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Brett Kavanaugh Binder [1]

To NARA

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Brett M. Kavanaugh

Nominee
to the
United States
Circuit Court of Appeals
for the
District of Columbia

Brett M. Kavanaugh
Nominee to the U.S. Court of Appeals for the D.C. Circuit

I. Background
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I. Background

BRETT M. KAVANAUGH
Nominee to the U.S. Court of Appeals for the DC Circuit

- **Brett Kavanaugh is a well-respected attorney and highly qualified candidate for the DC Circuit, with strong bi-partisan support from the legal community.** Mr. Kavanaugh has an extraordinary range of experience in the public and private sectors that makes him well-suited for the D.C. Circuit. **The ABA rated Mr. Kavanaugh "Well Qualified" to serve on the DC Circuit.**

  - ✓ He has practiced law in the private and public sectors, for 14 years. He was a partner at the law firm of Kirkland & Ellis, and has an outstanding reputation in the legal community.

  - ✓ Judge Walter Stapleton said of Mr. Kavanaugh, "He really is a superstar. He is a rare match of talent and personality." Delaware Law Weekly, May 22, 2002.

  - ✓ After arguing against Mr. Kavanaugh in the Supreme Court, Washington attorney Jim Hamilton stated, "Brett is a lawyer of great competency, and he will be a force in this town for some time to come." News Conference with James Hamilton, Federal News Service, June 25, 1998.

  - ✓ Mr. Kavanaugh graduated from Yale College and Yale Law School, and served as the Notes Editor on the prestigious Yale Law Journal.

- **Mr. Kavanaugh has extensive experience in the appellate courts, both as a clerk and as counsel.**

  - ✓ Mr. Kavanaugh clerked for Supreme Court Justice Anthony Kennedy, as well as Judge Walter Stapleton of the Third Circuit and Judge Alex Kozinski of the Ninth Circuit.

  - ✓ Prior to his Supreme Court clerkship, Mr. Kavanaugh earned a prestigious fellowship in the Office of the Solicitor General of the United States. The Solicitor General's office represents the United States before the Supreme Court.

  - ✓ Mr. Kavanaugh has argued both civil and criminal matters before the Supreme Court and appellate courts throughout the country.

- **Mr. Kavanaugh has dedicated the majority of his career to public service in both the Executive and Judicial branches.**

  - ✓ In addition to his service for three appellate judges and his work at the Department of Justice, Mr. Kavanaugh has worked for President Bush since 2001.

  - ✓ He currently serves as Assistant to the President and Staff Secretary. In that capacity, he is responsible for the traditional functions of that office, including

coordinating all documents to and from the President. He previously served as Senior Associate Counsel and Associate Counsel to the President. In that capacity, he worked on the numerous constitutional, legal, and ethical issues traditionally handled by that office.

- ✓ Mr. Kavanaugh served as an Associate Counsel in the Office of Independent Counsel, where he handled a number of the novel constitutional and legal issues presented during that investigation.

➢ **Mr. Kavanaugh believes in giving back to his community.**

- ✓ **While in private practice, Mr. Kavanaugh took on pro bono matters, including** representation of the Adat Shalom congregation in Montgomery County, Maryland against the attempt to stop the construction of a synagogue in the county.

- ✓ In addition to being active in his church, Mr. Kavanaugh has coached youth basketball and participated in other community activities.

Brett Kavanaugh – Experience

Allegation: Brett Kavanaugh is not qualified to be a federal appellate judge because he lacks the necessary experience.

Facts:

- **Brett Kavanaugh has all of the qualities necessary to be an outstanding appellate judge. He has impeccable academic credentials and significant legal experience in the federal courts.**

- **The ABA, the Democrat's "Gold Standard," has rated him "Well Qualified" to serve as a judge on the DC Circuit.**

  - ✓ He has practiced law in the private and public sectors for 14 years. He was a partner at the law firm of Kirkland & Ellis, specializing in appellate litigation, and has an outstanding reputation in the legal community.

  - ✓ Mr. Kavanaugh has dedicated a substantial portion of his career, 11 years, to public service.

- **Mr. Kavanaugh has argued both civil and criminal matters before the Supreme Court and appellate courts throughout the country.**

  - ✓ While serving as an Associate Counsel in the Office of Independent Counsel, Mr. Kavanaugh handled a number of the novel constitutional and legal issues presented during that investigation.

  - ✓ In private practice Mr. Kavanaugh focused on appellate matters and as part of his practice, he filed amicus briefs on behalf of clients with the U.S. Supreme Court.

- **Mr. Kavanaugh has extensive experience in the appellate courts, both as a clerk and as counsel.**

  - ✓ Mr. Kavanaugh served as a law clerk to Judge Walter Stapleton of the U.S. Court of Appeals for the Third Circuit.

  - ✓ He clerked on the Ninth Circuit for Judge Alex Kozinski of the U.S. Court of Appeals.

  - ✓ Mr. Kavanaugh was a law clerk to U.S. Supreme Court Justice Anthony Kennedy.

  - ✓ Prior to his Supreme Court clerkship, Mr. Kavanaugh earned a prestigious fellowship in the Office of the Solicitor General of the United States. The Solicitor General's office represents the United States before the Supreme Court.

➢ **Only 3 of the 19 judges confirmed to the D.C. Circuit since President Carter's term began in 1977 previously had served as judges.**

✓ Democrat-appointed D.C. Circuit judges with no prior judicial experience include: **Harry Edwards, Merrick Garland, Ruth Bader Ginsburg, Abner Mikva, David Tatel, and Patricia Wald.**

➢ In his 2001 *Year-End Report on the Federal Judiciary*, Chief Justice Rehnquist argued that "we must not drastically shrink the number of judicial nominees who have substantial experience in private practice." The Chief Justice also noted in his Report that "the federal Judiciary has traditionally drawn from a wide diversity of professional backgrounds, with many of our most well-respected judges coming from private practice."

✓ Supreme Court Justice **Louis Brandeis** spent his whole career in private practice before he was named to the Supreme Court in 1916.

✓ Supreme Court Justice **Byron White** spent fourteen years in private practice and two years at the Justice Department before his appointment to the Court by President Kennedy in 1962.

✓ Supreme Court Justice **Thurgood Marshall** had no judicial experience when President Kennedy recess appointed him to the Second Circuit in 1961. Marshall had served in private practice and as Special Counsel and Director of the NAACP prior to his appointment.

➢ **President Clinton nominated, and the Senate confirmed, a total of 32 lawyers without any prior judicial experience to the U.S. Court of Appeals, including Judges David Tatel and Merrick Garland to the DC Circuit.**

Confirmed Clinton Appeals Court Judges Without Prior Judicial Experience

Name	Circuit	Confirmed
M. Blane Michael	Fourth	September 30, 1993
Robert Henry	Tenth	May 6, 1994
Guido Calabresi	Second	July 18, 1994
Michael Hawkins	Ninth	September 14, 1994
William Bryson	Federal	September 28, 1994
David Tatel	DC	October 6, 1994
Sandra Lynch	First	March 17, 1995
Karen Moore	Sixth	March 24, 1995
Carlos Lucero	Tenth	June 30, 1995
Diane Wood	Seventh	June 30, 1995
Sidney Thomas	Ninth	January 2, 1996

Merrick Garland	DC	March 19, 1997
Eric Clay	Sixth	July 31, 1997
Arthur Gajarsa	Federal	July 31, 1997
Ronald Gilman	Sixth	November 6, 1997
Margaret McKeown	Ninth	March 27, 1998
Chester Straub	Second	June 1, 1998
Robert Sack	Second	June 15, 1998
John Kelly	Eighth	July 31, 1998
William Fletcher	Ninth	October 8, 1998
Robert King	Fourth	October 9, 1998
Robert Katzmann	Second	July 14, 1999
Raymond Fisher	Ninth	October 5, 1999
Ronald Gould	Ninth	November 17, 1999
Richard Linn	Federal	November 19, 1999
Thomas Ambro	Third	February 10, 2000
Kermit Bye	Eighth	February 24, 2000
Marsha Berzon	Ninth	March 9, 2000
Timothy Dyk	Federal	May 24, 2000
Robert Tallman	Ninth	May 24, 2000
Johnnie Rawlinson	Ninth	July 21, 2000
Roger Gregory	Fourth	May 9, 2001

Brett Kavanaugh – Age

Allegation: Brett Kavanaugh is too young to be a federal appellate judge – he's only 39 years old.

Facts:

- Mr. Kavanaugh would bring a broad range of experience to the court.
  - ✓ Mr. Kavanaugh's legal work ranges from service as associate counsel to the President, to appellate lawyer in private practice, to experience as a prosecutor.
  - ✓ Mr. Kavanaugh has clerked at two of the U.S. Courts of Appeal, the Third and Ninth Circuits, and at the Supreme Court. He would bring to the D.C. Circuit his experience with those courts.
  - ✓ In private practice and during his service as a prosecutor, Mr. Kavanaugh participated in appellate matters in a number of the federal courts of appeal.
- All three of the judges for whom Mr. Kavanaugh clerked were appointed to the bench before they were 39. All have been recognized as distinguished jurists.
  - ✓ Justice Kennedy was appointed to the 9th Circuit when he was 38 years old.
  - ✓ Judge Kozinski was appointed to the 9th Circuit when he was 35 years old.
  - ✓ Judge Stapleton was appointed to the district court at 35 and later elevated to the 3rd Circuit.
- There are many examples of judges who were appointed to the bench at a young age and have had illustrious careers.

Name	Circuit	Age
Judge Harry Edwards	DC	39
Judge Douglas Ginsburg	DC	40
Judge Kenneth Starr	DC	37
Judge Samuel Alito	3rd	40
Judge J. Michael Luttig	4th	37
Judge Karen Williams	4th	40
Judge J. Harvie Wilkinson	4th	39
Judge Edith Jones	5th	35
Judge Frank Easterbrook	7th	36
Judge Donald Lay	8th	40
Judge Steven Colloton	8th	40
Judge Anthony Kennedy (later	9th	38

appointed to the Supreme Court)		
Judge Mary Schroeder	9th	38
Judge Alex Kozinski	9th	35
Judge Deanell Tacha	10th	39
Judge Stephanie Seymour	10th	39
Judge J.L. Edmondson	11th	39

- Age should not be a measure of a person's experience. Many distinguished senators began their service at a young age.
  - ✓ Senators Biden and Kennedy were elected to the Senate at the age of 30, and Senator Leahy was elected at 34.

II. Office of Independent Counsel

Brett Kavanaugh – Starr Report

Allegation: Brett Kavanaugh was a co-author of Independent Counsel's Ken Starr's report to the House of Representatives, in which Starr alleged that there were grounds for impeaching President Clinton. Kavanaugh's participation in Starr's investigation of the Monica Lewinsky affair evidences his partisan, right-wing agenda.

Facts:

- **According to numerous press reports, Mr. Kavanaugh did not author the narrative section of the Independent Counsel's report that chronicled in detail President Clinton's sexual encounters with Monica Lewinsky.**

- **Mr. Kavanuagh has since criticized the House of Representatives for releasing the report to the public before reviewing it.** See Brett M. Kavanaugh, "First Let Congress Do Its Job," *The Washington Post*, Feb. 26, 1999, at A27.

- **The section of the Independent Counsel's report co-authored by Mr. Kavanaugh – grounds for impeachment – was required by law, and the allegations contained in that section were confirmed by subsequent events.**

  - ✓ Federal law required Independent Counsel Starr to advise the House of Representatives of "any substantial and credible information" uncovered during the course of his investigation that may constitute grounds for impeachment. *See* 28 U.S.C. § 595(c).

  - ✓ According to press reports, Mr. Kavanaugh co-authored the section of the Independent Counsel's report that explained the substantial and credible information that may constitute grounds for impeachment. This section summarized the specific evidence supporting the allegations that President Clinton made false statements under oath and attempted to obstruct justice.

- **The Independent Counsel's report never stated that President Clinton should have been impeached. Rather, it only explained that the Office of Independent Counsel had uncovered substantial and credible information that <u>may</u> constitute grounds for impeachment. This conclusion was clearly borne out by subsequent events.**

  - ✓ The House of Representatives determined that the information presented by the Independent Counsel constituted grounds for impeachment. By a vote of 228-206, the House voted to impeach President Clinton for perjuring himself before a grand jury. And by a vote of 221-212, the House voted to impeach President Clinton for obstructing justice.

  - ✓ After a trial in the U.S. Senate, fifty Senators voted to remove President Clinton from office for obstructing justice.

- ✓ **Numerous Democrats co-sponsored a censure resolution introduced by Senator Feinstein that stated that President Clinton "gave false or misleading testimony and his actions [] had the effect of impeding discovery of evidence in judicial proceedings."** S.Res. 44, 106th Cong. (1999).
  - Members of the Senate who co-sponsored the censure resolution included: Senator Durbin (D-IL), Senator Kennedy (D-MA), Senator Kohl (D-WI), Senator Schumer (D-NY), Minority Leader Tom Daschle (D-SD), and Senator John Kerry (D-MA).
  - Then-Congressman Schumer, as Senator-elect stated that "it is clear that the President lied when he testified before the grand jury."
- ✓ U.S. District Court Judge Susan Webber Wright later held President Clinton in contempt for "giving false, misleading, and evasive answers that were designed to obstruct the judicial process" in Paula Jones's sexual harassment lawsuit and ordered him to pay a fine of $90,000.
- ✓ In January 2001, President Clinton admitted to giving "evasive and misleading answers, in violation of Judge Wright's discovery's orders" during his deposition in Paula Jones's sexual harassment lawsuit. As a result, he agreed to pay a $25,000 fine and give up his law license for five years.

➢ **The U.S. Senate already has confirmed judicial and other nominees who worked for Independent Counsel Ken Starr. If these nominees' work for the Independent Counsel was not disqualifying, then there is no reason why Brett Kavanaugh should not be confirmed because of his work for the Office of Independent Counsel.**

- ✓ Steven Colloton served as Associate Independent Counsel from 1995 to 1996 and was confirmed for a seat on the Eighth Circuit Court of Appeals on September 4, 2003 by a vote of 94 to 1. He was confirmed to be the U.S. Attorney for the Southern District of Iowa on September 5, 2001, by a voice vote.
- ✓ John Bates served as Deputy Independent Counsel from 1995 to 1997 and was confirmed for a seat on the U.S. District Court for the District of Columbia on December 11, 2001 by a vote of 97 to 0.
- ✓ Amy St. Eve served as Associate Independent Counsel from 1994 to 1996 and was confirmed for a seat on the U.S. District Court for the Northern District of Illinois on August 1, 2002 by a voice vote.
- ✓ William Duffey served as Associate Independent Counsel from 1994 to 1995 and was confirmed to be the U.S. Attorney for the Northern District of Georgia on November 6, 2001, by a voice vote. Mr. Duffey recently was nominated for a seat on the United States District Court for Northern District of Georgia and was voted out of the Senate Judiciary Committee on February 5, 2004, by unanimous consent.

- ✓ Karin Immergut served as Associate Independent Counsel in 1998 and was confirmed to be the U.S. Attorney for the District of Oregon on October 3, 2003 by a voice vote.

- ✓ Alex Azar served as Associate Independent Counsel from 1994 to 1996 and was confirmed to be the General Counsel of the Department of Health and Human Services on August 3, 2001, by a voice vote.

- ✓ Eric Dreiband served as Associate Independent Counsel from 1997 to 2000 and was confirmed to be General Counsel of the Equal Employment Opportunity Commission on July 31, 2003, by a voice vote.

- ✓ Julie Myers served as Associate Independent Counsel from 1998 to 1999 and was confirmed to be an Assistant Secretary of Commerce on October 17, 2003, by a voice vote.

The Washington Post, February 26, 1999

February 26, 1999, Friday, Final Edition

SECTION: OP-ED; Pg. A27

LENGTH: 1274 words

HEADLINE: First Let Congress Do Its Job; A deep structural flaw in the independent counsel statute.

BYLINE: Brett M. **Kavanaugh**

BODY:
To many of us, including many who have worked in the independent counsel's office, it seemed clear long ago that the independent counsel statute is a dubious idea. But why exactly is the statute so bad? After all, are independent counsel investigations really more aggressive than the often bare-knuckled Justice Department investigations of political figures such as Mayor Marion Barry or Rep. Joseph McDade? The answer is almost certainly no, as any honest defense lawyer would concede.

But there is a deeper structural flaw with the statute. It permits Congress to enlist an outside agency within the executive branch (the independent counsel) to conduct an intensive investigation of a president or his administration and then report to Congress and the public on the results. The statute thus allows Congress to avoid its own investigative and oversight responsibilities and thereby avoid (or at least defer) responsibility for unpopular or politically divisive investigations. The Lewinsky matter is the clearest example yet of this unfortunate phenomenon.

To begin with, after allegations of presidential obstruction of justice landed in the public domain in January 1998, the House did nothing for nearly eight months, but instead deferred to the independent counsel's investigation. That is not what the Constitution contemplated. When Congress learns of serious allegations against a president, it must quickly determine whether the president is to remain in office, for only Congress (not an independent counsel) has the authority to make that initial and fundamental decision.

In the Lewinsky case, for example, the House Judiciary Committee could have questioned Monica Lewinsky, Betty Currie, Vernon Jordan and perhaps even the president in early 1998 (an approach this author publicly advocated at that time), granted immunity where necessary and gotten to the truth. There simply was no need for this mess to have occupied the country for 13 months.

The constitutional confusion continued when the independent counsel submitted his referral to Congress in September. Consistent with the independent counsel statute, the referral identified several possible "grounds for impeachment," the statutory prerequisite for an independent counsel to directly submit grand jury information involving presidential misconduct to Congress. But that raises a serious question: Why does the statute authorize an independent counsel, a member of the executive branch, to describe the possible grounds for impeachment of the president, a decision in the exclusive province of Congress. (Disclosure: I worked on that part of the independent counsel's referral that identified possible legal grounds for impeachment.)

The constitutional confusion persisted after the referral arrived in Congress. Most assumed

that the Judiciary Committee would, at a minimum, carefully review the referral before authorizing any public release. Some thought that the committee might not release materials submitted by the independent counsel at all, but instead simply use the referral as a springboard to plan and conduct its own investigation. Indeed, the Rodino Judiciary Committee apparently never released the 1974 Jaworski referral, and the Senate Judiciary Committee carefully guards the somewhat analogous FBI background reports on presidential nominees.

In this instance, however, after an overwhelming bipartisan vote, the House publicly released the independent counsel's report without even reviewing it beforehand -- notwithstanding widespread recognition that the referral necessarily would describe extraordinarily sensitive evidence and personal information. The House's immediate and unscreened release of the referral and subsequent release of truckloads of sensitive grand jury material -- the president's grand jury videotape, grand jury transcripts, the Tripp-Lewinsky audiotapes and the like -- obviously caused unnecessary harm to Congress, the presidency, the independent counsel and the public discourse.

The referral process also exposed yet again the fundamental flaw in the statute's requirement that independent counsels file substantive reports, as opposed to simply providing Congress raw evidence. The reports divert attention from the evidence to the perceived accuracy and fairness of the report. Because independent counsel cases involve political figures, the prosecutorial reports are inevitably attacked as politically motivated documents. We now have plenty of examples: the McKay report (attacked as unfair to Edwin Meese), the Walsh report (attacked as unfair to presidents Reagan and Bush) and the Starr report (attacked as unfair to President Clinton). Congress's original conception of independent counsel reports -- that the independent counsel's recitation and interpretation of the evidence would be accepted as gospel by all -- reflects a post-Watergate naivete that has been flatly disproved by two decades of experience.

In this case, moreover, the House's massive public release of the referral and backup evidence not only was unwise on its own terms, but also suggested that the independent counsel -- not the House -- was defining the impeachment process. Of course, after the public release of the referral, many believed that constitutional normality would return -- that the Judiciary Committee would conduct its own investigation and probe witnesses directly, a seemingly necessary ingredient before impeaching and removing a president of the United States. But that, too, never happened. Instead, to the chagrin of constitutional purists, both the House and the Senate rendered their judgments without a full and independent congressional investigation in either body.

So now that it is over, whom do we blame for the morphing of constitutional roles we witnessed over the last year? No one can legitimately blame the independent counsel: He followed the statute and the mandate given him by the attorney general and three-judge court (Sam Dash's reinterpretations notwithstanding), and it obviously was not his role to tell the House that it should be more aggressive in conducting its own impeachment process. Nor can one place much criticism on the House Judiciary Committee, for it deferred to a process seemingly ordained by the independent counsel statute. Rather, the blame lies squarely on the independent counsel statute itself -- the hydraulic force that facilitated, and even caused, the unfortunate blending of constitutional roles throughout the impeachment process. Yet another reason to end this statute and revert to a system more closely resembling the tried-and-true discretionary system of administration-appointed special prosecutors -- one in which Congress does its job and oversees the executive.

To be clear, my criticism of the process the country underwent over the past year is not to say whether President Clinton should or should not have been removed from office. One can argue that the president would have been removed had the proper constitutional process been followed. Alternatively, one can argue that he never would have been impeached. Regardless, the procedure that Congress followed in this case, pursuant to the independent counsel statute, was deeply flawed in that it required a single quasi-executive branch officer

-- who was, on the one hand, defenseless against relentless and orchestrated political assaults and, on the other hand, unaccountable to the people -- to define the impeachment process.

The writer, a Washington attorney, served as an associate counsel for independent counsel Kenneth W. Starr.

GRAPHIC: ILL,,TIM BRINTON

LOAD-DATE: February 26, 1999

Source: News & Business > News > By Individual Publication > W > **The Washington Post** ⓘ
Terms: **kavanaugh and date(geq (2/25/99) and leq (2/27/99))** (Edit Search)
View: Full
Date/Time: Thursday, July 3, 2003 - 9:15 AM EDT

Brett Kavanaugh – Vince Foster Investigation

Allegation: Brett Kavanaugh's work for Independent Counsel Kenneth Starr while he investigated the Clinton Administration demonstrates Mr. Kavanaugh's partisan, right wing agenda. In particular, Mr. Kavanaugh investigated the circumstances surrounding former Deputy White House Counsel Vince Foster's death for three years after four separate investigations already had concluded that Mr. Foster committed suicide.

Facts:

- **Mr. Kavanaugh's work on the investigation of Vince Foster's death demonstrates his fairness and impartiality.**
  - ✓ While working for Independent Counsel Kenneth Starr, Mr. Kavanaugh was the line attorney responsible for the Office of Independent Counsel's investigation into Vince Foster's death. Mr. Kavanaugh also prepared the Office of Independent Counsel's report on Vince Foster's death.
  - ✓ **In the report prepared by Mr. Kavanaugh, the Office of Independent Counsel concluded that Vince Foster had committed suicide, thus debunking alternative conspiracy theories advanced by critics of the Clinton Administration.**
  - ✓ Mr. Kavanaugh's role in the Vince Foster investigation evidences his ability to assess evidence impartially and refutes any allegation that his decision-making is driven by ideological or partisan considerations.
- **Mr. Kavanaugh's work on the investigation of Vince Foster's death was careful and thorough and demonstrates his outstanding skills as a lawyer.**
  - ✓ In investigating Vince Foster's death, Mr. Kavanaugh was required to manage and review the work of numerous FBI agents and investigators, FBI laboratory officials, and leading national experts on forensic and psychological issues.
  - ✓ Mr. Kavanaugh conducted interviews with a wide variety of witnesses concerning both the cause of Vince Foster's death and his state of mind.
  - ✓ While some have complained that the Independent Counsel's investigation of Vince Foster's death took too long and was unnecessary, a careful, thorough, and detailed investigation was necessary under the Independent Counsel's mandate.
- **The report prepared by Mr. Kavanaugh demonstrated sensitivity to Vince Foster's family.**
  - ✓ Although photographs taken of Vince Foster's body after his death were relevant to the investigation, they were excluded from the report prepared by Mr.

Kavanaugh because "[t]he potential for misuse and exploitation of such photographs [was] both substantial and obvious." See *Report on the Death of Vincent W. Foster Jr., By the Office of Independent Counsel, In re: Madison Guaranty Savings & Loan Ass'n, to the Special Division of the United States Court of Appeals for the District of Columbia Circuit* (filed July 15, 1997), Section III.D.

➢ **The Office of the Independent Counsel's investigation into the death of Vince Foster was compelled by its court-assigned jurisdiction.**

✓ The Special Division of the United States Court of Appeals for the District of Columbia Circuit asked the Office of the Independent Counsel to investigate and prosecute matters "relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings & Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc."

✓ The death of Vince Foster fell within the Office of the Independent Counsel's jurisdiction both because of the way Whitewater-related documents from Mr. Foster's office were handled after his death, and because of Mr. Foster's possible role or involvement in Whitewater-related events under investigation by the Office of Independent Counsel.

➢ **The U.S. Senate has confirmed judicial and other nominees who worked for Independent Counsel Ken Starr. If these nominees' work for the Independent Counsel was not disqualifying, then there is no reason why Brett Kavanaugh should be disqualified because of his work for Independent Counsel Starr.**

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Brett Kavanaugh – *Georgetown Law Journal* Article

Allegation: In a 1998 article for the *Georgetown Law Journal*, Brett Kavanaugh argued for a narrow interpretation of executive privilege and specifically stated that courts could only enforce executive privilege claims with respect to national security and foreign affairs information. As Associate White House Counsel, however, Mr. Kavanaugh was involved with asserting executive privilege in a variety of other contexts, including documents relating to Vice President Cheney's energy policy task force, the Enron investigation, and the Marc Rich pardon.

Facts:

- **Mr. Kavanaugh's *Georgetown Law Journal* article demonstrates his impartiality and ability to analyze issues without respect to ideological or partisan concerns.**
  - ✓ While President Clinton was in office and thus subject to possible criminal indictment for perjury and obstruction of justice, Mr. Kavanaugh called on Congress in his article to clarify that a sitting President is not subject to criminal indictment while in office. *See* Brett M. Kavanaugh, *The President and the Independent Counsel*, Geo. L.J. 2133, 2157 (1998).
  - ✓
- **The positions taken by Mr. Kavanaugh as Associate White House Counsel are consistent with the views regarding executive privileges that he expressed in his *Georgetown Law Journal* article.**
  - ✓ In his *Georgetown Law Journal* article, Mr. Kavanaugh was addressing only claims of executive privilege **in response to grand jury subpoenas or criminal trial subpoenas** when he stated that courts would only enforce such claims in the context of national security or foreign affairs information. *Id.* at 2162.
  - ✓ Mr. Kavanaugh also argued, however, that a presumptive privilege for Presidential communications existed, not limited to the areas of national security and foreign affairs, and that "it may well be absolute in civil, congressional, and FOIA proceedings." Mr. Kavanaugh clarified that "it is only in the discrete realm of criminal proceedings where the privilege may be overcome." *Id.* at 2171.
  - ✓ As Associate White House Counsel, **Mr. Kavanaugh has never worked on a matter where the President invoked or threatened to invoke executive privilege in responding to a grand jury subpoena or a criminal trial subpoena**. There is thus no contradiction between the views expressed in his *Georgetown Law Journal* article and his actions while working at the White House.
- **Mr. Kavanaugh's article presented a thoughtful examination of the problems associated with the independent counsel statute and offered a moderate and sensible set of recommendations for reform.**

- ✓ Among the difficulties Mr. Kavanaugh identified with the independent counsel system existing at the time were the length and politicization of independent counsel investigations. *Id.* at 2135.

- ✓ He also argued that the appointment and removal provisions pertaining to independent counsels, both in theory and in fact, led to unaccountable independent counsels. *Id.*

- ✓ To solve these problems, Mr. Kavanaugh set forth several proposals. For example, Mr. Kavanaugh suggested that independent counsels should be nominated by the President and confirmed by the Senate, and that the President should have absolute discretion over whether and when to appoint an independent counsel. *Id.* at 2135-36.

- ✓ Jerome Shestack, the President of the American Bar Association at the time that Mr. Kavanuagh's article was published, **complimented his "well-reasoned and objectively presented recommendations"** and noted his **"most scholarly and comprehensive review of the issues of executive privilege."** Jerome J. Shestack, *The Independent Counsel Act Revisited*, 86 Geo. L.J. 2011, 2019 (1998).

Georgetown Law Journal
July, 1998

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

*2133 THE PRESIDENT AND THE INDEPENDENT COUNSEL

Brett M. Kavanaugh [FNa1]

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*2134 INTRODUCTION

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

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

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

Nonetheless, Congress can improve the current "independent counsel" system, which was established by the Ethics in Government Act of 1978. [FN4] Several problems have been identified with the current system, including the following: (1) the appointment mechanism, by attempting to specify situations where an independent counsel is necessary, requires the President and Attorney General to seek appointment of an independent counsel in cases

where it is not warranted and permits the President and Attorney General to avoid appointment of an independent counsel in cases where it is warranted; (2) the appointment and removal provisions (which do not involve the President) are contrary to our constitutional system of separation of powers and, both in theory and perception, lead to unaccountable independent counsels; (3) the investigations last too long; (4) an independent counsel can investigate matters beyond the initial grant of jurisdiction; and (5) independent counsel investigations have become "politicized" (a commonly used but rarely defined term).

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

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

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

For example, Attorney General Janet Reno appointed an independent counsel to investigate whether Secretary of Agriculture Michael Espy accepted illegal gratuities--a very important investigation, but one that Congress and the people might have entrusted to the Justice Department. [FN7] On the other hand, the Attorney General has refused to appoint an independent counsel for the campaign fund-raising matter based on a narrow analysis of the independent counsel statute's triggering mechanism. That approach ignores the broader question that should be the issue (and historically has been the issue): At the end of the day, will the American people and the Congress have confidence in the credibility of the Justice Department investigation if it culminates in a no-prosecution decision against those high-level executive branch officials under investigation?

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

Fourth, Congress should eliminate the statutory reporting requirement. The reporting requirement adds great time and expense to independent counsel investigations, and the reports are inevitably viewed as political documents. The

ordinary rules of prosecutorial secrecy should apply to evidence gathered during an independent counsel investigation, except that the special counsel should be authorized to provide the President and the House Judiciary Committee with a classified report of any evidence regarding possible misconduct by current officers of the executive branch (including the President) that might dictate removal by the President or impeachment by the Congress.

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

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

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

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

I. BACKGROUND

A. THE CURRENT LEGAL SCHEME

1. The Policy Justification for a Special Counsel

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

On the flip side, however, contrary to the claims of some critics, there is a real check against an over-aggressive special prosecutor--the same check that deters an over-aggressive Justice Department prosecutor. It is the jury. As

Professor Katy Harriger correctly noted:

Prosecutors, both independent and regular, must have sufficient evidence to ***2139** convince a jury that a crime has been committed. One clear constraint on independent counsel ... is one that is on all prosecutors. They must ask themselves whether their case will pass the "smell test" in front of a jury. Will they find criminal action beyond a reasonable doubt? There is virtually no incentive for any prosecutor, independent or otherwise, to pursue a criminal case that fails that test. To argue then that there are no checks on the independent counsel is, to say the least, disingenuous for it ignores the fact that independent counsel do not operate outside the established legal system in their pursuit of criminal cases. They cannot escape the requirement that their case against an individual be reviewed by an impartial judge and a jury of his peers. [FN10]

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

2. Two Statutory Mechanisms for Appointment of Special Counsels

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

Second, under §§ 591-599 of Title 28, the mandatory "independent counsel" statute, Congress has specified a number of covered persons as to whom the Attorney General must seek the appointment of an independent counsel if, after a preliminary investigation, she finds "reasonable grounds to believe that further investigation is warranted." [FN13] The Attorney General does not select an independent counsel herself, but instead applies to a panel of three judges (the "Special Division") preselected by the Chief Justice of the United States. [FN14] The panel of judges then selects an independent counsel. [FN15] The independent counsel's ***2140** jurisdiction is technically defined by the Special Division, [FN16] although the Special Division defines it in the manner requested by the Attorney General. [FN17] The independent counsel is to conduct all investigations and prosecutions "in the name of the United States," [FN18] and is to conclude his investigation by notifying the Special Division and filing a report on "the work of the independent counsel." [FN19] The independent counsel may not expand his jurisdiction to cover unrelated matters except upon application to the Attorney General and approval by the Special Division. [FN20] Pursuant to this statute, nearly twenty independent counsel have served since 1978, most notably in the Iran-Contra and Whitewater matters.

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

B. ARE OUTSIDE FEDERAL PROSECUTORS EVER NECESSARY?

1. An Illusory Debate

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

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

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

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

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

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

Finally, the most famous critic of the independent counsel statute is Justice Antonin Scalia. His dissent in Morrison v. Olson, [FN26] the decision upholding the constitutionality of the independent counsel statute, is largely an analysis of the Constitution's separation of powers, including the requirements of the Appointments Clause and the Court's jurisprudence regarding the removal power of the ***2142** President. Notwithstanding the length and force of his dissent, Justice Scalia's objection to the independent counsel statute was really quite simple: The President must be able to appoint and remove at will the independent counsel. If the President can select the independent counsel, and the President can remove the independent counsel at will, then Justice Scalia would have no objection. [FN27]

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

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

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

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

In 1924, following a Senate resolution calling for appointment of a special prosecutor, [FN32] President Calvin Coolidge appointed two special prosecutors, one Republican and one Democrat, to jointly conduct the criminal

investigation of the Teapot Dome scandal. [FN33] The special prosecutors subsequently obtained the conviction of the former Secretary of Interior for taking a bribe. [FN34]

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

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

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

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

In 1994, during a brief period when the independent counsel statute had lapsed, President Clinton asked the Attorney General to appoint a special counsel to investigate the Whitewater matter, which involved criminal referrals and allegations against former business partners of the President (James B. McDougal and Susan H. McDougal) and a separate, specific allegation of wrongdoing against the President by former Arkansas businessman and Judge David L. Hale. The Attorney General selected Robert B. Fiske, Jr., who served until the independent counsel statute was reauthorized, at which time the panel of judges determined that the statute required appointment of an independent counsel who was not an administration official. [FN38]

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

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

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

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

many outside prosecutors appointed throughout our history demonstrates their importance and necessity. And the further fact that even the strongest critics of the mandatory independent counsel statute concede that an outside prosecutor is necessary in some cases is telling evidence that some mechanism for appointment of an outside prosecutor is appropriate.

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

II. IMPROVING THE SYSTEM

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

Section 1. Appointment and Jurisdiction of a Special Counsel

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

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

***2146** Section 2. Reports by a Special Counsel.

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

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

Presidential Immunity.

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

Presidential Privileges.

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

A. Appointment and removal of the special counsel

The single most important change this article proposes concerns the appointment and removal of an independent counsel. Congress should eliminate §§ 591-599 of Title 28, and adopt a new statutory provision:

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

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

1. Appointment of the Special Counsel

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

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

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

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

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

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

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

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

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

counsel is an effort to obtain a hung jury, and there is a real danger that it will work in all but *2149 the most clear-cut cases of guilt. [FN46]

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

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

Second, presidential appointment and Senate confirmation would ensure that the credentials of a special counsel are extraordinarily high. And particular issues regarding the nominee's past could be fleshed out and explained rather than being dredged up years down the road by the subjects of the investigation.

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

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

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

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

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

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

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

2. Removal of the Special Counsel

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

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

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

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

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

As noted above, this article proposes the following statutory language.

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

Congress should no longer try to specify in advance the circumstances requiring a special counsel. The triggering mechanism of the current mandatory independent counsel statute can be grossly over-or under-inclusive depending on the circumstances. In some cases, the Attorney General is required to request an independent counsel even when

it seems evident that Congress and the public would accept the credibility of a Justice Department investigation (for example, the investigation of Secretary of Labor Alexis Herman). In other cases, such as the Democratic campaign fundraising matter, the mandatory appointment provision of the statute is not triggered, even though there seems an obvious need for an outside prosecutor in order to assure the public of a thorough and credible investigation.

Indeed, the campaign fundraising matter has revealed a series of heretofore unforeseen flaws in the triggering mechanism of the statute. First, the decision whether to appoint an independent counsel has degenerated into a debate between the Attorney General and her critics over the precise features of the triggering mechanism--for example, whether a sufficiently specific and credible allegation has been made against a "covered person." This dispute has focused on the question of which telephones were used to make certain fundraising calls. The debate over such technicalities has obscured the broader question of whether United States officials, or members of American political parties, knowingly solicited or accepted contributions which were provided by citizens of foreign countries. [FN56]

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

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

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

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

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

C. JURISDICTION

The following proposed statutory language relates to jurisdiction.

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

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

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

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

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

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

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

D. REPORTS

Congress should enact the following statutory language regarding the special counsel's duty to provide information regarding the evidence developed during his investigation.

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

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

In any event, § 594(h) of the current statute requires that an independent counsel's final report set forth "fully and completely a description of the work of the independent counsel, including the disposition of all cases brought." [FN61] ***2156** Before the 1994 amendment, the statute also required that the final report set forth "the reasons for not prosecuting any matter within the prosecutorial jurisdiction" of the independent counsel. [FN62]

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

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

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

E. INVESTIGATION AND PROSECUTION OF THE PRESIDENT

This article proposes the following statutory language to establish that a sitting President cannot be indicted.

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

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

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

The reason for such political attacks are obvious. The indictment of a President would be a disabling experience for the government as a whole and for the President's political party--and thus also for the political, economic, social,

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

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

Watergate Special Prosecutor Jaworski concluded, for example, that "the Supreme Court, if presented with the question, would not uphold an indictment of the President for the crimes of which he would be accused." Accordingly, he thought it would be irresponsible conduct to recommend that the grand jury return an indictment against the President. He based this conclusion on the arguments presented to him:

[Tlhe impeachment process should take precedence over a criminal indictment because the Constitution was ambivalent on this point and an indictment provoking a necessarily lengthy legal proceeding would either compel the President's resignation or substantially cripple his ability to function effectively in the domestic and foreign fields as the Nation's Chief Executive Officer. Those consequences, it was argued, should result from the impeachment mechanism explicitly provided by the Constitution, a mechanism in which the elected representatives of the public conduct preliminary inquiries and, in the event of the filing of a bill of impeachment of the President, a trial based upon all the facts. [FN67]

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

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

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

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

[O]ffenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of

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

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

The Federalist Papers thus suggest the ill wisdom of entrusting the power to judge the President of the United States to a single person or body such as an independent counsel: The discretion "to doom to honor or to infamy the most confidential and the most distinguished characters of the community forbids the commitment of the trust to a small number of persons." [FN78] In the constitutional debates, Gouverneur Morris explained that the Senate should try impeachments, and that the President would be liable to prosecution afterwards. [FN79] The Federalist Papers similarly point out that:

the punishment which may be the consequence of conviction upon impeachment is not to terminate the chastisement of the offender. After having been sentenced to a perpetual ostracism from the esteem and confidence and honors and emoluments of his country, he will still be liable to prosecution and punishment in the ordinary course of law. [FN80]

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

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

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

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

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

F. THE PRESIDENT'S PRIVILEGES

The following statutory language is proposed:

In response to a federal grand jury or criminal trial subpoena sought by the United States, no court of the United

States shall enforce or recognize a privilege claimed by the President in his official capacity, or by an Executive department or agency, except on the ground of national security, or as provided by federal statute or rule that refers specifically to the privileges ***2162** available to government officials or agencies in grand jury or criminal trial proceedings.

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

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

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

1. Non-Constitutional Executive Privileges

Federal Rule of Evidence 501 provides that privileges in federal criminal trials and grand jury proceedings are "governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience" except as "provided by Act of Congress" or the Constitution. Section 535(b) of Title 28 makes clear for purposes of federal criminal proceedings that the President may not maintain any common-law privilege claim such as the governmental attorney-client and work product privileges that President Clinton asserted in the Whitewater investigation. The statute provides:

> Any information, allegation, or complaint received in a department or agency of the executive branch of the Government relating to violations of title 18 involving Government officers and employees shall be expeditiously reportedly to the Attorney General by the head of the department or agency.... [FN92]

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

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

statutory construction, that explicit exception confirms the statute's plain meaning--and no further exceptions can be judicially inferred or created. [FN96]

The legislative history supports that conclusion as well. The House Committee Report accompanying § 535 stated that "[t]he purpose" of the provision is to "require the reporting by the departments and agencies of the executive branch to the Attorney General of information coming to their attention concerning any alleged irregularities on the part of officers and employees of the Government." [FN97] The report emphasizes that " i f the Attorney General or the Federal Bureau of Investigation undertakes such investigation, they should have complete cooperation from the department or agency concerned." [FN98] The Justice Department supported the legislation:

The Department of Justice urges the prompt enactment of the measure, for such legislation will emphasize the congressional intent that the chief law- enforcement officer of the Government is to have free access to all units thereof for the purpose of ferreting out personnel criminally violating their trusts and oaths of office. [FN99]

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

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

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

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

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

2. Constitutionally Based Executive Privileges

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

The dispute in Nixon arose in connection with a criminal trial of seven individuals, including former White House officials. The District Court issued a trial subpoena sought by the United States (represented by the special

prosecutor) to obtain tape recordings of conversations among President Nixon and various high-level White House officials, including White House Counsel John Dean. [FN109] President Nixon resisted production of the tapes, citing the executive privilege for presidential communications.

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

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

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

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

The Court then struck the balance between the President's generalized interest in confidentiality and the "need for relevant evidence in criminal trials." [FN121] In this regard, the Court said it was important to distinguish the need for evidence in criminal proceedings from the need for evidence in congressional proceedings, civil cases, or Freedom of Information Act (FOIA) actions. In the latter situations, it may well be that the executive privilege for presidential ***2168** communications is absolute (or in the case of congressional subpoenas, a nonjusticiable question). However, the criminal context is different. As the Court emphasized, the traditional commitment to the rule of law is "nowhere more profoundly manifest than in our view that the twofold aim of criminal justice is that guilt shall not escape or innocence suffer." [FN122] The Court further noted that " t he need to develop all relevant facts in the adversary system is both fundamental and comprehensive. ... To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense." [FN123]

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

[T]he allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts. A President's acknowledged need for confidentiality in the communications of his office is general in nature, whereas the constitutional need for production of relevant evidence in a criminal proceeding is specific and central to the fair

adjudication of a particular criminal case in the administration of justice. Without access to specific facts a criminal prosecution may be totally frustrated. The President's broad interest in confidentiality of communications will not be vitiated by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal cases.

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

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

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

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

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

[The current draft] impl[ies] that there must be a compelling need for the material to overcome presumptively privileged executive documents. I take it that you are suggesting that there is a dimension to overcoming the privilege beyond the showing of relevance and admissibility. This makes far too much of the general privilege rooted in the need for confidentiality, and it is not my understanding of the Conference vote. As I have already indicated, my view is that relevance and admissibility themselves provide whatever compelling need must be shown. I would also doubt that the Prosecutor has made any showing of necessity beyond that of relevance and admissibility. [FN129]

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

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

This interpretation of Nixon was advanced by Judge Silberman in his 1990 concurrence in United States v. North.

[FN132] The district court in that case, Judge Silberman noted, had interpreted Nixon as "constructing a very high barrier to a criminal defendant who wishes to call a President or ex- President who, it is asserted, will give evidence relevant to the defense." [FN133] Finding "it instructive to note how easily the Court in Nixon was satisfied that the tapes sought by the Special Prosecutor ... were relevant," Judge Silberman indicated that in cases where national security is not asserted, no special showing other than relevance is necessary even after executive privilege is claimed. [FN134] Judge Silberman continued:

To be sure, the Court used the language "essential to the justice of the pending criminal case" and "demonstrated specific need for evidence" in describing what was needed to overcome the President's qualified privilege. But the Court does not appear to have meant anything more than the showing that satisfied Rule 17(c). Nowhere in the opinion does the Court ever describe any offer by the Special Prosecutor other than the rather perfunctory showing of relevance .... Even in the section of the opinion dealing with executive privilege, the Court stated that "the President's broad interest in confidentiality ***2171** of communications will not be vitiated by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal cases." [FN135]

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

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

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

The court stated that this first component "can be expected to have limited impact." [FN144] In the grand jury setting, moreover, "the fact that evidence covered by the presidential communications privilege may be inadmissible should not affect a court's determination of the grand jury's need for the material." [FN145] The court further stated that the second component also will be "easily" satisfied when "an immediate White House advisor is being investigated for criminal behavior." [FN146] Even in cases where a person outside the White House is under investigation, the court said that this second component still will be satisfied when the proponent can "demonstrate a need for information that it currently possesses, but which it has been unable to confirm or disprove." [FN147] Of course, that showing can be made in virtually all investigations--few facts are ever fully confirmed or disproved. The court further stated that this standard would not impose "too heavy" a burden on the subpoena proponent. [FN148]

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

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

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

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

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

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

4. The Policy of Executive Privileges

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

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

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

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

information by another. Such rules should take account of the complex considerations of governmental structure, tradition, and regulation that are involved." [FN157]

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

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

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

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

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

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

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

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

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

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

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

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

The third situation occurs not where the employee initiates conversation, but where the agency elicits information from its employees about some event. Government agencies and government agency attorneys often have a legitimate interest in obtaining facts about a particular event; the fact- gathering process enables an agency head (or delegate) to discipline employees, institute new policies that will prevent similar errors in the future, inform the Congress or the public of the facts, or merely deal with the latest political controversy. Thus, the White House has conducted numerous internal investigations, as have many agencies and inspectors general. Given the number of such investigations, a far-reaching and novel governmental attorney-client privilege is, by definition, unnecessary to encourage such activity. [FN166] Unlike a corporation (which is subject to indictment), no legitimate government agency would be, or has been, discouraged from conducting internal factfinding by the knowledge that any evidence of crime uncovered will in fact be presented to the relevant law enforcement authorities. Indeed, this was the premise behind the enactment of Section 535 (and the many inspector general statutes as well).

CONCLUSION

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

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

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

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

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

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

[FN4]. 28 U.S.C. §§ 591-99 (1994).

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

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

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

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

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

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

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

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

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

[FN14]. 28 U.S.C. § 592(c).

[FN15]. Id. § 593(b).

[FN16]. Id. § 593(b)(3).

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

[FN18]. 28 U.S.C. § 594(a)(9). The symbolism of this nomenclature is important and should be retained in any future legislation. Criminal defendants (and other critics) inevitably try to imply to juries (and the public) that the appointed counsel is somehow an extra-governmental official who does not warrant the same respect as prosecutors representing the United States. In the 1996 trial of Jim Guy Tucker, James McDougal, and Susan McDougal, for example, the defendants refused to refer to the prosecutors as the "United States," arguing that "they are independent Counsel appointed under a special act." The Court put a quick end to this tactic: "The indictment which was rendered by citizens of this state, the caption is United States of America versus James B. McDougal, Jim Guy Tucker, and Susan H. McDougal. Mr. Jahn and his associates represent the United States of America. Disregard the comment made by Mr. Collins." United States v. McDougal, Tucker, and McDougal, No. LR-CR-95-173, Tr. at 4525-27 (E.D. Ark. Apr. 11, 1996).

[FN19]. 28 U.S.C. § 594(h).

[FN20]. Id. § 593(c).

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

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

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

[FN24]. Id.

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

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

[FN27]. In the final pages of his dissent, Justice Scalia also pointed out what he termed the "[un]fairness" of an independent counsel investigation, and he did so in broad terms that arguably seem to apply to all special counsel, whether appointed by a court or by the President (or Attorney General). In comparing a special counsel to an "ordinary" Justice Department prosecutor, however, Justice Scalia appeared to rely on a romantic vision of "ordinary" federal prosecutors. In fact, an "ordinary" federal prosecutor is at least as likely to engage in hardball, near-the-edge tactics as a special counsel whose every move is publicly tracked, analyzed, and criticized. Moreover, the only concrete measure of over-aggressiveness is the prosecutor's conviction rate. A careful prosecutor should not bring many cases that end in outright acquittal on all counts. As it turns out, the record of independent counsels appointed under the statute is better than that of the Justice Department. Only one independent counsel appointed under the statute has ever suffered an outright jury acquittal, which is an impressive record, particularly given the skilled attorneys retained by the defendants in such cases.

Justice Scalia also pointed out that ordinary federal prosecutors suffer from constraints on resources and that independent counsels generally do not. Morrison, 487 U.S. at 727-33 (Scalia, J., dissenting). That is not an entirely accurate or persuasive argument. First, the fact that some federal prosecutors' offices may be understaffed and thus unable to prosecute federal crimes that should be prosecuted is hardly a model for investigations of possible crimes by our highest national officials. Indeed, that is the kind of backwards logic that Justice Scalia ordinarily ridicules. Second, in allocating its enormous annual appropriation, the Department of Justice regularly determines that certain kinds of crimes warrant intensive investigation and prosecution, whether it be drug distribution or health care fraud

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

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

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

[FN31]. Id. at 8.

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

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

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

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

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

[FN36]. 28 U.S.C. §§ 591-99 (1994).

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

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

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

public corruption cases. See Harriger, supra note 10, at 3.

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

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

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

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

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

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

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

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

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

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

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

[FN51]. 28 U.S.C. § 596(a)(1).

[FN52]. Id. § 515; id. § 543.

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

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

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

[FN56]. See CNN Capital Gang, supra note 43 (Senator Hatch argued: "Who cares about the phone calls ... It's all the other stuff that ought to be investigated.").

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

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

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

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

[FN61]. 28 U.S.C. § 594(h)(1)(B).

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

[FN63]. 28 U.S.C. § 595(c).

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

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

that the President advocates, Congress, of course, could not repeal it.").

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

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

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

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

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

[FN71]. Id.

[FN72]. Id.

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

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

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

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

[FN77]. Id. at 397.

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

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

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

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

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

[FN83]. As indicated in the statutory language proposed by this article, Congress should take appropriate steps to

ensure that the statute of limitations would not prevent prosecution of a President after he leaves office.

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

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

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

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

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

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

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

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

[FN92]. 28 U.S.C. § 535(b). The subsection states in full:

Any information, allegation, or complaint received in a department or agency of the executive branch of the Government relating to violations of title 18 involving Government officers and employees shall be expeditiously reported to the Attorney General by the head of the department or agency, unless--

(1) the responsibility to perform an investigation with respect thereto is specifically assigned otherwise by another provision of law; or

(2) as to any department or agency of the Government, the Attorney General directs otherwise with respect to a specified class of information, allegation, or complaint.

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

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

[FN95]. 28 U.S.C. § 535 (b)(2).

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

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

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

[FN99]. Id. at 3553 (emphasis added). In an independent counsel investigation, the independent counsel is the official who receives information about matters within his jurisdiction. "When issuing ... subpoenas, an independent

counsel stands in the place of the Attorney General." S.Rep. No. 100-123, at 22 (1987); see 28 U.S.C. § 594(a).

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

[FN101]. Id.

[FN102]. Id.

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

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

[FN105]. In re Grand Jury Subpoena, 112 F.3d at 921 n.10. The Attorney General has authorized an exception to § 535(b) for information obtained by government attorneys who, pursuant to a specific regulation (28 C.F.R. § 50.15), represent government employees in their personal capacities--for example, in civil suits alleging Bivens violations. The OLC memoranda address only the exception for these personal representations. See Office of Legal Counsel Memorandum, at 5 (Mar. 29, 1985) (analyzing duty under C.F.R. § 50.15 and U.S.C. § 535(b) of an Assistant U.S. Attorney who discovered information while representing Bivens defendants); Office of Legal Counsel Memorandum, at 1 (Apr. 3, 1979) (addressing question regarding "propriety of providing Justice Department representation in a civil suit to a government employee"); Office of Legal Counsel Memorandum, at 4 (Aug. 30, 1978) (analyzing under C.F.R. § 50.15 and U.S.C. § 535(b) the "contours of the relationship between a Department attorney and an individual government employee whose representation has been undertaken"); Office of Legal Counsel Memorandum, at 1 (Nov. 30, 1976) (addressing question regarding situation where "[t]he U.S. Attorney's Office is currently representing both a Federal employee and the United States as defendants in a civil suit for damages" and the employee has told the Assistant U.S. Attorney information that could incriminate the employee).

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

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

[FN108]. Id. at 706-13.

[FN109]. Id. at 687-88.

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

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

[FN112]. Id. at 86-87.

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

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

[FN115]. Id. at 708.

[FN116]. Id. at 705.

[FN117]. Id. at 708.

[FN118]. Id.

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

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

[FN121]. Id.

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

[FN123]. Id.

[FN124]. Id. at 712-13.

[FN125]. Id. at 714.

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

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

[FN128]. Id.

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

[FN130]. Id.

[FN131]. As reported in The Brethren, Justice Powell had last-minute reservations about the legal standard and said at the conference on July 23 that he was considering a last-minute concurrence because "[t]hey were ruling that any grand jury could subpoena material from the President in a criminal investigation. That was too sweeping. They could, and they should, rule more narrowly. ..." BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN 409 (1979). Woodward and Armstrong report that the room "erupted" and Justice William Brennan "made an impassioned plea for unanimity." Id. Justice Powell then decided to adhere to the Chief Justice's opinion, and thus the opinion rejected a Nixon v. Sirica kind of standard and instead held that evidence meeting the requirements of Rule 17 must be produced unless there was a claim of state secrets. Id. at 410.

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

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

[FN134]. Id. at 952.

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

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

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

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

[FN139]. Id. at 754.

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

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

[FN142]. Id.

[FN143]. Id.

[FN144]. Id.

[FN145]. Id. at 757.

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

[FN147]. Id. at 761.

[FN148]. Id. at 756.

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

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

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

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

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

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

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

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

[FN157]. Restatement (Third) of the Law Governing Lawyers § 124 cmt. b (1996) (Proposed Final Draft No. 1) (also stating that "unlike persons in private life, a public agency or officer has no autonomous right of confidentiality in communications relating to governmental business").

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

[FN159]. Id. at 921.

[FN160]. Id.

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

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

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

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

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

[FN166]. The President (or relevant agency head) can require that the employee cooperate in an internal agency investigation. See 4B Opinion of the Off. of Legal Couns. 421, 427 (1980) ("The obligation of public officials to answer questions related to the performance of their public duties is well- recognized"). To be sure, an agency employee questioned by an agency attorney may refuse to answer questions out of a fear of self-incrimination, although the failure to answer questions may lead to his dismissal. See LaChance v. Erickson, 118 S.Ct. 753, 756 (1998) ("It may well be that an agency ... would take into consideration the failure of the employee to respond.").

The government employee who does not claim the Fifth Amendment and speaks to the attorney could be investigated or prosecuted based at least in part on the communications to government attorneys (Oliver North, for example). But that is a good result: Insulating government employees from criminal investigation and prosecution has never been considered a governmental interest that justifies withholding relevant information from the federal grand jury. Indeed, the only governmental interest is precisely the opposite.

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

Brett Kavanaugh – Privilege Arguments v. Work on E.O. 13233

Allegation: While working for Independent Counsel Kenneth Starr, Brett Kavanaugh fought the Clinton Administration for access to confidential communications. As Associate White House Counsel in the Bush Administration, however, Mr. Kavanaugh helped to draft Executive Order 13233, which dramatically limits public access to presidential records. Such a stark inconsistency demonstrates Mr. Kavanaugh's ideological and partisan agenda.

Facts:

- **Mr. Kavanaugh's work on privilege issues for the Office of the Independent Counsel was consistent with his work on Executive Order 13233.**
  - ✓ Mr. Kavanaugh argued on behalf of the Office of the Independent Counsel that government attorneys in the Clinton Administration could not invoke the attorney-client privilege to block the production of information **relevant to a federal criminal investigation**.
  - ✓ Mr. Kavanaugh also argued on behalf of the Office of Independent Counsel that the attorney-client privilege, once a client was deceased, did not apply with full force in **federal criminal proceedings**, and that federal courts should not recognize a new "protective function privilege" for Secret Service Agents in **federal criminal proceedings**.
  - ✓ The federal courts of appeals agreed with Mr. Kavanaugh's position in those cases.
  - ✓ **Nothing in Executive Order 13233 purports to block prosecutors or grand juries from gaining access to presidential records in a criminal investigation.**
- Executive Order 13233 simply **establishes policies and procedures** to govern requests for presidential records and the assertion of constitutionally-based privileges. **It does not purport to set forth those circumstances under which an assertion of executive privilege should be made and/or would be successful.**
  - ✓ **Executive Order 13233 specifically recognizes that there are situations where a party seeking access to presidential records may overcome the assertion of constitutionally based privileges.** *See* Section 2(b).
  - ✓ In his *Georgetown Law Journal* article, which was authored during the Clinton Administration, Mr. Kavanaugh specifically recognized the difference between asserting executive privilege in a criminal context and outside of a criminal context.
  - ✓ He argued that a presumptive privilege for Presidential communications existed and that "it may well be absolute in civil, congressional, and FOIA proceedings."

Mr. Kavanaugh wrote: "it is only in the discrete realm of criminal proceedings where the privilege may be overcome." *See* Brett M. Kavanaugh, *The President and the Independent Counsel*, Geo. L.J. 2133, 2171 (1998).

- **While working in the White House Counsel's Office, Mr. Kavanaugh's work on privilege issues has been consistent and evenhanded, whether the issue at hand involved the Bush Administration or the Clinton Administration.**

  - ✓ For example, Mr. Kavanaugh worked in the Counsel's Office when the Bush Administration asserted executive privilege to shield the records regarding the pardons issued by Bill Clinton at the end of his presidency.

  - ✓ Mr. Kavanaugh likewise was involved in the Bush Administration's assertion of executive privilege to withhold from Congress Justice Department documents related to the investigation of alleged campaign fundraising abuses by the Clinton Administration.

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Presidential Documents

Title 3—

The President

Executive Order 13233 of November 1, 2001

Further Implementation of the Presidential Records Act

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to establish policies and procedures implementing section 2204 of title 44 of the United States Code with respect to constitutionally based privileges, including those that apply to Presidential records reflecting military, diplomatic, or national security secrets, Presidential communications, legal advice, legal work, or the deliberative processes of the President and the President's advisors, and to do so in a manner consistent with the Supreme Court's decisions in *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), and other cases, it is hereby ordered as follows:

Section 1. *Definitions.*

For purposes of this order:

(a) "Archivist" refers to the Archivist of the United States or his designee.

(b) "Presidential records" refers to those documentary materials maintained by the National Archives and Records Administration pursuant to the Presidential Records Act, 44 U.S.C. 2201-2207.

(c) "Former President" refers to the former President during whose term or terms of office particular Presidential records were created.

Sec. 2. *Constitutional and Legal Background.*

(a) For a period not to exceed 12 years after the conclusion of a Presidency, the Archivist administers records in accordance with the limitations on access imposed by section 2204 of title 44. After expiration of that period, section 2204(c) of title 44 directs that the Archivist administer Presidential records in accordance with section 552 of title 5, the Freedom of Information Act, including by withholding, as appropriate, records subject to exemptions (b)(1), (b)(2), (b)(3), (b)(4), (b)(6), (b)(7), (b)(8), and (b)(9) of section 552. Section 2204(c)(1) of title 44 provides that exemption (b)(5) of section 552 is not available to the Archivist as a basis for withholding records, but section 2204(c)(2) recognizes that the former President or the incumbent President may assert any constitutionally based privileges, including those ordinarily encompassed within exemption (b)(5) of section 552. The President's constitutionally based privileges subsume privileges for records that reflect: military, diplomatic, or national security secrets (the state secrets privilege); communications of the President or his advisors (the presidential communications privilege); legal advice or legal work (the attorney-client or attorney work product privileges); and the deliberative processes of the President or his advisors (the deliberative process privilege).

(b) In *Nixon v. Administrator of General Services*, the Supreme Court set forth the constitutional basis for the President's privileges for confidential communications: "Unless [the President] can give his advisers some assurance of confidentiality, a President could not expect to receive the full and frank submissions of facts and opinions upon which effective discharge of his duties depends." 433 U.S. at 448-49. The Court cited the precedent of the Constitutional Convention, the records of which were "sealed for more than 30 years after the Convention." *Id.* at 447 n.11. Based on those precedents and principles, the Court ruled that constitutionally based privileges available to a President "survive[] the individual President's tenure." *Id.* at 449. The Court also held that a former President, although no longer

a Government official, may assert constitutionally based privileges with respect to his Administration's Presidential records, and expressly rejected the argument that "only an incumbent President can assert the privilege of the Presidency." *Id.* at 448.

(c) The Supreme Court has held that a party seeking to overcome the constitutionally based privileges that apply to Presidential records must establish at least a "demonstrated, specific need" for particular records, a standard that turns on the nature of the proceeding and the importance of the information to that proceeding. See *United States v. Nixon*, 418 U.S. 683, 713 (1974). Notwithstanding the constitutionally based privileges that apply to Presidential records, many former Presidents have authorized access, after what they considered an appropriate period of repose, to those records or categories of records (including otherwise privileged records) to which the former Presidents or their representatives in their discretion decided to authorize access. See *Nixon v. Administrator of General Services*, 433 U.S. at 450-51.

Sec. 3. *Procedure for Administering Privileged Presidential Records.*

Consistent with the requirements of the Constitution and the Presidential Records Act, the Archivist shall administer Presidential records under section 2204(c) of title 44 in the following manner:

(a) At an appropriate time after the Archivist receives a request for access to Presidential records under section 2204(c)(1), the Archivist shall provide notice to the former President and the incumbent President and, as soon as practicable, shall provide the former President and the incumbent President copies of any records that the former President and the incumbent President request to review.

(b) After receiving the records he requests, the former President shall review those records as expeditiously as possible, and for no longer than 90 days for requests that are not unduly burdensome. The Archivist shall not permit access to the records by a requester during this period of review or when requested by the former President to extend the time for review.

(c) After review of the records in question, or of any other potentially privileged records reviewed by the former President, the former President shall indicate to the Archivist whether the former President requests withholding of or authorizes access to any privileged records.

(d) Concurrent with or after the former President's review of the records, the incumbent President or his designee may also review the records in question, or may utilize whatever other procedures the incumbent President deems appropriate to decide whether to concur in the former President's decision to request withholding of or authorize access to the records.

(1) When the former President has requested withholding of the records:

(i) If under the standard set forth in section 4 below, the incumbent President concurs in the former President's decision to request withholding of records as privileged, the incumbent President shall so inform the former President and the Archivist. The Archivist shall not permit access to those records by a requester unless and until the incumbent President advises the Archivist that the former President and the incumbent President agree to authorize access to the records or until so ordered by a final and nonappealable court order.

(ii) If under the standard set forth in section 4 below, the incumbent President does not concur in the former President's decision to request withholding of the records as privileged, the incumbent President shall so inform the former President and the Archivist. Because the former President independently retains the right to assert constitutionally based privileges, the Archivist shall not permit access to the records by a requester unless and until the incumbent President advises the Archivist that the former President and the incumbent President agree to authorize access to the records or until so ordered by a final and nonappealable court order.

(2) When the former President has authorized access to the records:

(i) If under the standard set forth in section 4 below, the incumbent President concurs in the former President's decision to authorize access to the records, the Archivist shall permit access to the records by the requester.

(ii) If under the standard set forth in section 4 below, the incumbent President does not concur in the former President's decision to authorize access to the records, the incumbent President may independently order the Archivist to withhold privileged records. In that instance, the Archivist shall not permit access to the records by a requester unless and until the incumbent President advises the Archivist that the former President and the incumbent President agree to authorize access to the records or until so ordered by a final and nonappealable court order.

Sec. 4. *Concurrence by Incumbent President.*

Absent compelling circumstances, the incumbent President will concur in the privilege decision of the former President in response to a request for access under section 2204(c)(1). When the incumbent President concurs in the decision of the former President to request withholding of records within the scope of a constitutionally based privilege, the incumbent President will support that privilege claim in any forum in which the privilege claim is challenged.

Sec. 5. *Incumbent President's Right to Obtain Access.*

This order does not expand or limit the incumbent President's right to obtain access to the records of a former President pursuant to section 2205(2)(B).

Sec. 6. *Right of Congress and Courts to Obtain Access.*

This order does not expand or limit the rights of a court, House of Congress, or authorized committee or subcommittee of Congress to obtain access to the records of a former President pursuant to section 2205(2)(A) or section 2205(2)(C). With respect to such requests, the former President shall review the records in question and, within 21 days of receiving notice from the Archivist, indicate to the Archivist his decision with respect to any privilege. The incumbent President shall indicate his decision with respect to any privilege within 21 days after the former President has indicated his decision. Those periods may be extended by the former President or the incumbent President for requests that are burdensome. The Archivist shall not permit access to the records unless and until the incumbent President advises the Archivist that the former President and the incumbent President agree to authorize access to the records or until so ordered by a final and nonappealable court order.

Sec. 7. *No Effect on Right to Withhold Records.*

This order does not limit the former President's or the incumbent President's right to withhold records on any ground supplied by the Constitution, statute, or regulation.

Sec. 8. *Withholding of Privileged Records During 12-Year Period.*

In the period not to exceed 12 years after the conclusion of a Presidency during which section 2204(a) and section 2204(b) of title 44 apply, a former President or the incumbent President may request withholding of any privileged records not already protected from disclosure under section 2204. If the former President or the incumbent President so requests, the Archivist shall not permit access to any such privileged records unless and until the incumbent President advises the Archivist that the former President and the incumbent President agree to authorize access to the records or until so ordered by a final and nonappealable court order.

Sec. 9. *Establishment of Procedures.*

This order is not intended to indicate whether and under what circumstances a former President should assert or waive any privilege. The order is intended to establish procedures for former and incumbent Presidents to make privilege determinations.

Sec. 10. *Designation of Representative.*

The former President may designate a representative (or series or group of alternative representatives, as the former President in his discretion may determine) to act on his behalf for purposes of the Presidential Records Act and this order. Upon the death or disability of a former President, the former President's designated representative shall act on his behalf for purposes of the Act and this order, including with respect to the assertion of constitutionally based privileges. In the absence of any designated representative after the former President's death or disability, the family of the former President may designate a representative (or series or group of alternative representatives, as they in their discre tion may determine) to act on the former President's behalf for purposes of the Act and this order, including with respect to the assertion of constitutionally based privileges.

Sec. 11. *Vice Presidential Records.*

(a) Pursuant to section 2207 of title 44 of the United States Code, the Presidential Records Act applies to the executive records of the Vice President. Subject to subsections (b) and (c), this order shall also apply with respect to any such records that are subject to any constitutionally based privilege that the former Vice President may be entitled to invoke, but in the administration of this order with respect to such records, references in this order to a former President shall be deemed also to be references to the relevant former Vice President.

(b) Subsection (a) shall not be deemed to authorize a Vice President or former Vice President to invoke any constitutional privilege of a President or former President except as authorized by that President or former President.

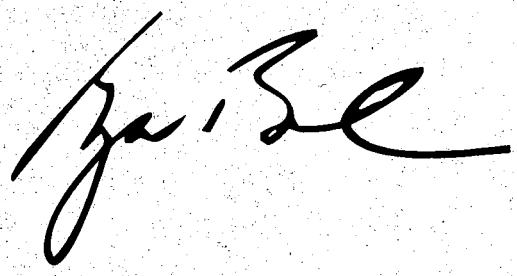
(c) Nothing in this section shall be construed to grant, limit, or otherwise affect any privilege of a President, Vice President, former President, or former Vice President.

Sec. 12. *Judicial Review.*

This order is intended to improve the internal management of the executive branch and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party, other than a former President or his designated representative, against the United States, its agencies, its officers, or any person.

Sec. 13. *Revocation.*

Executive Order 12667 of January 18, 1989, is revoked.



THE WHITE HOUSE,
November 1, 2001.

[FR Doc. 01–27917
Filed 11–2–01; 11:23 am]
Billing code 3195–01–P

Brett Kavanaugh – Defense of Ken Starr

Allegation: Brett Kavanaugh has vocally defended his former boss, Independent Counsel Kenneth Starr. He has called Starr "an American hero," written that Starr's "record is one of extraordinary accomplishment and integrity," and praised Starr for "consistently perform[ing] with the highest skill and integrity." This staunch defense of the overzealous Independent Counsel constitutes compelling evidence of Kavanaugh's right-wing views.

Facts:

➢ **Many have expressed that the public criticism directed at Independent Counsel Kenneth Starr was vicious and unwarranted.**

✓ The Washington Post editorial page said of Judge Starr:

- "Yet the sum of Mr. Starr's faults constituted a mere shadow of the villainy of which he was regularly accused. The larger picture is that Mr. Starr pursued his mandates in the face of a relentless and dishonorable smear campaign directed against him by the White House. He delivered factually rigorous answers to the questions posed him and, for the most part, brought credible indictments and obtained appropriate convictions. For all the criticism of the style of his report on the Monica Lewinsky ordeal, the White House never laid a glove on its factual contentions. The various ethical allegations against him have mostly melted away on close inspection. At the end of the day, Mr. Starr got a lot of things right." Editorial, Wash. Post, Oct. 20, 1999, at A28.

- "The temptation to make Mr. Starr into an emblem of something flows out of the need to make a neat story out of a complex and messy history. But it is exactly the complexity of Mr. Starr's investigation that belies any attempt to make it stand simply for any set of virtues or vices in the legal system. Mr. Starr, in our view, should be remembered as a man who--hampered alike by intensely adverse conditions and by his own missteps--managed to perform a significant public service." Editorial, Wash. Post, Oct. 20, 1999, at A28.

✓ Ronald Rotunda, professor at George Mason University School of Law and assistant counsel for Democrats on the Senate Watergate Committee, explained in December 1996 that the attacks on Judge Starr's integrity were belied by the fact that President Clinton's attorney General continued to assign him new matters to investigate and had the power to fire Judge Starr if he acted unethically. Peter Baker, *Did President Order Attack on Investigator?*, Seattle Times, Dec. 4, 1996, at A3.

- Rotunda stated: "This is basically a blatantly political attack on Starr that is inconsistent within the administration itself." *Id.*

✓ In a prescient editorial published shortly after Judge Starr's appointment, law professor Garrett Epps – a self-described liberal and supporter of President Clinton – wrote: "If Starr's investigation turns up no evidence of wrongdoing, he

may blight his own career prospects, which would be a loss to the nation. But if he does produce indictments, many Democrats will believe that he is the agent of a partisan conspiracy. If he obtains convictions, the defendants can claim to be victims of political persecution." Garrett Epps, Editorial, *Take My Word, Starr Will Be Fair*, PORTLAND OREGONIAN, Aug. 17, 1994, at C7.

➢ **Kenneth Starr was a fair and impartial Independent Counsel with a substantial record of accomplishment.**

✓ The Washington Post editorial page said, upon Judge Starr's appointment, "he is also a respected practitioner precisely because of his performance as judge and solicitor general, and he was on Clinton Attorney General Janet Reno's own short list of likely candidates for independent counsel when she picked Mr. Fiske." Editorial, Kenneth Starr for Robert Fiske, WASH. POST, Aug. 7, 1994, at C8.

✓ Upon Judge Starr's appointment as Independent Counsel, Mark Gitenstein, former chief Democratic counsel to the Senate Judiciary Committee, said: "Starr was a good, fair judge, and I think he will be fair in this proceeding." Nancy Roman, *Starr Hailed as Fair, Moderate*, WASH. TIMES, Aug. 6, 1994, at A6.

✓ Carter judicial appointee, Judge Patricia Wald said of Judge Starr: "Ken is definitely a conservative ... but he's wholly undevious and never tries to slip anything by." *National Briefing Whitewater I: Delay Seen as Biggest Danger*, THE HOTLINE, Aug. 8, 1994.

✓ Time magazine's chief political correspondent, Michael Kramer, wrote about Judge Starr's appointment in his column: "[Ken Starr's] integrity and honesty have never been seriously questioned. When even a dues-paying liberal like the legal director of the American Civil Liberties Union says, 'I'd rather have Starr investigate me than almost anyone I can think of,' the case for bias is virtually closed." Michael Kramer, *Fade Away, Starr*, TIME, Aug. 29, 1994, at 37.

➢ **Kenneth Starr initiated criminal prosecutions only where he uncovered strong evidence of criminal wrongdoing. Where he did not find overwhelming evidence of illegal behavior, he appropriately exercised prosecutorial restraint.**

✓ In his investigations of the death of Vince Foster, the firing of White House travel office employees, the Clinton White House's potential misuse of FBI files, and the Clintons' involvement in Whitewater and Madison Guaranty Savings and Loan, Kenneth Starr did not bring any criminal charges.

✓ In those areas, however, where he did find persuasive evidence of wrongdoing, Starr brought charges against and successfully obtained convictions of 14 individuals, including Jim and Susan McDougal, Arkansas Governor Jim Guy Tucker, and former Associate Attorney General Webster Hubbell.

➢ **Independent Counsel Starr prevailed in court in nearly every dispute between the Office of the Independent Counsel and those seeking to withhold evidence by asserting various privileges.**

- ✓ Federal appellate courts sided with Independent Counsel Starr in rejecting:
  - The creation of a "protective function privilege" that would authorize Secret Service agents to refuse to testify before a federal grand jury. *In re Sealed Case*, 148 F.3d 1073 (D.C. Cir. 1998).
  - The claim that government lawyers may rely on attorney-client or work-product privilege to withhold information subpoenaed by a federal grand jury. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1997).
  - The claim that government attorneys could invoke the attorney-client privilege in response to grand jury questions seeking information relating to the possible commission of a federal crime. *In re Lindsey*, 158 F.3d 1263 (D.C. Cir. 1998).

➢ **Independent Counsel Starr was required by law to refer to the House of Representatives any substantial and credible information that may have constituted grounds for impeachment, and his referral was clearly justified as demonstrated by subsequent events.**

- ✓ Federal law required Independent Counsel Starr to advise the House of Representatives of "any substantial and credible information" uncovered during the course of his investigation that might constitute grounds for impeachment. *See* 28 U.S.C. § 595(c).
- ✓ The Independent Counsel's report detailed substantial and credible information that may have constituted grounds for impeachment. It summarized specific evidence supporting the charges that President Clinton lied under oath and attempted to obstruct justice.

➢ **The Independent Counsel's report never stated that President Clinton should have been impeached. Rather, it only explained that the Office of Independent Counsel had uncovered substantial and credible information that <u>may</u> constitute grounds for impeachment. This conclusion was clearly borne out by subsequent events.**

- ✓ The House of Representatives determined that the information presented by the Independent Counsel constituted grounds for impeachment. By a vote of 228-206, the House voted to impeach President Clinton for perjuring himself before a grand jury. And by a vote of 221-212, the House voted to impeach President Clinton for obstructing justice.
- ✓ After a trial in the U.S. Senate, fifty Senators voted to remove President Clinton from office for obstructing justice.
- ✓ U.S. District Court Judge Susan Webber Wright later held President Clinton in contempt for "giving false, misleading, and evasive answers that were designed to obstruct the judicial process" in Paula Jones's sexual harassment lawsuit and ordered him to pay a fine of $90,000.

- ✓ In January 2001, President Clinton admitted to giving "evasive and misleading answers, in violation of Judge Wright's discovery's orders" during his deposition in Paula Jones's sexual harassment lawsuit. As a result, he agreed to pay a $25,000 fine and give up his law license for five years.

- ➢ **Numerous Democrats co-sponsored a censure resolution introduced by Senator Feinstein that stated that President Clinton "gave false or misleading testimony and his actions [] had the effect of impeding discovery of evidence in judicial proceedings."** S.Res. 44, 106th Cong. (1999).

  - ✓ Members of the Senate who co-sponsored the censure resolution included: Senator Durbin (D-IL), Senator Kennedy (D-MA), Senator Kohl (D-WI), Senator Schumer (D-NY), Minority Leader Tom Daschle (D-SD), and Senator John Kerry (D-MA).

  - ✓ Then-Congressman Schumer, as Senator-elect stated that ''it is clear that the President lied when he testified before the grand jury.''

The Washington Post, November 15, 1999

The Washington Post

November 15, 1999, Monday, Final Edition

SECTION: OP-ED; Pg. A23

LENGTH: 763 words

HEADLINE: To Us, Starr Is an American Hero

BYLINE: Robert J. Bittman; Brett M. **Kavanaugh;** Solomon J. Wisenberg

BODY:
Richard Cohen's Oct. 26 op-ed broadside, "So Long, Ken Starr," grossly mischaracterizes Ken Starr and his investigation. Cohen ridicules the Lewinsky case, but he ignores the following facts:

Starr uncovered a massive effort by the president to lie under oath and obstruct justice. The House impeached the president. Fifty senators voted to remove the president. Thirty-two other senators who voted to retain the president nonetheless signed a resolution that condemned Bill Clinton for giving "false or misleading testimony" and "impeding discovery of evidence in judicial proceedings" and concluded that he had "violated the trust of the American people." Judge Susan Webber Wright held the president in contempt because he intentionally provided "false, misleading and evasive answers" and "undermined the integrity of the judicial system."

Those conclusions fully vindicate Starr's findings and make Cohen's diatribes against the case ("woe is me, the Republic is in peril") look juvenile.

Cohen contends that certain information in Starr's referral to Congress should not have been made public and that Starr threw "everything out on the lawn for all the neighbors to see." But Starr submitted the report to Congress under seal. It was a bipartisan Congress that publicly released the report without even reviewing it beforehand.

Cohen argues that Starr "trapped" the president. Not so. The president "trapped" himself. Clinton knew long before his civil deposition (because Wright repeatedly so ruled) that his other sexual encounters with subordinate employees were relevant to Paula Jones's sexual harassment case. Yet the president decided to roll the dice and lie under oath and obstruct justice.

Starr did not cause this; Clinton did. Nor did Starr cause the president later to lie to the grand jury, to parse the meaning of the words "is" and "sex" and on and on. Clinton did all of this with premeditation and on his own. The word that ordinarily describes such behavior is not "trapped" but "guilty."

Cohen complains that Starr began by investigating Whitewater and "wound up" investigating the Lewinsky matter. But Janet Reno, not Starr, gave the independent counsel jurisdiction over new matters.

Cohen also notes--ominously--that Starr is a Republican. Special prosecutors traditionally have been respected lawyers of the opposite party. Archibald Cox investigated President Richard Nixon. Former senator John C. Danforth is investigating Janet Reno. The reason is simple: A decision not to indict in a politically charged case is more credible if made by a prosecutor of the opposite party. And a conviction requires that 12 citizen jurors vote for conviction, the procedural check on the "aggressive" prosecutor.

As important as what Cohen says is what he does not say. Cohen does not mention Starr's successful investigation of Madison Guaranty Savings and Loan. Starr obtained convictions of Jim and Susan McDougal, of Gov. Jim Guy Tucker (the first conviction this century of a sitting governor) and of former associate attorney general Webster Hubbell.

And Cohen ignores Starr's investigation of the Clintons' involvement in Madison and Whitewater and his investigations of the Vince Foster, travel office and FBI files issues. Why? Starr brought no criminal indictments and submitted no impeachment referrals in those matters. Starr recognized more than anyone that criminal prosecution (or an impeachment referral, in the case of the president) is not a political game--that a prosecutor should not invoke those processes unless the evidence is strong, almost overwhelming.

Cohen also skips past Starr's remarkable legal record. Starr won nearly every dispute: executive privilege, Secret Service privilege, government attorney-client privilege, jurisdictional issues, the list goes on.

Contrary to Cohen's table-thumping, the record establishes that Starr was a thorough, fair, ethical and successful prosecutor. His record is one of extraordinary accomplishment and integrity. And to us, Starr is an American hero.

Over time, fair-minded people will come to hail Starr's enormous contributions to the country and see the presidentially approved smear campaign against him for what it was: a disgraceful effort to undermine the rule of law, an episode that will forever stand, together with the underlying legal and moral transgressions to which it was connected, as a dark chapter in American presidential history.

The writers served as attorneys in the office of independent counsel Kenneth W. Starr.

LOAD-DATE: November 15, 1999

The Washington Post, October 20, 1999

7 of 9 DOCUMENTS

The Washington Post

October 20, 1999, Wednesday, Final Edition

SECTION: EDITORIAL; Pg. A28

LENGTH: 542 words

HEADLINE: Mr. Starr's Departure

BODY:

AS LONG AS historians remain interested in American politics in the 1990s they are likely to debate the merits of Kenneth Starr's investigation. The parameters of the debate are already stark. Mr. Starr's defenders see him as a voice of principle who stood firm for the rule of law and courageously spoke unpopular truths about a president who had disgraced his office yet remained inexplicably popular. By contrast, Mr. Starr's detractors see him as a kind of demon who embodies everything puritanical and intrusive about contemporary American conservatism and whose zeal against a president from a different party led him on a crusade to bring him down, with whatever collateral consequences.

The reality is that neither of these narratives aptly describes Mr. Starr or the very mixed legacy that he left on resigning his post this week. Mr. Starr was given an almost impossible task. He was asked to address authoritatively a set of essentially unrelated public integrity questions of varying degrees of seriousness. The impossibility of his job was partly his own fault, since he made the mistake of accepting--and sometimes seeking--additional matters to review. But it is unclear whether anyone with such broad jurisdiction could have avoided being perceived as President Clinton's personal prosecutor.

Mr. Starr's own errors contributed greatly to this perception. At times in his investigation, he clearly lacked perspective--going full throttle after relatively marginal characters and pursuing imprudent litigation and investigative strategies. He also had a maddening tendency to ignore appearances--even at the expense of the public credibility of his investigation. This was particularly regrettable because the circumstances of his own appointment, which followed the dismissal of the widely admired Robert Fiske for inadequate reasons, begged suspicion. Rather than allaying this concern, Mr. Starr seemed to taunt his doubters by maintaining his law practice and his relationship with conservative causes.

Yet the sum of Mr. Starr's faults constituted a mere shadow of the villainy of which he was regularly accused. The larger picture is that Mr. Starr pursued his mandates in the face of a relentless and dishonorable smear campaign directed against him by the White House. He delivered factually rigorous answers to the questions posed him and, for the most part, brought credible indictments and obtained appropriate convictions. For all the criticism of the style of his report on the Monica Lewinsky ordeal, the White House never laid a glove on its factual contentions. The various ethical allegations against him have mostly melted away on close inspection. At the end of the day, Mr. Starr got a lot of things right.

The temptation to make Mr. Starr into an emblem of something flows out of the need to make a neat story out of a complex and messy history. But it is exactly the complexity of Mr. Starr's investigation that belies any attempt to make it stand simply for any set of virtues or vices in the legal system. Mr. Starr, in our view, should be remembered as a man who--hampered alike by intensely adverse conditions and by his own missteps--managed to perform a significant public service.

LOAD-DATE: October 20, 1999

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8/17/94 PTLDOGN C07 ALLNEWS
8/17/94 Portland Oregonian C07
1994 WL 4559071
(Publication page references are not available for this document.)

Portland Oregonian

Wednesday, August 17, 1994

FORUM

TAKE MY WORD, STARR WILL BE FAIR

GARRETT EPPS

Summary: But such reassurance shouldn't be needed for independent counsel

Lawyers familiar with federal ethics law were not entirely surprised Aug. 5 when a federal appellate panel refused to reappoint Robert Fiske, the special counsel chosen by Attorney General Janet Reno to investigate Whitewater and related matters.

Fiske had been appointed by the administration, thus raising the appearance of a conflict of interest. As the panel -- called the Special Division -- noted, the Independent Counsel Reathorization Act "contemplates an apparent as well as an actual independence on the part of the counsel."

But many observers were stunned when the three-judge panel turned instead to former appellate judge and solicitor general Kenneth W. Starr.

Starr, a prominent Reagan and Bush supporter, has no prosecutorial experience and is deeply involved in politics. **Starr** openly considered a Republican bid to unseat **Democratic** Sen. Charles Robb of Virginia. He has publicly attacked President Clinton's position on possible presidential immunity from civil suit and even considered filing an amicus brief supporting Paula Jones in her sexual harassment suit against the president. And no one who knows Starr doubts that he would -- and should -- be on the GOP short list for the Supreme Court if the White House changes hands.

In other words, Starr does not embody what the Special Division (on which two of the three judges are Republican appointees) called "the intent of the act that the actor actor be protected against perceptions of conflicts." As a political foe of the president, Starr will be seen by many as biased.

(Publication page references are not available for this document.)

As E.J. Dionne of The Washington Post noted, it is as if a Democrat-dominated panel had named liberal professor Laurence Tribe to investigate Iran-Contra.

Make no mistake about my meaning. I know Starr personally. (Starr was a guest lecturer at the UO Law School in February.) Politically, we are chalk and cheese: I am a Democrat, a liberal and a supporter of the president; he is the direct opposite of all of these. But I admire him more than I can say, because at a level beyond politics, he is a fine lawyer, an honest judge and a good man.

I have not the slightest doubt that he will be fair, judicious and discreet in his conduct of the Whitewater investigation. You can take my word for it, or that of Reno herself, who seriously considered naming Starr to the office that eventually went to Fiske.

That, however, is precisely what made it a grievous mistake for the Special Division to offer this appointment and for Starr to accept it. The point of the independent counsel law is that neither Republicans like **Starr** nor **Democrats** like me should have to take someone else's word that -- despite appearances -- justice is being done in a nonpartisan, evenhanded manner.

The authors of the law knew that many administrations would conduct honest investigations of their own personnel, but they also knew that the public, sickened by Watergate and other scandals, would not believe that political appointees could investigate themselves or their superiors.

Thus was born the independent counsel, to ensure both fairness and the appearance of such. Previous counsels in high-profile cases have tended to be nonpolitical figures, often appointed relatively late in their careers, who could not credibly be suspected of a personal or partisan agenda.

If Starr's investigation turns up no evidence of wrongdoing, he may blight his own career prospects, which would be a loss to the nation. But if he does produce indictments, many Democrats will believe that he is the agent of a partisan conspiracy. If he obtains convictions, the defendants can claim to be victims of political persecution.

If the Whitewater investigation derails the president's agenda or prevents his re-election, Clinton's supporters will forever be convinced that they were defeated by a GOP judicial coup d'etat -- and they will note bitterly that Reno was forced to appoint Fiske in the first place because the Republicam blocked an effort to

(Publication page references are not available for this document.)

reauthorize appointment by the Special Division until after Fiske's probe was under way.

The effects of such a perception would be long-lasting and corrosive, with potentially grave effects on our politics and our heritage of government under law.

Only two people have the power to defuse this potential disaster. One is Reno, who under the act has the power to remove a counsel "for good cause . . . or any other condition that substantially impairs the performance" of the counsel's duties.

The law permits the counsel to challenge his removal in a different federal court than the one that appointed him; such a hearing would be interesting indeed. But given political reality, and the Clinton administration's record of support for the Independent Counsel Reauthorization Act, Reno is unlikely to fire Starr.

The other person who can act is Kenneth Starr himself. A beloved and respected figure, he has almost certainly accepted this post out of a sense of public service. Ironically, he stands to lose as much as Clinton if the process goes awry.

Garrett Epps is an assistant professor of law at the University of Oregon.

TABULAR OR GRAPHIC MATERIAL SET FORTH IN THIS DOCUMENT IS NOT DISPLAYABLE

Graphic - Drawing by MIKE RAMIREZ KENNETH W. STARR - Tainted by perception of partisanship

---- INDEX REFERENCES ----

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8/6/94 WATIMES A6 ALLNEWS
8/6/94 Wash. Times (D.C.) A6
1994 WL 5486140
(Publication page references are not available for this document.)

The Washington Times

Saturday, August 6, 1994

A;NATION

Starr hailed as fair, moderate

Nancy E. Roman
THE WASHINGTON TIMES

Kenneth Starr, the new Whitewater **independent counsel**, was assessed yesterday from the left and the right as a nonpartisan, fair-minded lawyer.

"As solicitor general he bent over backwards to avoid partisanship, and as a result he incurred the wrath of conservatives on more than one occasion," said Chip Mellor, president of the libertarian Institute for Justice. "In areas of civil rights, abortion, he was definitely viewed as moderate."

Mr. Starr, 48, was **appointed** to the U.S. Court of Appeals for the D.C. Circuit by President Reagan in 1983. President Bush chose him as the Justice Department's top lawyer in 1989. When Bill Clinton was elected president, Mr. Starr went into private practice in Washington.

"Starr was a good, fair judge, and I think he will be fair in this proceeding," said Mark Gitenstein, chief Democratic counsel to the Senate Judiciary Committee when Mr. Starr was nominated to the federal bench. "I didn't agree with him on a number of his decisions, but he is fair."

Mr. Gitenstein said that when Mr. Starr was in the Justice Department, they sometimes worked together. "He was a pretty straightforward guy," he said. "He's easy to work with. He'll do a good job here. The only issue is what happens to all the work that Fiske did?"

Mr. Gitenstein said Mr. Starr should give broad deference to Mr. Fiske's work. "I believe that Starr would give him that deference."

Alan Slobodin of the Washington Legal Foundation, on whose

(Publication page references are not available for this document.)

legal policy advisory board Mr. Starr serves, said he is an "outstanding" choice for **independent counsel**.

"He's got Olympian credentials. To say he is well-respected is understating it," he said, adding that he bases his position on Mr. Starr's tenure on the federal bench.

"He was there during the mid-'80s, when the ideological complexion was changing. He was respected by the Democratic **appointees** to the Court of Appeals," he said. "Of course, he voted more with the conservative wing of that court, but he was viewed as more of a moderate."

When Mr. Starr was nominated to be solicitor general in 1989, press accounts quoted liberal lawyers who had tried cases in his court as saying he was the "least doctrinaire" of the Reagan **appointees** to the D.C. Circuit.

Before being named a judge, Mr. Starr served as counselor to Attorney General William French Smith.

During that time he was the only political **appointee** to argue against the Justice Department's decision to support Bob Jones University's attempt to claim tax-exempt status despite its racially discriminatory policies.

Tex Lezar, former chief of staff to Mr. Starr and now the Republican nominee for lieutenant governor of Texas, described Mr. Starr as a "very straight arrow" who demands clear evidence before taking any action.

He noted that Mr. Starr has no criminal experience and has never served as a prosecutor, but he said the former solicitor general knows a lot about conflict of interest and is "perfectly capable of being that certain someone who knows when someone is gracefully ducking."

* Major Garrett contributed to this report.

****BOX

KENNETH WINSTON STARR

BORN: Vernon, Texas, July 21, 1946. Lives in McLean.

WIFE: Alice Jean Mendell

CHILDREN: Randall Postley, Carolyn Marie and Cynthia Anne

8/6/94 WATIMES A6

(Publication page references are not available for this document.)

EDUCATION: Bachelor's from George Washington University; master's from Brown University; law degree from Duke University

CAREER HIGHLIGHTS: Law clerk to U.S. Chief Justice Warren E. Burger, 1975-77; associate and partner, Gibson, Dunn & Crutcher, 1977-81; counselor to the attorney general, 1981-83; judge, U.S. Court of Appeals for the D.C. Circuit, 1983-89; U.S. solicitor general, 1989-93; partner, Kirkland & Ellis, 1993-present.

TABULAR OR GRAPHIC MATERIAL SET FORTH IN THIS DOCUMENT IS NOT DISPLAYABLE

Box, KENNETH WINSTON STARR, By The Washington Times

---- INDEX REFERENCES ----

EDITION: 2

Word Count: 593
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12/4/96 STLTI A3 ALLNEWS
12/4/96 Seattle Times A3
1996 WL 3695264
(Publication page references are not available for this document.)

The Seattle Times

Wednesday, December 4, 1996

NEWS

CLOSE-UP

DID PRESIDENT ORDER ATTACK ON INVESTIGATOR?

PETER BAKER
WASHINGTON POST

ATTORNEY GENERAL Janet Reno has continued to assign independent counsel Kenneth Starr new matters to investigate and has the power to fire him. But now Starr's integrity is being attacked, and the administration says it won't interfere.

WASHINGTON - Clinton strategist James Carville has launched a public campaign to discredit Kenneth Starr, the independent counsel pursuing the man Carville helped put in the White House. But Carville's not doing so on the orders of the president. Really.

Nor is President Clinton secretly encouraging him. Really. And the president couldn't stop Carville even if he tried. Really.

That, at least, is the official White House line, implausible as it seems to doubters whose business cards don't list 1600 Pennsylvania Ave. as an office address.

White House officials don't seem all that unhappy about Carville's plans to set up a grass-roots, anti-Starr organization. Clinton made perfectly clear yesterday he has no intention of calling off his political consultant; when asked if he would talk to Carville about it, he answered flatly, "No."

That and other public remarks by top aides in recent days have been taken as tacit approval of the Carville counterattack, which will include campaign-style newspaper advertisements, fund-raising appeals and opposition research.

But Carville was vague on organizational details.

Such an "all-out" assault is unprecedented in the history of

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(Publication page references are not available for this document.)

Independent counsels, according to specialists in the field. Special prosecutors have been fired (Archibald Cox during Watergate) and come under withering partisan fire (Lawrence Walsh during Iran-contra), but they have never endured an organized public-relations attack of the likes that Carville describes.

A variety of Republican leaders, legal scholars and even some Democrats have denounced Carville's effort as everything from improper to bad political strategy.

'Incendiary device'

"This is a very, very incendiary device, and it may have incendiary consequences as yet unseen," said Joseph diGenova, a former GOP federal prosecutor who also has served as an independent counsel. DiGenova said it appeared to be an attempt to shape public perceptions to influence potential jurors. "That would be the O.J. Simpson-ing of Whitewater."

Ronald Rotunda, a University of Illinois law professor who was an assistant counsel for **Democrats** on the Senate Watergate Committee, said attacks on **Starr's** integrity are belied by the fact that Clinton's own attorney general, Janet Reno, has continued to assign him new matters to investigate and has the power to fire **Starr** if he had acted unethically. "This is basically a blatantly political attack on Starr that is inconsistent within the administration itself," Rotunda said.

The notion that the White House is uninvolved, he added, bore little credibility: "It looks to me that Carville's got his marching orders and is carrying them out."

Carville sees clear message

Carville denied that yesterday, saying he has not spoken to Clinton about his plans, nor sought permission from the White House. But he also seemed confident he was not deviating from the president's own thoughts, pointing to a PBS interview last fall when Clinton said it was "obvious" Starr was out to get him. "He's spoken, it seems to me, pretty clearly and unambiguously," Carville said of Clinton.

Even so, White House press secretary Michael McCurry on Monday went so far as to suggest that Clinton had no power over Carville, who managed his 1992 campaign and has remained close to the president.

Arguments against Starr

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(Publication page references are not available for this document.)

The thrust of Carville's case against Starr is that the former Reagan solicitor general is a partisan "right-wing" Republican with an ax to grind, and should be fired. In particular, Carville has cited Starr's legal representation of tobacco interests and his recent speech at a law school founded by Christian Coalition leader Pat Robertson.

Criticism of his plans, Carville added, is only likely to energize him. "It's okay to attack the president but it's not okay to defend the president?" he said heatedly. "I'm not playing by those rules!"

Carville previously said he wanted to go after Starr the day he was appointed but was talked out of it by the White House. Asked about that yesterday, he identified George Stephanopoulos and Mark Gearan as the Clinton aides who dissuaded him, adding that they feared that then-White House counsel Lloyd Cutler would resign if Carville followed through.

"The difference between last time and this time," Carville said, is that this time "I didn't ask anyone."

Starr's investigation

As independent counsel, Kenneth Starr is investigating:

-- Whitewater: The failed land-development project in which Bill Clinton, then governor of Arkansas, and Hillary Rodham Clinton invested.

-- Vince Foster: The apparent suicide in 1993 of the White House deputy counsel.

-- FBI files: The White House personnel security chief's improper collection of almost 900 FBI files, including those of Republicans no longer working for the White House.

-- Travel-office firings: 1993 dismissal White House travel office staff in what Republicans suspect was an effort to give jobs to Clinton friends from Arkansas.

TABULAR OR GRAPHIC MATERIAL SET FORTH IN THIS DOCUMENT IS NOT DISPLAYABLE

PHOTO; Caption: 1) JAMES CARVILLE 2) KENNETH STARR

---- INDEX REFERENCES ----

STORY ORIGIN: WASHINGTON

106TH CONGRESS
1ST SESSION

S. RES. 44

Relating to the censure of William Jefferson Clinton.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 12, 1999

Mrs. FEINSTEIN (for herself, Mr. BENNETT, Mr. MOYNIHAN, Mr. CHAFEE, Mr. KOHL, Mr. JEFFORDS, Mr. LIEBERMAN, Mr. SMITH of Oregon, Mr. DASCHLE, Ms. SNOWE, Mr. REID, Mr. GORTON, Mr. BRYAN, Mr. MCCONNELL, Mr. CLELAND, Mr. DOMENICI, Mr. TORRICELLI, Mr. CAMPBELL, Mr. WYDEN, Mrs. LINCOLN, Mr. KERRY, Mr. KERREY, Mr. SCHUMER, Mr. DURBIN, Mrs. MURRAY, Mr. WELLSTONE, Mr. BREAUX, Ms. MIKULSKI, Mr. DORGAN, Mr. BAUCUS, Mr. REED, Ms. LANDRIEU, Mr. KENNEDY, Mr. LEVIN, Mr. ROCKEFELLER, Mr. ROBB, Mr. INOUYE, and Mr. AKAKA) submitted the following resolution; which was referred to the Committee on Rules and Administration

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RESOLUTION

Relating to the censure of William Jefferson Clinton.

Whereas William Jefferson Clinton, President of the United States, engaged in an inappropriate relationship with a subordinate employee in the White House, which was shameful, reckless and indefensible;

Whereas William Jefferson Clinton, President of the United States, deliberately misled and deceived the American people, and people in all branches of the United States Government;

Whereas William Jefferson Clinton, President of the United States, gave false or misleading testimony and his actions have had the effect of impeding discovery of evidence in judicial proceedings;

Whereas William Jefferson Clinton's conduct in this matter is unacceptable for a President of the United States, does demean the Office of the President as well as the President himself, and creates disrespect for the laws of the land;

Whereas William Jefferson Clinton fully deserves censure for engaging in such behavior;

Whereas future generations of Americans must know that such behavior is not only unacceptable but also bears grave consequences, including loss of integrity, trust and respect;

Whereas William Jefferson Clinton remains subject to criminal actions in a court of law like any other citizen;

Whereas William Jefferson Clinton's conduct in this matter has brought shame and dishonor to himself and to the Office of the President; and

Whereas William Jefferson Clinton through his conduct in this matter has violated the trust of the American people: Now, therefore, be it

Resolved, That—

(1) the United States Senate does hereby censure William Jefferson Clinton, President of the United States, and does condemn his wrongful conduct in the strongest terms;

(2) the United States Senate recognizes the historic gravity of this bipartisan resolution, and trusts and urges that future congresses will recognize the importance of allowing this bipartisan statement of censure and condemnation to remain intact for all time; and

(3) the Senate now move on to other matters of significance to our people, to reconcile differences between and within the branches of government, and to work together—across party lines—for the benefit of the American people.

○

H

United States District Court,
E.D. Arkansas,
Western Division.

Paula Corbin JONES, Plaintiff,
v.
William Jefferson CLINTON and Danny Ferguson, Defendants.

No. LR-C-94-290.

July 29, 1999.

After United States President was held in civil contempt for failure to obey discovery orders in civil lawsuit brought against him, 36 F.Supp.2d 1118, parties submitted evidence of expenses and fees incurred by plaintiff's counsel. The District Court, Susan Webber Wright, Chief Judge, held that: (1) President would be required to pay expenses incurred by federal judge to attend tainted deposition, and (2) plaintiff's counsel were entitled to fees and expenses in amount of $79,999 and $9,485, respectively.

So ordered.

West Headnotes

[1] **Federal Civil Procedure** 1539
170Ak1539

As a sanction against United States President who was held in civil contempt for failure to obey discovery orders in civil lawsuit brought against him, President would be required to pay federal judge's expenses for attending tainted deposition at President's request.

[2] **Federal Civil Procedure** 1269.1
170Ak1269.1

In proceedings to determine attorney fees and expenses that would be imposed against United States President who was held in civil contempt for failure to obey discovery orders in civil lawsuit brought against him, plaintiff's counsel were not entitled to conduct limited discovery of President's attorney fees and expenses; there was no need to conduct discovery of President's fees and expenses to determine whether fees and expenses claimed by plaintiff's counsel were incurred as a result of sanctioned conduct, and resolving issue of President's contempt expeditiously and without hearings, was in the public interest.

[3] **Contempt** 70
93k70

[3] **Contempt** 74
93k74

A coercive contempt sanction, such as a fine, is designed to force the offending party to comply with a court's order, whereas a compensatory sanction is designed to compensate the non-offending party for the damage they incur as a result of the offending party's contempt.

[4] **Contempt** 49
93k49

Court may make an adjudication of contempt and impose a contempt sanction even after the action in which the contempt arose has been terminated.

[5] **Federal Civil Procedure** 1278
170Ak1278

Discovery sanctions may be awarded against a party after entry of summary judgment and dismissal of a case. Fed.Rules Civ.Proc.Rules 37, 56, 28 U.S.C.A.

[6] **Contempt** 74
93k74

Sanctions for compensatory contempt are not imposed to punish the contemnor, but must be based upon evidence of actual loss.

[7] **Federal Civil Procedure** 1278
170Ak1278

As a civil contempt sanction against United States President who failed to obey discovery orders in civil lawsuit brought against him, plaintiff's counsel were entitled to attorney fees and expenses of $79,999 and $9,485, respectively, rather than requested amounts of $437,825 and $58,533; plaintiff's counsel were entitled to recover only the fees and expenses that plaintiff incurred as a result of President's willful failure to obey court's discovery orders.

***720** Donovan Campbell, Jr., Rader, Campbell, Fisher & Pyke, Dallas, TX, Gregory S. Kitterman, Little Rock, AR, for plaintiff.

Steven H. Aden, John W. Whitehead, The Rutherford Institute, Charlottesville, VA, Daniel A. Gecker, Steven Scott Biss, Maloney, Huennekens, Parks, Gecker, Parsons, Richmond, VA, Robert Batton, Jacksonville, AR, Bill W. Bristow, Seay & Bristow, Jonesboro, AR, Stephen C. Engstrom, Wilson, Engstrom, Corum & Coulter, Little Rock, AR, Kathlyn Graves, Wright, Lindsey & Jennings, Little Rock, AR, Robert S. Bennett, Skadden, Arps, Slate, Meaghen & Flom, Washington, DC, for defendants.

MEMORANDUM AND ORDER

SUSAN WEBBER WRIGHT, Chief Judge.

On April 12, 1999, this Court entered a Memorandum Opinion and Order adjudging William Jefferson Clinton, President of the United States, to be in civil contempt of court pursuant to Fed.R.Civ.P. 37(b)(2) for his willful failure to obey certain discovery Orders of this Court in a lawsuit brought against him by Paula Corbin Jones. *See Jones v. Clinton*, 36 F.Supp.2d 1118 (E.D.Ark.1999). The Court determined that the President violated this Court's discovery Orders by giving false, misleading and evasive answers that were designed to obstruct the judicial process, and that sanctions must be imposed, not only to redress the misconduct of the President in this case, but to deter others who might themselves consider emulating the President of the United States by engaging in misconduct that undermines the integrity of the judicial system. *See id.* at 1127, 1131-32, 1134. The Court ordered the President to pay plaintiff any reasonable expenses, including attorney's fees, caused by his willful failure to obey this Court's discovery Orders, and directed plaintiff's former counsel to submit to this Court a detailed statement of any expenses and attorney's fees incurred in connection with the matter. *Id.* at 1132, 1134-35. The Court additionally ordered the President to deposit into the registry of this Court the sum of $1,202.00, the total expenses incurred by this Court in traveling to Washington, D.C. at the President's request to preside over his January 17, 1998 deposition. *Id.* [FN1] However, the Court stayed enforcement of its Order for thirty days to give the President an opportunity to file a notice of appeal or to request a hearing in which to demonstrate why he is not in civil contempt of court, why sanctions should not be imposed, or why the Court is otherwise in error in proceeding in the manner in which it has. *Id.* at 1134-35. The Court stated that should the President fail to file a notice of appeal or request a hearing within the time allowed, it would enter an Order setting forth the time and manner by which the President is to comply with the sanctions being imposed. *Id.* The President subsequently notified this Court that while he disputes allegations that he knowingly and intentionally gave false testimony under oath, he will not request a hearing or file a notice of appeal. Accordingly, the Court addresses at this time the sanctions to be imposed in accordance with the April 12th Order.

FN1. In addition, the Court referred the matter to the Arkansas Supreme Court's Committee on Professional Conduct for review and any action it deems appropriate. *Id.*

I.

On May 7, 1999, this Court received in response to its April 12th Order a statement of fees and expenses totaling $437,825.00 from the law firm of Rader, Campbell, ***721** Fisher & Pike ("RCFP") and a statement of fees and costs totaling $58,533.03 from John W. Whitehead and The Rutherford Institute (collectively, "TRI"). That same day, the President, through his attorney, Robert S. Bennett, submitted a letter to this Court stating that he would timely file a formal pleading objecting to the "excessive" amount of the claim for fees and expenses by plaintiff's attorneys--characterizing the claim as "unreasonable and inconsistent with the Court's Order and governing law"--but that he did not otherwise intend to request a hearing or file a notice of appeal with respect to the April 12th Order. *See* May 7, 1999 Letter.

On May 21, 1999, the President filed his formal response to the statements of fees and expenses submitted by plaintiff's attorneys. In his response, the President states that due to the public interest in providing an expeditious resolution to this matter, and due to the urgent duties of his office, he recognizes that it is in the best interests of the country to forego his right to a hearing under the Order. [FN2] Resp. of Pres. at 1. The President further states that while he does not concur with the findings of this Court, he will pay the $1,202.00 levied by this Court for its expenses in attending his January 17th deposition at his request, and will pay the reasonable costs incurred by plaintiff as a result of those actions

that this Court found to be at odds with its discovery Orders--his answer to Interrogatory No. 10, submitted on December 23, 1997, and certain limited portions of his January 17th deposition testimony, insofar as either pertained to his relationship with Monica Lewinsky. *Id.* at 1-2. As in his May 7th letter, however, the President contends that the fees and expenses requested by RCFP and TRI are unreasonable in that for the most part they bear no relationship to the actions that gave rise to the April 12th Order, are "demonstrably overreaching," and, with the exception of certain fees and expenses in the range of $12,300.00 to $33,700.00, should thus be denied. *Id.* at 2-3.

FN2. The Court expressed these same concerns in its April 12th Order. *See Jones v. Clinton,* 36 F.Supp.2d at 1132-34.

RCFP and TRI each filed a reply to the President's response. RCFP asserts that the work included in their statement of fees and expenses is directly related to the President's misconduct and that the President's dishonesty caused their work, both before and after the specific instances of his misconduct referenced in this Court's April 12th Order, to be rendered useless. Reply of RCFP at 2-3. TRI, in turn, asserts that the sanctions proposed by the President, "if adopted by this Court, would do precious little to 'redress the misconduct of the President in this case,' " and would not only fail to deter others who might consider emulating the President's misconduct, "but would actually serve to create an unintended incentive for such conduct by imposing *de minimus* consequences on conduct that, in the words of [this] Court, has 'undermined the integrity of the judicial system' itself." Reply of TRI at 1-2 (quoting April 12th Order).

[1] The Court has carefully considered the pleadings submitted in response to this Court's April 12th Order (doc.#'s 488-497) and, without objection, will require that the President pay the $1,202.00 levied by this Court for its expenses in attending his January 17th deposition at his request and will require that the President pay the reasonable fees and expenses incurred by plaintiff as a result of those actions that this Court found to be at odds with its discovery Orders. The Court finds, however, that the claims for fees and expenses included in RCFP's and TRI's statements are excessive and must be reduced.

A.

[2] As a preliminary matter, the Court addresses a motion filed by RCFP and ***722** joined by TRI to conduct limited discovery of the President's attorneys' fees and expenses. RCFP seeks to determine the amount of time expended by the lawyers who represented the President in connection with his contemptible conduct, the hourly rates charged for that work, and the nature and amount of the expenses incurred in connection with that work. Mot. of RCFP at 1. RCFP states that this discovery is necessary in light of the position taken by Mr. Bennett in his May 7th letter to this Court. *Id.*

The Court denies RCFP's motion. The President does not contest RCFP's and TRI's billing rate or the amount of time spent on any given task, but simply opposes their statements insofar as he claims the fees and expenses included therein were not incurred as a result of the conduct sanctioned by this Court, or because their statements are too vague to assess any possible link between the claimed costs and the sanctioned conduct. Resp. of Pres. at 2-3. There is no need to conduct discovery of the President's attorneys' fees and expenses in order for this Court to determine whether the fees and expenses claimed by RCFP and TRI were in fact incurred as a result of the conduct sanctioned by this Court. [FN3]

FN3. RCFP states that discovery of the President's attorneys' fees and expenses will make clear the appropriate magnitude of the fees which should be awarded pursuant to this Court's April 12th Order. Reply of RCFP at 14. They state that the President's expenditure of fees may well be the best evidence of his own valuation of the case, and that a sanction amounting to a mere ten percent of that value is not out of proportion. *Id.* The Court is not, however, concerned with the amount of fees expended by the President's attorneys in defending their client, but is only concerned with the amount of reasonable fees and expenses incurred by plaintiff's former counsel as a result of the President's willful failure to obey this Court's discovery Orders as described in the April 12th Order. The Court will not base any such sanction on a percentage of the President's attorney's fees and expenses.

Moreover, this Court has determined that resolving the issue of the President's contempt expeditiously and without hearings is in the public interest, *see*

Jones v. Clinton, 36 F.Supp.2d at 1127, 1133, and granting RCFP's motion for additional discovery would only delay its resolution. Indeed, it was in the interests of bringing this matter to a speedy closure that this Court addressed in its April 12th Order only those narrow aspects of the President's contemptuous conduct with which there was no factual dispute and which were fully apparent from the record. *See id.* at 1127, 1132-33. The Court fully recognized that the President and other individuals within the jurisdiction of this Court might have engaged in additional misconduct warranting the imposition of sanctions, including violations of the Court's Confidentiality Order on Consent of all Parties. *See id.* at 1127 n. 14, 1132-33. Ascertaining whether the President or other individuals violated the Confidentiality Order or engaged in other sanctionable misconduct, however, would require hearings and the taking of evidence. *See id.* The President's misconduct as set forth in the April 12th Order, by contrast, is fully apparent from the record and can be summarily addressed without convening evidentiary hearings. Were additional discovery on the part of RCFP and TRI allowed, the Court, in fairness, would allow the President to conduct discovery of RCFP and TRI as well. The history of this case suggests that such additional discovery, rather than being limited, would be "contentious and time-consuming." *See id.* at 1121. Given that prospect, the Court would be inclined to expand the proceedings to address possible misconduct beyond that addressed in the April 12th Order, including any possible misconduct on the part of RCFP and/or TRI.

The Court finds, however, that additional discovery and expansion of the proceedings is not necessary at this time as the record is sufficiently developed for this Court to determine whether the fees and expenses claimed by RCFP and TRI were ***723** incurred as a result of the conduct sanctioned by this Court. That being so, and in the interests of bringing this matter to a speedy closure, the Court will deny RCFP's motion to conduct limited discovery.

B.
1.

[3][4][5] The Court now turns to the central issue at hand: determining whether the fees and expenses included in the statements of RCFP and TRI are within the scope of this Court's April 12th Order. There are two kinds of civil contempt sanctions a court can impose: coercive and compensatory. *Klett v. Pim*, 965 F.2d 587, 590 (8th Cir.1992) (citations omitted). A coercive sanction, such as a fine, is designed to force the offending party to comply with a court's order, whereas a compensatory sanction is designed to compensate the non-offending party for the damage they incur as a result of the offending party's contempt. *Id. See also Hartman v. Lyng*, 884 F.2d 1103, 1106 (8th Cir.1989) (a court's civil contempt power serves two purposes: to effectuate compliance with a court's order or process, and to compensate individuals from harm incurred by noncompliance); *Thompson v. Cleland*, 782 F.2d 719, 721 (7th Cir.1986) (" '[j]udicial sanctions in civil contempt proceedings may, in a proper case, be employed for either or both of two purposes: to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained' ") (quoting *United States v. United Mine Workers*, 330 U.S. 258, 303-04, 67 S.Ct. 677, 91 L.Ed. 884 (1947)); *In re Kave*, 760 F.2d 343, 351 (1st Cir.1985) (civil contempt sanctions can include a conditional fine to induce the purging of contemptuous conduct and "a *compensatory* fine to make whole the aggrieved party for damages caused by the contemnor's conduct") (emphasis in original). The matter of the President's contempt involves compensatory rather than coercive sanctions as the Court is not seeking to coerce the President into compliance with any pending Court order--the underlying action having been dismissed [FN4]--and sanctions are being imposed, not only to deter others who might consider emulating the President's misconduct, but to compensate the plaintiff by requiring that the President pay her any reasonable fees and expenses caused by his willful failure to obey this Court's discovery Orders. *See Jones v. Clinton*, 36 F.Supp.2d at 1131-32, 1134-35. *See also Lyng*, 884 F.2d at 1106 (a compensatory sanction "serves to make reputation to the injured party, restoring that party to the position it would have held had the court's order been obeyed") (citation omitted). Accordingly, this Court must determine the sum total of reasonable fees and expenses that plaintiff incurred as a result of the President's willful failure to obey this Court's discovery Orders. [FN5]

FN4. As the Court noted in its April 12th Order, "[a] Court may make an adjudication of contempt and impose a contempt sanction even after the action in which the contempt arose has been terminated." *Jones v. Clinton*, 36 F.Supp.2d at 1125 n. 12 (quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990)). In this regard, and contrary to the assertions of certain commentators, discovery sanctions under Fed.R.Civ.P. 37 may be awarded against a party after entry

of summary judgment and dismissal of a case pursuant to Fed.R.Civ.P. 56. *See Heinrichs v. Marshall and Stevens Inc.*, 921 F.2d 418, 420-21 (2nd Cir.1990). Indeed, "[g]iven the Supreme Court's approval of post-judgment sanctions under Rule 11, and the support in the circuits for the practice under Rule 37, the question of post-judgment sanctions under Rule 37 is virtually moot." Stephen R. Bough, *Spitting in a Judge's Face: The 8th Circuit's Treatment of Rule 37 Dismissal and Default Discovery Sanctions*, 43 S.D.L.Rev. 36, 43 (1998) (footnote omitted).

FN5. The President argues that TRI's statement should be rejected in its entirety as TRI's role in this litigation was to raise funds and coordinate public relations for plaintiff, TRI did not enter an appearance until the appeal of this Court's dismissal of the case (although TRI was shown as "of counsel" on plaintiff's pleadings), TRI's statement was untimely, and the information contained in TRI's statement is "extremely vague." Resp. of Pres. at 8-9. Although the Court will not reject TRI's statement, the Court will consider any vagueness of TRI's statement, as it will with RCFP's statement, in determining the reasonable fees and expenses that plaintiff incurred as a result of the President's misconduct.

***724** 2.

This Court found that the President's sworn statements concerning whether he and Ms. Lewinsky had ever been alone together and whether he had ever engaged in sexual relations with Ms. Lewinsky--specifically, his answer to Interrogatory No. 10, submitted on December 23, 1997, and certain limited portions of his January 17th deposition testimony--were in violation of this Court's discovery Orders ruling that plaintiff was entitled to information regarding any individuals with whom the President had sexual relations or proposed or sought to have sexual relations and who were during the relevant time frame state or federal employees. *See Jones v. Clinton*, 36 F.Supp.2d at 1127. Notwithstanding the narrow and specific nature of the misconduct referenced in the April 12th Order, RCFP and TRI include in their respective statements claims for fees and expenses which clearly cannot be said to have been caused by the misconduct upon which this Court's April 12th Order is based. These include fees and expenses associated with various Court proceedings and conferences; fees and expenses associated with the investigation by the Office of the Independent Counsel ("OIC") of the Lewinsky matter and OIC's involvement in this civil case; fees and expenses associated with this Court's evidentiary ruling excluding the Lewinsky evidence from trial and plaintiff's mandamus petition seeking to reverse that ruling; fees and expenses associated with various press conferences, researching and reviewing media reports, and reviewing correspondence; and fees and expenses associated with examining the Starr Report.

Both RCFP and TRI appear to justify the breadth of the fees and expenses included in their statements by arguing, at least in part, that sanctions may be imposed to punish the President's misconduct. RCFP argues, for example, that the President's willful failure to follow this Court's discovery Orders "made a mockery" of both his deposition and all of the proceedings and orders leading up to the deposition, and that he should therefore be made to pay for all of the work done and expenses incurred in the course of events leading up to his deposition and, in particular, all efforts to discover facts concerning Monica Lewinsky. Reply of RCFP at 2-4. Similarly, TRI asserts that the contemptuous conduct of the President was a "substantial factor" in each of the events for which costs and/or attorney's fees are being sought, and, as previously noted, cautions this Court against imposing *de minimis* consequences on conduct that undermined the integrity of the judicial system. Reply of TRI at 2-3.

[6] The Court rejects RCFP's and TRI's apparent understanding of the basis upon which compensatory sanctions may be imposed. Regardless of whether the President's failure to follow this Court's discovery Orders "made a mockery" of the proceedings or even was a "substantial factor" in the events for which fees and expenses are being sought, sanctions for compensatory contempt are not imposed to punish the contemnor, *see Lyng*, 884 F.2d at 1106, but must be based upon evidence of actual loss. *Law v. NCAA*, 134 F.3d 1438, 1443 (10th Cir.1998). *See also Burke v. Guiney*, 700 F.2d 767, 770 (1st Cir.1983) (a compensatory fine for civil contempt requires proof of damages). Avoiding imposition of compensatory sanctions that may be characterized as "*de minimus* " simply is not a consideration in determining whether actual loss has been shown.

The Court also rejects RCFP's argument that because this Court properly could have imposed the sanction

of entering judgment against the President on the ***725** basis of his contempt of court, [FN6] plaintiff's counsel would have been justified in seeking compensation for all of their labor and reimbursement for all of the expenses incurred following the President's false answer to Interrogatory No. 10, submitted on December 23, 1997. *See* Reply of RCFP at 12-13. Specifically, RCFP argues that upon the service of the President's false response to plaintiff's interrogatories, he had a continuing obligation as an officer of the Court and a party subject to the Court's discovery orders to disclose the falsity of his response, and that judgment could have been entered against the President upon such disclosure. *Id.* Such a judgment, argues RCFP, could have been entered against the President upon his disclosure of the falsity of his response and would have obviated the need for any further legal services to be rendered or expenses incurred by plaintiff's counsel. *Id.* RCFP's argument, however, overlooks the probability that any damages awarded to plaintiff as a result of a judgment entered against the President for his civil contempt would not have been based on any fees and expenses incurred by her counsel as a result of the conduct described in this Court's April 12th Order, but would have been damages that plaintiff herself could prove at a subsequent hearing, *i.e.,* damages for alleged deprivation of her constitutional rights and privileges, damages for alleged conspiracy to deprive her of her equal protection and privileges of the laws, and damages for alleged intentional infliction of emotional distress (Counts I-III of plaintiff's amended complaint). Even in the unlikely event that the Court would forego such a hearing on damages, the amount of the judgment would be no greater than the specific amount stated in plaintiff's amended complaint, which is $525,000. [FN7] Because the parties have already settled this case for $850,000, it is appropriate to limit fees and expenses to those incurred as a result of the misconduct upon which the Court's April 12th Order is based and not engage in speculation concerning what the Court might have ordered had its grant of summary judgment to defendants been reversed on appeal and the case remanded.

FN6. This Court noted in its April 12th Order that the Court would have considered rendering a default judgment against the President pursuant to Fed.R.Civ.P. 37(b)(2) had this Court's grant of summary judgment to defendants been reversed on appeal and the case remanded. *See Jones v. Clinton,* 36 F.Supp.2d at 1131.

FN7. Plaintiff's initial complaint sought $700,000. Following the entry of this Court's Memorandum Opinion and Order granting in part and denying in part the President's motion for judgment on the pleadings, *see Jones v. Clinton,* 974 F.Supp. 712 (E.D.Ark.1997), and following the entry of new counsel for plaintiff in this case, plaintiff filed an amended complaint (with leave of this Court) in which she sought $525,000 [doc. #176]. The Court recognizes that plaintiff's amended complaint seeks damages in an amount to be determined by a jury and that the $525,000 figure represents the minimum sought by plaintiff for the conduct referenced in Counts I-Ill of the amended complaint.

[7] There is no need to burden today's Memorandum and Order with an exhaustive, entry-by-entry review of the fees and expenses claimed by RCFP and TRI in determining the sum total of reasonable fees and expenses that plaintiff incurred as a result of the President's willful failure to obey this Court's discovery Orders. The parties have addressed RCFP's and TRI's statements by establishing general categories of time entries, and this Court will address those statements in the same manner. [FN8]

FN8. The Court has engaged in a painstaking review of each time entry and claim for costs set forth in RCFP's and TRI's respective statements in determining whether the fees and expenses claimed therein were caused by the discovery violations referenced in the Court's April 12th Order. All claims for fees and expenses not specifically mentioned in today's Memorandum and Order have been carefully considered by the Court and are hereby denied.

a.

The Court will disallow fees and expenses incurred prior to December 23, ***726** 1997. Work done prior to that date *a fortiori* was not caused by the President's discovery violations on December 23, 1997, and January 17, 1998.

b.

The Court will disallow fees and expenses associated with the hearing in Pine Bluff, Arkansas on January 12, 1998. This hearing was convened by the Court on its own initiative primarily to address the President's upcoming deposition. Monica Lewinsky's name was mentioned only briefly during the hearing in response to this Court's query regarding witnesses plaintiff anticipated calling at trial, and a wide variety of topics were addressed, including the possibility of settlement. This hearing did not result from the discovery violations referenced in the Court's April 12th Order.

c.

The Court will allow a portion of the fees and expenses associated with the President's January 17th deposition. The President objects to such an award, arguing that he would have been deposed regardless of any discovery violations and that plaintiff thus would have incurred fees and expenses associated with the deposition irrespective of any misconduct on his part. While that may be true, the President's failure to follow this Court's discovery Orders resulted in plaintiff's counsel devoting extra time, effort, and expense to certain topics that likely would have been unnecessary had he been truthful. Plaintiff therefore incurred fees and expenses in connection with the President's deposition as a result of his discovery violations.

The Court does find, however, that fees and expenses should be limited to time spent asking questions about Ms. Lewinsky. In this regard, the President claims, and the Court agrees, that approximately 20% of the President's deposition concerned Ms. Lewinsky. Plaintiff's counsel do not contest this percentage, but merely argue that the President's falsehoods infected the entire record with doubt and that plaintiff therefore is entitled to reimbursement for all fees and expenses associated with the deposition. As previously noted, however, compensatory sanctions must be based on evidence of actual loss, *see* NCAA, 134 F.3d at 1443, and the Court finds that plaintiff's counsel have established evidence of actual loss, at most, with respect to no more than 20% of their claim for fees and expenses associated with the deposition. [FN9] Accordingly, as so reduced, RCFP is entitled to $5,233.00 for fees and expenses associated with the President's deposition, and TRI is entitled to $3,136.58 for its expenses. [FN10]

FN9. RCFP and TRI argue that the President is being required to reimburse this Court the entire amount of costs incurred in attending his January 17th deposition, not just 20%, and that plaintiff likewise should be reimbursed for all fees and expenses incurred in connection with the deposition. The Court disagrees. The President was noticed for deposition prior to the actions which gave rise to the April 12th Order, and plaintiff's counsel would have incurred fees and expenses in connection with the deposition regardless of any misconduct on the part of the President. This Court, on the other hand, would not have incurred any expenses in connection with the deposition had the President not requested that the Court preside over the proceedings at which he ultimately disobeyed this Court's oral ruling that certain questions be answered. *See Jones v. Clinton*, 36 F.Supp.2d at 1127. Thus, the Court deems its expenses incurred in connection with the President's misconduct at his deposition to be the total expenses incurred by this Court in traveling to Washington, D.C. at the President's request to preside over the proceedings. As for awarding plaintiff even 20%, this apportionment, as correctly noted by the President, reflects an assumption highly favorable to plaintiff that all of the Lewinsky matter was violative of this Court's discovery Orders.

FN10. The President argues that plaintiff's counsel has included fees for six attorneys to attend his deposition, even though only one RCFP attorney questioned the President, and that fees for such duplicative services should he disallowed. The Court notes, however, that the President himself had five attorneys--including the White House Counsel--in attendance at the deposition. Given the unique circumstances of this case, this Court does not find it unreasonable that plaintiff had more than one attorney in attendance.

*727 d.

The Court will disallow fees and expenses associated both with plaintiff's motion for this Court to reconsider its ruling excluding the Lewinsky evidence at trial and her subsequent petition for a writ of mandamus with the Court of Appeals for the Eighth Circuit seeking to overturn that ruling. [FN11]

The Court excluded the Lewinsky evidence from trial, not in response to any misconduct on the part of the President, but in response to a motion by OIC for limited intervention and stay of discovery in this civil case. *See Jones v. Clinton,* 993 F.Supp. 1217 (E.D.Ark.1998) (Order denying motion to reconsider ruling excluding Lewinsky evidence from trial). [FN12] Thus, the fees and expenses associated with attempts by plaintiff's counsel to overturn this Court's Lewinsky ruling were not caused by the President's willful failure to obey this Court's discovery Orders and, therefore, are not compensable.

FN11. RCFP later withdrew this petition following this Court's grant of summary judgment to defendants on April 1, 1998.

FN12. OIC argued in its motion that counsel for plaintiff were deliberately shadowing the grand jury's investigation of the Lewinsky matter and 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 1218 (quoting OIC Motion, at 2-3). This Court made the decision to disallow discovery as to Ms. Lewinsky and to exclude evidence concerning her from trial because its admission would frustrate the timely resolution of this case and cause undue expense and delay, the substantial interests of the Presidency militated against any undue delay that would be occasioned by allowing plaintiff to pursue the Lewinsky matter, and the government's criminal proceedings (to which this Court generally must yield in civil matters) could be impaired and prejudiced were the Court to permit inquiry into the Lewinsky matter by the parties in this civil case. *Id.* at 1219-20. The Court noted that evidence of the Lewinsky matter, even assuming it to be very favorable to plaintiff, was not essential to the core issues in this case of whether plaintiff herself was the victim of *quid pro quo* sexual harassment, hostile work environment harassment, or intentional infliction of emotional distress. *Id.* at 1222. *See also Jones v. Clinton,* 36 F.Supp.2d at 1122 n. 7.

RCFP, however, argues that if the President had told the truth on January 17, 1998, their discovery related to Ms. Lewinsky would then have been completed and OIC's motion would never have been filed. Reply of RCFP, at 6. They argue that this Court then would not have been asked to stay discovery related to Ms. Lewinsky because very little, if any, additional discovery related to her would have been sought, and this Court would not have had occasion to consider at that stage excluding the evidence at trial. *Id.*

While the Court does not question RCFP's representations as made in hindsight, the Court is hard pressed to conclude that plaintiff, given the intensity and contentiousness with which discovery was then being conducted, would not at that time have proceeded with depositions of Linda Tripp, Betty Currie, Vernon Jordan, and other witnesses in an effort to confirm or learn additional details of the relationship between Ms. Lewinsky and the President and, perhaps, to establish or discount through these witnesses the existence of any other relationships that might be relevant to the issues in the case. Moreover, even had the President told the truth with respect to Ms. Lewinsky, there is nothing in the record before the Court to indicate that Ms. Lewinsky would not at that time have continued to stand by her affidavit denying sexual relations between herself and the President, thus necessitating additional related discovery by plaintiff. [FN13] The ***728** Court simply cannot infer that OIC would not have intervened in this case had the President acknowledged a relationship between himself and Ms. Lewinsky on January 17th and that additional related discovery on the part of the plaintiff would thereby have ceased. [FN14] Such would require speculation and involves events that are not of record in this case. *See* n. 13, *supra.* Accordingly, the Court disallows fees and expenses associated with the attempts by plaintiff's counsel to overturn this Court's Lewinsky ruling. [FN15]

FN13. Not included in the record of this case are many materials, including the transcript of Ms. Lewinsky's grand jury testimony and transcripts of depositions generated in the course of this litigation, that might reveal additional instances of misconduct other than those described in the Court's April 12th Order. Such materials are not normally filed of record and, thus, are not part of the official record to be considered by this Court. Indeed, because such materials are not normally filed of

record, the transcript of the President's January 17th deposition had not been filed of record until just recently. In this regard, the Court, prior to considering the issue of the President's possible contempt following his August 17, 1998 address to the Nation and prior to issuing its April 12th Order, had to expand the record by first obtaining, and then filing of record, the following items: (1) President Clinton's Responses to Plaintiff's Second Set of Interrogatories; (2) President Clinton's Supplemental Responses to Plaintiff's Second Set of Interrogatories; (3) the redacted transcript of the January 17, 1998 deposition of President Clinton; (4) the transcript of the August 17, 1998 videotaped grand jury testimony of President Clinton; and (5) the transcript of President Clinton's August 17, 1998 televised address to the Nation. *See* Order of April 12, 1999 [doc.#478]. While the Court certainly could further expand the record of this case and convene hearings to address other possible instances of misconduct beyond those upon which the April 12th Order is based, the Court, in the interests of the Presidency and in order to bring this matter to a speedy closure, declines to do so.

FN14. The Court notes that OIC was given authorization to investigate the President's conduct in this case prior to the January 17th deposition.

FN15. Likewise, the Court will disallow fees and expenses associated with responding to OIC subpoenas.

e.

The Court will allow fees and expenses associated with preparing to depose Ms. Lewinsky, attempting to substantiate the Lewinsky allegations, responding to her motion for a protective order, and traveling to Washington, D.C. for her deposition. The President acknowledges that fees and expenses incurred by plaintiff in seeking Lewinsky evidence subsequent to the actions upon which the Court's April 12th Order is based and prior to the decision by this Court to exclude that evidence from trial fall within the Court's Order. The Court agrees and, therefore, RCFP is entitled to $12,316.00 for fees and expenses associated with these activities, and TRI is entitled to $5,545.85 for its fees and expenses.

f.

The Court will allow fees and expenses associated with the motion for summary judgment and the subsequent appeal to the Eighth Circuit following this Court's grant of summary judgment to defendants, but only to the extent that plaintiff's brief on summary judgment and her appeal dealt with the President's falsehoods and alleged obstruction of justice concerning Monica Lewinsky. Unlike the matter involving this Court's evidentiary ruling excluding the Lewinsky evidence from trial, this Court has no difficulty in concluding that these fees and expenses would not have been incurred had the President not willfully failed to obey this Court's discovery Orders. [FN16] Accordingly, RCFP is entitled ***729** to $27,687.37 for fees and expenses associated with the motion for summary judgment and subsequent appeal, and TRI is entitled to $802.50 for its fees and expenses.

FN16. RCFP and TRI have included many general time entries with respect to the work spent on the motion for summary judgment and subsequent appeal that do not specify which hours were spent for which activities. The Court recognizes, however, that plaintiff's counsel were not anticipating at the time they recorded these time entries that they would later be asked to segregate the time spent as a result of the President's misconduct. Accordingly, rather than disallow these time entries in their entirety, the Court has reduced the total number of hours claimed in these time entries to a number of hours that this Court deems reasonable for work spent on that compensable portion of the time entry. Thus, for example, where a time entry claims compensation for, say, six hours spent drafting a response to the President's motion for summary judgment, the Court, notwithstanding RCFP's assertion that all of the time entries dealt with the President's falsehoods and alleged obstruction of justice, has reduced the hours claimed for that activity to a number that this Court would deem reasonable for time spent only on that portion of the response dealing with the President's falsehoods and alleged obstruction of justice concerning Ms. Lewinsky. While this process might not be

exact, the Court believes it represents a fair and expeditious solution to determining the sum total of reasonable fees and expenses that plaintiff incurred as a result of the President's willful failure to obey this Court's discovery Orders.

g.

The Court will allow fees and expenses associated with researching contempt and spoilation issues following the President's August 17, 1998 televised Address to the Nation, and in responding to this Court's request for a transcript of the President's deposition. Although RCFP never filed a motion for contempt following the President's August 17th Address, the fees and expenses associated with these activities would have been unnecessary had the President followed this Court's discovery Orders. Accordingly, RCFP is entitled to $22,235.25 for fees and expenses associated with these activities. [FN17]

FN17. TRI does not appear to claim any fees and expenses with respect to these activities.

h.

Finally, the Court finds that RCFP is entitled to $12,527.50 for fees and expenses associated with reviewing and responding to this Court's April 12th Order requiring plaintiff's former counsel to submit a statement of reasonable fees and expenses. [FN18]

FN18. Again, TRI does not appear to claim any fees and expenses with respect to these activities.

III.

The Court takes no pleasure in imposing contempt sanctions against this Nation's President and, no doubt like many others, grows weary of this matter. Nevertheless, the Court has determined that the President deliberately violated this Court's discovery Orders, thereby undermining the integrity of the judicial system, and that sanctions must be imposed to redress the President's misconduct and to deter others who might consider emulating the President's misconduct. *See Jones v. Clinton*, 36 F.Supp.2d at 1131-32, 1134. Accordingly, the Court hereby orders the following:

1. The President shall deposit the sum of $1,202.00 into the registry of this Court within sixty (60) days of the date of entry of this Memorandum and Order.

2. The President shall pay RCFP the sum of $79,999.12 within sixty (60) days of the date of entry of this Memorandum and Order.

3. The President shall pay TRI the sum of $9,484.93 within sixty (60) days of the date of entry of this Memorandum and Order.

IT IS SO ORDERED this 29th day of July 1999.

57 F.Supp.2d 719

END OF DOCUMENT

United States District Court,
E.D. Arkansas,
Western Division.

Paula Corbin JONES, Plaintiff,
v.
William Jefferson CLINTON and Danny Ferguson, Defendants.

No. LR-C-94-290.

April 12, 1999.

Following settlement of former state employee's sexual harassment action against President and the United States Senate's acquittal of President of Articles of Impeachment, the District Court sua sponte raised issue of President's contempt. The District Court, Susan Webber Wright, Chief Judge, held that: (1) court had power to hold President in civil contempt; (2) President was in contempt of court; and (3) President was liable for plaintiff's reasonable expenses caused by President's willful failure to obey discovery orders and expenses incurred by court in traveling to President's tainted deposition.

Judgment entered.

West Headnotes

[1] Damages 50.10
115k50.10

Under Arkansas law, tort of outrage requires that plaintiff prove that: (1) defendant intended to inflict emotional distress or knew or should have known that emotional distress was likely result of his conduct; (2) conduct was extreme and outrageous and utterly intolerable in civilized community; (3) defendant's conduct was cause of plaintiff's distress; and (4) plaintiff's emotional distress was so severe in nature that no reasonable person could be expected to endure it.

[2] United States 26
393k26

There was no constitutional barrier to federal district court holding President of the United States in civil contempt of court and imposing sanctions for his actions undertaken in his role as civil litigant in civil case that did not relate to his duties as President, but rather involved actions taken by President before his term of office began.

[3] United States 26
393k26

Necessary incident of federal court's power to determine legality of President's unofficial conduct includes power to address unofficial conduct which threatens integrity of proceedings before court.

[4] Federal Civil Procedure 2757
170Ak2757

Federal courts have inherent power necessary to exercise all other powers, including ability to dismiss actions, assess attorney fees, and to impose monetary or other sanctions appropriate for conduct which abuses judicial process.

[5] Contempt 70
93k70

In selecting contempt sanctions, court must use least possible power adequate to end proposed.

[6] Federal Civil Procedure 2756.1
170Ak2756.1

Federal district court has power to conduct independent investigation in order to determine whether it has been victim of fraud.

[7] Contempt 44
93k44

Court may make adjudication of contempt and impose contempt sanction even after action in which contempt arose has been terminated.

[8] Federal Civil Procedure 2827
170Ak2827

Court generally may act sua sponte in imposing sanctions.

[9] Contempt 30
93k30

Federal court has inherent power to protect its integrity and prevent abuses of judicial process by holding party in contempt and imposing sanctions for violations of court's orders.

[10] Contempt 60(3)
93k60(3)

To hold party in civil contempt, clear and convincing evidence must show that court fashioned clear and reasonably specific order, and that party violated that order.

[11] Federal Civil Procedure 1278
170Ak1278

When discovery order has been violated which could be adequately sanctioned under rules, court ordinarily should turn to its inherent powers to impose sanctions only as secondary measure. Fed.Rules Civ.Proc.Rule 37, 28 U.S.C.A.

[12] Federal Civil Procedure 1456
170Ak1456

President of United States violated court orders allowing plaintiff who alleged that she was sexually harassed by President to discover information regarding any individuals with whom President had or proposed to have sexual relations and who were state or federal employees, by giving false, misleading, and evasive deposition testimony regarding whether he had ever been alone with or engaged in sexual relations with certain White House intern, and violation amounted to civil contempt. Fed.Rules Civ.Proc.Rule 37(b)(2), 28 U.S.C.A.

[13] Federal Civil Procedure 1452
170Ak1452

[13] Federal Civil Procedure 1538
170Ak1538

Production order is generally needed to trigger rule authorizing discovery sanctions. Fed.Rules Civ.Proc.Rule 37(b), 28 U.S.C.A.

[14] Federal Civil Procedure 1452
170Ak1452

[14] Federal Civil Procedure 1538
170Ak1538

Federal district court's order ruling on plaintiff's motion to compel President to respond to interrogatories and court's oral ruling at President's deposition requiring President to answer questions posed by plaintiff's counsel were production orders, as required for application of rule authorizing discovery sanctions. Fed.Rules Civ.Proc.Rule 37(b), 28 U.S.C.A.

[15] Federal Civil Procedure 1453
170Ak1453

[15] Federal Civil Procedure 1539
170Ak1539

President's violation of court's discovery orders in sexual harassment suit warranted imposition of civil contempt sanctions, requiring President to pay plaintiff any reasonable expenses, including attorney fees, caused by President's willful failure to obey discovery orders and to reimburse district court for its expenses in traveling to Washington D.C. at President's request to preside at his tainted deposition. Fed.Rules Civ.Proc.Rule 37(b)(2), 28 U.S.C.A.

[16] Attorney and Client 32(3)
45k32(3)

Arkansas Supreme Court has exclusive jurisdiction over conduct of Arkansas attorneys and has power to make rules regulating practice of law and professional conduct of attorneys of law. Ark.Const.Amend. No. 28.

[17] Federal Civil Procedure 2756.1
170Ak2756.1

Federal district court's referral to State Supreme Court Committee on Professional Conduct of matter regarding alleged professional misconduct of President of United States, who was licensed attorney in Arkansas, did not relinquish federal district court's jurisdiction to address matter and issue sanctions.

[18] Federal Civil Procedure 2756.1
170Ak2756.1

Authority of federal district court to sanction attorneys is independent of, and in addition to, power of review possessed by state disciplinary authorities.

[19] Federal Civil Procedure 1456
170Ak1456

[19] Federal Civil Procedure 1542
170Ak1542

District court would utilize summary civil contempt procedures, rather than criminal contempt proceeding, to address United States President's failure to disclose his relationship with White House intern as ordered by court; court could expeditiously resolve matter and prevent any double jeopardy issues from arising by focusing on undisputed matters that were contained in record. Fed.Rules Civ.Proc.Rule 37(b)(2), 28 U.S.C.A.; Fed.Rules Cr.Proc.Rule 42, 18 U.S.C.A.

***1119** Gregory S. Kitterman, Little Rock, AR, for Paula Corbin Jones.

Kathlyn Graves, Wright, Lindsey & Jennings, Little Rock, AR, Stephen C. Engstrom, ***1120** Wilson, Engstrom, Corum & Coulter, Little Rock, AR, Robert S. Bennett, Skadden, Arps, Slate, Meaghan & Flom, Washington, DC, for William Jefferson Clinton.

Bill W. Bristow, Seay & Bristow, Jonesboro, AR, Robert Batton, Municipal Judge, Jacksonville, AR, for Danny Ferguson.

MEMORANDUM OPINION AND ORDER

SUSAN WEBBER WRIGHT, Chief Judge.

What began as a civil lawsuit against the President of the United States for alleged sexual harassment eventually resulted in an impeachment trial of the President in the United States Senate on two Articles of Impeachment for his actions during the course of this lawsuit and a related criminal investigation being conducted by the Office of the Independent Counsel ("OIC"). The civil lawsuit was settled while on appeal from this Court's decision granting summary judgment to defendants and the Senate acquitted the President of both Articles of Impeachment. Those proceedings having concluded, the Court now addresses the issue of contempt on the part of the President first raised in footnote five of the Court's Memorandum and Order of September 1, 1998. *See Jones v. Clinton*, 12 F.Supp.2d 931, 938 n. 5 (E.D.Ark.1998). For the reasons that follow, the Court hereby adjudges the President to be in contempt of court for his willful failure to obey this Court's discovery Orders.

I.

[1] Plaintiff Paula Corbin Jones filed this lawsuit seeking civil damages from William Jefferson Clinton, President of the United States, and Danny Ferguson, a former Arkansas State Police Officer, for alleged actions beginning with an incident in a hotel suite in Little Rock, Arkansas on May 8, 1991, when President Clinton was Governor of the State of Arkansas. Plaintiff was working as a state employee on the day in question and claimed that Ferguson persuaded her to leave the registration desk she was staffing and visit Governor Clinton in a business suite at the hotel. She claimed the Governor made boorish and offensive sexual advances that she rejected, [FN1] and that her superiors at work subsequently dealt with her in a hostile and rude manner and punished her in a tangible way for rejecting those advances. [FN2]

FN1. Although the President's alleged conduct was certainly "outrageous" as that term is commonly understood, plaintiff failed to establish that the President's alleged conduct met the requirements of the *tort of outrage* which, under Arkansas law, requires that a plaintiff prove that: (1) the defendant intended to inflict emotional distress or knew or should have known that emotional distress was the likely result of his conduct; (2) the conduct was extreme and outrageous and utterly intolerable in a civilized community; (3) the defendant's conduct was the cause of the plaintiff's distress; and (4) the plaintiff's emotional distress was so severe in nature that no reasonable person could be expected to endure it. *See Jones v. Clinton*, 990 F.Supp. 657, 676 (E.D.Ark.1998).

FN2. Additional detail on the factual background of this case can be found in the Court's Memorandum Opinion and Order of April 1, 1998. *See Jones v. Clinton*, 990 F.Supp. 657.

Plaintiff's complaint was filed on May 6, 1994. On August 10, 1994, the President filed a motion to dismiss the complaint without prejudice on grounds of immunity and to toll any statutes of limitations until he is no longer President, thereby allowing plaintiff to refile her suit after he is out of office. On

December 28, 1994, this Court denied the President's motion to dismiss on immunity grounds and ruled that discovery in the case could proceed, but concluded that any trial should be stayed until such time as the President is no longer in office. *See* Jones v. Clinton, 869 F.Supp. 690 (E.D.Ark.1994). Both parties appealed. On January 9, 1996, a divided panel of the Court of Appeals for the Eighth Circuit affirmed this Court's Order denying the President's motion to dismiss on immunity grounds and allowing discovery to proceed, but reversed this Court's Order staying the trial of this matter for the duration of President Clinton's term in office. *See* Jones v. Clinton, 72 F.3d 1354 (8th Cir.1996). The President subsequently filed a petition for certiorari with the Supreme Court of the United States, which was granted, *see* Clinton v. Jones, 518 U.S. 1016, 116 S.Ct. 2545, 135 L.Ed.2d 1066 (1996), and on May 27, 1997, the Supreme Court handed down an opinion holding that there is no constitutional impediment to allowing plaintiff's ***1121** case to proceed while the President is in office. *See* Clinton v. Jones, 520 U.S. 681, 117 S.Ct. 1636, 137 L.Ed.2d 945 (1997).

Following remand of the case to this Court, the President, joined by Ferguson, filed a motion for judgment on the pleadings pursuant to Fed.R.Civ.P. 12(c). By Memorandum Opinion and Order dated August 22, 1997, this Court granted in part and denied in part the President's motion. *See* Jones v. Clinton, 974 F.Supp. 712 (E.D.Ark.1997). The Court dismissed plaintiff's defamation claim against the President, dismissed her due process claim for deprivation of a property interest in her State employment, and dismissed her due process claims for deprivation of a liberty interest based on false imprisonment and injury to reputation, but concluded the remaining claims in plaintiff's complaint stated viable causes of action. *See id.* The Court thereupon issued a Scheduling Order setting forth a deadline of January 30, 1998, for the completion of discovery and the filing of motions.

Discovery in this case proved to be contentious and time-consuming. During the course of discovery, over 50 motions were filed, the Court entered some 30 Orders, [FN3] and telephone conferences were held on an almost weekly basis to address various disputes and resolve motions. In addition, the Court traveled to Washington, D.C. at the request of the President to preside over his civil deposition on January 17, 1998. It was at a hearing on January 12, 1998, to address issues surrounding the President's deposition and at the deposition itself that the Court first learned of Monica Lewinsky, a former White House intern and employee, and her alleged involvement in this case.

FN3. Included in these Orders was a Confidentiality Order on Consent of all Parties. The Court entered this Order on October 30, 1997, due to the salacious nature of much of the discovery and the media's intense and often inaccurate coverage of this case. *See* Jones v. Clinton, 12 F.Supp.2d at 935-36. The Court took this action to help insure that a fair and impartial jury could be selected in the event this matter went to trial by limiting prejudcial pre-trial publicity and to protect the interests of the various Jane Does in maintaining privacy. *Id.* at 936- 37.

At his deposition, the President was questioned extensively about his relationship with Ms. Lewinsky, this Court having previously ruled on December 11, 1997, that plaintiff was "entitled to information regarding any individuals with whom the President had sexual relations or proposed or sought to have sexual relations and who were during the relevant time frame [of May 8, 1986, up to the present] state or federal employees." *See* December 11, 1997 Order, at 3. [FN4] Based on that ruling, this Court overruled objections during the deposition from the President's attorney, Robert S. Bennett, that questions concerning Ms. Lewinsky were inappropriate areas of inquiry and required that such questions be answered by the President. *See* Pres. Depo. at 53-55, 66, 78. Having been so ordered, the President testified in response to questioning from plaintiff's counsel and his own attorney that he had no recollection of having ever been alone with Ms. Lewinsky and he denied that he had engaged in an "extramarital sexual affair," in "sexual relations," or in a "sexual relationship" with Ms. Lewinsky. [FN5] *Id.* at 52-53, 56-59, 78, 204. An affidavit submitted by Ms. Lewinsky in support of her motion to quash a subpoena for her testimony and made a part of the record of the President's deposition likewise denied that she and the President had engaged in a sexual relationship. ***1122** When asked by Mr. Bennett whether Ms. Lewinsky's affidavit denying a sexual relationship with the President was a "true and accurate statement," the President answered, "That is absolutely true." Pres. Depo. at 204.

FN4. The Court's December 11th Order ruled on plaintiff's motion to compel responses to her second set of interrogatories, granting in part and denying in part the motion. However, the Court also addressed in the Order the President's upcoming deposition and concluded that for purposes of the deposition, not only was plaintiff entitled to information regarding any individuals with whom the President had sexual relations or proposed or sought to have sexual relations and who were during the relevant time frame state or federal employees, but that the Court would possibly permit plaintiff to question the President with regard to matters that fell outside that time frame if she had an independent basis for doing so. *See* December 11, 1997 Order, at 4.

FN5. At the request of plaintiff's counsel, the term "sexual relations" was defined as follows during the deposition: "For the purposes of this deposition, a person engages in 'sexual relations' when the person knowingly engages in or causes ... 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.... 'Contact' means intentional touching, either directly or through clothing." *See* Depo. Ex. 1.

The President's denial of a sexual relationship with Ms. Lewinsky at his deposition was consistent with his answer of "None" in response to plaintiff's Interrogatory No. 10, which requested the name of each and every federal employee with whom he had sexual relations when he was President of the United States. *See* Pres. Clinton's Resp. to Pl.'s Second Set of Int. at 5; Pres. Clinton's Supp. Resp. to Pl.'s Second Set of Int. at 2. This interrogatory was answered on December 23, 1997, after this Court had entered its December 11th Order ruling on plaintiff's motion to compel responses to her second set of interrogatories and finding that plaintiff was entitled to such information. See December 11, 1997 Order, at 3, 6. [FN6]

FN6. The President's answer to this interrogatory was made a part of the record of the President's deposition. There was no formal definition of the term "sexual relations" with respect to plaintiff's interrogatory or the President's answer.

One day prior to the President's deposition, and unknown to this Court, the Special Division of the United States Court of Appeals for the District of Columbia Circuit granted a request from Attorney General Janet Reno to expand the jurisdiction of Independent Counsel Kenneth W. Starr and entered an Order authorizing the Independent Counsel "to investigate ... whether Monica Lewinsky or others suborned perjury, obstructed justice, intimidated witnesses, or otherwise violated federal law other than a Class B or C misdemeanor or infraction in dealing with witnesses, potential witnesses, attorneys, or others concerning the civil case *Jones v. Clinton.*" *In re Madison Guaranty Savings & Loan Ass'n,* Div. No. 94-I, 1998 WL 472444 (D.D.C. Jan. 16, 1998). A short time later, the President's relationship with Ms. Lewinsky and OIC's investigation of that relationship broke in the national media.

On the afternoon of January 28, 1998, with less than 48 hours remaining in the period for conducting discovery, OIC filed with this Court a motion for limited intervention and stay of discovery in this civil case. OIC argued that counsel for plaintiff were deliberately shadowing the grand jury's investigation of the matter involving Ms. Lewinsky and 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." Motion of OIC, at 2-3. This Court convened a telephone conference the following morning and, after eliciting the views of the parties and OIC, entered an Order granting in part and denying in part OIC's motion. *See Jones v. Clinton,* 993 F.Supp. 1217 (E.D.Ark.1998) (Order denying plaintiff's motion for reconsideration). In essence, the Court concluded that the parties could continue with discovery in the short time that remained of those matters not involving Ms. Lewinsky, but that any discovery that did involve Ms. Lewinsky would not be allowed to go forward and, further, that any evidence concerning Ms. Lewinsky would be excluded from the trial of this matter. *Id.* at 1218-19. [FN7]

FN7. In so ruling, and contrary to numerous assertions, this Court did not rule that

evidence of the Lewinsky matter was irrelevant or immaterial to the issues in plaintiff's case. Indeed, the Court specifically acknowledged that such evidence might have been relevant to plaintiff's case and, as she argued, "might possibly have helped her establish, among other things, intent, absence of mistake, motive, and habit on the part of the President." 993 F.Supp. at 1222 (citing Fed.R.Evid. 404(b), 406). At the time, however, the Court anticipated that the President and Ms. Lewinsky would both deny a sexual relationship and that plaintiff would attempt to rebut their denials with extrinsic evidence that could be inadmissable under Fed.R.Evid. 608(b). To stay discovery so that plaintiff could explore such evidence would have required extensive additional delay. In that regard, this Court made the decision to disallow discovery as to Ms. Lewinsky and to exclude evidence concerning her from trial, not because the Court considered such evidence to be irrelevant or immaterial, but because its admission would frustrate the timely resolution of this case and cause undue expense and delay, the substantial interests of the Presidency militated against any undue delay that would be occasioned by allowing plaintiff to pursue the Lewinsky matter, and the government's criminal proceedings (to which this Court generally must yield in civil matters) could be impaired and prejudiced were the Court to permit inquiry into the Lewinsky matter by the parties in this civil case. *Id.* at 1219-20. The Court noted that evidence of the Lewinsky matter, even assuming it to be very favorable to plaintiff, was "not essential to the *core issues* in this case of whether plaintiff *herself* was the victim of *quid pro quo* sexual harassment, hostile work environment harassment, or intentional infliction of emotional distress." *Id.* at 1222 (emphasis in original).

***1123** Following the completion of discovery, the President and Ferguson each filed a motion for summary judgment pursuant to Fed.R.Civ.P. 56. By Memorandum Opinion and Order dated April 1, 1998, this Court granted the President's and Ferguson's motions for summary judgment and entered judgment dismissing this case. *See Jones v. Clinton,* 990 F.Supp. 657 (E.D.Ark.1998). The Court concluded that there were no genuine issues for trial in this case and that defendants were entitled to judgment as a matter of law with respect to plaintiff's claims that she was subjected to *quid pro quo* and hostile work environment sexual harassment, that the defendants conspired to deprive her of her civil rights, and that she suffered emotional distress so severe in nature that no reasonable person could be expected to endure it. *Id.* The plaintiff appealed. Meanwhile, OIC's investigation of the President continued.

On August 17, 1998, the President appeared before a grand jury in Washington, D.C., as part of OIC's criminal investigation and testified about his relationship with Ms. Lewinsky and his actions during this civil lawsuit. That evening, the President discussed the matter in a televised address to the Nation. In his address, the President stated that although his answers at his January 17th deposition were "legally accurate," he did not volunteer information and that he did indeed have a relationship with Ms. Lewinsky that was inappropriate and wrong. *See* Pres. Addr., 1998 WL 14394084. The President acknowledged misleading people, in part because the questions posed to him "were being asked in a politically inspired lawsuit which has since been dismissed," and because he "had real and serious concerns about an Independent Counsel investigation that began with private business dealings 20 years ago...." *Id.* It was during the President's televised address that the Court first learned the President may be in contempt. *See Jones v. Clinton,* 12 F.Supp.2d at 938 n. 5. [FN8]

FN8. In addressing the President's objections to the unsealing of the transcript of his deposition, this Court stated in footnote five as follows: "Although the Court has concerns about the nature of the President's January 17th, 1998 deposition testimony given his recent public statements, the Court makes no findings at this time regarding whether the President may be in contempt."

On September 9, 1998, the Independent Counsel, having concluded there was substantial and credible information that the President committed acts that may constitute grounds for impeachment, submitted his findings from his investigation of the Lewinsky matter to the United States House of Representatives

pursuant to 28 U.S.C. § 595(c). The House of Representatives thereupon commenced impeachment proceedings, ultimately passing two Articles of Impeachment against the President, one alleging perjury in his August 17th testimony before the grand jury and the other alleging obstruction of justice in this civil case. The matter then proceeded to trial in the United States Senate.

On November 13, 1998, while the impeachment proceedings were taking place in the House of Representatives, the plaintiff reached an out-of court settlement for $850,000.00 and withdrew her appeal of this Court's April 1st decision granting summary judgment to defendants. *See Jones v. Clinton*, 161 F.3d 528 (8th Cir.1998). Thereafter, on February 12, 1999, the Senate acquitted the President of both Articles of Impeachment.

Following the acquittal of the President, this Court held a telephone conference on February 16, 1999, to address the remaining issues before this Court, including the issue of attorney's fees and the issue of whether the President should be subject to contempt proceedings. *See* February 16, 1999 Order, at 2. [FN9] The Court explained to the parties that it had previously declined to address the issue of the President's contempt due to the fact that this case was on appeal at the time and Congress was conducting impeachment proceedings against the President. *See id.* at 3. [FN10] The Court explained that had this ***1124** Court's grant of summary judgment to defendants been reversed and the case remanded, there would have been available certain sanctions that are unavailable otherwise. *Id.* The Court further explained that even though this litigation begat the controversy that was the subject of the President's impeachment trial in the Senate, the interests protected by the contempt authority of the Court are significantly different from the interests protected by the impeachment process. *Id.* In essence, stated the Court, the contempt authority protects the integrity of a court's proceedings and provides a means of enforcement of its orders, while impeachment is a constitutional process in which the proper inquiry is the President's fitness to serve in office. *Id.* Given this distinction, the Court determined that it should defer to Congress and its constitutional duties prior to this Court addressing the President's conduct in this civil case.

FN9. On March 4, 1999, an agreement was reached as to allocation of the $850,000.00 settlement, thus rendering moot all issues concerning attorneys' fees. *See* March 4, 1999 Order.

FN10. After becoming aware of the President's possible contempt on August 17th, the Court learned through published reports that the House of Representatives may conduct proceedings to consider evidence of possible impeachable offenses against the President (proceedings of which in fact began on September 9th with the submission of the Independent Counsel's report to the House of Representatives). Those reports, and the fact that the matter was on appeal at the time, led to this Court's decision as stated in footnote five of the Court's September 1st Memorandum and Order to defer addressing at that time the matter of the President's contempt.

As the Court explained to the parties, however, it is now time to address the issue of the President's contempt as all other proceedings that heretofore have precluded this Court from addressing the issue have concluded. *Id.* [FN11] Accordingly, it is that issue to which the Court now turns.

FN11. The Court informed the parties that a member of the House Managers who prosecuted the impeachment trial against the President contacted the undersigned in early January of this year to let me know that he was considering calling me as a witness for the impeachment trial. I objected and was never subpoenaed or otherwise asked to testify. Later, a representative of the House Managers requested and, with my permission, received an affidavit concerning the President's deposition from my law clerk, Barry W. Ward, who attended the President's deposition. The Court allowed the parties an opportunity to request that I recuse from deciding the remaining issues in this case because of the House Manager's contact with me or because of Mr. Ward's affidavit, but none did so.

II.

[2] The threshold question in this matter is whether a President of the United States can be held in civil

contempt of court and thereby sanctioned. Although federal courts possess the authority to impose sanctions for civil contempt pursuant to the Federal Rules of Civil Procedure and their inherent authority, *see* Fed.R.Civ.P. 37(b)(2) (providing that a court may enter an order treating as a contempt of court the failure of a party to obey the court's orders); *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991) (noting that the power to punish for contempts is inherent in all courts), no court has ever held a President in contempt of court. *See Franklin v. Massachusetts*, 505 U.S. 788, 827, 112 S.Ct. 2767, 120 L.Ed.2d 636 (1992) (Scalia, J., concurring). *See also United States v. Nixon*, 418 U.S. 683, 692, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974) (noting that the issue of whether a President can be cited for contempt could engender protracted litigation). Nevertheless, this Court has considered the matter and finds no constitutional barrier to holding the President in civil contempt of court in this case and imposing sanctions.

This lawsuit involved private actions allegedly taken by the President before his term of office began, and the contumacious conduct on the part of the President was undertaken in his role as a litigant in a civil case and did not relate to his duties as President. Both the Court of Appeals for the Eighth Circuit and the Supreme Court held in this case that the Constitution does not place the President's unofficial conduct beyond judicial scrutiny. In so ruling, the Court of Appeals specifically rejected the President's argument that "because a federal court will control the litigation, the Third Branch necessarily will interfere with the Executive Branch through the court's scheduling orders *and its powers to issue contempt citations and sanctions.* " *Jones v. Clinton*, 72 F.3d at 1361 (emphasis added). Likewise, the Supreme Court explained that " '[it] is settled law that the separation-of-powers doctrine does not bar every exercise of jurisdiction over the President of the United States,' " ***1125** *Clinton v. Jones*, 520 U.S. at 705, 117 S.Ct. 1636 (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 753-54, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982)), and noted that "[i]f the judiciary may severely burden the Executive Branch by reviewing the legality of the President's official conduct, and if it may direct appropriate process to the President himself, it must follow that the federal courts have power to determine the legality of his unofficial conduct." *Id.*

[3][4] Although not expressly addressed by the Supreme Court, a necessary incident of the power to determine the legality of the President's unofficial conduct includes the power to address unofficial conduct which threatens the integrity of the proceedings before the court. The sanctioning provisions in the Federal Rules of Civil Procedure vest federal courts with the power to address conduct which threatens the integrity of the judicial process, *see, e.g.*, Fed.R.Civ.P. 11 (providing that sanctions may be appropriate where a claim is presented for an improper purpose) and 37 (sanctions for failure to cooperate with discovery), and the existence in the federal courts of an inherent power " 'necessary to the exercise of all others' " is likewise firmly established and "include[s] the ability to dismiss actions, assess attorneys' fees, and to impose monetary or other sanctions appropriate 'for conduct which abuses the judicial process.' " *Harlan v. Lewis*, 982 F.2d 1255, 1259 (8th Cir.) (quoting *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34, 3 L.Ed. 259 (1812); *Chambers*, 501 U.S. at 44-45, 111 S.Ct. 2123), *cert. denied*, 510 U.S. 828, 114 S.Ct. 94, 126 L.Ed.2d 61 (1993). *See also Spallone v. United States*, 493 U.S. 265, 276, 110 S.Ct. 625, 107 L.Ed.2d 644 (1990) (noting the axiom that courts have inherent power to enforce compliance with their lawful orders through civil contempt).

[5] Certainly the Court recognizes that significant constitutional issues would arise were this Court to impose sanctions against the President that impaired his decision-making or otherwise impaired him in the performance of his official duties. *See Clinton v. Jones*, 520 U.S. at 708, 117 S.Ct. 1636. No such sanctions will be imposed, however. Throughout the history of this case, this Court has attempted to apply the law to the President in the same manner as it would apply the law to any other litigant, keeping in mind the "high respect that is owed to the office of the Chief Executive" and the Supreme Court's directive that such respect "inform the conduct of the entire proceeding...." *See id.* at 707, 117 S.Ct. 1636. In that regard, this Court will not impose greater sanctions against the President for his contumacious conduct in this case than would be imposed against any other litigant and member of the bar who engaged in similar misconduct. Moreover, this Court is aware that it is obliged to use the least possible power adequate to the end proposed in selecting contempt sanctions, *see Spallone*, 493 U.S. at 276, 110 S.Ct. 625, and will base the imposition of sanctions on a principle of proportionality, recognizing that the President's contumacious conduct occurred in a case that was both dismissed on summary judgment as lacking in merit and in which the plaintiff was made whole, having agreed to a settlement in excess of that prayed for in her

complaint.

[6][7][8] In sum, the Court finds that the power to determine the legality of the President's unofficial conduct includes with it the power to issue civil contempt citations and impose sanctions for his unofficial conduct which abuses the judicial process. [FN12] That established, the Court now turns to the central issue of the President's contempt.

> FN12. Every district court "has the power to conduct an independent investigation in order to determine whether it has been the victim of fraud." *Chambers*, 501 U.S. at 44, 111 S.Ct. 2123. Although this civil action has been terminated, "[a] court may make an adjudication of contempt and impose a contempt sanction even after the action in which the contempt arose has been terminated." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990). In addition, a court generally may act *sua sponte* in imposing sanctions. *Chambers*, 501 U.S. at 42 n. 8, 111 S.Ct. 2123.

A.

[9][10][11] As noted earlier, a federal district court has two principal sources of authority for finding a party in civil contempt of its discovery orders: Fed.R.Civ.P. 37(b)(2) and the court's inherent power. *See, e.g.*, ***1126***Webb v. District of Columbia*, 146 F.3d 964, 971 (D.C.Cir.1998); *Jones v. Thompson*, 996 F.2d 261, 264 (10th Cir.1993); *Cobell v. Babbitt*, 37 F.Supp.2d 6, 9 (D.D.C.1999). Pursuant to Rule 37(b)(2), a court may hold a party in contempt of court for failing to obey an order to provide discovery and may impose several specific, nonexclusive sanctions to address such misconduct, "the parameters of the available measures being 'such orders in regard to the failure as are just.' " *Cobell*, 37 F.Supp.2d at 9-10 (quoting Fed.R.Civ.P. 37(b)(2)). However, when rules alone do not provide courts with sufficient authority to protect their integrity and prevent abuses of the judicial process, the inherent power fills the gap. *Shepherd v. American Broadcasting Companies, Inc.*, 62 F.3d 1469, 1474 (D.C.Cir.1995) (citing *Chambers*, 501 U.S. at 46, 111 S.Ct. 2123). In this regard, a court has the "inherent power to protect [its] integrity and prevent abuses of the judicial process" by holding a party in contempt and imposing sanctions for violations of the court's orders. *Cobell*, 37 F.Supp.2d at 9 (quoting *Webb*, 146 F.3d at 971). When the source of the civil contempt is a failure to comply with a discovery order, the analysis and available remedies under Fed.R.Civ.P. 37 and the court's inherent power are essentially the same. *Id.* at 9-10. *Cf. Dillon v. Nissan Motor Corp.*, 986 F.2d 263, 268-69 (8th Cir.1993) (noting the comparability of sanctions under Fed.R.Civ.P. 37 and sanctions under the court's inherent power); *Gates Rubber Co. v. Bando Chem. Ind., Ltd.*, 167 F.R.D. 90, 107 (D.Co.1996) (noting that "Rule 37 and the inherent powers of the court may be different routes by which to reach a result, but the analysis of the criteria along the way can be exactly the same"). Two requirements must be met before a party may be held in civil contempt: the court must have fashioned an Order that is clear and reasonably specific, and the party must have violated that Order. *Cobell*, 37 F.Supp.2d at 9 (citations omitted). Generally, these two requirements must be shown by clear and convincing evidence. *Id.* Although these requirements apply whether the court is proceeding under Fed.R.Civ.P. 37 or its inherent power, *see id.* a court ordinarily should turn to its inherent powers only as a secondary measure when a discovery order has been violated. *Id.* at 10. *See also Chambers*, 501 U.S. at 50, 111 S.Ct. 2123 (noting that "when there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the Rules, the court ordinarily should rely on the Rules rather than the inherent power"). Accordingly, this Court addresses the President's contumacious conduct under Fed.R.Civ.P. 37(b)(2), finding that rule sufficient in its scope to redress the abuse of the judicial process that occurred in this case.

1.

Fed.R.Civ.P. 37(b)(2) sets forth a broad range of sanctions that a district court may impose upon parties for their failure to comply with the court's discovery orders. The Rule provides that if a party fails to obey an order to provide or permit discovery, the court "may make such orders in regard to the failure as are just" and, among others, impose the following sanctions: (1) the court may order that the matters regarding which the order was made or any other designated facts be taken as established for the purposes of the action in accordance with the claim of the party obtaining the order; (2) the court may refuse to allow the disobedient party to support or oppose designated claims or defenses, or prohibit that party from introducing designated matters in evidence; (3) the court may strike any pleadings or

parts thereof, stay further proceedings until the order is obeyed, dismiss the action or proceeding or any part thereof, or render a judgment of default against the disobedient party; and (4) the court may, in lieu of any of the foregoing sanctions or in addition thereto, enter an order treating as a contempt of court the failure of the party to obey the court's orders. Fed.R.Civ.P. 37(b)(2). In addition to those sanctions, the Rule provides:

> In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order ... to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially ***1127** justified or that other circumstances make an award of expenses unjust.

Fed.R.Civ.P. 37(b)(2).

a.

[12][13][14] On two separate occasions, this Court ruled in clear and reasonably specific terms that plaintiff was entitled to information regarding any individuals with whom the President had sexual relations or proposed or sought to have sexual relations and who were during the relevant time frame state or federal employees. *See* December 11, 1997 Order, at 3; Pres. Depo. at 53-55, 66, 78. [FN13] Notwithstanding these Orders, the record demonstrates by clear and convincing evidence that the President responded to plaintiff's questions by giving false, misleading and evasive answers that were designed to obstruct the judicial process. The President acknowledged as much in his public admission that he "misled people" because, among other things, the questions posed to him "were being asked in a politically inspired lawsuit, which has since been dismissed." Although there are a number of aspects of the President's conduct in this case that might be characterized as contemptuous, the Court addresses at this time only those matters which no reasonable person would seriously dispute were in violation of this Court's discovery Orders and which do not require a hearing, namely the President's sworn statements concerning whether he and Ms. Lewinsky had ever been alone together and whether he had ever engaged in sexual relations with Ms. Lewinsky. [FN14]

FN13. As a general matter, a production order is needed to trigger Rule 37(b). *See, e.g., Shepherd,* 62 F.3d at 1474; *Kropp v. Ziebarth,* 557 F.2d 142, 146 n. 7 (8th Cir.1977). Here, the Court's December 11th Order ruling on plaintiff's motion to compel and addressing aspects of the President's deposition constitutes a production order within the meaning of Rule 37(b), as does the Court's oral ruling at the President's deposition that the Lewinsky matter was, consistent with the December 11th Order, a proper subject of inquiry, and that the President was required to answer such questions from plaintiff's counsel. *Cf. Jones v. Uris Sales Corp.,* 373 F.2d 644, 647-48 (2nd Cir.1967) (proceedings before district court during which the judge issued an oral order requiring compliance with the subpoena provided a proper basis for Rule 37(b)(2) sanction).

FN14. Other possible contumacious conduct on the part of the President that the Court does not address at this time includes his possible violation of this Court's admonition not to discuss the deposition with anyone. At the conclusion of the President's deposition, the Court stated as follows: "Before he leaves, I want to remind him, and everyone else in the room, that this case is subject to a Protective Order ... and therefore all parties present, including Secret Service agents, videographers, court reporters and the witness are not to say anything whatsoever about the questions they were asked, the substance of the deposition, the length of it, objections, recess, any details, whether the President did well or did not do well, whether he is credible or not credible, [or] whether he admitted or denied any specific allegations...." Pres. Depo. at 212-13. This admonition was an oral reiteration of the Court's October 30th Confidentiality Order on Consent of all Parties and constituted an expansion of the Order to persons present at the deposition who would otherwise not have been subject to its provisions. While the President may have violated the Confidentiality Order, *see, e.g.,* Pres. GJ Test. at 54-58 (wherein the President testified that he approached his secretary the day after the deposition in order to ascertain information regarding some of the questions that were asked of him by plaintiff's counsel), the record in this case suggests that there were violations of the Confidentiality Order attributable to other individuals within the jurisdiction of

this Court as well. Ascertaining whether the President or other individuals violated the Confidentiality Order--either with respect to the deposition or otherwise--would require hearings and the taking of evidence. For reasons to be stated, the Court determines that such hearings are not in the best interests of the President or this Court. *See* Section II(B), *infra.*

i.

At his January 17th deposition, the President responded to a series of questions regarding whether he and Ms. Lewinsky had ever been alone together by maintaining that he could not recall being alone with her. The President testified as follows:

Q. Mr. President, before the break, we were talking about Monica Lewinsky. At any time were you and Monica Lewinsky together alone in the Oval Office?

A. I don't recall, but as I said, when she worked at the legislative affairs office, they always had somebody there on the weekends. I typically worked some on the weekends. Sometimes they'd bring me things on the weekends. She--it seems to me she brought things to me once or twice on the weekends. In that case, whatever ***1128** time she would be in there, drop it off, exchange a few words and go, she was there. I don't have any specific recollections of what the issues were, what was going on, but when the Congress is there, we're working all the time, and typically I would do some work on one of the days of the weekends in the afternoon.

Q. So I understand, your testimony is that it was possible, then, that you were alone with her, but you have no specific recollection of that ever happening?

A. Yes, that's correct. It's possible that she, in, while she was working there, brought something to me and that at the time she brought it to me, she was the only person there. That's possible.

* * * * * *

Q. Do you ever recall walking with Monica Lewinsky down the hallway from the Oval Office to your private kitchen there in the White House?

A.... [M]y recollection is that, that at some point during the government shutdown, when Ms. Lewinsky was still an intern but was working the chief staff's office because all the employees had to go home, that she was back there with a pizza that she brought to me and to others. I do not believe she was there alone, however. I don't think she was. And my recollection is that on a couple of occasions after that she was there but my secretary, Betty Currie, was there with her. She and Betty are friends. That's my, that's my recollection. And I have no other recollection of that.

* * * * * *

Q. At any time were you and Monica Lewinsky alone in the hallway between the Oval office and this kitchen area?

A. I don't believe so, unless we were walking back to the back dining room with the pizza. I just, I don't remember. I don't believe we were alone in the hallway, no.

* * * * * *

Q. At any time have you and Monica Lewinsky ever been alone together in any room in the White House?

A. I think I testified to that earlier. I think that there is a, it is--I have no specific recollection, but it seems to me that she was on duty on a couple of occasions working for the legislative affairs office and brought me some things to sign, something on the weekend. That's--I have a general memory of that.

Pres. Depo. at 52-53, 56-59.

At his August 17th appearance before the grand jury, the President directly contradicted his deposition testimony by acknowledging that he had indeed been alone with Ms. Lewinsky on a number of occasions during which they engaged in "inappropriate intimate contact." Pres. GJ Test. at 9-10. He stated he also was alone with her "from time to time" when there was no "improper contact" occurring. *Id.* at 134. The President began his testimony by reading a statement which reads in part as follows:

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 17th, 1998 deposition. But they did involve inappropriate intimate contact. These inappropriate encounters ended, at my insistence, in early 1997.

Id. at 9-10. The President then testified as follows in response to questions regarding whether he and Ms. Lewinsky had ever been alone together:

Q. Let me ask you, Mr. President, you indicate in your statement that you were alone with Ms. Lewinsky. Is that right?

A. Yes, sir.
Q. How many times were you alone with Ms. Lewinsky?
A. Let me begin with the correct answer. I don't know for sure. But if you would like me to give an educated guess, I will do that, but I do not know for sure. And I will tell you what I think, based on what I remember. But I can't be held to a specific time, because I don't have records of all of it.
Q. How many times do you think?
A. Well, there are two different periods here. There's the period when she worked in the White House until April of '96. And ***1129** then there's the period when she came back to visit me from February of '97 until late December '97.
Based on our records--let's start with the records, where we have the best records and the closest in time. Based on our records, between February and December, it appears to me that at least I could have seen her approximately nine times. Although I do not believe I saw her quite that many times, at least it could have happened.
There were--we think there were nine or 10 times when she was in, in the White House when I was in the Oval Office when I could have seen her. I do not believe I saw her that many times, but I could have. * * * I remember specifically, I have a specific recollection of two times. I don't remember when they were, but I remember twice when, on Sunday afternoon, she brought papers down to me, stayed, and we were alone.
And I am frankly quite sure--although I have no specific memory, I am quite sure there were a couple of more times, probably two times more, three times more. That's what I would say. That's what I can remember. But I do not remember when they were, or at what time of day they were, or what the facts were. But I have a general memory that would say I certainly saw her more than twice during that period between January and April of 1996, when she worked there.

Id. at 30-32. In addition, the President recalled a specific meeting on December 28, 1997, less than three weeks prior to his January 17th deposition, at which he and Ms. Lewinsky were alone together. *Id.* at 34. The President went on to acknowledge that he tried to conceal his "inappropriate intimate relationship" with Ms. Lewinsky by not telling anyone about the relationship and by "do[ing] it where nobody else was looking at it," stating that he would have to be an "exhibitionist not to have tried to exclude everyone else." *Id.* at 38, 54. The President testified as follows in response to a question regarding how many times that occurred:

Well, if you go back to my statement, I remember there were a few times in '96, I can't say with any certainty. There was once in early '97. After she left the White House, I do not believe I ever had any inappropriate contact with her in the rest of '96. There was one occasion in '97 when, regrettably, that we were alone together for a few minutes, I think about 20 minutes, and there was inappropriate contact. And after that, to the best of my memory and belief, it did not occur again.

Id. at 38-39.

ii.

With respect to whether he and Ms. Lewinsky had engaged in sexual relations, the President testified at his January 17th deposition as follows:

Q. Did you have an extramarital sexual affair with Monica Lewinsky?
A. No.
Q. If she told someone that she had a sexual affair with you beginning in November of 1995, would that be a lie?
A. It's certainly not the truth. It would not be the truth.
Q. I think I used the term "sexual affair." 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?
Mr. Bennett: I object because I don't know that he can remember -
The Court: Well, it's real short. He can--I will permit the question and you may show the witness definition number one.
A. I have never had sexual relations with Monica Lewinsky. I've never had an affair with her.

Pres. Depo. at 78.

The President confirmed these denials in response to questioning from his attorney regarding Ms. Lewinsky's affidavit and whether he and Ms. Lewinsky ever had a "sexual relationship":

Q. In paragraph eight of her affidavit, she says this, "I have never had a sexual relationship with the President, he did not propose that we have a sexual relationship, he did not offer me employment or other benefits in exchange for a sexual relationship, he did not deny me employment or other benefits for rejecting a sexual relationship." ***1130** Is that a true and accurate statement as far as you know it?
A. That is absolutely true.

Id. at 204.

Consistent with his denial at his deposition of a sexual relationship with Ms. Lewinsky, the President

had earlier answered "None" in response to plaintiff's Interrogatory No. 10, which stated as follows:

> Please state the name, address, and telephone number of each and every [federal employee] with whom you had sexual relations when you [were] ... President of the United States.

See Pres. Clinton's Resp. to Pl.'s Second Set of Int. at 5; Pres. Clinton's Supp. Resp. to Pl.'s Second Set of Int. at 2. As previously noted, this interrogatory was answered without regard to a formal definition of the term "sexual relations" after this Court had entered its December 11th Order ruling that plaintiff was entitled to such information.

At his August 17th grand jury appearance, the President directly contradicted his deposition testimony by acknowledging "inappropriate intimate contact" with Ms. Lewinsky on numerous occasions. Pres. GJ Test. at 9-10, 38-39, 54. When asked by a grand juror what he meant by "inappropriate contact," the President stated, "What I meant was, and what they can infer that I meant was, that I did things that were--when I was alone with her, that were inappropriate and wrong." *Id.* at 92-93. The President repeatedly refused to provide answers to questions regarding specific sexual activity between himself and Ms. Lewinsky, instead referring to his statement acknowledging "inappropriate intimate contact" and stating that "sexual relations" as defined by himself and "most ordinary Americans" means, for the most part, only intercourse. *Id.* at 12, 22-24, 92-94, 102-03, 110-11, 139, 168. Nevertheless, the President, while claiming that he did not engage in intercourse with Ms. Lewinsky and did not engage in any other contact with her that would fall within the definition of "sexual relations" used at his deposition, acknowledged that the nature of his "inappropriate intimate contact" with Ms. Lewinsky was such that he would have been an "exhibitionist" had it been viewed by others. *Id.* at 10, 12, 54, 96. The President went on to state that he did not believe he violated the definition of sexual relations he was given "by directly touching those parts of her body with the intent to arouse or gratify." *Id.* at 139, 168.

b.

It is difficult to construe the President's sworn statements in this civil lawsuit concerning his relationship with Ms. Lewinsky as anything other than a willful refusal to obey this Court's discovery Orders. Given the President's admission that he was misleading with regard to the questions being posed to him and the clarity with which his falsehoods are revealed by the record, [FN15] there is no need to engage in an extended analysis of the President's sworn statements in this lawsuit. Simply put, the President's deposition testimony regarding whether he had ever been alone with Ms. Lewinsky was intentionally false, and his statements regarding whether he had ever engaged in sexual relations with Ms. Lewinsky likewise were intentionally false, notwithstanding tortured definitions and interpretations of the term "sexual relations." [FN16]

FN15. Indeed, even though the President's testimony at his civil deposition was entirely consistent with Ms. Lewinsky's affidavit denying "sexual relations" between herself and the President, the President's attorney later notified this Court pursuant to his professional responsibility that portions of Ms. Lewinsky's affidavit were reported to be "misleading and not true" and that this Court should not rely on Ms. Lewinsky's affidavit or remarks of counsel characterizing that affidavit. *See* Letter of September 30, 1998. The President's testimony at his deposition that Ms. Lewinsky's denial in her affidavit of a "sexual relationship" between them was "absolutely true" likewise was "misleading and not true."

FN16. The President seemed to accept OIC's characterization of his improper contact with Ms. Lewinsky as "some kind of sex" and as a "physically intimate" relationship. Pres. GJ Test. at 123, 136. Although the President did not disclose any specific sexual acts between himself and Ms. Lewinsky, he did state that oral sex performed by Ms. Lewinsky on himself would not constitute "sexual relations" as that term was defined by plaintiff at his deposition. *Id.* at 93, 100, 102, 104- 05, 151-52, 168. It appears the President is asserting that Ms. Lewinsky could be having sex with him while, at the same time, he was not having sex with her.

Certainly the President's aggravation with what he considered a "politically inspired ***1131** lawsuit" may well have been justified, although the Court makes no findings in that regard. Even assuming that to be so, however, his recourse for the filing of an improper claim against him was to move for the imposition of sanctions against plaintiff. *See, e.g., Clinton v. Jones*, 520 U.S. at 708-09, 117 S.Ct. 1636 (noting the

availability of sanctions for litigation directed at the President in his unofficial capacity for purposes of political gain or harassment). The President could, for example, have moved for sanctions pursuant to Fed.R.Civ.P. 11 if, as he intimated in his address to the Nation, he was convinced that plaintiff's lawsuit was presented for an improper purpose and included claims "based on 'allegations and other factual contentions [lacking] evidentiary support' or unlikely to prove well-grounded after reasonable investigation." *Id.* at 709 n. 42, 117 S.Ct. 1636 (quoting Fed.R.Civ.P. 11(b)(1), (3)). The President never challenged the legitimacy of plaintiff's lawsuit by filing a motion pursuant to Rule 11, however, and it simply is not acceptable to employ deceptions and falsehoods in an attempt to obstruct the judicial process, understandable as his aggravation with plaintiff's lawsuit may have been. "A lawsuit is not a contest in concealment, and the discovery process was established so that 'either party may compel the other to disgorge whatever facts he has in his possession.' " *Southern Ry. Co. v. Lanham,* 403 F.2d 119, 130 (5th Cir.1968) (quoting *Hickman v. Taylor,* 329 U.S. 495, 507, 67 S.Ct. 385, 91 L.Ed. 451 (1947)).

In sum, the record leaves no doubt that the President violated this Court's discovery Orders regarding disclosure of information deemed by this Court to be relevant to plaintiff's lawsuit. The Court therefore adjudges the President to be in civil contempt of court pursuant to Fed.R.Civ.P. 37(b)(2).

2.

[15] The Court now turns to the issue of appropriate sanctions. Several of the sanctions contemplated by Fed.R.Civ.P. 37(b)(2) are unavailable to this Court as the underlying lawsuit has been terminated. The Court cannot, for example, order that the matters upon which the President gave false statements be taken as established, nor can the Court render a default judgment against the President, both of which the Court would have considered had this Court's grant of summary judgment to defendants been reversed and remanded. Moreover, as the Court earlier noted, the determination of appropriate sanctions must take into account that this case was dismissed on summary judgment as lacking in merit--a decision that would not have changed even had the President been truthful with respect to his relationship with Ms. Lewinsky [FN17]--and that plaintiff was made whole, having settled this case for an amount in excess of that prayed for in her complaint. Nevertheless, the President's contumacious conduct in this case, coming as it did from a member of the bar and the chief law enforcement officer of this Nation, was without justification and undermined the integrity of the judicial system. "[O]ur adversary system depends on a most jealous safeguarding of truth and candor," *United States v. Shaffer Equip. Co.,* 11 F.3d 450, 463 (4th Cir.1993), and "[t]he system can provide no harbor for clever devises to divert the search, mislead opposing counsel or the court, or cover up that which is necessary for justice in the end." *Id.* at 457-58. Sanctions must be imposed, not only to redress the misconduct of the President in this case, but to deter others who, having observed the President's televised address to the Nation in which his defiance of this Court's discovery Orders was revealed, might themselves consider emulating the President of the United States by willfully violating discovery orders of this and other courts, thereby engaging in conduct that undermines the integrity of the judicial system. *See National Hockey League v. Metropolitan Hockey Club, Inc.,* 427 U.S. 639, 643, 96 S.Ct. 2778, 49 L.Ed.2d 747 (1976) (noting that "other parties to other lawsuits would feel freer than we think Rule 37 contemplates they should feel to ***1132** flout other discovery orders of other district courts" if contumacious conduct was left unaddressed) (per curiam); *Roadway Express v. Piper,* 447 U.S. 752, 763-64, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980) (noting that Rule 37 sanctions must be applied diligently, both to penalize those whose conduct warrants sanctions and to deter those who might be tempted to sanctionable conduct in the absence of such a deterrent). Accordingly, the Court imposes the following sanctions:

> FN17. The Court noted that whether other women may have been subjected to workplace harassment does not change the fact that plaintiff has failed to demonstrate that she "*herself* was the victim of alleged *quid pro quo* or hostile work environment sexual harassment, [that] the President and Ferguson conspired to deprive *her* of her civil rights, or [that] *she* suffered emotional distress so severe in nature that no reasonable person could be expected to endure it." *Jones v. Clinton,* 990 F.Supp. at 678- 79 (emphasis in original).

First, the President shall pay plaintiff any reasonable expenses, including attorney's fees, caused by his willful failure to obey this Court's discovery Orders.

Plaintiff's former counsel are directed to submit to this Court a detailed statement of any expenses and attorney's fees incurred in connection with this matter within twenty (20) days of the date of entry of this Memorandum Opinion and Order.

Second, the President shall reimburse this Court its expenses in traveling to Washington, D.C. at his request to preside over his tainted deposition. The Court therefore will direct that the President deposit into the registry of this Court the sum of $1,202.00, the total expenses incurred by this Court in traveling to Washington, D.C. [FN18]

FN18. The undersigned and Mr. Ward departed Little Rock, Arkansas for Washington, D.C. on January 16, 1998, and returned to Little Rock on January 18, 1998. Total expenses were incurred in accordance with the rules and regulations set forth in the *Guide to Judiciary Policies and Procedures,* Volumes I and III. In this respect, air fare was $216.00 per ticket and subsistence was $374.00 each. Remaining expenses totaled $ 22.00.

[16][17][18] In addition, the Court will refer this matter to the Arkansas Supreme Court's Committee on Professional Conduct for review and any disciplinary action it deems appropriate for the President's possible violation of the Model Rules of Professional Conduct. [FN19] Relevant to this case, Rule 8.4 of the Model Rules provides that it is professional misconduct for a lawyer to, among other things, "engage in conduct involving dishonesty, fraud, deceit or misrepresentation," or to "engage in conduct that is prejudicial to the administration of justice." The President's conduct as discussed previously arguably falls within the rubric of Rule 8.4 and involves matters that the Committee on Professional Conduct may deem appropriate for disciplinary action. [FN20]

FN19. The Committee on Professional Conduct acts as an arm of the Arkansas Supreme Court in matters relating to the supervision and licensing of Arkansas attorneys, of which the President is one, and that Court has exclusive jurisdiction over the conduct of Arkansas attorneys and has the power to make rules regulating the practice of law and the professional conduct of attorneys of law. *See* Neal v. Wilson, 920 F.Supp. 976, 987- 88 (W.D.Ark.1996), *aff'd,* 112 F.3d 351 (8th Cir.1997). In that regard, the Arkansas Supreme Court has adopted the American Bar Association's Model Rules of Professional Conduct as the State of Arkansas's code of professional responsibility. *See In re Arkansas Bar Ass'n,* 287 Ark. 495, 702 S.W.2d 326 (1985).

FN20. In referring this matter to the Committee on Professional Conduct, this Court does not thereby relinquish jurisdiction to address the matter itself and issue sanctions. Rather than having been displaced, the authority of this Court to sanction attorneys is independent of, and in addition to, the power of review possessed by the Committee on Professional Conduct. *See* Harlan v. Lewis, 982 F.2d at 1261 (noting that "[a] district judge must have the power to deal with conduct of attorneys in litigation without delegating this responsibility to state disciplinary mechanisms," and that "[s]tate disciplinary authorities may act in such cases if they choose, but this does not limit the power or responsibility of the district court").

B.

[19] In addressing only the President's sworn statements concerning his relationship with Ms. Lewinsky, this Court is fully aware that the President may have engaged in other contumacious conduct warranting the imposition of sanctions. *See* n. 13, *supra.* The Court determines, however, that this matter can be summarily addressed by focusing on those specific instances of the President's misconduct with which there is no factual dispute and which primarily occurred directly before the Court. While hearings might have been necessary were there an issue regarding the President's willfulness in failing to obey the Court's discovery Orders, the circumstances surrounding the President's failure to disclose his relationship with Ms. Lewinsky as ordered by this Court are undisputed and contained within the record. The President has essentially admitted that he intended to mislead plaintiff in her efforts *1133 at gaining information deemed by this Court to be relevant, and hearings would not assist the Court in addressing the President's misconduct

regarding his failure to obey this Court's discovery Orders. Thus, no possible prejudice to the President can result from this Court utilizing summary procedures rather than convening hearings. Indeed, it is in the best interests of the President and this Court that this matter be expeditiously resolved. Hearings to address other possible instances of misconduct on the part of the President could possibly be quite extensive and would require the taking of evidence, including, if necessary, testimony from witnesses.

This is not to say that the Court considers other instances of possible Presidential misconduct in this case unworthy of the Court's attention. In fact, the Court fully considered addressing all of the President's possible misconduct pursuant to the criminal contempt provisions set forth in Fed.R.Crim.P. 42, but determines that such action is not necessary at this time for two primary reasons. [FN21]

> FN21. Under 18 U.S.C. § 401, federal courts possess the power to impose sanctions for criminal contempt committed in or near the presence of the court. When invoking this power, courts must follow one of two procedures set forth in Fed.R.Crim.P. 42. Pursuant to Rule 42(a), a court may punish direct contempt, *i.e.,* that contempt which occurs within the "actual presence" of the court, in a summary fashion. For conduct beyond the scope of Rule 42(a), such as indirect contempts that occur out of court, Rule 42(b) requires such other criminal contempts to be prosecuted upon notice and a hearing. *See Schleper v. Ford Motor Co.,* 585 F.2d 1367, 1372 (8th Cir.1978).

First, the summary adjudication procedures delineated in Rule 42(a) are most likely inapplicable in this case since the power summarily to convict and punish for contempt of court under that rule generally "rests on the proposition that a hearing to determine guilt of contempt is not necessary when contumacious conduct occurs in the actual presence of a judge who observes it, and when immediate action is required to preserve order in the proceedings and appropriate respect for the tribunal." *Smith v. Smith,* 145 F.3d 335, 342- 43 (5th Cir.1998) (quoting *In re Chaplain,* 621 F.2d 1272, 1275 (4th Cir.), *cert. denied,* 449 U.S. 834, 101 S.Ct. 106, 66 L.Ed.2d 40 (1980)). Here, the Court was not aware of any of the instances of the President's possible misconduct until well after this case had been dismissed on summary judgment, and immediate action was not required to preserve order in the proceedings. *See International Union, United Mine Workers of Am. v. Bagwell,* 512 U.S. 821, 832-33, 114 S.Ct. 2552, 129 L.Ed.2d 642 (1994) (noting that "[s]ummary adjudication becomes less justifiable once a court leaves the realm of immediately sanctioned, petty direct contempts," and that "[if] a court delays punishing a direct contempt until the completion of trial, for example, due process requires that the contemnor's rights to notice and a hearing be respected").

Second, resolving the matter expeditiously and without hearings pursuant to Rule 42(b) is in the best interests of both the President and this Court. Were the Court to delve into conduct which arguably was contumacious but which is not fully apparent from the record, this Court, as previously noted, would be required to hold hearings and take evidence, including, if necessary, testimony from witnesses. Such hearings could possibly last several weeks and might require referral of the matter to a prosecutor. *See United States v. Neal,* 101 F.3d 993, 997-98 (4th Cir.1996) (noting that when contumacious conduct occurs out of the presence of the court or does not interfere with ongoing proceedings immediately before the court, contempt power does not permit a judge to dispense with a prosecutor altogether and fill the role himself). Because much of the President's conduct has been or is being investigated by OIC, and in order to prevent any potential double jeopardy issues from arising, *see, e.g., United States v. Dixon,* 509 U.S. 688, 696, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993) (noting that protection of the double jeopardy clause applies to nonsummary criminal contempt prosecutions), this Court will forego proceeding under Fed.R.Crim.P. 42 and address the President's contempt by focusing on those undisputed matters that are capable of being summarily addressed pursuant to Fed.R.Civ.P. 37(b)(2). *See Bagwell,* 512 U.S. at 833, 114 S.Ct. 2552 (noting that certain indirect contempts are appropriate ***1134** for imposition through civil proceedings, including contempts impeding the courts ability to adjudicate the proceedings before it and those contempts involving discrete, readily ascertainable acts). [FN22]

> FN22. In electing to proceed under Fed.R.Civ.P. 37(b)(2), the Court also avoids any constitutional issues that might arise

from addressing the matter in a criminal context. As noted in Section II of this Memorandum Opinion and Order, the Supreme Court essentially resolved the question of whether a President can be cited for civil contempt by holding, in a *civil* proceeding, that the Constitution does not place the President's unofficial conduct beyond judicial scrutiny. *See Clinton v. Jones,* 520 U.S. at 705, 117 S.Ct. 1636. Criminal contempt, however, "is a *crime* in the ordinary sense," *see Bagwell,* 512 U.S. at 826, 114 S.Ct. 2552 (quoting *Bloom v. Illinois,* 391 U.S. 194, 201, 88 S.Ct. 1477, 20 L.Ed.2d 522 (1968)) (emphasis added), and the question of whether a President can be held in criminal contempt of court and subjected to criminal penalties raises constitutional issues not addressed by the Supreme Court in the *Jones* case. Such issues could engender protracted litigation, *see United States v. Nixon,* 418 U.S. at 692, 94 S.Ct. 3090, and consume the resources of both the President and this Court.

Nevertheless, the Court will convene a hearing at the request of the President should he desire an opportunity in which to demonstrate why he is not in civil contempt of court, why sanctions should not be imposed, or why the Court is otherwise in error in proceeding in the manner in which it has. In that regard, the Court will stay enforcement of this Memorandum Opinion and Order for thirty (30) days from the date of its entry in which to give the President an opportunity to request a hearing or file a notice of appeal. In addition, the Court will entertain any legitimate and reasonable requests from the President for extensions of time in which to address the matter. Should the President fail to request a hearing or file a notice of appeal within the time allowed, the Court will enter an Order setting forth the time and manner by which the President is to comply with the sanctions herein imposed. Should the President succeed in obtaining a hearing, however, whether at his request or by way of appeal, any interests in an expeditious resolution of this matter and in sparing the President and this Court the turmoil of evidentiary hearings will no longer be a consideration. Accordingly, the President is hereby put on notice that this Court will take evidence at any future hearings--including, if necessary, testimony from witnesses--on all matters concerning the President's conduct in this lawsuit which may warrant a finding of civil contempt. [FN23]

FN23. The scheduling of any hearings would, of course, be considerate to the President's schedule and his conducting the duties of his office. The Court is particularly mindful of the crisis in Yugoslavia and recognizes that the President must not be distracted in his attention to that situation or other issues of immense importance.

III.

The Court takes no pleasure whatsoever in holding this Nation's President in contempt of court and is acutely aware, as was the Supreme Court, that the President "occupies a unique office with powers and responsibilities so vast and important that the public interest demands that he devote his undivided time and attention to his public duties." *Clinton v. Jones,* 520 U.S. at 697, 117 S.Ct. 1636. As noted earlier, however, this Court has attempted throughout this case to apply the law to the President in the same manner as it would apply the law to any other litigant, keeping in mind the duties and status of the Presidency and the "high respect" that is to be accorded his office. *See Clinton v. Jones,* 520 U.S. at 707, 117 S.Ct. 1636. In that regard, there simply is no escaping the fact that the President deliberately violated this Court's discovery Orders and thereby undermined the integrity of the judicial system. Sanctions must be imposed, not only to redress the President's misconduct, but to deter others who might themselves consider emulating the President of the United States by engaging in misconduct that undermines the integrity of the judicial system. Accordingly, the Court adjudges the President to be in civil contempt of court pursuant to Fed.R.Civ.P. 37(b)(2) for his willful failure to obey this Court's discovery Orders and hereby orders the following:

1. The President shall pay plaintiff any reasonable expenses, including attorney's fees, caused by his willful failure to obey this Court's discovery Orders. Plaintiff's former counsel are directed to submit to this Court a detailed statement of any expenses and attorney's ***1135** fees incurred in connection with this matter within twenty (20) days of the date of entry of this Memorandum Opinion and Order.

2. The President shall deposit into the registry of this Court the sum of $ 1,202.00, the total expenses incurred by this Court in traveling to Washington, D.C. at the President's request to preside over his

January 17th deposition.

In addition, the Court will refer this matter to the Arkansas Supreme Court's Committee on Professional Conduct for review and any action it deems appropriate.

The Court will stay enforcement of this Memorandum Opinion and Order for thirty (30) days from the date of its entry in order to allow the President an opportunity to request a hearing or file a notice of appeal. Should the President fail to timely request a hearing or file a notice of appeal, the Court will enter an Order setting forth the time and manner by which the President is to comply with the sanctions herein imposed.

IT IS SO ORDERED this 12th day of April 1999.

36 F.Supp.2d 1118, 79 Fair Empl.Prac.Cas. (BNA) 1561

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C

Supreme Court of the United States

In the Matter of DISCIPLINE OF Bill CLINTON.

No. D-2270.

Oct. 1, 2001.

Bill Clinton, of New York, New York, is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

122 S.Ct. 36 (Mem), 534 U.S. 806, 151 L.Ed.2d 254, 1 Cal. Daily Op. Serv. 8542

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