 2, 1998, p.36-39; see *Clinton Accused: Guide to Impeachment* THE INDEPENDENT, Jan. 23, 1998, p.8; *'Smoking Gun' Could Trigger Bid to Boot Bubba*, NEW YORK POST, Jan. 23, 1998, p.9; *Clinton Is Becoming Increasingly Isolated As His Latest Crisis Deepens*, THE SCOTSMAN, Jan. 23, 1998, p.15; *Excerpt of A Telephone Interview With Morton Kondrake and Ed Henry of Roll Call*, 34 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 115 (Jan. 21, 1998).

⁴ *Bob Barr Discusses Impeachment Process for Bill Clinton*, CNN BOTH SIDES WITH JESSE JACKSON (Feb. 15, 1998).

⁵ JOINT PRESS CONFERENCE OF THE PRESIDENT AND PRIME-MINISTER TONY BLAIR OF GREAT BRITAIN, Feb. 6, 1998; PRESS BRIEFING BY MIKE MCCURRY, Jan. 26, 1998; PRESS BRIEFING BY MIKE MCCURRY, Jan. 23, 1998; PRESS BRIEFING BY MIKE MCCURRY, Jan. 21, 1998.

Declaration of Charles F.C. Ruff
Page 5

Consequently, presidential advisors must gather information and formulate advice for the President about the Lewinsky investigation to address the myriad of issues and inquiries that the investigation raises in this context. In addition, the Counsel's Office must prepare to defend against any such proceeding.

B. Domestic and Foreign Policy Matters

23. The President's State of the Union address occurred days after the press reported the expansion of the OIC's jurisdiction and the allegations surrounding Ms. Lewinsky. The White House received numerous inquiries as to whether the President would address these allegations in his State of the Union address.⁶ The President's advisors obviously were required to gather information, consider available options, and advise the President about how to handle this and related matters.

24. The President's ability to work with Congress to enact legislation is likewise affected by the Lewinsky investigation. Certain legislators have been described as "throwing up their hands at the prospect of doing any serious business,"⁷ thereby significantly affecting the President's domestic agenda.⁸ Indeed, Senate Majority Leader Trent Lott recently remarked that the Lewinsky investigation "is beginning to have an impact on the presidency, on the president and on his ability to deal with many very important issues for the future of our country -- from Social

⁶ E.g., PRESS BRIEFING BY MIKE MCCURRY, Jan. 26, 1998.

⁷ *Clinton Under Fire*, LOS ANGELES TIMES, Jan. 26, 1998, p.A17; see also *The President Under Fire: The Public View*, NEW YORK TIMES, Jan. 27, 1998, p.A1 ("most Americans fear that the scandal will interfere with his future ability to perform his job effectively"); *Alleged Clinton Affair Boosts call for Impeachment Probe*, STATES NEWS SERVICE, Jan. 22, 1998.

⁸ See *Lawmakers Return Amidst Scandal*, AP ONLINE, Jan. 26, 1998.

Declaration of Charles F. C. Ruff

Page 9

Security to what's going on in Iraq to now what's going on in Kosovo." Therefore, in discussing with the President his ability to achieve the Administration's domestic policy objectives, advisors must take into account the impact of issues arising out of the Lewinsky investigation on his efforts and advise him accordingly.

25. Based upon information from others, I understand that the Lewinsky investigation also affected the President's ability to address foreign policy matters. For example, during the recent crisis with Iraq, certain people speculated that the Lewinsky investigation might harm the President's ability to "influence" the public, thus rendering him incapable of garnering support for the U.S. position on this issue and ultimately negotiating a successful resolution with Iraq.⁹ These same concerns were raised when the President addressed Middle East issues, including his recent meetings with Prime Minister Netanyahu and Mr. Arafat.¹¹ Therefore, the President's advisors necessarily discussed the Lewinsky investigation and advised the President so that he could effectively execute his constitutional duties regarding foreign policy matters.

C. Discussions Regarding the Assertion of Applicable Privileges

26. When an investigative body subpoenas the White House or one of its staff members for

⁹ *Lott Urges Clinton to Give Details*, ASSOCIATED PRESS, March 9, 1998.

¹⁰ *Crisis Develops Inside the White House*, CNN LATE EDITION WITH WOLF BLITZER (Jan. 25, 1998); see also, *Twin Perils of Love & War*, TIME, March 2, 1998, p.36-39; *Republicans End Silence On Troubles Of President*, THE NEW YORK TIMES, March 1, 1998, sec.1, p.20, col.1; *It's Hard To Believe The Clintons*, CHICAGO TRIBUNE, Jan. 29, 1998, p.19; *Echoes of the past but a far cry from Watergate*, FINANCIAL TIMES, Jan. 24, 1998, p.3; *Scandal tests Clinton on Iraq crisis*, AGENCE FRANCE PRESSE, Jan. 24, 1998.

¹¹ *N.J. lawmakers worry Clinton's woes could hurt host of issues*, GANNETT NEWS SERVICE, Jan. 30, 1998; *It's Hard To Believe The Clintons*, CHICAGO TRIBUNE, Jan. 29, 1998, p.19; *Letters to the Editor: Sex and the president through media eyes*, THE SAN DIEGO UNION-TRIBUNE, Jan. 27, 1998, p.B-7.

Declaration of Charles F.C. Ruff
Page 10

information. White House confidentiality interests are often implicated. The Counsel's Office has always attempted to deal with these privilege issues in a careful and deliberate manner.

27. After ascertaining that a subpoenaed individual possesses confidential information, the decision whether to assert privilege over such communications or information is one that the White House approaches thoughtfully, deliberately, and seriously. First, we carefully review the nature and substance of the communication to determine its confidential nature. Second, we evaluate whether the assertion of the privilege is legally sustainable and otherwise appropriate. Finally, we brief the President and advise him in making the ultimate decision. Thus, this process involves core presidential decisionmaking.

28. Accordingly, presidential advisors have engaged in deliberations to determine whether it is necessary to advise the President to assert privilege over certain communications. These discussions are presumptively privileged.

D. Strategy Sessions Involving Presidential Advisors and Counsel

29. The President is unable personally to keep abreast of every matter that is handled by or could possibly affect him or the Executive Branch. Accordingly, the President must rely on advisors to ensure the progress and development of these matters and, when appropriate, brief the President with information and advice that will permit him to make decisions and respond to inquiries. Often, issues arise unexpectedly, and thus advisors must always be prepared to assist the President on a moment's notice with the most recent, accurate and comprehensive information, and the full range of options relating to a particular decision.

30. The Lewinsky investigation is no exception to this process. As illustrated in the examples presented above, since first reported, this investigation has affected the President's

Declaration of Charles F. C. Ruff

Page 11

ability to execute his constitutional obligations and has been the primary subject of press inquiries. This investigation has also intruded on the work of the President and his immediate advisors and staff, and has raised issues involving privilege, witness availability and subpoena compliance. As a result, the President's advisors and counsel have held regular meetings to gather and exchange information, as well as to formulate recommendations, for the President.

VI. The Subpoenas to Bruce R. Lindsey and Sidney Blumenthal

A. Communications with the OIC before Grand Jury Appearances by Mr. Lindsey and Mr. Blumenthal

31. On [REDACTED], the OIC served on Bruce Lindsey, Assistant to the President and Deputy Counsel, a subpoena calling for his appearance to testify on [REDACTED] before the grand jury.

32. In an effort to address, prior to Mr. Lindsey's appearance, the scope of the matters that the OIC sought to discuss with Mr. Lindsey and other senior advisors to the President and to address potential privileges that might be implicated, I contacted the OIC to discuss the matter. On February 3, 1998, Special Counsel Lanny Breuer and I met with Kenneth Starr, Robert Bittman, Steve Collatan, and Jackie Bennett. I explained the nature of the privilege concerns that would arise from broad-ranging inquiries into staff discussions and communications with the President, and I asked OIC to describe with particularity the possible areas of inquiry. They declined to do so.

33. The OIC informed me that it had postponed indefinitely Mr. Lindsey's appearance, and therefore a discussion of their examination of Mr. Lindsey was premature. As a result, our discussions about his testimony were curtailed, and instead we focused on the pending appearance of another presidential advisor, [REDACTED].

Declaration of Charles F.C. Ruff
Page 12

34. On February 4, 1998, Mr. Starr sent me a letter indicating that they intended to inquire into privileged areas based upon their view that executive privilege was inapplicable to information relating to the Lewinsky investigation. (2/4/98 Letter from Starr to Ruff, attached as Exhibit 1).

35. On February 5, 1998, I responded to Mr. Starr's letter and stated that, under the principles of *In re Sealed Case* and other relevant authority, conversations among advisors were presumptively privileged. (2/5/98 Letter from Ruff to Starr, attached as Exhibit 2).

36. I pointed out that the "discussions among and between the President's senior staff involve the very capacity of the President and his staff to govern—to pursue his legislative agenda, to ensure the continued leadership of [the] United States in the world community, and to maintain the confidence of the people who elected him—all of which lie at the heart of his role under Article II of the Constitution." (*Id.* at 2). I concluded by indicating my willingness to explore all possible accommodations of our respective interests. (*Id.*).

37. On February 6, 1998, the OIC sent me a letter rejecting my offer and restating its position regarding the communications about which it intended to inquire. In rejecting my offer, the OIC did not articulate any need for this information, as required by *In re Sealed Case*, but simply asserted that its desire "to resolve this matter in a timely fashion" compelled disclosure. (2/6/98 Letter from Starr to Ruff at 1, attached as Exhibit 3).

38. Finally, on the issue of discussions between witnesses and White House counsel, the OIC stated that, under the Eighth Circuit decision in *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1997), it intended to question White House personnel as to the substance of such communications, and that if a witness asserted the attorney-client privilege, the OIC intended to "take such further steps as are appropriate." (*Id.* at 2).

Declaration of Charles F.C. Ruff
Page 13

B. Mr. Lindsey's Communications are Presumptively Privileged

39. As described in his declaration, filed in connection with the White House's opposition to the OIG's motions to compel, Mr. Lindsey testified before the grand jury on [REDACTED] and on [REDACTED]. Over the course of those three days of testimony, Mr. Lindsey willingly answered questions about his personal knowledge with respect to any allegations of a personal relationship between Ms. Lewinsky and the President, and any allegations of suborning perjury in connection with the *Jones* litigation, as well as several questions about Mr. Lindsey's discussions with others that involved Ms. Lewinsky. [REDACTED]

40. Mr. Lindsey declined to answer other specific categories of questions relating to the *Jones* litigation and the Lewinsky investigation on the grounds that they are subject to executive privilege, attorney-client privilege, attorney-work product privilege, and/or the common interest doctrine. [REDACTED]

41. The confidential communications that Mr. Lindsey declined to disclose to the grand jury are presumptively privileged. They occurred while performing his duties as Deputy Counsel to the President and as one of the principal advisors to the President, or as the President's personal attorney prior to the President taking office. [REDACTED]. Mr. Lindsey had these discussions with the President, other White House attorneys, presidential advisors to the President, and/or with the President's private attorneys. [REDACTED] The communications contain information and advice relating to the *Jones* litigation or Lewinsky investigation that Mr. Lindsey gathered or provided for the purpose of assisting the President in making decisions in connection with his official duties or to ensure that the allegations and inquiries surrounding these matters did not impair the President's discharge of his official duties. [REDACTED]

[REDACTED]

C. Mr. Blumenthal's Communications are Presumptively Privileged

42. [REDACTED], Mr. Blumenthal testified before the grand jury. [REDACTED]
[REDACTED] Mr. Blumenthal declined to answer certain questions on the grounds that they are subject to executive privilege. [REDACTED]

43. In his capacity as Assistant to the President, Mr. Blumenthal participates in and is consulted on a wide variety of matters, including domestic policy issues, presidential speeches, (including the State of the Union address), national security issues, and international freedom of the press issues. [REDACTED] Mr. Blumenthal also serves as the liaison for the President to the office of the Prime Minister of Great Britain; a role that requires him to interact with the Prime Minister and his advisors on a variety of subjects, including United States foreign policy matters. [REDACTED]

44. To perform his duties, Mr. Blumenthal consults with other presidential advisors to gather information and formulate advice to give to the President. [REDACTED] In carrying out these duties, Mr. Blumenthal has had discussions with the President, First Lady, and other senior advisors regarding the allegations and inquiries surrounding the Lewinsky investigation. [REDACTED] These discussions took place in the context of Mr. Blumenthal's assisting the President to perform his duties; in particular, the President's State of the Union address and the visit by the Prime Minister of Great Britain. [REDACTED] Accordingly, these discussions are presumptively privileged.

[REDACTED]

Declaration of Charles F.C. Ruff
Page 15

VII. Communications with the OIC in early March 1998

45. The White House sought to avoid needless confrontation by reaching a mutually agreeable accommodation that would permit the OIC access to the information that it purportedly needed to conduct its investigation while maintaining the legitimate confidentiality interests of the White House. On March 2, 1998, W. Neil Eggleston, the attorney representing the Office of the President in connection with litigation arising out of the Lewinsky investigation, sent a letter to the OIC requesting that the White House be consulted about whether such an accommodation was reachable. (3/2/98 Letter from Eggleston to Starr, attached as Exhibit 4). Mr. Eggleston also described to the OIC the well-established accommodation process that the White House historically followed, citing the *Espy* litigation as an example. (*Id.* at 1). Finally, Mr. Eggleston offered to meet with the OIC to discuss the areas of inquiry that implicated privilege concerns and to consider any articulation of need that the OIC might make. (*Id.* at 2).

46. On that same day, the OIC replied to Mr. Eggleston's letter, reiterating its earlier position that executive privilege did not apply to information relating to the Lewinsky investigation. (3/2/98 Letter from Bittman to Eggleston, attached as Exhibit 5). The OIC also stated that the White House was using executive privilege as a dilatory tactic. (*Id.* at 20). Finally, the OIC took the view that the White House was in the better position "to identify the areas it wishe[d] to withdraw the invocation of executive privilege," and thus requested that the White House submit a proposal by noon on March 4, 1998. (*Id.*).

47. On March 4, 1998, Mr. Eggleston responded to the OIC's letter. He began by underscoring the principle that, although the parties may disagree as to whether certain information is privileged, the accommodation process requires the parties to set aside any difference over the applicability of the privilege and focus on trying to reach an acceptable

Declaration of Charles F.C. Ruff

Page 16

agreement. (3/4/98 Letter from Eggleston to Starr, attached as Exhibit 6). Mr. Eggleston continued:

Your Office was unwilling to describe the subject matters about which you intended to question White House officials prior to their testimony. After several weeks of grand jury testimony by White House officials, we now have a sense of the areas that we believe are of interest to your investigation. It appears that, in addition to seeking facts about this matter, you are seeking ongoing advice given to the President by his senior advisors, including attorneys in the Counsel's Office, as well as the substance of these advisors's discussions as to how to address the Lewinsky investigation in a manner that enables the President to perform his constitutional, statutory, and other official duties.

(*Id.* at 1).

48. Mr. Eggleston then explained that the Office of the President was prepared to instruct White House witnesses along the following general lines:

- (1) White House Advisors (Non-Lawyers): Advisors will be permitted to testify as to factual information regarding the Lewinsky investigation, including any such information imparted in conversations with the President. We will continue to assert executive privilege with respect to strategic deliberations and communications.
- (2) White House Attorney Advisors: Attorneys in the Counsel's Office will assert attorney/client privilege; attorney work product; and, where appropriate, executive privilege, with regard to communications, including those with the President, related to their gathering of information, the providing of advice, and strategic deliberations and communications.

(*Id.* at 2).

49. Mr. Eggleston stated that he believed that this approach would accommodate the parties' respective interests. (*Id.*) He also stressed that, because the White House did not know the specific questions the OIG intended to ask a particular witness, we would evaluate the application of these instructions in response to specific questions and were willing to discuss any

Declaration of Charles F.C. Ruff
Page 17

particular issue. (*Id.*).

50. Mr. Eggleston also rejected the OIC's suggestion that the White House's assertion of privilege was a delaying tactic, pointing out that during the six weeks of the investigation, numerous White House witnesses either appeared or were interviewed, and each had answered all legitimate questions. Moreover, the White House had attempted to address and resolve all privilege issues prior to the appearance or interview of a White House official. (*Id.*).

51. On March 6, 1998, the OIC responded to Mr. Eggleston's letter, maintaining its position that executive privilege did not apply, and rejecting Mr. Eggleston's proposed approach. (3/6/98 Letter from Bitman to Eggleston, attached as Exhibit 7). On that same day, the OIC filed its motions to compel.

VIII. Disclosure of these Communications will Debilitate this and Future Presidencies

52. The President's advisors have not merely assumed that the Lewinsky investigation is a matter that has substantially affected the Presidency. They have taken it upon themselves to evaluate carefully how, if at all, it relates to the President's discharge of his duties. Politicians (both Democratic and Republican), political analysts (both domestic and foreign), and the media have all pronounced that the investigation affects the President's ability to achieve his foreign policy objectives and domestic agenda, and even poses a real threat to his ability to remain in office. In response to these reports, advisors have acted to ensure that they completely understand the scope and ramifications of the Lewinsky investigation so that they can give well-informed advice to the President to enable him to fulfill his responsibilities to the American people.

Declaration of Charles F.C. Ruff

Page 18

53. Disclosure of these communications will have a chilling effect on these and future presidential advisors. When a matter like the Lewinsky investigation affects the President's ability to execute his duties, his advisors cannot sit idly by and hope that it will resolve itself with little impact on the President. The President relies on them to assess a particular issue and to help him make sound decisions. To be effective, these advisors need the ability to evaluate relevant information, explore novel approaches, engage in heated debate, and provide blunt, candid, and even harsh, advice to the President. The President has a constitutionally based confidentiality interest in this process, and "the critical role that confidentiality plays in [this process] cannot be gainsaid." *In re Sealed Case*, 121 F.3d at 750.

54. If advisors must perform these duties with the knowledge that they have no expectation of confidentiality, that at some point their deliberations and advice will be disclosed, and that they will be held publicly accountable for their recommendations, they will be disinclined to gather all of the relevant information about a matter and avoid giving novel and frank advice to the President. They will fail in their duty to assist the President in dealing with matters that have an impact on his office and the Executive Branch. In turn, the President will be hindered in performing his duties because he will not receive the full benefit of his advisors' skills. He also will have to waste much of his time performing the functions that intermediaries normally would -- and should -- handle.

55. To strip a President of the core assistance and critical advice that are the lifeblood of his ability to execute his duties will inevitably result in the erosion of the effectiveness of the Office of the President. Such an outcome conflicts with basic constitutional principles and our country's notion of an effective Presidency and a well-balanced, democratic government.

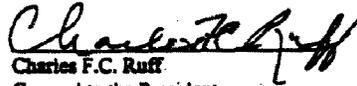
Declaration of Charles F.C. Ruff
Page 19

IX. The Decision to Assert Privilege

56. I have discussed with the President these areas of inquiry and the privileged nature of the information sought. The President has directed me to invoke formally the privileges applicable to these communications.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

March 17, 1998
Date


Charles F.C. Ruff
Counsel to the President



Office of the Independent Counsel

1001 Pennsylvania Avenue, N.W.
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Washington, D.C. 20004
(202) 514-8688
Fax (202) 514-8802

February 4, 1998

The Honorable Charles F.C. Ruff
Counsel to the President
The White House
Washington, DC 20500

Dear Mr. Ruff:

I write in response to your visit of yesterday concerning the sensitive matter of Executive privilege. As you know, at the request of the Attorney General, the Special Division recently conferred jurisdiction on this Office to investigate whether "Monica Lewinsky or others" suborned perjury, obstructed justice, or committed other federal crimes. We understand from your discussion that certain witnesses employed by the White House may invoke Executive privilege in response to questions posed by the grand jury in its continuing investigation of that matter. After careful consideration of your comments, including consultation with our Ethics Counselor Samuel Dash, we believe strongly that the grand jury is entitled to inquire into discussions of senior White House staff members, both among themselves and with the President, concerning the Monica Lewinsky matter.

As we understand your comments, there are two principal areas of testimony where the White House may invoke Executive privilege. The first includes discussions, to which the President was not a party, among what you have described as "senior staff." The discussions at issue occurred after the Lewinsky matter became public last month. You indicated that these discussions may have encompassed such topics as how to respond publicly to the news, what political strategies to adopt, and how to advise the President concerning these matters. We further understood you to say that the White House did not expect to assert Executive privilege with respect to whatever factual information, if any, was discussed among the staff.

The second area involves communications between members of the White House staff and the President himself that took place after the public revelations concerning our new jurisdiction. We did not understand you to take a firm position on the question whether the President would assert Executive privilege with respect to his own communications with advisors on this subject.

As a threshold matter, we believe there is serious doubt whether communications of

The Honorable Charles F. Ruff
February 4, 1998
Page 2

senior staff and the President concerning the Lewinsky matter fall within the scope of Executive privilege. When the Supreme Court recognized a "presumptive privilege for Presidential communications," United States v. Nixon, 418 U.S. 683, 707 (1974), it explained that the privilege attached to communications in the exercise of the President's Article II powers. *Id.* at 705. The privilege is limited to communications "in performance of the President's responsibilities," *id.* at 711, "of his office," *id.* at 713, and "made in the process of shaping policies and making decisions." *Id.* at 708 (quoted in Nixon v. Administrator of General Services, 433 U.S. 425, 449 (1977)).

The actions of the President and the White House in response to the Lewinsky matter do not, as we see it, carry out a constitutional duty of the President. Monica Lewinsky was a prospective witness in civil litigation in which the President is a private party. In more recent days, this Office has been charged by the Attorney General and the Special Division with responsibility to conduct a criminal investigation of "Ms. Lewinsky and others." These matters concern the President in his personal capacity. They do not involve the President's execution of the laws. Accordingly, we doubt that presidential and senior staff communications on these matters are entitled to a presumptive Executive privilege.

In any event, assuming the presumptive applicability of an Executive privilege, we are confident that many communications among White House staff and/or the President constitute important evidence in the grand jury's investigation that is not reasonably available elsewhere. See In re Sealed Case, 121 F.3d 729, 753 (D.C. Cir. 1997). The President's own statements are of critical importance to the grand jury's investigation. His statements to advisors represent highly relevant information not available from any other source. Particularly given the President's refusal to make public statements concerning the Lewinsky matter, [REDACTED], there is no alternative source that even approaches a substitute for direct evidence of the President's statements.

Similarly, the statements of senior White House staff will in many instances be important to the grand jury's investigation. For example, just as factual information in the possession of presidential advisers may reveal the nature of the President's deliberations, see In re Sealed Case, 121 F.3d at 750-51, so too may the discovery of deliberations among the White House staff concerning strategy give the grand jury unique insight to the factual premises on which the President and his staff are operating. Where the grand jury's investigation focuses on not merely "an immediate White House advisor," *id.* at 755, but on conduct of the President himself, we believe the courts will recognize that evidence of senior staff communications will be "particularly useful" to the grand jury. *Id.*

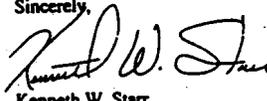
If the President ultimately does assert Executive privilege with respect to any evidence sought by the grand jury, then we expect that the district court will be required to determine whether the President's claim of privilege should be upheld under the circumstances. We agree

The Honorable Charles F. Ruff
February 4, 1998
Page 3

with your suggestion that a log of conversations among senior staff, including a list of participants and a specific, generic description of the subject matter, may facilitate the process of resolving any such disputes. If you are in a position to provide such a log in fairly short order, then we would consider whether the log is sufficient from our point of view to frame the issues properly for decision by the Court.

If you believe that further discussions of these matters would be helpful, we would be pleased to visit with you again at your convenience.

Sincerely,

A handwritten signature in black ink, appearing to read "Kenneth W. Starr". The signature is written in a cursive, slightly slanted style.

Kenneth W. Starr
Independent Counsel

THE WHITE HOUSE
WASHINGTON
February 5, 1998

BY FACSIMILE

Kenneth W. Starr, Esq.
Independent Counsel
Suite 400 North
1001 Pennsylvania Ave., NW
Washington, D.C. 20004

Dear Mr. Starr:

This is in response to your letter of February 4, 1998.

First, I want to inform you that within 45 minutes of its delivery, James Bennet of the New York Times called the White House Press Office to ask whether I had received a letter from you concerning executive privilege. Since there could have been only a few persons on your staff who were aware of the letter's delivery, I ask that you immediately request that the FBI, using agents not affiliated with your office, investigate to determine who disclosed the existence of the letter and its substance (as well as, presumably, the fact and substance of our meeting) to the press. I and the three members of my staff who were aware of the letter before Bennet's call will be happy to be interviewed (under oath) in connection with any such investigation.

Let me move now to the substance of your letter.

As you will not be surprised to learn, I disagree with your position on the applicability of executive privilege to discussions among senior White House staff and between senior staff and the President concerning the Lewinsky matter. In particular, I disagree with your contention that, under *In re Sealed Case* or any other authority, the grand jury would be permitted to inquire into the substance of deliberations among the President's most senior advisers in order to determine on what factual predicates these deliberations were based. Such an argument would swallow up the entire premise of the court's decision. Indeed, your argument, if followed to its logical conclusion, would mean that the President would be barred from seeking the advice of those responsible for assisting him in carrying out his constitutional responsibilities because every conversation would be the subject of grand jury inquiry.

Kenneth W. Starr, Esq.
 February 5, 1998
 Page 2

To the extent that you rely on the fact that [REDACTED] I find it curious that your office would [REDACTED] less than a week hence – when it is a matter of public knowledge that he is to begin a state visit by the Prime Minister of Great Britain and when, as you are also fully aware, the United States is confronting a major international crisis – and then argue that [REDACTED] justifies intrusion into his discussions with his advisors. Nor can the President's decision not to comment on the Lewinsky matter – other than to deny that he had sexual relations with Ms. Lewinsky and that he ever asked her to lie – justify such an intrusion.

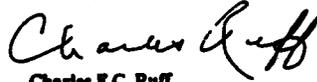
Let me also clarify three points I made in our meeting. First, discussions among and between the President's senior staff involve the very capacity of the President and his staff to govern – to pursue his legislative agenda, to ensure the continued leadership of the United States in the world community, and to maintain the confidence and support of the people who elected him – all of which lie at the heart of his role under Article II of the Constitution. Second, as to what position the President himself might take on the assertion of executive privilege as to his communications if he were to be questioned, I did not purport to take any position – “firm” or otherwise. And third, I indicated that, in deciding whether to assert privilege, we have historically sought to distinguish the substance of advisory and deliberative discussions from segregable facts, not available elsewhere, that may be contained in otherwise privileged communications.

Finally, I remain willing to explore all avenues for resolving our disagreement, although I admit to being more than a little uncertain as to how to conduct discussions without reading about them simultaneously in the press. I am also uncertain about your office's current position with respect to the questioning of senior staff members before the grand jury. Although we had initially been informed that your office did not intend to inquire into the substance of any staff discussions or communications with the President, but rather only to identify the circumstances (date, attendees, general subject matter, etc.) of such discussions in order to establish an appropriate record, we have now been advised that you do intend to pursue such inquiries. We had also been informed that witnesses were not to be questioned concerning communications with White House counsel, but we now understand that you do not intend to follow that practice where there is more than one non-lawyer present – a rule that I must say seems to have no rational basis.

Kenneth W. Starr, Esq.
February 5, 1998
Page 3

If we can come to some preliminary agreement as to the protocol that will be followed in connection with [REDACTED] appearance and that of other senior staff, it may be that there remains some prospect for addressing both your interests and our very serious concerns. If you believe that further discussions would be fruitful, please call me.

Sincerely,



Charles F.C. Ruff
Counsel to the President



Office of the Independent Counsel

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 (202) 514-8688
 Fax (202) 514-8802

February 6, 1998

The Honorable Charles F. C. Ruff
 Counsel to the President
 The White House
 Washington, D.C. 20500

Dear Mr. Ruff:

I write in response to your February 5 letter.

Let me reiterate the scope of our inquiry: We do not intend to question senior staff about deliberative matters beyond the jurisdictional grant recently crafted by the Attorney General and the Special Division. We do not seek information about discussions that relate solely to the President's foreign policy or his legislative agenda. We do not seek information about military or diplomatic secrets. We do intend to ask about discussions concerning an alleged relationship between Monica Lewinsky and the President, acting in his private capacity.

As to your contention that such discussions fall under Executive privilege, we must respectfully disagree. We believe that the President's relationship with Ms. Lewinsky, and the President's response to a private, civil lawsuit or a criminal investigation, fall outside the scope of his Article II duties. Executive privilege, as a threshold matter, thus appears to us inapplicable.

Even if the privilege did attach, we believe we would satisfy the test set forth in *United States v. Nixon*. The grand jury is investigating the conduct of Ms. Lewinsky and others with respect to a civil lawsuit against the President in his private capacity. This Office was given responsibility over that investigation after the Attorney General's representative, under exigent circumstances, made an extraordinary oral submission to the Special Division. The grand jury's need for information to resolve this matter in a timely fashion could hardly be more compelling.

In your letter, you suggest that [REDACTED]

[REDACTED] We fully recognize that the President, in the discharge of his constitutional duties, may have valid scheduling reasons for [REDACTED]

[REDACTED] We simply noted the President's response as a partial explanation for why the grand jury needs evidence of his statements from other sources.

Under the circumstances, we do not believe that Executive privilege allows the withholding of important, relevant information that the grand jury needs to complete its inquiry. We cannot agree with you that when senior staff discuss how to handle allegations of the President's private

The Honorable Charles F.C. Ruff
 February 6, 1998
 Page 2

misconduct, they are aiding the President in the performance of his constitutional duties -- which is the only basis for asserting Executive privilege. Your expansive view of the privilege, it seems to us, could equally cover the communications at issue in Nixon.

You express uncertainty about our position with respect to questioning senior staff members before the grand jury. We will be specific: We intend to inquire into the substance of staff discussions and communications with the President concerning Ms. Lewinsky and related matters. If the witness asserts Executive privilege in the grand jury, we will limit our questioning to those matters necessary to establish an appropriate record for the district court (e.g., whether the communication was for the purpose of advising the President, the official government matter to which the communication relates, date, attendees, etc.). If there is no assertion of privilege, then we will proceed with questions.

You also raise the issue of communications between witnesses and White House Counsel. We hereby notify you that in light of In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910 (8th Cir. 1997), we intend to question witnesses as to the substance of such communications. If a witness asserts attorney-client privilege, we will take such further steps as are appropriate.

Finally, you suggest that someone in this Office disclosed details of our conversations and correspondence to the New York Times. On several occasions in recent weeks, we have been falsely accused of such disclosures. In this particular instance, reporters had been questioning the White House Press Secretary about Executive privilege since January 22; the Wall Street Journal had reported on January 29 that the White House was preparing to assert the privilege (indeed, this was our first notice of your plans); we took extensive steps to arrange for your confidential visit to our offices; subsequent media information plainly came from the White House (e.g., the Associated Press reported on February 5 that "individuals familiar with the letter" said that "Starr's letter left the White House convinced there was no more room for goodwill negotiating"); and the reporter who asked you about our letter covers the White House, not the Office of the Independent Counsel. Under the circumstances, we respectfully suggest that your suspicions are misdirected.

If we can provide further information that may help forestall or resolve any disputes, please let me know.

Yours sincerely,

Kenneth W. Starr
 by *John B. ...*
 KENNETH W. STARR
 Independent Counsel

HOWREY & SIMON

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W. Neil Eggleston
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March 2, 1998

VIA HAND DELIVERY

Kenneth W. Starr, Esq.
Independent Counsel
Office of the Independent Counsel
1001 Pennsylvania Avenue, N.W.
Suite 490 North
Washington, DC 20004

Dear Mr. Starr:

I represent the Office of the President of the United States in connection with any litigation impacting that Office arising out of your current Grand Jury investigations. This representation extends to potential litigation over the applicability and extent of privileges.

Before you initiate litigation, the White House requests that we be consulted about whether an accommodation is reachable between the President's interest in confidentiality and whatever need the Grand Jury may have for the testimony.

Because these matters involve clashes between branches of government, the usual practice has been for the respective parties to attempt to reconcile their differences and accommodate the needs of the other party to the extent possible.

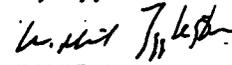
That was certainly the course that we followed in the Espy litigation. We released to the Espy Independent Counsel documents for which the Independent Counsel had articulated a substantial showing of need. Indeed, the White House determined to release one of these privileged documents during the litigation itself. The White House only invoked privilege over those documents, the release of which we believed would hindered the President's ability to discharge his duties.

OWREY & SIMON

Kenneth W. Starr, Esq.
March 2, 1998
Page 2

We believe a similar attempt to accommodate the respective interests would be appropriate in this matter as well. We would be prepared to meet with you, review the proposed areas of witness questioning, and consider any need you may demonstrate on why any applicable privileges should not be asserted.

Very truly yours,



W. Neil Eggleston

cc: Charles F. C. Ruff, Esq.



Office of the Independent Counsel

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March 2, 1998

HAND DELIVERED

W. Neil Eggleston, Esq.
 Howrey & Simon
 1299 Pennsylvania Ave., N.W.
 Washington, DC 20004-2402

Dear Mr. Eggleston:

We are in receipt here in Washington of your letter dated today to Judge Starr, who is currently in meetings in Little Rock. We have, however, communicated at length with him, and this letter reflects the evaluation and considered judgment of this Office. In brief, you have asked "whether an accommodation is reachable" between the White House and this Office as to the President's invocation of executive privilege, and you suggest a meeting to "reconcile" these differences.

As you are aware, this Office met with White House Counsel a month ago at his request in -- what we believed then to be -- a good-faith attempt to resolve any disputes over privilege without the need to resort to time-consuming litigation. At that meeting and in subsequent correspondence, White House Counsel expressed an unyielding view of the applicability of executive privilege in this setting. Then and since, we have set forth our view that White House Counsel's reading of executive privilege and its applicability to the Monica Lewinsky matter is, with all respect, entirely misplaced. As a threshold matter, the President's communications with regard to Ms. Lewinsky are purely private in nature and therefore fall outside the scope of executive privilege. Such communications were not made in the exercise of the President's Article II powers nor were they made "in performance of the President's responsibilities." United States v. Nixon, 418 U.S. 683, 708, 713 (1974); see also In Re Sealed Case, 121 F.3d 729, 752 (1997) (executive privilege "only applies to communications . . . on official government matters"). In addition, we find the instant invocation of executive privilege odd, given the reported statement of then-White House Counsel Lloyd Cutler that it was the White House's "practice" not to assert executive privilege in "investigations of personal wrongdoing by government officials."

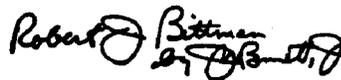
W. Neil Eggleston, Esq.
 March 2, 1998
 Page two

Since our exchanges with White House Counsel, many White House employees have been questioned before the grand jury about Ms. Lewinsky. Several of these witnesses have invoked executive privilege at the direction of the White House. You propose we meet to "review" the areas of questioning and demonstrate our need for the information in an effort to avoid litigation. With all respect, we fail to discern the purpose of such a meeting at this juncture. First, the White House has already begun to litigate these issues.

Second, we have, as you know, already asked the specific questions and identified the "areas of witness questioning." Third, there is no need -- and indeed no requirement -- that we demonstrate why we need these communications, since executive privilege is, for the reasons already stated, simply inapplicable to the personal communications of the President at issue here.

That being said, we are willing to consider any good-faith attempt to resolve these issues promptly. We were in discussions with the White House several weeks ago, but the President subsequently chose to invoke executive privilege as to virtually every communication relating to Ms. Lewinsky. In this respect, we are constrained to make this point clear: this investigation has confronted numerous delaying tactics. Yet we have repeatedly stressed to the White House that the public interest demands a swift resolution of all matters involving Ms. Lewinsky. We believe, moreover, given this history, that the White House is in a better position to identify the areas it wishes to withdraw the invocation of executive privilege. We warmly welcome such a proposal so that we can move the grand jury's investigation forward. If you wish to submit a proposal, kindly do so in writing by noon, Wednesday, March 4, 1998.

Sincerely,



Robert J. Bittman
 Deputy Independent Counsel

cc: Honorable Charles F.C. Ruff

HOWREY & SIMON

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eggleston@hs.com

March 4, 1998

VIA FACSIMILE and HAND DELIVERY

Kenneth W. Starr, Esq.
Independent Counsel
Office of the Independent Counsel
1001 Pennsylvania Avenue, N.W.
Suite 490 North
Washington, DC 20004

Dear Mr. Starr:

I received a letter from Deputy Counsel Robert J. Bittman in response to my March 2, 1998 letter outlining our wish to ensure that we had explored, prior to any litigation, all reasonable accommodations to avoid or limit litigation.

Mr. Bittman responded by restating your Office's view that executive privilege does not apply to any questioning of White House officials regarding the Lewinsky investigation—something upon which, as you know, we disagree. Indeed, the impetus for my letter was that we disagree on the law. Despite our legal disagreements, however, we are duty bound to attempt to reach a mutually agreeable accommodation that provides the grand jury with the information it needs while preserving this and future Presidents' legitimate interests in receiving candid and frank advice in confidence from their advisors.

Your Office was unwilling to describe the subject matters about which you intended to question White House officials prior to their testimony. After several weeks of grand jury testimony by White House officials, we now have a sense of the areas that we believe are of interest to your investigation. It appears that, in addition to seeking facts about this matter, you are seeking ongoing advice given to the President by his senior advisors, including attorneys in the Counsel's Office, as well as the substance of these advisors' discussions as to how to address the Lewinsky investigation in a manner that enables the President to perform his constitutional, statutory and other official duties.

Washington, DC

Los Angeles

San Francisco

HOWREY & SIMON

Kenneth W. Starr, Esq.
March 4, 1998
Page 2

In light of these areas of inquiry, we are prepared to discuss an approach that we believe will accommodate our respective interests. To that end, the Office of the President is prepared to instruct White House witnesses along the following general lines:

- **White House Advisors (Non-Lawyers):** Advisors will be permitted to testify as to factual information regarding the Lewinsky investigation, including any such information imparted in conversations with the President. We will continue to assert executive privilege with respect to strategic deliberations and communications.
- **White House Attorney Advisors:** Attorneys in the Counsel's Office will assert attorney/client privilege; attorney work product; and, where appropriate, executive privilege, with regard to communications, including those with the President, related to their gathering of information, the providing of advice, and strategic deliberations and communications.

At this point, the instructions that we intend to provide to White House advisors and attorneys are necessarily general, since we do not know the questions you intend to ask. We of course will evaluate the application of these instructions to the advisors and attorneys in response to specific questions and would welcome an opportunity to meet and discuss any particular issues, as needed.

The accommodation we are proposing will permit the grand jury to complete its work in a timely fashion and will provide the factual information that it needs for this investigation. We do not believe, however, that you have demonstrated, or can demonstrate, a need for information about the strategic discussions of White House advisors about this matter.

Although you argue that the Lewinsky investigation is purely private, the intersection of this matter with, for example, the State of the Union, an enumerated duty under Article II, section 3 of the Constitution, and Prime Minister Blair's visit and their joint press conference make it abundantly clear that this investigation has implications for the President's performance of his official duties. These instances also illustrate the very obvious need for the President to receive the candid and frank counsel of his advisors in confidence.

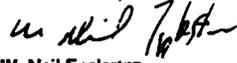
I also reject out-of-hand your suggestion that the assertion of privilege is a delaying tactic or that the White House has in any manner delayed your investigation. While you have been investigating this matter for merely six weeks, numerous White House witnesses have appeared or been interviewed by your agents. None has refused to appear and each has answered all legitimate inquiries. Moreover, we have made every attempt to discuss and resolve potential privilege issues with you before the grand jury appearance of particular White House officials. As you surely are aware, the President's invocation of privilege to permit him and future Presidents to discharge their duties under Article II of the Constitution is a fundamental obligation, not a delaying tactic.

HOWREY & SIMON

Kenneth W. Starr, Esq.
March 4, 1998
Page 3

In sum, it is our mutual constitutional obligation to seek a reasonable accommodation of our interests. We are prepared to meet for that purpose at your earliest convenience.

Very truly yours,



W. Neil Eggleston
Attorney for the Office of the President

cc: The Honorable Charles F.C. Ruff
Robert J. Bittman, Esq.



Office of the Independent Counsel

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March 6, 1998

HAND DELIVERED

W. Neil Eggleston, Esq.
 Howrey & Simon
 1299 Pennsylvania Ave., N.W.
 Washington, DC 20004-2402

Dear Mr. Eggleston:

This responds to your letter to this Office dated March 4, 1998.

As you know, since early February we have been in discussions with the White House regarding the applicability of executive privilege to the matters involving Monica Lewinsky. We have great respect for the Office of the President and the important duties and responsibilities of the President. In this case, we have not sought nor will we seek any information implicating state secrets or diplomatic relations. The matters involving Ms. Lewinsky, moreover, relate only to the President acting in his personal capacity, as a private citizen. If there are any communications relating to Ms. Lewinsky which legitimately jeopardize state secrets or diplomatic relations, please identify them and we will review our request.

As fully outlined in our correspondence to you and the White House, the matters regarding Ms. Lewinsky do not involve the President acting his official capacity. Consequently, executive privilege is inapplicable as a threshold and fundamental matter. Any communication pertaining to Ms. Lewinsky is thus not privileged -- no matter the title or position of the person involved in the communication. We therefore cannot agree with your suggestion to keep such highly probative, relevant information from the grand jury.

Sincerely,

Robert J. Bittman
 Deputy Independent Counsel

cc: The Honorable Charles F.C. Ruff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE GRAND JURY PROCEEDINGS

Misc. Action Nos. 98-095,
98-096 & 98-097 (NHL)

REDACTED VERSION FILED

ORDER

MAY 27 1998

NANCY MAYER-WHITTINGTON, CLERK

Upon consideration of the motions of the Independent Counsel to compel, ~~supporting brief~~ opposing memoranda, and oral argument on the motions, and for the reasons given in the accompanying Memorandum Opinion, it is this 26th day of May 1998,

ORDERED that the motion of the Independent Counsel to compel Bruce Lindsey to testify in Miscellaneous Action No. 98-95 be, and hereby is, granted; it is further

ORDERED that the motion of the Independent Counsel to compel Sidney Blumenthal to testify in Miscellaneous Action No. 98-96 be, and hereby is, granted; and it is further

ORDERED that the motion of the Independent Counsel to compel [REDACTED] to testify in Miscellaneous Action No. 98-97 be, and hereby is, denied as moot.

Norma Holloway Johnson
NORMA HOLLOWAY JOHNSON
CHIEF JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE GRAND JURY PROCEEDINGS

Misc. Action Nos. 98-095,
98-096 & 98-097 (NHJ)

FILED

REDACTED VERSION

MAY 27 1998

NANCY MAYER-WHITTINGTON, CLERK
U.S. DISTRICT COURT

MEMORANDUM OPINION

Before this Court are the Independent Counsel's motions to compel three witnesses to comply with their grand jury subpoenas. Witnesses Bruce Lindsey and Sidney Blumenthal have refused to answer certain questions propounded to them before the grand jury on the basis of executive privilege and Lindsey has refused to answer certain questions based upon the [REDACTED], governmental attorney-client privilege, and governmental work product protection. The attorney for the White House represented to the Court at a hearing on this matter that there were no questions as to which the third witness, [REDACTED], would assert the executive privilege or the attorney-client privilege. The Court will therefore deny the Independent Counsel's motion to compel [REDACTED] testimony as moot.

With respect to the remaining witnesses, the Court will first address their mutual claim of executive privilege. [REDACTED] Lastly, the Court will consider Lindsey's claim of governmental attorney-client privilege and work product protection.

I. Analysis

A. Executive Privilege

The OIC has moved to compel the testimony of Lindsey and Blumenthal, two of President Clinton's senior advisers. The President has asserted that the executive privilege, also known as the presidential communications privilege, protects conversations involving himself,

Lindsey and Blumenthal, and top White House aides. The presidential communications privilege is a governmental privilege intended to promote candid communications between the President and his advisors concerning the exercise of his Article II duties. United States v. Nixon, 418 U.S. 683, 705, 708, 711 (1974); In re Sealed Case, 121 F.3d 729, 744 (D.C. Cir. 1997) (the "Espy case"). This Circuit has recognized a "great public interest" in preserving "the confidentiality of conversations that take place in the President's performance of his official duties" because such confidentiality is necessary in order to protect "the effectiveness of the executive decision-making process." Nixon v. Sirica, 487 F.2d 700, 717 (D.C. Cir. 1973); In re Sealed Case, 121 F.3d at 742. Courts have recognized that the President "occupies a unique position in the constitutional scheme," Nixon v. Fitzgerald, 457 U.S. 731, 749 (1982), and that "[i]n no case of this kind would a court be required to proceed against the president as against an ordinary individual." Nixon, 418 U.S. at 708 (quoting United States v. Burr, 25 F.Cas. 187, 192 (No. 14,694) (C.C.D.Va. 1807)).

1. The Presumption of Privilege

The White House argues that the communications of Lindsey and Blumenthal are presumptively privileged because President Clinton has invoked executive privilege. The OIC counters that the communications are not privileged because the executive privilege applies only to communications regarding official presidential matters and the federal grand jury investigation regarding Monica Lewinsky and the Paula Jones litigation are private matters. In light of the holdings of the United States Supreme Court and the Court of Appeals for the District of Columbia Circuit, this Court finds that it has a duty to treat the subpoenaed testimony of Lindsey and Blumenthal as presumptively privileged. See Nixon, 418 U.S. at 713; In re Sealed Case, 121

F.3d at 743.

Prompted by the Watergate investigation, the Supreme Court held that when the President of the United States asserts a claim of executive privilege, the district court has a "duty to . . . treat the subpoenaed material as presumptively privileged." Nixon, 418 U.S. at 713 (emphasis added). The D.C. Circuit recently reiterated this holding when it considered President Clinton's assertion of the executive privilege in the context of a federal grand jury investigation of Michael Espy, former Secretary of Agriculture. In re Sealed Case, 121 F.3d at 743. The D.C. Circuit wrote: "The President can invoke the privilege when asked to produce documents or other materials that reflect presidential decision-making and deliberations and that the President believes should remain confidential. If the President does so, the documents become presumptively privileged." Id. at 744. In the Espy case, the D.C. Circuit treated the executive communications at issue as presumptively privileged just as it had done in earlier cases involving President Nixon's assertions of executive privilege. Id. at 743; see Sirica, 487 F.2d at 717; Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 730 (1974) ("Presidential conversations are 'presumptively privileged,' even from the limited intrusion represented by in camera examination of the conversations by a Court."). The presumptive privilege for executive communications "embodies a strong presumption, and not merely a lip-service reference." Delums v. Powell, 561 F.2d 242, 246 (D.C. Cir.), cert. denied, 434 U.S. 880 (1977).

No court has ever declined to treat executive communications as presumptively privileged on the grounds that the matters discussed involved private conduct. In fact, in the Nixon cases, the D.C. Circuit and the Supreme Court treated President Nixon's executive

communications with his aides as presumptively privileged even though they involved the President's alleged criminal involvement in a break-in at the Democratic National Committee headquarters and its subsequent cover-up. See Nixon, 418 U.S. at 708; Sirica, 487 F.2d at 717; Senate Select, 498 F.2d at 730. In Senate Select, the subpoena explicitly directed President Nixon to give Congress taped conversations between himself and John Dean that "discuss[ed] alleged criminal acts occurring in connection with the Presidential election of 1972." 498 F.2d at 727. The D.C. Circuit not only presumed that the conversations were privileged, but also stated that the showing of need required to overcome the presumption "turned, not on the nature of the presidential conduct that the subpoenaed material might reveal, but instead, on the nature and appropriateness of the function in the performance of which the material was sought, and the degree to which the material was necessary to its fulfillment." *Id.* at 730. In other words, the nature of the presidential conduct at issue, whether it was official or private, appeared not to affect the presumption of privilege or the need stage of the D.C. Circuit's executive privilege analysis.

Purely private conversations that did not touch on any aspect of the President's official duties or relate in some manner to presidential decision-making would not properly fall within the executive privilege.¹ However, the President does need to address personal matters in the context of his official decisions. The position that nothing the President or his advisors could say

¹ See, e.g., Nixon v. Administrator of General Services, 433 U.S. 425, 449 (1977) (noting that the privilege is "limited to communications 'in performance of [a President's] responsibilities,' 'of his office,' and made 'in the process of shaping policies and making decisions'"); In re Sealed Case, 121 F.3d at 752 ("Of course, the privilege only applies to communications that these advisers and their staff author or solicit and receive in the course of performing their function of advising the President on official government matters.").

to each other regarding the grand jury investigation or the Jones litigation would relate to the President's official duties is oversimplified. Indeed, the Independent Counsel has conceded that certain executive communications, such as those discussing how the President should respond to the Lewinsky matter during Tony Blair's visit, are protected by the executive privilege. 3/20/98 Tr. at 61-62.

At this stage, the Court has no evidence that Lindsey and Blumenthal's conversations discussing the Lewinsky and Jones matters were not related in some way to official decision-making. To the contrary, the Court has [REDACTED] sworn affidavits asserting that the conversations at issue involved official matters such as possible impeachment proceedings, domestic and foreign policy matters, and assertions of official privileges.² The Office of the President submitted the affidavits "to establish as a factual matter that the communications in the White House over which executive privilege was being asserted related to official matters and official conduct." 3/20/98 Tr. at 43. The grand jury transcripts provided to the Court do not indicate that the witnesses refused to answer questions regarding conversations that did not relate to the President's official duties. The Court will not speculate that conversations among the President and his advisors fell outside of the President's Article II responsibilities.

The Court does not have documents or tapes to review in camera that could establish whether the content of the subpoenaed communications relates only to private matters, nor does it know how Lindsey and Blumenthal might answer the grand jury's questions. The Court is aware of only the unanswered questions themselves. Furthermore, unlike the Espy case, the

² Declaration of Charles F.C. Ruff at ¶¶ 19-28; [REDACTED].

subpoenas here call for testimony, not documents that the Court could review in camera. The Court's ability to assess whether the subpoenaed materials relate to official decisions is thus greatly hindered. This Circuit has stated:

[A]ny court completely in the dark as to what Presidential files contain is duty bound to respect "the singularly unique role under Art. II of a President's communications and activities, related to the performance of duties under that Article." For "a President's communications and activities encompass a vastly wider range of sensitive material than would be true of any 'ordinary individual,'" and "(i)t is therefore necessary in the public interest to afford Presidential confidentiality the greatest protection consistent with the fair administration of justice." [T]here is a presumption of privilege which can only be overcome by some demonstration of need.

United States v. Haldeman, 559 F.2d 31, 76 (D.C. Cir. 1976) (footnotes omitted), cert. denied sub. nom Ehrlichman v. United States, 431 U.S. 933 (1977).

Under Nixon, the Court has a duty to treat the subpoenaed testimony as presumptively privileged. 418 U.S. at 713. In light of this binding precedent, the factual similarities between the Nixon cases and the case at hand, and the evidence submitted with respect to the President's invocation of privilege, this Court finds that it must treat the communications of Lindsey and Blumenthal as presumptively privileged.

2. The Scope of the Privilege

Although the Court must presume that presidential communications are privileged, the scope of the privilege is limited to "communications authored or solicited and received by those members of an immediate White House adviser's staff who have broad and significant responsibility for investigating and formulating the advice to be given to the President on the particular matter to which the communications relate." In re Sealed Case, 121 F.3d at 752. In other words, the President does not have to participate personally in the communication in order

for it to be privileged.

Citing the presidential communications privilege, Lindsey refused to answer questions before the grand jury regarding a conversation he had with [REDACTED]. The White House did not mention [REDACTED] in its brief or at the hearings before this Court, much less argue that [REDACTED] is a presidential adviser. At any rate, the White House has not met its burden of showing that [REDACTED] communications with Lindsey “occurred in conjunction with the process of advising the President.” *Id.* Accordingly, the Court finds that any conversations between Lindsey and [REDACTED] are not covered by the executive privilege.

Both Lindsey and Blumenthal refused to answer questions before the grand jury regarding conversations they had with the First Lady, citing executive privilege. [REDACTED] states: “The First Lady functions as a senior adviser to the President, and it was in that capacity that I had discussions with her about the Independent Counsel’s investigation.” [REDACTED] At the hearing on this matter, in response to a question from the Court, the attorney for the White House argued that First Ladies have traditionally held a position of senior adviser to the President and cited Association of American Physicians & Surgeons, Inc. v. Clinton, 997 F.2d 898 (D.C. Cir. 1993). The OIC has not contested that Mrs. Clinton would be covered by the executive privilege.

²⁴ In Association of American Physicians & Surgeons, the D.C. Circuit faced the question of whether Mrs. Clinton was an “officer or employee of the government” for purposes of the Federal Advisory Committee Act (“FACA”). *Id.* at 902. Mrs. Clinton chaired the President’s Task Force on National Health Care Reform (“Task Force”), which was to advise the President and make recommendations to him. The issue before the D.C. Circuit was whether the Task Force qualified for an exemption from FACA as an advisory group whose members were all

officers and employees of the government. Rather than decide the constitutional question of whether the application of FACA would unconstitutionally interfere with the President's duty to "take Care that the Laws be faithfully executed," U.S. Const. art II, § 3, the court decided that Mrs. Clinton was an officer or employee of the government under FACA. 997 F.2d at 911. In the D.C. Circuit's discussion of the constitutional question, the court stated: "This Article II right to confidential communications attaches not only to direct communications with the President, but also to discussions between his senior advisers. . . . [I]f the President seeks advice from those closest to him, whether in or out of government, the President's spouse, typically, would be regarded as among those closest advisers." *Id.* at 909-10.

Mrs. Clinton is widely seen as an advisor to the President and "Congress itself has recognized that the President's spouse acts as the functional equivalent of an assistant to the President." *Id.* at 904 (citing 3 U.S.C. § 105(e)). The Court finds that conversations between the First Lady and Lindsey or Blumenthal fall under the executive privilege.

3. OIC's Showing of Need

The presumptive executive privilege is not absolute. *Sirica*, 487 F.2d at 716. The Court will not accept the President's "mere assertion of privilege as sufficient to overcome the need of the party subpoenaing the [testimony]." *Id.* at 713. The presumption of privilege may be rebutted by a sufficient showing of need by the Independent Counsel.³ *In re Sealed Case*, 121 F.3d 729, 754 (D.C. Cir. 1997).

In deciding what showing of need is sufficient to overcome an assertion of the executive

³ See *Nixon*, 418 U.S. at 713; *In re Sealed Case*, 121 F.3d at 742; *Dellums*, 561 F.2d at 249; *Senate Select*, 498 F.2d at 730.

privilege, the D.C. Circuit looked to the need analyses established in the cases involving President Nixon and the Watergate investigation. *Id.* at 753.⁴ The court found that these cases “balanced the public interests served by protecting the President’s confidentiality in a particular context with those furthered by requiring disclosure.” *Id.* Working from the Supreme Court’s rather vague requirement of a “demonstrated, specific need for evidence,” *Nixon*, 418 U.S. at 713, the D.C. Circuit concluded that in order to overcome an assertion of executive privilege, the OIC must show “first, that each discrete group of the subpoenaed materials likely contains important evidence; and second that this evidence is not available with due diligence elsewhere.” *In re Sealed Case*, 121 F.3d at 754. These elements must be shown “with specificity.” *Id.* at 756. The information sought need not be “critical to an accurate judicial determination.” *Id.* at 754.

The first requirement means that the evidence being sought must be “directly relevant to the issues that are expected to be central to the trial.” *Id.* The D.C. Circuit noted that this requirement will not typically have much impact because Federal Rule of Criminal Procedure 17(c) already limits a subpoena to relevant information. With respect to the second requirement, the party seeking to overcome the privilege should first attempt to determine whether sufficient evidence could be obtained elsewhere. *Id.* at 755. The issuer of the subpoena “should be prepared to detail these efforts and explain why evidence covered by the presidential privilege is still needed.” *Id.* The Court of Appeals has noted:

there will be instances where such privileged evidence will be particularly useful, as when, unlike the situation here, an immediate White House advisor is being investigated for criminal behavior. In such situations, the subpoena proponent

⁴ The D.C. Circuit examined the need analyses established in *Nixon*, 418 U.S. at 713; *Sirica*, 487 F.2d at 716; and *Senate Select*, 498 F.2d at 731.

will be able easily to explain why there is no equivalent to evidence likely contained in the subpoenaed materials.

Id. The court also foresaw that “a grand jury will often be able to specify its need for withheld evidence in reasonable detail based on information obtained from other sources.” *Id.* at 757.

Finally, if the grand jury finds it difficult to obtain evidence from other sources, “this fact in and of itself will go far toward satisfying the need requirement.” *Id.*

If a “demonstrated, specific need” is shown, then the subpoenaed testimony shall be given to the grand jury unless there is “no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury’s investigation.” *United States v. R. Enterprises*, 498 U.S. 292, 300 (1991). “The question of what evidence might reasonably be relevant to the grand jury’s investigation should be answered by reference to the reasons the grand jury gave in explaining its need for the subpoenaed materials.” *In re Sealed Case*, 121 F.3d at 759.

The Court ordered the OIC to make a showing of need and the OIC made an extensive *ex parte* submission to the Court on that subject, which the Court has reviewed *in camera*. The submission surveys a substantial portion of the evidence gathered by the grand jury during the OIC’s investigation to provide background for the OIC’s explanation of why certain inquiries must be directed to the White House and the President’s closest advisers. The OIC attaches portions of the grand jury testimony of Lindsey⁵ and Blumenthal that highlight the questions they declined to answer on the basis of executive privilege.

In general, Lindsey declined to answer questions relating to [REDACTED]. He also

⁵ Upon the motion of Lindsey, the Court has reviewed the transcript of his complete grand jury testimony as well.

declined to discuss [REDACTED]. Blumenthal declined to answer questions relating to [REDACTED]. The submission delineates nineteen categories of information it seeks from Lindsey and three categories of information it seeks from Blumenthal and describes how each category meets the In re Sealed Case need standard.

Because the Court has reviewed the documents in camera, and most, if not all, of those documents are protected by Federal Rule of Criminal Procedure 6(e)(2), its finding of need cannot be detailed. See id. at 740. The Court cannot describe the categories of evidence needed in any more detail than it has already because doing so would reveal "matters occurring before the grand jury." See Federal Rule of Civil Procedure 6(e)(2). The Court finds that the categories of testimony sought by the OIC from Lindsey and Blumenthal are all likely to contain relevant evidence that is important to the grand jury's investigation. In re Sealed Case, 121 F.3d at 754. The OIC has been authorized to investigate whether Monica Lewinsky "or others," including President Clinton, suborned perjury, obstructed justice, or tampered with witnesses. Order of the Special Division, Jan. 16, 1998. The testimony sought and withheld based on executive privilege is likely to shed light on that inquiry, whether exculpatory or inculpatory. In re Sealed Case, 121 F.3d at 754.

In addition, [REDACTED]. If there were instructions from the President to obstruct justice or efforts to suborn perjury, such actions likely took the form of conversations involving the President's closest advisors, including Lindsey and Blumenthal. Additionally, if the President disclosed to a senior adviser that he committed perjury, suborned perjury, or obstructed justice, such a disclosure is not only unlikely to be recorded on paper, but it also would constitute some of the most relevant and important evidence to the grand jury investigation. The D.C.

Circuit noted that if a crime being investigated by the grand jury relates to “the content of certain conversations,” then the grand jury’s need for the exact text of those conversations is “undeniable.” *Id.* at 761 (quoting *Senate Select.* 498 U.S. at 732) (emphasis added).

The Court also finds that the OIC has met its burden of showing with specificity that the evidence is not available with due diligence elsewhere. *See id.* at 754. The OIC seeks testimony regarding conversations that took place within the White House and the only sources of that testimony are those persons participating in the conversations. Further, the OIC presented the Court with detailed information about its unsuccessful efforts to obtain this evidence through other sources. The OIC has diligently pursued other alternatives where feasible.⁶ [REDACTED]

In sum, the OIC has provided a substantial factual showing to demonstrate its “specific need” for the testimony. *Nixon*, 418 U.S. at 713. The Court finds that the evidence covered by the presumptive privilege remains necessary to the grand jury and cannot feasibly be obtained elsewhere. The Court will grant the OIC’s motions to compel the testimony of Lindsey and Blumenthal insofar as they have asserted executive privilege.

B. [REDACTED]

C. *Official Attorney-Client Privilege and Work Product Protection*

⁴Lindsey has asserted an absolute governmental attorney-client privilege in response to

⁶ The White House claims to have offered to permit non-attorney advisors such as Blumenthal to testify as to factual information in executive communications but refuses to permit them to disclose strategic deliberations. However, the White House fails to establish the parameters of factual and strategic matters and the Court finds it difficult to discern in advance whether communications are strategic or factual. For example, if directions were given to obstruct justice in some fashion, such directions could constitute a strategic decision but could also be characterized as a factual event. Not only was the White House offer ambiguous, but there is also some question as to whether it was a firm offer. Given the ambiguity of the offer, the Court declines to factor it into its decision.

grand jury questions concerning his communications with the President, members of the White House Counsel's Office, grand jury witnesses or their attorneys, and the President's personal attorneys. The attorney-client privilege protects communications from clients to their attorneys that were intended to be confidential and were made for the purpose of obtaining legal advice. See Tax Analysts, 117 F.3d at 618. Communications from attorneys to their clients are also protected if the communications "rest on confidential information obtained from the client." Id. (citation omitted). Lindsey claims to have performed legal services as Deputy Counsel to the President for his client, the Office of the President. He has "advis[ed] the Office of the President on whether the President should assert his official privileges to protect the communications at issue here from compelled disclosure, and gather[ed] the facts needed to reach a recommendation on that question." White House's Mem. Concerning President Clinton's Suppl. Filing in Support of Opp. to Mot. to Compel Testimony of Bruce Lindsey at 2. In addition, Lindsey has gathered information including talking to grand jury witnesses or their attorneys in order to provide legal advice to the Office of the President with respect to potential impeachment proceedings.

Lindsey also asserts an absolute governmental attorney-client privilege with respect to advice he rendered to the Office of the President on "how best to prevent other litigation in which the President is involved from hampering the Presidency's fulfillment of its institutional duties." Id. To the Court's knowledge, the only "other litigation in which the President is involved" is the Paula Jones suit. Additionally, Lindsey asserts the governmental privilege with respect to his communications with the President's personal attorneys pursuant to the common interest doctrine. He claims that the Office of the President and the President as an individual share certain common interests that permitted confidential communications between the Office of the

White House Counsel and the President's personal attorneys. Lastly, Lindsey has asserted the governmental work product doctrine in response to questions regarding his interviews with grand jury witnesses and their counsel.

1. The Attorney-Client Privilege in the Federal Grand Jury Context

The White House asks the Court to recognize an absolute governmental attorney-client privilege in the context of a federal grand jury investigation of an official's alleged private misconduct. The OIC argues that no such privilege should exist in this context.

The Court begins by noting that privileges "are not lightly created nor expansively construed, for they are in derogation of the search for truth." *Nixon*, 418 U.S. at 710. Privileges should be recognized "only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Trammel v. United States*, 445 U.S. 40, 50 (1980) (citations omitted). When deciding whether to recognize asserted privileges, courts are instructed by Federal Rule of Evidence 501 to interpret the common-law privileges "in the light of reason and experience." Pursuant to Rule 501, this Court must determine whether the asserted privilege has any history of being applied under the circumstances here, and if not, whether applying such a privilege would serve some important public interest.

Only two Courts of Appeal have addressed the issue of whether a governmental attorney-client privilege can be asserted in response to a federal grand jury subpoena. The Sixth Circuit explained that it has assumed that a governmental attorney-client privilege exists but has "never explicitly so decided." *Reed v. Baxter*, 134 F.3d 351, 356 (6th Cir. 1998); *In re Grand Jury Subpoena*, 886 F.2d 135 (6th Cir. 1989). Neither Sixth Circuit case decided that a governmental

attorney-client privilege exists and neither case involved an investigation of a government official's private conduct; both cases challenged official government conduct.

The Eighth Circuit case, by contrast, did involve a federal grand jury investigation of a government official's private conduct and is the only Court of Appeals case that has actually decided whether a governmental attorney-client privilege should exist in the federal grand jury setting. *In re Grand Jury Subpoena*, 112 F.3d 910 (8th Cir.), *cert. denied*, 117 S. Ct. 2482. That case involved a federal grand jury investigation of the private conduct of President and Hillary Clinton in what is known as the Whitewater matter. *See id.* at 913. The White House received a grand jury subpoena seeking "[a]ll documents created during meetings attended by any attorney from the Office of Counsel to the President and Hillary Rodham Clinton (regardless of whether any other person was present)' pertaining to several Whitewater-related subjects." *Id.* The White House refused to produce two sets of notes responsive to the subpoena, asserting a governmental attorney-client privilege. *Id.* at 914. Both sets of notes were taken during meetings attended by White House attorneys, Mrs. Clinton, and her personal attorneys. *Id.*

The Eighth Circuit required production of both sets of notes, concluding that even if a governmental attorney-client privilege exists in other contexts, "the White House may not use the privilege to withhold potentially relevant information from a federal grand jury." *Id.* at 915. Pursuant to Federal Rule of Evidence 501, the court applied the federal common law of attorney-client privilege to the facts and found that no governmental attorney-client privilege exists in the context of a federal criminal investigation. *Id.* The Eighth Circuit was not persuaded that Proposed Federal Rule of Evidence 503, which defines "client" to include public officers or public organizations, or the few cases involving a governmental attorney-client privilege in fact

established such a privilege in the grand jury context. *Id.* at 916-17. As a result, the Eighth Circuit "turned to general principles" about privileges and the grand jury and decided not to recognize such a privilege. *Id.* at 918, 919-21.

The majority rejected the dissent's decision to recognize a qualified governmental attorney-client privilege that would be subject to the *Nixon* balancing test regarding executive privilege, concluding that no governmental attorney-client privilege, not even a qualified one, should exist in the federal grand jury context. *In re Grand Jury Subpoena*, 112 F.3d at 919. Under the *Nixon* test, the grand jury's need for the subpoenaed material is balanced against the White House's need for confidentiality. 418 U.S. at 712-13. Executive communications, which the Court discussed earlier, are presumed privileged unless the proponent of the subpoena can overcome the presumption with a sufficient showing of specific need for the privileged material. *Id.* at 713. The dissenting judge in the Eighth Circuit case thought this analysis should apply to the governmental attorney-client privilege to ensure that the President receives candid, confidential legal advice that will be disclosed only if a federal grand jury truly needs it. *In re Grand Jury Subpoena*, 112 F.3d at 926-27. The majority did not find *Nixon* to be "directly controlling" as it addressed a different privilege, but did find the case "indicative of the general principle that the government's need for confidentiality may be subordinated to the needs of the government's own criminal justice processes." *Id.* at 919.

2. Applicability of the Governmental Attorney-Client Privilege

In seeking to compel Lindsey to testify, the OIC asks the Court to follow the majority opinion in the Eighth Circuit case and find that no attorney-client privilege exists in the federal grand jury context. The White House urges this Court not to follow the Eighth Circuit case,

insisting that the majority's reasoning is flawed and that the D.C. Circuit clearly recognizes an absolute governmental attorney-client privilege. The White House argues that the attorney-client privilege is an absolute privilege and that it should therefore apply equally to civil and criminal matters regardless of whether a private or government party asserts the privilege.⁷ The amicus brief of the Attorney General asks the Court to recognize a qualified privilege that would "balance the demands of criminal law enforcement against the asserted need for confidentiality [by the White House]."⁸ Brief Amicus Curiae for the United States, Acting Through the Attorney General at 7-8 ("Attorney General Amicus Brief"). While the Attorney General does not request a specific balancing test, she does suggest a standard of need similar to the one established in *Nixon*. See Brief Amicus Curiae for the United States, Acting Through the Attorney General, Supporting Certiorari, in *In re Grand Jury Subpoena*, 112 F.3d 910 (8th Cir.1997), at 15.⁹

In this Circuit, an absolute governmental attorney-client privilege does apply to FOIA cases and other civil cases in which government attorneys represent government agencies or employees against private litigants in matters involving official government conduct. D.C. Circuit FOIA cases,⁹ Proposed Rule of Evidence 503, and the D.C. Bar's Rules of Professional

⁷ The White House also seeks a qualified governmental attorney-client privilege in the alternative, if the Court rejects its arguments for an absolute privilege.

⁸ The Amicus Brief filed in this matter incorporates the arguments made by the Attorney General in support of the petition for certiorari in *In re Grand Jury Subpoena*, 112 F.3d 910 (8th Cir.), cert. denied, 117 S.Ct. 2482 (1997).

⁹ See, e.g., *Tax Analysts*, 117 F.3d at 618; *Brinton v. Dep't of State*, 636 F.2d 600, 603 (D.C. Cir. 1980); *Mead Data Central v. Dep't of the Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977).

Conduct¹⁰ all recognize such a privilege.¹¹ In light of these authorities and the President's need for confidential legal advice, *see Nixon*, 418 U.S. at 708, the Court concludes that a governmental attorney-client privilege does apply in the federal grand jury context. In *Nixon*, the Supreme Court found that President Nixon's need for confidential advice from his advisers supported the existence of an executive privilege, acknowledging that "[a] President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately." *Id.* This Court finds the President's need for confidential legal advice from the White House Counsel's Office to be as legitimate as his need for confidential political advice from his top advisers. This compelling need supports recognition of a governmental attorney-client privilege even in the context of a federal grand jury subpoena.

3. The Scope of the Governmental Attorney-Client Privilege

Although the Court finds that a governmental attorney-client privilege should apply in the federal grand jury context, the Court is not willing to recognize an absolute privilege. Even though this privilege is absolute in civil cases, such as FOIA cases, this Court finds FOIA cases to be distinguishable from federal grand jury matters because the former involve civil litigation between the federal government and private parties seeking information from the government.

¹⁰ *See* District of Columbia Rules of Professional Conduct, R. 1.13 & cmt. 7, 1.6 & cmts. 33-36.

¹¹ "Uniform Rule [of Evidence] 502 limits the governmental privilege to situations involving a pending investigation or litigation and requires a finding by the court that disclosure will 'seriously impair' the agency's pursuit of the investigation or litigation." *In re Grand Jury Subpoena*, 112 F.3d at 916 (citing Unif. R. Evid. 502(d)(6)).

whereas the latter involve criminal matters in which a government party seeks information from another government agency. *In re Grand Jury Subpoena*, 112 F.3d at 918-19. The Court agrees with the Eighth Circuit that the criminal/civil distinction is significant and that "[m]ore . . . particularized rules may be necessary where one agency of government claims the privilege in resisting a demand for information by another." *Id.* at 916 (quoting *Restatement (Third) of the Law Governing Lawyers* § 124 cmt. b). In the context of a federal grand jury investigation where one government agency needs information from another to determine if a crime has been committed, the Court finds that the governmental attorney-client privilege must be qualified in order to balance the needs of the criminal justice system against the government agency's need for confidential legal advice.

The Supreme Court's reasons for recognizing a qualified and not absolute executive privilege in *Nixon* support this Court's conclusion that a qualified governmental attorney-client privilege should apply in the federal grand jury context. In *Nixon*, President Nixon claimed an absolute executive privilege in response to a trial subpoena for tapes and documents regarding his conversations with his staff and aides. 418 U.S. at 688-89. The Supreme Court held that only a qualified executive privilege should exist in the criminal trial context. *Id.* at 711-12 n.19. This Court agrees with the Supreme Court that "[t]he impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the function of the courts under Art. III." *Id.* at 707. Although the D.C. Circuit recognizes an absolute government attorney-client privilege in FOIA cases and in other civil cases in which a government attorney represents a government agency or employee, the Court finds that this absolute privilege should not be

"expansively construed" to apply to a federal grand jury investigation for such a privilege would clearly be "in derogation of the search for truth." *Id.* at 710. The Court believes that a qualified governmental attorney-client privilege will permit federal grand juries to search for the truth about alleged crimes while simultaneously protecting the need of the White House for confidential legal communications.

The White House claims that candid legal advice will be chilled if the Court does not recognize an absolute governmental attorney-client privilege in the federal grand jury context. Similar arguments were rejected by the Supreme Court with respect to the assertions of executive privilege by President Nixon and with respect to a privilege asserted by state legislators comparable to that of members of Congress.¹² Like the Supreme Court, this Court "cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution." *Nixon*, 418 U.S. at 712. The argument is also unpersuasive

¹² In *United States v. Gillock*, the Supreme Court rejected similar arguments:

We recognize that denial of a privilege to a state legislator may have some minimal impact on the exercise of his legislative function; however, similar arguments made to support a claim of Executive privilege were found wanting in *United States v. Nixon*, when balanced against the need of enforcing federal criminal statutes. There, the genuine risk of inhibiting candor in the internal exchanges at the highest levels of the Executive Branch was held insufficient to justify denying judicial power to secure all relevant evidence in a criminal proceeding. Here, we believe that recognition of an evidentiary privilege for state legislators for their legislative acts would impair the legitimate interest of the Federal Government in enforcing its criminal statutes with only speculative benefit to the state legislative process.

445 U.S. 360, 373 (1980) (citations omitted).

for reasons articulated by the Eighth Circuit:

Because agencies and entities of the government are not themselves subject to criminal liability, a government attorney is free to discuss anything with a government official — except for potential criminal wrongdoing by that official — without fearing later revelation of the conversation. An official who fears he or she may have violated the criminal law and wishes to speak with an attorney in confidence should speak with a private attorney, not a government attorney.

In re Grand Jury Subpoena, 112 F.3d at 921. Only a qualified governmental attorney-client privilege in the grand jury context can balance the President's need for frank legal advice against the grand jury's need for relevant evidence of criminal conduct.

Since the Nixon decision in 1974, the White House has operated effectively under a qualified executive privilege. The President continues to receive candid political advice from his top aides and the Court has no doubt that the President will continue to receive sound legal advice from White House attorneys under a qualified governmental attorney-client privilege.

The Court shares the belief of the D.C. Circuit that

So long as the presumption that the public interest favors confidentiality can be defeated only by a strong showing of need by another institution of government — a showing that the responsibilities of that institution cannot responsibly be fulfilled without access to records of the President's deliberations — we believed in Nixon v. Sirica, and continue to believe, that the effective functioning of the presidential office will not be impaired.

Senate Select, 498 F.2d at 730. The Court is confident that "the President's broad interest in confidentiality of communications will not be vitiated by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal cases." Nixon, 418 U.S. at 713.

The Court's decision to make the attorney-client privilege qualified like the executive privilege not only respects the needs of the criminal justice system, but also saves courts from

having to apply two different privilege standards to conversations commingling political and legal advice to the President. Many of the President's top advisers, such as Lindsey, provide both legal and political advice to the President and White House discussions often involve a mixture of the two. If no privilege applied to legal advice in the White House, as the OIG would have it, White House attorneys might be tempted to characterize their advice as political to acquire the qualified protection of the executive privilege. Similarly, if an absolute privilege applied to legal advice to the President while only a qualified executive privilege applied to political advice, the President and his staff might be tempted to characterize confidential political communications as legal in order to obtain greater protection. The Court finds that an absolute governmental attorney-client privilege would overly complicate communications to the President for both White House employees and the federal courts, that it would unduly frustrate the work of federal grand juries, and that it is not necessary to ensure candid legal advice to the President.

The White House argues that the attorney-client privilege has always been an absolute privilege and that it should not be qualified in the federal grand jury context. Although it is true that a private party may invoke an absolute attorney-client privilege in both civil and criminal matters, including federal grand jury investigations,¹³ the Court finds that the differences between private and governmental organizations noted by the Eighth Circuit provide compelling reasons for qualifying the governmental attorney-client privilege in the context of a federal grand jury investigation. See *In re Grand Jury Subpoena*, 112 F.3d at 920. While the Eighth Circuit

¹³ See, e.g., *Hickman v. Taylor*, 329 U.S. 495 (1947); *In re Sealed Case*, 124 F.3d 230 (D.C. Cir. 1997), cert. granted sub. nom. *Swidler & Berlin v. United States*, 66 U.S.L.W. (U.S. Mar. 30, 1998) (No. 97-1192); *In re Sealed Case*, 107 F.3d 46 (D.C. Cir. 1997).

majority found these differences provided sufficient grounds for not recognizing any governmental attorney-client privilege in the federal grand jury context, this Court finds the differences support qualifying the privilege so that it may be overcome when a federal grand jury can show sufficient need for otherwise privileged material.

A private organization such as a corporation and a government institution such as the White House differ significantly, especially in the criminal context. First, as the Eighth Circuit pointed out, the conduct of White House personnel cannot subject the White House as a legal entity to criminal liability. *Id.* The alleged conduct of Ms. Lewinsky and President Clinton may subject them to criminal prosecution or impeachment respectively, but their conduct cannot implicate the White House in any criminal or civil litigation. As the Eighth Circuit pointed out, there is a difference between "official misconduct" and "misconduct by officials" and it is clear that "[t]he OIG's investigation can have no legal, factual, or even strategic effect on the White House as an institution." *Id.* at 923. The conduct of corporate employees, however, can expose a corporation to civil and criminal liability. *Id.* For this reason, corporate attorneys need an absolute privilege so that they can obtain candid information from corporate employees and provide competent legal advice to the corporation, as the Supreme Court fully recognized in *Upjohn*, 449 U.S. 383, 389-90 (1981). Given that no liability threatens the White House, its attorneys do not have as compelling a need to obtain full and candid information from the President regarding an investigation of his alleged private misconduct and thus do not need the protection of an absolute attorney-client privilege as much as private corporations do.

In fact, White House attorneys, like all other executive branch employees, have a statutory duty to report any criminal misconduct by other employees to the Attorney General.

See 28 U.S.C. § 535(b); In re Grand Jury Subpoena, 112 F.3d at 920. Unlike a private attorney representing a corporation, when a White House attorney learns that a White House employee has engaged in criminal conduct, he must report such conduct. A private attorney is under no such obligation unless the conduct poses a threat of death, substantial bodily harm, or bribery of witnesses, jurors, or court officials. See D.C. Rules of Professional Conduct, Rule 1.6(c); Model Rules of Professional Conduct, Rule 1.6(b). The Eighth Circuit refused to recognize a governmental attorney-client privilege in the context of a federal grand jury investigation in part because such a privilege would conflict directly with the duty established by section 535(b). In re Grand Jury Subpoena, 112 F.3d at 920. The White House challenges the Eighth Circuit's reasoning, arguing that section 535(b) and memoranda interpreting it from the Justice Department's Office of Legal Counsel¹⁴ show no congressional intent to vitiate the attorney-client privilege. The Attorney General's amicus brief also asserts that section 535(b) must be interpreted consistently with the governmental attorney-client privilege. See Attorney General Amicus Brief at 11.

Nothing in the language of the statute or its legislative history suggests a congressional intent either to vitiate the privilege or to exempt government attorneys from the duty to report. In re Grand Jury Subpoena, 112 F.3d at 932 (noting "the absence of any discussion of the subject

¹⁴ See Antonin Scalia, Assistant Attorney General, Office of Legal Counsel, Memorandum for the Deputy Attorney General re: Disclosure of Confidential Information Received by U.S. Attorney in the Course of Representing a Federal Employee at 2 (Nov. 30, 1976); Ralph W. Tarr, Acting Assistant Attorney General, Office of Legal Counsel, Duty of Government Lawyers Upon Receipt of Incriminating Information in the Course of an Attorney-Client Relationship with Another Government Employee at 6 (March 29, 1985) (both cited in In re Grand Jury Subpoena, 112 F.3d at 932 (Kopf, J., dissenting)).

in the legislative history") (citation omitted). The Court acknowledges that the Justice Department has interpreted the section consistently with a governmental attorney-client privilege outside of the grand jury context. Accordingly, the Court finds that section 535(b) neither precludes nor requires the recognition of a governmental attorney-client privilege in the federal grand jury context. Rather, the Court finds that section 535(b)'s duty to report criminal activity provides further support for the Court's conclusion that the governmental attorney-client privilege should be qualified in the context of a federal grand jury investigation of an official's alleged misconduct. Under a qualified privilege, government attorneys would be required to report privileged information regarding possible criminal activity, as section 535(b) requires, when a federal grand jury could demonstrate sufficient need for such information.

The Court's decision to qualify the governmental attorney-client privilege in the context of a federal grand jury investigation is also supported by the fact that White House attorneys, unlike private attorneys, work for the American public. As the Eighth Circuit pointed out, "the general duty to public service calls upon government employees and agencies to favor disclosure over concealment." *Id.* at 920. The Supreme Court has found that the public responsibilities of accountants weighed against giving them work product immunity, see *United States v. Arthur Young & Co.*, 465 U.S. 805, 817 (1984), and in refusing to recognize a governmental attorney-client privilege for White House attorneys, the Eighth Circuit recognized that White House attorneys bear far greater public responsibilities than private accountants. *In re Grand Jury Subpoena*, 112 F.3d at 921. This Court finds that the public responsibilities of White House attorneys weigh in favor of requiring them to divulge otherwise privileged information when a federal grand jury needs such information to determine whether a crime has been committed.

The Court believes that "the strong public interest in honest government and in exposing wrongdoing by public officials would be ill-served by recognition of a[n] [absolute] governmental attorney-client privilege in criminal proceedings inquiring into the actions of public officials." *Id.*

The Court shares the Eighth Circuit's belief that "to allow any part of the federal government to use its in-house attorneys as a shield against the production of information relevant to a federal criminal investigation would represent a gross misuse of public assets." *Id.* This is especially true given the large number of attorneys working for the federal government. See *id.* (recognizing the "pernicious potential of [a governmental attorney-client privilege] in a government top-heavy with lawyers") (citation omitted). White House attorneys are paid by U.S. taxpayers to provide legal advice on official presidential decisions, not the private decisions of President Clinton, and certainly not private, potentially criminal conduct. Members of the White House Counsel's office are not, and should not be, representing President Clinton in the grand jury investigation regarding Monica Lewinsky; the President's private attorneys have been hired to do this. The Eighth Circuit made this clear to the White House when it refused to recognize a governmental attorney-client privilege under very similar circumstances. *Id.* at 915. Since the issuance of the Eighth Circuit opinion in February 1997, the White House has been on notice that legal communications between the President and White House attorneys regarding federal grand jury investigations of the President or the First Lady's alleged private misconduct are not guaranteed absolute protection. Thus, if President Clinton had legal communications with White House attorneys regarding the grand jury investigation of the Monica Lewinsky matter, just as Hillary Clinton did in the Whitewater grand jury investigation, he did so "at [his] peril" because

both the majority and the dissent of the Eighth Circuit opinion made clear that such consultations would no longer be absolutely protected. *Id.* at 927 (Kopf, J., dissenting).¹⁵

4. The Standard of Need

For all of the above reasons, the Court holds that the governmental attorney-client privilege is qualified in the context of a federal grand jury investigation and that, like the executive privilege, it can be overcome by a showing of need. This Court must determine what type of showing must be made to justify release to a federal grand jury of materials protected by the governmental attorney-client privilege. In the *Espy* case, the D.C. Circuit addressed the same question with respect to the White House's assertion of the executive privilege in response to a federal grand jury subpoena. *In re Sealed Case*, 121 F.3d at 742. As the Court discussed earlier, the D.C. Circuit held that, in order to overcome the presumption of executive privilege, the OIC must show two factors: "first, that each discrete group of the subpoenaed materials likely contains important evidence; and second that this evidence is not available with due diligence

¹⁵ Judge Kopf, in dissent, concluded that the *Nixon* balancing test for executive privilege should apply to the governmental attorney-client privilege and warned Mrs. Clinton that in the future her communications with White House attorneys could be subject to disclosure. He wrote:

"because we should now declare for the first time that *Nixon* overcomes the White House privilege if a proper showing is made, Mrs. Clinton would consult with White House lawyers at her peril in the future. She would be informed from our opinion that such consultations might no longer be protected since the other party to her conversations (the White House and its lawyers) could be obligated to respond to a grand jury subpoena if the prosecutor made the showing required by *Nixon*. Consequently, in the future, and to the extent of a grand jury subpoena, any such communications could not legally be "intended" by Mrs. Clinton as "confidential" under Rule 503(a)(4) because she would know and understand that her communications could be "disclosed to third persons."

Id. at 927 (emphasis added).

elsewhere." *Id.* at 754. The Court finds that the need analysis established by the D.C. Circuit in the Espy case for assertions of the executive privilege in response to a federal grand jury subpoena should also apply to assertions of the governmental attorney-client privilege in response to a federal grand jury subpoena. The need analysis in the Espy case is more relevant and appropriate than the need analysis established by the Supreme Court for trial subpoenas in *Nixon* and properly weighs the President's need for confidential legal advice against the grand jury's need for relevant and otherwise unavailable evidence. *Id.* at 755-57.

Although the Espy case involved the executive privilege, the Court finds that its two-prong need analysis should apply to the government attorney-client privilege for many of the same reasons articulated above in support of the Court's decision to make the governmental attorney-client privilege qualified like the executive privilege in the context of a federal grand jury investigation. The President's need for candid legal advice from the White House Counsel's Office and his need for frank political advice from his top advisers are comparable needs that require some degree of confidentiality. The grand jury's need for relevant evidence of crimes applies equally whether the executive privilege or the governmental attorney-client privilege has been asserted. Thus, the competing needs in both cases are similar and the need analysis established by the D.C. Circuit in the Espy case provides a thoughtful balance of these needs. By requiring the Special Prosecutor to show that "each discrete group of the subpoenaed materials [or testimony] likely contains important evidence," the first prong of the need analysis ensures "that the evidence sought must be directly relevant to issues that are expected to be central to the trial." *Id.* at 754. This prevents the prosecutor from engaging in a fishing expedition and assures the President and White House attorneys that their conversations will be protected unless they

directly relate to a central matter of a criminal investigation. The second prong, which requires the prosecutor to show that the subpoenaed evidence "is not available with due diligence elsewhere," provides further protection for the President's need for confidential legal advice. *Id.*

As the Court noted earlier, applying the same need analysis to the White House's assertions of both the executive privilege and the governmental attorney-client privilege has the added benefit of sparing federal courts from having to apply two different legal standards to conversations combining political and legal advice to the President and removes the incentive to characterize one form of advice as the other in order to obtain greater privilege protection. This is especially important in the White House context because advisers such as Lindsey regularly provide both forms of advice within a single conversation. The Court also notes that "[t]he factors of importance and unavailability are also used by courts in determining whether a sufficient showing of need has been demonstrated to overcome other qualified executive privileges, such as the deliberative process privilege or the law-enforcement investigatory privilege." *Id.* at 755 (citing *In re Comptroller of the Currency*, 967 F.2d 630, 634 (D.C. Cir. 1992); *Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336, 1342 (D.C. Cir. 1984)). The Court finds no support for devising a different balancing test of the competing needs of the grand jury and the White House, especially given the similarities between the Espy case and the case at hand.

For all of the reasons articulated above, the Court holds that although an absolute governmental attorney-client privilege applies to civil cases in which government attorneys represent government agencies or government employees, only a qualified governmental attorney-client privilege applies to a subpoena issued by a federal grand jury. The Court further

holds that this privilege can be overcome if the subpoena proponent can show "first, that each discrete group of the subpoenaed materials [or testimony] likely contains important evidence; and second that this evidence is not available with due diligence elsewhere." *Id.* at 754. If the Court finds a sufficient showing of need, the Court shall order compliance with the subpoena subject to the relevancy standard established by *R. Enterprises*, 498 U.S. at 300. *See In re Sealed Case*, 121 F.3d at 759.

5. Application of the Court's Holdings to the Subpoenaed Testimony

The Court directed the OIC to inform the Court as to its need for the testimony withheld by Lindsey on the basis of the governmental attorney-client privilege. The OIC provided the Court with a substantial *ex parte* submission that the Court has reviewed *in camera*. This submission incorporates by reference the substance of the OIC's *ex parte* submission demonstrating its need for conversations covered by the executive privilege because Lindsey often asserted both the governmental attorney-client privilege and the executive privilege with respect to the same subpoenaed communications. The "need" submission regarding the governmental attorney-client privilege identifies fourteen categories of information sought from Lindsey and explains how each category meets the *In re Sealed Case* two-prong need standard.

The Court's finding of need cannot be detailed because the submission was reviewed *in camera* and involves matters subject to Federal Rule of Criminal Procedure 6(e)(2). *See id.* at 740. [REDACTED] The Court cannot describe the categories in any more detail without revealing "matters occurring before the grand jury." *See* Federal Rule of Criminal Procedure 6(e)(2).

The Court finds that all fourteen categories are "likely" to contain evidence that is

"important" and relevant to the grand jury's investigation. *In re Sealed Case*, 121 F.3d at 754. As the Court explained before, if there were instructions from the President to obstruct justice or suborn perjury, they were likely communicated to his closest advisors, such as Lindsey, in conversations unlikely to have been recorded on paper. If the White House interviewed grand jury witnesses in order to determine how and whether the President or his aides could avoid compliance with grand jury subpoenas or otherwise obstruct the investigation, then the witnesses' identities and the substance of those interviews would shed light on this. Similarly, if the President disclosed to his closest legal advisor that he committed crimes of perjury or obstruction of justice, he likely made the disclosure in a conversation, not in writing. Because "the content" of the conversations covered by the governmental attorney-client privilege likely contains important and relevant evidence to the crimes under investigation, the grand jury's need for those conversations is as "undeniable" as it is for communications protected by the executive privilege. *Id.* at 761 (citation omitted).

The OIC has shown with sufficient specificity that the subpoenaed testimony from Lindsey is not available with due diligence elsewhere. *See id.* at 754. The D.C. Circuit has stated that "when . . . an immediate White House advisor is being investigated for criminal behavior[,] . . . the subpoena proponent will be able easily to explain why there is no equivalent to evidence likely contained in the subpoenaed materials." *Id.* at 755. [REDACTED] The *ex parte* submission amply demonstrates the OIC's diligent but unsuccessful efforts to obtain this evidence from sources other than Lindsey whenever it was possible.

The Court finds that the OIC's showing of need has overcome Lindsey's assertions of the governmental attorney-client privilege. Accordingly, the Court orders Lindsey to comply with

the subpoena by answering the questions posed to him by the OIC and the grand jurors. If Lindsey finds the questions do not meet the relevancy standard established by R. Enterprises, the Court will be available to make this determination.

6. The Common Interest Doctrine

Lindsey also asserts that conversations with the President's private attorneys that he held in his official capacity as Deputy White House Counsel are protected under the common interest doctrine. [REDACTED], the Court finds that the White House and the President as an individual do not share sufficiently common interests in the grand jury investigation and the Paula Jones case for the common interest doctrine to apply.

7. The Governmental Work Product Doctrine

Lindsey has asserted that the work product doctrine protects subpoenaed testimony regarding his interviews with grand jury witnesses and their attorneys. [REDACTED] Lindsey has indicated that there are no work product documents. [REDACTED] The work product doctrine provides qualified protection for an attorney's work product prepared in anticipation of litigation. See Fed. R. Civ. P. 26(b)(3); Hickman v. Taylor, 329 U.S. 495 (1947). The doctrine applies in criminal cases, see United States v. Nobles, 422 U.S. 225, 239 (1975), and courts have "uniformly held that the work product doctrine applies to grand jury proceedings." United States v. Davis, 636 F.2d 1028, 1039 n.10 (5th Cir. 1981). It is clear that a government party may invoke the doctrine in civil cases. See NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 154 (1975). Even if a governmental work product doctrine applies in the criminal context, the Court finds that it does not apply to Lindsey's interviews because they were not in anticipation of an adversarial proceeding. Whenever the government invokes the doctrine, it bears the burden of

establishing its essential elements. See *In re Grand Jury Subpoena*, 112 F.3d at 925. One of the essential elements is that "the attorney was preparing for or anticipating some sort of adversarial proceeding involving his or her client." *Id.* at 924.

In the Eighth Circuit case involving Mrs. Clinton and the Whitewater investigation, the Court held that the work product doctrine did not apply to notes taken by a White House lawyer during a meeting involving Mrs. Clinton, her personal attorneys, and White House attorneys because the White House lawyer did not take the notes in "anticipation of litigation." *Id.* The Court rejected the White House's argument that the White House lawyer was preparing for the OIC's investigation because the OIC was investigating Mrs. Clinton as a private individual, not the White House. *Id.* Similarly, the Court rejected the White House's claim that its attorneys were anticipating litigation because they expected congressional hearings of employees at the White House and the institution itself. *Id.* The Court did not decide whether a congressional investigation constituted "an adversarial proceeding," but noted that even if it did, "the only harm that could come to the White House as a result of such an investigation is political harm" and that this did not meet the requirements of the work product doctrine. *Id.* at 924-25.

Like the Eighth Circuit, this Court holds that the work product doctrine does not apply to interviews with grand jury witnesses or their counsel conducted by White House attorneys, such as Lindsey, because they were not conducted in anticipation of litigation. Lindsey asserts that he conducted these interviews "for the purpose of providing legal and other advice to the witnesses," [REDACTED], and refers vaguely to "the ongoing grand jury investigation and potential Congressional proceedings," [REDACTED], but fails to explain why these proceedings constitute "litigation" for the White House. The Court finds that Lindsey and other White House

attorneys could not have been conducting the interviews in anticipation of an adversarial proceeding because the OIC is not investigating the White House. In re Grand Jury Subpoena, 112 F.3d at 924. The White House is not involved in any adversarial proceeding. Neither the OIC nor the Congress will be investigating the White House as an institution with respect to the Lewinsky matter. Because the White House has failed to meet its burden of showing that Lindsey's interviews were in anticipation of litigation, the work product doctrine does not apply to those interviews.

II. Conclusion

For the foregoing reasons, the Court will grant the motions of the Office of Independent Counsel to compel the testimony of Bruce Lindsey and Sidney Blumenthal and will deny as moot the motion to compel the testimony of [REDACTED]. An appropriate Order will issue on this date.


NORMA HOLLOWAY JOHNSON
CHIEF JUDGE

Dated: May 26, 1998

- 8 -

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued June 29, 1998

Decided July 27, 1998

No. 98-3060

IN RE: BRUCE R. LINDSEY (GRAND JURY TESTIMONY)

Consolidated with
Nos. 98-3062 and 98-3072

Appeals from the United States District Court
for the District of Columbia
(No. 98ms00095)

W. Neil Eggleston argued the cause for appellant the Office of the President, with whom *Timothy K. Armstrong*, *Julie K. Brof* and *Charles F.C. Ruff*, Counsel to the President, were on the briefs.

David E. Kendall argued the cause for appellant William J. Clinton, with whom *Nicole K. Seligman*, *Max Stier*, *Robert S. Bennett*, *Carl S. Rauh*, *Amy Sabrin* and *Katharine S. Sexton* were on the briefs.

Douglas N. Letter, Attorney, U.S. Department of Justice, argued the cause for amicus curiae the Attorney General,

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

with whom *Janet Reno*, Attorney General, *Frank W. Hunger*, Assistant Attorney General, *Stephen W. Preston*, Deputy Assistant Attorney General, and *Stephanie R. Marcus*, Attorney, were on the brief.

Kenneth W. Starr, Independent Counsel and *Brett M. Kavanaugh*, Associate Independent Counsel, argued the causes for appellee the United States, with whom *Joseph M. Ditzkoff*, Associate Independent Counsel, was on the brief.

Before: RANDOLPH, ROGERS and TATEL, *Circuit Judges*.

Opinion for the Court filed *PER CURIAM*.

Opinion dissenting from Part II and concurring in part and dissenting in part from Part III filed by *Circuit Judge TATEL*.

PER CURIAM: In these expedited appeals, the principal question is whether an attorney in the Office of the President, having been called before a federal grand jury, may refuse, on the basis of a government attorney-client privilege, to answer questions about possible criminal conduct by government officials and others. To state the question is to suggest the answer, for the Office of the President is a part of the federal government, consisting of government employees doing government business, and neither legal authority nor policy nor experience suggests that a federal government entity can maintain the ordinary common law attorney-client privilege to withhold information relating to a federal criminal offense. The Supreme Court and this court have held that even the constitutionally based executive privilege for presidential communications fundamental to the operation of the government can be overcome upon a proper showing of need for the evidence in criminal trials and in grand jury proceedings. See *United States v. Nixon*, 418 U.S. 683, 707-12 (1974); *In re Sealed Case (Espy)*, 121 F.3d 729, 736-38 (D.C. Cir. 1997). In the context of federal criminal investigations and trials, there is no basis for treating legal advice differently from any other advice the Office of the President receives in performing its constitutional functions. The public interest in honest government and in exposing wrongdoing by government officials, as well as the tradition and practice, acknowl-

edged by the Office of the President and by former White House Counsel, of government lawyers reporting evidence of federal criminal offenses whenever such evidence comes to them, lead to the conclusion that a government attorney may not invoke the attorney-client privilege in response to grand jury questions seeking information relating to the possible commission of a federal crime. The extent to which the communications of White House Counsel are privileged against disclosure to a federal grand jury depends, therefore, on whether the communications contain information of possible criminal offenses. Additional protection may flow from executive privilege and such common law privileges as may inhere in the relationship between White House Counsel and the President's personal counsel.

I.

On January 16, 1998, at the request of the Attorney General, the Division for the Purpose of Appointing Independent Counsels issued an order expanding the prosecutorial jurisdiction of Independent Counsel Kenneth W. Starr. Previously, the main focus of Independent Counsel Starr's inquiry had been on financial transactions involving President Clinton when he was Governor of Arkansas, known popularly as the Whitewater inquiry. The order now authorized Starr to investigate "whether Monica Lewinsky or others suborned perjury, obstructed justice, intimidated witnesses, or otherwise violated federal law" in connection with the civil lawsuit against the President of the United States filed by Paula Jones. *In re Motions of Dow Jones & Co.*, 142 F.3d 496, 497-98 (D.C. Cir.), (quoting order). "Thereafter, a grand jury here began receiving evidence about Monica Lewinsky and President Clinton, and others. . . ." *Id.* at 498.

On January 30, 1998, the grand jury issued a subpoena to Bruce R. Lindsey, an attorney admitted to practice in Arkansas. Lindsey currently holds two positions: Deputy White House Counsel and Assistant to the President. On February

18, February 19, and March 12, 1998, Lindsey appeared before the grand jury and declined to answer certain questions on the ground that the questions represented information protected from disclosure by a government attorney-client privilege applicable to Lindsey's communications with the President as Deputy White House Counsel, as well as by executive privilege, and by the President's personal attorney-client privilege. Lindsey also claimed work product protections related to the attorney-client privileges.

On March 6, 1998, the Independent Counsel moved to compel Lindsey's testimony. The district court granted that motion on May 4, 1998. The court concluded that the President's executive privilege claim failed in light of the Independent Counsel's showing of need and unavailability. See *In re Sealed Case (Espy)*, 121 F.3d at 754. It rejected Lindsey's government attorney-client privilege claim on similar grounds, ruling that the President possesses an attorney-client privilege when consulting in his official capacity with White House Counsel, but that the privilege is qualified in the grand jury context and may be overcome upon a sufficient showing of need for the subpoenaed communications and unavailability from other sources. The court also ruled the President's personal attorney-client privilege and work product immunity inapplicable to Lindsey's testimony.

Both the Office of the President and the President in his personal capacity appealed the order granting the motion to compel Lindsey's testimony, challenging the district court's construction of both the government attorney-client privilege and President Clinton's personal attorney-client privilege. The Independent Counsel then petitioned the Supreme Court to review the district court's decision on those issues, among others, before judgment by this court. On June 4, 1998, the Supreme Court denied certiorari, while indicating its expectation that "the Court of Appeals will proceed expeditiously to decide this case." *United States v. Clinton*, 118 S. Ct. 2079 (1998). Following an expedited briefing schedule, on June 29, 1998, this court heard argument on the attorney-client issues. Neither the Office of the President nor the President in his personal capacity has appealed the district court's ruling on

executive privilege. In Part II we address the availability of the government attorney-client privilege; in Part III we address the President's personal attorney-client privilege claims.

II.

The attorney-client privilege protects confidential communications made between clients and their attorneys when the communications are for the purpose of securing legal advice or services. See *In re Sealed Case*, 737 F.2d 94, 98-99 (D.C. Cir. 1984). It "is one of the oldest recognized privileges for confidential communications." *Swidler & Berlin v. United States*, 118 S. Ct. 2081, 2084 (1998).

The Office of the President contends that Lindsey's communications with the President and others in the White House should fall within this privilege both because the President, like any private person, needs to communicate fully and frankly with his legal advisors, and because the current grand jury investigation may lead to impeachment proceedings, which would require a defense of the President's official position as head of the executive branch of government, presumably with the assistance of White House Counsel. The Independent Counsel contends that an absolute government attorney-client privilege would be inconsistent with the proper role of the government lawyer and that the President should rely only on his private lawyers for fully confidential counsel.

Federal courts are given the authority to recognize privilege claims by Rule 501 of the Federal Rules of Evidence, which provides that

[e]xcept as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be

interpreted by the courts of the United States in the light of reason and experience.

FED. R. EVID. 501. Although Rule 501 manifests a congressional desire to provide the courts with the flexibility to develop rules of privilege on a case-by-case basis, *see Trammel v. United States*, 445 U.S. 40, 47 (1980), the Supreme Court has been “disinclined to exercise this authority expansively,” *University of Pa. v. EEOC*, 493 U.S. 182, 189 (1990). “[T]hese exceptions to the demand for every man’s evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.” *Nixon*, 418 U.S. at 710; *see also Trammel*, 445 U.S. at 50. Consequently, federal courts do not recognize evidentiary privileges unless doing so “promotes sufficiently important interests to outweigh the need for probative evidence.” *Id.* at 51.

The Supreme Court has not articulated a precise test to apply to the recognition of a privilege, but it has “placed considerable weight upon federal and state precedent,” *In re Sealed Case (Secret Service)*, 148 F.3d 1073, 1076 (D.C. Cir. 1998), *petition for cert. filed*, 67 USLW 3083 (U.S. July 16, 1998) (No. 98–93), and on the existence of “a ‘public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.’” *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996) (quoting *Trammel*, 445 U.S. at 50 (quoting *Elkins v. United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting))). That public good should be shown “with a high degree of clarity and certainty.” *In re Sealed Case (Secret Service)*, at 1076.

A.

Courts, commentators, and government lawyers have long recognized a government attorney-client privilege in several contexts. Much of the law on this subject has developed in litigation about exemption five of the Freedom of Information Act (“FOIA”). *See* 5 U.S.C. § 552(b)(5) (1994). Under that exemption, “intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency” are excused from mandatory disclosure to the public. *Id.*; *see also* S. REP. No. 89–813, at 2

(1965) (including within exemption five “documents which would come within the attorney-client privilege if applied to private parties”). We have recognized that “Exemption 5 protects, as a general rule, materials which would be protected under the attorney-client privilege.” *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980). “In the governmental context, the ‘client’ may be the agency and the attorney may be an agency lawyer.” *Tax Analysts v. IRS*, 117 F.3d 607, 618 (D.C. Cir. 1997); see also *Brinton v. Department of State*, 636 F.2d 600, 603–04 (D.C. Cir. 1980). In Lindsey’s case, his client—to the extent he provided legal services—would be the Office of the President.¹

Exemption five does not itself create a government attorney-client privilege. Rather, “Congress intended that agencies should not lose the protection traditionally afforded through the evidentiary privileges simply because of the passage of the FOIA.” *Coastal States*, 617 F.2d at 862. In discussing the government attorney-client privilege applicable to exemption five, we have mentioned the usual advantages:

the attorney-client privilege has a proper role to play in exemption five cases. . . . In order to ensure that a client receives the best possible legal advice, based on a full and frank discussion with his attorney, the attorney-client privilege assures him that confidential communications to his attorney will not be disclosed without his

¹ Charles F.C. Ruff, the current White House Counsel, stated in an affidavit that he provides legal advice to the President regarding a wide variety of matters relating to his constitutional, statutory, ceremonial, and other official duties. He also provides legal advice to the President regarding the effective functioning of the Executive Branch. Lindsey’s affidavit stated that the “White House Counsel’s Office provides confidential counsel to the President in his official capacity, to the White House as an institution, and to senior advisors about legal matters that affect the White House’s interests, including investigative matters. To this end, the Counsel’s Office, in which I serve as Deputy, receives confidential communications from individuals about matters of institutional concern.”

consent. We see no reason why this same protection should not be extended to an agency's communications with its attorneys under exemption five.

Mead Data Cent., Inc. v. United States Dep't of Air Force, 566 F.2d 242, 252 (D.C. Cir. 1977). Thus, when "the Government is dealing with its attorneys as would any private party seeking advice to protect personal interests, and needs the same assurance of confidentiality so it will not be deterred from full and frank communications with its counselors," exemption five applies. *Coastal States*, 617 F.2d at 863.

Furthermore, the proposed (but never enacted) Federal Rules of Evidence concerning privileges, to which courts have turned as evidence of common law practices, see, e.g., *United States v. Gillock*, 445 U.S. 360, 367-68 (1980); *In re Bieter Co.*, 16 F.3d 929, 935 (8th Cir. 1994); *Linde Thomson Langworthy Kohn & Van Dyke v. Resolution Trust Corp.*, 5 F.3d 1508, 1514 (D.C. Cir. 1993); *United States v. (Under Seal)*, 748 F.2d 871, 874 n.5 (4th Cir. 1984); *United States v. Mackey*, 405 F. Supp. 854, 858 (E.D.N.Y. 1975), recognized a place for a government attorney-client privilege. Proposed Rule 503 defined "client" for the purposes of the attorney-client privilege to include "a person, public officer, or corporation, association, or other organization or entity, either public or private." PROPOSED FED. R. EVID. 503(a)(1), reprinted in 56 F.R.D. 183, 235 (1972). The commentary to the proposed rule explained that "[t]he definition of 'client' includes governmental bodies." *Id.* advisory committee's note. The Restatement also extends attorney-client privilege to government entities. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 124 (Proposed Final Draft No. 1, 1996) [hereinafter RESTATEMENT].

The practice of attorneys in the executive branch reflects the common understanding that a government attorney-client privilege functions in at least some contexts. The Office of Legal Counsel in the Department of Justice concluded in 1982 that

[a]lthough the attorney-client privilege traditionally has been recognized in the context of private attorney-client

relationships, the privilege also functions to protect communications between government attorneys and client agencies or departments, as evidenced by its inclusion in the FOIA, much as it operates to protect attorney-client communications in the private sector.

Theodore B. Olsen, Assistant Attorney General, Office of Legal Counsel, *Confidentiality of the Attorney General's Communications in Counseling the President*, 6 Op. Off. Legal Counsel 481, 495 (1982). The Office of Legal Counsel also concluded that when government attorneys stand in the shoes of private counsel, representing federal employees sued in their individual capacities, confidential communications between attorney and client are privileged. See Antonin Scalia, Assistant Attorney General, Office of Legal Counsel, *Disclosure of Confidential Information Received by U.S. Attorney in the Course of Representing a Federal Employee* (Nov. 30, 1976); Ralph W. Tarr, Acting Assistant Attorney General, Office of Legal Counsel, *Duty of Government Lawyer Upon Receipt of Incriminating Information in the Course of an Attorney-Client Relationship with Another Government Employee* (Mar. 29, 1985); see also 28 C.F.R. § 50.15(a)(3) (1998).

B.

Recognizing that a government attorney-client privilege exists is one thing. Finding that the Office of the President is entitled to assert it here is quite another.

It is settled law that the party claiming the privilege bears the burden of proving that the communications are protected. As oft-cited definitions of the privilege make clear, only communications that seek "legal advice" from "a professional legal adviser in his capacity as such" are protected. See 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2292, at 554 (McNaughton rev. 1961). Or, in a formulation we have adopted, the privilege applies only if the person to whom the communication was made is "a member of the bar of a court" who "in connection with th[e] communication is acting as a lawyer" and the communication was made "for the

purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding.” *In re Sealed Case*, 737 F.2d at 98–99 (quoting *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357, 358–59 (D.Mass. 1950)).

On the record before us, it seems likely that at least some of the conversations for which Lindsey asserted government attorney-client privilege did not come within the formulation just quoted. In its original opposition to the Independent Counsel’s motion to compel Lindsey’s testimony, the Office of the President claimed the privilege for conversations related to “providing legal advice on the questions whether the Office of the President should invoke its testimonial privileges, including the attorney-client and presidential communications privileges” and “possible impeachment proceedings before the House Judiciary Committee.” White House Mem. in Opp’n to OIC’s Mot. to Compel at 19. Both of these subjects arose from the expanded jurisdiction of the Independent Counsel, which did not become public until January 20, 1998. Before then, any legal advice Lindsey rendered in connection with *Jones v. Clinton*, a lawsuit involving President Clinton in his personal capacity, likely could not have been covered by government attorney-client privilege.² Apparently realizing as much, the Office of the President added a third category in a supplemental filing: “Mr. Lindsey has also rendered advice to the Office of the President on how best to prevent other litigation in which the President is involved from hampering the Presidency’s fulfillment of its institutional duties.” White House Mem. Concerning President Clinton’s Supplemental Filing in Supp. of Opp’n to Mot. to Compel at 2. We take notice that in describing this third subject, the word “advice” is not preceded by the word “legal.” According to the Restatement, “consultation with one admitted to the bar but not in that other person’s role as lawyer is not protected.”

² We do not foreclose a showing by Lindsey when he appears again before the grand jury that prior to January 20, 1998, he gave legal advice as Deputy White House Counsel in regard to how private litigation involving the President was affecting the Office of the President.

RESTATEMENT § 122 cmt. c. “[W]here one consults an attorney not as a lawyer but as a friend or as a business adviser or banker, or negotiator . . . the consultation is not professional nor the statement privileged.” 1 MCCORMICK ON EVIDENCE § 88, at 322–24 (4th ed. 1992) (footnotes omitted). Thus Lindsey’s advice on political, strategic, or policy issues, valuable as it may have been, would not be shielded from disclosure by the attorney-client privilege.

As for conversations after January 20th, the Office of the President must “present the underlying facts demonstrating the existence of the privilege” in order to carry its burden. See *FTC v. Shaffner*, 626 F.2d 32, 37 (7th Cir. 1980). A blanket assertion of the privilege will not suffice. Rather, “[t]he proponent must conclusively prove each element of the privilege.” *SEC v. Gulf & Western Indus.*, 518 F. Supp. 675, 682 (D.D.C. 1981). In response to the Independent Counsel’s questions, Lindsey invariably asserted executive privilege and attorney-client privilege. On this record, it is impossible to determine whether Lindsey believed that both privileges applied or whether he meant to invoke them on an “either/or” basis. As we have said, the district court’s rejection of the executive privilege claim has not been appealed. With this privilege out of the picture, the Office of the President had to show that Lindsey’s conversations “concerned the seeking of legal advice” and were between President Clinton and Lindsey or between others in the White House and Lindsey while Lindsey was “acting in his professional capacity” as an attorney. *Shaffner*, 626 F.2d at 37.

With regard to most of the communications that were the subject of questions before the grand jury, it does not appear to us that any such showing was made in the grand jury by Lindsey or in the district court by the Office of the President in the proceedings leading to the order to compel his testimony. This may be attributable to the parties’ focus in the district court. The arguments on both sides centered on whether any attorney-client privilege protected the conversations about which Lindsey was asked, not on whether—if the privilege could be invoked—the conversations were covered

by it. In light of this, and in view of the Administration's abandonment of its executive privilege claim, Lindsey would have to return to the grand jury no matter how we ruled on the government attorney-client privilege claim.

There is, however, no good reason for withholding decision on the issues now before us. We have little doubt that at least *one* of Lindsey's conversations subject to grand jury questioning "concerned the seeking of legal advice" and was between President Clinton and Lindsey or between others in the White House and Lindsey while Lindsey was "acting in his professional capacity" as an attorney. *See id.* Before the grand jury, Lindsey spoke of many instances when legal advice would clearly have been appropriate, *see* Grand Jury Tr., Feb. 18, 1998, at 52-53, 90; Grand Jury Tr., Feb. 19, 1998, at 54-55, 81-84, and he specifically affirmed that there were times when White House staff members came to him in his role as a member of the White House Counsel's Office, *see id.* at 64-74. Furthermore, there were times when Lindsey only invoked executive privilege, *see, e.g.*, Grand Jury Tr., Feb. 18, 1998, at 115-16, at least implying that he invoked attorney-client privilege only when he thought it appropriate to do so. The issue whether the government attorney-client privilege could be invoked in these circumstances is therefore ripe for decision.

Moreover, the case has been fully briefed and argued. The Supreme Court has asked us to expedite our disposition of these appeals. Sending this case back for still another round of grand jury testimony, assertions of privileges and immunities, a district court judgment, and then another appeal would be inconsistent with the Supreme Court's request and would do nothing but prolong the grand jury's investigation. The parties, we believe, are entitled now to a ruling to govern Lindsey's future grand jury appearance.

We therefore turn to the question whether an attorney-client privilege permits a government lawyer to withhold from a grand jury information relating to the commission of possible crimes by government officials and others. Although the cases decided under FOIA recognize a government attorney-

client privilege that is rather absolute in civil litigation, those cases do not necessarily control the application of the privilege here. The grand jury, a constitutional body established in the Bill of Rights, "belongs to no branch of the institutional Government, serving as a kind of buffer or referee between the Government and the people," *United States v. Williams*, 504 U.S. 36, 47 (1992), while the Independent Counsel is by statute an officer of the executive branch representing the United States. For matters within his jurisdiction, the Independent Counsel acts in the role of the Attorney General as the country's chief law enforcement officer. See 28 U.S.C. § 594(a) (1994). Thus, although the traditional privilege between attorneys and clients shields private relationships from inquiry in either civil litigation or criminal prosecution, competing values arise when the Office of the President resists demands for information from a federal grand jury and the nation's chief law enforcement officer. As the drafters of the Restatement recognized, "More particularized rules may be necessary where one agency of government claims the privilege in resisting a demand for information by another. Such rules should take account of the complex considerations of governmental structure, tradition, and regulation that are involved." RESTATEMENT § 124 cmt. b. For these reasons, others have agreed that such "considerations" counsel against "expansion of the privilege to all governmental entities" in all cases. 24 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5475, at 125 (1986).

The question whether a government attorney-client privilege applies in the federal grand jury context is one of first impression in this circuit, and the parties dispute the import of the lack of binding authority. The Office of the President contends that, upon recognizing a government attorney-client privilege, the court should find an *exception* in the grand jury context only if practice and policy require. To the contrary, the Independent Counsel contends, in essence, that the justification for any *extension* of a government attorney-client privilege to this context needs to be clear. These differences in approach are not simply semantical: they represent different versions of what is the status quo. To argue about an

“exception” presupposes that the privilege otherwise applies in the federal grand jury context; to argue about an “extension” presupposes the opposite. In *Swidler & Berlin*, the Supreme Court considered whether, as the Independent Counsel contended, it should create an exception to the personal attorney-client privilege allowing disclosure of confidences after the client’s death. See *Swidler & Berlin*, 118 S. Ct. at 2083. After finding that the Independent Counsel was asking the Court “not simply to ‘construe’ the privilege, but to narrow it, contrary to the weight of the existing body of caselaw,” the Court concluded that the Independent Counsel had not made a sufficient showing to warrant the creation of such an exception to the settled rule. *Id.* at 2088.

In the instant case, by contrast, there is no such existing body of caselaw upon which to rely and no clear principle that the government attorney-client privilege has as broad a scope as its personal counterpart. Because the “attorney-client privilege must be ‘strictly confined within the narrowest possible limits consistent with the logic of its principle;’” *In re Sealed Case*, 676 F.2d 793, 807 n.44 (D.C. Cir. 1982) (quoting *In re Grand Jury Investigation*, 599 F.2d 1224, 1235 (3d Cir. 1979)); accord *Trammel*, 445 U.S. at 50, and because the government attorney-client privilege is not recognized in the same way as the personal attorney-client privilege addressed in *Swidler & Berlin*, we believe this case poses the question whether, in the first instance, the privilege extends as far as the Office of the President would like. In other words, pursuant to our authority and duty under Rule 501 of the Federal Rules of Evidence to interpret privileges “in light of reason and experience,” FED. R. EVID. 501, we view our exercise as one in defining the particular contours of the government attorney-client privilege.

When an executive branch attorney is called before a federal grand jury to give evidence about alleged crimes within the executive branch, reason and experience, duty, and tradition dictate that the attorney shall provide that evidence. With respect to investigations of federal criminal offenses, and especially offenses committed by those in government, government attorneys stand in a far different position from

members of the private bar. Their duty is not to defend clients against criminal charges and it is not to protect wrongdoers from public exposure. The constitutional responsibility of the President, and all members of the Executive Branch, is to "take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3. Investigation and prosecution of federal crimes is one of the most important and essential functions within that constitutional responsibility. Each of our Presidents has, in the words of the Constitution, sworn that he "will faithfully execute the Office of President of the United States, and will to the best of [his] Ability, preserve, protect and defend the Constitution of the United States." *Id.* art. II, § 1, cl. 8. And for more than two hundred years each officer of the Executive Branch has been bound by oath or affirmation to do the same. *See id.* art. VI, cl. 3; *see also* 28 U.S.C. § 544 (1994). This is a solemn undertaking, a binding of the person to the cause of constitutional government, an expression of the individual's allegiance to the principles embodied in that document. Unlike a private practitioner, the loyalties of a government lawyer therefore cannot and must not lie solely with his or her client agency.³

The oath's significance is underscored by other evocations of the ethical duties of government lawyers.⁴ The Profession-

³ We recognize, as our dissenting colleague emphasizes, that every lawyer must take an oath to enter the bar of any court. But even after entering the bar, a government attorney must take another oath to enter into government service; that in itself shows the separate meaning of the government attorney's oath. Moreover, the oath is significant to our analysis only to the extent that it underlies the fundamental differences in the roles of government and private attorneys—of particular note, the fact that private attorneys cannot take official actions.

⁴ Indeed, the responsibilities of government lawyers to the public have long governed the actions they can take on behalf of their "client":

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obli-

al Ethics Committee of the Federal Bar Association has described the public trust of the federally employed lawyer as follows:

[T]he government, over-all and in each of its parts, is responsible to the people in our democracy with its representative form of government. Each part of the government has the obligation of carrying out, in the public interest, its assigned responsibility in a manner consistent with the Constitution, and the applicable laws and regulations. In contrast, the private practitioner represents the client's personal or private interest. . . . [W]e do not suggest, however, that the public is the client as the client concept is usually understood. It is to say that the lawyer's employment requires him to observe in the performance of his professional responsibility the public interest sought to be served by the governmental organization of which he is a part.

Federal Bar Association Ethics Committee, The Government Client and Confidentiality: Opinion 73-1, 32 FED. B.J. 71, 72 (1973). Indeed, before an attorney in the Justice Department can step into the shoes of private counsel to represent a federal employee sued in his or her individual capacity, the Attorney General must determine whether the representation would be in the interest of the United States. See 28 C.F.R. § 50.15(a). The obligation of a government lawyer to uphold the public trust reposed in him or her strongly militates against allowing the client agency to invoke a privilege to prevent the lawyer from providing evidence of the possible commission of criminal offenses within the government. As

gation to govern at all; and whose interest . . . is not that it shall win a case, but that justice shall be done.

Berger v. United States, 295 U.S. 78, 88 (1935). In keeping with these interests, prosecutors must disclose to the defendant exculpatory evidence, see *Brady v. Maryland*, 373 U.S. 83, 87 (1963), and must try to "seek justice, not merely to convict," MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 (1980). Similarly, the government lawyer in a civil action must "seek justice" and avoid unfair settlements or results. *Id.* EC 7-14.

Judge Weinstein put it, “[i]f there is wrongdoing in government, it must be exposed. . . . [The government lawyer’s] duty to the people, the law, and his own conscience requires disclosure. . . .” Jack B. Weinstein, *Some Ethical and Political Problems of a Government Attorney*, 18 MAINE L. REV. 155, 160 (1966).

This view of the proper allegiance of the government lawyer is complemented by the public’s interest in uncovering illegality among its elected and appointed officials. While the President’s constitutionally established role as superintendent of law enforcement provides one protection against wrongdoing by federal government officials, see *United States v. Valenzuela-Bernal*, 458 U.S. 858, 863 (1982), another protection of the public interest is through having transparent and accountable government.⁵ As James Madison observed,

[a] popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.

Letter from James Madison to W.T. Barry (Aug. 4, 1822), in 9 THE WRITINGS OF JAMES MADISON 103 (Gaillard Hunt ed., 1910). This court has accordingly recognized that “openness in government has always been thought crucial to ensuring that the people remain in control of their government.” *In re Sealed Case (Espy)*, 121 F.3d at 749. Privileges work against these interests because their recognition “creates the risk that a broad array of materials in many areas of the executive branch will become ‘sequestered’ from public view.” *Id.* (quoting *Wolfe v. Department of Health & Human Servs.*, 815 F.2d 1527, 1533 (D.C. Cir. 1987)). Furthermore, “to allow any part of the federal government to use its in-house attor-

⁵ Congress has clearly indicated, as a matter of policy, that federal employees should not withhold information relating to possible criminal misconduct by federal employees on any basis. We discuss at more length Congress’s recognition of these concerns below in our discussion of 28 U.S.C. § 535(b).

neys as a shield against the production of information relevant to a federal criminal investigation would represent a gross misuse of public assets." *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 921 (8th Cir.), cert. denied, 117 S.Ct. 2482 (1997).

Examination of the practice of government attorneys further supports the conclusion that a government attorney, even one holding the title Deputy White House Counsel, may not assert an attorney-client privilege before a federal grand jury if communications with the client contain information pertinent to possible criminal violations. The Office of the President has traditionally adhered to the precepts of 28 U.S.C. § 535(b), which provides that

[a]ny information . . . received in a department or agency of the executive branch of the Government relating to violations of title 18 involving Government officers and employees shall be expeditiously reported to the Attorney General.

28 U.S.C. § 535(b) (1994). We need not decide whether section 535(b) alone requires White House Counsel to testify before a grand jury.⁶ The statute does not clearly apply to the Office of the President. The Office is neither a "department," as that term is defined by the statute, see 5 U.S.C. § 101 (1994); 28 U.S.C. § 451 (1994); *Haddon v. Walters*, 43 F.3d 1488, 1490 (D.C. Cir. 1995) (per curiam), nor an "agency," see *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156 (1980) (FOIA case); see also *Armstrong v. Executive Office of the President*, 1 F.3d 1274, 1295

⁶ 28 U.S.C. § 535(a) authorizes the Attorney General to "investigate any violation of title 18 [the federal criminal code] involving Government officers and employees." The Independent Counsel fills the shoes of the Attorney General in this regard because Congress has given the Independent Counsel "with respect to all matters in [his] prosecutorial jurisdiction . . . full power and independent authority to exercise all investigative and prosecutorial functions and powers of . . . the Attorney General." 28 U.S.C. § 594(a); see *In re Sealed Case (Secret Service)*, 148 F.3d at 1078.

(D.C. Cir. 1993) (per curiam); *National Sec. Archive v. Archivist of the United States*, 909 F.2d 541, 545 (D.C. Cir. 1990) (per curiam). However, at the very least “[section] 535(b) evinces a strong congressional policy that executive branch employees must report information” relating to violations of Title 18, the federal criminal code. *In re Sealed Case (Secret Service)*, 148 F.3d at 1078. As the House Committee Report accompanying section 535 explains, “[t]he purpose” of the provision is to “require the reporting by the departments and agencies of the executive branch to the Attorney General of information coming to their attention concerning any alleged irregularities on the part of officers and employees of the Government.” H.R. REP. NO. 83-2622, at 1 (1954). Section 535(b) suggests that all government employees, including lawyers, are duty-bound not to withhold evidence of federal crimes.

Furthermore, government officials holding top legal positions have concluded, in light of section 535(b), that White House lawyers cannot keep evidence of crimes committed by government officials to themselves. In a speech delivered after the *Kissinger* FOIA case was handed down, Lloyd Cutler, who served as White House Counsel in the Carter and Clinton Administrations, discussed the “rule of making it your duty, if you’re a Government official as we as lawyers are, a statutory duty to report to the Attorney General any evidence you run into of a possible violation of a criminal statute.” Lloyd N. Cutler, *The Role of the Counsel to the President of the United States*, 35 RECORD OF THE ASS’N OF THE BAR OF THE CITY OF NEW YORK No. 8, at 470, 472 (1980). According to Cutler, “[w]hen you hear of a charge and you talk to someone in the White House . . . about some allegation of misconduct, almost the first thing you have to say is, ‘I really want to know about this, but anything you tell me I’ll have to report to the Attorney General.’” *Id.* Similarly, during the Nixon administration, Solicitor General Robert H. Bork told an administration official who invited him to join the President’s legal defense team: “A government attorney is sworn to uphold the Constitution. If I come across evidence that is bad for the President, I’ll have to turn it over. I won’t be able to sit

on it like a private defense attorney." *A Conversation with Robert Bork*, D.C. BAR REP., Dec. 1997–Jan. 1998, at 9.

The Clinton Administration itself endorsed this view as recently as a year ago. In the proceedings leading to the Supreme Court's denial of certiorari with regard to the Eighth Circuit's decision in *In re Grand Jury Subpoena Duces Tecum*, the Office of the President assured the Supreme Court that it "embraces the principles embodied in Section 535(b)" and acknowledged that "the Office of the President has a duty, recognized in official policy and practice, to turn over evidence of the crime." Reply Brief for Office of the President at 7, *Office of the President v. Office of Independent Counsel*, 117 S. Ct. 2482 (1997) (No. 96-1783). The Office of the President further represented that "on various occasions" it had "referred information to the Attorney General reflecting the possible commission of a criminal offense—including information otherwise protected by attorney-client privilege." *Id.* At oral argument, counsel for the Office of the President reiterated this position. In addition, the White House report on possible misdeeds relating to the White House Travel Office stated that "[i]f there is a reasonable suspicion of a crime . . . about which White House personnel may have knowledge, the initial communication of this information should be made to the Attorney General, the Deputy Attorney General, or the Associate Attorney General." WHITE HOUSE TRAVEL OFFICE MANAGEMENT REVIEW 23 (1993).

We are not aware of any previous deviation from this understanding of the role of government counsel. We know that Nixon White House Counsel Fred Buzhardt testified before the Watergate grand jury without invoking attorney-client privilege, although not much may be made of this.⁷ See Anthony Ripley, *Milk Producers' Group Fined \$5,000 for Nixon Gifts*, N.Y. TIMES, May 7, 1974, at 38. On the other hand, the Office of the President points out that C. Boyden

⁷ President Nixon waived executive privilege and attorney-client privilege before the grand jury. See SPECIAL PROSECUTION FORCE. WATERGATE REPORT 88 (1975) [hereinafter WATERGATE REPORT].

Gray, White House Counsel during the Bush Administration, and his deputy, John Schmitz, refused to be interviewed by the Independent Counsel investigating the Iran–Contra affair and only produced documents subject to an agreement that “any privilege against disclosure . . . including the attorney-client privilege” was not waived. 1 LAWRENCE E. WALSH, FINAL REPORT OF THE INDEPENDENT COUNSEL FOR IRAN/CONTRA MATTERS 478–79 & n.52 (1993). However, the Independent Counsel in that investigation had not subpoenaed Gray or Schmitz to testify before a grand jury, and there is no indication that the information sought from them constituted evidence of any criminal offense. Independent Counsel Walsh apparently sought to question these individuals merely to complete his final report. *See id.* In any event, even outside the grand jury context, the general practice of government counsel has been to cooperate with the investigations of independent counsels. For example, Peter Wallison, White House Counsel under President Reagan, produced his diary for the Iran–Contra investigation and cooperated in other ways. *See id.* at 44, 470 n.137, 517, 520. Other government attorneys both produced documents and agreed to be interviewed for that investigation. *See id.* at 346–48, 366–68, 536 & nn.116–17, 537.

The Office of the President asserts two principal contributions to the public good that would come from a government attorney’s withholding evidence from a grand jury on the basis of an attorney-client privilege. First, it maintains that the values of candor and frank communications that the privilege embodies in every context would apply to Lindsey’s communications with the President and others in the White House. Government officials, the Office of the President claims, need accurate advice from government attorneys as much as private individuals do, but they will be inclined to discuss their legal problems honestly with their attorneys only if they know that their communications will be confidential.

We may assume that if the government attorney-client privilege does not apply in certain contexts this may chill some communications between government officials and gov-

ernment lawyers. Even so, government officials will still enjoy the benefit of fully confidential communications with their attorneys unless the communications reveal information relating to possible criminal wrongdoing. And although the privacy of these communications may not be absolute before the grand jury, the Supreme Court has not been troubled by the potential chill on executive communications due to the qualified nature of executive privilege.⁸ *Compare Nixon*, 418 U.S. at 712–13 (discounting the chilling effects of the qualification of the presidential communications privilege on the candor of conversations), *with Swidler & Berlin*, 118 S. Ct. at 2087 (stating, in the personal attorney-client privilege context, that an uncertain privilege is often no better than no privilege at all). Because both the Deputy White House Counsel and the Independent Counsel occupy positions within the federal government, their situation is somewhat comparable to that of corporate officers who seek to keep their communications with company attorneys confidential from each other and from the shareholders. Under the widely followed doctrine announced in *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970), corporate officers are not always entitled to assert such privileges against interests within the corporation, and accordingly must consult with company attorneys aware that their communications may not be kept confidential from shareholders in litigation. *See id.* at 1101. Any chill on candid communications with government counsel flowing from our decision not to extend an absolute attorney-client privilege to the grand jury context is both comparable and similarly acceptable.

Moreover, nothing prevents government officials who seek completely confidential communications with attorneys from consulting personal counsel. The President has retained several private lawyers, and he is entitled to engage in the completely confidential communications with those lawyers befitting an attorney and a client in a private relationship. *See infra* Part III.

⁸ We do not address privilege exceptions relating to military secrets or other exempted communications.

The Office of the President contends that White House Counsel's role in preparing for any future impeachment proceedings alters the policy analysis.⁹ The Ethics in Government Act requires the Independent Counsel to "advise the House of Representatives of any substantial and credible information . . . that may constitute grounds for an impeachment." 28 U.S.C. § 595(c) (1994). In November 1997, a Congressman introduced a resolution in the House of Representatives calling for an inquiry into possible grounds for impeachment of the President. See H.R. Res. 304, 105th Cong. (1997). Thus, to the extent that impeachment proceedings may be on the horizon, the Office of the President contends that White House Counsel must be given maximum protection against grand jury inquiries regarding their efforts to protect the Office of the President, and the President in his personal capacity, against impeachment. Additionally, the Office of the President notes that the Independent Counsel serves as a conduit to Congress for information concerning grounds for impeachment obtained by the grand jury, and, consequently, an exception to the attorney-client privilege before the grand jury will effectively abrogate any absolute privilege those communications might otherwise enjoy in future congressional investigations and impeachment hearings.

Although the Independent Counsel and the Office of the President agree that White House Counsel can represent the President in the impeachment process, the precise contours of Counsel's role are far from settled.¹⁰ In any event, no matter

⁹ The district court did not rule upon this argument, and hence we lack the benefit of that court's thinking in addition to a complete record on the nature, scope, and content of communications between the President and Deputy White House Counsel with regard to the impeachment issue. See *Gilda Marx, Inc. v. Wildwood Exercise, Inc.*, 85 F.3d 675, 679 (D.C. Cir. 1996) (per curiam).

¹⁰ While a prior Comptroller General has thought that White House Counsel could properly be paid out of federal funds for representing the President in matters leading up to an impeachment, see Letter from Elmer B. Staats, U.S. Comptroller General, to Rep. John F. Seiberling 7 (Oct. 25, 1974), history yields little guidance on the role that White House Counsel would properly play

what the role should be, impeachment is fundamentally a *political* exercise. See THE FEDERALIST No. 65 (Alexander Hamilton); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 764, at 559 (5th ed. 1905). Impeachment proceedings in the House of Representatives cannot be analogized to traditional legal processes and even the procedures used by the Senate in “trying” an impeachment may not be like those in a judicial trial. See (*Walter*) *Nixon v. United States*, 506 U.S. 224, ~~228~~–31 (1993); STORY, COMMENTARIES ON THE CONSTITUTION § 765, at 559–60. How the policy and practice supporting the common law attorney-client privilege would apply in such a political context thus is uncertain. In preparing for the eventuality of impeachment proceedings, a White House Counsel in effect serves the President as a political advisor, albeit one with legal expertise: to wit, Lindsey occupies a dual position as an Assistant to the President and a Deputy White House Counsel. Thus, information gathered in preparation for impeachment proceedings and conversations regarding strategy are presumably covered by executive, not attorney-client, privilege. While the need for secrecy might arguably be greater under these circumstances, the district court’s ruling on executive privilege is not before us. In addition, in responding to the grand jury investigation and gathering information in preparation for future developments in accordance with his official duties, White House Counsel may need to interact

in impeachment proceedings. The only President impeached by the House and tried by the Senate, Andrew Johnson, retained private counsel, and his Attorney General resigned from office in order to assist in his defense. See WILLIAM H. REHNQUIST, GRAND INQUESTS 222 (1992). In contrast, after the House Judiciary Committee began an impeachment inquiry into the Watergate scandal, President Richard Nixon appointed James D. St. Clair as a special counsel to the President for Watergate-related matters. See WATERGATE REPORT 103. Although Nixon resigned before the House of Representatives voted on any articles of impeachment, St. Clair handled much of the President’s defense until the President’s resignation. See *id.* at 103–15. At the very least, nothing prevents a President faced with impeachment from retaining private counsel, and in turn this makes less clear what might be the division of labor between White House Counsel and private counsel.

with the President's private attorneys, and to that extent other privileges may be implicated. *See infra* Part III.

Nor is our conclusion altered by the Office of the President's concern over the possibility that Independent Counsel will convey otherwise privileged grand jury testimony of White House Counsel to Congress.¹¹ *Cf.* FED. R. CRIM. P. 6(e). First, no one can say with certainty the extent to which a privilege would generally protect a White House Counsel from testifying at a congressional hearing. The issue is not presently before the court.¹² *See Nixon*, 418 U.S. at 712 n.19; *In re Sealed Case (Espy)*, 121 F.3d at 739 nn.9-10, 753. Second, the particular procedures and evidentiary rules to be employed by the House and Senate in any future impeachment proceedings remain entirely speculative. Finally, whether Congress can abrogate otherwise recognized privileges in the course of impeachment proceedings may well constitute a nonjusticiable political question. *See (Walter) Nixon*, 506 U.S. at 236.

The Supreme Court's recognition in *United States v. Nixon* of a qualified privilege for executive communications severely undercuts the argument of the Office of the President regarding the scope of the government attorney-client privilege. A President often has private conversations with his Vice President or his Cabinet Secretaries or other members of the

¹¹ Contrary to the Office of the President's suggestion, this is not a novel concern stemming from the Ethics in Government Act. During initial discussions with the Watergate Special Prosecutor, "[James] St. Clair was primarily concerned that evidence produced for the grand jury not subsequently be provided by [the Special Prosecutor] to the House Judiciary Committee for use in its impeachment inquiry." WATERGATE REPORT 104-05. The Special Prosecutor eventually asked the grand jury to transmit an "evidentiary report" to the House Committee considering President Nixon's impeachment. *Id.* at 143.

¹² The Office of the President cites no authority for the proposition that communications between White House Counsel and the President would be absolutely privileged in congressional proceedings, but rather merely suggests that they "should" be.

Administration who are not lawyers or who are lawyers, but are not providing legal services. The advice these officials give the President is of vital importance to the security and prosperity of the nation, and to the President's discharge of his constitutional duties. Yet upon a proper showing, such conversations must be revealed in federal criminal proceedings. *See Nixon*, 418 U.S. at 713; *In re Sealed Case (Espy)*, 121 F.3d at 745. Only a certain conceit among those admitted to the bar could explain why legal advice should be on a higher plane than advice about policy, or politics, or why a President's conversation with the most junior lawyer in the White House Counsel's Office is deserving of more protection from disclosure in a grand jury investigation than a President's discussions with his Vice President or a Cabinet Secretary. In short, we do not believe that lawyers are more important to the operations of government than all other officials, or that the advice lawyers render is more crucial to the functioning of the Presidency than the advice coming from all other quarters.

The district court held that a government attorney-client privilege existed and was applicable to grand jury proceedings, but could be overcome, as could an applicable executive privilege, upon a showing of need and unavailability elsewhere by the Independent Counsel. While we conclude that an attorney-client privilege may not be asserted by Lindsey to avoid responding to the grand jury if he possesses information relating to possible criminal violations, he continues to be covered by the executive privilege to the same extent as the President's other advisers. Our analysis, in addition to having the advantages mentioned above, avoids the application of balancing tests to the attorney-client privilege—a practice recently criticized by the Supreme Court. *See Swidler & Berlin*, 118 S. Ct. at 2087.

In sum, it would be contrary to tradition, common understanding, and our governmental system for the attorney-client privilege to attach to White House Counsel in the same manner as private counsel. When government attorneys learn, through communications with their clients, of information related to criminal misconduct, they may not rely on the

government attorney-client privilege to shield such information from disclosure to a grand jury.

III.

The Independent Counsel does not contest that the President is entitled in his *personal* capacity to the same privileges as any person, and thus that he receives the full protection of the attorney-client and work product privileges in his dealings with personal counsel. Although, according to the President's brief, Lindsey has not served as the President's private counsel since 1993, the President maintains under two theories, each rejected by the district court, that some information that Lindsey has obtained during his tenure as a Deputy White House Counsel may nonetheless be protected under the President's *personal* attorney-client and work product privileges. First, under the "intermediary" doctrine, the President contends that his personal attorney-client privilege covers those instances when Lindsey acted as his agent to assist him in conveying information and instructions to his private counsel and securing information and advice in return. Second, under the "common interest" doctrine, the President contends that his attorney-client privilege covers instances in which he and his private counsel conferred with Lindsey about matters in which the President in his *personal* capacity had an overlapping concern with Lindsey's client—the President in his *official* capacity. Although both these contentions seem at first to conflict with the rationales underlying our conclusion that there is no government attorney-client privilege before a federal grand jury, in light of the deference due to the President about how best to maintain effective communication with his private counsel, we agree that Lindsey can act as an intermediary. However, because Lindsey is a government official, the common interest doctrine cannot apply to shield evidence of possible criminal misconduct from the grand jury.

A.

The President first contends that his personal attorney-client privilege allows Lindsey to refuse to disclose informa-

tion obtained while serving as an intermediary between the President and his private counsel. Although the district court recognized that the attorney-client privilege sometimes covers communications between an attorney and a client made through an agent, *see* RESTATEMENT § 120, the court ruled that the privilege did not cover communications made through Lindsey for three reasons: first, it was unpersuaded that the President needed to use an intermediary; second, it found that Lindsey was not actually used as an intermediary; and third, it was unsure that the use of a government attorney as an intermediary would ever be proper. We are satisfied that no greater showing of need was required for the President to use Lindsey as an intermediary and, thus, information Lindsey may have learned when he was, in fact, acting merely as an intermediary falls within the President's personal attorney-client privilege.

Although the district court found (and the Independent Counsel does not contest) both that Lindsey served as the President's agent and that the official duties of the President may make him unavailable to his private counsel, it gave little credence to the insistence of Robert S. Bennett, one of the President's personal attorneys in the *Jones* litigation, that Lindsey, one of the President's closest advisers and his common travel companion, often provided the most expeditious way to contact the President. The district court demurred:

It is not clear to the Court why Bennett could not also call the President at a convenient time if Lindsey could do so or why someone at the White House could not connect them so that they could speak to each other. . . .

In the situation described to the Court, it is unclear why Lindsey was a necessary intermediary.

The district court placed considerable weight in a concession by another of the President's private counsel that the attorneys representing him in the Whitewater matters had not to that point needed to use Lindsey as an intermediary, although that counsel emphasized that, unlike counsel in the *Jones* litigation, her firm had not to that point "had the

immediacy of the civil litigation” and in such an eventuality might later need Lindsey’s intermediary services.

The parties dispute whether the use of an agent for communication between the attorney and the client must be “reasonably necessary” in order for that agent to fall within the attorney-client privilege, as the Independent Counsel urges, or whether the privilege can cover any agent used for securing legal advice regardless of the client’s need for the agent, as the President contends.¹³ But even if we assume that the Independent Counsel is correct, the district court erred in ruling that the President’s use of Lindsey as an intermediary was not reasonably necessary. In applying the standard of “reasonable necessity,” one must necessarily take into account the client’s circumstances and the obstacles preventing direct communication with the attorney. What is reasonable to expect of an ordinary client may not be reasonable to expect of the President of the United States. Although the Independent Counsel emphasizes that the typical case in which the intermediary doctrine has been held to apply involves the client’s fundamental inability to communicate without an intermediary rather than the client’s busy schedule and general inaccessibility, *see, e.g., Hendrick v. Avis Rent A Car Sys.*, 944 F. Supp. 187, 189 (W.D.N.Y. 1996) (paralyzed client); *State v. Aquino-Cervantes*, 945 P.2d 767, 771–72 (Wash. Ct.App. 1997) (client requiring translator), that distinction is not dispositive here. When the client is the President, the standard of “reasonable necessity” must accommodate the unavoidable, virtually full-time demands of the office. Moreover, the court would be remiss not to heed the Supreme Court’s instructions in *Clinton v. Jones*, 117 S. Ct. 1636 (1997), that “[t]he high respect that is owed to the office of the Chief Executive . . . is a matter that should inform the conduct of the entire proceeding,” *id.* at 1650–51,

¹³ Compare PROPOSED FED. R. EVID. 503(a)(4), reprinted in 56 F.R.D. at 236 (requiring that the use of an intermediary be “reasonably necessary”); RESTATEMENT § 120 cmt. f (same), with 1 MCCORMICK ON EVIDENCE § 91 (4th ed. 1992) (finding it irrelevant whether the use of the intermediary was “reasonably necessary”); 3 WEINSTEIN’S FEDERAL EVIDENCE § 503 (2d ed. 1997) (same).

and that there is a tradition of federal courts' affording "the utmost deference to Presidential responsibilities," *id.* at 1652 (quoting *Nixon*, 418 U.S. at 710-11) (internal quotation marks omitted). In light of these considerations, we decline to second-guess the President's decision to use Lindsey as an intermediary in order to avoid undue disruptions to the President's ability to carry out his official responsibilities. So viewed, the designation of Lindsey as an intermediary was at least *reasonably* necessary and, thus, while acting in this capacity his communications came within the President's personal attorney-client privilege. *Cf. FTC v. TRW, Inc.*, 628 F.2d 207, 212 (D.C. Cir. 1980).

There is a further question, however, when if ever Lindsey actually was acting as an intermediary. The district court found that regardless of whether an intermediary was necessary, Lindsey went beyond merely transmitting information to "consulting with Bennett regarding litigation strategy and describing his past representation of President Clinton to Bennett." Relying on *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961), the President contends that Lindsey qualified under the intermediary doctrine even when he was not acting in a purely ministerial role. In *Kovel*, the Second Circuit refused to confine the scope of the doctrine to menial or ministerial employees, for the court could identify

no significant difference between a case where the attorney sends a client speaking a foreign language to an interpreter to make a literal translation of the client's story . . . and a [case] where the attorney, ignorant of the foreign language, sends the client to a non-lawyer proficient in it, with instructions to interview the client on the attorney's behalf and then render his own summary of the situation, perhaps drawing on his own knowledge in the process, so that the attorney can give the client proper legal advice.

Id. at 921. Thus, the President contends that Lindsey did not overstep his role as an intermediary when adding insight and information to the communications between the President and his private counsel.

In considering whether a client's communication with his or her lawyer through an agent is privileged under the intermediary doctrine, the "critical factor" is "that the communication be made 'in confidence for the purpose of obtaining legal advice from the lawyer.'" *Linde Thomson*, 5 F.3d at 1514 (emphasis removed) (quoting *TRW*, 628 F.2d at 212). When an agent changes a message in a way not intended simply to ensure complete understanding (as in the case of a translator), the agent is not acting consistently with this purpose; by changing the message, the agent injects himself or herself into the chain of communication, rather than effectuating the client's purpose of receiving advice from his or her lawyer.

It is true that courts have held the intermediary doctrine applicable to agents who have added value to attorney-client communications, *see, e.g., United States v. Judson*, 322 F.2d 460, 462-63 (9th Cir. 1963); *Miller v. Haulmark Transp. Sys.*, 104 F.R.D. 442, 445 (E.D. Pa. 1984), and we have no quarrel with the general proposition that intermediaries may add value. Clearly, for instance, a translator adds value to the interaction between the attorney and the client, as does an accountant who digests the client's financial information and puts it into a form useable by the attorney. *See TRW*, 628 F.2d at 212 (noting that an accountant could be covered by the intermediary doctrine only when acting to "put[] the client's information into terms that the attorney can use effectively"). There are limits, though, and the district court correctly observed that the intermediary doctrine would not cover instances when Lindsey consulted with the President's private counsel on litigation strategy. The "attorney-client privilege must be 'strictly confined within the narrowest possible limits consistent with the logic of its principle,'" *In re Sealed Case*, 676 F.2d at 807 n.14 (quoting *In re Grand Jury Investigation*, 599 F.2d at 1235), and "[w]ithout . . . limitations [on the protection accorded the work of third persons], the attorney-client privilege would engulf all manner of services performed for the lawyer that are not now, and should not be, summarily excluded from the adversary process," *TRW*, 628 F.2d at 212. It would stretch the intermediary doctrine beyond the logic of its principle to include

Lindsey's legal contributions as an extra lawyer, and we decline to do so.¹⁴ Those contributions, rather than facilitating the representation of the President's personal counsel, constitute Lindsey's own independent contribution to the President's cause and cannot therefore be said to be covered by the intermediary doctrine. One lawyer does not need another lawyer providing supplementary legal advice to facilitate communication regarding matters of legal strategy.

The record does not show, however, that Lindsey *never* acted as a mere intermediary. In a declaration filed in the district court, Lindsey described his role as an intermediary thus: "Typically, when the President's private lawyers need information in connection with the *Jones* lawsuit, they telephone me with questions for the President. I present questions to the President at opportune times, and later relay the President's answers back to private counsel." That Lindsey may have on occasion consulted with Bennett on legal strategy does not mean that Lindsey could not claim the protection of the intermediary doctrine for those instances in which he

¹⁴ Of course, one unable to win protection through the intermediary doctrine still might be able to claim the client's attorney-client privilege through a different route. The President maintains, for instance, that conversations between his private counsel and Lindsey are privileged to the extent that such conversations related to Lindsey's prior private representation of then-Governor Clinton. The present record is, however, inadequate for us to conclude what subjects may have been encompassed within Lindsey's prior private representation of Governor Clinton and whether Lindsey will be asked to testify before the grand jury about matters relating to the prior private representation. Although Lindsey might still assert attorney-client privilege as to information he learned while serving as the Governor's private counsel, regardless of whether he subsequently communicated such information to the President's current private counsel, *see* RESTATEMENT § 45(2) & cmt. b, we decline to consider whether and to what extent Lindsey may assert attorney-client privilege for conversations he had while serving as Deputy White House Counsel regarding subjects that only relate to the prior private representation of the Governor. That question remains open for consideration by the district court upon request of the parties. *See id.* § 111 & cmt. c.

did act as an intermediary. As the district court properly acknowledged, “most of Lindsey’s assistance was not as an intermediary relaying messages between the President’s private attorneys and the President himself.” Upon remand, the district court should address when, if ever, Lindsey was acting as a true intermediary and allow him to claim the President’s attorney-client privilege as appropriate.

Given the concerns that led us to conclude that a Deputy White House Counsel cannot rely on a government attorney-client privilege to shield evidence from the grand jury, the Independent Counsel insists that it would be illogical for the court ever to allow the President’s personal attorney-client privilege to shield government attorneys. While most parties could not expect that the use of a government official as an intermediary would provide an effective shield before a federal grand jury, the President is not just any party. Although he cannot use the government attorney-client privilege to withhold his conversations with advisors from the grand jury, *see supra* section II.B, in order to have full and meaningful access to confidential counsel from his private attorneys, he must rely on aides. As one of his private attorneys told the district court, it is unrealistic to expect that the President can use a private party as an intermediary every time one is necessary: “the private individual can’t just hop onto Air Force One and go off to Africa with the President and attend meetings and be in sessions and always be by his side the way a governmental official properly is.” Such an arrangement would not only be inconvenient, but might also pose security risks. *Cf. In re Sealed Case (Secret Service)*, 148 F.3d at 1075; *Stigile v. Clinton*, 110 F.3d 801, 803–04 (D.C. Cir. 1997). Moreover, forcing the President to go out of his way to find an appropriate intermediary would be insensitive to the Supreme Court’s instruction that we pay “the utmost deference to Presidential responsibilities.” *Jones*, 117 S. Ct. at 1652 (quoting *Nixon*, 418 U.S. at 710–11) (internal quotation marks omitted). Certainly, the duty of the public official not to withhold information from the grand jury is usually paramount, *see supra* section II.B, but in light of the President’s undisputed right to have an effective relationship with

personal counsel, consonant with carrying out his official duties, we hold that the intermediary doctrine can still protect a government official when that official acts as a mere intermediary.

B.

The President also contends that Lindsey is within the protection of his personal attorney-client privilege under the "common interest" doctrine. As a usual rule, disclosure of attorney-client or work product confidences to third parties waives the protection of the relevant privileges; however, when the third party is a lawyer whose client shares an overlapping "common interest" with the primary client, the privileges may remain intact. *See In re Sealed Case*, 29 F.3d 715, 719 (D.C. Cir. 1994); *United States v. AT&T*, 642 F.2d 1285, 1300-01 (D.C. Cir. 1980). Finding that the President and the Office of the President do not share any legally cognizable common interest, the district court denied Lindsey's invocation of the President's personal attorney-client privilege through the common interest doctrine. The President contends that the district court erred and that Lindsey's interactions with the President's private counsel should be protected under the doctrine.¹⁵

Although it has long been recognized that the President in his private persona shares some areas of common interest with the Office of the President, *see, e.g., United States v. Burr*, 25 F. Cas. 187, 191-92 (No. 14,694) (C.C.D. Va. 1807) (Marshall, C.J.), and although the Office of the President contends persuasively that the threat of impeachment, if nothing else, presents a common interest between the Presi-

¹⁵ Although the President contends that Lindsey also may claim the President's personal work product privilege for attorney work product prepared by or revealed to Lindsey about matters within the common interest of the President and the Office of the President, *see AT&T*, 642 F.2d at 1300-01, we fail to see how the question of the President's personal work product privilege was raised by the questions asked of Lindsey before the grand jury, and we thus decline to address this issue.

dent in his personal capacity and the Office of the President,¹⁶ the existence of a common interest does not end our analysis.

As we have established, government officials have responsibilities not to withhold evidence relating to criminal offenses from the grand jury. *See supra* section II.B. The President cannot bring Lindsey within his personal attorney-client privilege as he could a private citizen, for Lindsey is in a fundamentally different position. Unlike in his role as an intermediary, *see supra* section III.A, Lindsey necessarily acts as a government attorney functioning in his official capacity as Deputy White House Counsel in those instances when the common interest doctrine might apply, just as in those instances when the government attorney-client privilege might apply. His obligation not to withhold relevant information acquired as a government attorney remains the same regardless of whether he acquired the information directly from the President or from the President's personal counsel. Thus, his status before the federal grand jury does not allow him to withhold evidence obtained in his official role under either the government attorney-client privilege or the President's personal attorney-client privilege applied through the common interest doctrine.

If the President wishes to discuss matters jointly between his private counsel and his official counsel, he must do so

¹⁶ Impeachment may remove the person, but no one could reasonably controvert that it affects the Office of the President as well. Even if there will always be a President and an Office of the President, it is unrealistic to posit that the Presidency will not be diminished by an impeachment. *See, e.g.*, Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 323 (1994); *see also* William H. Rehnquist, *The Impeachment Clause: A Wild Card in the Constitution*, 85 NW. U. L. REV. 903, 917-18 (1991). The possibility of impeachment implicates institutional concerns of the White House, and White House Counsel, representing the Office of the President, would presumably play an important role in defending the institution of the Presidency.

cognizant of the differing responsibilities of the two counsel and tailor his communications appropriately; undoubtedly, his counsel are alert to this need as well. Although his personal counsel remain fully protected by the absolute attorney-client privilege, a Deputy White House Counsel like Lindsey may not assert an absolute privilege in the face of a grand jury subpoena, but only the more limited protection of executive privilege. Consequently, although the President in his personal capacity has at least some areas of common interest with the Office of the Presidency, and although there may thus be reason for official and personal counsel to confer, the overarching duties of Lindsey in his role as a government attorney prevent him from withholding information about possible criminal misconduct from the grand jury.

IV.

Accordingly, for the reasons stated in this opinion, we affirm in part and reverse in part.

In accordance with the Supreme Court's expectation that "the Court of Appeals will proceed expeditiously to decide this case," *Clinton*, 118 S. Ct. at 2079, any petition for rehearing or suggestion for rehearing *in banc* shall be filed within seven days after the date of this decision.

It is so ordered.

TATEL, *Circuit Judge, dissenting from Part II and concurring in part and dissenting in part from Part III.* The attorney-client privilege protects confidential communication between clients and their lawyers, whether those lawyers work for the private sector or for government. Although I have no doubt that government lawyers working in executive departments and agencies enjoy a reduced privilege in the face of grand jury subpoenas, I remain unconvinced that either “reason” or “experience” (the tools of Rule 501) justifies this court’s abrogation of the attorney-client privilege for lawyers serving the Presidency. This court’s far-reaching ruling, moreover, may have been unnecessary to give this grand jury access to Bruce Lindsey’s communications with the President, for on this record it is not clear whether those communications involved official legal advice that would be protected by the attorney-client privilege. Before limiting the attorney-client privilege not just for this President, but for all Presidents to come, the court should have first remanded this case to the district court to recall Lindsey to the grand jury to determine the precise nature of his communications with the President.

I

My colleagues and I have no disagreement concerning personal legal advice Lindsey may have given the President. We agree, and the White House concedes, that the official attorney-client privilege does not protect such communications, for as a White House employee Lindsey had no authority to provide such advice. Nor do we disagree about political advice given to the President by advisers who happen to be lawyers. Such advice is protected, if at all, by the executive privilege alone. Our disagreement centers solely on whether a grand jury can pierce the attorney-client privilege with respect to official legal advice that the Office of White House Counsel gives a sitting President.

One of the oldest privileges at common law and “rooted in the imperative need for confidence and trust,” *Jaffee v. Redmond*, 518 U.S. 1, 10 (1996) (quoting *Trammel v. United*

States, 445 U.S. 40, 51 (1980)), the attorney-client privilege “encourage[s] ‘full and frank communication between attorneys and their clients, and thereby promote[s] broader public interests in the observance of law and the administration of justice.’” *Swidler & Berlin v. United States*, 118 S. Ct. 2081, 2084 (1998) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)). The privilege protects client confidences even in the face of grand jury subpoenas. *See id.* at *2, *7.

Government attorneys enjoy the attorney-client privilege in order to provide reliable legal advice to their governmental clients. “Unless applicable law otherwise provides, the attorney-client privilege extends to a communication of a governmental organization . . . and of an individual officer . . . of a governmental organization.” RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (“RESTATEMENT”) § 124 (Proposed Final Draft No. 1, 1996); *see also* PROPOSED FED. R. EVID. 503(a)(1), *reprinted in* 56 F.R.D. 183, 235 (1972). We have explained that where “the Government is dealing with its attorneys as would any private party seeking advice to protect personal interests, [it] needs the same assurance of confidentiality so it will not be deterred from full and frank communications with its counselors.” *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 863 (D.C. Cir. 1980); *see also Tax Analysts v. IRS*, 117 F.3d 607, 620 (D.C. Cir. 1997) (“Communications revealing . . . client confidences [between IRS field personnel and IRS counsel regarding audit activity] . . . are clearly covered by the attorney-client privilege. . .”).

This court now holds that for all government attorneys, including those advising a President, the attorney-client privilege dissolves in the face of a grand jury subpoena. According to the court, its new rule “avoids the application of balancing tests to the attorney-client privilege—a practice recently criticized by the Supreme Court.” *Maj. Op.* at 26. But whether a court abrogates the privilege by applying the balancing test rejected in *Swidler*, or by the rule the court adopts today, the chilling effect is precisely the same. Clients, in this case Presidents of the United States, will

avoid confiding in their lawyers because they can never know whether the information they share, no matter how innocent, might some day become “pertinent to possible criminal violations,” *id.* at 18. Rarely will White House counsel possess cold, hard facts about presidential wrongdoing that would create a strong public interest in disclosure, yet the very possibility that the confidence will be breached will chill communications. *See Swidler*, 118 S. Ct. at 2086–87. As a result, Presidents may well shift their trust on all but the most routine legal matters from White House counsel, who undertake to serve the Presidency, to private counsel who represent its occupant.

Unlike *Jaffee*, 518 U.S. at 10–11 (recognizing a federal psychotherapy privilege), and *In re Sealed Case*, 148 F.3d 1073, 1078–79 (D.C. Cir. 1998) (declining to recognize a protective function privilege for Secret Service agents), this case involves not the creation of a new privilege, but as in *Swidler*, the carving out of an exception to an already well-established privilege. *See Swidler*, 118 S. Ct. at 2087–88. Denying that they are creating an exception, my colleagues say that they are “defining the particular contours of the government attorney-client privilege,” Maj. Op. at 14, but no court has suggested that the attorney-client privilege must be extended client by client to each new governmental entity, proceeding by proceeding. Rather, “[u]nless applicable law otherwise provides,” RESTATEMENT § 124, the privilege applies to all attorneys and all clients, regardless of their identities or the nature of the proceeding, *see Swidler*, 118 S. Ct. at 2087 (finding no case authority for civil-criminal distinction). The question before us, then, is whether either “reason” or “experience” (FED. R. EVID. 501), calls for exempting the Presidency from the traditional attorney-client relationship that all clients enjoy with their lawyers. *See, e.g., Trammel*, 445 U.S. at 48, 52 (curtailing spousal privilege based on majority trend in state law, the disappearance of “ancient” notions of the subordinate status of women, and the unpersuasiveness of arguments regarding privilege’s effect on marital stability).

As one of its reasons for abrogating the presidential attorney-client privilege, the court says that legal advice is no different from the advice a President receives from other advisers, advice protected only by executive privilege. Maj. Op. at 25–26. I think the court seriously underestimates the independent role and value of the attorney-client privilege. Unlike the executive privilege—a broad, constitutionally derived privilege that protects frank debate between President and advisers, see *United States v. Nixon*, 418 U.S. 683, 708 (1974); *In re Sealed Case*, 121 F.3d 729, 742–46 (D.C. Cir. 1997)—the narrower attorney-client privilege flows not from the Constitution, but from the common law, see *Swidler*, 118 S. Ct. at 2084. The attorney-client privilege does not protect general policy or political advice—even when given by lawyers—but only communications with lawyers “for the purpose of obtaining legal assistance.” RESTATEMENT § 122. Necessitated by the nature of the lawyer’s function, the attorney-client privilege enables the lawyer as an officer of the court properly to advise the client, including facilitating compliance with the law. See *Upjohn*, 449 U.S. at 389. In other words, the unique protection the law affords a President’s communications with White House counsel rests not, as my colleagues put it, on some “conceit” that “lawyers are more important to the operations of government than all other officials,” Maj. Op. at 26, but rather on the special nature of legal advice, and its special need for confidentiality, as recognized by centuries of common law. It therefore makes sense that the Presidency possesses both the attorney-client and executive privileges, and that courts treat them differently.

The court also cites 28 U.S.C. § 535(b). Although that statute generally supports qualifying—though not abrogating—the attorney-client privilege for government attorneys working in executive departments and agencies, the court acknowledges, as the Attorney General has told us in her *amicus* brief, that section 535(b) does not apply to the Office of the President. The court cites several statements, including former White House Counsel Lloyd Cutler’s speech to the New York Bar, the White House Travel Office Management Review, and the Administration’s *certiorari* petition in *In re*

Grand Jury Subpoena Duces Tecum, 112 F.3d 910 (8th Cir.), *cert. denied*, 117 S.Ct. 2482 (1997), indicating that White House lawyers comply with the spirit of section 535(b). Maj. Op. at 19–20. Nothing in those statements suggests, however, that their authors were referring to conversations between White House counsel and the President of the United States, *i.e.*, that one presidential subordinate (White House counsel) would report a confidential conversation with a President to another presidential subordinate (the Attorney General). The court points to no other statutory basis for denying the President the benefit of the official privilege. Although the Independent Counsel statute ensures independent, aggressive prosecution of wrongdoing, nothing in that statute disables a President from defending himself or otherwise indicates that Congress intended to deprive the Presidency of its official privileges.

The court refers to actions of a few previous White House counsel: Fred Buzhardt testified voluntarily before the Watergate grand jury; Peter Wallison turned over his diaries to the Iran–Contra investigation; and C. Boyden Gray and his deputy refused to be interviewed by that same Iran–Contra Independent Counsel. *See* Maj. Op. at 20–21. In my view, these limited and contradictory examples reveal nothing about the standard we should apply where, as here, a President of the United States actually invokes the attorney-client privilege in the face of a grand jury subpoena.

Acknowledging the facial inapplicability of section 535(b) to the Office of the President, the court relies on the government lawyer’s oath of office for the proposition that White House counsel cannot have a traditional attorney-client relationship with the President. But all lawyers, whether they work within the government or the private sector, take an oath to uphold the Constitution of the United States. In order to practice before this court, for example, attorneys must promise to “demean [themselves] . . . according to law . . . [and] support the Constitution of the United States.” Application for Admission to Practice (U.S. Court of Appeals for the D.C. Circuit). No one would suggest that this oath

abrogates a client's privilege in the face of a grand jury subpoena.

This court's opinion, moreover, nowhere accounts for the unique nature of the Presidency, its unique need for confidential legal advice, or the possible consequences of abrogating the attorney-client privilege for a President's ability to obtain such advice. Elected, head of the Executive Branch, Commander-in-Chief, head of State, and removable only by impeachment, the President is not just "a part of the federal government, consisting of government employees doing government business." Maj. Op. at 2. As Justice Robert H. Jackson observed in the steel seizure case, the Presidency concentrates executive authority "in a single head in whose choice the whole Nation has a part, making him the focus of public hopes and expectations. In drama, magnitude and finality his decisions so far overshadow any others that almost alone he fills the public eye and ear." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 653 (1952) (Jackson, J., concurring). Echoing Justice Jackson three decades later, the Supreme Court emphasized in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), that the President "occupies a unique position in the constitutional scheme," *id.* at 749, that we depend on the President for the "most sensitive and far-reaching decisions entrusted to any official under our constitutional system," *id.* at 752, and that the President's "unique status under the Constitution" distinguishes him from other executive branch officials, *id.* at 750. The Attorney General, focusing on the President's "singular responsibilities," describes the Presidency's critical need for legal advice as follows:

The Constitution vests the President with unique, and uniquely consequential, powers and responsibilities. The Nation's "executive Power" is vested in him alone. U.S. Const. Art. II, § 1. In addition to his significant and diverse domestic and foreign affairs responsibilities, he is specifically required to adhere to and follow the law, both in his oath of office (Art. II, § 1, Cl. 8) and in the requirement that "he shall take Care that the Laws be

faithfully executed.” Art. II, § 3. To fulfill his manifold duties and functions, the President must have access to legal advice that is frank, fully informed, and confidential. Because of the magnitude of the Nation’s interest in facilitating the President’s conduct of his office in accordance with law, the President’s pressing need for effective legal advice knows no parallel in government.

Amicus Br. at 24. By lumping the President together with tax collectors, passport application processors, and all other executive branch employees—even cabinet officers—the court bypasses the reasoned “case-by-case” analysis demanded by Rule 501, *Jaffee*, 518 U.S. at 8 (quoting S. REP. No. 93-1277, at 13 (1974)).

A President’s need for confidential legal advice may “know[] no parallel in government” for another reason. Because the Presidency is tied so tightly to the persona of its occupant, and because of what *Fitzgerald* referred to as the Presidency’s increased “vulnerability,” stemming from “the visibility of [the] office and the effect of [the President’s] actions on countless people,” *Fitzgerald*, 457 U.S. at 753, official matters—proper subjects for White House counsel consultation—often have personal implications for a President. Since for any President the line between official and personal can be both elusive and difficult to discern, I think Presidents need their official attorney-client privilege to permit frank discussion not only of innocuous, routine issues, but also sensitive, embarrassing, or even potentially criminal topics. The need for the official presidential attorney-client privilege seems particularly strong after Watergate which, while ushering in a new era of accountability and openness in the highest echelons of government, also increased the Presidency’s vulnerability. Aggressive press and congressional scrutiny, the personalization of politics, and the enactment of the Independent Counsel statute, Pub. L. No. 95-521, Tit. VI, 92 Stat. 1824, 1867 (1978) (codified as amended at 28 U.S.C. §§ 591-599 (1994))—which triggers appointment of an Independent Counsel based on no more than the existence of “reasonable grounds to believe that further investigation is warranted,” 28 U.S.C. § 592(c)(1)(A)—have combined to

make the Supreme Court's fear that Presidents have become easy "target[s]," *Fitzgerald*, 457 U.S. at 753, truer than ever. No President can navigate the treacherous waters of post-Watergate government, make controversial official legal decisions, decide whether to invoke official privileges, or even know when he might need private counsel, without confidential legal advice. Because of the Presidency's enormous responsibilities, moreover, the nation has compelling reasons to ensure that Presidents are well defended against false or frivolous accusations that could interfere with their duties. The nation has equally compelling reasons for ensuring that Presidents are well advised on whether charges are serious enough to warrant private counsel. I doubt that White House counsel can perform any of these functions without the candor made possible by the attorney-client privilege. As I said at the outset, weakening the privilege may well cause Presidents to shift their trust from White House lawyers who have undertaken to serve the Presidency, to private lawyers who have not.

Preserving the official presidential attorney-client privilege would not place the President above the law, as the Independent Counsel implies. To begin with, by enabling clients—including Presidents—to be candid with their lawyers and lawyers to advise clients confidentially, the attorney-client privilege promotes compliance with the law. See *Upjohn*, 449 U.S. at 389. Independent Counsels, moreover, have powerful weapons to combat abuses of the attorney-client privilege. If evidence suggested that a President used White House counsel to further a crime, the crime-fraud exception would abrogate the privilege. See *United States v. Zolin*, 491 U.S. 554, 562–63 (1989). If an Independent Counsel had evidence that White House counsel's status as an attorney was used to protect non-legal materials from disclosure, those materials would not be protected. See *State v. Philip Morris Inc.*, No. C1-94-8565, 1998 WL 257214, at *7 (Minn. Dist. Ct. Mar. 7, 1998) (releasing documents as penalty for bad faith claim of privilege). "The privilege takes flight," Justice Benjamin Cardozo said, "if the [attorney-client] relation is abused." *Clark v. United States*, 289 U.S. 1, 15 (1933). Or if an

Independent Counsel presented evidence that a White House counsel committed a crime, a grand jury could indict that lawyer. See George Lardner, Jr., *Dean Guilty in Cover-Up: Nixon Ex-Aide Pleads to Count of Conspiracy*, WASH. POST, Oct. 20, 1973, at A1. This Independent Counsel has never alleged that any of these abuses occurred.

To be sure, a properly exercised attorney-client privilege may deny a grand jury access to information, see *Swidler*, 118 S. Ct. at 2086 (justifying the burden placed on the truth-seeking function by the privilege), but Presidents remain accountable in other ways, see *Fitzgerald*, 457 U.S. at 757 (checks on Presidential action include impeachment, press scrutiny, congressional oversight, need to maintain prestige, and concern for historical stature). An Independent Counsel, moreover, can always report to Congress that a President has denied critical information to a grand jury. See 28 U.S.C. § 595(a)(2), (c). If the President continues to exercise his attorney-client privilege in the face of a congressional subpoena, and if Congress believes that the President has committed "high Crimes and Misdemeanors," U.S. CONST. art. II, § 4, Congress can always consider impeachment. See H. REP. NO. 93-1305, at 4, 187-213 (1974) (recommending impeachment of President Nixon based on his refusal to turn over information in response to congressional subpoenas).

II

During Lindsey's several grand jury appearances he invoked both executive and attorney-client privileges, often with respect to the same questions. Now that the White House has dropped the executive privilege issue, much of that information may be available to the Independent Counsel and we have no way of knowing which questions, if any, Lindsey would continue to decline to answer. Even more fundamental, Lindsey's affidavit, his testimony and the affidavit of White House Counsel Charles F.C. Ruff suggest that the communications between Lindsey and the President regarding the Monica Lewinsky and Paula Jones matters may have involved political and policy discussions, not legal advice. To

be sure, the affidavits and Lindsey's testimony refer to advice about legal topics, such as invoking privileges and preparing for impeachment. But nowhere do they demonstrate that Lindsey rendered that advice in his capacity as a lawyer, *i.e.*, that "the lawyer's professional skill and training would have value in the matter." RESTATEMENT § 122 cmt. b. A conversation is not privileged merely because the President asked Lindsey a question about a nominally legal matter or in his capacity as White House Counsel staff. For example, if Lindsey advised the President about the political implications of invoking executive privilege, that communication would not be privileged; if he discussed the availability of the privilege as a legal matter, the conversation would be protected.

Distinguishing between Lindsey's legal and non-legal advice becomes even more difficult because not only does Lindsey wear two hats, one legal (Deputy White House Counsel) and one non-legal (Special Assistant to the President), but the Office of White House Counsel has historically performed many non-legal functions, such as giving policy advice, writing speeches, and performing various political tasks. See STEPHEN HESS, *ORGANIZING THE PRESIDENCY* 36, 43, 84 (1988); Lloyd N. Cutler, *The Role of the Counsel to the President of the United States*, 35 RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 470, 472-76 (1980); Jeremy Rabkin, *At the President's Side: The Role of the White House Counsel in Constitutional Policy*, LAW & CONTEMP. PROBS., Autumn 1993, at 63, 65-76. When an advisor serves dual roles, the party invoking the privilege bears a particularly heavy burden of demonstrating that the services provided were in fact legal. See, e.g., *Texaco Puerto Rico, Inc. v. Department of Consumer Affairs*, 60 F.3d 867, 884 (1st Cir. 1995) (where agency "delegated policymaking authority to its outside counsel to such an extent that counsel ceased to function as lawyers and began to function as regulators," it could not invoke attorney-client privilege); RESTATEMENT § 122 cmt. c (whether privilege applies to lawyer acting in dual roles depends upon circumstances); cf. *In re Sealed Case*, 121 F.3d at 752 (with respect to "'dual hat' presidential advisors, the government

bears the burden of proving that the communications" are covered by the executive privilege).

Accordingly, before abrogating the official attorney-client privilege for all future Presidents, this court should have remanded to the district court to allow the Independent Counsel to recall Lindsey to the grand jury to determine whether, with respect to each question that he declines to answer, he can demonstrate the elements of the attorney-client privilege, namely that each communication was made between privileged persons in confidence "for the purpose of obtaining or providing legal assistance for the client," RESTATEMENT § 118. See *United States v. Kovel*, 296 F.2d 918, 923 (2nd Cir. 1961) (remanding to permit accountant witness to offer factual support for assertion that communications were made in pursuit of legal advice). If Lindsey failed to meet this burden, that would end the matter, leaving for another day the difficult question of presidential attorney-client privilege, with its consequences for the functioning of the Presidency, as well as its potential implications for possible impeachment proceedings (implications we have hardly begun to consider). See Maj. Op. at 23-25; Office of the President Br. at 26-29; Office of the Independent Counsel Br. at 35; cf. *Amicus* Br. at 34-37. On the other hand, if Lindsey demonstrated that his communications involved official legal advice, the district court could use the remand to enrich the record by, for example, inviting former White House counsel to describe the nature of the relationship between Presidents and White House counsel generally and the role of the attorney-client privilege in particular. This would create an infinitely more useful record for us, or eventually the Supreme Court, to determine whether reason or experience justifies any change in the official presidential attorney-client privilege, and if so, whether the privilege can be modified without threatening a President's ability to "take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3. See *Swidler*, 118 S. Ct. at 2087 n.4 (noting lack of empirical evidence in support of limiting the privilege); *Jaffee*, 518 U.S. at 16 & n.16 (relying on *amicus* briefs citing psychology and social work studies); *Trammel*, 445 U.S. at

48, 52 (relying on historical developments regarding the role of women in marriage).

I do not consider the Supreme Court's expectation that we proceed expeditiously to be inconsistent with our obligation to engage in fully reasoned and informed decision-making. The importance to the Presidency of effective legal advice requires no less. Moreover, according to the Independent Counsel, the grand jury is exploring whether obstruction of justice, perjury, witness intimidation, and other crimes were committed in January 1998. *See* 18 U.S.C. § 3282 (establishing five-year statute of limitations for non-capital federal crimes). We thus have time to determine whether we need to resolve this important question and, if so, to ensure that we do so on the basis of a fuller, more useful record. If the Independent Counsel needs to report to Congress more expeditiously, he is free to do so.

III

I concur in Part III.A of the court's opinion. For the reasons stated in Parts I and II of my published dissent, I cannot join Part III.B. Since I believe that the Presidency's confidential attorney-client privilege covers communications with White House counsel, I would hold that the common interest doctrine protects communications between White House counsel and a President's private counsel where the attorneys share an overlapping common interest.

04/1961	William McKinley	Buffalo	Pistol	Killed	96-190	Hullington v. Nash, Warden
07/15/1963	Franklin Roosevelt (President-elect)	Miami	Pistol	Missed target	96-264	Prisoners Crises, Inc. v. General Electric Co.
11/1/1960	Harry Truman	Washington	Automatic weapon	Assaults Interrupted	96-385	Bertes v. LA State Bd. of CPAS
11/23/1963	John Kennedy	Dallas	Rifle	Killed	96-488	Smith v. Laser, Wilson, Buford
06/1975	Gerald Ford	Sacramento	Pistol	Missile	96-483	Messer v. Hammonds
09/2/1976	Gerald Ford	San Francisco	Pistol	Missed target	96-487	Piano v. Nasuti
3/30/1961	Ronald Reagan	Washington	Pistol	Wounded	96-489	Duffield v. Robertson, Stephens & Co.
April 1963	George Bush (former President)	Karvick	Bomb	Plot thwarted	96-410	Pator v. MN New Country Sch.
10/28/1964	Bill Clinton	Washington	Assault rifle	Missed target	96-411	Haber v. DC Bd. on Prof. Responsibility
					96-412	Jackson v. NCT Corp.
					96-418	WY Dept. of Trans. v. Stright
					96-423	Thompson v. Dept. of the Navy
					96-445	Batchelder v. Krummelt
					96-448	Stewart v. Stewart
					96-449	Gueto Records, Inc. v. Peterson
					96-461	Doe v. Miles Inc.
					96-483	Chen v. Zygo Corp.
					96-486	O'Brien v. U.S.
					96-497	Hansen v. Dunbar
					96-583	Bello v. Citicorp Natl. Bank
					96-621	Jenovold v. Shalek, Sec. of HHS
					96-623	Fritz v. Lancaster Cty., PA
					96-637	Moody v. Moody
					96-645	Pear Daniel (NFOER), Inc. v. Seward
					96-646	Groves v. WCI Holdings Corp.
					96-646	Kennedy v. Goldie, Adminr. of NASA
					96-682	Smith-Gregg v. Dept. of Interior
					96-689	Camin Mgmt. Corp. v. NLRB
					96-617	Schaeffer v. U.S.
					96-6181	Pinsberger v. Gramley, Warden
					96-6818	Ludwig v. Vermette
					96-6931	Barus v. Puchalski, Clerk
					96-6934	Taylor v. Garret, Judge
					96-6939	Bogart v. Curry
					96-6940	Parrell v. Johnson, Dir., TX DCJ
					96-6941	Smith v. Parker, Warden
					96-6944	Pullcutt v. Wilshire Leasing, Limited
					96-6982	Lam v. Barnett
					96-6988	Correll v. Stewart, Dir., AZ DOC
					96-6965	Pizzo v. Sailer, Sec., LA DOC
					96-6967	Perfetto v. Kahlmann, Sept., Sellina
					96-6968	Richardson v. Huffman
					96-6970	Clymer v. Rubenstein
					96-6973	Howell v. Tennessee
					96-6977	Wasson v. Oklahoma
					96-6813	Franklin v. Francis, Warden
					96-6817	Johnson v. Illinois
					96-6839	Lane v. Sleghtary, Sec., FL DOC
					96-6843	Allen v. Oklahoma
					96-6870	Miller v. Pennsylvania
					96-6877	Wade v. Ohio
					96-6183	Moore v. Johnson, Dir., TX DCJ
					96-6189	Stevens v. Florida
					96-6167	Rodden v. Bowesat, Sept., Potoni
					96-6169	Oberuch v. Stewart, Dir., AZ DOC

Source: Kaiser, *Presidential Assassinations and Assaults: Characteristics and Impact on Executive Procedures*, 11 *Presidential Studies Quarterly* 648, 648-47 (1981); N. Y. Times, June 28, 1966, section A, p. 7, col. 2; N. Y. Times, Apr. 8, 1966, section A, p. 16, col. 6.

96-316 *Office of the President v. Office of Independent Counsel*. The motion for leave to file an unredacted appendix under seal is granted. The petition for a writ of certiorari is denied. Justice Breyer, with whom Justice Ginsburg joins, dissenting from the denial of certiorari. The divided decision of the Court of Appeals makes clear that the question presented by this petition has no clear legal answer and is open to serious legal debate. Both parties agree that the question presented is important and warrants this Court's attention. See *Pat. for Cert. 6-7*; *Pat. for Cert. in United States of America v. Clinton*, O. T. 1997, No. 97-1924, p. 9. I recognize that a denial of certiorari is not a disposition on the merits of that question. See, e.g., *Equality Foundation of Greater Cincinnati, Inc. v. Cincinnati, Ohio*, 511 U.S. 100 (1994) (Stevens, J., respecting denial of certiorari). Nonetheless, whether or when other opportunities for this Court to consider the issue arise depends upon whether or when the President, or other Government employees, will risk disclosing to Government lawyers significant matters that, under the Court of Appeals' decision, are not privileged. They may very well choose the cautious course, holding back information from Government counsel, perhaps hiring outside lawyers instead. I believe that this Court, not the Court of Appeals, should establish controlling legal principle in this disputed matter of law, of importance to our Nation's governance. I would grant the petition for certiorari.

Certiorari—Summary Disposition

97-945 *Un. Paperworkers Int. v. Buzenius*. The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of *Marguez v. Screen Actors Guild*, 525 U.S. ____ , 67 U.S.L.W. 4001 (1998).

97-1507 *Teel v. Kharana*. The motion of petitioners for double costs is denied. The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Fifth Circuit with instructions to dismiss the case as moot. See *United States v. Mustangwear, Inc.*, 340 U.S. 36 (1950).

Orders in Pending Cases

A-334 *Weinstein v. Starr*. The application for injunctive relief addressed to Justice Sotillo and referred to the Court is denied.

A-336 *Maritime Overseas Corporation v. Ellis*. The application for a stay addressed to Justice O'Connor and referred to the Court is denied.

M-27 *Mason v. Securities and Exchange Commission*. The motion to direct the Clerk to file a petition for a writ of certiorari out-of-time is denied.

97-9361 *Jones v. U.S.* The motion of petitioner for appointment of second counsel is denied.

96-184 *Wyoming v. Houghton*. The motion of respondent for appointment of counsel is granted and it is ordered that Deann D. Densmore, Esq., of Cheyenne, Wyoming, is appointed to serve as counsel for the respondent in this case.

Certiorari Granted

96-436 *Allen v. Malee*. The petition for a writ of certiorari is granted.

97-1927 *Hanson v. Berger*; and 96-83 *Wilson v. Layne*, Dep. U.S. Marshal. The petitions for writs of certiorari are granted limited to the following questions: 1. Whether law enforcement officers violate the Fourth Amendment by allowing members of the news media to accompany them and to observe and record their execution of a warrant? 2. Whether, if this action violates the Fourth Amendment, the officers are nonetheless entitled to defense of qualified immunity?

The cases are consolidated and a total of one hour is allotted for oral argument.

96-5881 *Lilly v. Virginia*. The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted.

Certiorari Denied

97-1094 *Seahorse Const. Assistance v. Pielochmann*.

96-128 *McNamara v. Chicago, IL*.

96-163 *Irvine, CA v. Nelson*.

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FINAL

Final: Final, Classified
Friday's Contents on Page A2

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Starr Probes Clinton Personal Life Whitewater Prosecutors Question Arkansas Troopers About Women

By Bob Woodward and Susan Schmidt
Washington Post Staff Writers

FBI agents and prosecutors working for independent counsel Kenneth W. Starr's Whitewater investigation have questioned Arkansas state troopers in recent months about their knowledge of any extramarital relationships Bill Clinton may have had while he was Arkansas governor, according to two of the troopers questioned and sources close to the investigation.

Agents also have questioned a number of women whose names have been mentioned in connection with President Clinton in the past, the sources said. The

sources said that the extensive interviews were part of an effort by Starr's office to find close Clinton associates in whom he may have confided and who might be able to provide information about the veracity of sworn statements Clinton has made in the course of the Whitewater investigation.

The troopers said investigators asked about 12 to 15 women by name, including Paula Corbin Jones, a former Arkansas state employee who has filed a civil lawsuit against Clinton alleging he sexually harassed her in 1991. Clinton categorically has denied the allegations and has said he does not recall ever meeting Jones.

A White House spokesman and a private

Clinton attorney said last night they had no immediate comment.

The nature of the questioning marks a sharp departure from previous avenues of inquiry in the three-year-old investigation, which began as an examination of the Whitewater land development project in which Clinton and his wife, Hillary Rodham Clinton, first met in 1978 along with Arkansas friends James B. and Susan McDougal. Until now, however, what has become a wide-ranging investigation of many aspects of Clinton's governorship has largely steered clear of questions about Clinton's relationships with women in Ar-

See STARR, A14, Col. 1



Independent counsel Kenneth W. Starr's office has questioned troopers about Paula Corbin Jones.

The Washington Post

Sections

- A News/Editorials
- B Style/Television
- C Metro/Obituaries/Religion
- D Business
- E, F Real Estate/Comics
- G Apartments/Real Estate Classified
- H Sports/Classified

Today's Contents: Page A2

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SATURDAY, FEBRUARY 14, 1998

25¢

Linda Tripp Briefed Jones Team on Tapes

Meeting Occurred Before Clinton Deposition

By Peter Baker
Washington Post Staff Writer

On the night before President Clinton's Jan. 17 deposition in the Paula Jones sexual misconduct lawsuit, Linda R. Tripp secretly met with a lawyer for Jones to fully brief him about Monica S. Lewinsky's purported affair with the president, according to people familiar with the meeting.

The two-hour session in Tripp's Columbia home armed the Jones legal team with enough information to ask Clinton precise questions the next day about Lewinsky and his ties to her. Instead of merely inquiring whether he had a relationship with her, the Jones lawyers were able to ask Clinton about gifts and visits and other details intended to pin him down.

Although he acknowledged giving her small gifts, Clinton denied under oath that day that he had sexual relations with Lewinsky, and said he could not recall ever being alone with the former White House aide for any length of time, sources knowledgeable about his testimony have said. Those statements have led to much of the legal peril Clinton now faces, leaving him vulnerable to a possible perjury charge if independent counsel Kenneth W. Starr can prove that the president had sex or even was ever alone with Lewinsky.

Tripp's activities that day demonstrate the unusual nexus between the Jones team as it sought ammunition in its civil case and the Starr team looking for potential criminal violations. By cooperating with Jones's lawyers even as she was providing Starr with information about Lewinsky's alleged affair, Tripp proved the crucial link in a scandal that is imperiling Clinton's presidency.

The previously unreported meeting between Tripp and the Jones team on Jan. 16 also adds another twist to what is known about the events of a day that is shaping up as a critical one in the

See TRIPP, A20, Col. 1

Tripp Met With Jones's Lawyers Before Clinton's Deposition

TRIPP, From A1

unfolding crisis. That was the same day that Lewinsky's first lawyer filed her affidavit in the Jones case denying any sexual liaison with the president. And it was the day that Tripp lured Lewinsky to an Arlington hotel where federal investigators confronted the 24-year-old woman and tried to enlist her as an undercover informant in their probe into whether Clinton or his close friend Vernon E. Jordan Jr. tried to obstruct justice by urging her to deny an affair.

Tripp spent the afternoon at the Ritz-Carlton Hotel at Pentagon City while federal investigators interrogated Lewinsky, then left for home where she met with Jones attorney T. Wesley Holmes in the evening, according to sources informed about the meeting. James Moody, Tripp's attorney, was also there, the sources said. But in an interview last night, Moody said he was out of town and suggested he was unaware of any such meeting. "I guess a lot happened that day," Moody said. "No one knows what anyone else was doing that day."

No one, it seems, except for Tripp. Among the many unanswered questions in the ongoing drama is what motivated her to surreptitiously record more than 20 hours of conversations with her one-time friend, hand over the tapes to Starr and, as it turns out, simultaneously provide crucial information to Jones's lawyers.

One reason she may have cooperated with the Jones camp, Moody said, was to avoid having to testify in a formal deposition about the Jones case, where Clinton's attorneys would have the chance to grill Tripp as well. Tripp had been subpoenaed by Jones's lawyers, but may have been able to persuade them to withdraw it by submitting to a private interview. "My objective at the time was to get her out of being deposed and off their radar screen," Moody said.

Clinton advisers see the Tripp-Jones meeting as further evidence of what they consider collusion, although they would not comment last night on the new details of Tripp's role in the two cases.

From the Jones perspective, however, interviewing Tripp the night before deposing Clinton was simply thorough and necessary research before going up against a hostile witness. "They wanted to prepare as completely as possible so they were ready to properly and fully question the president," said Joseph Canzano,

an attorney who has represented Jones before her current Dallas-based team took over. "That's good lawyering. To prepare in advance—is that bad? What are you supposed to do? Walk in with a blank pad?"

The Jones team had sought out a meeting with Tripp that day. All six lawyers from the law firm, Rader, Campbell, Fisher & Pyke, had flown in from Dallas for the deposition. But Tripp put them off for much of the day, without saying why, until finally, late in the day, she sent word that she would talk with them.

During the meeting, Tripp related much of the information that has since become public, including what she was told by Lewinsky three days earlier when they got together at the Ritz-Carlton bar, according to the sources. Unbeknownst to Lewinsky at the time, Tripp was wearing a hidden microphone supplied by the FBI and the tape of their conversation helped

prod Starr to seek the authority to expand his Whitewater investigation.

Jones's lawyers asked to review the tapes but Tripp would not allow it. Instead, they used the information they gleaned that night to confirm what they had previously been told by Tripp or intermediaries who had talked with her. On the next Monday and Tuesday, they negotiated with Moody the wording of a formal written declaration from Tripp, which she then signed Wednesday, Jan. 21, the same day the Lewinsky allegations were first reported in The Washington Post.

In that statement, which was obtained by The Post last week, Tripp said Lewinsky "revealed to me in detailed conversations on innumerable occasions that she has had a sexual relationship with Clinton since November 15, 1995. She played for me at least three tapes containing the president's voice and showed me gifts they exchanged."

Tripp, who had worked with Lewin-

sky at the Pentagon where both were transferred after stints at the White House, first came to the attention of Jones's attorneys last summer when she publicly said she encountered another White House aide, Kathleen E. Willey, after an alleged sexual encounter with the president.

In early October, the Rutherford Institute, which by then had taken over the case and was paying some of the legal expenses of Rader, Campbell, received the first of three anonymous tips from someone with a woman's voice suggesting they look into someone named "Monica." Tripp at the time had been confiding in a friend, New York literary agent Lucianne Goldberg, however Goldberg has denied providing information to Jones's lawyers. The Jones camp does not believe Tripp or Goldberg was the source of those calls, but quickly learned that Tripp might have information about Lewinsky.

Tripp was subpoenaed by the Jones team Nov. 24, but she began



BY TYLER HALLORY FOR THE WASHINGTON POST
 Paula Jones arrives at law offices in January for President Clinton's deposition in her sexual misconduct lawsuit.



OWM VIA ASSOCIATED PRESS
 Linda R. Tripp, left, with Monica S. Lewinsky in undated photo.

having a series of contacts with the lawyers and so her deposition scheduled for Dec. 18 was postponed. The Wall Street Journal reported that Tripp talked with Jones's lawyers twice in the week leading up to the Clinton deposition.

The information she provided apparently proved important in the questioning led by Jones attorney James A. Fisher. Did you ever have sexual relations with Lewinsky, Clinton was asked. Did she ever actually visit you when she was cleared to visit the White House by the president's personal secretary, Betty Currie? Did you give her gifts? Were you ever alone with her?

The president was so struck by the specificity of the questions, one person close to him has said, that when he returned to the White House that night, he called Currie and asked her to come into the office the next day so they could compare notes. Currie has told investigators that Clinton told her she was always in earshot while Lewinsky was around, which Currie agreed with, according to a source informed about the account. But Currie also told investigators that in fact she sometimes did leave Clinton and Lewinsky alone while she was in an outer office.

One witness who could be important in proving whether Clinton actually was alone with Lewinsky is retired Secret Service officer Lewis C. Fox. In an interview with The Post, he has said the two were together in the Oval Office for about 40 minutes one afternoon in late 1995.

The Justice Department reached a partial agreement with Starr last night that would allow the prosecutor to interview Fox without delving into matters crucial to security of the president. But the agreement does not cover other Secret Service personnel Starr may wish to talk to.

Staff writers Lorraine Adams and Roberto Suro contributed to this report.

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IN WATERGATE, REPORTERS CHECKED ABUSE OF
POWER. IN THE LEWINSKY AFFAIR, THEY
ENABLED IT BY LAPPING UP KEN STARR'S
LEAKS - WHICH HE NOW ADMITS FOR THE FIRST
TIME. THE INSIDE STORY - DAY BY DAY.

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WHAT MAKES THE MEDIA'S PERFORMANCE A TRUE SCANDAL, A TRUE EXAMPLE OF AN INSTITUTION BEING CORRUPTED TO ITS CORE, IS THAT THE COMPETITION FOR SCOOPS SO BEWITCHED ALMOST EVERYONE THAT THEY LET THE MAN IN POWER WRITE THE STORY—ONCE TRIPP AND GOLDBERG PUT IT TOGETHER FOR HIM. **BY STEVEN BRILL**

It began with high fives over the telephone. "It's breaking! It's breaking! We've done it," Lucianne Goldberg screamed into her phone in Manhattan to her son in Washington. It was 7:00 A.M., Wednesday, January 21.

"This was my mom's day," says Jonah Goldberg, 29, referring to the controversial New York literary agent who had now shepherded the Monica Lewinsky story into the world's headlines and onto Independent Counsel Kenneth Starr's radar screen. "Here was everything we'd done since the fall breaking night there on *Good Morning America*, with Sam Donaldson standing in front of the White House and George Stephanopoulos talking . . . impeachment."

"For five years I had had all kinds of Clinton stories that I had tried to peddle," Lucianne Goldberg recalled during a series of interviews. "Stories from the state troopers, from other women, you name it. And for five years I couldn't get myself arrested. Now I was watching this land! I was lovin' it. Spike and Linda and us had really done it."

"Spike" is Lucianne Goldberg's pet name for Michael Isikoff, the relentless *Newsweek* reporter whose stories about President

Clinton's alleged sexual misconduct—from Paula Jones to Kathleen Willey and now to Monica Lewinsky—had led the way on this sometime lonely beat. "Linda" is Linda Tripp, the onetime White House secretary now known more for taping than typing. For four years she had been a frustrated client of Goldberg's, hoping to sell a White House scandal memoir.

As of this morning, Tripp, under Lucianne Goldberg's tutelage, had constructed the material for Isikoff's greatest scoop—often according to his probably unwitting specifications. The two women had even steered it in a way that now allowed Ken Starr to hone in on the president and the intern. Then, by leaking the most damaging details of the investigation to a willing, eager press corps, Starr was able to create an almost complete presumption of guilt. Indeed, the self-righteousness with which Starr approached his role—and the way he came to be able to count on the press's partnership in it—generated a hubris so great that, as detailed below, he himself will admit these leaks when asked.

The abuses that were Watergate spawned great reporting. The Lewinsky story has reversed the process. Here, an author in quest of material teamed up with a prosecutor in quest of a crime, and most of the press became a cheering section for the combination that followed.

G A T E

PRESSGATE

As such, the Lewinsky saga raises the question of whether the press has abandoned its Watergate glory of being a *check* on official abuse of power. For in this story the press seems to have become an *enabler* of Starr's abuse of power.

An examination of the Lewinsky story's origins and a day-by-day review of the first three weeks of the media coverage that followed, suggest that as it has careened from one badly sourced scoop to another in an ever more desperate need to feed its multimedia, 24-hour appetite, the press has abandoned its treasured role as a skeptical "fourth estate." This story marks such a fundamental change in the press's role that the issues it raises will loom long after we determine (if we ever do) whether the president is guilty of a sexual relationship with the intern, obstruction of justice, or both.

Looking For A True Crime Story:

It started with the 1993 death of Deputy White House Counsel Vincent Foster, Jr. In some anti-Clinton circles, Foster's suicide became what Lucianne Goldberg calls "the best true crime story out there. . . . I was interested in getting a book out about Foster's death, and Tony Snow [the conservative columnist and now-Fox newsmen] suggested I talk to Linda Tripp."

A veteran government secretary, Tripp, then 43, had been assigned to work for White House Counsel Bernard Nussbaum. Tripp claimed to have been the last person to see Foster alive, and, as with many aspects of her job, she made more of this Jeopardy-like fact than it was worth.

Following Nussbaum's resignation in 1994, Tripp was moved to a job at the Pentagon. She got a raise, but, in terms of status, it was a comedown.

Goldberg was a good match for Tripp. A gravelly-voiced, chain-smoking 63-year-old with a self-described "big mouth," Goldberg is a West Side Manhattanite who takes delight in defying her neighborhood's liberal chic. She runs in conservative circles, makes no secret of her disdain for the president, and her acknowledged past includes doing dirty tricks for the Nixon campaign.

Yet the reception Tripp got from Goldberg was a letdown. "She had been the last person to see Vince Foster, and she hated the Clinton people and told me stories about the clothes they

wore and how they faked around with each other. . . . But was that a book? Come on," says Goldberg.

"I kinda liked her," Goldberg continues. "So we kept in touch, and we did put a proposal together."

As *The New Yorker* reported in a February article by Jane Mayer that deserves credit for being the first to spot the Goldberg-book deal impetus for the Tripp-Lewinsky story, the proposal contained a purported but nonspecific chapter on sexual hijinks.

The 'Pretty Girl':

In May of 1996, Tripp told Goldberg about a former White House intern who had been transferred to the Pentagon and was working with Tripp in the public affairs office. "One day Linda called and told me about what she called 'the pretty girl,' who'd become her friend," Goldberg recalls. "She said the pretty girl said she had a boyfriend in the White House. Linda was excited. This might be material."

"A few weeks later," says Goldberg, "Linda told me the pretty girl's name [Monica Lewinsky] and said the boyfriend was Clinton."

But, says Goldberg, even with proof, which she didn't have, it was just another Clinton girlfriend story. Maybe the girlfriend could do a book, but not Linda.

"I remember for a while my mom thinking Linda could get us Monica as a client," says Jonah Goldberg, a television producer who also runs a Washington office for his mother.

Nonetheless, according to the two Goldbergs, Tripp repeatedly rebuffed their hints that they meet the former intern.

Although Tripp and Lucianne Goldberg kept up their relationship through 1996, Goldberg did not push the book idea. "It wasn't high on my list," says Goldberg. "No one seemed to care about this guy screwing everything in sight."

On The Radar Screen:

Perceptions about the president and sex changed markedly as 1997 began. In January, *Newsweek* published a cover story on the Paula Jones suit declaring that the case deserved to be taken seriously. The *Newsweek* story—along with the Supreme Court's hearing (also in January) of the Jones lawyers' appeal that their case not be delayed until after President Clinton had left office—suddenly made the president's alleged sexual misconduct and his resulting legal troubles topic A.

Isikoff On The Hunt:

Newsweek now allowed Isikoff, its lead reporter on the Jones story, to add the Clinton sex allegations to a beat that already included not only Whitewater, but also the blossoming controversy surrounding the funding of the 1996 Democratic campaign.

A native New Yorker who grew up on Long Island, Isikoff, 46, started in journalism as a reporter for a Washington-based news service initially funded by Ralph Nader. "It was the Woodward and Bernstein era," he says. "Being a reporter was exciting."

For him, it still is. A journalist's version of Columbo, with a perpetually whiny voice and an awkward, nervous look, Isikoff instinctively distrusts power. Now, as he patrolled his

Josh Goldberg:
He calls the
Lewinsky story
a "Goldberg
conspiracy."



BARB TENN
KURT

Reporting assistance provided by assistant editor Michael Kadish

BARBARA HORN

expanded beat in early 1997. Isikoff got a tip from one of Jones's lawyers, who had heard that there was a volunteer White House worker who had been groped by the president in 1993 when she'd met with him seeking a job.

Isikoff eventually tracked down Kathleen Willey, and after he had pestered her over a period of several months, she talked about the incident but refused to be quoted. According to Isikoff, Willey suggested that he "go ask Linda Tripp" for confirmation, because Tripp had seen Willey after she'd left the Oval Office on the day of the alleged incident.

Yes, she had seen Willey emerge from the Oval Office disheveled, Tripp told Isikoff, according to his subsequent story. And yes, Willey claimed the president had kissed her and fondled her. But, no, Tripp declared, Willey was not upset; she seemed happy about the president's attention.

Isikoff says that he and his editors were reluctant to go with that confusing account, until they learned in late July that the Jones lawyers had subpoenaed Willey (but not Tripp, whom they did not know about). Now *Newsweek* had a hook—a legitimate more-than-just-sex hook—for the story.

The result, entitled "A Twist In Jones v. Clinton," was a tortured account of the potential role that a new but reluctant accuser, Kathleen Willey, might have in the Jones case. Isikoff quoted Tripp as confirming the incident but disputing whether Willey had seemed unhappy about it.

In the days that followed, Isikoff says, he was surprised that the rest of the press largely ignored the article, seeing it as just part of the demerol of the smarmy Jones suit.

Linda Tripp did not ignore it.

"Linda tends to view her role in things as much more important than it is," says Jonah Goldberg. "And she was both thrilled and terrified by the play Isikoff gave her in this piece. She thought the whole world was now watching her. And she thought she also could now come to center stage with what she knew about Monica."

In fact, according to Isikoff, from the moment he had first talked to Tripp in March 1997 about Willey, "she was telling me that I had the right idea but that I was barking up the wrong tree with Kathleen Willey. She kind of steered me away from Willey."

At a meeting in a bar near the White House in April 1997, Tripp again pushed Isikoff to consider a better story, one about an intern and the president. But Isikoff remained focused on Willey. Why? Because, he says, he knew that there was a link from her to a story that was about more than sex: the Jones trial. He also says that he made no bones about the importance of that link to Tripp.

For Tripp, the motive for filling that need was unambiguous. "I always told Linda that for her to have a real book deal, she had to get some of what she knew into a mainstream publication of some kind," recalls Goldberg. "I drummed that into her. Without that, she was just another kook."

According to Goldberg, it was soon after the *Newsweek* article appeared that Tripp—at Goldberg's urging—went to a Radio Shack store and bought a \$100 tape recorder so that she could begin gathering her proof.

The Tapes:
In October, the Goldbergs tried to advance the story by getting Isikoff to listen to Tripp's tapes of Lewinsky talking to her about sex with Clinton. Seeing she was Tripp's



"One day Linda called and told me about what she called 'the pretty girl,' who'd become her friend," Goldberg recalls. "She said 'the pretty girl' said she had a boyfriend in the White House. Linda was excited. This might be material."

"media adviser," as Isikoff recalls it, Goldberg invited him to a meeting at Jonah Goldberg's apartment. She told him he wouldn't regret it.

According to all who were present (except Tripp, who would not comment for this article), Isikoff was told Lewinsky's name. Two tapes were on the coffee table. Lucianne offered to queue up the first one.

Isikoff declined.

"I knew that if I listened to these tapes I would become part of the process, because I knew the taping was ongoing," explains Isikoff, who also adds that he was in a hurry to get to CNBC, where he was a paid Clinton sex scandal pundit.

Get Me Something Tangible:

But Isikoff heard enough of a description of what was on the tapes to request more. He wanted "a tangible way to check this out with some other source," recalls Jonah Goldberg. "And he needed more than just sex. He said he needed other sources and he needed for this to relate to something official." Isikoff confirms this conversation.

To Isikoff, he was simply musing aloud about what would make a legitimate *Newsweek* story. To the Goldbergs and Tripp, he was writing out specs. And by the end of October, Isikoff's hopes had been fulfilled on both counts.

First, they produced something tangible. Lewinsky began sending letters and one package to presidential secretary Berry Currie at the White House, allegedly so that Currie could pass them to the president. What was in that package? Tripp and Goldberg told Isikoff it contained a lurid sex tape. Goldberg then told Isikoff how to get copies of the receipts for those letters and the package. It was easy—because the courier service employed by Lewinsky is owned by Goldberg's brother's family.

"We told Linda to suggest that Monica use a courier service to send love letters to the president," says Lucianne Goldberg.

PRESSGATE

"And we told her what courier service to use. Then we told Spikev [Isikoff] to call the service." (Isikoff says he later found out that the service was owned by Goldberg's brother's family, but that for him the only issue was the fact that Lewinsky had, indeed, sent the letters and, in one case, a package that seemed like a tape, according to the courier who delivered it to the White House—and who was made available for Isikoff to interview by the eager-to-be-helpful courier service.)

As for something "official," Tripp and Lucianne Goldberg told Isikoff that Lewinsky, who was planning to move to New York with her mother, was going to get a job there working for U.N. ambassador Bill Richardson. In fact, Richardson himself was going to meet with the lowly former intern at the Watergate over breakfast in a few days to talk about the job, Tripp and Goldberg reported. In other words, they contended, the president was getting his girlfriend a government job.

"That was interesting enough that we sent a reporter—not me, because I was now recognizable from all my TV stuff—to stake out the Watergate for breakfast," says Isikoff.

Newsweek's Daniel Klaidman waited from 7:00 until 11:30 A.M., but Richardson and Lewinsky never appeared. "That real-



Newsweek's Isikoff: Goldberg called him "Spikev," and helped shape his best story.

ly worried my editors. . . . We didn't know that Richardson had an apartment there and they were meeting there," says Isikoff.

It was at about this time—October 1997—that the new Paula Jones legal team started getting anonymous calls from a woman saying that Linda Tripp and Monica Lewinsky would be well worth subpoenas. Each of what one member of the Jones team estimates were three or four calls got increasingly less vague.

Who made those calls?

"My mom didn't do it," Jonah Goldberg says. "Linda did, but I can tell you that she didn't get the idea on her own."

Lucianne Goldberg says she isn't sure Linda called them, "but it wouldn't surprise me, and it made sense, didn't it?"

Did Lucianne encourage her to make the calls? "Do you think I had to?" asks Goldberg.

Did she encourage her? "Not exactly, but, hell, I guess you could say so."

What seems clear is that no one other than one of the Goldbergs or Tripp would have had the knowledge or the

motive to have tipped off the Jones lawyers. And whoever made the calls, they were persuasive enough that by just before Christmas both Lewinsky and Tripp had been subpoenaed.

"That's when this heated up," says Isikoff. "When I found out that they had been subpoenaed, I could see the perjury possibilities and everything else. It was starting to be a real story."

In short, the exact dynamic that had made the Willey tale a publishable story for Isikoff—that it was part of the Jones trial—had now apparently been engineered by the Goldberg-Tripp book-deal team. Moreover, those similarly orchestrated "receipts" from the courier service gave Isikoff the tangible proof he said he needed.

"I guess I'd like to think this was more a Goldberg conspiracy than a right-wing conspiracy," Jonah concludes when asked about this orchestration.

Monica Becomes Hysterical:

According to the Goldbergs' accounts of the Lewinsky-Tripp tapes and to Isikoff's account of the tapes he eventually heard, when Lewinsky got her subpoena in December she became hysterical. On the tapes her hysteria comes off as a fear of how to decide whether to rat on the president or risk perjury—a fear exacerbated by Tripp's declaration to her that she, Tripp, was going to tell the truth about what Lewinsky had told her about the relationship.

As 1997 drew to a close, Isikoff says he knew he'd be coming back from his Christmas vacation in January to what might be a major story.

Clowns In A Car:

"That first week in January," recalls Lucianne Goldberg, "we were kind of panicked. You had [Lewinsky] on the phone to Linda . . . saying she didn't know what to do and that she was gonna sign an affidavit saying she had never had any sex with the president"—an affidavit that Lewinsky did in fact sign on January 7. "And you had Linda worried about her own testimony and about what Isikoff was going to do."

Goldberg says that Tripp was now worried enough to consult Kirby Behre, the lawyer she had used when she had testified in the Whitewater hearings. But when Behre (who declined all public comment for this article) was told about the tapes, his suggestion, according to Goldberg, "shocked Tripp and Goldberg: 'He told her he was going to go to Bob Bennett—the president's defense lawyer in the Jones case—' . . . and get Bennett to settle the Jones case and avoid all this.'"

In fact, Tripp and the Goldbergs wanted anything but a settlement that would see Tripp's cameo role in history evaporate. They were headed in the opposite direction. What they had pushed from a talk about a presidential affair to a story about a new witness in a civil suit they now wanted to push to the next step—a criminal case. "We wanted a [new] lawyer so that Linda could go to Ken Starr," explains Lucianne Goldberg.

By Friday, January 9, Goldberg had found James Moody, a relatively unknown Washington attorney who had been active in taxpayer rights and other conservative causes.

Tripp Goes To Starr:

Why the rush for a new lawyer? "Because we wanted someone to get the tapes back from Behre so we could take them to Starr," says Lucianne Goldberg.

In fact, while Moody ended up getting the tapes back quickly (apparently by Monday, January 12), even that wasn't fast enough for Tripp. "Linda," says Jonah Goldberg, "was in a frenzy."

"I told her to call Starr Monday night," says Lucianne Goldberg. "She was afraid Isikoff was going to do a story and she wanted to make sure she got to Starr first. . . . Neither of us wanted Starr to read about her in *Newsweek*. We wanted to be at the center of it."

But didn't her going to Starr also insure that Isikoff would have a story? "Yes, that's true, too," says Goldberg with a laugh. "We knew this would never *not* be a story for Spikey [Isikoff] once Starr had it."

"Linda called Starr's people Monday night," Goldberg continues. "And after a few minutes they asked her where she was, told her to stay there, and piled in a car and drove out to her house. She told me it was like that Charlie Chaplin movie or something with all those cops like clowns stuffed into a car coming out to see her. . . . We never knew they would pounce like that."

Starr says that his staff spent that night and the next day, Tuesday, January 13, debriefing Tripp.

According to Goldberg—who was in contact with Tripp through Wednesday night, January 14—Starr's lawyers and FBI agents told Tripp that they needed more than was on her tapes to prove both the president's alleged effort to get Lewinsky to lie and Washington lawyer and Clinton friend Vernon Jordan's supposed obstruction of justice, via his help getting a job for Lewinsky. Their plan? They wanted Tripp to meet with Lewinsky and wear a wire while she walked Lewinsky through a conversation that they would script.

Getting more about Jordan on tape was crucial for Starr. Because his office had been established to investigate Whitewater, his people had already concluded that extending their jurisdiction to the Lewinsky affair required their arguing that Jordan's role with Lewinsky paralleled his suspected but unproven role in helping disgraced former Associate Attorney General Webster Hubbell obtain lucrative consulting assignments in exchange for Hubbell's remaining silent about the Clintons and Whitewater.

On Tuesday, Goldberg or Tripp (Goldberg and Isikoff won't say who) called Isikoff and told him that Tripp had gone to Starr and that Starr was planning to do his own taping of Lewinsky. "That call knocked my breath out," says Isikoff.

On Wednesday, Isikoff got a full report from Goldberg (according to both) and prepared to confront Starr's office the next day with what he knew.

The Sting:

Later that night, says Goldberg, Tripp told her that "Starr's people were shutting her down . . . she was being moved and her phone number was being changed and all that."

Isikoff says that when he talked to Starr deputy Jackie Bennett, Jr. on Thursday, Bennett begged him to wait until Friday before trying to call Jordan, the White House, or Lewinsky about his story. Why? Because Starr was not only going to confront Lewinsky with the new tape his team had just recorded of her and Tripp as they met in a dining room at the Ritz-Carlton, Pentagon City (in Arlington); they were also going to try to get Lewinsky to wire herself and get Jordan and



maybe even the president on tape obstructing justice. Isikoff says he agreed to hold off in exchange for getting a full report on how the stings had gone. Bennett refuses to comment on any discussion he had with Isikoff, except to say that "what Isikoff knew put us in a difficult position."

Also on Thursday, Starr's deputies met in the afternoon with Deputy Attorney General Eric Holder to request that Attorney General Janet Reno expand Starr's authority beyond Whitewater to include charges of an attempt to cover up Lewinsky's affair with the president. Again, their hook to Whitewater was Jordan's supposed role, a role that was murky at best on the original Tripp tapes.

Now, according to Bennett and to a Justice Department official, the Starr people talked about their own tapes of Tripp and Lewinsky, though no tapes were played at the meeting with Holder.

According to the Justice Department source, while Starr deputy Bennett made much of Jordan's job hunt for Lewinsky, he failed to mention what he knew from the earlier Tripp tapes—that Jordan had begun offering that help at least a month before Lewinsky was subpoenaed in the Jones case. Bennett says he does not remember "if I mentioned that."

Bennett does confirm that he mentioned repeatedly that *Newsweek* was working on an article that would be public by Sunday. "This was meant as a way of explaining why we had to act fast," says a Justice Department participant. "But the way he said it and kept saying it, it also was clear to us that if we turned down the request, *Newsweek* would know about that, too. We had no choice."

Another reason that Reno was in a bind was that under the independent counsel law, Starr could have appealed a rundown to the mostly conservative three-judge panel that had appointed him in the first place. That probably would have meant that

PRESGATE

Starr would have gotten his jurisdiction after all, while Reno got a story in *Newsweek* saying she had rejected it.

On Friday afternoon, January 16, Reno approved the expansion of Starr's jurisdiction.

Also on Friday, Tripp met again with Lewinsky at the Ritz-Carlton in Arlington, where FBI agents and Starr deputies descended on the former intern. They stayed with her until late that night trying to get her—and later, her and her lawyer, William Ginsburg (who was conferring with them by telephone)—to agree to help them get Jordan and the president on tape in exchange for immunizing her from a perjury prosecution for having sworn in an affidavit in the Jones case that she and Clinton had not had a sexual relationship. No agreement was reached.

Starr Bogs *Newsweek*

That snag in dealing with Lewinsky forced Starr's people to beg Isikoff to hold off until Saturday before trying to call anyone whom his story would implicate. Any call by Isikoff to the White House or to Jordan asking about the former intern would kill any chance of Jordan or the president being stung by her. "You want to report what you know," Isikoff says. "But you don't want to influence what happens." Isikoff agreed to wait until Saturday (his deadline was Saturday evening), but admits, "This was making me crazy. How was I gonna reach Jordan on a Saturday?"

It was also not clear on Friday that *Newsweek* was going to run any story at all. "New York was sounding like they thought this wasn't enough," says Isikoff, referring to *Newsweek's* New York-based top editors.

"Friday night, Spike called and told me there were some problems," Goldberg recalls. "But he said it looked like they would go with it."

Soon after that call, Isikoff finally heard some of the original tapes. According to Lucianne and Jonah Goldberg and one source at *Newsweek* in a position to know, at 12:30 A.M. on Saturday, Tripp's new lawyer, Moody, showed up at the *Newsweek* offices with two tapes that he had selected because, he told the *Newsweek* staffers, they most pertained to Jordan and a possible cover-up.

"I had to fight with Moody until the last minute to let *Newsweek* hear those tapes," says Goldberg. "He just didn't get it." Moody says he "never played any tapes for *Newsweek*," but declined to comment on the account by the Goldbergs or the *Newsweek* source that he made the tapes available for them to play.

Lucianne Goldberg says that at her direction, Moody selected the tapes that would most implicate Jordan and the president in obstructing justice, because they contained the non-sex material that Isikoff said he needed to publish a story. Isikoff, along with Washington bureau chief Ann McDaniel, deputy bureau chief Evan Thomas, and investigative correspondent Daniel Klaidman, listened for four hours as Lewinsky talked and cried and complained about a man whom she called names like "the big creep," but who she clearly meant was the president. The sexual talk was explicit, and it did not seem contrived.

"We were all pretty convinced," says Thomas. "Within five or ten minutes it was clear to everybody that this was compelling stuff."

Nonetheless, Isikoff concedes that the material they had



hoped for about Jordan or the president being complicit in an obstruction of justice just wasn't there.

"What we didn't have here was Monica saying, 'Clinton told me to lie,'" says Isikoff. "In fact, there is one passage where Linda, knowing the tape is going, says, 'He knows you're going to lie; you've told him, haven't you?' She seems like she's trying to get Monica to say it. But Monica says no." That, concludes Isikoff, "made New York real queasy when we told them."

Unknown to Isikoff, while he was listening to the tapes, Tripp had been released by Starr's investigators so that she could go home. Waiting for her there were Jones's lawyers—who were scheduled to question President Clinton the next morning in a deposition. Starr would later tell me that he did not know why she was released from her extensive detouring at that particular time.

Thus, the president's criminal inquisitors, having just finished with Tripp, had now made it possible for his civil case opponents to be given ammunition with which to question the president in his sworn testimony—from which Starr, in turn, might then be able to extract evidence of criminal perjury.

And we now know that the next morning President Clinton was questioned as closely about Monica Lewinsky as he was about Paula Jones.

On Saturday morning Klaidman of *Newsweek* found out that Starr had gotten authorization from the Justice Department to expand his investigation to include Lewinsky. "That tipped me off the fence," says deputy Washington bureau chief Thomas. "Just that was a story."

Isikoff, Thomas, and Klaidman were now pushing New York to publish. Meantime, Starr's people again begged Isikoff to hold off, first for a few hours, then for another week.

"What followed," says Isikoff, "was an incredible seven-hour dialogue. It went back and forth. I couldn't believe we were still debating this when I've got to try to reach Vernon Jordan."

Spiked:

At about 5:00 p.m. *Newsweek* chairman and editor in chief Richard Smith decided to hold the story. Smith's decision, he says, was based on three factors: an uneasiness with what they had heard and not heard about Jordan on the tapes, their inability to question Lewinsky directly, and an inclination to take Starr up on his offer of waiting and not impeding the investigation while also getting a better story. "Hell, it's not like this was the Bay of Pigs," says Isikoff, who argued against delay. "We don't have any obligation to work with the government. This was as much a story about Starr as anything else. And we knew that part cold."

"We talked about just doing an item on the expanded investigation (without naming Lewinsky), but we thought we knew too much for that," says Smith. "It wouldn't have been leveling with our readers."

Goldberg says that she learned from Isikoff at about 6:00 that the story was killed. At 11:11 A.M. on Sunday, Internet gossip columnist Matt Drudge (who the prior summer had spilled the beans on his website when Isikoff's Willey story had been delayed) sent out a bulletin: *Newsweek* had spiked an Isikoff story about a presidential affair with an intern.

Drudge's report made Lewinsky radioactive. She could no longer be used to sting Jordan or the president, and the immunity negotiations her lawyer was having that night with Starr abruptly ended.

Who leaked to Drudge? Although Lucianne Goldberg concedes readily that she took a call from Drudge that night and confirmed everything that Drudge knew, she adamantly denies being his original source and offers an elaborate recitation of the circumstance and time of her conversation with Drudge that evening.

"Besides," she adds, "what Drudge reported wasn't really complete; there was nothing about the sting."

Which is true, but it's also a giveaway, because in fact Goldberg had no way of knowing about the planned sting of the president and Jordan, which means that she seems a likely source. Asked about that, Goldberg laughs and says, "I'm sticking to my story."

As for Drudge, he supplied a similarly detailed explanation of why his source was not Goldberg.

"It would make sense for my mom to have talked to Drudge," says Jonah Goldberg. "She really was mad that *Newsweek* was killing it and she didn't believe [*Newsweek*] would print it the next week. So, she may have been afraid to admit it because the leak seemed to blow up in Starr's face even though she had no way of knowing that at the time."

Actually, the leak did work for Linda Tripp and the Goldbergs. For it assured that the *Newsweek* story would be anything but buried.

Sunday Gossip:

At 10:30 Sunday morning, William Kristol, the editor and publisher of the conservative *Weekly Standard* (and Dan Quayle's former chief of staff), who is a regular panelist on ABC's Sunday morning show *This Week with Sam Donaldson & Coke Roberts*, became the first person to mention the intern scandal on any outlet beyond Drudge. Toward the end of the program, Kristol said: "The story in Washington this morning

Who leaked to Drudge? "It would make sense for my mom to have talked to Drudge," says Jonah Goldberg. For the leak did work for Tripp and the Goldbergs; it assured that the *Newsweek* story would be anything but buried.

is that *Newsweek* magazine was going to go with a big story based on tape-recorded conversations, which [involve] a woman who was a summer intern at the White House."

Former Clinton aide George Stephanopoulos, also an ABC pundit, interrupted and said, "And Bill, where did it come from—the Drudge Report?"

As Kristol began to answer, Sam Donaldson jumped in, with what would turn out to be one of the rare moments in the whole intern affair of a TV reporter exercising good on-air instincts. "I'm not an apologist for *Newsweek*," Donaldson said, drowning out Kristol with his trademark voice, "but if their editors decided they didn't have it cold enough to go with, I don't think we can here."

"I hadn't heard anything about Drudge or anything else about this story," Donaldson would later recall. "I just decided we shouldn't go on our air with a story that *Newsweek* had decided it couldn't go with."

But the story had now moved far beyond Drudge, and the race was on to get there first.

The principal contestants were Jackie Judd, a general assignment correspondent for ABC, and Susan Schmidt of *The Washington Post*, with *Time* and the *Los Angeles Times* also in the hunt. What Judd and Schmidt had in common with Isikoff was that they had been covering Whitewater—and Ken Starr and his deputies—for years, when almost everyone else was ignoring that beat. Schmidt recalls that the previous Friday she had



Monica Lewinsky:
To this day none of
the journalists who've
reported about her
have spoken to her.

PRESSGATE

"heard from sources in Starr's office something about Vernon Jordan and coaching a witness." The Drudge item, she says, gave her "more direction."

"By Tuesday mid-day, Sue Schmidt came to me with an outline of the story," recalls *Washington Post* executive editor Leonard Downie. "We still waited late into the afternoon and evening," he adds. "It wasn't anything we were missing as much as what would make us feel better. We have a high threshold on private lives around here."

Downie and the *Post's* top editors stayed through the evening, missing the deadline for the paper's first edition at about 9:00 because they still weren't comfortable. Then, says Downie, Peter Baker, Schmidt's reporting partner on this beat, "reached the wonderful Mr. Ginsburg, who gave us an on-the-record quote about the investigation, including the classic quote about the president either being a misogynist or Starr having ravaged Monica's life."

The article finally ran in the second edition, using the words "source" or "sources" 11 times.

Citing "sources" who could only be people in Starr's office, the article's fifth paragraph said that Lewinsky can be heard on Tripp's tapes describing "Clinton and Jordan directing her to testify falsely."

That is exactly the material that had been missing from the tapes that *Newsweek* heard, which, in part, had caused the magazine to hold its story, as Isakoff concedes. And, remember, Tripp's lawyer had selected what he said were the most incriminating tapes for *Newsweek* to hear that night.

Which means that this damning material was either on the new tapes that Tripp had just made of Lewinsky for Starr the prior week, or it is the Starr side's extreme spin on the tapes *Newsweek* heard.

This is not a minor point: The charge that Lewinsky had been instructed to lie was not only the linchpin of Starr's expanded jurisdiction, but would also be the nub of any impeachment action against the president—and the premise of all of the front-page stories and hours of talk-show dialogue that would follow that speculated about impeachment. That such charges would stem secondhand—from one person's talking on a tape about what other people had said to her—is weak enough. Weaker still is that the only tapes heard by any reporters clearly didn't say that. In fact, they seemed to say just the opposite. The tapes, if any, that *do* have Lewinsky claiming she had been told to lie were based on a script provided by prosecutors and not heard by any independent party to verify if Lewinsky had said so, or if she was led too far into saying it.

Have That Scotch:

Lanny Davis, then a White House counsel in charge of dealing with press inquiries related to the various investigations of the president, recalls that at about 9:00 that Tuesday night, January 20, he returned a call to the White House from Peter Baker of the *Post*: "I told him he was interrupting a good scotch. He said 'You're gonna need that scotch.' Then he laid it all out for me. It was breathtaking."

Davis drove back to the White House, where he and other top aides assembled in White House Counsel Charles Ruff's office and waited for a messenger to bring them the *Post* from its loading dock a few blocks away. By the time the *Post* came out on its website at 12:10 A.M., "all hell broke loose on my

pager," Davis recalls. "It was surreal. Everyone was calling, and meanwhile Clinton is right below us in the Oval [Office] with [Israeli Prime Minister Benjamin] Netanyahu."

Over at ABC, Jackie Judd's story was ready for the 11:10 P.M. *Nightline* broadcast, which meant she would have beaten the *Post*. But *Nightline* host Ted Koppel, who was in Cuba doing a special on the Pope's visit, decided to hold it rather than shoehorn it in at the last minute.

Later that night, Judd managed to get the story onto the ABC radio network (as well as its overnight television news show and its website) and then led with it on *Good Morning America* the next morning—which is what caused Lucianne Goldberg to whoop into the phone on January 21.

From that point, says Bob Woodward, the *Washington Post* reporter who teamed up with Carl Bernstein in Watergate, there was "a frenzy unlike anything you ever saw in Watergate... We need to remember that for the first night or nine months of Watergate, there were only six reporters working on it full time."

What follows is a log of the first—and most furious—three weeks of that frenzy. It should be read with one often-overlooked reality in mind: All of it—every bulletin, every hour of talk radio, even segment of cable news special, every Jay Leno joke, every website page, every Congressional pronouncement—would be based on a woman looking for a book deal who had surreptitiously taped some of her conversations with a 21-year-old "friend" whom none of the reporters or pundits had talked to.



DAY 1: Wednesday 1/21/98

The Speculators:

Jackie Judd's 7:00 A.M. *Good Morning America* report is a bombshell. Citing "a source," Judd says Lewinsky can be heard on a tape claiming the president told her to deny an affair and that Jordan "instructed her to lie." Again, those can't be the tapes Tripp made on her own, because *Newsweek* would have heard that.

Switching to the pundits, ABC's Stephanopoulos, the former Clinton aide, seconds a notion brought up five minutes earlier by Sam Donaldson, saying: "There's no question that ...

if [the allegations] are true . . . it could lead to impeachment proceedings." It has taken less than 10 minutes from the break-
ing of the story of an intern talking on the phone for the dis-
cussion to escalate to talk of impeachment.

At 7:30, the show's newscaster says that "two sources" have
told ABC's Jackie Judd that both Jordan and the president
instructed her to lie under oath." Asked later what happened
... that half hour to double her sources, Judd says: "I think I
was trying to be extra-careful the first time. We actually had a
lot of sources."

visit To A Museum, Then Payback Time:

For *The New York Times*, the intern story
gan the way Watergate had: *The Washington Post* had caught
the Paper of Record asleep.

"Drudge was just not something on our radar screens," one
Times Washington reporter recalls. And while some in the bureau
noticed Krustol's comment on *Thu Week*, they hadn't paid
... much attention to it, much less allowed it to mar the three-day
Martin Luther King Day weekend.

Worse, when the *Times* people awoke on Wednesday and
saw the front-page *Post* story or caught the news on *Good
Morning America*, there was little they could do to get an early
start on catching up. The office had arranged a special tour of
new exhibit of old *Times* front pages at Washington's
Oronoro Gallery of Art, and two reporters would later recall
that there was pressure on them to turn out in good numbers.
So until about 10:00 that morning, most of the *Times*'s talent
was on a museum tour.

Not Jeff Gerth. He skipped the tour.

In terms of being a sleuth, Gerth is more Isikoff than
Isikoff. Now 51, he has covered everything from organized
crime, to global business regulation, to campaign finance, to
food safety in his 23 years at the *Times*. And in 1992, he had
broken the first Whitewater story.

Now, recalls another *Times* reporter, Gerth got "hold of his
senior Starr people and played a real guilt trip on them. They'd
just made him look bad and he was Mr. Whitewater." (Gerth
now refuses to comment on his sources, except to say that "you
can imply what you want, but I always have multiple sources."
He adds: "I didn't feel bad about missing this because I was
never interested in touching the sex stories.")

Getting leaks from law enforcement officials—especially
information about prospective or actual grand jury proceedings,
where the leaks are illegal—is usually a cat-and-mouse process.
The prosecutors know they are doing something wrong, and
they worry about whom they can trust. You run a guess by
someone. They answer vaguely but encouragingly. You push a
little bit more, and they let on a bit more. Then you try some-
one else, again stretching what you think you know with a guess
or two to see if that person will confirm your suspicion by say-
ing something like, "You're not far off." Then you go back to the
first person for confirmation. It's almost never as easy as it seems
when a story is published or broadcast that says, "sources say."

But this morning, while he did not, he later asserted, simply
call one "magic phone number" and get it all. Gerth had an easier,
faster time of it. "By about midday, Jeff had a memo that was about
as comprehensive as you could imagine, which he kept supple-
menting," recalls Michael Oreskes, the *Times*'s Washington bureau
chief. Gerth freely shared his memo with everyone in the office.

The anchors are with the Pope in Havana but the headline
is Lewinsky, and the heart of all three reports features a
correspondent who, citing anonymous sources, has clearly
been given extensive information by Starr's office.

All Monica All The Time:

At 6:00 P.M. the MSNBC Internet news service,
which beginning at 11:00 A.M. had headlined the Lewinsky story
"A Presidential Denial," is now calling it "Crisis at the Top,"
with the sub-headline "Sex allegations threaten to consume
White House." Meantime, MSNBC's sister cable-TV channel is
talking about the intern allegations almost nonstop. For the next
100 days, the fledgling cable channel would become virtually all
Monica, all the time.

Newsweek Goes On-Line:

The *Post* and ABC stories (plus a front-
page in the *Los Angeles Times* that has almost as much infor-
mation as the *Post* have now made a joke out of the idea that
Isikoff's story can hold until next week. So, at about 7:00 P.M.,
Newsweek goes on-line.

Isikoff's furiously typed story loads up everything he
knows. What's notable is that he now doesn't mention what he
later says was a key exchange on the tapes he heard, the ques-
tion-and-answer that had caused his editors to hold the story:
the fact that on those tapes Lewinsky answers, "No," when
Tripp asks, "He [the president] knows you're going to lie.
You've told him, haven't you?"

Live From Havana:

Each of the three broadcast network news
anchors is live in Havana for the Pope's visit, but the headline
for each show is Lewinsky—and the heart of all three reports
features a correspondent who, citing anonymous sources, has
clearly been given extensive information by Starr's office.

Starr And Leaks:

On April 15, during a 90-minute interview with
Starr, I am reminded of the kind of old-world straight arrow
that he is. Starr is the opposite of slick—which in this case
means he doesn't lie when asked a straight, if unexpected, ques-
tion. After he expresses disappointment with my insistence that
our conversation not be off the record or on background, I ask
a series of questions not about his investigation, but about dis-
cussions he or his deputies might have had with reporters. I
make clear that these questions are based not only on the obvi-
ous fact that many of the stories about the investigation seem to
have only been able to have come from his office, but also on
what reporters or editors at six different news organizations
have told me and, in three cases, on documents I have seen
naming his office as a source for their reporting about the
Lewinsky allegations.

Details of his answers are reported below. As a general
matter, in response to an opening "Have you ever . . ." ques-
tion, Starr hesitates, then acknowledges that he has often

PRESSGATE

talked to various reporters without allowing his name to be used and that his prime deputy, Jackie Bennett, Jr., has been actively involved in "briefing" reporters, especially after the Lewinsky story broke. "I have talked with reporters on background on some occasions," he says, "but Jackie has been the primary person involved in that. He has spent much of his time talking to individual reporters."

Starr maintains that there was "nothing improper" about him and his deputies speaking with reporters "because we never discussed grand jury proceedings."

If there was nothing improper, why hadn't he or Bennett ever been quoted by name on the record?

"You'd have to ask Jackie," Starr replies.

Aren't these apparent leaks violations of the federal law commonly referred to as "rule 6-E" that prohibits prosecutors from revealing grand jury information?

"Well, it is definitely not grand jury information, if you are

"I have talked with reporters on background on some occasions," says Starr, "but Jackie [Bennett] has been the primary person involved in that. He has spent much of his time talking to individual reporters."

talking about what witnesses tell FBI agents or us before they testify before the grand jury or about related matters," he replies. "So, it's not 6-E."

In fact, there are court decisions (including one in early May from the Washington, D.C., federal appeals court with jurisdiction over this Starr grand jury) that have ruled explicitly that leaking information about prospective witnesses who might testify at a grand jury or about expected testimony or about negotiations regarding immunity for testimony or about the strategy of a grand jury proceeding all fall within the criminal prohibition. And Starr himself has been quoted on at least one occasion saying the same thing. On February 3, during one of his sidewalk press conferences, Starr refused to comment on the Lewinsky investigation's status. He couldn't talk, he said then on camera, "about the status of someone who might be a witness 'because' that goes to the heart of the grand jury process."

Moreover, whether or not the criminal law applies to these discussions between reporters and Starr and his deputies, it is clearly a violation of both Justice Department prosecutorial guidelines and the bar's ethical code for prosecutors to leak substantive information about pending investigations to the press.

What about that? I ask Starr. Was he conceding unethical but not illegal leaks?

Perhaps realizing that he has already conceded too much, Starr reverts to a rationalization so stunning that two days later I called his just-hired spokesman, Charles Bakaly, who sat in on much of the Starr interview, to make sure I heard it correctly. (Bakaly said that I had.)

"That would be true," Starr says, "except in the case of a situation where what we are doing is countering misinformation that is being spread about our investigation in order to discredit our office and our dedicated career prosecutors. . . . I think it is our obligation to counter that kind of misinformation, and it is our obligation to engender public confidence in the work

of this office. We have a duty to promote confidence in the work of this office."

In other words, Starr is claiming a free pass. For even assuming that his leaks are not illegal under 6-E—which, again, is a huge assumption—he's saying that they are not unethical either, because they are aimed at negating attacks and promoting confidence in the work of his office. Which, of course, could be said about any leak from any prosecutor that attempts to show that an investigation is making progress in going after the bad guys.

Asked two days after the Starr interview about this apparent loophole in the ethical prohibitions against leaks (again, even assuming they are not illegal), Starr's deputy, Bennett, says, "It is true that Ken's view is that . . . the public has a right to know about our work—to the extent that it does not violate legal requirements."

As for why it all of this is proper, Starr or he had not been quoted by name on the record countering all this misinformation, Bennett says. "I think I have been quoted on occasion."

A NEXUS check of all stories by major newspapers, magazines, and network news organizations concerning the first month of the Lewinsky story did not turn up any examples of Bennett being quoted by name talking about the progress or particulars of the investigation.

As for the comprehensive network reports about the Lewinsky investigation aired on the first night the story broke, Starr confirms in our interview that Bennett had spent "much of the day briefing the press." But he asserts again that Bennett had done nothing improper because his efforts were directed at countering the impression that Starr's office had improperly exceeded its jurisdiction or had mistreated Lewinsky. In none of these reports is Bennett quoted by name.

Asked if he had spoken to the network correspondents, or to Schmidt of the *For* or to Gerth of the *Times*, Bennett said, "Ken has said what he said . . . but I am not going to answer any questions about any particular conversations I had with any members of the press. . . . I don't think it's any of your business."

The reporters involved declined all comment on their sources—which, of course, is what they should do if they have promised their sources anonymity.

Applying The Pressure:

There is a purpose to these January 21 leaks beyond glorifying Starr and embarrassing the president. On this day, the day that the story breaks, Starr's people are again negotiating with Lewinsky's lawyer, William Ginsburg. "The more they can make me feel like they have a strong case without me," says Ginsburg, "the more pressure they figure I'll be under. And the same I guess is true for Vernon Jordan. They want him to flip, too."

The most laughably lapdog-like work comes from NBC's David Bloom who, throughout this story, would perform as a virtual stenographer for Starr. In a report lasting about two minutes, he uses the terms "sources say" five times and "law enforcement source" twice, ending ominously with this: "One law enforcement source put it this way: quote, 'We're going to dangle an indictment in front of her [Lewinsky] and see where that gets us.'" Bloom is clearly helping Starr fulfill his duty to "engender confidence in the work of" his office.

CBS's Dan Rather and the network's chief White House correspondent, Scott Peilev, are more circumspect. Rather

characterizes Clinton's comments on National Public Radio and *The NewsHour with Jim Lehrer* as "flat-out" denials, and he repeatedly emphasizes that none of the allegations have been proven.

At ABC, Sam Donaldson dissects what he sees as the tentativeness of the president's denials. Then, Jackie Judd, citing a "source who has heard the tapes" that Tripp made at the Ritz-Carlton under the Starr people's direction (which means at this point that only Starr's office can possibly be the source), says that Lewinsky can be heard on the tapes saying that "Jordan instructed her to lie under oath." The Starr people are clearly using one of the three reporters they know best and trust the most (the other two being Isikoff and the *Post's* Susan Schmidt) "to engender public confidence" in their work—and to step up the pressure on Lewinsky and Jordan.

When asked specifically about these three reporters during our interview, Starr acknowledges that his deputy, Bennett, has talked "extensively" to each. He then refers me to Bennett for details. Bennett refuses to comment on any talks he had had with the favored three. In none of their reports is Bennett ever quoted by name.

Feeding The Furnace:

Twenty years ago a story of this scope would have had a chance to catch a breath after the network evening newscasts. The next round of coverage would not come until the morning papers. Now it is only after the networks' evening news that the story achieves maximum velocity. It's then that talk television gets to use it to fill its need for the news that is gold—the type that can generate ratings with inexpensive talking heads rather than expensive reporters in the field.

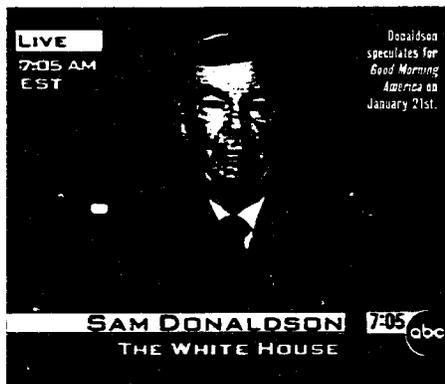
On CNN's *Larry King Live*, Evan Thomas of *Newsweek* leads off with his description of the Lewinsky tapes he had heard.

"Our PR department decided to do a blitz on television and get all of us out there," Thomas later explains. "It's something the newsweeklies always want to do *newsdays*—get mentioned and get noticed—and in this story we really wanted to be identified with it because it was our story. . . . You need to be careful about television," adds Thomas. "They try to lure you into saying more than you know, into saying something new. It's a trap, and after a few days I hated it."

Thomas tells a caller who asks how he can know the tapes are legitimate that one of the reasons that *Newsweek* did not run its story that weekend was that it could not authenticate the tapes. That's a new explanation, and, if sincere, it raises the question of why *Newsweek* went on-line today with its story; for the magazine certainly can't have authenticated the tapes since it heard them that Saturday morning because it did not get to keep copies.

Whatever these nits, King's show, which includes former Clinton aides James Carville and Dee Dee Myers as well as Ronald Reagan and George Bush press secretary Marlin Fitzwater, does provide a good, lively introduction to the story.

Geraldo Rivera, on CNBC's *Rivera Live*, provides quite a bit more. His guests include Paula Jones spokeswoman Susan Carpenter, McMillan; William Ginsburg, who for this hour is in his "I-can't-say-anything" mode; a *Newsweek* editor named Jon Meacham (apparently one of Thomas's TV-blitz squad



people), who had not heard the Lewinsky tapes but is on the show to talk about them anyway and does so happily; and one Dolly Browning, who has written a novel (agented by Lucianne Goldberg), which is described as a fictionalized version of her own long affair with Bill Clinton. Add three more lawyer-pundits and Rivera (who also has a law degree), and you have a kind of dinner party conversation from hell, in which any and all variety of truth, speculation, fiction, and ax-grinding are thrown together for the viewing public to sort out for themselves.

Over at MSNBC, we find *The Big Show with Keith Olbermann*, which features much the same mixture but with a more sarcastic and less intelligent host. The blurring *Newsweek* here is Howard Fineman, the magazine's chief political correspondent. According to Thomas and Isikoff, Fineman hadn't even known about the Lewinsky story until after Drudge leaked it, much less heard the tapes, a point Fineman later concedes to me.

"We have heard some of the tapes," Fineman begins, not telling his viewers how royal his use of "we" really is. After describing what everyone else by now has said is on them, he adds something new, revealing that "we" have "confirmed, apparently, the president's own voice on Monica Lewinsky's answering machine. We haven't heard that tape, but we know pretty authoritatively that apparently the president's voice is on her tape machine. . . . If true, how idiotic of the President of the United States," Fineman declares.

Nearly four months later, as of this writing, there is no confirmation of that tape, let alone confirmation that, if there is one, it incriminates the president in anything.

"Television is definitely more loose-goosey than print," Fineman later explains. "And I have loosened up myself, sometimes to my detriment. . . . and said things that were unfair or worse. . . . It's like you're doing your first draft with no layers of editors and no rewrites and it just goes out to millions of people."

Within a week, Fineman would become a regular on-air nighttime and weekend analyst for NBC, MSNBC, and

PRESSGATE

CNBC for an annual fee that he says is "in the ballpark" of \$65,000. That's about 40 percent of his day-job *Newsweek* salary for what he estimates to be 5 to 10 percent of the time he works for the magazine.

"We didn't let our reporters actively covering this go on television, except for Bob [Woodward], who essentially talked about Watergate," *The Washington Post's* Downie later says. "They're supposed to be reporters, not people giving spin or expressing a point of view. And if I were running *Time* or *Newsweek* I would have the same view."

"Len and I have a different view on that," counters *Newsweek* editor in chief Richard Smith, who also notes that "the people on our staff who were really in the know—Isikoff, McDaniel, Thomas—were among the most sober, thoughtful voices you heard. But you can find people in our organization or any organization that, given the voracious maw that electronic journalism has become, were tempted to say more than they knew."

Another Olbermann guest is his NBC colleague Tim Russert, the NBC Washington bureau chief and *Meet The Press* host. "One of his best friends told me today," says Russert, referring to the president, "if this is true, he has to get out of town. . . . Whether it will come to that, I don't know, and I don't think it's right or fair to be in the speculation game."

But talk TV is the speculation game. So, after taking a breath, Russert continues: "But I do not underestimate anything happening at this point. The next 48 to 72 hours are critical."

Olbermann's MSNBC show, which runs from 8:00 to 9:00 P.M. eastern time, debuted last October. A marquee newscaster at the ESPN cable sports network, Olbermann had been lured by big bucks and the promise of aggressive promotion that would put him and MSNBC—the Microsoft-NBC joint venture challenge to CNN—on the map. Now, as his show wraps on this first night of the scandal, his producers are already talking among themselves in the control room about using the intern scandal to birth a whole new show called *White House in Crisis*. That show would debut at 11:00 on February 3. And MSNBC officials would later make no bones of the fact that with that show, and with Olbermann's 8:00 P.M. show and, indeed, with the entirety of their talk-news daytime programming, they were hell-bent on using the intern scandal to do for their entire network what the Iranian hostage crisis had done for a half-hour ABC program called *Nightline* in 1979.

Indeed, MSNBC's use of the alleged intern scandal was endemic to how all 24-hour cable news networks and all talk radio had come to use such topics in the late 1990s. For these talk machines, the subject matter isn't simply a question of bumping circulation a bit for a day or a week, the way it is for traditional newspapers or magazines, or of boosting ratings for a part of a half-hour show or an hour magazine program the way it is for network television. Rather it's a matter of igniting a rocket under the entire revenue structure of the enterprise.

Thus, while the three broadcast networks' evening news ratings increased a total of about six percent in the week beginning on this day (January 21), MSNBC's average rating for its entire 24-hour day—a day when almost all of its coverage was devoted to the intern scandal—increased by 131 percent. Which meant that its revenue from advertising (which is the only revenue that varies from week to week in cable television) would also jump 131 percent if it could sustain that increase.



DAY 2: Thursday 1/22/98

Not Watergate:

The *Times* gets up off the mat with a comprehensive page-one report that leads with the president's denial—then details the material on the tapes. Most of the country's other newspapers use information from the *Times* and The Associated Press, which publishes a less complete story.

What all the stories have in common is that none is based on firsthand reporting. It is all the prosecutors' or other lawyers' ("sources") rendition of what witnesses or potential witnesses have said, are saying, or might say.

"The big difference between this and Watergate," says Bob Woodward is that in Watergate, Carl Bernstein and I went out and talked to people whom the prosecutors were ignoring or didn't know about. . . . In fact, that's what Watergate was all about—the government not doing its job when it came to prosecuting this case. . . . And we were able to look these people in the eye and decide if they were credible and get the nuances of what they were saying. . . . Here, the reporting is all about lawyers telling reporters what to believe and write."

Today Fights Back:

After being bested by Jackie Judd and *Good Morning America* yesterday, the *Today* show is fighting back. One advantage the show has is NBC's contract with *Newsweek's* Isikoff. Plus, they've snagged Drudge. But first we hear from Tim Russert, who declares: "I believe [impeachment] proceedings will begin on the Hill if there is not clarity given by the president over the next few weeks."

Then cohost Matt Lauer peppers Drudge with questions about his journalistic standards. Then he demands, "Are you at all concerned that you've made a mistake here?"

Drudge responds by hurling another sizzle ball: "Not at all. As a matter of fact, I have reported that there's a potential DNA trail that would tie Clinton to this young woman."

What Drudge is referring to is his report on the Web the day before about a semen-stained dress—which is something Lucianne Goldberg later told me she had heard about from Tripp and had passed on to Drudge and some other reporters.

Lauer asks for more: "You say Monica Lewinsky has a piece of clothing that might have the president's semen on it," he says. "What evidence do you have of that?"

"She has bragged . . . to Mrs. Tripp, who has told this to investigators, it's my understanding," says Drudge.

Next up is Isikoff (who has already appeared in the first half hour). Lauer can't let the dress story die. He demands to know if Isikoff "has heard anything" about the dress, or if he has any confirmation of its existence. Isikoff tries to brush him off: "I have not reported that, and I am not going to report that until I have evidence that it is, in fact, true."

Lauer doesn't let go. "You're not telling me whether you've ever heard it," he persists. "I've heard lots of wild things, as I am sure you have," Isikoff replies, clearly frustrated. "But you don't go on the air and blab them."

Asked later why he had given Drudge the opportunity to air *any* unconfirmed rumors live on national television, let alone pressed him about the most sordid one out there, Lauer says, "Because that story was out there. People were starting to talk about it." As for why he hectoring Isikoff about Drudge's dress rumor, Lauer says, "I was really just trying to get him to debunk it, not substantiate it. That's all I was doing."

In a moment rich enough in irony for a remake of the movie *Network*, Katie Couric follows Lauer's semen interviews about an hour later with a segment featuring a child psychologist explaining how to help children "make sense" of "the Clinton sex scandal."

Meanwhile, at ABC's *Good Morning America*, the pundits, including George Stephanopoulos and Sam Donaldson, bat around all manner of rumors and leaks—including a dress about which "there are all sorts of reports on the Internet" (Donaldson), sexually explicit tapes, and the fact that the president admitted to having "an affair" with Gennifer Flowers in his Paula Jones deposition (something also mentioned on NBC). The only guest who stays on the straight and narrow is legal analyst Jeffrey Toobin.

"I do have an m.o.," Toobin explains later. "These cases really come down to facts . . . and facts tend to be in short supply at the beginning of a story like this. So I just try to emphasize the variety of options based on the factual scenarios. . . . It's more about journalism than the law, because journalism [asks] about facts. . . . The problem," Toobin continues, "is that if, for example, you engage in a . . . long discussion about the legal elements of obstruction of justice, you are presupposing that there was an obstruction of some kind. . . . A discussion about the elements of impeachment presupposes that there's some relevance to an impeachment discussion. Worst of all," he concludes, "all of the Lewinsky discussions were based on the one hundred percent certainty that they had a sexual relationship, and there is pressure in that direction because it makes the discussion interesting."

Out Of Havana:

The network evening newscasts have left Cuba and the Pope behind; the anchors are now reporting from Washington (NBC and CBS) or New York (ABC).

"First we heard that Brokaw was going back," recalls CBS's Dan Rather. "Then we heard Jennings was . . . clearing out. . . I truly wanted to stay there and report on the Pope, but I got the distinct impression [from his bosses in New York] that if I stayed another minute, I would have been there all alone and without a job. I might as well have just stayed here forever with Castro."

Newsweek's Howard Fineman had never heard the tapes.

"We have heard some of the tapes," Fineman declares on television, not telling his viewers how royal his use of "we" really is.

CBS's Scoop:

For all of Rather's purported reluctance, CBS News now begins to emerge as a place for unexciting but important scoops. Tonight, White House correspondent Scott Pelley reports that the president's personal secretary has been subpoenaed to testify before the grand jury and that FBI agents had gone to her home last night. Pelley is also the first to report that Secret Service records indicate that Lewinsky visited the White House "as recently as last [December]."

The Biggest Day In The Clinton Presidency:

On the *Nightly News*, NBC White House correspondent Claire Shipman cites "mounting circumstantial evidence—messenger receipts [the ones created by Lucianne Goldberg's brother's family's courier service . . .] or reports of the president's voice on the answering machine of Lewinsky."

NBC caps its report with a discussion between Tom Brokaw and Tim Russert. "Tim, tomorrow [Friday, January 23] is the biggest day of the Clinton presidency," Brokaw declares. Whereupon Russert notes that the key event of the big day—Lewinsky's scheduled deposition in the Jones case—is now likely to be postponed, which it was.

Now, It's 24-48 Hours:

Russert is nothing if not consistent.

Yesterday he declared that the president had 48-72 hours to give the country a complete explanation. Now on NBC's sister network, CNBC, he tells Geraldo Rivera that the president "basically has the next 24 to 48 hours to . . . talk to the country, either through a press conference or a news interview and explain exactly what happened, what kind of relationship he had."

"I was only reporting the state of mind of people at the White House," Russert later contends. "Even the president, in those first few days, said he would provide answers sooner rather than later."

Brendan Sullivan To The Rescue:

Over at *Larry King Live*, *Newsweek's* Evan Thomas has apparently forgotten his own worry about reporters trying too hard to make news on television. "We understand Brendan Sullivan"—the famed Washington lawyer who represented Oliver North, among others, and is a partner at the firm where Clinton defense lawyer David Kendall is also a partner—"is masterminding a legal team" for the president, Thomas tells King. If so, as of this writing, he has never surfaced.

"That was just wrong," Thomas concedes later. "Brendan may have an informal role," he adds. "But how are you ever gonna prove it?"

PRESSGATE



Ken Baultler
January 3rd
tells Geraldo
about "four
other interns."

DAY 3: Friday 1/23/98

Generifer And Monica:

The Washington Post publishes a story headlined "Flowers Feels Vindicated By Report: Similarities Seen In Relationships." The story is based on the false leak that the president has now acknowledged an "affair" with Flowers, rather than the one encounter that it turns out the president did admit to in his deposition. (This exaggeration of what the president actually admitted to—not of what might have actually happened—will pollute most subsequent accounts of the deposition.) The paper also runs an account of the continued sparring between Starr's office and Lewinsky lawyer William Ginsburg. It's full of anonymous sources from Starr's side and the on-the-record Ginsburg on Lewinsky's side. "They leak and I patch," Ginsburg asserts later.

'Out There':

The St. Louis Post-Dispatch (which is a good barometer of mainstream city newspapers outside the media hothouses of Washington, New York, and Los Angeles) leads with a story, "From News Services," that—by definition in a situation like this—vacuums up every leak and rumor about the investigation and the Lewinsky-Starr negotiations.

Bob Woodward would later say that print had done a much better job with this story than television because "it has the time to check things out and get it right." He's generally right about papers with their own national reporters, like *The Washington Post*, the *Los Angeles Times*, the *Chicago Tribune*, *USA Today*, and *The New York Times*. But today, as on most days, the other papers—which now mostly use news services and wire reports to disseminate national news—gobble up the confirmed and unconfirmed from everywhere else, print and television.

It is not a pretty picture.

And it's a major manifestation of the virus that will afflict this story: A rumor or poorly sourced and unconfirmed leak aired or printed in one national medium ricochets around the country until it becomes part of the national consciousness. In short, once it's "out there," it's really out there.

The Missouri Interns:

Today's *Post-Dispatch* rumor bazaar is supplemented by the one kind of national story that most newspapers still produce with their own reporters and with parody-like uniqueness: the classic "local angle." In this case, it's a piece headlined "Missouri, Illinois Interns Are Fully Briefed on Details of

A rumor or poorly sourced and unconfirmed leak aired or printed in one national medium ricochets all over until it becomes part of the national consciousness. In short, once it's "out there," it's really out there.

Job." It's about how interns at the two state legislatures are cautioned about being wowed by "people of influence and charisma."

Inside Ken Starr's Mind:

On *The CBS Evening News with Dan Rather*, Phil Jones reports that "two sources familiar with the independent counsel's investigation tell CBS News that Kenneth Starr is, quote, 'absolutely convinced that Monica Lewinsky was telling the truth when she was recorded by her friend Linda Tripp.'"

The Dress:

ABC's Peter Jennings opens *World News Tonight* with this introduction: "Today, someone with specific knowledge of what it is that Monica Lewinsky says really took place between her and the president has been talking to ABC's Jackie Judd."

Following this buildup, Judd reports: "The source says Monica Lewinsky claims she would visit the White House for sex with Mr. Clinton in the early evening or early mornings on the weekends, when certain aides who would find her presence disturbing were not at the office. According to the source, Lewinsky says she saved, apparently as some kind of souvenir, a navy blue dress with the president's semen stain on it. If true, this could provide physical evidence of what really happened."

This source could be someone who has heard the tapes. It could even be Linda Tripp. But it's not. Although Judd would not comment on her source, Lucianne Goldberg told me that she herself is the source for this Jackie Judd report and for others that would follow. And she claims she heard all this from Linda Tripp, but is not sure that any of it is on a tape. (The *Newsmark* people who heard the tapes say it is not on what they heard.) In fact, Goldberg is not sure that Tripp said Lewinsky had talked about having saved a dress, as opposed to a dress simply having been stained. "I might have added the part about it being saved," Goldberg told me.

We can assume that Goldberg is telling the truth that she's the source because of what Judd reports next:

"ABC News has obtained documents that confirm that Lewinsky made efforts to stay in contact with the president after she left the White House. . . . These are bills," she continues, holding some papers up to the camera, "from a courier service which Lewinsky used at least seven times between October 7 and December 8."

Yes, the courier service—the one owned by Goldberg's brother's family. How else but from Goldberg could Judd have obtained those handy records?

Stop Us Before We Kill Again:

Every two or three days throughout the reporting of this alleged scandal, the press seems to stop, take a breath, and flagellate itself, as if to say to its audience, "Stop us

before we kill again." Much of it, including a piece by ABC's Cynthia McFadden and a special on CNN moderated by Jeff Greenfield, would be quite good. Much of it would be quite the opposite.

For example, minutes after Judd's scoop, Jennings introduces Tom Rosenzweig of the Pew Charitable Trusts' Project for Excellence in Journalism.

Jennings: "How do you think the media is doing, Tom?"
Rosenzweig: "So much of what we have seen in the last three days is speculation, rumor, innuendo."

Jennings: "Let me say . . . that I think the press has been pretty good on saying repeatedly these are allegations. Would you have us ignore them?"

Rosenzweig: "No. . . . But we have reporters go on and characterize secondhand what is on the tapes. . . . We've had reporters go on and say that the president has 48 hours to . . . put the scandal behind him."

Jennings: "Okay, Tom Rosenzweig, thanks very much. Critical of the press. Part of his job."

A Weakness For 24-Year-Olds:
Olbermann's *Big Show* at 8:00 features a guest who says, "Maybe if he stood . . . up there and said, 'I'm sorry. I have a weakness for 24-year-olds,' he might . . . survive it."
The expert: Watergate ex-con John Ehrlichman.

Four Other Interns

Geraldo Rivera hosts the usual melange, who trade all variety of wild theories. He calls them his "cast," and they include Jennifer Flowers, Paula Jones's lawyer, and some other lawyers, one of whom is Ann Coulter, a Rivera regular described as a conservative "constitutional law attorney." Asked by Rivera if she thinks it is "sleazy" that Lewinsky had been questioned for "eight to nine hours without an attorney present," Coulter counters matter-of-factly that it is not as bad as "the President of the United States using her to service him, along with four other interns."

What's curious about the Rivera show is the way it uses its NBC bloodline to combine this kind of rollicking garbage with the more serious contributions of the network's newscasters. Mixed in with the screaming and smearing from Coulter and the others are live reports from White House correspondent Shipman and even taped bites from Tom Brokaw.

It's a fascinating display of corporate synergy. Or perhaps it is a suicidal, long-term cheapening of a great brand name. True, the high-low mix helps ratings short-term; but if your business plan as a media organization is to be a cut above Drudge—and it has to be, because anyone can be Drudge—how can this be a good long-term business strategy?

Asked later if she minded being sandwiched in that night between Rivera, talking about the president's "alleged peccadilloes," and Coulter, talking about those "four other interns," Shipman says, "It's true that you get a different style on NBC with Brokaw than with Olbermann or Geraldo, but I think Geraldo does a pretty good job of separating out the rumor from the fact. He's very smart and I am not at all uncomfortable with his role at NBC."

Do the NBC and Brokaw brand names get hurt by mixing them with Geraldo? "Geraldo does what he does," Brokaw says. "He doesn't arrive in the guise of someone who

is going to be a traditional mainstream reporter. . . . And the public is very good at telling the difference. They have a good filter on this stuff."

"In the case of Claire or Tom, they're being reporters on *Nightly News* and being reporters on *Geraldo*," says NBC News president Andrew Lack later. "The shows have different flavors, but as long as they don't change their acts, I'm not concerned."



The video clip that CNN kept televising even after CNN's president said it was unfairly taken out of context.

DAY 4: Saturday 1/24/98

The Souvenir Dress

The Lucianne Goldberg—Jackie Judd semen dress story is spreading. The front page of the *New York Post* blazes, "Monica's Love Dress," with the declarative subhead "Ex-intern Kept Gown as Souvenir of Affair." The story quotes "sources."

"She Kept Sex Dress," echoes the *Daily News*.

Some papers across the country also run a United Press International wire service story, sent out the night before, saying that ABC has quoted an unnamed source saying, "Lewinsky saved a navy blue dress stained with President Clinton's semen." So now we have a source not saying that that is what Lewinsky says, but just plain stating it.

Lewinsky Not 'Squeezed'

Schmidt of *The Washington Post* does stenography for the prosecutors. Citing "sources close to Starr," she writes that Lewinsky's ten-hour session in Arlington with Starr's deputies and the FBI wasn't really a harrowing encounter, after all. It only took that long, Schmidt writes, because Lewinsky let it drag on.

This kind of leak from Starr's shop clearly falls under the category of what Starr later contends were "attempts by us to counter the spread of misinformation."

In fact, in our interview he even cites "correcting allegations about our mode of interrogating a particular witness" as an example of the kind of press briefing Bennett had undertaken. But as an attempt to affect public perception—and a potential jury's perception—it is also a clear violation of Justice Department guidelines and the lawyer's code of professional responsibility.

PRESSGATE

Resignation:

At 6:00 p.m. on this Saturday evening, CNN breaks into its regular programming with a bulletin. Wolf Blitzer, standing on the White House lawn, says, "Despite the president's public and carefully phrased public denials, several of his closest friends and advisers, both in and out of the government, now tell CNN that they believe he almost certainly did have a sexual relation[ship] with . . . Lewinsky, and they're talking among themselves about the possibility of a resignation. . . . Mark this moment—about 6:00 p.m. on Saturday, January 24—as the height of the frenzy."

"Every one of us senior advisers were sitting there . . . in the White House having a meeting to prepare to go on the Sunday talk shows," Clinton aide Paul Begala later recalls, "and we heard Wolf outside saying we were talking about resignation. . . . It was pure bullshit. And we all went out there and yelled at him."

But Blitzer had been careful to say he was referring to Clinton friends in and out of the government, not just to the White House group Begala is talking about. And with all the media tornadoes swirling about concerning other women, a smoking gun—semen dress, and the like, it should have been no surprise that some of the president's friends, especially those outside the immediate White House group working on fighting the storm, would at least "talk about" resignation.

The 'Come-Hither Look':

Just after the Blitzer resignation-talk story, CNN produces a 10- or 12-second video clip from its archives that shows the president embracing Lewinsky. She is in a crowd at a White House lawn reception. It's the first picture of the two of them together, and it will be aired hundreds of times in the weeks to follow, usually in slow motion.

"I thought that showing it once was okay, but that after that we should have shown it in context," CNN/US president Richard Kaplan says later. "Clinton always embraces people and he must have embraced a hundred people just that way at that event. . . . I told our people to show it in context."

So how come we still have only seen this isolated embrace? I ask Kaplan two months after it was first aired. "I don't know," he says. "I told them not to do it. I just don't know."

Tomorrow, in its new issue, *Newsweek* will make even more of the picture. Evan Thomas will pen an article that tells readers to "look closely at those video clips. There is a flirty girl in a beret, gazing a little too adoringly at the president—who in turn gives her a hug that is just a bit too familiar."

"There's nothing special about that embrace," Kaplan asserts. "What *Newsweek* wrote was just bullshit," Kaplan asserts.

"Any criticism of that is completely full of shit," counters Thomas. "All over Washington you could just feel people reacting to that picture. She had that come-hither look."

Barings Heaven:

According to MSNBC communications director Maria Baraglia, the fledgling cable network scores its highest ever full-day rating (outside of its Princess Diana coverage) today. By her estimate, "ninety-five percent of our coverage was the scandal." The stars are *Newsweek* pundit Isikoff and Jonathan Alter, who has a contract with NBC and its cable networks to produce pieces and provide commentary.

TIME

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DAY 5: Sunday 1.25.98

Special Assistant to the President for . . . ???

At 6:00 a.m., *Time* magazine director of public affairs Diana Pearson reports for work. Pearson, who had recently been lured away from *Newsweek* is one of a new breed of in-house magazine marketing people. Her job: to get *Time* mentioned. Her main tool: the press release she finishes at dawn every Sunday morning that touts the issue that went to press late the night before. She then faxes it to newspapers and television networks, making sure that it reaches the TV people in time to be talked about on the Sunday shows.

This morning she is working with what *Time* managing editor Walter Isaacson later tells me "is our crash effort to catch up to *Newsweek*."

She reads through *Time's* piece and decides, as she later puts it, that "the most catchy item, and one thing we had that seemed to be new," is an unourced claim buried in *Time's* exhaustive report, in which Lewinsky reportedly told Tripp that if she ever moved back to the White House from the Pentagon, she would be "Special Assistant to the President for blow jobs." So, she makes it the headline of her press release.

"I have never seen this," Isaacson says when asked about this press release five weeks later. "But I have heard about it, and can tell you that that should not have been the headline. . . . We've now taken careful steps," he adds, "to make sure that all press releases are cleared by a top editorial person."

Five weeks after she penned the release, Pearson says that "in retrospect it probably wasn't representative of the story." She also says that "there has been no change in the press release procedure. No one sees them after I do them Sunday morning."

Exhaustive, But ...:

Time's package of stories is, indeed, not well presented by that cawdry press release. Fabulously written, particularly the main story by senior editor Nancy Gibbs, it sizzles questions from all sides and touches all bases—from Gen Starr's tactics, to Vernon Jordan's role, to Lewinsky's bio, to Linda Tripp's motives, to the relevant legal issues. It is all done in a better, more understandable form than any other publication, including, ironically, *Newsweek*, which still has so much to report from the tapes that its package seems overwhelmed and disorganized.

"You can cover a lot of sins and reporting gaps with Nancy Gibbs," *Time* Inc. editor in chief Norman Pearlstine explains later.

"A role of a newsworthy," continues Pearlstine, in what many of his more aggressive reporters would view as an obvious rationalization, "usually can't be to make news the way *Newsweek* did... The more traditional role is that of synthesis, analysis, and writing. And for that I'll take a Nancy Gibbs over any investigative reporter in America... Remember," he adds, "that in the beginning [*Time* founder] Henry Luce didn't even think we needed reporters, just writers who could synthesize what others were reporting... which for this story in particular is what I think readers really needed."

True enough. But one could argue that, instead of a filter, *Time* applied a shovel to reporting what was "out there" already.

About five weeks after the issue appeared, I asked Pearlstine to read the following lines of Gibbs's story:

"Monica Lewinsky's story was so cawdry, and so devastating, it was hard to know which was harder to believe: that she would make up such a story, or that it actually might have happened. Without proof, both possibilities were left to squirm side by side... As each new tape surfaced, each new detail arose, of Secret Service logs showing late-night visits when Hillary was out of town; of presents sent by courier; of a dark dress saved as a souvenir, spattered with the president's DNA, the American public began stripping Bill Clinton of the benefits of the doubt."

Didn't that last sentence, for all its opening qualifiers, simply throw in a whole bunch of unproved allegations unfairly? I asked Pearlstine. "Yes, I do have a problem with it. It seems to have just taken everything out there and treated it as fact," he said, though he added that he wanted to confer with those who had worked on the story and get back to me.

Three days later, Pearlstine sent a letter attaching a longer letter from *Time* managing editor Walter Isaacson defending the paragraphs. Pearlstine said the Isaacson letter made him more comfortable than he had been when we spoke. Isaacson's letter, citing the qualifiers that preceded that final sentence, argued that "even in hindsight, I do not think we could have stated more clearly that these allegations which were... widely reported but also confirmed to us by investigators... were not proven and were part of a murky tale."

Of course what was "confirmed by us" were only the unourced allegations by investigators. But Isaacson is right: The real problem is the swiding allegations and rumors, not *Time's* performance in summarizing them. And Isaacson's qualifiers in talking about them were a lot stronger than most.

"I thought that showing it once was okay, but after that we should have shown it in context," CNN/BS president Richard Kaplan says later. "Clinton always embraces people...he must have embraced 100 people just that way at that event."

Softening Starr's Image:

Susan Schmidt of *The Washington Post* begins this Sunday with another softening of Ken Starr's image. "[A] source close to the prosecutor insisted he never intended to overshadow on Jordan or Clinton," Schmidt reports.

Anguished Linda:

On the Sunday Today show, talkoff—now openly engaged in punditry and teasing how "genuine" the taped conversations seem with a certainty that he would never be allowed to assert in print—refers to an anguished Monica Lewinsky being heard on *Newsweek's* newly released tape excerpts, along with "a similarly anguished Linda Tripp."

It's 60-60 At Best:

Next up on the Sunday Today show is Tim Russert, who takes time out from preparing for *Meet The Press* to tell host Jack Ford that "one [friend] described [President Clinton] as near Houdini-like in his ability to escape these kind of scandals and crises. But they realize that it's 60-60 at best."

Meet The Drudge:

On his own show, Russert announces that among his *Meet The Press* guests is Matt Drudge.

Drudge seizes his moment. When Russert asks about reports on the tapes of the president and other women, Drudge declares, "There is talk all over this town [that] another White House staffer is going to come out from behind the curtains this week... [T]here are hundreds—hundreds, according to Miss Lewinsky, quoting Clinton." At a later point, Drudge adds that if the Clinton side keeps denying the charges, "this upcoming week is going to be one of the worst weeks in the history of this country."

"Our Round Table is an op-ed page," Russert explains later. "And Matt Drudge was a big player—the big player—in breaking this story... We can pretend that the seven or ten million Americans who were logging on to him don't have the right to see him, but I don't agree."

The Witness:

On ABC's *This Week with Sam Donaldson* & *Cokie Roberts* (where the alleged scandal got its first airing a week ago), ABC's Jackie Judd has what Cokie Roberts announces are "new revelations in the alleged affair."

Judd then declares: "ABC News has learned that Ken Starr's investigation has moved well beyond Monica Lewinsky's claims and taped conversations that she had an affair with President Clinton. Several sources have told us that in the spring of 1996, the president and Lewinsky were caught in an intimate encounter in a private area of the White House. It is not clear whether the

PRESSGATE

witnesses were Secret Service agents or White House staff."

There are four things you need to know about that paragraph:
 1. *This report surfaces at the time that Starr's people are putting the most pressure on Ginsburg and his clients to have Lewinsky testify that she had an affair with the president and that he pressured her to lie about it.* "With leaks like that, they were just trying to scare me into thinking they had a smoking gun and didn't need Monica," Ginsburg asserts later. As if to make sure that the point isn't lost on Ginsburg, Judd's report concludes this way: "This development . . . underscores how Ken Starr is collecting evidence and witnesses to build a case against the president—a case that would not hinge entirely on the word of Monica Lewinsky."

2. *On the night before (Saturday, January 24) ABC had televised a one-hour special on the alleged scandal, and, according to anchor Peter Jennings, Judd had wanted to air her report then. But, says Jennings, "I wanted to hold it . . . I was just not comfortable with the sourcing."*

"Our anchor and White House reporter...say here's something that we don't know is true but [we'll] tell you anyway...so we can say we reported it just in case it turns out to be true," says a disgusted NBC reporter. "That's outrageous."

Asked later what happened between late Saturday night and early Sunday morning to make the story airworthy, Jennings says, "I wasn't there on Sunday, but I am told that Jackie worked on it more and was happy with the sourcing by Sunday....She is a fabulous reporter, and I have no reason to doubt her....She plays by the rules and her sourcing is always great."

Judd later explains that "there was no start or stopping in this news cycle. So, yes, between Saturday night and Sunday there were new sources."

3. *What can "several" sources mean?* Webster's dictionary defines several as "more than two but fewer than many." Didn't Judd even know how many sources she had? Can there be any excuse for this imprecision other than that this was a figure of speech? "To me," Judd later explains, "it usually means a minimum of three. . . . I know it was at least three. Of course, I knew how many it was at the time, but I didn't think I needed to specify."

4. *As of this writing, nearly four months after Judd's ABC "scoop," there is no sign of these independent witnesses.*

Does ABC still think the story was right? I later ask Jennings. "We have not yet retracted it," he says, "and I am still happy she's had no reason to think we should retract it....Overall, ABC has done a fabulous job. Our reporting on this has been exemplary, and I challenge anyone to find where it hasn't been."

"We have not had to retract a single thing," echoes Judd. "I still think there might be a potential witness," she adds.

Might be? A potential witness?

"Jackie Judd is a first-class reporter; she's no crackpot," says Richard Kaplan, who is president of CNN but until last year was a top news executive at ABC and used to supervise Judd. It's an assessment echoed by Judd's current colleagues, too. But a first-class reporter needs an editor—a questioner, someone who slows up on the accelerator at exactly the time that the

reporter becomes certain that full speed ahead is the only speed.

This is especially true if the reporter is aggressive and has been covering a prosecutorial beat too long. For example, reporters who make their careers covering organized crime can become so inured to the badness of their targets and to the righteousness of the prosecutors on the other side that, after a while, some believe almost anything the prosecutors tell them. There is an almost complete suspension of the skepticism that had made them want to be reporters in the first place.

That's what has happened to Jackie Judd this morning. And apparently there was no editor there to stop her. It was as if in the fabled scenes in the Watergate movie, *All The President's Men*, when Jason Robards, playing *Washington Post* executive editor Ben Bradlee, tells his "boys," Woodward and Bernstein, that they "need more," they shrug the old man off and take their stuff to the printing press.

And as with those organized crime reporters, it may be that Judd—and Schmidt and Isikoff, too—are right *in general* about President Clinton's allegiance to his marriage vows. Ditto Ken Starr. The issue here, though, is whether they're right about this particular allegation and are treating the president fairly in considering it. In short, whether there turns out to be a witness or not, how can Judd defend a January story *declaring* that there were witnesses by saying four months later that "there still might be a potential witness?"

The Witness As Predicate

Now that Judd's scoop has been aired, Sam Donaldson uses it as the predicate for much of his questioning of guests on *This Week*. They include Clinton aide Paul Begala, who attacks it as an unsubstantiated leak, and House Judiciary Committee Chairman Henry Hyde, who would preside over any initial impeachment hearings.

Donaldson begins with Hyde by saying, "Corroborating witnesses have been discovered . . . Mr. Chairman, what do you think of that?"

Hyde doesn't bite. "It's an allegation," he says. "We don't have any proof of it yet."

In their closing roundtable discussion, Donaldson tells co-anchor Cokie Roberts, "If he's not telling the truth, I think his presidency is numbered in days. . . . Mr. Clinton, if he's not telling the truth and the evidence shows that, will resign, perhaps this week."

"You have Sam Donaldson saying it's a matter of days, and Tim Russert talking about '12 hours—it's kinda crazy,'" Bob Woodward says later. "They seem to forget that it was April of 1974 when the tapes came out with Nixon saying, 'I want you to lie,' and it still took four months."

Three months later, Donaldson defends his prediction, saying, "I said . . . 'if there is evidence,' and I thought evidence would be presented before now. And I clearly meant evidence that is persuasive."

Batching Up The Story

At the end of his show, Donaldson takes Judd's report a step further. Instead of Judd's "several sources have told us" introduction, Donaldson closes the show by declaring that "corroborating witnesses have been found who caught the president and Miss Lewinsky in an intimate act in the White House."

"Someone in the control room asked me to summarize Jackie's report." Donaldson explains later. "And one of the dangers of an ad-lib situation is that you never say it as precisely as you would like." As for the bona fides of the story three months later, Donaldson says, "All I can say is that we believed it was accurate, but people changed their minds about what they would say."

Four Sources:

By about 3:00 Sunday afternoon, *The New York Times* is drafting its own story about witnesses interrupting the president and Lewinsky. "When I saw the Judd report on ABC, I recognized it as a story we were working on," *Times* Washington bureau chief Michael Oreskes later recalls. "By the time I came in that afternoon, we had four sources. And we were preparing to lead the *Times* with it the next morning."

Bulletin:

At 4:42 eastern time, Tom Brokaw and Claire Shipman of NBC break into pre-Super Bowl programming with the following bulletin:

Brokaw: "There's an unconfirmed report that, at some point, someone caught the president and Ms. Lewinsky in an intimate moment. What do you know about that?"

Shipman: "Well, sources in Ken Starr's office tell us that they are investigating that possibility but that they haven't confirmed it."

"Our anchor and White House reporter come on the air and say, here's something that we don't know is true but we just thought we'd tell you anyway just for the hell of it, so we can say we reported it just in case it turns out to be true," a disgruntled NBC reporter says later. "That's outrageous."

Asked three months later why he aired that kind of "bulletin," Brokaw says, "That's a good question. I guess it was because of ABC's report. Our only rationale could be that it's out there, so let's talk about it.... But in retrospect we shouldn't have done it."

Of course, what Shipman did confirm in that report was the commission of one certain felony, though not one involving the president: The leak of material from Starr's office pertaining to a grand jury investigation. For she does tell us that her report comes from "sources in Ken Starr's office."

In our later interview, when asked about Shipman's report, Starr refers me to Bennett, who, again, refused to discuss any conversations with specific reporters.

Story Killed:

At about 8:00, the *Times* kills its witness story. According to Oreskes, reporters Stephen Labaton and John Broder "came in to me and said, 'guess what? We don't have it.' It turns out that they had felt uneasy, and when they tracked back our four sources [Broder and Labaton], concluded that they were only telling them what they'd all heard from the same person—who did not know it first-hand anyway."

"Sometimes, especially in this thing, the story you're proudest of is the story you don't run," Oreskes adds. "We were under enormous pressure on this one. . . . People were beating us. But sometimes you just have to sit there and take it."

Pulling Back:

By the time ABC airs its evening news at 6:30, Jackie Judd is pulling back. In the morning, "several sources" had told her the president and Lewinsky were caught in the act. Now we hear from her only that "Starr is investigating claims" that a witness caught them in the act.

The New York Post's version of Jackie Judd's "scoop."

DAY 6: Monday 1/25/98

Caught in The Act:

Picking up on Judd's "scoop," both the *Daily News* and *Post* in New York scream. "Caught In The Act" across their front pages this morning. Meanwhile, the *St. Louis Post-Dispatch*, in a story bylined "From News Services," reports (as do other newspapers using similar wire services) that "ABC News reported that the president and Lewinsky were caught in an intimate encounter."

'All This Stuff Floating Around':

One of the stranger pick-ups of Judd's witness story comes from the *Chicago Tribune*, a paper "shut out of getting our own scoops from Starr because we never invested in having our people cover him on 'Whitewater,'" according to Washington bureau chief James Warren.

The *Tribune* reports what ABC reported, then says that it could not confirm the story independently: "I was against using it, but agreed to this as a compromise," Warren explains later.

Tribune associate managing editor for foreign and national news George de Lama says later: "We figured that our readers had seen it and had access to it. So we had to acknowledge that it existed, and we wanted to say we could not confirm it."

PRESSGATE

It is indeed a dilemma. Should a story become a news item that has to be repeated and talked about simply because it is broadcast the first time? Or should Chicago newspaper readers be shielded from it?

"In retrospect," de Lara later concedes, "I wish we had not published it. . . . It soon became clear to us that there's gonna be all kinds of stuff out there floating around and we should just publish what we know independently."

Which the *Tribune* later did, admirably, with a scoop interview of press secretary Mike McCurry musing about the possibility that the truth of the president's relationship with Lewinsky is "complicated," and with a story about money going to a legal defense fund for Paula Jones being used by Jones personally.

The "Secret Service" witness story seems to be a one-source story from a fifth-hand source. DiGenova (1) heard his wife (2) talking to a friend (3) of someone (4) who had talked to someone (5) who said he'd seen Lewinsky with Clinton.

Desperate Times:

Again, *Newsweek's* Evan Thomas has forgotten his own admonition about reporters mouthing off on television. On *Good Morning America* to promote *Newsweek's* new issue, he is asked, "Do the [president's] advisers think that the American people are going to draw some sort of distinction between sexual acts?" To which Thomas replies, as if he knows, "Desperate times call for desperate measures."

More Pressure On Lewinsky:

On the *NBC Nightly News*, David Bloom, with his ever-helpful "sources," puts more pressure on Lewinsky and Ginsburg. "[S]ources also caution that if no deal is struck tonight, [Lewinsky] could be hauled before a . . . grand jury . . . as early as tomorrow." Four months later, there would still be no deal and no Lewinsky testimony.

Monica At The Gates:

On CBS's evening newscast, Scott Peley reports that "sources" tell him that on January 3, Lewinsky was "denied entry at the [White House] gate" and "threw a fit, screaming, 'Don't you know who I am?'" It's a report that doesn't get picked up by the rest of the media, despite its apparent news value: if true, it would mean that during this exact week that the president was trying to get Lewinsky to participate in a cover-up, she was being turned away at the White House. But three months later Peley maintains, "I know this story was true."

This Just In: A Seventh-Hand Story:

Larry King Live seems to be going well for the president. This is the night of the day when the president forcefully denied having had sex with "that woman, Miss Lewinsky." Former campaign aide Mandy Grunwald and the Reverend Jesse Jackson (plus the ubiquitous Evan Thomas, Republican politico Ed Rollins, and former *Washington Post* executive editor Ben Bradlee) are engaged in a balanced, calm

discussion for most of the show. Then, with a few minutes left, King returns from a commercial break with a bulletin:

Panel, this just in from Associated Press, Washington: A Secret Service agent is reportedly ready to testify that he saw President Clinton and former White House intern Monica Lewinsky in a compromising position. *The Dallas Morning News* reports tonight (on its website) that it has talked to an unidentified lawyer familiar with the negotiations between the agent and the office of . . . Ken Starr. The paper quotes the lawyer as saying the agent is, quote, 'now a government witness,' end quote."

Reread that paragraph. At best, it's a fourth-hand report (though, as we'll see, it's actually seventh-hand). The Associated Press (1) is quoting *The Dallas Morning News* (2) as quoting an anonymous lawyer-source (3) as saying that a witness (4) will say something. Yet it punctures the "maybe-Clinton-will-survive" tone of the rest of the *King* show—as it does the remainder of Geraldo Rivera's show on CNBC, where he introduces the AP report as follows: "Uh-oh, hold it. Oh, hold it. Hold it, hold it, hold it. Bulletin. Bulletin. Bulletin. Associated Press, three minutes ago. . . ."

Ninety minutes later, *The Dallas Morning News* pulls the story, because, the *News* would later explain, its source called in to say they had gotten it wrong.

"You get handed something, you read it," Larry King says later. "I didn't have to, but I kind of felt compelled to. . . . It wasn't the *New York Post*. It was the AP and *The Dallas Morning News*. It's a dilemma of live television. What do you do? You're at the mercy of what's handed to you."

CNN president Richard Kaplan says later that he had been asked earlier in the evening by CNN producers who had heard about the possible Dallas story whether they should use it if the *Morning News* indeed published it. He had said no. "But then Tom Johnson"—CNN's chairman and Kaplan's boss—"called into the control room." Kaplan says, "Tom knew these Dallas people well and he said they were reliable."

Johnson says that his go-ahead for CNN to report the *Dallas Morning News* story came only "after some producer just ripped it off the wire and had Larry read it. I then told them it was okay to do it on the ten o'clock news show, too." Still, Johnson confirms that "it's my fault. I called around to the *Morning News* people and to AP people, and they assured me on this story. . . . The *Morning News* people told me the source, who was some lawyer. . . . But I'm the one who made the decision."

Associated Press Washington bureau chief Jonathan Wollman explains later that AP uses its own judgment in deciding which stories from other news organizations to publish on its wire. He also notes that, soon after his organization filed the report that Larry King read, "we added something from our own people quoting Secret Service agents as being skeptical of the *Morning News* story. Then we added something from the White House disputing the story."

In fact, this story was a leak from a Washington lawyer named Joseph diGenova. He and his wife, Victoria Toensig, are former federal prosecutors who often appear on talk TV, defending Starr and making the case for the president's guilt.

According to Toensig, she had been approached by a "friend of someone who is a former worker in the White House." (Toensig will not say if the person's friend was a Secret Service agent or a White House steward.) The person who contacted

Toensig told Toensig that this former White House employee had been told by a coworker at the White House that the coworker had, says Toensig, "seen the president and Lewinsky in a compromising position." Toensig was asked by the friend whether she might be willing to represent this secondhand witness if this person decided to go to Starr and talk about what the alleged firsthand witness (the coworker) had said.

DiGenova had overheard his wife discussing this possibility with this friend of the secondhand witness. Then, according to diGenova, after he had heard Jackie Judd's report of a witness on Sunday, he "mentioned" to *Dallas Morning News* reporter David Jackson that he'd "heard the same story that Judd had broadcast." Without telling Jackson, diGenova was thinking about what he had heard his wife discussing. However, by the time diGenova had mentioned this to Jackson, unbeknownst to him, the person who had approached his wife on behalf of this secondhand witness had broken off the discussions, and the secondhand witness had not come forward. According to Toensig, when Jackson called her on Monday and asked her about the story, "I told him, 'If Joe [her husband] told you that, he's wrong. Do not go with that story.' But I guess he didn't believe me."

According to Toensig, before her talks with the friend of the possible secondhand witness had broken off, she had mentioned the possibility of the witness to people in Starr's office—which means that when Jackson of the *Morning News* called Starr's office to get a second-source "confirmation," his second source was, in fact, no second source at all. It was just someone playing back diGenova's now-inoperative story, which diGenova's wife had tried to shoot down.

"When I saw Geraldo read the bulletin," Toensig recalls, "I figured they must have gotten it from someone else—not Joe and certainly not me. Then I got a call from [the *Morning News*] later that night and Jackson asked me to tell him again that he was right... and I immediately said, 'I told you you were wrong earlier and not to go with it.'"

"This was a single-source story from me," diGenova concludes. "I thought they'd check it; all I did was give them a vague tip of what I had heard Vicki talking about on the phone." Jackson of *The Dallas Morning News* declines to comment on his conversations with diGenova or his sources for the story.

In short, this story of a "Secret Service" witness seems to have been a one-source story from a fifth-hand source: DiGenova (1) heard his wife (2) talking to a friend (3) of someone (4) who had talked to someone (5) who said he'd seen Lewinsky with Clinton. That makes CNN's report a seventh-hand story, because we have to add *The Dallas Morning News* and *The Associated Press* to the chain before we get to *Larry King*.

"As a result of the *Morning News* thing," CNN's president of global gathering and international networks, Eason Jordan, says later. "We instituted a new policy. At least two senior executives here have to give the okay before we go with anyone else's reporting on anything having to do with this story.... We've decided that it's a total cop-out to go with someone else's stuff and just attribute it to them. Once you put it on your air it's your responsibility."

"I can't tell you how much pressure we were under from our own bosses to report something like the *Morning News* reported," CBS's Dan Rather remembers. "That rumor was all over the place. But we just couldn't nail it.... It was a third-

hand source and maybe a fourth-hand source."

"Without getting into details," adds Scott Pelley of CBS, "I can tell you that we just didn't like the sourcing. It was too suspect."

According to a journalist at ABC, and to two reporters working on the story that day at rival news organizations, Jackie Judd's sources for her report about a White House witness the night before were also people in Starr's office who had heard about the supposed secondhand witness, probably from Toensig. Which would make hers a fifth-hand report, too.

Jennings disputes this. "I have no doubt that we were on to a different story," he says, "because I know who our sources are." Could his sources, whom he declined to name, have been people who had simply talked to the Dallas paper's sources? "I'm fully satisfied that they weren't," he says.

Judd refuses all comment about "anything having to do with sources."

A Good Day On The Web:

At MSNBC's ambitious website there have been 834,000 visits today, far more than for any other day, including the days following the death of Princess Diana.



DAY 7: Tuesday 1/27/98

The Retracted Story Lives:

The *St. Louis Post-Dispatch* reports this morning that "*The Dallas Morning News* reported Monday night that a Secret Service agent was prepared to testify that he saw Clinton and Lewinsky in a compromising situation."

Goodbye:

Tonight is the night of the president's State of the Union message, and in *The Washington Post*, James Glassman writes a column saying that the president should say he's sorry and that he's resigning.

Reckless idiot:

New York Times op-ed foreign affairs columnist Thomas Friedman writes about his feeling of personal betrayal: "I knew he was a charming rogue with an appealing agenda, but I didn't think he was a reckless idiot with an appealing agenda."

PRESSGATE

Four Options:

On the Microsoft-owned and Michael Kinsley-edited *Slate* web magazine, Jacob Weisberg presents four options for the president with their chances of success: Brazen It Out: 20 percent; Confession: 5 percent; Full Confession: 15 percent; and Wag the Dog: 2 percent.

Circulation Up:

The Washington Post reports that *USA Today* printed 20 percent more copies than usual for its weekend edition, that CNN's rating are up about 40 percent, and that *Time* added 100,000 copies to its usual newsstand distribution.

Let's Not Ask About Any Rumors:

The event of the day is Hillary Clinton's morning appearance on the *Today* show, forcefully defending her husband. Matt Lauer interviews her, and does a terrific job.

"We found out over the weekend that she was going to go through with [the long-scheduled interview]," Lauer says. "On Monday afternoon I sat down with [various producers and NBC News president] Andy Lack to run through it for about two or three hours. . . . It wasn't so much about questions as about tone. . . . We talked about asking her about whether the president defines oral sex as sexual relations, but we decided that we were not going to ask the First Lady of the United States a question like that.

"Another thing we decided," Lauer says, "was that we were not going to ask a single question based on rumor or speculation."

Why was that standard used for Mrs. Clinton, but for no one else?

"Because we knew we'd run into a dead end because she'd say, 'that's based on rumor or a sealed document,' or something like that, and I'm not going to talk about it."

If only other *Today* guests had that discipline.



144
HILLARY CONTENT EVALUATOR 1/98

An editorial that the paper's own editors should read.

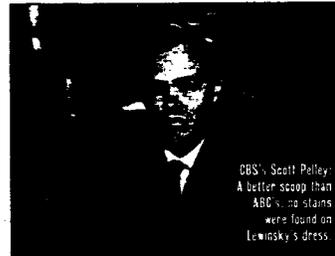
DAY 8: Wednesday 1/28/98

Do As We Say, Not As We Do:

The *St. Louis Post-Dispatch* greets its readers with an editorial that stams Jackie Judd's ABC report about a

"witness" and the *Dallas Morning News* report about a "Secret Service witness" as examples of "rumor being reported as news. . . . The media would be best to stick with traditional conventions that require firsthand information and confirmation from multiple sources," says the paper.

Not mentioned is the fact that the *Post-Dispatch* had itself reported both stories in its own news columns. Why not? William Freivogel, who wrote the editorial for the *Post-Dispatch*, explains: "We don't in general criticize our own paper. . . . This was meant as a general commentary."



CBS's Scott Pelley: A better scoop than ABC's, no stains were found on Lewinsky's dress.

DAY 9: Thursday 1/29/98

The Vanishing Dress:

The CBS Evening News leads with a scoop. Scott Pelley reports that "no DNA evidence or stains have been found on a dress that belongs to Lewinsky."

"I'd much rather have our scoop about the semen dress than the scoop everyone else had," Pelley says later.

The next night, Jackie Judd will spin the no-dress story her way. She'll say "law enforcement sources . . . say a dress and other pieces of clothing were tested, but that they had all been dry-cleaned before the FBI picked them up from Lewinsky's apartment." In other words, the lack of evidence only proves how clever the criminals are.

Whether it turns out that Bill Clinton had sex with Monica Lewinsky or not (and whether it turns out that he stained one dress or 100 dresses) has nothing to do with the fact that Judd's every utterance is infected with the clear assumption that the president is guilty at a time when no reporter can know that.

DAY 10: Friday 1/30/98

Those Terrible Paparazzi:

The Daily News leads with a story about Lewinsky being mobbed by the press when she went out to dinner in Washington the night before with Ginsburg. "The black car being pursued by the paparazzi echoed the scene just before the car crash that killed Princess Diana," the paper reports.

On the front page of the paper is the paparazzi shot of



Lewinsky in the car. Asked later why his own paper would help enhance the market for paparazzi misconduct by buying a photograph taken under circumstances that his paper described as so intimidating and dangerous. Daily News owner and copublisher Mortimer Zuckerman said he would have to call me back. He didn't.

Three Precious Words:

Jeff Greenfield, who has just joined CNN from ABC, proves why he may be one of the smartest people on television. On Larry King Live, he's asked what he thinks of Linda Tripp having charged today that she was present at 1:00 A.M. in Lewinsky's apartment when the president called one night. His answer: "Well... since I was not in the room, have not talked to Linda Tripp, have not talked to Monica Lewinsky, have not heard the tape... I think the best course of action is for me to say: 'I don't know.' And, you know, I am beginning to think those might be the three most precious words that we all ought to... remember... This notion of guessing... what... do we think the president, if it was the president, might have said to Monica Lewinsky that Linda Tripp could conceivably have heard that I haven't talked to her about? 'I'll pass.'"



DAY 11: Saturday 1. 31. 98

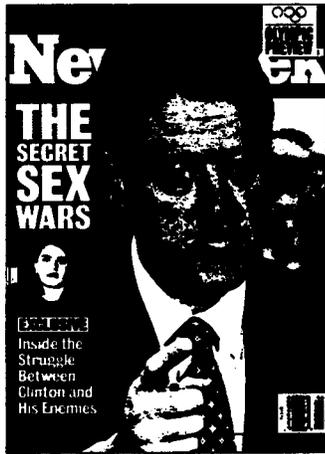
Tripp Surfaces:

The big story in the morning newspapers is that Linda Tripp has come out of hiding to issue the statement King asked Greenfield about the night before. Tripp charges, as the St. Louis Post-Dispatch dutifully reports in a widely circu-

ed Associated Press story: that Lewinsky described "every detail of an alleged affair with Clinton during hundreds of hours of conversations over the last 15 months. In addition, I was present when she received a late night phone call from the president. I have also seen numerous gifts they exchanged and heard several other tapes of him."

Another wire service story in the same edition of the Post-Dispatch says Lewinsky lawyer Ginsburg denies that Tripp "ever was privy to any conversation" between Lewinsky and President Bill Clinton.

What's most curious about Tripp's statement is that witnesses who are cooperating with prosecutors are routinely forbidden from making any public statements, in exchange for not being prosecuted themselves. (Tripp was potentially vulnerable under a Maryland law that prohibits taping telephone conversations without the consent of both parties.) "She made her own decision," Starr later contends. "You can't control the actions of an independent-minded human being."



Newsweek's second straight scandal cover story.

DAY 12: Sunday 2. 1. 98

More From The FBI Tapes:

Starr's people have obviously continued to make good on their promise to give folks the best seat in the house as they continue to trickle out the alleged contents of the tapes they made of Tripp and Lewinsky. Now, in its new issue, Newsweek reports that Lewinsky told Tripp that she had told Vernon Jordan she would not sign the affidavit stating she did not have sex with the president until he got her a job.

In another article, Newsweek declares that the magazine "has

PRESSGATE

learned that [in his Jones deposition] Clinton swore he never met alone with Lewinsky after she left the employ of the White House. . . . But *Newsweek* has confirmed that Clinton and Lewinsky did in fact meet last Dec. 18, and investigators are examining the possibility of several other occasions on which the two met alone."

When Clinton's deposition is revealed three weeks later, the premise of this scoop would turn out to be wrong; the president did not say he hadn't met alone with Lewinsky.

DAY 13: Monday 2/2/98

An All-Time High:

Most of the nation's newspapers report that polls show the president's popularity to be at an all-time high. Meantime, Susan Schmidt and Bill McAllister of *The Washington Post* lead with Starr saying "his investigation of the Monica Lewinsky matter is moving swiftly."

DAY 14: Tuesday 2/3/98

No Secret Service Agent:

On the *Evening News*, CBS's Peley says he has "learned that the Secret Service has conducted an internal inquiry and now believes that no agents saw any liaison between the president and Monica Lewinsky."

"I liked that scoop better than Jackie Judd's," Peley says later.

DAY 15: Wednesday 2/4/98

The Journal Pushes The Button:

Just before 4:00 p.m. *Wall Street Journal* reporter Glenn Simpson tells White House deputy press secretary Joe Lockhart that the paper needs comment for a story charging that White House steward Bayani Nelvis has told a federal grand jury that he saw President Clinton and Lewinsky alone in a study next to the Oval Office, and that after the two left he recovered tissues with "lipstick and other stains" on them. Lockhart says he'll get back to Simpson quickly.

Fifteen minutes later, and without waiting for Lockhart, the *Journal* publishes the story on its Internet site.

"When I told [*Journal* Washington bureau chief Alan] Murray that Joe was going to get right back to me, Alan told me it was too late," Simpson says later. "He had already pushed the button."

"The White House had taken the position [in general] that it was not commenting," Murray says. "So I figured, why wait?"

Murray, who refuses comment on whether Starr's office was the source for the story except to say, "I can promise you we had sources outside of Starr's office," concedes that he had heard that ABC was also on the story and that he wanted to beat them. Murray, who is known around Washington as an especially careful, responsible journalist, also acknowledged that his paper had just completed a joint venture agreement with NBC to provide editorial content to its CNBC cable network (which offers financial news during the day and talk shows at night)

and that, "yes, it was in my mind that we could impress them with this." However, Murray also points out that because the *Journal* has long operated a wire service, "making instant publishing decisions was not new to us."

"They got too excited and Alan rushed to get on television," asserts one veteran *Journal* reporter, who says he has knowledge of the decision to publish.

Indeed, Murray appears on CNBC minutes after he pushes the button on his website reciting the Nelvis story. Almost immediately, the White House press office denounces the story, and Nelvis's attorney, who seems to be cooperating with White House lawyers, calls the story "absolutely false and irresponsible."

By the time the actual newspaper would go to bed later that evening, the *Journal* would pull back. It will report that the steward described the incident in question to Secret Service personnel, nor to the grand jury.

When the paper sees daylight on February 5, White House press secretary Mike McCurry will denounce the *Journal*'s on-line story—and its failure to await comment from him—as "one of the sorriest episodes of journalism I've ever witnessed."

By Monday, February 9, the *Journal* would be forced to report that "White House steward Bayani Nelvis told a grand jury he didn't see President Clinton alone with Monica Lewinsky, contrary to a report in *The Wall Street Journal* last week." And *Journal* managing editor Paul Steiger would be quoted in the same story as saying, "We deeply regret our erroneous report of Mr. Nelvis's testimony."

Could it be that Judd's report on Sunday night about a "witness" catching the president in the act, and *The Dallas Morning News*'s dead-wrong, one-sourced, fifth-hand report on Monday night about a Secret Service agent being ready to testify, and this report about Nelvis testifying or, as it later became, about Nelvis telling a Secret Service agent what he had seen, are all different versions of the same story? "Yes, I am sure it's all the same story," says Victoria Toensig (the lawyer whose conversation that her husband had overheard became the "source" for the *Dallas Morning News* story).

Of course, it could ultimately turn out that a credible witness claiming to have seen the president and Lewinsky in a compromising position—or claiming that Nelvis told him or her about that—does come forward. By late-May, rumors would persist that Starr would produce at least that much. But the point is that, in early February, when these stories are published, they are at best third-, fourth-, or fifth-hand claims and the reporting of them as breakthrough news is a scandal.

No Other Sites:

It's near 8:00 p.m. and the networks have to decide how to handle the *Journal*'s scoop.

ABC goes halfway, saying Nelvis has been called as a witness and "he might have been in a position to observe Mr. Clinton without the president's knowledge."

At NBC, "[vice president of NBC News] Bill Wheatley [*Nightly News*'s executive producer] David Doss, and I were standing in a cubicle at 5:10 talking into a conference phone with Tim Russert." Tom Brokaw recalls. "The *Journal*'s website story was moving toward a full-blown story. But we decided, after talking to Tim, that it didn't have legs."

"We almost went with the *Journal* story," CNN's head of

newsgathering, Eason Jordan, says, "But the rule we put in place after the *Dallas Morning News* screwup stopped us."

"The difference between this and Watergate," says Brokaw, "is what I call the Big Bang Theory of Journalism. There's been a Big Bang and the media have expanded exponentially.... Back then, you had no *Nightline*, no weekend *Today* or *Good Morning America*, no Internet, no magazine shows [except *60 Minutes*], no C-Span, no real talk radio, and no CNN or MSNBC or Fox News doing news all day.... As a result of all this, the news process has accelerated greatly.... Something, some small piece of matter, maybe a rumor, can get pulled into the vacuum at night on a talk show or in the morning on Imus [the nationally syndicated radio show that is a bastion of smart, irreverent political conversation] and get talked about on radio or on CNN or MSNBC during the day and pick up some density, then get talked about some more or put on a website that afternoon and pick up more density, and by late afternoon I have to look at something that has not just shape and density but some real veneer—and I have to decide what to do with it. That's kind of what happened with this one."

Brokaw's description of the care he took in this instance of the unsubstantiated *Wall Street Journal* story is impressive. And his assessment of the way the new technology of 24-hour cable channels and websites has forever turned the old news cycle into a tornado is right on the money. But the often sorry performance of his own news organization—for example, in chasing Judd's ABC "scoop" by rushing on that Brokaw-Shupman "bulletin" the prior Sunday of an "unconfirmed report" of a witness, let alone NBC's airing on sister channels MSNBC and CNBC of any and all rumors—makes it impossible not to conclude that Brokaw is describing an out-of-control process that he and his colleagues are often part of. He's like the articulate alcoholic at an AA meeting.



DAY 16: Thursday 2/5/98

No 'Jam' Job:

The *New York Times* "bulldog" edition comes out tonight with a Friday morning story that punctures the revelry among those who hear about it at the White House state dinner for British Prime Minister Tony Blair. It's about Clinton secretary Betty Currie having not been at work for "several"

Starr acknowledges that he personally had met with [the *Times* reporters] about the Betty Currie story, although, he says, "my understanding was that they knew the substance of it...I only wanted to talk to them about its timing."

days because she was with Starr's people. Among other things, says the *Times*, Currie has spoken of having retrieved some presidential gifts from Lewinsky, and about how she had been called into the Oval Office the day after President Clinton faced those surprise Lewinsky questions at his Jones deposition and was taken by the president through a series of rhetorical questions and answers.

The article, by Jeff Gerth, Stephen Labason, and Don Van Natta, Jr., seems to be yet another relying on prosecutorial leaks rather than Watergate-like firsthand reports from witnesses. In fact, in our interview, Starr acknowledges that he personally had met with Labason and Gerth about the story; although, he says, "My understanding was that they knew the substance of it...I only wanted to talk to them about its timing." Starr urges me to talk to his deputy, Bennett—who, he says, had "talked more extensively with the *Times* for the story." As far as why he had not been quoted by name if the discussion was not improper, Starr says only that Bennett "knows about the ground rules."

But Bennett refuses to discuss the ground rules, while asserting that he was "in no way a source for the information in the *Times*' Betty Currie story." No one at the *Times* will discuss their sources for this or any other story, but one top *Times* editor points out that the reporters could not have cared about discussing the timing of the story with Starr because "we ran it in the next available paper" after that meeting.

Prepared over several days—this was not some Sue Schmidt jam job," says one *Times* reporter—the *Times*' Currie story would stand out nearly four months later as the most damaging to the president—and the one whose basic facts had not been challenged. But although it is precisely written and careful not to draw conclusions, it will not be read by the rest of the press with the same precision.

Coached:

On *Nightline*, Ted Koppel scraps a planned show on the International Monetary Fund. He opens by announcing "a late-breaking story" that "the president's personal secretary" is said to have told investigators that she was coached by President Clinton to say things she knew to be untrue.

"This was a breaking story, and the opening has to be written very quickly," Koppel later recalls. "But right after that I quoted the *Times*' language exactly.... Our opener is like a magazine cover or news headline: it frequently will use a grabber verb or adjective that is used later on."

Nightline guest Sam Donaldson also repeats the word "coached." Only NPR's Nina Totenberg, another guest, is more careful: "This story...is fairly clearly a leak from the prosecutor's office and with the exception of [the gift]...it is their characterization of what Betty Currie has said."

By the next morning, Currie's lawyer—who was quoted

PRESSGATE

deep down in the original *Times* article saying that Currie was not "aware of any illegal or ethical impropriety by anyone"—would issue a statement declaring that it is "absolutely false" that his client believed that Clinton "tried to influence her recollection." The White House, meanwhile, offers its own spin on the Clinton session with Currie: The president was simply refreshing his own memory.

Whatever the full story, what matters is that the *Times* didn't spin it one way or the other, while the rest of the press did.

"Everyone said we said 'coaching,' but we didn't," Gerch recalls later. "There was a lot of deliberation here over what words went into that story.... The story as written, not as interpreted, was accurate."

"I still have no idea whether she was coached or not," says *Times* Washington bureau chief Oreskes. "We were acutely aware of the fact that we were dealing with descriptions and partial descriptions that were secondhand."

Clinton lawyer David Kendall goes on the attack to deflect the Currie story.



DAY 17: Friday 2/6/98

Counterattack:

The morning shows are filled with talk about the president "coaching" Betty Currie, as are the newspaper headlines. ("Prez Told Me To Lie," screams the *New York Post*.)

But by the afternoon, the White House has turned the day around. First there is the president's relaxed, effective performance at his afternoon joint press conference with Prime Minister Blair. Then there's a counterattack from his lawyer, David Kendall, who bashes Starr for alleged unlawful leaks and distributes a 15-page letter to Starr that claims to document them.

Kendall's slam works so well that the NBC, ABC, and CBS evening news shows lead with it. The only talk about the *Times* Betty Currie story—the stuff of the *Nightline* show the night before—comes by way of explaining that this is the latest leak that the Clinton lawyers are so angry about.

The reason it's working has to do with the dynamics of the media. True, the press loves a good crime investigation and

loves reporting the leaks that trickle out. But even more, reporters love a one-on-one fight. It's more dramatic and easier to understand—and it makes booking pro and con guests on the talk shows a breeze.

"We'd been talking about leaks since this started," says White House spin man Paul Begala. "But sometimes you just have to get up and scream it and start a food fight to get them to write about it."

"Because we decided not to get into specific denials of most of this stuff, we could not answer with facts," concedes former White House scandal counsel Lanny Davis. "So we answered with a fight about the process and the prosecutor."

Showing Their Colors:

Now that it has become a Starr-Clinton food fight, the reporters on the talk shows are even more tempted to show their real colors. Rather than "analyze" what is happening in the investigation, tonight they are called upon to take sides. It is almost scary to watch people who sell themselves as unbiased reporters of fact by day become these kind of fierce advocates at night once the camera goes on.

A good example is Stuart Taylor, Jr., the serious, scrupulous, and brilliant senior writer for the *National Journal* who virtually started all of this with a groundbreaking 1996 piece on the Paula Jones suit in *The American Lawyer* that, by *Newsweek's* own account, had inspired the *Newsweek* cover story about the case. Taylor has become the complete anti-Clinton partisan. He makes no bones about it, so much so that the one television show that prefers calm analysis to food fights—*The NewsHour with Jim Lehrer* on PBS—has already dropped him from his legal analyst perch. (I was the co-owner and editor of *The American Lawyer* when Taylor's Jones piece was published.)

Now, on *Nightline*, Taylor takes the absurd Starr position as his own—that if prosecutors leak material coming from their talks with witnesses as they prepare them for the grand jury, they are not committing a crime, because only leaks from actual grand jury testimony are crimes. That's not what the courts have ruled, and it's a quite a bit of legalistic derring-do, coming from someone who said 11 days earlier on *Nightline*, in referring to the president, that "innocent people with nothing to hide who tell the truth don't need to surround themselves with phalanxes of lawyers." (About six weeks after this appearance, Taylor would begin negotiating with Starr to take a job advising Starr and writing the independent counsel's report to the House of Representatives, but he would ultimately decide not to accept the offer.)

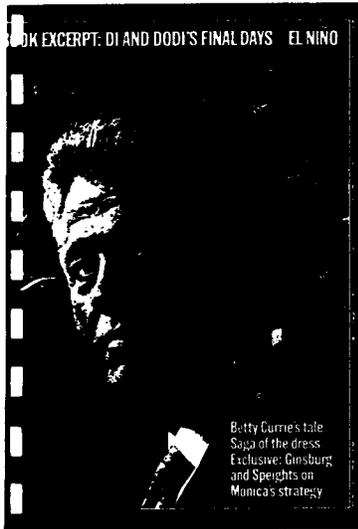
DAY 18: Saturday 2/7/98

Leaks? What Leaks?:

The nation's newspapers generally highlight Kendall's leak charges. Many of those writing the stories, such as Schmidt and Baker of *The Washington Post*, know from their own experience the charges are true. But they can't and won't say it.

Two days later, media reporter Howard Kurtz of *The Washington Post* (who is also a contributor to this magazine) would write a story headlined "With Leaks, Reporters Go With The Flow." In the piece, Kurtz describes the "bizarre quality to

the weekend coverage of White House charges that... Starr was illegally leaking... At least some journalists at each major news organization know whether Starr's staff is in fact dishing on background, but the stories are written as though this were an impenetrable mystery."



DAY 19: Sunday 2/8/98

We Can't Ask:
Time magazine is out this morning with a cover story entitled "Trial By Leaks." The story has a problem: It's produced by reporters, writers, and editors who know the truth but can't write it.

Even a wordsmith as skilled as *Time* senior editor Nancy Gibbs—who, as with the first *Time* Lewinsky cover story, pens the lead piece here—can't write around this problem. Describing leaks "so fast and steady" that they are "an underground river," Gibbs proceeds over five pages simply to describe all the leaks—in essence republishing even the now-discredited ones. But nowhere does she confront the basic question the article raises: Aren't Starr's people leaking? Nowhere do we find a *Time* reporter asking Starr what any reporter would ask in any other story: whether he or Bennett or anyone else in the office has talked to specific reporters who are the obvious beneficiaries of leaks.

It's hardly an unimportant question. For in the entire Lewinsky story there is a lot more evidence of Starr and some of his deputies committing this felony than there is of the president or Vernon Jordan committing a felony. The problem is that the best witnesses—the witnesses with firsthand knowledge—are the reporters and editors covering the story.

"We can't ask Starr or Bennett if they have leaked to this or that reporter, because we are out there getting those leaks ourselves from them," *Time* managing editor Walter Isaacson later concedes.

Harrang The Times:

The White House spin people are out in force today. At noon, on CNN's *Last Edition* with Wolf Blitzer, top Clinton advisor Rahm Emanuel charges that in both the case of the *Wall Street Journal* steward-witness story and the *Time*'s Betty Currie story, "lawyers representing those individuals issued statements saying these stories are blatantly false."

Not true in terms of the *Times*. Currie's lawyer had simply stated that all of the coaching interpretations of that story—not the carefully written *Times* story itself—were false. In other words, Emanuel has skillfully, and cynically, used one bad story—the *Journal*'s—to tar the *Times* story, the facts of which no one had disputed by that morning (and which no one has disputed as of this writing, and which remains, with its accounts of gifts retrieved and testimony reviewed, the single most damaging story for the president).

This raises a larger issue. Because so much of the reporting of the Lewinsky story would turn out to be discredited, the journalism that should *not* be discounted by the public will be. That's because the average reader or viewer, especially when pushed this way by the White House, will not be able to discern the difference.

Time's cover story (far left) on leaks didn't ask or answer the only important question.

Geraldo Rivera asks Gerry Spence for some "folk wisdom" about Lewinsky and the president.



DAY 21: Tuesday 2/10/98

A Matter Of Honor:
 Geraldo asks cowboy lawyer Gerry Spence about a "powerful man of a certain age... who is accused of accepting sexual favors from an allegedly frisky young

PHOTO: GUY LAWRENCE/REUTERS

PRESSGATE

California girl. Gerry," Rivera says. "I believe you have some folk wisdom to impart?"

Spence dives in: "Why hasn't he told the truth about this alleged peccadillo? . . . I was sitting in the little town of Newcastle the other day and talking to an old cowboy. And here's what he had to say about that. . . . 'Well,' he said, 'Here's to the heights of heaven and here's to the depths of hell, and here's to the dirty SOB who'd make love to a woman and tell.'"

DAY 22: Wednesday 2/11/98

Alone At Last:

Susan Schmidt has another scoop, and it's a firsthand report, not a leak. This morning she writes that former uniformed Secret Service guard Lewis Fox says that he was posted outside the Oval Office one Saturday in the fall of 1995 and he saw the president meet alone with Lewinsky for 40 minutes in the early afternoon. Schmidt makes much of this. In her lead sentence, 40 minutes becomes "Monica S. Lewinsky spent part of a weekend afternoon in late 1995 alone with President Clinton. . . ." And that, she says, makes Fox "the first person to publicly say that he saw the president and Lewinsky alone together."

But there's less here than meets the eye. Strangely, Fox is paraphrased but not quoted in Schmidt's article because, she later asserts, "he refused to be quoted." It's a rare article that is wholly about an on the record interview with someone (and

"[T]his story was very much driven in the beginning on sensitive information that was coming out of the prosecutor's office," says an internal *New York Times* publication.

headlined as such) in which that person is not quoted at all.

But it turns out that Fox had been liberally quoted in his local Pennsylvania newspaper and on Pittsburgh television before Schmidt got to him, saying that, yes, he had seen the two alone, but that he doubted anything untoward could have happened because there are so many ways to see into the Oval Office and there is such a constant threat of interruption from people walking in.

Why didn't Schmidt ask Fox if the two could have been interrupted? "I wasn't interested in his opinion," she says later. "Who cares about his opinion? Clinton testified that he was never alone with her, and this guy makes him a liar. Period."

In fact, when the president's deposition in the Jones case is made public soon after this interview with Schmidt, it turns out that Clinton did not testify that he was never alone with Lewinsky.

"This story was a perfect example of Sue Schmidt's attitude," says Clinton aide Emanuel. "Anyone who thinks the president could do something like that uninterrupted on a f---king Saturday is either in fantasy land or doesn't care about facts. We're all here on Saturday at 1:30. We live here, goddamnit."

The Good, The Bad, And The Beraldo: It is tempting to dismiss Geraldo Rivera as a sleaze peddler. But he is also one of the smartest, best-prepared newspeople out there.

And tonight, as with many nights of his Lewinsky circus, he shows it. Talking about Schmidt's *Washington Post* story on Secret Service officer Fox, Rivera says, "We note, however, for the record, that the agent's story has become . . . [in Schmidt's hands] far more damning since he first began talking about a week ago. Back then Fox told a local newspaper . . . that it would've been difficult for the two to have had a sexual encounter while in the Oval Office because of its many windows. . . . And we also note for the record that every allegation [about] purported eyewitness to the president and Monica's being alone, including last week's account of Mr. Nelvis in *The Wall Street Journal*, has so far proven erroneous."

Circus Or Town Meeting?

Rivera's show is emblematic of these first three weeks of coverage of the Lewinsky story. There was some good reporting and some sharp analysis. But it was mixed in with so many one-sided leaks and rumors that it was diluted into nothingness—so much so that many opinion polls showed that a majority of Americans believed the president to be guilty of something he adamantly denied and about which there is not yet nearly enough real evidence to know for sure, one way or the other.

Brokaw may be right: Americans may be good at filtering out the reliable from the nonreliable. It could also be argued that, in the old days, any town meeting would have had some crazies and gossips take the stage or whisper among the audience the way the crazies and prosecutor-fed gossips took to the printing presses and the electronic stage in the days following January 21.

But in the end that only euphemizes the appalling picture of the fourth estate presented by the first three weeks of this imbroglio.

Because it is episodic, the log presented above does not convey that overall picture, nor does the more subdued coverage of later weeks in this story.

But you can remember it.

It's a blizzard of newspaper front pages and magazine covers and every TV news show and pseudo-news show giving this story the kind of play that no story—none, not Princess Diana, not O.J., and certainly not Watergate—has ever gotten.

And so much of that coverage was rumors and speculation, that when a self-styled Committee of Concerned Journalists did a study examining 1,565 statements and allegations contained in the reporting by major television programs, newspapers, and magazines in the first six days of the circus, they found that 41 percent of the statements were not factual reporting at all, but were "analysis, opinion, speculation, or judgement"; that only 26 percent were based on named sources; and that 30 percent of all reporting "was effectively based on no sourcing at all by the news outlet publishing it."

It doesn't take Woodward and Bernstein to know that most of those anonymous sources were from Starr's office, spinning out stories to pressure Lewinsky or other witnesses and to create momentum and a presumption of guilt. I have personally seen internal memos from inside three news organizations that cite Starr's office as a source. And six different people who work at mainstream news organizations have told me about specific leaks.

Here's more specific, tangible, sourced proof of the obvious: For an internal publication circulated to *New York Times* employees in April, Washington editor Jill Abramson is quoted in a discussion about problems covering the Lewinsky story as saying, "[T]his story was very much driven in the beginning on sensitive information that was coming out of the prosecutor's office. And the [sourcing] had to be vague, because it was...given with the understanding that it would not be sourced."

And, as we have seen, Starr himself conceded to me that he talked to the *Times* about the Betty Currie story and often talked to other reporters, and he has all but fingered Bennett as 1998's Deep Throat. Moreover, his protestation that these leaks—or "briefings," as he calls them—do not violate the criminal law, and don't even violate Justice Department or eth-



ical guidelines if they are intended to enhance confidence in his office or to correct the other side's "misinformation," is not only absurd, but concedes the leaks.

Worse still is the lack of skepticism with which the press by and large took these leaks and parroted them.

To be sure, that kind of leak-report dynamic is common in crime reporting, where reporters make lawmen look good and defendants look bad by publishing stories of mounting evidence in ongoing investigations.

Yet there's a difference here. In the typical criminal process, all that bad publicity historically hasn't outweighed the burden of proof and the ability of a jury to focus on the evidence actually presented at trial. Juries are famous for getting from "where there's smoke there's fire" to looking at specific evidence. But Bill Clinton is not going to have a trial with that kind of jury. If he gets any hearing at all, it will be an impeachment hearing—which is a political process, a process where all the bad effects of all the leaks could count. And absent an impeachment hearing, the president's continuing ability to do his job will depend in some part on his public standing.

Many now agree that it is hard to imagine that a powerful independent counsel under no real checks and balances is what the Founding Fathers had in mind when they wrote

Geraldo Rivera's show is emblematic of these first three weeks of coverage. There was some good reporting and some sharp analysis. But it was mixed in with so many one-sided leaks and rumors that it was diluted into nothingness.

the Constitution. It is harder still to imagine that a press corps helping that prosecutor in his work by headlining whatever he leaks out—instead of remaining professionally suspicious of him and his power—is what the founders had in mind when they wrote the First Amendment. The press, after all, is the one institution that the Founding Fathers permanently protected so that reporters could be a check on the abuse of power.

And it is impossible to imagine that what the founders had in mind when they wrote the impeachment clause is that a president could be brought down by that prosecutor and by that press corps, all because a Linda Tripp and a Lucianne Goldberg got an intern to talk into a capped phone about sex so they could put together a book deal.

So far, it seems that the American people understand this, even if the press doesn't.

So maybe it's the press that needs to draw lessons from Pressgate, not its customers. Or maybe the customers can force these lessons on the press by being more skeptical of the product that is peddled to them. I have three such lessons in mind:

*First, consumers of the press should ignore all publications or newscasts that try to foist the term "sources" on them unaccompanied by any qualifiers or explanation. The number of sources should be specified (is it two or 26?) and the knowledge, perspective, and bias of those sources should be described, even if the source cannot be named. (Is it a cab driver or a cabinet officer, a defense lawyer or a prosecutor?)

*Second, no one should read or listen to a media organization that reports on another news outlet's reporting of anything significant and negative without doing its own verification.

*And, third, no one should read or listen to any media outlet that consistently shows that it is the lapdog of big, official power rather than a respectful skeptic.

The big power here is Ken Starr. Prosecutors usually are in crime stories, and the independent counsel's power is unprecedented.

This is what makes Pressgate—the media's performance in the lead-up to the Lewinsky story and in the first weeks of it—a true scandal, a true instance of an institution being corrupted to its core. For the competition for scoops to toss out into a frenzied, high-tech news cycle seems to have so bewitched almost everyone that the press eagerly let the man in power write the story—once Linda Tripp and Lucianne Goldberg put it together for him. ■

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UNDER SEAL

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE GRAND JURY PROCEEDINGS

Misc. No. 98-55 (NHJ)
(consolidated with Misc. No. 98-177 and
Misc. No. 98-228)

FILED

UNDER SEAL

JUN 19 1998

NANCY MAYERBAMPTINGHAM, CLERK
U.S. DISTRICT COURTORDER TO SHOW CAUSE

Presently before the Court are three motions requesting that this Court order the Office of the Independent Counsel ("OIC") to show cause why it, or individuals therein, should not be held in contempt for violations of Federal Rule of Criminal Procedure 6(e)(2).¹ The first motion for order to show cause, Misc. No. 98-55, was filed on behalf of President Clinton by his personal counsel Mr. Kendall on February 9, 1998, and on March 3, 1998, the Court granted Ms. Lewinsky's motion to intervene in this action. The second motion for order to show cause, Misc. No. 98-177, was filed on May 6, 1998, on behalf of President Clinton by his personal attorneys Mr. Kendall and Mr. Bennett, the White House, Mr. Lindsey, and Mr. Blumenthal. These parties and Ms. Lewinsky are collectively "movants." On June 16, 1998, the parties who filed Misc. No. 98-177 filed a third motion for order to show cause, Misc. No. 98-228. The Court will consolidate these three motions into a single action and address them together at a show cause hearing. See Fed. R. Civ. P. 42(a).

I. Standards for Establishing a Prima Facie Violation of Rule 6(e)(2)

The United States Court of Appeals for the District of Columbia Circuit has held that a

¹ Rule 6(e)(2) prohibits prosecutors, grand jurors, and certain individuals other than witnesses from disclosing "matters occurring before the grand jury." Fed. R. Crim. P. 6(e)(2).

district court "must conduct a 'show cause' hearing" if a motion for order to show cause establishes a prima facie violation of Rule 6(e)(2). See *Barry v. United States*, 865 F.2d 1317, 1321 (D.C. Cir. 1989). To establish a prima facie case, movants must show that "media reports disclosed information about 'matters occurring before the grand jury' and indicated that the sources of the information included attorneys and agents of the Government." *Id.* (citations omitted). Once a prima facie case is established, the Government must "come forward with evidence to negate the prima facie case" at a show cause hearing to avoid being held in contempt. *Id.* The show cause hearing helps the court determine whether the Government was responsible for the alleged leaks of Rule 6(e) material. If the Court finds the Government violated Rule 6(e)(2), it may order appropriate relief such as contempt sanctions and equitable relief. See *Id.*

A. "Matters Occurring Before the Grand Jury"

In order to establish a prima facie case, movants must first demonstrate that the media reports disclosed "matters occurring before the grand jury." *Id.* The D.C. Circuit recently reaffirmed that "matters occurring before the grand jury" include "not only what has occurred and what is occurring, but also what is likely to occur." *In re Motions of Dow Jones & Co.*, Nos. 98-3033 and 98-3034, 1998 WL 216042, *3 (D.C. Cir. May 5, 1998) (emphasis added). Such past, current, or future matters before the grand jury include "the identities of witnesses or jurors, the substance of testimony," "actual transcripts," "the strategy or direction of the investigation, the deliberations or questions of jurors, and the like." *Id.* (citations omitted). In addition to a witness's identity, "the fact that he was subpoenaed to testify, the fact that he invoked [a] privilege in response to questions, [and] the nature of the questions asked" of him are also secret matters. *Id.* at *4. The D.C. Circuit has also held that "naming or identifying grand jury

witnesses; quoting or summarizing grand jury testimony; evaluating testimony; discussing the scope, focus or direction of the grand jury investigations; and identifying documents considered by the grand jury and conclusions reached as a result of the grand jury investigations" are also matters protected by Rule 6(e)(2). Fund for Constitutional Gov't v. Nat'l Archives & Records Serv., 656 F.2d 856, 869 (D.C. Cir. 1981).

Furthermore, testimonial or documentary information given to OIG investigators or FBI agents working for the OIG by witnesses who have been subpoenaed to appear before the grand jury, whether such information is given before or after their testimony, is protected by Rule 6(e)(2). See Dow Jones, 1998 WL 216042, at *3; In re: The Special February 1975 Grand Jury (Bagon), 662 F.2d 1232, 1238 (7th Cir. 1981), aff'd on other grounds, 463 U.S. 476 (1983). Although in its previous submissions to the Court the OIG has denied that Rule 6(e)(2) applies to such information,² the Independent Counsel himself recently conceded this application, noting that "[w]hat we [the OIG] must avoid, and what we do avoid, is discussion of information sought from or provided by witnesses — whether in the form of *investigative interviews*, grand jury appearances, or *documents provided to this Office*." Letter from Mr. Starr to Editor of Brill's Content of June 16, 1998, at 2 (emphasis added). Rule 6(e)(2) also protects investigative reports, including FBI reports, "where they are closely related to the grand jury's investigation itself and where disclosure would reveal the identities of targets and other witnesses." Martin v. Consultants & Administrators, Inc., 966 F.2d 1078, 1097 (7th Cir. 1992).³

² See, e.g., Opp'n to First Show Cause Motion at 14-15, 36.

³ The OIG disputes that Rule 6(e)(2) applies to FBI materials, citing three cases, but the Court finds these cases unpersuasive and distinguishable. See Davies v. Comm'r of Internal

B. Attribution of Source

In addition to establishing that media reports disclosed "matters occurring before the grand jury," movants must also show that such reports "indicated that the source of the information included attorneys and agents of the Government." *Barry*, 865 F.2d at 1321. When deciding whether movants have met their burden, the Court must treat all statements in the news reports as true with respect to what was disclosed and by whom. See *Lance*, 610 F.2d at 219. Thus, if a news report explicitly identifies the source of information protected by Rule 6(e)(2), the Court must accept this attribution as correct for purposes of the prima facie case. While an article expressly identifying a government official as the source of the Rule 6(e) information clearly supports a prima facie case, "[i]t is not necessary for [an] article to expressly implicate the Justice Department [or other governmental entity] as the source of the disclosures if the nature of the information disclosed furnishes the connection." *Barry*, 865 F.2d at 1325 (citations omitted). For instance, "[t]he precise attribution of a source in one . . . may give definition of a vague source reference in others because of their context in time or content." *Id.* at 1326 (citations omitted). Additionally, "attorneys and agents of the Government" need not be the only source of the disclosure of Rule 6(e) material, but need only be "included" among the sources. *Id.* at 1321.

With respect to the media reports identified in the first motion for order to show cause, the OIC has submitted affidavits from its employees in an effort to rebut any prima facie

Revenue, 68 F.3d 1129, 1130 (9th Cir. 1995); *In re Grand Jury Matter*, 682 F.2d 61 (3d Cir. 1982); *In re Grand Jury*, 510 F. Supp. 112, 115 (D.D.C. 1981). While it is true that disclosure of information obtained from a prior FBI or other governmental investigation may not violate Rule 6(e), see *In re Grand Jury Investigation, Lance v. Dep't of Justice*, 610 F.2d 202, 217 (5th Cir. 1980), here FBI agents, like OIC investigators, are directly involved in this ongoing grand jury investigation and thus are bound by Rule 6(e)(2).

violations. The Court finds that the affidavits fail to rebut the prima facie violations of Rule 6(e)(2) established by the first show cause motion. Affidavits denying allegations in a news report that establishes a prima facie case can, but do not necessarily, rebut the prima facie case.

The inability to show a definite source for some of the information contained in the articles *might* cause a prima facie case to fail if a responsive affidavit denying the allegation is made. At the same time, *even with such a response*, the detail as well as the seriousness of the disclosure may militate in favor of a further investigation of its source in the form of an evidentiary hearing.

Lance, 610 F.2d at 219 (emphasis added). The Court finds that the serious and repetitive nature of disclosures to the media of Rule 6(e) material strongly militates in favor of conducting a show cause hearing.

The affidavits from the OIC do not deny that OIC employees were the source of articles in which the OIC was explicitly identified as such.⁴ Moreover, the affidavits merely deny disclosing "any of the information quoted in Mr. Kendall's motion that is subject to Rule 6(e)." However, the OIC's submissions to the Court regarding the show cause motions make plain that the OIC defines material protected by Rule 6(e) too narrowly.⁵ Therefore, the affidavits disavow disclosing only material that the OIC deems to be "subject to Rule 6(e)," not what this Court holds to be protected by Rule 6(e).

⁴ Instead, the OIC claims that the information attributed to OIC sources in the first show cause motion is not covered by Rule 6(e). *See, e.g.*, Opp'n to First Show Cause Motion, at 35-41.

⁵ In its Opposition to the first show cause motion, the OIC insisted that Rule 6(e) does not apply to information provided by a witness before he or she has testified. *See, e.g.*, Opp'n to First Show Cause Motion, at 36 ("The first [part of the article] concerns a remark purportedly made by Ms. Lewinsky, and Movant cites no evidence that she has testified before the grand jury."). The OIC also incorrectly maintained that Rule 6(e) does not apply to FBI materials developed for a grand jury investigation. *See id.* at 14 and *see supra* at 3 n. 2.

Movants in the first show cause motion, counsel for the President and Ms. Lewinsky, have requested access to the *ex parte* affidavits filed by the OIC. The OIC filed 98 affidavits with this Court. Because 96 of the affidavits use exactly the same language and only two of the 98 affidavits use different language, the Court will grant movants access to three affidavits: one representing 96 of the affidavits and the two others that used different language. In response to the concerns of the OIC, the Court has redacted from the affidavits the names and job titles of any OIC employees involved in this grand jury investigation. See *United States v. Eisenberg*, 711 F.2d 959, 964 (11th Cir. 1983).

II. Application of Standards to Motions for Order to Show Cause

Based upon the three motions for order to show cause, the OIC's responses in opposition to such motions, and the oral argument of counsel at the sealed hearing held on March 12, 1998, the Court finds that movants have established *prima facie* violations of Rule 6(e)(2). Although the Court finds that several articles establish *prima facie* violations, the Court notes that a *prima facie* case may be established by only one article. See *Barry*, 865 F.2d at 1321, 1325-26. Examples from the first show cause motion that establish *prima facie* violations of Rule 6(e)(2) include Tabs 1, 2, and 5. Tab 1 is an NBC Nightly News report aired on February 4, 1998, that directly identifies "sources in Starr's office" and discloses information regarding a subpoenaed witness's potential testimony before the grand jury, evaluations of such potential testimony, and the strategy and direction of the OIC's investigation. See *Dow Jones*, 1998 WL 216042, at *3; *Fund for Constitutional Gov't*, 656 F.2d at 869. Tab 2, a New York Daily News article published on January 23, 1998, and Tab 5, a New York Times article published on February 2, 1998, also identify OIC prosecutors as the sources of the reports and also improperly disclose what a

subpoenaed witness has told the OIG during investigative interviews. *Id.*

With respect to the second show cause motion, the Court finds that CBS News White House Correspondent Scott Pelley's report that "investigators have spent months checking out Tripp's story and now claim she is, quote 'completely reliable'" establishes a prima facie violation of Rule 6(e)(2).⁴ Tab L, May 8, 1998, Transcript. Although the report does not explicitly identify the OIG as the source, it does identify "investigators." The attribution to "investigators" strongly implies that the source was investigators from the OIG, particularly given that the "nature of the information disclosed furnishes the connection" to the OIG. *BARRY*, 865 F.2d at 1325. OIG investigators are the most likely "investigators" to "have spent months checking out Tripp's story" and have the greatest interest in suggesting to the public that Linda Tripp is a reliable source of information. Given that Ms. Tripp is virtually certain to testify before the grand jury, discussing the nature and credibility of her potential testimony violates Rule 6(e)(2). See *Dow Jones*, 1998 WL 216042, at *3; *Fund for Constitutional Gov't*, 656 F.2d at 869 (noting that evaluations of testimony are covered by Rule 6(e)(2)).

The Court also finds that the Fox News report aired on May 6, 1998, regarding Mr. Starr's comment to the press about the Court's Opinion on executive privilege establishes a prima facie violation of Rule 6(e)(2) and a violation of the Court's order that the parties receiving the Opinion not discuss it with the press. Within a day of the Court's releasing the Opinion on May 4, 1998, the press began reporting that the Court had issued a ruling with regard to President Clinton's executive privilege claim and that the Court had denied the claim. See, e.g., *The day*

⁴ The Court finds that the Fox News Broadcast aired on May 5, 1998, does not establish a prima facie violation and therefore will not entertain further argument regarding this report.

after the leaks, Mr. Starr told reporters in front of his home that he believed the Opinion was a "a magnificent ruling." This comment not only confirmed for the press that the Court had indeed made a decision but also revealed that the substance of that decision was favorable to the OIC. The fact that information about the Opinion had already been leaked at the time of Mr. Starr's comment in no way authorized him to make statements confirming or denying such leaks. See Dow Jones, 1998 WL 216042, at *8 ("Rule 6(e) does not create a type of secrecy which is waived once public disclosure occurs") (citations omitted); Barry v. United States, 740 F. Supp. 888, 891 (D.D.C. 1990) ("The Government is obligated to stand silent regardless of what is reported, accurate or not, by the press."). Confirming the existence and substance of a sealed court ruling presents a prima facie violation of Rule 6(e)(2) and a violation of a court order not to discuss the ruling.

With respect to the third motion, the Court finds that it provides further support for the prima facie violations of Rule 6(e)(2) established by the first and second motions. The Independent Counsel's admission to journalist Steven Brill that he and Deputy Independent Counsel Jackie Bennett speak to reporters on condition of anonymity and his statement to Mr. Brill that Rule 6(e) does not apply to "what witnesses tell FBI agents or us [the OIC] before they testify before the grand jury" bolster the Court's findings of prima facie violations of Rule 6(e)(2) by the OIC. See Steven Brill, "Pressgate," Brill's Content, Aug. 1998, at 132.⁷ Mr. Brill's assertions that he has "personally seen internal memos from inside three news organizations that cite Starr's office as a source" and that "six different people who work at mainstream news

⁷ Although the Independent Counsel has responded to Mr. Brill's article, he has not disputed that he made these statements in his interview with Mr. Brill.

organizations have told [him] about specific leaks" also support the Court's findings of prima facie violations. *Id.* at 131, 150.

III. Procedures for the Show Cause Hearing

The three motions establish prima facie violations of Rule 6(e)(2) and thereby require the Court to conduct a show cause hearing. *Berry*, 865 F.2d at 1321. Given that the motions identify a significant number of news reports and in order to facilitate an efficient show cause hearing, the Court asks movants to identify a limited number of such reports that they intend to focus on at the show cause hearing. Movants shall identify such news reports for the Court by June 24, 1998. If movants would like this Court to consider at the show cause hearing additional news reports that have not been identified in the three motions,⁸ movants shall have until June 24, 1998, to file another show cause motion. The OIC shall have until June 30, 1998, to submit any additional responses to the allegations raised by the news reports identified by movants for the show cause hearing and by any additional show cause motions.

The Court will not hear deposition testimony at the hearing but will permit live testimony. Movants and the OIC shall submit witness lists to the Court by July 1, 1998. As the parties have agreed, the show cause hearing shall be held on July 6, 1998, at 10:00 a.m. and shall be sealed. The Court will release a redacted transcript of the hearing, and to that end, the parties shall submit their proposed redactions seven days after they receive the official transcript.

Upon consideration of the entire record in this matter, it is this 19th day of June 1998,

⁸ For example, at the scheduling conference on June 15, 1998, counsel for Mr. Lindsey expressed interest in having a Los Angeles Times article dated June 12, 1998, considered at the show cause hearing.

ORDERED that the three motions for order to show cause in Misc. Nos. 98-55, 98-177, and 98-228 be, and hereby are, granted; it is further

ORDERED that the three redacted affidavits be, and hereby are, released to movants in the first show cause motion, counsel for the President and Ms. Lewinsky; it is further

ORDERED that movants shall identify for the Court by June 24, 1998, a limited number of news reports that they intend to focus on at the show cause hearing; it is further

ORDERED that any additional show cause motions to be considered at the July 6 hearing must be filed by June 24, 1998; it is further

ORDERED that the OIC shall respond to movants' June 24 submissions by June 30, 1998; it is further

ORDERED that movants and the OIC shall submit witness lists to the Court by July 1, 1998; it is further

ORDERED that representatives of the OIC appear to show cause why the Office or individuals therein should not be held in contempt for violation of Federal Rule of Criminal Procedure 6(e)(2) at 10:00 a.m. in Courtroom 4 on July 6, 1998; it is further

ORDERED that the hearing shall include counsel for President Clinton, Ms. Lewinsky, the White House, Mr. Lindsey, Mr. Blumenthal, and the OIC. If there are objections to the participation of any of these parties, such objections shall be filed by June 24, 1998; it is further

ORDERED that the parties shall submit proposed redactions to the transcript of the show cause hearing within seven days of receiving the official transcript; and it is further

ORDERED that the parties shall submit proposed redactions of all their pleadings regarding the motions for order to show cause by July 20, 1998.


NORMA HOLLOWAY JOHNSON
CHIEF JUDGE

UNDER SEAL

DECLARATION

I, [REDACTED], declare, to the best of my knowledge and belief, as follows:

1. I am a [REDACTED] currently assigned to the Office of the Independent Counsel ("OIC") under Kenneth W. Starr.
2. I am familiar with Federal Rule of Criminal Procedure 6(e) and my obligations thereunder.
3. I have not knowingly disclosed, directly or indirectly, to any news organization any of the information quoted in Mr. Kendall's motion that is subject to Rule 6(e).

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed: February 2nd 1998

[REDACTED]

DECLARATION

I, [REDACTED], declare, to the best of my knowledge and belief, as follows:

1. I am a [REDACTED] ASSISTANT currently assigned to the Office of the Independent Counsel ("OIC") under Kenneth W. Starr.

2. I am familiar with Federal Rule of Criminal Procedure 6(e) and my obligations thereunder.

3. I have not knowingly disclosed, directly or indirectly, to any news organization any of the information quoted in Mr. Kendall's motion that is subject to Rule 6(e) [REDACTED] OIC

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed: February 23, 1998

[REDACTED]

2

DECLARATION

1. [REDACTED] declares, to the best of my knowledge and belief, as follows:

1. I am a [REDACTED] currently assigned to the Office of the Independent Counsel ("OIC") under Kenneth W. Starr.

2. I am familiar with Federal Rule of Criminal Procedure 6(e) and my obligations thereunder.

3. I have not knowingly disclosed, directly or indirectly, to any news organization any of the information quoted in Mr. Kendall's motion that is subject to Rule 6(e).
Added by me during my assignment to the Office of the Independent C

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed: February 23, 1998

[REDACTED]

UNDER SEAL

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE GRAND JURY PROCEEDINGS

Misc. Action No. 98-55, 98-177
and 98-228 (NHJ)
(consolidated)

FILED**UNDER SEAL JUN 26 1998****MEMORANDUM ORDER**

SIDNEY HAYES-NORTHINGTON, CLERK
U.S. DISTRICT COURT

On June 19, 1998, the Court ordered the Office of Independent Counsel ("OIC") and individual members therein to show cause why they should not be held in contempt for violation of Federal Rule of Criminal Procedure 6(e)(2). Before the Court is a motion for production of documents and for testimony filed by President William J. Clinton, the White House, Bruce Lindsey, and Sidney Blumenthal ("movants"). Also before the Court are the objections of the OIC to the Court's Order of June 19, 1998. For the reasons given below, the Court will deny the movants' motion in part and grant it in part and will clarify its proposed procedures in light of the OIC's objections.

First, however, the Court clarifies its Order of June 19, 1998, to make clear that the OIC is to be prepared to show cause at the July 6 hearing why it should not be held in contempt for violation of this Court's orders that sealed judicial decisions should not be revealed to the public in addition to showing cause regarding alleged violations of Rule 6(e).

I. Movants' Discovery Requests

Movants seek discovery from the OIC before the show cause hearing in the form of both document production and depositions. The OIC opposes this request, urging that movants not be allowed to intrude into the workings of the grand jury.

Although this matter arises out of a grand jury proceeding, this Circuit has found that

motions for contempt for violation of Rule 6(e) may be pursued as a civil cause of action. *Barry v. United States*, 865 F.2d 1317, 1321 (D.C. Cir. 1989). The cause of action in movants' motions to show cause is civil, not criminal,¹ and discovery of relevant evidence is available in civil actions. Fed. R. Civ. P. 26(b)(1). The Court found only one case that mentions discovery in a Rule 6(e) contempt setting. In *re Hunter*, 520 F. Supp. 1020, 1022 (W.D. Mo. 1981), *aff'd*, 673 F.2d 211 (8th Cir. 1982), states: "If [movants'] charges appear to have a basis in fact, the District Court in the exercise of its sound discretion can order a hearing and grant reasonable discovery in connection therewith."

The Court will allow discovery restricted to matters not covered by Rule 6(e).² The Court will order the OIC to produce the documents requested by movants but the OIC shall redact any Rule 6(e) material. Further, the Court will allow movants to depose the OIC employees it listed in its motion but will limit those questions to the following subject areas: (1) OIC policy regarding press contacts, (2) actual contacts with the press by OIC employees, and (3) specific representations made by the OIC about the first two subject areas. The Court will also allow movants to subpoena for testimony at the hearing the seven witnesses they have identified. Movants' questioning at the hearing will be limited in the same manner as the deposition questioning. The Court is satisfied that such questions will lead to relevant information. Fed. R.

¹ Should the Court find a direct violation of Rule 6(e), the Court reserves the right to take any appropriate steps, including referring the matter to the United States Attorney, the Department of Justice, or a special master for criminal contempt investigation and proceedings. See Fed. R. Crim. P. 42(b).

² The OIC requests a protective order "barring any discovery related to matters occurring before the grand jury." Consolidated Response of the United States at 10 n.6, and the Court will grant that request.

Civ. P. 26.

In addition, movants seek production of *ex parte* submissions made by the OIC in conjunction with its Opposition to the Show Cause Motion filed on February 20, 1998. Insofar as the motion requests production of affidavits filed *ex parte* on that date, the motion is moot because the Court already granted that relief. The remainder of the *ex parte* documents fall within Rule 6(e) and the Court will not order their disclosure to movants.

II. OIC's Objections to Court's Order to Show Cause

The Court's Order of June 19, 1998, directed that counsel for movants would be included in the July 6 show cause hearing and stated that the parties should file any objections to that procedure by a certain date. The OIC has objected to the presence of counsel for movants at the show cause hearing and states that the law requires such a hearing to be held *ex parte*.

The leading D.C. Circuit case on this matter nowhere suggests that a contempt hearing should be held *ex parte*. See Barry, 865 F.2d at 1321-26. On remand in the Barry case, the district court strongly implies that plaintiffs were present at the evidentiary hearing. See Barry v. United States, 740 F. Supp. 888, 889 n.1 (D.D.C. 1990) ("Initially, in preparation for the evidentiary hearing following remand, plaintiff sought to present additional materials relating to more recent events, which materials he asserted would bolster his case. At the hearing, however, plaintiff abandoned this effort and stated unequivocally that he would 'stand on the record' as it is currently constituted.")

The Eleventh Circuit in Eisenberg also does not suggest that a contempt hearing for violation of Rule 6(e) should be held *ex parte*. 711 F.2d at 965 ("Targets' counsel may then play a proper role in hearings involving imposition of contempt sanctions on government employees.

As was stated in *Lance*, [610 F.2d 202, 219 (5th Cir. 1980)], "such a hearing carries little threat of conflict with grand jury proceedings."³ It is true that *Eisenberg* sets out a different procedure than the one used by the D.C. Circuit in *Barry*: it suggests a second step after the establishment of the *prima facie* case and before a contempt hearing wherein the Court determines whether Rule 6(e) has been violated. *Eisenberg*, 711 F.2d at 965. The *Barry* court, however, unambiguously states that "[o]nce a *prima facie* case is shown, the district court must conduct a 'show cause' hearing" 865 F.2d at 1321.

The Court agrees with the OIC that it is obliged to "ensure that the evidentiary hearing does not compromise the secrecy and integrity of the ongoing grand jury investigation." Consolidated Response of the United States at 4. Moreover, the Court believes it can honor this obligation and allow the OIC to present its rebuttal evidence in a fair and complete manner. In response to the OIC's concerns and in light of the importance of Rule 6(e) secrecy, the Court will begin the July 6, 1998, show cause hearing with an *ex parte* presentation by the OIC. At the outset of the hearing, the OIC may present any Rule 6(e) material to the Court it deems necessary to rebut the *prima facie* case.³ Also, if deemed necessary, the OIC may file further rebuttal evidence *in camera*. *Eisenberg*, 711 F.2d at 966. After the OIC's presentation, movants may join the hearing, cross-examine the OIC's witnesses, and present their evidence to the Court. If it becomes necessary for the OIC to present material covered by Rule 6(e) during the remainder of the hearing, the OIC may submit it to the Court at a bench conference or by other appropriate means.

³ The OIC's *ex parte* presentation should be strictly limited to matters that directly involve Rule 6(e) materials.

Accordingly, it is this 26th day of June 1998,

ORDERED that the OIC appear on July 6, 1998, to show cause why it should not be held in contempt for violating this Court's orders that sealed judicial decisions shall not be revealed to the public as well as alleged violations of Rule 6(e); it is further

ORDERED that the motion for production of documents and for testimony filed by President William J. Clinton, the White House, Bruce Lindsey, and Sidney Blumenthal be, and hereby is, denied in part and granted in part; it is further

ORDERED that movants' request that the OIC produce materials filed ~~ex parte~~ by the OIC on February 20, 1998, be, and hereby is, denied; it is further

ORDERED that movants' request to subpoena documents from the OIC that are related to media contacts with the OIC be, and hereby is, granted; it is further

ORDERED that the OIC redact from those documents any Rule 6(e) material; it is further

ORDERED that the OIC produce those documents to movants by June 30, 1998; it is further

ORDERED that movants' request to subpoena certain witnesses for deposition testimony be, and hereby is, granted in part, subject to the restrictions described in this Memorandum Order; it is further

ORDERED that movants shall be barred from discovery of any material covered by Rule 6(e); it is further

ORDERED that movants' request to subpoena certain witnesses for hearing testimony be,

and hereby is, granted. Movants' questioning at the hearing shall be subject to the restrictions described in this Memorandum Order.

Norma Holloway Johnson
NORMA HOLLOWAY JOHNSON
CHIEF JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE GRAND JURY PROCEEDINGS

Misc. Action No. 98-55, 98-177
and 98-228 (NHJ)
(consolidated)

FILED

UNDER SEAL JUL - 7 1998

NANCY MAYER-WASHINGTON, CLERK
U.S. DISTRICT COURT

ORDER

On June 19, 1998, the Court ordered the Office of the Independent Counsel ("OIC") to appear and show cause why it, or individuals therein, should not be held in contempt for violations of Federal Rule of Criminal Procedure 6(e)(2). In its June 19 Order, the Court found that several media reports establish prima facie violations of Rule 6(e)(2). On June 26, 1998, the Court entered a related order allowing certain limited discovery prior to the show cause hearing and outlining the procedures to be followed at that hearing. Based on the OIC's request, the Court issued a third order on June 29, continuing the show cause hearing to a later date and staying discovery in this matter until July 11, 1998.

On July 6, 1998, the OIC filed a notice of appeal from the Court's Orders of June 19 and

June 26:

Notice is hereby given this 6th day of July, 1998, that the United States of America, by Kenneth W. Starr, Independent Counsel, hereby appeals to the United States Court of Appeals for the District of Columbia from the order of this Court entered on the 26th day of June, 1998, as well as the order entered on the 19th day of June, 1998.

Notice of Appeal: In its notice of appeal, the OIC does not state the basis for its appeal of the Court's June 19 and June 26 Orders.

As a general rule, "[t]he filing of a notice of appeal is an event of jurisdictional significance — it confers jurisdiction on the court of appeals and divests the district court of its

control over those aspects of the case involved in the appeal." Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982) (per curiam). "An exception to this general rule has been recognized, however, in cases where an appeal is noticed from an order which is not appealable. In such cases, the district court can disregard the notice of appeal and proceed with the case." Hammerman v. Pascock, 623 F. Supp. 719, 720-21 (D.D.C. 1985) (Johnson, J.); see also Ruby v. Secretary of the Navy, 365 F.2d 385, 389 (9th Cir. 1966), cert. denied, 386 U.S. 1011 (1967) ("Where the deficiency in a notice of appeal, by reason of . . . reference to a non-appealable order, is clear to the district court, it may disregard the purported notice of appeal and proceed with the case, knowing that it has not been deprived of jurisdiction."); see generally Allan Ideo, The Authority of a Federal District Court to Proceed after a Notice of Appeal has been Filed, 143 F.R.D. 307, 311 (1992) (noting that the circuits are in accord that the district court's jurisdiction is not divested by a notice of appeal from an unappealable, interlocutory order). Without such an exception, a court is powerless to prevent intentional dilatory tactics, the nonappealing party's right to continuing trial court jurisdiction is left without a remedy, and the smooth and efficient functioning of the judicial process is inhibited. See United States v. Hitchmon, 602 F.2d 689, 694 (5th Cir. 1979) (en banc).

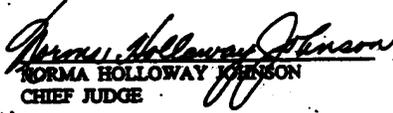
In light of the OIC's notice of appeal, the Court must determine whether its orders of June 19 and June 26 are properly appealable orders. Rather than make such a determination ~~gr~~ sponte, the Court will order the parties to submit briefs on this issue.

Accordingly, it is this 7th day of July 1998,

ORDERED that the OIC shall submit to the Court no later than 4:00 p.m. on Thursday, July 9, 1998, a memorandum stating the basis for its belief that the Court's Orders of June 19 and

June 26 are properly appealable orders; and it is further

ORDERED that the movants may respond to the OIC's memorandum, no later than
12:00 p.m. on Friday, July 10, 1998.


NORMA HOLLOWAY JOHNSON
CHIEF JUDGE

UNDER SEAL**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA****IN RE GRAND JURY PROCEEDINGS**Misc. Action No. 98-55, 98-177
and 98-228 (NHJ)(consolidated)
UNDER SEAL**FILED**

JUL - 9 1998

ORDERNANCY MAYER-WHITTINGTON, CLERK
U.S. DISTRICT COURT

On July 6, 1998, the Office of Independent Counsel ("OIC") filed a notice of appeal with respect to the Court's Orders of June 19 and June 26. In the Order of June 19, the Court found that movants established prima facie violations of Rule 6(e) by the OIC and required the OIC to show cause why it should not be held in contempt. The Order of June 26 outlines the procedures for the evidentiary show cause hearing and permits limited discovery by movants. On July 7, 1998, the Court ordered the OIC to explain "the basis of its belief that the Court's Orders of June 19 and June 26 are properly appealable orders." That same day, the OIC moved to stay enforcement of these two Orders pending appeal. On July 8, 1998, the OIC submitted a memorandum asserting the collateral order doctrine as the basis of its notice of appeal. Upon consideration of this memorandum and the motion for stay, the Court will deny the OIC's request for a stay pending appeal.

The OIC argues that the Court should stay its Orders pending appeal because the OIC has met the four-factor test set out in Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 842-43 (D.C. Cir. 1977). The factors to be considered in determining whether a stay is warranted are as follows: "(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants a stay; and (4)

the public interest in granting the stay." Cuomo v. United States Nuclear Regulatory Commission, 772 F.2d 972, 974 (D.C. Cir. 1985). Contrary to the OIC's assertion, the Court finds that the OIC's premature notice of appeal meets none of the Holiday Tours factors.

I. ⁹ Likelihood of Success on the Merits

The OIC has not made out a case on the merits adequate to permit a stay. As the Court explained in its July 7 Order, a notice of appeal from a non-appealable order does not divest the district court of its jurisdiction. See Order of July 7, 1998. The Orders in question are clearly not final orders appealable under 28 U.S.C. § 1291. The finality requirement is "a historic characteristic of federal appellate procedure" that advances the important interest of avoiding piecemeal review of ongoing district court proceedings," for "piecemeal review would not only delay the ultimate resolution of disputes by spawning multiple appeals, [but] it would also 'undermine the independence of the district judge in conducting court proceedings.'" MDK, Inc. v. Mike's Train House, Inc., 27 F.3d 116, 121 (4th Cir. 1994) (internal citations omitted).

Although the collateral order doctrine provides an exception to the finality requirement,¹ the Court finds that the Orders in question do not fall within that doctrine. As the OIC has failed to demonstrate that the Orders are even appealable, it cannot show a likelihood of prevailing on the merits of its appeal.

The OIC claims that the Court's Orders of June 19 and June 26 are appealable under the collateral order doctrine. See Cohen, 337 U.S. at 546-47. According to this doctrine, "[a]n interlocutory order of the district court may be appealed if it: (1) 'conclusively determine[s] the

¹ See Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546-47 (1949).

disputed question'; (2) 'resolve[s] an important issue completely separate from the merits of the action'; and (3) would be "effectively unreviewable on appeal from a final judgment." United States v. Rostenkowski, 59 F.3d 1291, 1296 (D.C. Cir. 1995) (quoting Coopers & Lybrand v. Livesey, 437 U.S. 463, 468 (1978)). "Unless all three requirements are established, jurisdiction is not available under the collateral order doctrine." Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 276 (1988).

A. Order of June 19

The Court finds that the Order of June 19 is not an appealable order under the collateral order doctrine. The OIC has failed to state any basis for its assertion that the show cause order falls within the doctrine.² First, the Order does not "conclusively determine the disputed question" of whether the OIC indeed violated Rule 6(e) by leaking grand jury matters to the media. Rostenkowski, 59 F.3d at 1296. This question cannot be resolved until the Court has conducted the show cause hearing. The Order of June 19 merely finds that prima facie violations of Rule 6(e) have been established and does not find that the OIC has committed actual violations. Secondly, the Order does not "resolve an issue completely separate from the merits of the action." Id. Rather, the issues raised by the show cause order are inextricably connected to the merits raised by the show cause motions themselves, which will be addressed at the show cause hearing. Lastly, the show cause order will be effectively reviewable on appeal from a final judgment. Id. If at the close of the show cause hearing, the Court finds the OIC to be in contempt, the OIC will be able to appeal the contempt citation as a final order at which time the

² All of the OIC's arguments pertain to the discovery and procedural aspects of the Order of June 26. See OIC Memorandum In Response to Court's Order of July 7, 1998, at 2.

Court's decision to conduct a show cause hearing will undoubtedly be reviewed on appeal.

B. Order of June 26

With respect to the Order of June 26, the Court also finds that it is not an appealable order under the collateral order doctrine. The Court begins by noting that "[t]he general rule for a witness challenging a discovery order is that he must first refuse to produce the requested documents or testimony and subject himself to a contempt citation before the right to review arises. Under this rule discovery orders are generally regarded as nonfinal and thus nonappealable."³ *United States v. AT&T*, 642 F.2d 1285, 1295 (D.C. Cir. 1980); see also *In re Sealed Case*, 141 F.3d 337, 339 (D.C. Cir. 1998). Although the collateral order doctrine provides an exception to this general rule, see *AT&T*, 642 F.2d at 1295, the Court finds that the Order of June 26 does not fall within this exception. This decision is supported by the fact that "courts have routinely declined to extend the collateral order doctrine to discovery rulings." *MDK*, 27 F.3d at 121 (citations omitted); see also *Boughton v. Cotter Corp.*, 10 F.3d 746, 749 (10th Cir. 1993) ("This circuit has repeatedly held that discovery orders are not appealable under the Cohen doctrine.").

With respect to the first factor of the *Cohen* test, the Order of June 26 does not conclusively determine the disputed questions of pre-hearing discovery and the conduct of the

³ "It is the main rule that an order in an ongoing proceeding compelling testimony or documentary production is not immediately appealable; to obtain instant appellate review, the party to whom the command is addressed must refuse to respond and submit to a contempt citation." *In re Sealed Case*, 737 F.2d 94, 97 (D.C. Cir. 1984); see also *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 377 (1981) ("In the rare case when appeal after final judgment will not cure an erroneous discovery order, a party may defy the order, permit a contempt citation to be entered against him, and challenge the order on direct appeal of the contempt ruling.").

show cause hearing. The OIC asserts that the questions of whether it shall submit to pre-hearing discovery and whether it will permit the presence and participation of movants at the show cause hearing have been conclusively determined. However, these issues have not been conclusively determined because the OIC has "neither complied with [movants'] subpoena nor refused to comply but instead has taken this appeal." In re Grand Jury Subpoena for New York State Income Tax Records, 607 F.2d 566, 569 (2d Cir. 1979). The OIC has not moved to quash movants' subpoena, nor has it been held in contempt for refusing to comply with the subpoena. Under these circumstances, the first factor of Cohen is not met, as the Second Circuit explains:

[W]hile the Cohen doctrine holds that certain collateral orders may be deemed final, it does not transmute a preliminary collateral order into a conclusive collateral order. Even as to the collateral matters themselves a sense of finality is required, and federal appellate jurisdiction depends on the existence of a decision that leaves nothing for the court to do but execute the order. This dependence generally forecloses immediate appeals from orders denying motions to quash, and requires that the more conclusive order of contempt, which truly leaves nothing for the court but its execution, be entered before appeal is permitted.

Id. (internal citations omitted). Thus, until the OIC makes a decision either to comply or to refuse to comply with the subpoena and the Order of June 26,⁴ the disputed issues of whether the OIC will submit to discovery and permit movants' participation in the hearing will not be conclusively determined.

The Court finds that the Order of June 26 also fails to meet the second element of the collateral order doctrine because the Order does not resolve an important issue completely

⁴ See In re Sealed Case, 141 F.3d at 340 ("[P]etitioner is asserting its own interests in [the asserted privilege] . . . [and] [t]hus it has the requisite incentives (as well as the clear ability) to risk contempt and thereby force review into the usual channel. Accordingly, direct appeal is unavailable as an alternative avenue for relief.")

separate from the merits of the action. The merits of the action pertain to whether the OIC violated Rule 6(e) and, if so, whether it should be held in contempt. The discovery order directly addresses the OIC's contacts with the press, an issue that lies at the heart of the merits. Although the "[C]ourt's order compelling discovery may seem a self-contained piece of litigation when viewed in isolation," "[r]esolving the issue of whether [movants] will be able to secure this information from the [OIC] perforce impacts the manner in which the [show cause hearing] will be conducted." *MDK*, 27 F.3d at 121; see also *Gross v. G.D. Searle & Co.*, 738 F.2d 600, 603 (3d Cir. 1984) (finding discovery order to be inseparable from the main action because "the information sought is relevant to — and not separate from — the merits of the underlying dispute"). Furthermore, the information revealed in discovery will likely bear directly on the nature of potential contempt findings and appropriate relief. Thus, the Order does not meet the second element of the collateral order doctrine.

Lastly, the Order fails to meet the third element of the doctrine because it is effectively reviewable on appeal.⁵ In its motion for stay, the OIC notes that "courts regularly allow the government to pursue interlocutory appeals from orders requiring the disclosure of privileged information," citing *United States v. AT&T*, 642 F.2d 1285, 1296 (D.C. Cir. 1980) (emphasis added), and *Irons v. FBI*, 811 F.2d 681, 683 (1st Cir. 1987). While this may be true, the Order of June 26 in no way requires the OIC to disclose privileged material. This case is distinguishable from the two cases cited by the OIC and other cases involving court orders requiring disclosure

⁵ Because the OIC is both the custodian of the documents and the subpoenaed witness in this case, it can obtain review on appeal unlike a nonparty witness who is granted leave to appeal collateral orders under the *Perman* doctrine. See *Perman v. United States*, 247 U.S. 7 (1918).

of privileged materials that courts found to satisfy the collateral order doctrine. See, e.g., In re Grand Jury Subpoena Duces Tecum, 797 F.2d 676, 678 (8th Cir. 1986); Siedle v. Putnam Investment, Inc., 1998 WL 309277, *2 (1st Cir. June 16, 1998). Given that the Order explicitly directs the OIC to redact any privileged material covered by Rule 6(e), there is no risk that the OIC will be forced to "let the cat out of the bag, without any effective way of recapturing it if the district court's directive was ultimately found to be erroneous." Irons, 811 F.2d at 683.

The OIC contends that "[i]t is impossible to disclose what the United States may have represented to press sources without revealing protected information." Motion to Stay Court's Orders of June 19 and June 26 at 8.

the Order of June 26 explicitly directs the OIC to redact any Rule 6(e) information from documents reflecting press contacts.⁶ Given that the Order does not require release of privileged Rule 6(e) material and in fact forbids this, the Court fails to understand why it would be "impossible" to disclose OIC contacts with the press without revealing Rule 6(e) material.

Even if compliance with the discovery and hearing procedures set forth in the Order of June 26 in some way led to the release of privileged Rule 6(e) information, the Order would still be effectively reviewable on appeal for the following reasons:

The only sense in which the order can be argued to satisfy the third prong of the Cohen test is that it exposes to others' view documents that [the OIC] contends should not be so exposed. The practical consequences of the district court's decision . . . can be effectively reviewed on direct appeal following a judgment on the merits. If [the Court of Appeals] determines that privileged documents were wrongly turned over to [movants] and were used to the detriment of [the OIC] at [the show cause hearing], [the Court of Appeals] can reverse any adverse judgment and require a new [show cause hearing], forbidding any use of the improperly disclosed documents. [Movants] would also be forbidden to offer at [the hearing] any documents, witnesses, or other evidence obtained as a consequence of their access to the privileged documents.

Boughton, 10 F.3d at 749. However, as the Court has already explained and as the Order of June 26 makes plain, there should be little to no risk of disclosing privileged Rule 6(e) material to movants if the OIC makes appropriate redactions to its documents before turning them over to movants.

II. The Remaining Stay Factors

The other three Holiday Tours factors weigh in favor of denying the motion for a stay. First, the OIC will not be irreparably harmed if the Court fails to grant a stay. No Rule 6(e) material will be released because the Court ordered that such material may be redacted by the OIC. Thus, grand jury secrets will not be revealed. Moreover, while the prosecution has an interest in continuing its investigation uninterrupted by distraction, the Court has found that movants presented a prima facie case of violation of Rule 6(e) by the OIC and the Court must follow up with a show cause hearing which the Court has determined will be aided by discovery and the presence of movants at an appropriate time. See Barry v. United States, 865 F.2d 1317, 1321 (D.C. Cir. 1989).

The OIC also argues

⁷The purpose of the show cause hearing is to identify what Rule 6(e) information, if any, the OIC revealed to the press.

The harm to movants of granting a stay is manifest.⁸ The Court is prepared to hold a hearing to determine whether the OIC and its representatives should be held in contempt for violation of Rule 6(e). If in fact the movants' allegations are true, this hearing could serve to stop the flow of leaks damaging to the targets of this grand jury investigation. Even if the movants' allegations are found to be false, the show cause hearing should set an example for those parties who are the source of the damaging leaks. The OIC states that, for prevention of future leaks, "the Court has already issued orders governing confidentiality." However, the Court has issued many such orders in the past, several of which have been ignored by a party or

⁸ By contrast, harming a possible relationship between an OIC attorney and a reporter wherein the OIC attorney is improperly passing information on to the reporter is not the type of harm that should concern this Court.

parties.

Third, while there is a substantial public interest in continuing the grand jury investigation expeditiously, there is also a substantial public interest in stopping the many leaks that have come out of this case. Not only do the leaks damage the investigations' targets and its witnesses, each leak erodes respect for the judiciary and the orders sealing the pleadings and hearings in this grand jury matter.

For the reasons given above, the Court finds that the OIC has failed to meet the standard for staying enforcement of the Orders of June 19 and June 26. Accordingly, it is this *9/26/98* day of July 1998,

ORDERED that the OIC's motion to stay enforcement of the Orders of June 19 and June 26 be, and hereby is, denied; it is further

ORDERED that the show cause hearing originally scheduled for July 6, 1998, be, and hereby is, rescheduled for 10:00 a.m. on July 20, 1998, in Courtroom 4; it is further

ORDERED that the stay on all discovery, including depositions and the production of documents, be, and hereby is, lifted on July 11, 1998, at which time discovery shall commence; it is further

ORDERED that the Office of the Independent Counsel shall produce documents pursuant to movants' subpoena no later than 12 noon on July 11, 1998; it is further

ORDERED that the documents produced to movants and the deposition testimony disclosed to movants shall be used only for purposes of the show cause hearing and shall be kept strictly confidential; and it is further

ORDERED that the parties shall file their witness lists no later than July 15, 1998.


NORMA HOLLOWAY JOHNSON
CHIEF JUDGE

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued July 21, 1998

Decided August 3, 1998

In re: Sealed Case No. 98-3077

Consolidated with
98-3078, 98-3079, 98-3081

ON PETITION FOR WRIT OF MANDAMUS

Kenneth W. Starr, Independent Counsel, argued the cause for petitioner, with whom *Donald T. Bucklin*, *Scott T. Kragie*, and *Andrew W. Cohen* were on the petition and reply.

David E. Kendall argued the cause for respondent William J. Clinton, with whom *Nicole K. Seligman*, *Max Stier*, *Robert S. Bennett*, *Carl S. Rauh*, *Amy Sabrin*, *Katharine S. Sexton*, *W. Neil Eggleston*, *William J. Murphy*, and *William Alden McDaniel, Jr.*, were on the response.

Before: WALD, SILBERMAN, and HENDERSON, *Circuit Judges*.

Opinion for the Court filed *Per Curiam*.

Per Curiam: The Independent Counsel (IC) petitions for a writ of mandamus directing the district court to vacate its orders authorizing [

] to subpoena documents from the IC, conduct limited depositions of the IC and his staff, and subpoena the IC and his staff for similarly limited testimony at a show cause hearing relating to alleged violations of the grand jury

* Bold brackets signify sealed material.

secrecy rule. We conclude that we have power to determine the issues presented by the petition; resolving those issues in a substantially different way than the district court did, we issue the writ.

I.

[
]¹ filed motions in the district court requesting that the court order Independent Counsel Kenneth W. Starr to show cause why he, and/or his staff, should not be held in contempt for violation of Federal Rule of Criminal Procedure 6(e)(2), which prohibits attorneys for the government from disclosing confidential grand jury information.² The movants alleged that the IC and his staff had divulged such information to the press, and provided the court with several news reports about the investigation wherein a reporter describes the source of the information as, to quote one illustrative example, “a source close to Starr.” Appendix to Opposition to Emergency Motion to Stay the District Court’s Orders,

¹ [

]

² Rule 6(e) provides in relevant part: “[A]n attorney for the government . . . shall not disclose matters occurring before the grand jury, except as otherwise provided in these rules. . . . A knowing violation of Rule 6 may be punished as a contempt of court.” FED. R. CRIM. P. 6(e)(2). The IC, as an “attorney for the government,” is subject to the secrecy requirements of Rule 6(e)(2). *In re North*, 16 F.3d 1234, 1245 (D.C. Cir. 1994).

at Tab 1 (Thomas Galvin, *Monica Keeping Mum—For Now Fends Off Query On Internal Affairs*, DAILY NEWS, Jan. 23, 1998, at 26). The district court held that such news reports established a *prima facie* case of a violation of Rule 6(e)(2) because the “media reports disclosed information about ‘matters occurring before the grand jury’ and indicated that the sources of the information included attorneys and agents of the Government.” Order to Show Cause, Misc. No. 98-55 (June 19, 1998), at 2 (quoting *Barry v. United States*, 865 F.2d 1317, 1321 (D.C. Cir. 1989)).

The district court read our decision in *Barry* as holding that once a *prima facie* violation of Rule 6(e)(2) is established, the court is *required* to conduct an adversarial hearing at which the prosecutor must show cause why he should not be held in contempt. Order to Show Cause at 9, (citing *Barry*, 865 F.2d at 1321). Accordingly, the district court issued the two procedural orders at issue in this petition. The court first scheduled a show cause hearing. Order to Show Cause at 10. In the second order, it clarified the nature of the show cause hearing. The IC was ordered to produce, on July 11, the documents requested by movants, with any Rule 6(e) material redacted.³ The court ruled that movants would be permitted to depose the IC and several of his staff, prior to the adversarial hearing, on three subject areas: (1) the IC’s policy regarding press contacts, (2) actual contacts with the press by the IC or his staff, and (3) specific representations made by the IC about the first two

³ Discovery of documents from the IC was initially scheduled to begin on June 30, 1998. At the request of the IC, the district court stayed the discovery order until July 11.

subject areas. The court further ruled that movants could subpoena the IC and several of his staff for testimony at the show cause hearing, with the subject matter of the questioning to be limited in the same manner as during the depositions. Mem. Order, Misc. No. 98-55 (June 26, 1998), at 2. Finally, the court set forth the procedure to be followed at the show cause hearing: the hearing would begin with an *ex parte* presentation by the IC of any Rule 6(e) material the IC deems necessary to rebut the *prima facie* case; after the IC's presentation, movants' counsel would join the hearing, cross-examine the IC and his witnesses, and present their evidence. *See id.* at 4.

The IC filed a notice of appeal, followed by a motion for stay pending appeal. The district court subsequently declined to stay its orders, reasoning that the factors for granting a stay pending appeal were not met. Order, No. 98-55 (July 9, 1998). Specifically, the court found that the IC's likelihood of prevailing on the merits of its appeal was low given the court's conclusion that the orders are not even appealable; that the IC would not be irreparably harmed by the orders because the orders allowed him to redact any Rule 6(e) material and thus he would not be required to provide any confidential investigative material to movants; that the harm to movants of granting a stay was substantial because without an immediate show cause hearing, there would be no deterrence of future leaks in the interim before the appeal; and that the public interest in stopping leaks and in preserving respect for the judiciary's orders sealing grand jury proceedings outweighed any delay that might be caused by the show cause hearing and its associated discovery process.

On July 9, 1998, the same day the district court denied the IC's motion for a stay pending appeal, the IC petitioned us for mandamus relief.⁴ Because discovery was set to begin on July 11, we ordered an administrative stay of the district court's procedural orders so that we would have sufficient opportunity to consider the merits of the petition for writ of mandamus. Order, No. 98-3077 (July 10, 1998). We now conclude that we have power to determine the issues presented in the petition; based on our analysis of those issues, we issue the writ.

II.

The writ of mandamus has been described as "an extraordinary remedy, to be reserved

⁴ Petitioner styles his petition a "Petition for Writ of Prohibition" rather than a "Petition for Writ of Mandamus." Because "the grounds for issuing the writs are virtually identical," *In re Halkin*, 598 F.2d 176, 179-80 n.1 (D.C. Cir. 1979), and because "mandamus" is the more familiar term, we prefer to use it.

Petitioner simultaneously filed an emergency motion to stay the district court's orders pending appeal. Petitioner argues in that motion that we have jurisdiction to review the district court's orders--which he concedes are interlocutory--under the collateral order doctrine. Emergency Motion of the United States of America at 7 (citing *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546-47 (1949)). We have recently described the criteria for the collateral order doctrine and the writ of mandamus as "similar." *In re Minister Papandreou*, 139 F.3d 247, 250 (D.C. Cir. 1998); see also *In re Kessler*, 100 F.3d 1015, 1016 (D.C. Cir. 1997) ("In practical terms, the difference between the two, at least in this context [of review of a discovery order], is mainly semantic."). Ease of analysis, as will become clear in Part II.B. *infra*, dictates that we discuss petitioner's arguments using the framework for mandamus relief. Cf. *Papandreou*, 139 F.3d at 250 (discussing the criteria for both mandamus relief and the collateral order doctrine, and then embarking on an analysis framed solely in terms of mandamus without articulating a reason for preferring one framework over the other).

for extraordinary situations.” *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988) (citing *Kerr v. United States Dist. Court*, 426 U.S. 394, 402 (1976)).⁵ As we recently observed, liberal use of the writ would “undercut the general rule that courts of appeals have jurisdiction only over ‘final decisions of the district courts,’ 28 U.S.C. § 1291, and would lead to piecemeal appellate litigation.” *In re Minister Papandreou*, 139 F.3d 247, 249 (D.C. Cir. 1998). Not surprisingly, the extraordinary nature of mandamus relief is reflected in the strict criteria for its issuance: Mandamus will issue only if the petitioner bears his “burden of showing that the petitioner’s right to issuance of the writ is clear and indisputable,” *Gulfstream*, 485 U.S. at 289 (citation and internal quotation marks omitted), and that “no other adequate means to attain the relief” exist, *Allied Chem. Corp. v. Daiiflon, Inc.*, 449 U.S. 33, 35 (1980). See *Papandreou*, 139 F.3d at 250.

A.

We take the latter requirement first. Respondent, referring us to our opinion in *In re Kessler*, 100 F.3d 1015 (1997), urges that petitioner has an adequate alternative means to challenge the district court’s discovery orders. As respondent correctly observes, we stated in *Kessler* that “in the ordinary case, a litigant dissatisfied with a district court’s discovery

⁵ Statutory authority for issuing the writ of mandamus is provided by 28 U.S.C. § 1651 (1994): “The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.”

order must disobey the order, be held in contempt of court, and then appeal that [final] order on the ground that the discovery order was an abuse of discretion.” *Kessler*, 100 F.3d at 1015; *see also Papandreou*, 139 F.3d at 250 (“If held in contempt, a litigant then has a final order from which he may appeal, asserting any legal flaws in the underlying discovery order.”); *In re: Sealed Case*, 141 F.3d 337, 339 (D.C. Cir. 1998). Respondent argues that the disobedience and contempt path to appeal is an adequate means to relief, and that petitioner must therefore pursue it rather than seeking the extraordinary writ of mandamus.

Unfortunately, in *Kessler*, *Papandreou*, and *In re: Sealed Case*, the parties did not bring to our attention a longstanding distinction between civil and criminal contempt orders issued against a party to a litigation. While a criminal contempt order issued against a party is considered a final order and thus appealable forthwith under 28 U.S.C. § 1291, *Bray v. United States*, 423 U.S. 73, 76 (1975); *Matter of Christensen Eng'g Co.*, 194 U.S. 458, 461 (1904); *SEC v. Simpson*, 885 F.2d 390, 395 n.7 (7th Cir. 1989), a civil contempt order issued against a party is typically deemed interlocutory and thus not appealable under 28 U.S.C. § 1291, *Fox v. Capital Co.*, 299 U.S. 105, 107 (1936); *Doyle v. London Guar. & Accident Co.*, 204 U.S. 599 (1907); *International Ass'n of Machinists & Aerospace Workers v. Eastern Airlines, Inc.*, 849 F.2d 1481, 1484 (D.C. Cir. 1988); *Duell v. Duell*, 178 F.2d 683, 687 (D.C. Cir. 1949) (describing the rule as “thoroughly settled”); *In re Joint E. & S. Dists. Asbestos Litig.*, 22 F.3d 755, 765 (7th Cir. 1994). Indeed, we reaffirmed the rule that a civil contempt order issued against a party is not appealable as recently as *SEC v. Finnegan*, No. 97-5272,

1998 WL 65530, at *1 (D.C. Cir. Jan. 13, 1998).

The confusion in our caselaw may be a product of several factors. For one, the authoritative Supreme Court cases on these issues are rather old and are not frequently cited. For another, the distinction between civil and criminal contempt orders for purposes of appealability by a party has been criticized, *see Powers v. Chicago Transit Auth.*, 846 F.2d 1139, 1141 (7th Cir. 1988) (noting that although “many modern commentators believe that the rule postponing review [of a civil contempt order issued against a party] is unduly harsh, . . . the rule is too well established to be changed by us.”); *cf.* 15B CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3917, at 399-404 (2d ed. 1992) (reviewing the policy debate on the merits of the distinction), especially in light of the different regime for non-parties that allows immediate appeals from orders of either civil or criminal contempt, *Petroleos Mexicanos v. Crawford Enters., Inc.*, 826 F.2d 392, 398 (5th Cir. 1989); *United States v. Columbia Broad. Sys.*, 666 F.2d 364, 367 n.2 (9th Cir. 1982) (citing cases). Most likely, our questionable assumption in *Kessler*, *Papandreou*, and *In re: Sealed Case* can be traced to an imprecise footnote from which we quoted: “As a general rule, a district court’s order enforcing a discovery request is not a ‘final order’ subject to appellate review. A party that seeks to present an objection to a discovery order immediately to a court of appeals must refuse compliance, be held in contempt, and then appeal the contempt order.” *Church of Scientology of Calif. v. United States*, 506 U.S. 9, 18 n.11 (1992) (citing *United States v. Ryan*, 402 U.S. 530 (1971)). On

its face, this passage suggests that any contempt order issued against a party, whether civil or criminal, is an appealable final order. But it is rather implausible that the Supreme Court, in dicta—not to mention in a footnote—meant to overrule *sub silentio* the holdings in *Fox* and *Doyle*. Moreover, the case relied on by the Supreme Court, *United States v. Ryan*, 402 U.S. 530 (1971), is inapposite. *Ryan* involved a recipient of a subpoena duces tecum issued by a grand jury, who sought to appeal from the district court's denial of a motion to quash the subpoena. The Court held that such an order is not appealable, and that appeal could only be taken from a contempt order that would follow from a refusal to produce the documents requested in the subpoena. *Id.* at 552. It did not distinguish civil from criminal contempt, for there was no need to do so. The case involved a recipient of a grand jury subpoena, not a party-litigant, and so did not implicate the *Doyle* rule.

In any event, we need not definitively resolve the apparent conflict in our cases as to whether a civil contempt order issued in the context of an ongoing civil litigation is appealable as a final order. It is enough for us to observe that there is substantial doubt whether, if squarely presented with the issue, we would deem such a civil contempt order appealable. Given a district court's discretion whether to hold a party who refuses to comply with a discovery order in civil or criminal contempt, "a party who wishes to pursue the disobedience and contempt path to appeal cannot know whether the resulting contempt order will be appealable." WRIGHT, MILLER & COOPER § 3914.23, at 146. The implication, of course, is that the disobedience and contempt route to appeal cannot be labeled an adequate

means of relief for a party-litigant. So too here. The discovery order addressed to petitioner arises out of a civil proceeding ancillary to a grand jury investigation, *Barry*, 865 F.2d at 1321-22, and petitioner is properly characterized as a party in that civil proceeding. Petitioner cannot know, *ex ante*, whether refusal to comply with the discovery order will result in a civil contempt order or a criminal contempt order. The uncertainty of this means to relief bespeaks its inadequacy in this case.

Our conclusion that the disobedience and contempt path to appeal is inadequate does not answer whether some other means to relief--besides the writ of mandamus--is adequate for petitioner. Presumably, a civil contempt order, if issued against petitioner at the *conclusion* of the ancillary civil proceeding, would constitute a final order, appealable under 28 U.S.C. § 1291; it would not be like the civil contempt orders we discussed above that arise in the course of an ongoing litigation. The Rule 6(e)(2) ancillary civil proceeding we established in *Barry* is a peculiar creature in this regard; the *raison d'être* of the proceeding is a determination by the district court whether or not to hold the prosecutor in civil contempt. Respondent argues, therefore, that petitioner must wait until the conclusion of this ancillary civil proceeding and, if found in civil contempt at that point, seek to appeal the discovery orders.

The inadequacy of this alternative is apparent upon consideration of the nature of the harm that petitioner alleges will occur if we allow the procedural orders to stand. Petitioner contends that if he discloses [

the grand jury's investigation may be irreparably harmed. In this respect, petitioner is asserting something akin to a privilege insofar as "once [the] putatively protected material is disclosed, the very right sought to be protected has been destroyed." *In re Ford Motor Co.*, 110 F.3d 954, 963 (3d Cir. 1997) (citation omitted); *see also Papandreou*, 139 F.3d at 251 ("Disclosure followed by appeal after final judgment is obviously not adequate in such cases--the cat is out of the bag."). Although we have not had occasion to address the issue of irreparable harm to law enforcement from disclosure of arguably "privileged" material in the context of a mandamus petition, our sister circuits have concluded that such harm renders appeal after final judgment an inadequate means to relief from the discovery order. *See In re Department of Justice*, 999 F.2d 1302, 1305 (8th Cir. 1993) (district court had ordered the FBI to turn over documents compiled for law enforcement purposes and assertedly privileged under FOIA, which, if released, would have irreparably harmed ongoing law enforcement proceedings); *In re Attorney Gen. of the United States*, 596 F.2d 58, 60 (2d Cir. 1979) (district court had ordered the Attorney General to release files disclosing the names of confidential government informants, arguably protected under the informant's privilege and which, if released, might have had immediate adverse effects on law enforcement and intelligence-gathering).

Petitioner submits, moreover, that the district court's procedural orders, because they involve discovery and an adversarial hearing, will cause significant delay to petitioner's

grand jury investigation as compared to the proposed alternate procedure of an *ex parte* presentation to the district court or a special master. In this respect, too, the type of harm petitioner alleges is irreparable: the burden of discovery and of the adversarial hearing is immediate and could not be recompensed were petitioner successful in appealing the procedural orders as part of an appeal from a final judgment of civil contempt. Petitioner, in effect, is claiming an immunity from discovery and adversarial process while the grand jury investigation is in progress. Thus, this case is similar to *Papandreou*, 139 F.3d at 250, in which we observed, in the course of issuing a writ of mandamus to vacate discovery orders implicating sovereign immunity, that the infliction of the “burdens” of discovery might cause irreparable harm to one who asserts an immunity from those very burdens.

Finally, respondent contends, relying on our decision in *In re United States*, 872 F.2d 472 (D.C. Cir. 1989), that the IC has the alternative remedy of seeking relief from the district court from discovery that the IC is able to demonstrate will disclose grand jury or investigative secrets: In *In re United States*, the district court had expressed a willingness to determine *in camera*, item-by-item, whether the state secrets privilege protected from discovery certain materials requested by a plaintiff suing the government under the Federal Tort Claims Act, and to allow the government to redact names from certain documents. We denied the government’s petition for mandamus, in part because “[t]he district court did not reject the Government’s assertion of privilege; on the contrary, . . . the court demonstrated a perceptive understanding of and wholesome respect for the state secrets.” *Id.* at 478.

Respondent argues that the district court here has demonstrated a similar willingness to accommodate petitioner's concerns about the confidentiality of the grand jury investigation: the district court has ordered that "discovery [is] restricted to matters not covered by Rule 6(e)," Mem. Order (June 26, 1998), at 2, and that "[i]f it becomes necessary for the OIC to present material covered by Rule 6(e) during the [show cause] hearing, the OIC may submit it to the Court at a bench conference or by other appropriate means," *id.* at 4.

We think, however, that unlike the district court's procedural protections in *In re United States*, the district court's safeguards here do not go far enough to assure us that the district court will protect the confidentiality interests of the IC. For example, even if the IC redacted the content of communications with members of the press to omit grand jury material, the residual information regarding the identity of the contact and the time such contact was made would give rise to inferences about the substance of "matters occurring before the grand jury." Furthermore, the IC is not troubled solely by the possibility that Rule 6(e) material might be disclosed, but also by the prospect of disclosing even the identities of members of the press with whom the IC and his staff have spoken[

]. The district court's order does not accommodate this concern. Rather, it explicitly designates "actual contacts with the press by OIC employees," Mem. Order (June 26, 1998), at 2, as one of the subject areas on which respondent will be permitted to question petitioner and his staff by deposition and at the show cause hearing. And the district court's order does not assuage petitioner's fear that

discovery and an adversarial hearing will divert petitioner's focus--significantly more so than would an *ex parte* presentation--from directing the grand jury investigation at a crucial juncture.

B.

That petitioner has no adequate means of relief besides mandamus does not conclude our inquiry into whether we have power to address the merits presented by the petition. We must further determine whether petitioner has carried his "burden of showing that [his] right to issuance of the writ is clear and indisputable." *Gulfstream*, 485 U.S. at 289 (citations omitted); see also *Papandreou*, 139 F.3d at 250. On its face, this criterion is somewhat circular. The right to issuance of the writ must be "clear and indisputable," but criteria for determining whether a petitioner has a right to issuance of the writ at all--let alone one that is clear and indisputable--are conspicuously absent from this formulation.

The Supreme Court in *Schlagenhauf v. Holder*, 379 U.S. 104 (1964), described one category of cases for which mandamus is appropriate, a category into which we think the case at bar fits exactly. In *Schlagenhauf*, the district court, pursuant to Federal Rule of Civil Procedure 35, ordered a defendant in litigation arising out of a bus accident to submit to mental and physical examinations by several doctors. The defendant petitioned the Seventh Circuit to issue a writ of mandamus vacating the district court's order, claiming that Rule 35 authorized mental and physical examinations only of plaintiffs, not defendants. Whether

Rule 35 could be applied to a defendant was a “basic, undecided question”; only one federal case had touched on the issue, and only one state case had ever ordered the mental or physical examination of a defendant. *Id.* at 110. The Seventh Circuit thought it had power to review the question presented by the petition. The Supreme Court agreed, holding that “the petition was properly before [the Seventh Circuit] on a substantial allegation of usurpation of power in ordering *any* examination of a defendant, an issue of first impression that called for the construction and application of Rule 35 in a new context.” *Id.* at 111 (emphasis added). We have described *Schlagenhauf* as authorizing consideration of a petition for writ of mandamus “when the appellate court is convinced that resolution of an important, undecided issue will forestall future error in trial courts, eliminate uncertainty and add importantly to the efficient administration of justice.” *Colonial Times, Inc. v. Gasch*, 509 F.2d 517, 524 (D.C. Cir. 1975).⁶

The appropriate procedural framework for the Rule 6(e)(2) ancillary civil proceeding we recognized in *Barry* is as “important” and “undecided” today as was the proper interpretation of Rule 35 at the time *Schlagenhauf* arose in 1964. We provided scant guidance in *Barry* on the proper conduct of the Rule 6(e)(2) proceeding. And although the Eleventh Circuit has set forth in significant detail a procedural framework for a Rule 6(e)(2)

⁶ See also *In re Department of Justice*, 999 F.2d at 1305 (holding that power to determine the issues presented in a writ of mandamus is conferred when a “case presents a unique situation”); *In re Attorney Gen.*, 596 F.2d at 64 (issuing the writ of mandamus in part because of “the underlying issues of first impression” presented in the petition).

proceeding akin to the one we recognized in *Barry*, see *United States v. Eisenberg*, 711 F.2d 959, 964 (11th Cir. 1983), it is the only case we could find that has done so. The importance of the grand jury to the enforcement of the federal criminal law is well documented, and the impact on an ongoing grand jury investigation of a burdensome discovery process and adversarial hearing, through which [] learn of confidential investigative material—even if not Rule 6(e) material—could be profound. Accordingly, we have power “to determine . . . the issues presented by the petition for mandamus,” *Schlagenhauf*, 379 U.S. at 111, and we turn to the merits to evaluate whether petitioner has a clear right to the issuance of the writ.

III.

A. *The Nature of the Proceeding*

In this circuit, the scope and nature of proceedings to enforce Rule 6(e)(2) are governed by our opinion in *Barry*. In *Barry*, we outlined the basic framework governing actions brought under Rule 6(e)(2):

It is generally understood that a *prima facie* case of a violation of Rule 6(e)(2) is made when the media reports disclosed information about “matters occurring before the grand jury” and indicated that the sources of the information included attorneys and agents of the Government. Once a *prima facie* case is shown, the district court must conduct a “show cause” hearing to determine whether the Government was responsible for the pre-indictment publicity and whether any information disclosed by the Government concerned matters occurring before the grand jury. At this hearing, the burden shifts to the Government

to come forward with evidence to negate the *prima facie* case. If after such a hearing the trial court determines that remedial action is warranted, it may order the Government to take steps to stop any publicity emanating from its employees.

Barry, 865 F.2d at 1321 (citations, footnote, and internal quotation omitted). *Barry* thus envisions that a two-step analysis will be employed to determine whether a violation of Rule 6(e)(2) has occurred. First, the district court must determine whether the plaintiff has established a *prima facie* case. This determination will typically be based solely on an assessment of news articles submitted by the plaintiff; indeed, we acknowledged in *Barry* that a Rule 6(e)(2) plaintiff could not be “expected to do more at this juncture of the litigation” given that he or she would “almost never have access to anything beyond the words of the [news] report.” *Id.* at 1326 (internal quotation omitted) (alteration in the original).⁷ Second, if the court determines that a *prima facie* case has been established, the burden shifts to the government to “attempt to explain its actions” in a show cause hearing. *Id.* at 1325. If the government fails to rebut the *prima facie* case, a violation of Rule 6(e)(2) is deemed to have occurred. *Cf., e.g., Duplan Corp. v. Deering Milliken, Inc.*, 540 F.2d 1215, 1220 (4th Cir. 1976) (noting that a *prima facie* showing “subject[s] the opposing party

⁷ To be sure, the plaintiff’s burden in a Rule 6(e)(2) proceeding is relatively light. The articles submitted need only be susceptible to an interpretation that the information reported was furnished by an attorney or agent of the government; in fact, “[i]t is not necessary for [an] article to expressly implicate [the government] as the source of the disclosures if the nature of the information disclosed furnishes the connection.” *Barry*, 865 F.2d at 1325 (internal quotation omitted). Of course, should a Rule 6(e)(2) plaintiff be in possession of evidence of a violation other than the articles themselves, that evidence should be submitted as part of the *prima facie* case.

to the risk of non-persuasion if the evidence as to the disputed fact is left unrebutted”). The court then determines what remedy will be sufficient to deter further leaks. The remedy may be the imposition of civil contempt sanctions or equitable relief or both, “depending upon the nature of the violation and what the trial court deems necessary to prevent further unlawful disclosures of matters before the grand jury.” *Barry*, 865 F.2d at 1323. Significantly, in establishing this two-step framework, *Barry* said nothing about the burden shifting back to the plaintiff after the government’s presentation or about the plaintiff retaining the burden of persuasion after a *prima facie* case has been established. *See id.* (noting that purpose of show cause hearing is to permit the government to respond; “if the Government fails in its defense,” the trial court should consider appropriate relief); *cf. Combs v. Ryan’s Coal Co., Inc.*, 785 F.2d 970, 984 (11th Cir. 1986) (“The party seeking the contempt citation retains the ultimate burden of proof. . . .”). Under *Barry*, then, the plaintiff’s burden is minimal; the responsibility of coming forward with evidence to rebut the accusation of unauthorized disclosure lies squarely with the government, the party in “the best position to know whether [it is] responsible for a violation of the Rule.” *Barry*, 865 F.2d at 1326 (internal quotation omitted). If, of course, the government convinces the trial judge that no violation of Rule 6(e)(2) has occurred, that is the end of the proceeding.

Here, the IC does not contest the district court’s finding that the movants have satisfied their burden to establish a *prima facie* case through the submission of various news articles indicating that information relating to grand jury proceedings or witnesses was

obtained from sources associated with the IC or that a show cause hearing is now required under *Barry*. The IC does, however, object strenuously to the discovery procedures set forth by the district court in its order governing the conduct of the show cause hearing—in particular, the requirement that the IC be required to produce documents sought by the movants, submit to depositions of employees listed by the movants, and respond to subpoenas for live testimony at the hearing. (The IC has stated his willingness, however, to submit any information or testimony in any form required to the district court in an *in camera* proceeding.) The only issue before us, it is worth emphasizing, is not whether a show cause hearing will go forward in the district court as to whether the IC or members of his staff have made unauthorized disclosures to the press but rather the manner in which the hearing will be conducted: as a full-scale adversarial evidentiary proceeding or as an *in camera* inquiry by the trial judge and/or any special master or counsel it might appoint to assist the court in the task. Our review of the district court's orders is a fairly deferential one. In general, district courts are accorded a wide degree of latitude in the oversight of discovery-related proceedings, and we review orders pertaining to discovery only for abuse of discretion. *See, e.g., Laborers' Int'l Union of N. Am. v. Department of Justice*, 772 F.2d 919, 921 (D.C. Cir. 1984) (“Control of discovery is a matter entrusted to the sound discretion of the trial courts.”). We are acutely aware that in this matter in particular the job of supervising the grand jury has been an arduous one requiring many interventions by the trial court, which has met its duties with admirable dedication and expedition. Nonetheless, the appropriate

procedure for a Rule 6(e)(2) hearing is a matter of grave importance, not only for this proceeding but for future ones, involving the need to protect the secrecy of the grand jury itself as well as the need to efficaciously remedy violations of that secrecy prohibited by Rule 6(e)(2). Accordingly, in this opinion we will lay down what we conclude is the appropriate way to conduct such a show cause proceeding.

Barry itself provided little in the way of a roadmap to assist the district court in proceeding once a *prima facie* case is made, that is, it did not address the specifics of how the show cause hearing should be conducted. It did not, for example, indicate whether the hearing should be open to the public or sealed, whether or to what extent discovery should be permitted and by whom, whether the hearing should include live testimony or rely solely on documentary evidence, or how to minimize any risk that the hearing will result in the disclosure of Rule 6(e) material to unauthorized recipients. In order to resolve these critical questions, we must balance two somewhat competing concerns, both of which lie just beneath *Barry*'s surface. We begin with the recognition that *Barry* held that a proceeding to enforce the secrecy mandate of Rule 6(e)(2) is civil in nature and may be initiated by a private plaintiff.⁸ The movants in this proceeding have, however, seized on this "civil"

⁸ In this respect, we are aligned with the Fifth and Eleventh Circuits, see *In re Grand Jury Investigation (Lance)*, 610 F.2d 202 (5th Cir. 1980); *Eisenberg*, 711 F.2d 959, and have taken a different view from that later reached by other courts, see *Finn v. Schiller*, 72 F.3d 1182 (4th Cir. 1996) (Rule 6(e)(2) provides for civil or criminal contempt remedy but may not be initiated by private plaintiff); *In re Grand Jury Investigation (90-3-2)*, 748 F. Supp. 1188 (E.D. Mich. 1990) (Rule 6(e)(2) provides only for criminal contempt remedy).

characterization to argue that, pursuant to the Federal Rules of Civil Procedure, which generally govern civil actions for civil contempt, *see* 3 CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 705 (1982),⁹ they are entitled to broad discovery against the IC, including the opportunity to require production of and to review documents from the IC and to subpoena and question the IC and members of his staff about the alleged unauthorized disclosures involved in the news articles that formed the basis of the *prima facie* case.¹⁰ *See, e.g., Degen v. United States*, 517 U.S. 820, 825-26 (1996) (noting that in a civil case, “a party is entitled as a general matter to discovery of any information sought if it appears ‘reasonably calculated to lead to the discovery of admissible evidence’”) (quoting FED. R. CIV. P. 26(b)(1)).¹¹ In most proceedings characterized as “civil,” this would certainly be the case:

⁹ Because the Federal Rules of Civil Procedure generally govern civil contempt proceedings, it is arguable that a Rule 6(e)(2) proceeding must be initiated by complaint and not by motion, *see* FED. R. CIV. P. 3 (“A civil action is commenced by filing a complaint with the court”), and must first request injunctive relief before seeking contempt sanctions, *see Blalock v. United States*, 844 F.2d 1546, 1550 (11th Cir. 1988) (“[T]here is no such thing as an independent cause of action for civil contempt; civil contempt is a device used to coerce compliance with an in personam order of the court which has been entered in a pending case.”); *but see Barry*, 865 F.2d at 1324 n.7 (“[A] civil contempt sanction may include appropriate equitable relief.”). Because the IC has not raised either of these concerns below or before this court, we will not consider them further here.

¹⁰ Indeed, the movants’ motion to the district court requesting discovery asserted that it was unnecessary for them to secure the court’s permission to commence civil discovery. *See* Memorandum in Support of Motion for Production of Documents and Testimony (June 19, 1998), at 2.

¹¹ Of course, a district court retains the discretion “to control any discovery process which may be instituted so as to balance [the plaintiff’s] need for access to proof . . . against the extraordinary needs of [the government] for confidentiality.” *Webster v. Doe*, 486 U.S. 592, 604 (1988).

An overriding interest in the revelation of truth creates a need for free and open access to evidence; indeed, we have called it a “hallmark of our adversary system that we safeguard party access to the evidence tendered in support of a requested court judgment” and noted that the “firmly held main rule” is that “a court may not dispose of the merits of a case on the basis of *ex parte, in camera* submissions.” *Abourezk v. Reagan*, 785 F.2d 1043, 1060-61 (D.C. Cir. 1986), *aff’d by an equally divided court*, 484 U.S. 1 (1987) (citations omitted). Exceptions to this rule are few and narrow. *Id.*

We ultimately conclude, however, that the unique nature of a Rule 6(e)(2) show cause hearing requires such an exception. This is not a typical civil proceeding between two disputants; rather, it resembles more clearly an ancillary proceeding to a criminal grand jury inquest. To the extent that sanctions are requested to deter future leaks (and the remedy is thus prospective and prophylactic, rather than retrospective and punitive), a Rule 6(e)(2) action is indeed civil in nature. *See Barry*, 865 F.2d at 1324; *see also Gompers v. Buck’s Stove & Range Co.*, 221 U.S. 418, 441 (1911) (civil contempt sanctions are “remedial, and for the benefit of the complainant,” while criminal contempt sanctions are “punitive, to vindicate the authority of the court”). But the way in which the proceeding is conducted must acknowledge the essential nature of the proceeding as one designed to guard the sanctity of the grand jury process itself. Thus, *Barry* describes a Rule 6(e)(2) plaintiff as having only “a very limited right to seek injunctive relief or civil contempt of court through the district court supervising the grand jury.” *McQueen v. United States*, 1998 WL 217538,

at *7 (S.D. Tex. Mar. 30, 1998) (citing *Barry*). The plaintiff in a Rule 6(e)(2) suit would not, of course, be entitled to seek monetary damages or attorneys' fees and costs from an errant prosecutor, even though such damages are commonly awarded in civil contempt actions. See, e.g., *Clark v. Library of Congress*, 750 F.2d 89, 103 (D.C. Cir. 1984) (holding that sovereign immunity "bar[s] suits for money damages against officials in their official capacity absent a specific waiver by the government") (emphasis omitted); see also *Barry*, 865 F.2d at 1321-22 (noting only that Rule 6(e)(2) permits "equitable relief, either in addition to, in conjunction with or in lieu of contempt sanctions"); *McQueen*, 1998 WL 217538, at *8 (monetary damages unavailable under Rule 6(e)(2)); cf. *United States v. Waksberg*, 112 F.3d 1225, 1226 (D.C. Cir. 1997) ("One of the permissible purposes of civil contempt sanctions is to compensate the complainant for losses sustained, through a fine payable to the complainant.") (internal quotation omitted); *Food Lion, Inc. v. United Food & Commercial Workers Int'l Union*, 103 F.3d 1007, 1017 n.14 (D.C. Cir. 1997) (same as to fees and costs). In truth, like a habeas corpus proceeding, a Rule 6(e)(2) civil action is something of a hybrid: although initiated by a private plaintiff, it is designed to be a supplementary means of enforcing the rules of a criminal proceeding. Cf. *Santana v. United States*, 98 F.3d 752, 754 (3d Cir. 1996) (noting that the nature of habeas corpus cases is "not adequately captured by the phrase 'civil action'; they are independent civil dispositions of completed criminal proceedings"). A Rule 6(e)(2) proceeding, dealing as it does with the substance of an ongoing criminal grand jury investigation, must be fully cognizant of the interests underlying

that concurrent criminal proceeding.

The Supreme Court “consistently ha[s] recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings,” *Douglas Oil Co. of Calif. v. Petrol Stops N.W.*, 441 U.S. 211, 218 (1979), “a long-established policy . . . older than our Nation itself,” *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 399 (1959) (internal quotation omitted). Rule 6(e)(2), by reinforcing this need for secrecy, protects several interests of the criminal justice system:

First, if preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements. There also would be the risk that those about to be indicted would flee, or would try to influence individual grand jurors to vote against indictment. Finally, by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule.

Douglas Oil, 441 U.S. at 219. Thus, there are obvious risks of disclosure of grand jury material posed by translating normal discovery techniques or routine cross-examination of witnesses by all participating parties into Rule 6(e)(2) proceedings. Because a violation of Rule 6(e)(2) requires that the disclosure concern “matters occurring before the grand jury,”¹²

¹² Although we have recently noted in a case involving the rights of the media to gain access to district court hearings and pleadings related to the grand jury’s investigation that the phrase “matters occurring before the grand jury” encompasses “not only what has occurred and what is occurring, but also what is likely to occur,” including “the identities of witnesses or jurors, the substance of testimony as well as actual transcripts, the strategy or

see Barry, 865 F.2d at 1321; FED. R. CRIM. P. 6(e)(2), the IC may defend against an allegation of an unauthorized disclosure in the press by asserting that the information reported is, in fact, *not* a matter before the grand jury. In order to do so, however, he may well need to explain what material was before the grand jury.¹³ Even the fact that the “leaked” material was not relevant to the investigation could itself be quite revealing, and certainly admissions that grand jury material was disclosed would be useful to witnesses who might be recalled. The possibility that document production, depositions, and cross-examination of government prosecutors would result in a disclosure of Rule 6(e) material clearly increases the risk of “[a greater] number of persons to whom the information is available (thereby increasing the risk of inadvertent or illegal release to others), [and thus] renders considerably more concrete the threat to the willingness of witnesses to come forward and testify fully and candidly.” *United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 432 (1983) (rejecting automatic disclosure of grand jury materials to government civil attorneys). Moreover, if discovery and examination of government witnesses through depositions and

direction of the investigation, the deliberations or questions or jurors, and the like,” *In re Motions of Dow Jones & Co., Inc.*, 142 F.3d 496, 500 (D.C. Cir. 1998), *petition for cert. filed*, 66 U.S.L.W. 3790 (U.S. June 3, 1998) (No. 97-1959) (internal quotation omitted), we note here the problematic nature of applying so broad a definition, especially as it relates to the “strategy or direction of the investigation,” to the inquiry as to whether a government attorney has made unauthorized disclosures.

¹³ We recognize that the district court’s orders restricted discovery to “matters not covered by Rule 6(e),” but given that the disclosure of Rule 6(e) material is at the heart of this case, we find it impossible to imagine how any meaningful discovery regarding leaks could take place that would not involve the disclosure of some Rule 6(e) material.

in court were routinely available in Rule 6(e)(2) suits, targets and witnesses would surely be encouraged to bring such proceedings in the hope of obtaining information as to the course of the grand jury's investigation whenever the relatively low threshold of a *prima facie* case attributing the source of a "leak" to the prosecutor was met. *Cf. id.* at 432 ("If prosecutors in a given case knew that their colleagues would be free to use the materials generated by the grand jury for a civil case, they might be tempted to . . . start or continue a grand jury inquiry where no criminal prosecution seemed likely."). The advantage of cross-examining government agents involved in an ongoing investigation about whether a "leak" of grand jury information has occurred cannot be overstated, particularly in cases of large-scale public interest. At the very least, if discovery or cross-examination in a Rule 6(e)(2) proceeding were allowed to proceed along its usual course, it would almost certainly result in the release of the names of the government agents involved in the investigation as well as the names of members of the press with whom they have been in contact [

]. Short of a blanket denial of any press contacts at all, it would seem to us to be virtually impossible for IC personnel to answer movants' questions about whom they talked to, where, and about what without disclosing details of the investigation that tread perilously near to or in fact step over the line into areas of grand jury secrecy. Even if the specifics of information discussed with members of the press were redacted to omit grand jury material (and it is hard to see what use the questioning would be if the answers were so limited), the fact that the redaction was

made at all would give rise to inferences about the substance of grand jury material when put together with the context of the answer and the identity of the media representative who authored it. Moreover, even if certain information discussed with members of the press regarding the course of the investigation, such as investigative leads ultimately not pursued, was considered not to be “matters occurring before the grand jury” and thus would not be subject to redaction, its revelation would still provide useful clues as to the direction of the prosecutors’ efforts. In sum, we cannot envision how a useful inquiry could be conducted about what the IC or members of his staff told the press about certain matters relevant to the grand jury’s investigation without disclosing the focus of the investigation (or, minimally, the areas or individuals not being focused on).¹⁴ We must conclude, therefore, that the drafters of Rule 6(e)(2) intended that proceedings to ferret out violations of the grand jury secrecy rule should not themselves present an undue risk of compromising that very secrecy. See, e.g., *McQueen*, 1998 WL 217538, at *9 (“[L]iberal discovery rules in civil suits . . . would expose grand jury deliberations, the identity of grand jurors, and other grand jury members to the public. This would not only inhibit the grand jury’s deliberative process, it would potentially expose grand jury members, government lawyers and agents, and witnesses to outside pressures and possible danger. In short, it would eviscerate the very protections to the grand jury process Rule 6 was intended to provide.”); *Blalock*, 844 F.2d at 1559 n.19

¹⁴ While we cannot permit the IC’s assertions of risk to the grand jury to act as an impenetrable shield against the progress of a Rule 6(e)(2) investigation, we must give some credence to his assertions, since we are not privy to the status or the substance of the grand jury’s investigation.

(Tjoflat, J., specially concurring) (inquiry into status of grand jury's investigation, "especially when conducted in the context of an adversarial civil contempt proceeding, would inevitably lead to the disclosure of grand jury matters, the very vice Rule 6(e)(2) was designed to avoid"); *Donovan v. Smith*, 552 F. Supp. 389, 390 (E.D. Pa. 1982) (denying defendants' request to depose lead government attorney and thereby "intrud[e] into his knowledge regarding the prosecution of this action").

There is a further impediment to treating a Rule 6(e)(2) proceeding in all respects like a typical civil adversarial proceeding. It would almost certainly engage the district court and the prosecutor in lengthy collateral proceedings and in so doing divert the grand jury from its investigation. How, for instance, could counsel for a Rule 6(e)(2) plaintiff be permitted to engage in discovery and in-court examination of government witnesses without granting the government's attorney a similar opportunity to depose movants' counsel, movants' associates, and, indeed, the movants themselves if they could be shown to have relevant information about how the leaks really occurred? After all, if the government seeks to prove that it is not the source of the information reported, it has an interest in identifying the true source. By setting forth a simple, two-step framework, we believe *Barry* sought to achieve a swift resolution of an alleged Rule 6(e)(2) violation and to put an immediate stop to any leaks while not unduly interfering with the work of the grand jury with a full-blown sidebar trial on the Rule 6(e)(2) issue. See *Barry*, 865 F.2d at 1326 (show cause hearing "carries little threat of conflict with the grand jury proceedings") (internal quotation omitted); *cf.*

United States v. Dionisio, 410-U.S. 1, 17 (1973) (“Any holding that would saddle a grand jury with minitrials . . . would assuredly impede its investigation and frustrate the public’s interest in fair and expeditious administration of the criminal laws.”); *Eisenberg*, 711 F.2d at 966 (targets should not be permitted access to information that “would permit them to embark upon a broad scale investigation of their own”).

Given the lack of guidance in *Barry* on how to conduct the rebuttal phase of a Rule 6(e)(2) inquiry, it is not surprising that the district court proceeded as it did. Nevertheless, we believe that the risks of even inadvertent disclosure of grand jury matters and the specter of unnecessary detraction from the main business of the grand jury’s investigation are simply too serious to allow the movants[

]full access to all relevant materials produced by the government or to let them conduct direct or cross-examination of government investigative personnel during ongoing grand jury proceedings. In our view, *Barry* did not contemplate such an adversarial evidentiary hearing as the next stage following a *prima facie* case. Indeed, we have been hard pressed to find any case in which a Rule 6(e)(2) proceeding has been conducted in such a manner; in all reported cases brought to our attention, *in camera* and/or *ex parte* proceedings have been the norm. See, e.g., *Eisenberg*, 711 F.2d at 966 (prohibiting preindictment participation by targets); *Barry v. United States*, 740 F. Supp. at 888, 894 (D.D.C. 1990) (district court holds government’s documentary submission sufficient to rebut *prima facie* case); *Donovan*, 552 F. Supp. at 390 (court holds *in camera* proceeding in which government responded to

questions submitted to court by defense counsel and by court); *see also* PAUL S. DIAMOND, FEDERAL GRAND JURY PRACTICE AND PROCEDURE § 10.02 (3d ed. 1997) (“It is rare indeed for a court to require that the government meet its burden under Rule 6 by presenting the testimony of its attorneys and agents, thus subjecting them to cross-examination. There is obvious potential for defense abuse of the government and interference with the grand jury were the courts to require live rebuttal testimony in all cases.”) (footnote omitted); *cf. Barry*, 865 F.2d at 1326 (characterizing request to disclose grand jury matters as “extraordinary”). In balancing the movants’ right to discovery and direct participation in questioning the IC or his prosecutors against the interest in maintaining grand jury secrecy, we must inevitably give priority to ensuring that a proceeding to enforce the protections of Rule 6(e)(2) does not ultimately subvert the rule itself.¹⁵

¹⁵ Our decision to limit direct movant participation at this second stage of the show cause hearing is further fueled by the immediacy of the potential harm to the grand jury. As we understand it, this grand jury is still hearing testimony, and while the interest in grand jury secrecy does not disappear altogether after the investigation is concluded, *see Douglas Oil*, 441 U.S. at 222, it is at its most intense while the investigation is ongoing. *See, e.g., In re Grand Jury Subpoena*, 72 F.3d 271, 275 (2d Cir. 1995) (“The government represents that the grand jury investigation here is very much ongoing, thereby heightening the government’s interest in secrecy.”). Indeed, it would obviously be futile to invoke civil contempt sanctions, which are intended to be forward-looking and prophylactic, if grand jury proceedings were already concluded. This requires that extra care be taken in structuring appropriate Rule 6(e)(2) proceedings to ensure that the course of the grand jury’s investigation is not diverted.

B. *The Appropriate Procedure*

We will now endeavor to set forth the contours of how a show cause hearing may proceed once a *prima facie* case has been established, recognizing that within these boundaries, the district court should have sufficient leeway to establish procedures it believes will assist it best in discovering the truth of the matter while at the same time not causing undue interference with either the work of the grand jury or that of the district court itself.

We find the Eleventh Circuit's decision in *Eisenberg* to be the most useful precedent on the direction the show cause hearings should take. In *Eisenberg*, the targets of two grand juries filed motions in district court alleging violations of Rule 6(e)(2) and submitting as proof various newspaper articles that reported government agents and attorneys as the source of the information disclosed. The district court, after finding the articles conclusively established the existence of a Rule 6(e)(2) violation, ordered counsel for the government to identify to counsel for the targets "each government attorney, officer, agent, or employee with access to the aforescribed grand jury matters" as well as to furnish affidavits executed by each such person that included the identity of any news media representative with which they had communicated and the circumstances and substance of each communication. *Id.* at 962 (internal quotation omitted). As in our case, the government in *Eisenberg* did not contest the district court's conclusion that the news articles submitted established a *prima facie* case or that it was required to provide the designated information to the court for its consideration. The government did challenge, however, just as the IC does here, any

requirement that it furnish that information directly to the targets at a time before any indictments had yet issued. *Id.* at 963-64.

The Eleventh Circuit reversed the district court's order to produce information about the press disclosure to the targets before indictments had been issued or the grand jury's investigation had ended. Ruling that the articles established only a *prima facie* case, the Court of Appeals nonetheless found it appropriate for the district court to have ordered the government "to take steps to stop any publicity emanating from its employees" before moving to a consideration of whether the government had in fact violated Rule 6(e)(2) by past disclosures. *Id.* at 964. The court stated decisively, however, that the targets should not be allowed to participate directly in this inquiry as to the government's culpability. Rather, the district court should first have conducted an *in camera* review of the government's proffer of evidence as to its conduct:

[W]e do not think the court properly balanced the targets' interest in the information with the harmful effects that could follow the disclosure to targets' counsel of names of all the government employees involved in the investigation. . . . Such information could lead counsel to call upon those government agents and attempt to interview them; news would spread that the attorneys for the targets were invading the province of the grand jury; and prospective witnesses could be intimidated from testifying.

Id. at 965. As a result, the *Eisenberg* court held that the information identified by the district court "should first be furnished to the district court *in camera*"; after reviewing this material, the district court could then determine whether further proceedings were necessary as well

as the extent of the targets' involvement in those proceedings. *Id.* at 966.

Admittedly, *Eisenberg* does not provide all the answers. It is not entirely clear, for example, whether the *Eisenberg* court contemplated that the *in camera* review of the government's rebuttal evidence might, if it failed to satisfy the judge as to the government's innocence or guilt, be followed by a hearing in which the targets' counsel would be allowed to participate in order to determine the existence of a violation, *see id.* ("The court may subsequently determine whether a hearing should be held on the alleged government violations of Rule 6(e) and whether counsel for targets should be present at the hearing."), or whether the court would make the decision on the existence of a violation by itself and invite the presence of the targets' counsel only at the remedy stage, *see id.* at 965 ("Once the court determines that Rule 6(e) has been violated, the court may properly inform the targets' counsel of the names of the violators. Targets' counsel may then play a proper role in hearings involving imposition of contempt sanctions on government employees."). To the extent *Eisenberg* can be read to suggest that counsel for Rule 6(e)(2) plaintiffs should be permitted to play an adversarial role in the show cause hearing, we cannot agree. We do find persuasive, however, the *Eisenberg* court's conclusion that *in camera* review of the government's *ex parte* proffer is the most appropriate way to conduct proceedings in Rule 6(e)(2) cases and protect grand jury secrecy.

The use of *in camera* review in proceedings collateral to a grand jury investigation is by no means novel. District courts are often required to conduct an *in camera* review of

grand jury material requested under Rule 6(e)(3)(C)(i)¹⁶ to determine what material, if any, is responsive to the need asserted by the requesting party; this *in camera* review “is necessary due to the paramount concern of all courts for the sanctity and secrecy of grand jury proceedings.” *Lucas v. Turner*, 725 F.2d 1095, 1109 (7th Cir. 1984); *see also In re Special Grand Jury 89-2*, 143 F.3d 565, 572 (10th Cir. 1998); S. REP. NO. 95-354, at 8 (1977), *reprinted in 1977 U.S.C.C.A.N.* 527, 532 (“It is contemplated that the judicial hearing in connection with an application for a court order by the government under subparagraph (3)(C)(i) should be *ex parte* so as to preserve, to the maximum extent possible, grand jury secrecy.”). Similarly, courts often use *in camera*, *ex parte* proceedings to determine the propriety of a grand jury subpoena or the existence of a crime-fraud exception to the attorney-client privilege when such proceedings are necessary to ensure the secrecy of ongoing grand jury proceedings. *See, e.g., In re Grand Jury Nos. 95-7354, 96-7529 and 96-7530*, 103 F.3d 1140, 1145 (3d Cir.), *cert. denied sub nom. Roe v. United States*, 117 S. Ct. 2412 (1997) (“*Ex parte in camera* hearings have been held proper in order to preserve the ongoing interest in grand jury secrecy.”); *In re Grand Jury Proceedings, Thursday Special Grand Jury Sep. Term, 1991*, 33 F.3d 342, 353 (4th Cir. 1994) (“[T]he government’s proffer [as to the existence of the crime-fraud exception] was made *in camera* because it concerned

¹⁶ Rule 6(e)(3)(C)(i) permits disclosure of “matters occurring before the grand jury” when “so directed by a court preliminary to or in connection with a judicial proceeding.” FED. R. CRIM. P. 6(e)(3)(C)(i). Parties seeking such material must show “that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed.” *Douglas Oil*, 441 U.S. at 222.

matters subject to an on-going investigation before the grand jury.”). Although *in camera*, *ex parte* submissions “generally deprive one party to a proceeding of a full opportunity to be heard on an issue,” *In re John Doe Corp.*, 675 F.2d 482, 490 (2d Cir. 1982), and thus should only be used where a compelling interest exists, *see, e.g., In re John Doe, Inc.*, 13 F.3d 633, 636 (2d Cir. 1994), we find that the nature of a Rule 6(e)(2) hearing, particularly when conducted during an ongoing grand jury investigation, involves such a compelling interest. *See, e.g., In re Grand Jury Proceedings*, 33 F.3d at 353 (holding that “*in camera* proceedings in the context of grand jury proceedings and on-going investigations requiring secrecy are not violative of due process” despite lack of opportunity to rebut government’s proffer); *In re John Doe*, 13 F.3d at 636 (“[W]here an *in camera* submission is the only way to resolve an issue without compromising a legitimate need to preserve the secrecy of the grand jury, it is an appropriate procedure.”); *In re John Doe Corp.*, 675 F.2d at 490 (“We recognize that appellants cannot make factual arguments about materials they have not seen and to that degree they are hampered in presenting their case. The alternatives, however, are sacrificing the secrecy of the grand jury or leaving the issue unresolved at this critical juncture.”).

In light of these concerns, we conclude that the show cause hearing in this instance should not proceed in a fully adversarial manner when only a *prima facie* case has been made. We emphasize, however, that the burden of rebutting the *prima facie* case will lie with the IC, who must now come forward with evidence, in whatever form the district court requires (including affidavits, depositions, production of documents, or live testimony) to

rebut the inferences drawn from the news articles that established the *prima facie* case of a Rule 6(e) leak to the press by personnel in or “close to” the IC’s office. This evidence should be submitted *ex parte* and *in camera* for the district court’s review. Because the government must negate at least one of the two prongs of the *prima facie* case—by showing either that the information disclosed in the media reports did not constitute “matters occurring before the grand jury” or that the source of the information was not the government—relevant evidence might include “what actually occurred before the grand jury, whether the purported grand jury disclosures are accurate, the identities of its employees with access to any of the grand jury information disclosed, and whether these individuals in turn provided any such information to the media,” *Barry*, 740 F. Supp. at 890, as well as evidence as to the IC’s general policies concerning press contacts, evidence as to the actual source of information reported by the press, or evidence describing any actual exchanges between a member of the IC’s staff and a member of the press associated with one of the identified reports. The district court’s task at this stage is to review the IC’s evidentiary submissions and determine whether they are sufficient to rebut the movants’ *prima facie* case—in other words, whether the evidence presented by the government is sufficient to render the identified press reports¹⁷ inaccurate either in their characterization of material as grand jury related or in their

¹⁷ Although *Barry* makes reference to a determination of whether there has been a “pattern or practice of impermissible disclosures of grand jury material,” *see Barry*, 865 F.2d at 1325, this should not be construed as requiring the district court to extend the Rule 6(e)(2) inquiry beyond the news articles submitted by the movants. Indeed, in order to limit the district court’s function to adjudication rather than investigation, we find it entirely appropriate to limit any findings to those articles.

identification of the source of the information. If the district court determines that the IC's submission is insufficient to rebut the *prima facie* case, or, indeed, if the IC or a member of his staff admit to violations, no further proceedings are necessary, and the district court may proceed to find that a Rule 6(e)(2) violation has occurred and determine the appropriate remedy. The announcement of the court's finding should be available to the movants and their participation in any remedy hearing presumptively allowed. If, on the other hand, the district court determines that the IC's submission conclusively rebuts the *prima facie* case, the show cause order should be discharged.¹⁸ In either event, this first stage should be *ex parte* and *in camera* in order to minimize the intrusion on the interests protected by Rule 6(e)(2).

If, however, after review of the government's rebuttal case the district court finds that it cannot make an adequate determination as to whether a violation of the rule has occurred, or if the district court cannot identify with certainty the individual or individuals responsible, further proceedings may be appropriate. Although the district court should take care to protect the secrecy of the grand jury investigation by continuing to conduct the proceedings

¹⁸ Because it is unlikely that a news report will attribute the disclosure of purported grand jury material to a specific individual, it is possible that a showing as to each individual associated with the IC who has access to certain material will be required to constitute sufficient rebuttal. *Cf. Lance*, 610 F.2d at 219 ("The inability to show a definite source for some of the information contained in the articles might cause a *prima facie* case to fail if a responsive affidavit denying the allegations is made."). We note that pursuant to Rule 6(e)(3)(B) of the Federal Rules of Criminal Procedure, the IC is required to provide to the district court the names of any government personnel who have been made privy to grand jury material in order to assist the IC in his investigation.

in camera and *ex parte*, we do not wish unnecessarily to cabin the district court's discretion as to the type of factfinding tools it may use. The court may, for example, request further affidavits or other types of documentary evidence from either the government or the movants; it may request that a member of the IC's staff or another witness answer questions of the court or questions submitted by the movants upon the court's invitation; the court may, if it so chooses, appoint a special master or other individual to collect evidence and submit a report to the district court for its review and adjudication. *See, e.g., Eisenberg*, 711 F.2d at 966 ("We can conceive of circumstances where a district court could seek the appointment of a special counsel to assist the court in determining whether Rule 6(e) violations had occurred.").¹⁹

If at the end of the day the district court determines that a violation of Rule 6(e)(2) has occurred, it may report this finding to the movants and identify the government agent or attorney responsible for the disclosure.²⁰ *See Eisenberg*, 711 F.2d at 965. The movants may then participate in determining the appropriate remedy, which, as we have noted, may include equitable relief, contempt sanctions, or both, *see Barry*, 865 F.2d at 1321-22, keeping in mind that the relief granted should be "carefully tailored to avoid unnecessary interference with grand jury proceedings," *id.* at 1323. Finally, the district court must keep a transcribed

¹⁹ The movants acknowledged before the district court, and the IC stated in oral argument before this court, that the involvement of such an individual might be appropriate. *See Prehearing Memorandum of President Clinton* (March 10, 1998), at 3.

²⁰ Ordinarily, the court should not reveal the precise substance of the disclosure to the movants, as this would tend to reveal "matters occurring before the grand jury."

record of what transpired in any *in camera* proceeding; should the grand jury ultimately issue indictments, the indicted party or parties may request the transcript of the Rule 6(e)(2) proceedings in order to determine whether to contest any indictment on the basis of the violation. See *Eisenberg*, 711 F.2d at 965; FED R. CRIM. P. 6(e)(3)(C)(ii) (disclosure of grand jury matters permitted "at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury").²¹

IV.

We are keenly aware that allegations that a government official has violated Rule 6(e)(2) are not to be taken lightly. As Justice Frankfurter noted, "[t]o have the prosecutor himself feed the press with evidence . . . is to make the State itself through the prosecutor, who wields its power, a conscious participant in trial by newspaper, instead of by those methods which centuries of experience have shown to be indispensable to the fair administration of justice." *Stroble v. California*, 343 U.S. 181, 201 (1952) (Frankfurter, J., dissenting). It is the very interests in protecting grand jury secrecy underlying the rule, however, that call for the utmost discretion on the part of the courts to ensure that the rule is not breached in the very act of rooting out violations. We believe the intent of *Barry* in

²¹ At this stage an adversarial presentation may be appropriate, since "[w]hat appears to be harmless to a district judge may be prejudicial if seen in light of a defense counsel's special familiarity with a given prosecution." *United States v. Fowlie*, 24 F.3d 1059, 1066 (9th Cir. 1994).

characterizing the inquiry into Rule 6(e)(2) violations as civil is honored by allowing the movants to identify any violations of the rule and, if necessary, to participate in crafting a remedy designed to stop further violations. Any direct participation in deciding whether a violation has occurred and by whom should be allowed by the district court only in extraordinary circumstances and as a last resort. The procedure we have outlined is designed to "allow the court to focus on the culpable individual rather than granting a [discovery] windfall" to the movants. *Bank of Nova Scotia v. United States*, 487 U.S. 250, 263 (1988).

We have decided the merits of the IC's challenge to the district court orders by granting its petition for writ of mandamus. Accordingly, we dismiss the appeal in No. 98-3077 *et al.*, vacate the procedural aspects of the district court's orders of June 19 and June 26, and remand for further proceedings consistent with this opinion.

It is so ordered.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE GRAND JURY PROCEEDINGS

Misc. No. 98-55 (NHJ)
(consolidated with Misc. No. 98-177 and
Misc. No. 98-228) **FILED**

REDACTED VERSION SEP 25 1998

NANCY MAYERBAMINGTON, CLERK
U.S. DISTRICT COURT

ORDER TO SHOW CAUSE

On June 19, 1998, the Court ordered the Office of the Independent Counsel ("OIC") and individual members therein to show cause why they should not be held in contempt for violations of Federal Rule of Criminal Procedure 6(e)(2). The Court also set forth procedures to be followed at a show cause hearing that would include the participation of counsel for President Clinton, the White House, Monica Lewinsky, Bruce Lindsey and Sidney Blumenthal (collectively "movants").¹ In a second Order, entered on June 26, 1998, the Court clarified its June 19 Order and outlined further procedures related to the show cause hearing including permitting the movants to undertake limited discovery of press contacts with the OIC. The OIC appealed the Court's procedural rulings permitting movants to take discovery and to participate in the show cause hearing. In its emergency appeal, the OIC did not contest the Court's finding that prima facie violations of Rule 6(e) had been established by at least six news reports. Rather, the OIC strenuously objected to the procedures that the Court had adopted in order to conduct the show cause hearing; the OIC argued that any show cause hearing and related discovery must be conducted *ex parte* and *in camera*. The Court of Appeals vacated the procedural aspects of the

¹ Monica Lewinsky has withdrawn her motion for an order to show cause and therefore she is no longer included among the movants in this matter.

Court's June 19 and June 26 Orders and remanded for further proceedings consistent with its Opinion. See In re Sealed Case, Nos. 98-3077, 98-3078, 98-3079 and 98-3081, 1998 WL 455602 (D.C. Cir. August 3, 1998) (per curiam).

Presently before the Court is the OIC's ex parte memorandum requesting that the Court outline further procedures for the OIC and its members to show cause why they should not be held in contempt. The Court will now determine which additional press reports raised in movants' motions to show cause constitute prima facie violations of Rule 6(e) and will set forth the procedures, in accordance with the decision of the Court of Appeals, that will guide the Court in deciding movants' motions. Such procedures shall include referral to a Special Master.

I. Standards for Establishing a Prima Facie Violation of Rule 6(e)(2)

Rule 6(e) provides, in relevant part, that "an attorney for the government, or any [such government personnel . . . as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law] shall not disclose matters occurring before the grand jury, except as otherwise provided in these rules. . . . A knowing violation of Rule 6 may be punished as a contempt of court." Fed. R. Crim. P. 6(e)(2) & 6(e)(3)(A)(ii). It is clear that the secrecy requirements of Rule 6(e) apply to the OIC. In re Sealed Case, 1998 WL 455602, at *16 n.2 (citing In re North, 16 F.3d 1234, 1245 (D.C. Cir. 1994)).

Our courts have consistently recognized the importance of secrecy to the proper functioning of our grand jury system, specifically noting "several distinct interests served by safeguarding the confidentiality of grand jury proceedings." Douglas Oil Co. of Calif. v. Petrol Stops N.W., 441 U.S. 211, 218 (1979). The Supreme Court outlined the "several distinct

interests" protected by Rule 6(e) as follows:

[F]irst, if preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements. There also would be the risk that those about to be indicted would flee, or would try to influence individual grand jurors to vote against indictment. Finally, by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule.

Id. at 219. Therefore, enforcing Rule 6(e) is of the utmost importance to the integrity of our grand jury process.

For this reason, the Court of Appeals has held that a district court "must conduct a 'show cause' hearing" if a motion for order to show cause establishes a prima facie violation of Rule 6(e)(2). *Barry v. United States*, 865 F.2d 1317, 1321 (D.C. Cir. 1989) (emphasis added). To establish a prima facie case, movants must show that "media reports disclosed information about 'matters occurring before the grand jury' and indicated that the sources of the information included attorneys and agents of [OIC]." *Id.* (citations omitted). Once a prima facie case is established, "the burden of rebutting the prima facie case will lie with the [Independent Counsel], who must now come forward with evidence, in whatever form the district court requires (including affidavits, depositions, production of documents, or live testimony) to rebut the inferences drawn from the news articles that established the prima facie case of a Rule 6(e) leak to the press by personnel in or 'close to' the [Independent Counsel's] office." *In re Sealed Case*, 1998 WL 455602, at *14. If the Court finds that a member of the OIC violated Rule 6(e)(2), it may order appropriate relief such as contempt sanctions and equitable relief. *See Barry*, 865 F.2d at 1321.

A. "Matters Occurring Before the Grand Jury"

In order to establish a prima facie case, movants must first demonstrate that the media reports disclosed "matters occurring before the grand jury." *Id.* The D.C. Circuit has held that the scope of grand jury secrecy is necessarily broad in order to properly effectuate the several distinct objectives of Rule 6(e). Fund for Constitutional Gov't v. National Archives & Records Serv., 656 F.2d 856, 869 (D.C. Cir. 1981). "It compasses not only the direct revelation of grand jury transcripts but also the disclosure of information which would reveal 'the identities of witnesses or jurors, the substance of testimony, the strategy or direction of the investigation, the deliberations or questions of the jurors, and the like." *Id.* (quoting SEC v. Dresser Indus., Inc., 628 F.2d 1362, 1382 (D.C. Cir. 1980) (en banc)) (emphasis added). In light of the "broad reach of grand jury secrecy," the Court of Appeals has held that Rule 6(e) covers "naming or identifying grand jury witnesses; quoting or summarizing grand jury testimony; evaluating testimony; discussing the scope, focus and direction of the grand jury investigations; and identifying documents considered by the grand jury and conclusions reached as a result of the grand jury investigations." *Id.* (emphasis added).

In addition, "the fact that [a witness] was subpoenaed to testify, the fact that he invoked [a] privilege in response to questions, [and] the nature of the questions asked" of him are "according to our precedent 'matters occurring before the grand jury.'" In re Motions of Dow Jones & Co., Inc., 142 F.3d 496, 501 (D.C. Cir. 1998) (citing SEC v. Dresser Industries, Inc., 628 F.2d at 1382). Furthermore, statements by prosecutors which disclose when an indictment will be presented to the grand jury, who will be charged in the indictment and what crimes will be charged also violate the secrecy requirement of Rule 6(e). See In re Grand Jury Investigation.

Lance v. Dep't of Justice, 610 F.2d 202, 218 (5th Cir. 1980). "[T]he touchstone is whether disclosure would tend to reveal some secret aspect of the grand jury's investigation." Senate of the Commonwealth of Puerto Rico v. United States Dep't of Justice, 823 F.2d 574, 582 (D.C. Cir. 1987) (citation omitted).

Moreover, the Court of Appeals recently reaffirmed that "matters occurring before the grand jury" include "not only what has occurred and what is occurring, but also what is likely to occur." In re Dow Jones, 142 F.3d at 499-500 (citing SEC v. Dresser Indus., Inc., 628 F.2d at 1382 and Fund for Constitutional Gov't, 656 F.2d at 869) (emphasis added).³ Clearly the prohibition on disclosure found in Rule 6(e) would have little force if prosecutors could reveal with impunity the substance of a prospective witness's testimony and comment on his or her credibility prior to the witness's appearance before the grand jury.

B. Attribution of Source

In addition to establishing that media reports disclosed "matters occurring before the

³ The Court notes that, in the course of addressing proper procedures for the present show cause hearing, the Court of Appeals quoted the foregoing language from In re Dow Jones and then cautioned of "the problematic nature of applying so broad a definition [of 'matters occurring before the grand jury'], especially as it relates to the 'strategy or direction of the investigation,' to the inquiry as to whether [the OIC] has made unauthorized disclosures." In re Sealed Case, 1998 WL 455602, at *16 n.12. However, for nearly two decades, controlling law in the D.C. Circuit has explicitly and repeatedly recognized that the necessarily broad reach of Rule 6(e) confidentiality encompasses "the strategy or direction of the investigation," in other words "what is likely to occur" during the course of the grand jury investigation. See In re Dow Jones, 142 F.3d at 499-500; Senate of the Commonwealth of Puerto Rico, 823 F.2d at 582; Fund for Constitutional Gov't, 656 F.2d at 869-70; SEC v. Dresser Indus., Inc., 628 F.2d at 1382. Moreover, as the OIC did not appeal this Court's interpretation of "matters occurring before the grand jury," the Court of Appeals footnote on this topic is mere dictum. Therefore, the Court does not believe that the dictum in this footnote was intended to overrule sub silentio the well-established law of this Circuit. See In re Sealed Case, 1998 WL 455602, at *3 (stating that such a method of overruling established legal precedent is "implausible").

grand jury," movants must also show that such reports "indicated that the source of the information included attorneys and agents of the [OIC]." Barry, 865 F.2d at 1321. When deciding whether movants have met their burden, the Court must treat all statements in the news reports as true with respect to what was disclosed and by whom. See Lance, 610 F.2d at 219; see also Barry, 865 F.3d at 1326 (noting that "complainants in Rule 6(e)(2) cases 'almost never have access to anything beyond the words of the [news] report.'" (quoting Lance, 610 F.2d at 219)). Thus, if a news report explicitly identifies the source of information protected by Rule 6(e)(2), the Court must accept this attribution as correct for purposes of the prima facie case.

While an article expressly identifying the OIC as the source of the Rule 6(e) information clearly supports a prima facie case, "[t]he article submitted need only be susceptible of an interpretation that the information reported was furnished by an attorney or agent of the [OIC]; in fact, '[i]t is not necessary for [an] article to expressly implicate the [OIC] as the source of the disclosures if the nature of the information disclosed furnishes the connection.'" In re Sealed Case, 1998 WL 455602, at *16 n.7 (quoting Barry, 865 F.2d at 1325) (emphasis added). For instance, "[t]he precise attribution of a source in one [press report] . . . may give definition of a vague source reference in others because of their context in time or content." Id. at 1326 (citations omitted). Additionally, "attorneys and agents of the Government" need not be the sole source of the disclosure of Rule 6(e) material, but need only be "included" among the sources. Id. at 1321.

II. Application of Standards to Movants' Motions for Order to Show Cause

In its June 19 Order to Show Cause, the Court found that the following six media reports constitute prima facie violations of Rule 6(e) or violations of this Court's orders prohibiting

disclosure of information relating to the grand jury investigation:

1. Thomas Galvin, "Monica Keeping Mum — For Now Fends Off Query on Internal Affairs," New York Daily News, January 23, 1998;
2. Don Van Natta, Jr. & John M. Broder, "Lewinsky Would Take Lie Test in Exchange for Immunity Deal," New York Times, February 2, 1998;
3. Claire Shipman, "Ken Starr Rejects Lewinsky's Immunity Deal," NBC Nightly News, February 4, 1998;
4. Fox News Broadcast, May 6, 1998;
5. Scott Pelley, "Exclusive Information About Kenneth Starr's Next Moves," CBS Evening News, May 8, 1998; and
6. Steven Brill, "Pressgate," Brill's Content, August 1998.³

In its June 19 Order, the Court also directed movants to identify other press reports that they believe establish additional prima facie violations of Rule 6(e) by the OIC. In response, movants identified 18 additional media reports. See Movants' Listing of Key News Reports for

³ While the "Pressgate" article may not, in and of itself, constitute a Rule 6(e) violation, it provides further support for the prima facie violations of Rule 6(e) established by the other media reports at issue. In other words, it helps to provide the context for the other press reports. The Independent Counsel's admission to Mr. Brill that he and Deputy Independent Counsel Jackie Bennett speak to reporters on condition of anonymity and his statement to Mr. Brill that Rule 6(e) does not apply to "what witnesses tell FBI agents or us [the OIC] before they testify before the grand jury" strongly supports the Court's findings of prima facie violations of Rule 6(e) by the OIC. See "Pressgate," at 132. Mr. Brill's assertions that he has "personally seen internal memos from inside three news organizations that cite Starr's office as a source" and that "six different people who work at mainstream news organizations have told [him] about specific leaks" also lends support to the Court's findings of prima facie violations. Id. at 131, 150.

July 6, 1998, Show Cause Hearing, June 24, 1998.⁴ Pursuant to the above-cited law governing Rule 6(e) show cause motions, the Court will now review these reports and determine whether they also constitute prima facie violations of Rule 6(e).

7. **David Bloom, "Newest Clinton Sex Scandal Causing Republican Calls for Impeachment," NBC Nightly News, January 21, 1998**

The Court finds that this news report constitutes a prima facie violation of Rule 6(e). In his report, Mr. Bloom stated that "federal law enforcement sources tell NBC News they're prepared to offer the young intern a choice between immunity and prosecution. One law enforcement source put it this way, quote, 'We're going to dangle an indictment in front of her and see where that gets us.'" (emphasis added). The report identifies the sources as members of federal law enforcement which, given the context and content of these statements, likely refers to attorneys or agents of the OIG. Moreover, the substance of the statement indicates that an indictment is being considered and identifies a target of the grand jury investigation. The leak from the law enforcement source also reveals the strategy or direction of the investigation.

8. **David Bloom, "President Clinton Faces Allegations of Affair with Former White House Intern, Then Telling Her to Lie About It," NBC News at Sunrise, January 22, 1998**

The Court finds that this news report constitutes a prima facie violation of Rule 6(e). In this television segment, Mr. Bloom reported that:

⁴ In the interest of judicial economy and in order to avoid overburdening the Special Master, the Court has chosen to focus on the 24 "key news reports" identified by movants, rather than making prima facie determinations regarding 111 different press reports raised by movants in five separate submissions. See Motions for Order to Show Cause of February 9, May 6, and June 16, 1998; and Supplemental Memoranda in Support of Motions for Order to Show Cause of May 12 and June 24, 1998.

Prosecutors suspect the president and his longtime friend, Vernon Jordan, tried to cover up allegations that Mr. Clinton was involved sexually with former White House intern Monica Lewinsky and other women — which is why this document, obtained last night by NBC News, could be a smoking gun. It's called "Points to Make in Affidavit." Prosecutors say it might as well be called "How to Commit Perjury in the Paula Jones Case." . . . Where did this document come from? Prosecutors suspect the president's allies of witness tampering. (emphasis added).

The report explicitly identifies "prosecutors" as disclosing evidence gathered as part of the grand jury investigation. This evidence, the "talking points" document, was likely to be presented to the grand jury. The law in this Circuit makes it perfectly clear that government attorneys may not reveal documentary evidence that is likely to be presented to the grand jury. Furthermore, these statements also reveal the scope, focus, and direction of the grand jury investigation — a plain violation of Rule 6(e).

9. **Michael Isikoff, "Diary of a Scandal," Newsweek (America Online ed.), January 22, 1998**

The Court finds that this news report constitutes a prima facie violation of Rule 6(e). In this online news article, Mr. Isikoff reports:

It is not clear who prepared these talking points, but Starr believes that Lewinsky did not write them herself. He is investigating whether the instructions came from Jordan or other friends of the president. . . . NEWSWEEK told Starr's deputies that the magazine was planning to run with the story in the issue that appeared that Monday. . . . Starr's deputies asked NEWSWEEK to hold off. . . . Starr was hoping to confront Lewinsky and persuade her to cooperate as a witness for the prosecution. Starr's deputies did not want to tip off Lewinsky or Jordan or the White House. . . . According to Starr's deputies, the fear that Lewinsky's name would become widely known was enough to torpedo the negotiations between Starr and her Lewinsky's [sic] lawyers. As of now, Lewinsky is not cooperating. According to knowledgeable sources, Starr is now considering whether to indict her for perjury. (emphasis added).

Here, Starr's deputies are directly cited as one of the sources for this story. Furthermore, the

attribution to "knowledgeable sources" regarding the potential indictment of Ms. Lewinsky and Mr. Starr's beliefs about the authorship of the talking points, particularly given the context of the entire article and the nature of the information disclosed, strongly suggests a source within the OIC. Moreover, the substance of the statements relating to possible indictments and the strategy or direction of the grand jury investigation constitutes "matters" covered by Rule 6(e).

10. Francis X. Clines & Jeff Gerth, "Subpoenas Sent as Clinton Denies Reports of an Affair with Aide at White House," New York Times, January 22, 1998

The Court finds that this news report constitutes a prima facie violation of Rule 6(e). In this news article, it is reported that:

[d]etails spilled out through the day, fueled by more than a dozen tape recordings of the intern that a friend had secretly made, some of them with a hidden F.B.I. tape recorder, said lawyers close to the investigation. Late tonight, F.B.I. agents sought interviews with people with whom the intern might have confided in at the White House and the Pentagon Mr. Starr, whose office was busy today issuing subpoenas and considering possible immunity for key witnesses, was reportedly investigating possible evidence that the President himself left in the alleged affair, including telephone messages subsequently re-recorded secretly for prosecutors. Lawyers familiar with the contents of some of the tapes said that Ms. Lewinsky told of the President advising her that if anyone asked about the affair, she was absolutely to deny it. (emphasis added).

Although this article does not contain direct attribution to sources within the OIC, there is a strong inference that at least one of the sources was an attorney or agent of the OIC, particularly in light of the disclosure of information known only to members of the OIC such as what FBI agents and attorneys in Mr. Starr's office were thinking and actively investigating. The substance of these leaks relates to evidence being gathered pursuant to grand jury subpoenas and the consideration of immunity deus for potential grand jury witnesses. Such matters are

protected by Rule 6(e). Furthermore, the Independent Counsel has admitted that OIC attorneys speak to reporters on a not-for-attribution basis. This admission reinforces the already strong inference that the information came from the OIC.

11. **Phil Jones, "Independent Counsel Kenneth Starr Moves Quickly in His Investigation Regarding President Clinton and Intern Monica Lewinsky," CBS Evening News, January 23, 1998**

The Court finds that this news report constitutes a prima facie violation of Rule 6(e). Mr. Jones reports that "two sources familiar with the Independent Counsel's investigation tell CBS News that Kenneth Starr is, quote, 'absolutely convinced that Monica Lewinsky was telling the truth when she was recorded by her friend, Linda Tripp.' . . . Starr isn't commenting on anything publicly, but our sources say he is aware that he must move quickly on this matter; that he can't dally on the Lewinsky case like he has on other matters. Starr wants to grant Lewinsky immunity, but not until she provides information on what truthful facts she would give in return for immunity." (emphasis added). Mr. Jones' "sources familiar with the Independent Counsel's investigation" purport to disclose the Independent Counsel's thoughts on several topics that are clearly covered by Rule 6(e), including the credibility of Ms. Lewinsky, a likely grand jury witness, and also the status of immunity negotiations with this witness. This insight into the strategy or direction of the grand jury investigation implicates attorneys or agents working for the OIC as the sources.

12. Susan Schmidt and Peter Baker, "Ex-Intern Rejected Immunity Offer in Probe," The Washington Post, January 24, 1998

The Court finds that this news report constitutes a prima facie violation of Rule 6(e). In this article, it is reported that:

[f]ederal investigators last week offered former White House aide Monica Lewinsky immunity from prosecution if she would cooperate in their investigation into whether President Clinton tried to persuade her to deny an affair under oath, but Lewinsky turned the offer down. The offer was described yesterday by sources close to independent counsel Kenneth W. Starr For all of yesterday's the (sic.) public jousting between the lawyers, a source said Starr's investigators searched her Watergate apartment with her family's permission on Thursday and came away with a variety of personal items, including letters, that [Starr's investigators] hope might help establish a link between Clinton and the young woman. According to sources familiar with the investigation, Lewinsky has said that the president gave her a pin and a book of poetry, According to a source close to the prosecutors, [Ms. Lewinsky's mother Marcia Lewis] was puzzled about why they were intent on making a criminal case at all, saying "What's the big deal? So she lied and tried to convince someone else to lie." (emphasis added).

Statements in this article are repeatedly attributed to sources close to the Independent Counsel, sources familiar with the investigation, and sources close to the prosecutors. Given the nature of the information disclosed, attorneys or agents of the OIC are implicated as the sources. Moreover, the article strongly suggests that some of the disclosures come from sources who are themselves receiving information from attorneys or agents of the OIC. If at anytime the members of the OIC were disclosing protected information to "sources," who in turn were passing that information on to reporters, that of course would also constitute violations of Rule 6(e). In substance, the information revealed in this article details immunity negotiations with a potential grand jury target and also reveals the scope, focus, and direction of the grand jury investigation.

13. **Claire Shipman, "Still No Deal Between Monica Lewinsky and Whitewater Prosecutor Ken Starr Regarding White House Sex Scandal," NBC News Special Report, January 25, 1998**

The Court finds that this news report constitutes a prima facie violation of Rule 6(e). In this television segment, Ms. Shipman reported that "sources in Ken Starr's office tell us that they are investigating [a report that at some point someone caught the president and Ms. Lewinsky in an intimate moment], but they haven't confirmed it." (emphasis added). In this report, the attribution to the OIC is explicit and the OIC sources reveal a specific detail of the strategy or direction of their investigation, directly breaching grand jury confidentiality.

14. **Howard Fineman & Karen Breslau, "Sex, Lies and the President," Newsweek, February 2, 1998**

The Court finds that this news report constitutes a prima facie violation of Rule 6(e). In this article, it is reported that "[a]t the direction of special prosecutor Starr, the FBI placed a 'wire' listening device on Lewinsky's friend Linda Tripp. The resulting tape of Lewinsky-Tripp conversations could be especially strong evidence in a federal court. And on one of them, to which NEWSWEEK gained access, Lewinsky gives clues to what might be an effort to silence her, involving the president and his close friend Washington lawyer Vernon Jordan." Although not directly attributed to a source in the OIC, the content and context of the report suggests that Newsweek gained access to the FBI tape through an attorney or agent of the OIC as this tape was made under the direction of agents working for the OIC. The testimony on this tape from a potential target of the grand jury investigation clearly is evidence likely to be presented to the grand jury and therefore is protected from disclosure by Rule 6(e).

15. Francis X. Clines, "Stephanopoulos Testifies as Beset Lewinsky Flies Home," The New York Times, February 4, 1998

The Court finds that this news report constitutes a prima facie violation of Rule 6(e). In this article, it is reported that "[w]e are trying to get to the truth of what would be, if proven, serious charges," Mr. Starr declared in a brief interview today with CNN. His investigators are pursuing a number of leads, including forensic testing of items taken from Ms. Lewinsky, who reportedly said on the tapes that she had a dress that had been stained by the President in a sexual encounter. One of her dresses was recently tested, with negative results, said one Federal investigator, who would not say what else might be tested." (emphasis added). The nature of this information regarding specific leads and investigative methods of the OIC investigation strongly suggests that the Federal investigator cited in the story is working with the OIC. The substance of these leaks also reveals the scope, focus, and direction of the grand jury investigation.

16. Jackie Judd, "Clinton Team on the Offensive," World News Tonight with Peter Jennings, January 30, 1998

The Court finds that this news report constitutes a prima facie violation of Rule 6(e). In this television segment, Ms. Judd reports that "According to law enforcement sources, Starr so far has come up empty in a search for forensic evidence of a relationship between Mr. Clinton and Lewinsky. The sources say a dress and other pieces of clothing were tested, but that they had all been dry cleaned before the FBI picked them up from Lewinsky's apartment." (emphasis added). A source for the story is identified as a member of law enforcement. Given the context and nature of the investigatory information disclosed, the law enforcement sources are likely to

be attorneys or agents working for the OIC. Moreover, the substance of the story pertains to evidence being gathered as part of the grand jury investigation, a matter within the protection of Rule 6(e).

17. **Scott Pelley, "Talks between Monica Lewinsky's Attorney and Prosecutors at an Impasse," CBS Morning News, January 30, 1998 .**

The Court finds that this news report constitutes a prima facie violation of Rule 6(e). In this story, it is reported that "the prosecution acknowledged what it hoped would be key evidence is not. . . . CBS news has learned that no DNA evidence or stains have been found on a dress that belongs to Monica Lewinsky. The dress and other clothes were seized by the FBI from Lewinsky's apartment after she told a friend they may contain some evidence. But again, the FBI lab has found no DNA evidence." (emphasis added). This report directly attributes information regarding physical evidence to a prosecution source and the disclosure reveals the scope, focus, and direction of the grand jury investigation.

18. **John King, "Investigating the President: Lewinsky Immunity Talks Collapse," CNN Early Edition, February 5, 1998**

The Court finds that this news report constitutes a prima facie violation of Rule 6(e). In this report, Mr. King states that "[s]ources in Starr's office suggesting (sic.) that if Monica Lewinsky does not negotiate an immunity deal quite soon that they are prepared to go ahead and press charges against her." (emphasis added). Mr. King attributes his reporting directly to sources in Starr's office. According to this news report, these OIC sources disclosed the status of immunity negotiations with a potential target of the grand jury and the possible indictment of this target.

19. Don Van Natta, Jr. & James Bennet, "Starr Turns Down Limit on Questions to Clinton's Aides," New York Times, February 5, 1998

The Court finds that this news report constitutes a prima facie violation of Rule 6(e). In this article, it is reported that "[o]ne official involved in the discussions about whether Ms. Lewinsky would cooperate with Mr. Starr's investigation said prosecutors had set a deadline of Friday at noon for her lawyers to indicate whether she would talk with prosecutors. If the deadline passes without a deal, the official said, Ms. Lewinsky could face prosecution." (emphasis added). This disclosure regarding the status of immunity negotiations with a grand jury target and her possible indictment by the grand jury is attributed to an official involved in the immunity negotiations. The only officials who would have been involved in these negotiations are members of the OIC. In addition, these disclosures reveal the strategy or direction of the investigation.

20. Susan Schmidt & Peter Baker, "Starr Rejects Proposal on Lewinsky Testimony," Washington Post, February 5, 1998

The Court finds that this news report constitutes a prima facie violation of Rule 6(e). In this article, it is reported that:

[I]ndependent counsel Kenneth W. Starr yesterday rejected a proposed cooperation agreement from Monica S. Lewinsky's lawyers and gave them until the end of the week to make the former White House intern available for questioning or let her face possible prosecution, according to sources with knowledge of the investigation. Prosecutors decided the written statement from Lewinsky was not solid enough to form the basis of an agreement because it contained inconsistencies and contradictions. Lewinsky acknowledged having a sexual relationship with President Clinton in the statement, the sources said, but she gave a muddled account of whether she was urged to lie about that relationship to lawyers in the Paula Jones sexual harassment suit. (emphasis added).

Much of this article is attributed to sources with knowledge of the investigation. The confidential information disclosed includes the status of immunity negotiations, the possible indictment of a target of the grand jury investigation, the credibility of the testimony of a potential target, and the content of a witness's proffer gathered as part of the grand jury investigation. The content and context of many of these background statements, particularly revelations about the prosecutors' reasons for rejecting Ms. Lewinsky's proffer, suggest that the disclosures came from members of the OIC.

21. **Lisa Myers, "Possible Indictment of Monica Lewinsky by Kenneth Starr Discussed," Today, February 24, 1998**

The Court finds that this news report constitutes a prima facie violation of Rule 6(e). In this television segment, Ms. Myers reports that:

NBC news has learned that, for the first time, Ken Starr now is seriously considering indicting the former intern. . . . [S]ources close to the investigation tell NBC news that [Ms. Lewinsky may never be called before the grand jury], that instead of calling her as his key witness, Starr may bring criminal charges against her. . . . Lawyers close to the investigation say Starr's team lost what little trust they had in Monica's lawyer, William Ginsburg, and thought Monica's mother, Marcia Lewis, was not entirely forthcoming after she got immunity, a preview of what Monica might do. . . . At this point, sources say prosecutors are not sure they would get the truth from Monica. So some see indicting her as, quote, "the least bad option." (emphasis added).

Ms. Myers attributes her reporting to sources close to the investigation. These background sources disclose the status of immunity negotiations and the possible indictment of a target of the grand jury investigation. These sources also reveal the strategy of Mr. Starr and other prosecutors regarding the scope, focus, and direction of the grand jury investigation. Given the nature of the information leaked and the Independent Counsel's admission that members of his

office talk to reporters on a not-for-attribution basis, there is a reasonable inference that these disclosures came from within the OIC.

22. **John Ellis, "It's the Beginning of the End for Clinton's Presidency," Boston Globe, February 7, 1998**

The Court finds that this news report constitutes a prima facie violation of Rule 6(e). In this article, Mr. Ellis writes that "Betty Currie is not the only White House staff member cooperating with the Office of the Independent Counsel. According to one reliable source, three other White House employees have spoken at length and in detail with Starr's office about the president's relationship with Lewinsky and his efforts to keep that relationship secret." (emphasis added). In a statement made the next day at a seminar at Harvard's Kennedy School of Government, Mr. Ellis claimed that the reliable source for his column was "a person in the special prosecutor's office." See Lars-Erik Nelson, "Kenneth Starr's Leaky Boat Looks Like It's Sinking," New York Daily News, February 13, 1998. According to Mr. Ellis' statements at Harvard and in his column, a member of the OIC disclosed to him the nature of the testimony of several witnesses that was gathered as part of the grand jury investigation. Such disclosures by members of the OIC, if not satisfactorily rebutted, violate Rule 6(e).

23. **Scott Pelley, "Kathleen Willey's Grand Jury Testimony Contradicts the President's Sworn Deposition," CBS Evening News, March 13, 1998**

The Court finds that this news report constitutes a prima facie violation of Rule 6(e). Mr. Pelley reports that "sources tell CBS news that prosecutors are now building a perjury case against the president, based on the testimony of Kathleen Willey before the grand jury earlier this

week. CBS news is told that Willey did, in fact, repeat her allegations under oath to the grand jury and those allegations flatly contradict what the president said in his sworn deposition." (emphasis added). In the context of this report and given the Independent Counsel's admission that members of his office talk to reporters on background, there is a reasonable inference that this unattributed leak came from within the OIC. The substance of the information disclosed pertains to the testimony of a grand jury witness, the prosecutors' strategy, and the scope, focus, and direction of the grand jury investigation.

24. Lisa Myers, "Ken Starr Asks for an Emergency Hearing on Executive Privilege from the Supreme Court, and Monica Lewinsky Fires Lawyer Ginsberg, Hiring Two New Attorneys," NBC Nightly News, June 2, 1998

The Court finds that this news report constitutes a prima facie violation of Rule 6(e). In this television report, Ms. Myers states that "[s]ources close to the case say it is not too late for Lewinsky to get a deal if she tells the full story. But so far prosecutors see few signals that Lewinsky herself is in a mood to be helpful. Remember her visit to the FBI last week to provide fingerprint and handwriting samples? Law enforcement sources say the session took an hour longer than usual, because Lewinsky was, at times, uncooperative. Tonight, sources close to the investigation say it will be almost impossible for Lewinsky to get immunity without providing evidence damaging to the president, that she must choose between protecting herself and protecting Mr. Clinton." (emphasis added). In this report, disclosures are attributed to sources close to the case, law enforcement sources working with the OIC, and sources close to the investigation. The context and substance of these statements implicate a member of the OIC or an FBI agent working with the OIC as a source of the disclosures, particularly given revelations

about what occurred during a secret FBI visit and disclosures regarding what prosecutors are "seeing" and thinking. Furthermore, the confidential information disclosed relates to the status and substance of immunity negotiations with a potential target of the grand jury investigation.

In sum, the Court finds that all twenty-four of the foregoing news reports constitute prima facie violations of Rule 6(e) by the OIC. Consequently, the Court must now determine procedures to govern the OIC's attempt to rebut these allegations.

III. Referral to a Special Master

Due to serious and repetitive prima facie violations of Rule 6(e), a complete and thorough review of these allegations must be undertaken. Toward that end, the Court will appoint _____ as the Special Master in this matter. _____ has agreed to accept this appointment. _____'s duties will be to collect and review evidence pertaining to the prima facie violations of Rule 6(e) and then to submit a report of _____ findings in order to assist the Court in determining whether the OIC has violated Rule 6(e). See In re Sealed Case, 1998 WL 455602, at *14 ("[T]he court may, if it so chooses, appoint a special master or other individual to collect evidence and submit a report to the district court for its review and adjudication."). In _____'s final report, the Special Master shall detail the evidence that _____ has collected and assess whether members of the OIC have violated grand jury confidentiality in specific instances. The OIC will be afforded the opportunity to review and to respond in camera to the Special Master's final report.

In furtherance of _____'s duties, _____ shall have the authority to subpoena documents, such as telephone records, telephone logs, letters, facsimiles, notes, memoranda, appointment records, visitor logs, calendars, etc. . . . from the OIC or any other relevant parties. _____ is also

authorized to gather testimony from present or former members of the OIC or any other relevant persons in any form deemed appropriate, whether through interviews of witnesses or pursuant to subpoena ad testificandum. Furthermore, the Special Master shall be required to keep a record of all of the evidence that is gathered for the Court's future review.

In order to assist the Special Master in carrying out his duties, movants may choose to submit proposed questions directed to the Independent Counsel or members of the OIC that pertain to the alleged Rule 6(e) violations. See In re Sealed Case, 1998 WL 455602, at *14 (suggesting such a procedure). These questions shall be designed to give guidance to the Special Master but will not obligate him to ask any specific proposed question. Of course, pursuant to the direction of the Court of Appeals, any answers to movants' questions will be received solely by the Special Master and the Court in camera.

The Court may also appoint such additional persons as it deems necessary to assist in carrying out its duties in a timely fashion. Both the Court and any persons that assist will be bound by the secrecy provisions of Rule 6(e) and shall keep any information learned in the course of performing their duties strictly confidential. Furthermore, any documentary evidence gathered or transcripts of testimony shall be kept under seal. In compliance with the instruction of the Court of Appeals in this matter, the Special Master's final report, any interim status reports, and any supporting evidence shall be submitted to the Court and served on the OIC ex parte and in camera. Under no circumstance should any of the evidence gathered be revealed to the movants without the Court's prior approval.

The Court will release this Order to Show Cause which is now issued under seal, and to that end, the parties shall submit their proposed redactions of the Order by October 1, 1998.

Upon consideration of the entire record in this matter, it is this 21st day of September 1998,

ORDERED that the OIC and individual members therein must show cause why they should not be held in contempt for violating Rule 6(e) through disclosures contained in the 24 news reports found by the Court to constitute prima facie violations of Rule 6(e); it is further

ORDERED that _____ be, and hereby is, appointed as the Special Master in this matter; it is further

ORDERED that the Clerk of Court furnish the Special Master with a copy of this Order to Show Cause; it is further

ORDERED that the Special Master shall gather and review any and all evidence pertaining to the prima facie violations of Rule 6(e) in order to assist the Court in determining whether any members of the OIC has violated Rule 6(e). Specifically, the Special Master is authorized by the Court to gather relevant documents and testimony from the OIC or other relevant parties pursuant to subpoena if necessary; it is further

ORDERED that the movants may submit a list of proposed questions directed to members of the OIC that pertain to the alleged Rule 6(e) violations. The Special Master shall not be obligated to propound any of these requested questions. Any such list of questions should be submitted to the Special Master no later than October 15, 1998; it is further

ORDERED that the Special Master shall maintain an accurate record of all evidence gathered pursuant to _____ duties; it is further

ORDERED that the Special Master may appoint such additional persons as are deemed necessary to assist _____ in carrying out _____ duties in a timely manner; it is further

ORDERED that the Special Master and any other persons assisting shall be bound by the secrecy provisions of Rule 6(e) and shall keep any information learned in the course of their duties in strict confidence. All documentary evidence and transcripts of testimony gathered in this matter shall be maintained under seal; it is further

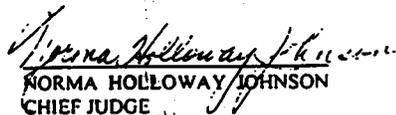
ORDERED that the Special Master shall submit a progress report to the Court on the thirtieth day of each month, or the next business day if the thirtieth day falls on a weekend or holiday, beginning October 30, 1998. Such progress reports shall be submitted in camera by letter directed to the Court with a copy provided to the OIC; it is further

ORDERED that the Special Master shall submit a final report of findings and conclusions to the Court in an expeditious manner, preferably by the end of November 1998. This report and any supporting evidence shall be submitted in camera to the Court with a copy provided to the OIC; it is further

ORDERED that the OIC may file a response to the Special Master's final report within fifteen days after the report is delivered to the OIC, or the next business day if the fifteenth day after the report is delivered falls on a weekend or holiday; it is further

ORDERED that the Special Master's fees and costs shall be divided evenly between movants (50%) and the OIC (50%) and shall be paid when and as due. The Court retains discretion to reallocate the fees and costs pending the determination of the motions for order to show cause; and it is further

ORDERED that the parties shall submit proposed redactions of the foregoing Order by October 1, 1998.


NORMA HOLLOWAY JOHNSON
CHIEF JUDGE