Impeachment

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Memorandum **Office of the Independent Counsel**

To: All Attorneys Date: 8/31/98

From: Brett M. Kavanaugh

Subject: "Possible Grounds for an Impeachment" Section
(aka Charging Section; aka Specifications Section)

Attached is a new draft of the "grounds" section -- a name hatched by a small group at John Harvards last night. Those on the reading/editing teams should read it and give me comments as soon as possible **(by Monday night, if possible!!)**.

Based on the obvious need for it as well as some comments, I have done a front-to-back review to tighten it substantially, make it as internally consistent and coherent as possible, and (hopefully) make it persuasive and usable as a stand-alone document. (The one section left as before is the Willey count, so it is not attached to this memo.) The draft clearly is still a little rough in places. In addition, we just finished putting in changes right before circulating, so pardon any obvious typos. Finally, there are still a number of footnote and cite-checking-type things and formatting that need to be cleaned up. But we'll make it if everyone on the team moves quickly.

1. RR is working on the abuse of power count, and I plan to turn substantial attention to that today (Monday) as well. I would hope we could have something to everyone by Tuesday morning, but I need to consult with RR about that. Continued ideas about that are welcome.

2. This draft contains more analysis and argumentation than earlier iterations. That has been necessitated by, inter alia, Clinton's grand jury testimony. I want to avoid adverbs in the draft, but I am not there yet. If we could make this entire referral free of words ending in -ly, that would be a good thing. Please feel free to strike such words.

3. I separated what was count 3 into two separate counts. It simply was not logical as a single count, as some have pointed out to me.

4. Should the narrative section go before the "grounds"? Does that decision depend on what the executive summary looks like?

5. Willey. I still vote it out, especially (and I know I am a broken record) if Arkansas/825/Susan/WH Counsel abuse is not included, as seems likely. David Hale has convicted a sitting Governor, the Governor's two partners in a bankruptcy scheme, and the two former business partners of the President. Kathleen Willey hasn't convicted squat, nor could she.

Looting an S&L in the 1980's versus a he-said/she-said. An issue (Whitewater) that has nearly felled the President several times in the last six and ½ years versus an issue (Willey) that the President savaged and destroyed in 24 hours, never to be heard from again. Bottom line: We look unhinged to include Willey and include nothing from Madison/Arkansas/825/Susan/WH obstruction.

6. On the order of counts, a lot of tinkering could be done. Let me know.

7. Carefully consider the retrieval of gifts section. How best to do that? We cannot really say that Clinton encouraged the return because ML does not say. It is not quite there yet.

8. Does the use of the term conspiracy work? I like it because it is correct and it is a weighty term. I tried to capture it, while taking Jay's suggestion into account.

9. IS IT TOO GRAPHIC?

10. SHOULD IT BE MORE GRAPHIC (kidding)?

11. How's the tone, particularly in analysis sections?

12. Are we missing "grounds" that we should be including?

Monday
8/31/98 8:00AM

There is Substantial and Credible Information that President Clinton Committed Acts that May Constitute Grounds for an Impeachment

Introduction

President Clinton's actions in connection with Monica S. Lewinsky may constitute grounds for an impeachment. Substantial and credible information obtained by the Office of Independent Counsel (OIC) reveals a systematic effort by President Clinton to conceal evidence about Ms. Lewinsky in a sexual harassment lawsuit, Jones v. Clinton, in which the President was a defendant. The OIC's investigation has revealed the following:

1. There is substantial and credible information that President Clinton lied under oath in his civil case when he denied a sexual affair, a sexual relationship, or sexual relations with Monica Lewinsky.

2. There is substantial and credible information that President Clinton lied under oath to the grand jury about his sexual relationship with Ms. Lewinsky.

3. There is substantial and credible information that President Clinton lied and provided misleading testimony during in his civil deposition about the nature of his relationship with Ms. Lewinsky.

4. There is substantial and credible information that the President and Monica Lewinsky had a mutual understanding -- a conspiracy to obstruct justice, in criminal law terms -- that each would lie under oath in the Jones case and that Ms. Lewinsky would conceal gifts from the President that had been subpoenaed by Ms. Jones' attorneys. Ms. Lewinsky transferred some of those gifts to President Clinton's secretary, Betty Currie, who stored them in her home under her bed.

5. There is substantial and credible information that the President obstructed justice and tampered with a potential witness by attempting to influence the

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testimony of Betty Currie in the days after his civil deposition.

6. There is substantial and credible information that President Clinton endeavored to obstruct justice during the grand jury investigation. He refused to testify for seven months and simultaneously lied to senior White House aides with knowledge that they would relay the President's false statements to the grand jury and thereby deceive the grand jury.

7. There is substantial and credible information that the President abused his constitutional authority by having a secret sexual relationship with a White House intern, misleading the American people about that relationship, and then refusing to testify for seven months.

[8. Willey]

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I. There is substantial and credible information that President Clinton lied under oath in six sworn statements he made as a defendant in Jones v. Clinton in denying sexual activity with Monica Lewinsky.

(1) He denied that he had a "sexual relationship" with Monica Lewinsky.
(2) He denied that he had a "sexual affair" with Monica Lewinsky.
(3) He denied that he had "sexual relations" with Monica Lewinsky.
(4) He denied that he engaged in or caused contact with the genitalia of "any person" with an intent to arouse or gratify (in particular, oral sex performed on him by Monica Lewinsky).
(5) He denied that he had contact with the breasts of Monica Lewinsky with an intent to arouse or gratify.
(6) He denied that he made contact with the genitalia of Monica Lewinsky with an intent to arouse or gratify.

There also is substantial and credible information that the President allowed his private attorney, while in the President's presence and acting as the President's agent, to make a false statement to the United States District Judge presiding at his deposition. In particular, the President's attorney stated to Judge Susan Webber Wright that "there is absolutely no sex of any kind in any manner, shape or form" between the President and Ms. Lewinsky.

Introduction

On May 6, 1994, Paula Corbin Jones filed a federal civil rights lawsuit against President Clinton claiming, among other things, that the President had sexually harassed her. The lawsuit was based on an incident that, according to Ms. Jones, occurred on May 8, 1991, in a suite at the Excelsior Hotel in Little Rock. According to Ms. Jones, who was then an Arkansas state employee, Governor Clinton made an unwelcome sexual advance

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on her by asking her to perform oral sex on him.

Throughout the discovery process, Judge Susan Webber Wright ruled, over the President's objections, that Ms. Jones' lawyers could seek information about women with whom President Clinton had worked and allegedly had sexual activity. Judge Wright's rulings followed the prevailing law in sexual harassment cases: The defendant's sexual relationships with others in the workplace, including consensual relationships, are a standard subject of inquiry during the discovery process. Moreover, Judge Wright stated that she was following a "meticulous standard of materiality" in her rulings allowing such questioning.

At a hearing on January 12, 1998, Judge Wright required Ms. Jones to list potential trial witnesses. Ms. Jones' list included a "Jane Doe" named Monica Lewinsky, as well as other "Jane Does" (the "Jane Does" were primarily certain women who had worked with or had some other employment connection to President Clinton). Ms. Jones intended to call Monica Lewinsky as a "similar act" witness in support of her claim.[1]

On January 17, 1998, Ms. Jones' lawyers deposed President Clinton. United States District Judge Susan Webber Wright presided over the deposition. At the time of the President's deposition, the President and his attorneys knew, based on the witness list and the January 12 hearing, that the President was likely to receive questions about Ms. Lewinsky and the other

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[1] For a discussion of the procedural background to the Jones case, see Appendix, Tab __.

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"Jane Does." And the attorneys for Ms. Jones did in fact ask the President numerous questions about several "Jane Does," including Ms. Lewinsky.

At the outset of the deposition, the President swore an oath to tell the truth. Federal criminal law requires a witness testifying under oath to provide truthful answers. The failure to do so is a crime punishable by imprisonment and fine.[2] Ms. Jones' attorneys emphasized this point to the President at the outset of his deposition, stating to the President: "And your testimony is subject to the penalty of perjury; do you understand that, sir?" The President responded, "I do."[3]

A. Evidence that President Clinton Lied Under Oath During the Civil Case

1. President Clinton's Statements Under Oath About Monica Lewinsky

During pretrial discovery, Paula Jones' attorneys served the President with written interrogatories. One stated in relevant part as follows:

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

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[2] Section 1621 of Title 18 (perjury) imposes a penalty of imprisonment of not more than five years and a maximum fine of $250,000 for lying under oath in a court proceeding.

[3] Clinton 1/17/98 Depo. at 19. Under the federal perjury statutes, it is a crime to knowingly make a false, material statement under oath, including in any ancillary court proceeding. An "ancillary proceeding" includes a deposition in a civil case. United States v. McAfee, 8 F.3d 1010 (5th Cir. 1993); United States v. Scott, 682 F.2d 695, 698 (8th Cir. 1982).

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[were . . . President of the United States.[4]

For purposes of this interrogatory, the term "sexual relations" was undefined. On December 23, 1997, under penalty of perjury, President Clinton, through his attorneys, answered this interrogatory: "None."[5]

At the January 17, 1998, deposition of the President, Ms. Jones' attorneys asked the President specific questions about his possible sexual activity with Monica Lewinsky. The attorneys used various terms in their questions, including "sexual affair," "sexual relationship," and "sexual relations." The terms "sexual affair" and "sexual relationship" were not further defined. The term "sexual relations" was further defined for purposes of 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.[6]

When asked about his possible sexual activity with Ms. Lewinsky, President Clinton testified:

Q: Did you have an extramarital sexual affair

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[4] See Plaintiff's Second Set of Interrogatories, No. 10. Judge Wright limited the scope of this question so that it covered only women who were state or federal employees at the relevant times.

[5] See President Clinton's Supplemental Responses to Plaintiff's Second Set of Interrogatories (Dec. 23, 1997).

[6] Clinton 1/17/98 Depo., Exh. 1.

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with Monica Lewinsky?

WJC: No.

Q: If she told someone that she had a sexual affair with you beginning in November of 1995, would that be a lie?

WJC: 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:[7] I object because I don't know that he can remember --

Judge Wright: Well, it's real short. He can -- I will permit the question and you may show the witness definition number one.

WJC: I have never had sexual relations with Monica Lewinsky. I've never had an affair with her.[8]

President Clinton reiterated his denial of a sexual relationship with Ms. Lewinsky under questioning from his own attorney:

Q: In paragraph eight of [Ms. Lewinsky's] 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

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[7] Robert S. Bennett, counsel for President Clinton.

[8] Clinton 1/17/98 Depo. at 78.

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relationship, he did not deny me employment or other benefits for rejecting a sexual relationship." Is that a true and accurate statement as far as you know it?

WJC: That is absolutely true.[9]

2. Monica Lewinsky's Testimony

Monica Lewinsky testified under oath before the grand jury that beginning in November 1995, when she was a White House intern, she had a lengthy and involved relationship with the President. The relationship included substantial sexual activity. She testified in detail about 10 sexual encounters that involved genital contact and about two others that involved kissing but no direct genital contact. As explained in the narrative section of this referral, White House records corroborate Ms. Lewinsky's story to the extent that she was in the White House during each of these encounters, [one not?] and the President's movement logs confirm that he was in the Oval Office area during each of the encounters.

We describe the ten encounters here because they are necessary in assessing whether the President lied under oath -- both in his civil deposition (where he denied any sexual relationship at all) and in his grand jury testimony (where he denied any sexual contact with Ms. Lewinsky's breasts or genitalia). In reading the following descriptions, the President's denials under oath in his deposition and to the grand

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[9] Clinton 1/17/98 Depo. at 204. The full text of Ms. Lewinsky's affidavit is set forth in the Appendix, Exhibit __.

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jury should be kept firmly in mind. Unfortunately, the nature of the President's denials requires that the contrary evidence be set forth in graphic, even disconcerting, detail.

(i) Ms. Lewinsky testified that her first sexual contact with the President occurred on the evening of Wednesday, November 15, 1995, while she was still an intern at the White House. Two times that evening, the President invited Ms. Lewinsky to meet him in the Oval Office.[10] On the first occasion, the President and Ms. Lewinsky had their first romantic kiss. On the second, she performed oral sex on the President in the Oval Office study.[11] During this encounter, the President touched Ms. Lewinsky's naked breasts with his hands and his mouth.[12] In addition, the President put his hand down Ms. Lewinsky's pants and stimulated her genital area causing her to have an orgasm.[13]

(ii) Ms. Lewinsky testified that she met with the President again two days later on Friday, November 17, 1995. During that encounter, Ms. Lewinsky stated, she performed oral sex on the President in the private bathroom outside the Oval Office study. The President initiated the oral sex by unzipping his pants and exposing his genitals. Ms. Lewinsky understood the President's

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[10] Lewinsky 8/26/98 Depo. at 7.

[11] Ms. Lewinsky stated that the hallway outside the Oval Office study was more suitable because it had no windows. **Lewinsky ___ GJ at ___.**

[12] Lewinsky 8/26/98 Depo. at 8.

[13] Lewinsky 8/26/98 Depo. at 8, 21.

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actions to be a signal that he wanted oral sex performed on him.[14] The President also fondled Ms. Lewinsky's naked breasts with his hands and mouth.[15]

(iii) Ms. Lewinsky testified that she met with the President on New Year's Eve, Sunday, December 31, 1995, when the President invited her to the Oval Office.[16] Once there, the President lifted Ms. Lewinsky's sweater and fondled her naked breasts with his hands and with his mouth. She stated that she performed oral sex on the President in the hallway outside the Oval Office study.[17] After the sexual encounter, she saw the President masturbating into the bathroom sink.[18]

(iv) Monica Lewinsky testified that she performed oral sex on the President in the bathroom outside the Oval Office study during the late afternoon on Sunday, January 7, 1996. This President arranged this encounter by calling Ms. Lewinsky at home and invited her to visit that day in the White House.[19] On that occasion, the President and Ms. Lewinsky went into the bathroom adjacent to the hallway to the back study, and the President fondled her naked breasts with his hands and mouth. Although the President stated that he wanted to touch her genitals, she

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[14] Lewinsky 8/26/98 Depo. at 14.

[15] Id. at 20.

[16] Lewinsky 8/26/98 Depo. at 16.

[17] Id. at 17.

[18] Id. at 18.

[19] Id. at 18.

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stopped him.[20] Ms. Lewinsky orally stimulated the President's anus with her mouth and also performed oral sex on the President.[21]

(v) Ms. Lewinsky testified that she and the President had a sexual encounter on the afternoon of Sunday, January 21, 1996, after the President invited her to the Oval Office.[22] This was shortly after their first phone sex encounter, which occurred on January 16, 1996. A couple engages in phone sex when one or both parties masturbate while one or both parties talk in a sexually explicit manner) The President lifted Ms. Lewinsky's top and fondled her naked breasts.[23] When the President unzipped his pants and exposed his genitals, she performed oral sex on the President in the hallway outside the Oval Office study.[24]

(vi) Ms. Lewinsky testified that she and the President had sexual contact in the Oval Office study and in the hallway outside the study on the afternoon of Sunday, February 4, 1996. This encounter was initiated by the President calling Ms. Lewinsky and then agreeing to allow Ms. Lewinsky to visit him. At this encounter, the President removed Ms. Lewinsky's dress and bra and touched her naked breasts with his mouth and hands. He also stimulated her genitals, causing her to have an orgasm. The

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[20] Id. at 19.

[21] Id. at 20.

[22] Id. at 22.

[23] Id. at 25.

[24] Id. at 26.

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President also indicated through his actions that he wanted Ms. Lewinsky to orally stimulate his anus, which she did. Ms. Lewinsky also performed oral sex on the President.[25]

(vii) Ms. Lewinsky testified that she and the President had sexual contact in the hallway outside the Oval Office study during the late afternoon on Sunday, March 31, 1996. The President arranged this encounter by calling Ms. Lewinsky and inviting her to the Oval Office. This encounter did not include oral sex. Instead, the President fondled Ms. Lewinsky's naked breasts with his hands and mouth and fondled her genitals directly by pulling her underwear out of the way. The President also inserted a cigar into Ms. Lewinsky's vagina, and then put the cigar in his mouth and said "Tastes good."[26]

(viii) Ms. Lewinsky testified that she and the President had sexual contact on Easter Sunday, April 7, 1996, in the hallway outside the Oval Office study and in the study itself.[27] This encounter was initiated when the President called Ms. Lewinsky at home, and she asked to come see him. On that occasion, the President touched Ms. Lewinsky's breasts, both through clothing and directly on her skin. After the President unzipped his own pants, Ms. Lewinsky performed oral sex on him.[28]

(ix) Ms. Lewinsky testified that the next time she engaged

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[25] Id. at 30-31.

[26] Id. at 37-38.

[27] Lewinsky 8/6/98 GJ at 94-95.

[28] Id. at 40-41.

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in oral sex with the President was nearly a year later, on Friday, February 28, 1997, in the early evening. (They had engaged in "phone sex" a number of times in the interim, according to Ms. Lewinsky, a situation where the President would masturbate while Ms. Lewinsky would talk in a sexual manner on the phone.) The president initiated this encounter by having Betty Currie call Ms. Lewinsky, and invite her to the White House to attend a radio address. After the address, Ms. Lewinsky and the President started kissing by the bathroom when the President unbuttoned her dress and fondled her breasts, first with her bra on, and then directly. He touched her genitals only through her tights on this occasion. Ms. Lewinsky performed oral sex on the President.[29]

(x) Ms. Lewinsky testified that she and the President had sexual contact again on the afternoon of March 29, 1997, in the Oval Office study. Ms. Lewinsky arranged that encounter by initiating conversations with Ms. Currie who in turn checked with the President.[30] On that occasion, the President unbuttoned Ms. Lewinsky's blouse and touched her breasts but not directly on the skin. The President also put his hands down Ms. Lewinsky's pants and stimulated her genitals causing her to have several orgasms. Ms. Lewinsky performed oral sex on the President. In addition, this encounter included brief, direct genital contact.[31]

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[29] Id. at 47.

[30] Id. at 49.

[31] Lewinsky 8/6/98 GJ at 21.

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(xi) Ms. Lewinsky testified that she met with President Clinton on the morning of Saturday, August 16, 1997. They kissed. Although Ms. Lewinsky touched the President's genitals through his clothing, he rebuffed her efforts to perform oral sex. No other sexual acts occurred during that encounter.[32] Ms. Lewinsky testified that the encounter took place in the Oval Office study.

(xii) On December 28, 1997, the President and Ms. Lewinsky met in the Oval Office, where they engaged in "passionate" kissing but no other sexual contact.[33]

3. **Phone Sex**

Ms. Lewinsky testified that she and the President often communicated by telephone.[34] The President left messages on Ms. Lewinsky's home answering machine on at least four occasions, and Ms. Lewinsky provided tapes of those messages to the OIC.[35] Ms. Lewinsky testified that in some of her phone conversations with the President, they engaged in phone sex.[36] She stated that she and the President engaged in phone sex at least 15 times.[37]

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[32] Id. at 52.

[33] Id. at 53.

[34] **cite**

[35] **cite**

[36] **cite**

[37] Lewinsky 8/6/98 GJ at 24. The summary chart of contacts between the President and Ms. Lewinsky, which is based on information provided by Ms. Lewinsky, lists 17 separate phone sex calls. Id. at 27-28.

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4. Physical Evidence on Monica Lewinsky's Dress

Ms. Lewinsky produced to OIC investigators a dress that she believed might contain the President's semen from the encounter on February 28, 1997.[38] At the request of the OIC, the FBI Laboratory examined the dress and found semen stains. At that point, the OIC requested a DNA sample from the President. The OIC and FBI technicians took blood from the President on August __, 1998. The FBI Laboratory then determined that the semen on Ms. Lewinsky's dress was, in fact, the President's semen.[39]

5. Testimony of Ms. Lewinsky's Friends about Her Relationship with the President

While the relationship with the President was ongoing, Monica Lewinsky told several friends, family members, and acquaintances some contemporaneous details about the relationship.

1. Catherine Allday Davis

Catherine Allday Davis, a college friend of Monica Lewinsky,[40] testified that Ms. Lewinsky told her in late 1995 or

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[38] Ms. Lewinsky stated that she did not save the dress as a memento. Rather, as she explained, she does not clean dresses until she is ready to wear them again, and she outgrew the blue dress by the time she planned to wear it again. The upshot was that, at the time this criminal investigation began, Ms. Lewinsky possessed the uncleaned dress. And at that point, the dress was probative evidence of a crime -- namely, that both Ms. Lewinsky and the President had lied under oath in denying a sexual relationship with each other.

[39] Report.

[40] Davis 3/17/98 GJ at 9-10. Ms. Davis talked to Ms. Lewinsky by telephone an average of once a week until April 1997,

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early 1996 about Monica's sexual relationship with the President.[41] According to Ms. Davis, Monica told her that the relationship included mutual kissing and hugging, as well as oral sex performed by Monica on the President. She also stated that the President touched Monica "on her breasts and on her vagina."[42] Ms. Davis also described an incident in which the President inserted a cigar into Ms. Lewinsky's vagina.[43] Ms. Davis further stated that Monica informed her that she had "phone sex" with the President five to ten times in 1996 or 1997.[44]

2. Neysa Erbland

Neysa Erbland, a high school friend of Monica Lewinsky,[45] testified that Ms. Lewinsky told her at some point in 1995 that she was having an affair with President Clinton.[46] Ms. Erbland said that she was told that the sexual relationship began when Monica was an intern.[47] Ms. Lewinsky stated to Ms. Erbland that the sexual contact included oral sex, kissing, and fondling one

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when Ms. Davis moved to Tokyo; thereafter she and Ms. Lewinsky remained in touch through e-mail. Id. at 14, 27.

[41] Davis 3/17/98 GJ at 19.

[42] Davis 3/17/98 GJ at 20.

[43] Davis 3/17/98 GJ at 169.

[44] Davis 3/17/98 GJ at 37.

[45] Erbland GJ, Feb. 12, 1998, at 9. Ms. Erbland testified that she spoke on the phone with Ms. Lewinsky at least once a month. Id. at 18-19.

[46] Erbland 2/12/98 GJ at 31.

[47] Erbland 2/12/98 GJ at 27.

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another.[48] On occasion, as Ms. Erbland described it, the President put his face in Ms. Lewinsky's naked chest.[49] Ms. Erbland also described a particular incident that Ms. Lewinsky had recounted: "He did manual stimulation on her and there was one time that she did tell me of -- he took a cigar from his desk -- and inserted [it] inside of her in a sexual way."[50] Ms. Erbland also understood from Ms. Lewinsky that she and the President engaged in phone sex, normally after midnight.[51][52]

3. Natalie Rose Ungvari

Monica Lewinsky told another high school friend, Natalie Rose Ungvari,[53] of her sexual relationship with the President. Ms. Ungvari recalled that Ms. Lewinsky said she performed oral sex on the President and that he fondled her breasts.[54] Ms.

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[48] Erbland GJ, Feb. 12, 1998, at 26 ("She told me that she had given him a blow job and that she had had all of her clothes off, but that he only had his shirt off and that she had given him oral sex and they kissed and fondled each other and that they didn't have sex. That was kind of a little bit of a letdown for her."); id. at 29 ("He put his face in her chest. And, you know, just oral sex on her part, you know, to him.").

[49] Erbland 2/12/98 GJ at 29.

[50] Id. at 45.

[51] Erbland GJ, Feb. 12, 1998, at 39 ("They were like phone sex conversations. They would, you know, talk about what they wanted to do to each other sexually.").

[52] Erbland GJ, Feb. 12, 1998, at 39.

[53] Ms. Ungvari spoke with Monica Lewinsky on the telephone an average of once a week, and visited her in Washington in October 1995 and March 1996. Ungvari GJ at 9-11, 14-15.

[54] Ungvari 3/19/98 GJ at 23-24.

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Lewinsky first informed Ms. Ungvari of the sexual relationship on November 23, 1995, while Ms. Lewinsky was still an intern. Ms. Ungvari specifically remembers the date because it was her birthday. Ms. Lewinsky told Ms. Ungvari that the President sometimes telephoned Ms. Lewinsky late at night and would ask her to talk while he masturbated.[55]

4. Ashley Raines

Ashley Raines, a friend of Ms. Lewinsky who worked in the White House Office and Policy Development Operations and Special Liaison,[56] testified that Ms. Lewinsky told her of the sexual relationship she had with the President. Ms. Raines testified that Ms. Lewinsky told her that the sexual relationship with the President began around the time of the government furlough in late 1995.[57] Ms. Raines understood that the President and Ms. Lewinsky engaged in kissing and oral sex, usually in the President's study.[58] Ms. Lewinsky also told Ms. Raines that she and the President had engaged in phone sex on several occasions.[59]

5. Andrew Bleiler

In late 1995, Monica Lewinsky first told Andrew Bleiler, a

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[55] Ungvari 3/19/98 GJ at 81.

[56] Raines 1/29/98 GJ at 11. Ms. Raines considers Monica Lewinsky a "close friend." Id. at 19.

[57] Raines 1/29/98 GJ at 35-36, 38.

[58] Raines 1/29/98 GJ at 30, 43, 48.

[59] Raines 1/29/98 GJ at 51.

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former boyfriend, about an affair she was having with a White House official who he later learned [when?] was the President.[60] Bleiler stated that Ms. Lewinsky told her that the relationship did not include sexual intercourse, but did include oral sex. She also described an incident where a cigar was inserted into Ms. Lewinsky's vagina, and sexual activity in which the President touched Ms. Lewinsky's genitals and caused her to have an orgasm.[61]

6. Linda Tripp

Linda Tripp worked with Monica Lewinsky at the Pentagon. Ms. Lewinsky told Ms. Tripp that she had a sexual relationship with President Clinton.[62] Ms. Tripp stated that Ms. Lewinsky first told her about the relationship in September or October 1996. At that time, Ms. Lewinsky told Ms. Tripp that the first sexual encounter with the President had occurred on November 15, 1995, when Ms. Lewinsky performed oral sex on the President. Ms. Lewinsky told Ms. Tripp that the sexual relationship generally included oral sex performed on the President, the President's fondling of Ms. Lewinsky's breasts, the President's manual touching and manipulation of Ms. Lewinsky's vagina, and phone sex in which the President masturbated.[63]

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[60] Andrew Bleiler 302 at 3.

[61] Bleiler 1/28/98 302 at 3.

[62] Tripp 7/2/98 GJ at 104.

[63] Tripp 7/2/98 GJ at 100-105.

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7. **Deborah Finerman**

Monica Lewinsky's aunt, Deborah Finerman, testified that Monica told her about her sexual relationship with President Clinton.[64] Ms. Finerman testified that one point Ms. Lewinsky described a particular sexual encounter with the President that concluded with his masturbating into a sink.[65] Ms. Finerman knew that kissing was involved, but otherwise she did not ask and was not told other specifics of the sexual activity between the President and Monica.[66] Ms. Finerman also said that Ms. Lewinsky would sometimes get "phone calls in the middle of the night" from the President.[67]

8. **Dale Young**

Dale Young, a family friend of Monica Lewinsky and Marcia Lewis (Monica's mother), testified that Ms. Lewinsky told her that she had engaged in oral sex with President Clinton.[68] Ms. Young understood that these encounters took place in a private room off of the Oval Office.[69]

9. **Kathleen Estep**

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[64] Finerman 3/18/98 Depo. at 30-33.

[65] Finerman 3/18/98 Depo. at 31. Ms. Finerman indicated that "it was something I didn't want to talk about," and Ms. Lewinsky "sort of clammed up" thereafter. Id. at 35.

[66] Finerman 3/18/98 Depo. at 33.

[67] Finerman 3/18/98 Depo. at 26-27.

[68] Young 6/23/98 GJ at 37-38.

[69] Young 6/23/98 GJ at 50.

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Kathleen Estep, a licensed certified Social Worker,[70] had three counseling sessions with Ms. Lewinsky in November 1996.[71] Based on her limited interaction with Ms. Lewinsky, Ms. Estep stated that she considered Ms. Lewinsky to be credible.[72] During their second session, Ms. Lewinsky told Ms. Estep about her sexual relationship with President Clinton.[73] Ms. Lewinsky told Ms. Estep that the physical part of the relationship involved kissing, Ms. Lewinsky performing oral sex on the President, and the President fondling her breasts.[74]

6. Analysis of President Clinton's Sworn Testimony During Civil Deposition

To summarize: The detailed testimony of Ms. Lewinsky, the corroborating testimony of the many persons to whom she made prior consistent statements in describing her sexual affair with the President, and the evidence of the President's semen on Ms. Lewinsky's dress establish that the following sexual activity occurred between Ms. Lewinsky and the President. They had 10 sexual encounters that included direct genital contact, as well as two others that included kissing, over a period from November

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[70] Estep 8/23/98 Statement at 1. In order to be considered a licensed certified social worker, Ms. Estep had to obtain a Master's degree, conduct 3,000 hours of supervised therapy, and pass a licensing exam.

[71] Estep 8/23/98 Statement at 1, 4.

[72] Estep 8/23/98 Statement at 3. Ms. Estep also thought that Ms. Lewinsky had her "feet in reality." Id.

[73] Estep 8/23/98 Statement at 2.

[74] Estep 8/23/98 Statement at 2.

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15, 1995, through December 28, 1997. On nine occasions, Ms. Lewinsky performed oral sex on the President. On two of those nine occasions, Ms. Lewinsky also made oral contact with the President's anus (one of those two times at his behest). On all nine occasions, the President touched and kissed Ms. Lewinsky's naked breasts. On three occasions, the President also touched her genitalia to the extent that Ms. Lewinsky had orgasm. On one occasion, the President inserted a cigar into her vagina to stimulate her. The President and Ms. Lewinsky also had phone sex on at least 15 occasions.

The President, however, testified under oath in the civil case -- both in the deposition and in a written answer to an interrogatory -- that he did not have a "sexual relationship" or "sexual affair" or "sexual relations" with Ms. Lewinsky and that he did not touch Ms. Lewinsky's breasts or genitalia.

Notwithstanding the overwhelming evidence to the contrary, the President does not now concede that he lied under oath in the civil case. For four of the six false statements that the President made during the civil case, the President's defense is semantic -- that the terms used in the Jones deposition to cover sexual activity did not cover, he claims, the sexual activity in which he engaged with Ms. Lewinsky. For his other two false statements, the President's defense is factual -- namely, he disputes Ms. Lewinsky's account that he ever touched her breasts

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or genitalia during sexual activity.[75]

First, in his sworn civil deposition, the President denied a "sexual affair" with Ms. Lewinsky (the term was not further defined). The President's apparent defense to lying under oath on this point rests on his definition of "sexual affair" -- namely, that it requires sexual intercourse. Under the President's apparent semantic defense, a man could regularly engage in oral sex and kissing with a woman, yet not have a sexual affair with her.

Second, in his civil deposition, the President also denied a "sexual relationship" with Ms. Lewinsky (the term was not further defined). The President's defense to lying under oath on this point similarly rests on his definition of "sexual relationship" --namely, that it requires sexual intercourse. Once again, under the President's theory, a man could regularly engage in oral sex and kissing with a woman, yet not have a "sexual relationship" with her.

The President's defense on this point is further undercut by the fact that the President's own lawyer at the same deposition, addressing Judge Wright, equated the term "sexual relationship" to "sex of any kind in any manner, shape or form" in discussing Ms. Lewinsky's affidavit (in which she had denied a sexual relationship). The President's lawyer used that interpretation when asking Judge Wright to terminate the questioning to prevent

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[75] He provided his defenses during his August 1998 grand jury appearance, which will be analyzed in a separate section.

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any questions regarding Monica Lewinsky. As revealed by the videotape of the deposition, the President was present and looking at his attorney when he offered that statement. The President nonetheless gave no indication whatsoever that he disagreed with his attorney's straightforward interpretation of the term "sexual relationship" to mean "sex of any kind in any manner, shape, or form."

Third, in an answer to an interrogatory submitted before his deposition, the President denied having "sexual relations" with Ms. Lewinsky (the term was not further defined). Yet again, the President's apparent defense to lying under oath on this point rests on his definition of "sexual relations" -- that it, too, requires sexual intercourse. According to President Clinton, he believed that oral sex -- even repeated oral sex over a period of months or years -- does not constitute sexual relations.

Fourth, in his civil deposition, the President falsely denied committing any acts that fell within the specific definition of "sexual relations" in effect for purposes of that questioning. Under that definition, sexual relations occur "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."[76] Thus, the President denied either knowingly engaging in contact or knowingly causing contact with the

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[76] Clinton 1/17/98 Depo., Exh. 1.

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genitalia or anus of "any person" with an intent to arouse or gratify the sexual desire of "any person."

Ms. Lewinsky testified, however, that she performed oral sex on the President on nine occasions. The President has never denied receiving oral sex from Ms. Lewinsky. Rather, with respect to oral sex performed on him by Ms. Lewinsky, the President's sole apparent defense to the allegation of lying under oath at the deposition focuses on his interpretation of "any person" in the definition. The President said that by receiving oral sex, he would not "engage in" contact with the genitalia, anus, groin, breast, inner thigh, or buttocks of "any person" because "any person" really means "any other person." And the President further stated before the grand jury: "[I]f the deponent is the person who has oral sex performed on him, then the contact is with -- not with anything on that list, but with the lips of another person."[77]

Thus, under the President's theory of the definition that he purports to have followed at his deposition, when two people are engaged in oral sex, one person would be having sexual relations, but the other person would not be having sexual relations.[78]

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[77] Clinton 8/17/98 GJ, at 151 (emphasis added).

[78] The definition used at his deposition also covers acts in which the deponent "cause[d] contact" with the genitalia or anus of "any person." The President said that this aspect of the definition still does not cover his receiving oral sex although he may have caused contact with his genitalia by having sexual activity with Ms. Lewinsky in which she performed oral sex on him. The President said that the word "cause" "implies forcing to me" and "forcible abusive behavior." And thus the President says that because his activity with Ms. Lewinsky did not include

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Fifth, by denying any acts that might fall within the specific definition of sexual relations at his civil deposition, the President denied engaging in or causing contact with the breasts of Ms. Lewinsky with an intent to arouse or gratify anyone's sexual desire. In contrast to his defenses to the four preceding specifications of lying under oath, the President's defense to lying under oath in this instance is purely factual.

As discussed above in great detail, Ms. Lewinsky testified that on each of the nine occasions that she had oral sex with the President, he touched and kissed her bare breasts. Her testimony on this point is quite credible. She had little motive to lie or exaggerate on this issue, as the nature of the sexual activity only became relevant due to the President's August 17, 1998 semantic defense regarding oral sex. Ms. Lewinsky stated repeatedly that she does not want to hurt the President. Her testimony on the nature of the President's touching of her body is also corroborated by prior consistent statements to various friends.

By contrast, the scenario that the President's testimony envisions casts substantial doubt on the President's statement that he did not touch Ms. Lewinsky's breasts. The President's apparent "hands-off" scenario -- in which he received oral sex on nine occasions from Ms. Lewinsky but never made direct contact with Ms. Lewinsky's breasts -- is not altogether plausible.

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any nonconsensual behavior, he did not lie under oath in denying that he "caused" contact with the genitalia of any person.

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Moreover, the President had extraordinary moral, personal, political, and legal motives to lie in the Jones deposition: He did not want to admit that he committed extramarital sex acts with a young intern in the Oval Office area of the White House.

Also, the President presumably believed that he could lie under oath without risk because Ms. Lewinsky had already filed a false affidavit denying a sexual relationship with the President. Indeed, that was the whole point of their mutual understanding that each would lie (explained more fully below). So the President could have expected that, without any consequences, a lie at his civil deposition about his sexual relationship with Monica Lewinsky would never be successfully challenged.

Sixth, in his civil deposition, the President also denied knowingly engaging in or causing contact with the genitalia of Ms. Lewinsky with an intent to arouse or gratify anyone's sexual desire. The President's defense to lying under oath on this point is also factual, that he did not engage in direct contact with Ms. Lewinsky's genitalia with an intent to arouse or gratify anyone's sexual desire.

Ms. Lewinsky testified in detail contradicting the President, stating that he touched her genitals on three occasions and used his hand to stimulate her, causing her to have orgasms. She also testified that, on one occasion, he inserted a cigar into her vagina to stimulate her. Her near-contemporaneous statements to her friends and confidants corroborate that testimony. [detail]

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B. Evidence that President Knowingly Allowed His Attorney to Make a False Statement at the Deposition

1. Evidence

At President Clinton's deposition, his attorney made a false statement to Judge Wright that had the possible effect of deceiving Judge Wright and Ms. Jones' attorneys in an important way. In President Clinton's presence, President Clinton's counsel objected to questions about Ms. Lewinsky. As a basis, the President's attorney pointed to Ms. Lewinsky's affidavit, which denied a "sexual relationship" with the President. The President's attorney stated that Ms. Lewinsky's affidavit thus showed that "there is absolutely no sex of any kind in any manner, shape, or form, with President Clinton" -- equating the term "sexual relationship" with "sex of any kind in any manner, shape, or form."

2. Analysis

At his grand jury appearance, the President was asked why he would allow his attorney -- in the President's presence and on his behalf -- to make a false statement to a United States District Judge. The President offered several responses.

First, the President argued that he was not paying attention when Mr. Bennett said that there is "absolutely no sex of any kind in any manner, shape or form." The President further stated: "That moment, that whole argument just passed me by. I was a witness." That suggestion is difficult to square with the videotape of the deposition, however, which shows that the

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President was looking at his private counsel when his counsel made this statement.

Alternatively, the President contended that when Mr. Bennett said that "there is absolutely no sex of any kind," Mr. Bennett was speaking only in the present tense and thus was making a literally true statement. The President further stated: "It depends on what the meaning of the word 'is' is,"[79] and that "actually, in the present tense that is an accurate statement."[80] Before the grand jury, counsel for the OIC then asked the President: "Do you mean today that because you were not engaging in sexual activity with Ms. Lewinsky during the deposition that the statement of Mr. Bennett might be literally true?"[81] The President responded: "No, sir. I mean that at the time of the deposition, it had been -- that was well beyond any point of improper contact between me and Ms. Lewinsky. So that anyone speaking in the present tense, saying there is not an improper relationship, would be telling the truth if that person said there was not, in the present tense; the present tense encompassing many months. That's what I meant by that."[82] Of course, such a detailed parsing of the words is entirely at odds with the President's assertion that the "whole argument passed me by."

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[79] Clinton 8/17/98 GJ at 59.

[80] Clinton 8/17/98 GJ at 20.

[81] Id. at 61.

[82] Id. at 61-62.

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The statement of the President's counsel was flatly erroneous and was intended to prevent questioning of any kind about Ms. Lewinsky. In other words, it was an improper endeavor to obstruct justice.[83] The President's defense of his own failure to correct his lawyer's statement is unpersuasive. Indeed, when asked several times whether the President has any reasonable duty to prevent his attorney from making a false statement to the federal judge, the President stated only: "Mr. Bennett was representing me. I wasn't representing him."[84] That is a truism, and a witness may not always be responsible for all false statements made by his attorney. But it is hard to fathom that the President of the United States, consistent with his constitutional duty to faithfully execute the laws, can be complicit in a blatant lie to a federal judge. A question asked of the President during his August 1998 grand jury appearance well captures that sentiment: "You are the President of the United States and your attorney tells a United States District Judge that there is no sex of any kind in any manner, shape, or form, whatsoever. And you feel no obligation to do anything about that at that deposition, Mr. President?"

Conclusion

There is substantial and credible information that the

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[83] We assume that the President's counsel, unlike the President, was not aware of the true nature of the sexual relationship between his client and Monica Lewinsky when he made this statement.

[84] Clinton 8/17/98 GJ at 30.

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President lied under oath in six separate statements as a defendant in a sexual harassment suit and that the President allowed his attorney, in his presence, to make a false statement to the United States District Judge presiding over the deposition.

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II. There is substantial and credible information that President Clinton lied under oath to the grand jury about his sexual relationship with Monica Lewinsky.

A. Background

In January 1998, upon application of the Attorney General, the United States Court of Appeals expanded the OIC's jurisdiction to investigate, among other matters, the President's possible obstruction of justice in the Jones case. The investigation was triggered by an allegation that Monica Lewinsky had a sexual relationship with the President, that she had filed a false affidavit to the contrary in the Jones case, and that she had been influenced to do so by the President's assistance, through Vernon Jordan and others, in finding her a job. After the President denied any sexual relationship with Monica Lewinsky in his January 17 deposition and otherwise minimized his relationship with her, those statements became additional subjects of the OIC investigation.

A threshold factual question was whether the President and Monica Lewinsky in fact had a sexual relationship. If they did, the President would have committed perjury in his civil deposition and interrogatory answer and Monica Lewinsky would have committed perjury in her civil affidavit. The answer to that preliminary factual question also could alter the interpretation of several possibly obstructionist acts by the President -- the employment assistance for Ms. Lewinsky, the concealment of gifts belonging to Ms. Lewinsky, the discussion

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between the President and Ms. Lewinsky of her testimony or affidavit, the President's post-deposition communications with Betty Currie, and the President's emphatic denials to his aides who were to be called before the grand jury.

During the investigation, the OIC gathered an enormous body of information that established that the President and Monica Lewinsky did, in fact, have a sexual relationship. That information is outlined in the first section above. In particular, the President's semen stain on Ms. Lewinsky's dress, the detailed and credible testimony of Ms. Lewinsky regarding the 10 sexual encounters, the tape recordings in 1997 where she described that relationship, and the testimony of friends to whom she made near-contemporaneous statements about the relationship all pointed to a single conclusion -- that she and the President did have a sexual relationship.

B. The President's Grand Jury Testimony

The President was largely aware of that extensive body of evidence before he testified to the grand jury on August 17, 1998. Of particular importance, the President knew that his semen might be on Ms. Lewinsky's dress because the OIC had asked him for a blood sample and had assured his counsel that there was a substantial predicate for the request.

The President had three choices in his testimony to the grand jury. First, the President could stick to his previous testimony in his civil case and deny any sexual relationship. But he knew that the contrary evidence was overwhelming,

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particularly if his semen were in fact on Ms. Lewinsky's dress. Second, the President could admit a sexual relationship. But he then would be simultaneously admitting that he lied under oath in the Jones case. Third, the President could assert the Fifth Amendment privilege against self-incrimination.

Confronting those three options, the President attempted to avoid the choice altogether. In the end, however, he simply compounded his false statements in the civil case by lying again under oath to the grand jury. When testifying to the grand jury, the President admitted to an undefined inappropriate "intimate" relationship with Monica Lewinsky. He maintained, however, that he had not committed perjury in the Jones case when he denied having a sexual relationship, sexual affair, and sexual relations with her.[85] The President stated that he believed (and believes) that his various statements in the Jones case denying a sexual relationship, sexual affair, and sexual relations were accurate.[86]

The President was asked whether Monica Lewinsky performed oral sex on him and, if she had, whether he had committed perjury in his civil deposition by denying a sexual relationship, sexual affair, or sexual relations with her. As to the undefined terms "sexual affair" and "sexual relationship" and the undefined term "sexual relations," the President responded that those terms necessarily include intercourse, that he had not committed

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[85] Clinton 8/17/98 GJ at 9-10.

[86] Clinton 8/17/98 GJ at 9-10.

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intercourse with Ms. Lewinsky, and that he thus had not committed perjury in denying a sexual relationship, sexual affair, or sexual relations.[87]

As to the more specific definition of "sexual relations," the President answered that he did not believe oral sex was covered by the definition of "sexual relations" used in the Jones deposition. He thus contended that he had not committed perjury on that question in the Jones deposition -- even assuming that Monica Lewinsky performed oral sex on him.

> Q: [I]s oral sex performed on you within that definition as you understood it, the definition in the Jones --
>
> A: As I understood it, it was not.[88]

Of course, it was not enough in the grand jury for the President simply to advance his purported definitional defense as to oral sex. There was also the question of his contact with her breasts or genitalia, which the President conceded was covered by the Jones definition. Because the President used that definitional defense with oral sex, the OIC also had to ask him whether he had touched Ms. Lewinsky's bare breasts or her genitalia -- because if he did, then he still committed perjury during the Jones case, regardless of the validity of his oral-sex definitional defense.

The President denied to the grand jury that he had engaged in such activity and said, in effect, that Monica Lewinsky was

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[87] Clinton 8/17/98 GJ at 23-24.

[88] Clinton 8/17/98 GJ at 93.

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lying.

Q: The question is, if Monica Lewinsky says that while you were in the Oval Office area, you touched her breasts, would she by lying?

A: That is not my recollection. My recollection is that I did not have sexual relations with Ms. Lewinsky and I'm staying on my former statement about that. . . . My, my statement is that I did not have sexual relations as defined by that.

Q: If she says that you kissed her breasts, would she by lying?

A: I'm going to revert to my former statement on that.

Q: Okay. If Monica Lewinsky says that while you were in the Oval Office area you touched her genitalia, would she be lying? And that calls for a yes, no, or reverting to your former statement.

A: I will revert to my former statement.[89]

The President elaborated that he considered kissing or touching breasts or genitalia during sexual activity to be covered by the Jones definition, and that he was specifically denying that he had ever engaged in such conduct.

Q: So touching, in your view then and now -- the person being deposed touching or kissing the breast of another person would fall within the definition.

A: That's correct, sir.

Q: And you testified that you didn't have sexual relations with Monica Lewinsky in the Jones deposition, under that definition, correct?

A: That's correct, sir.

Q: If the person being deposed touched the genitalia of another person, would that be -- and with the intent to arouse the sexual desire, arouse or gratify, as defined in definition (1), would that be, under your understanding then and now --

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[89] Clinton 8/17/98 GJ at 109-110.

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A: Yes, sir.

Q: Sexual relations.

A: Yes, sir.

Q: Yes it would?

A: Yes it would. If you had a direct contact with any of these places in the body, if you had direct contact with intent to arouse or gratify, that would fall within the definition.

Q: So you didn't do any of those three things --

A: You --

Q: -- with Monica Lewinsky.

A: You are free to infer that my testimony is that I did not have sexual relations, as I understood this term to be defined.

Q: Including touching her breast, kissing her breast, touching her genitalia?

A: That's correct.[90]

C. Analysis

President Clinton's testimony to the grand jury raises two problems of false statements. First, the President testified to the grand jury that, at the Jones deposition, he truly believed that he was telling the truth and nothing but the truth -- in particular, that he truly believed repeated oral sex was not covered by any of the terms and definitions for sexual activity used at the Jones deposition. The President's testimony to the grand jury is simply not credible: At the Jones deposition, it is our judgment that the President could not truly have believed

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[90] Clinton 8/17/98 GJ at 94-96.

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that he was telling the truth and nothing but the truth in denying a sexual relationship, sexual relations, or a sexual affair with Monica Lewinsky.

Second, and even putting aside that definitional defense as to oral sex, the President still lied under oath to the grand jury about his relationship with Ms. Lewinsky. The President's grand jury testimony directly contradicts Ms. Lewinsky's grand jury testimony on the question whether the President touched Ms. Lewinsky's breasts or genitalia during their sexual activity.

Given the nature of the issue, there can be no plausible contention that one or the other has a lack of memory or is mistaken. In this case, on this issue, either Monica Lewinsky lied to the grand jury, or President Clinton lied to the grand jury. It is our judgment that, under any rational view of the evidence, the President lied to the grand jury.

First, Ms. Lewinsky's testimony on these encounters is detailed and specific. She describes nine incidents of sexual activity in which the President touched and kissed her breasts. She testified that in three of those encounters, the President touched her genitalia, causing her to have orgasm on two occasions. She testified to one incident involving a cigar.

Second, Ms. Lewinsky has stated repeatedly that she does not want to hurt the President by her testimony, so she has little motive to exaggerate these facts. Moreover, it clearly was painful for her to testify to the details of her relationship with the President.

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Third, she is corroborated in important detail by the testimony of many of her friends and confidants. Many testified that Monica had said nearly contemporaneously that the President had touched her breasts and genitalia during sexual activity.

Fourth, the factual scenario that the President's testimony describes is simply not plausible. The President's apparent "hands-off" defense -- in which he received oral sex on nine occasions from Ms. Lewinsky but never made direct contact with Ms. Lewinsky's breasts -- is incredulous. As Ms. Lewinsky herself stated, it suggests that they had some kind of "sexual contract -- that all I did was perform oral sex on him and that that's all this relationship was."[91] But as the narrative explains, the nature of the relationship, including the sexual relationship, was far more than that.

Fifth, in the grand jury, the President had an extraordinary motive to lie about this fact. The President clearly sought to deny any acts that would show that he committed perjury in his civil case, including touching Ms. Lewinsky's breasts or genitalia.

Sixth, the President refused to answer specific questions at the grand jury about what activity he did engage in (as opposed to what activity he did not engage in). Even though he stated at the Jones deposition that he was quite willing to answer specific questions, he refused to do so to the grand jury. Ms. Lewinsky answered specific questions to the grand jury. The President

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[91] Lewinsky 8/20/98 GJ at 54.

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himself had offered to answer specific questions at his Jones deposition. His failure in the grand jury to answer specific follow-up questions strongly implies that he could not do so in a credible manner.

For all these reasons, there is substantial and credible information that the President lied to the grand jury about his sexual relationship with Monica Lewinsky.

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III. There is substantial and credible information that President Clinton lied and provided misleading testimony during his civil deposition when answering additional questions about his relationship with Monica Lewinsky.

During President Clinton's deposition in the Jones case, Ms. Jones' attorneys asked the President many other detailed questions about the nature of his relationship with Ms. Lewinsky, apart from whether the relationship was sexual.[92] These questions included (i) whether and how many times the President had been alone with Ms. Lewinsky in the White House, and (ii) whether he and Ms. Lewinsky exchanged gifts.[93]

There is substantial and credible information that the President lied under oath about all of these subjects. The President's false statement about the central fact of his relationship with Ms. Lewinsky -- that it was sexual -- led him to make all sorts of other false statements at the deposition, including about these issues.

A. There is substantial and credible information that President Clinton lied under oath in his

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[92] Throughout the Jones case, Ms. Jones's attorneys attempted to obtain information about the true nature of any relationship that President Clinton had with any woman other than his wife. The district court judge overseeing the Jones case, Judge Susan Webber Wright, ruled that Ms. Jones was entitled to discover this information with regards to women who were current or former federal employees, and that such information might be admissible at trial. These rulings entitled Ms. Jones to obtain truthful information regarding the nature of President Clinton's relationship with the Monica Lewinsky, a federal employee at the time.

[93] Ms. Jones's attorneys also served President Clinton with a document request that sought "any communications, meetings or visits involving" President Clinton and Ms. Lewinsky.

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civil deposition when he testified that he could not specifically recall instances in which he was alone with Monica Lewinsky.

1. The President's testimony

President Clinton was asked at his deposition whether he had ever been alone with Ms. Lewinsky, at any time, in the White House. He testified as follows:

> Q: . . . At any time were you and Monica Lewinsky together alone in the Oval Office?
>
> WJC: 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 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?
>
> WJC: 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.[94]

The President also was asked whether he had ever been alone with Ms. Lewinsky in the hallway that runs from the Oval Office,

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[94] Clinton 1/17/98 Depo. at 52-53 (emphasis added).

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past the study, to the dining room and kitchen area.[95]

> Q: At any time were you and Monica Lewinsky alone in the hallway between the Oval Office and this kitchen area?
>
> WJC: I don't believe so, unless we were walking back to the dining room with the pizza.[96] I just, I don't remember. I don't believe we were alone in the hallway, no.[97]

The President was then asked about any times he may have been alone in any room with Ms. Lewinsky:

> Q: At any time have you and Monica Lewinsky ever been alone together in any room of the White House?
>
> WJC: 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."[98]

2. Evidence That Contradicts the President's Testimony in the Jones Deposition.

In the seven months of this investigation preceding the President's testimony to the grand jury on August 17, the OIC gathered substantial and credible information that the President

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[95] Ms. Lewinsky testified that many of her sexual encounters with the President occurred in this hallway. Lewinsky 8/20/96 GJ at16-17.

[96] The President had earlier testified that during the government shutdown in November 1995, Ms. Lewinsky was working as an intern in the Chief of Staff's Office, and had brought the President and some others some pizza. Id. at 58.

[97] Id. at 58-59.

[98] Clinton 1/17/98 Depo. at 59.

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lied under oath in his statements under oath about being alone with Monica Lewinsky.

First, Monica Lewinsky testified before the grand jury that she was alone with the President on numerous occasions[99] and in numerous areas, including the Oval Office,[100] Nancy Hernreich's office,[101] the President's private study,[102] the private bathroom across from the study,[103] and the hallway that leads from the Oval Office to the private dining room.[104] Ms. Lewinsky confirmed that she and the President were alone when they engaged in sexual contacts.[105] [add fact that Clinton used cover story in depo]

Second, Betty Currie testified that President Clinton and Ms. Lewinsky were alone together in the Oval Office area a number of times.[106] She specifically remembered three of the occasions when the President and Ms. Lewinsky were alone together - February 28, 1997,[107] early December 1997,[108] and December 28,

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[99] Lewinsky 8/6/98 GJ at 20, 52.

[100] Lewinsky 8/26/98 Depo. at 21-22.

[101] Lewinsky 8/6/98 GJ at 76.

[102] Lewinsky 8/26/98 Depo. at 27-31.

[103] Lewinsky 8/6/98 GJ at 35.

[104] Lewinsky 8/26/98 Depo. at 6-7, 26, 35.

[105] Lewinsky 8/6/98 GJ at 20.

[106] Currie 2/17/98 GJ 32-33. See also Currie 5/6/98 GJ at 98. The Oval Office area includes the study, dining room, kitchen, bathroom, and hallway connecting the area. See Appendix, Exhibit __ (diagram of Oval Office area).

[107] Currie 2/17/98 GJ at 34-35 (recalling that after the President's radio address, the President told Ms. Lewinsky he

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1997.[109]

Third, six current or former members of the Secret Service testified that the President and Ms. Lewinsky were alone in the Oval Office — Robert Ferguson,[110] Lou Fox,[111] William Bordley,[112] Nelson Garabito,[113] Gary Byrne,[114] and John Muskett.[115]

Fourth, White House steward Glen Maes testified that on some

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wanted to show her his collection of political buttons. The President and Ms. Lewinsky went into the Oval Office study for 15 to 20 minutes while Ms. Currie waited nearby, in the pantry or the dining room).

[108] Currie 2/17/98 GJ 37-38 (testifying that Ms. Lewinsky came to the White House and met with the President alone for approximately 15 or 20 minutes). See also Currie 5/14/98 GJ at 116.

[109] Currie 2/17/98 GJ at 35-38 (testifying that Ms. Lewinsky and the President were in the Oval Office for "[p]erhaps 30 minutes."). Again, Ms. Currie testified that she believes no one else was present. See also Currie 5/6/98 GJ at 103-105.

[110] Ferguson 7/17/98 GJ, at 14-16, 20-21, 27-29, 35, 43 (alone for at least 10 to 15 minutes); Ferguson 7/23/98 GJ at 20-21.

[111] Fox GJ 34-37 (alone for at least forty minutes).

[112] Bordley 8/13/98 GJ at 9, 11-13, 15-16, 20-29 (alone for approximately 30 to 35 minutes).

[113] Garabito 7/30/98 GJ at 17, 19-20, 23, 25-26, 30-32 (alone for at least five to ten minutes).

[114] Byrne 7/30/98 GJ at 7-12, 29-32 (alone for at least 15 to 25 minutes).

[115] Muskett 7/21/98 GJ at 9-13, 25-28, 83, 91-92 (alone on Easter Sunday 1996); GJ Exhibit JFM-3 (Uniformed Division roster dated April 7, 1996, showing Muskett on duty outside the Oval Office from 2:30 p.m. to 11:00 p.m.).

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weekend day after Christmas 1997,[116] the President came out of the Oval office, saw Ms. Lewinsky with a gift, and escorted her into the Oval Office. Mr. Maes testified that the President and Ms. Lewinsky were alone together for approximately eight minutes, and then Ms. Lewinsky left.[117]

3. The President's Admissions Before the Grand Jury

On August 17, 1998, the President testified to the grand jury and began his testimony before the grand jury by reading a statement that explicitly admitted that he had been alone with Ms. Lewinsky:

> 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.[118]

The President admitted being alone with her on multiple occasions, although he could not pinpoint the precise number.[119] Perhaps most important, the President admitted that he was alone with Ms. Lewinsky on December 28, 1997, fewer than three weeks before his deposition in the Jones case.[120]

4. Analysis

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[116] According to White House records, Monica Lewinsky's last visit to the White House occurred on Sunday, December 28, 1997.

[117] [cite] (Q. . . . As far as you know, was anybody in the Oval Office, other than the President and Monica Lewinsky? A. No. Q. And how can you be sure of that? A. Because I had just came out of there not too long ago.)

[118] Clinton 8/17/98 GJ at 10 (emphasis added).

[119] Clinton 8/17/98 GJ at 93, 94.

[120] Clinton 8/17/98 GJ at 34.

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The President's testimony in his civil deposition about whether he was alone with ms. Lewinsky was knowingly false. Indeed, the President admitted to the grand jury that he had been alone with Ms. Lewinsky. As a result, even apart from the question whether he committed perjury during the Jones case about his sexual relationship with Ms. Lewinsky, the President clearly lied under oath in his deposition when he said that he did not recall being alone with Ms. Lewinsky.

The President had a clear motive to lie on this point. He no doubt knew that it would look unusual for a President to have been alone with a female intern or low-level staffer on so many occasions. Such an admission also might prompt Ms. Jones' attorneys to depose Ms. Lewinsky and ask specific questions of her about being alone with the President. It also might raise questions publicly if and when the President's deposition became public.

So merely lying about their sexual relationship at the civil deposition was insufficient to avoid raising further questions. The President also had to lie about being alone with Ms. Lewinsky -- or at least feign lack of memory as to any specific occurrences. And the President thus did lie under oath in his deposition in answering questions about being alone with Ms. Lewinsky.

B. Evidence that the President Provided False and Misleading Testimony at his Deposition in the Jones Case About Gifts and Messages Exchanged with Monica Lewinsky

FOIA # none (URTS 16305) DocId: 70105128 Page 50

1. President's Testimony about Gifts from the President to Monica Lewinsky

During his deposition in the Jones case, Ms. Jones's attorneys asked President Clinton several questions about whether he had given gifts to Monica Lewinsky.

> Q: Well, have you ever given any gifts to Monica Lewinsky?
>
> WJC: I don't recall. Do you know what they were?
>
> Q: A hat pin?
>
> WJC: I don't, I don't remember. But I certainly, I could have.
>
> Q: A book about Walt Whitman?
>
> WJC: I give -- let me just say, I give people a lot of gifts, and when people are around I give a lot of things I have at the White House away, so I could have given her a gift, but I don't remember a specific gift.
>
> Q: Do you remember giving her a gold broach?
>
> WJC: No.[121]

2. Evidence that Contradicts the President's Testimony

(i) Three weeks before the President's deposion, on December 28, 1997, President Clinton gave Ms. Lewinsky a number of gifts. They included a large Rockettes blanket from New York, a pin of the New York skyline, a "marble-like" bear's head from Vancouver, a pair of joke sunglasses, a small bag of cherry chocolates, a canvas bag from The Black Dog, and a stuffed animal wearing a t-

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[121] Clinton 1/17/98 Depo. at 75-76.

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shirt from The Black Dog.[122] When he testified to the grand jury, President Clinton admitted to giving Monica Lewinsky all of those gifts except for the stuffed animal and the box of chocolates.[123] Ms. Lewinsky produced the Rockettes blanket, the marble bear head, the Black Dog canvas bag, the Black Dog stuffed animal, and the joke sunglasses to this Office on July 29, 1998.[124]

(ii) The evidence also demonstrates that the President gave Ms. Lewinsky a hat pin as a belated Christmas gift on February 28, 1997.[125] The President and Ms. Lewinsky discussed the hatpin on December 28, 1997, after Ms. Lewinsky received a subpoena calling for her to produce all gifts that the President had given her, including, any hat pins.[126] According to Ms. Lewinsky, in her meeting with the President on December 28, "I mentioned that I had been concerned about the hat pin being on the subpoena and he said that that had sort of concerned him also and asked me if I had told anyone that he had given me this hat pin and I said no."[127]

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[122] Lewinsky 8/6/98 GJ at 150-51. Lewinsky GJ Exhibit 7.

[123] Clinton 8/17/98 GJ at 34-35.

[124] FBI Receipt for Property received, 7/29/98

[125] Lewinsky 8/6/98 GJ at 26-27; GJ Exhibit 7.

[126] Lewinsky 8/6/98 GJ at 151-52. "Please produce each and every gift including, but not limited to, any and all dresses, accessories, and jewelry, and/or hat pins given to you by, or on behalf of, Defendant Clinton." 92--DC-00000018.

[127] Lewinsky 8/6/98 GJ at 151-52. See also Lewinsky 2/__/98 Statement at 6-7; Currie 5/6/98 GJ at 142 (relating incident where the President shows the hat pin to Ms. Currie in front of Ms. Lewinsky). After the criminal investigation started, Ms.

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(iii) Ms. Lewinsky testified that the President gave her some additional gifts, such as a broach,[128] the book Leaves of Grass by Walt Whitman,[129] an Annie Lennox compact disk,[130] and a cigar with the Presidential seal.[131]

3. President's testimony about gifts from Monica Lewinsky to the President

When asked whether Monica Lewinsky had ever given him gifts, President Clinton testified as follows:

Q: Has Monica Lewinsky ever given you any gifts?

WJC: Once or twice. I think she's given me a book or two.

Q: Did she give you a cigar box?

Currie turned over a box of gifts that had been given to her by Monica Lewinsky. Ms. Currie understood from Ms. Lewinsky that the box contained gifts from the President. See Currie 5/6/98 GJ at 105-115. Ms. Lewinsky testified that the box contained gifts from the President, including the hat pin. Lewinsky 8/6/98 GJ at 151-162.

[128] Ms. Lewinsky testified that the President had given her a gold broach and she made near-contemporaneous statements to Ms. Erbland, Ms. Raines, Ms. Ungvari, and Ms. Tripp regarding the gift. Lewinsky 8/6/98 GJ at 26-28; Lewinsky GJ Exh. 6;: Erbland GJ 41; Raines GJ 53-55; Ungvari GJ 24; Tripp GJ, July 29, 1998, at 105.

[129] Ms. Lewinsky testified that Leaves of Grass, was "the most sentimental gift he had given me." Lewinsky 8/ 6/98 GJ at 156. Ms. Lewinsky made near-contemporaneous statements to her mother, her aunt, and her friends Ms. Davis, Ms. Erbland, and Ms. Raines that the President had given her Leaves of Grass. Davis GJ 30-31; Erbland GJ 40-41; Finerman depo 15-16; Marcia Lewis 2/10/98 GJ at 51-52; Lewis 2/11/98 GJ at 10 ("[S]he liked the book of poetry very much."). Raines GJ 53-55.

[130] Lewinsky __ GJ at __; LT2 at 8 (Lewinsky describing conversation with President where he gave her CD).

[131] Lewinsky 8/26/98 Depo. at 15; Ungvari GJ 41-44 (noting Ms. Lewinsky "occasionally" smoked cigars); and Finerman deposition 13-17.

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WJC: No.

Q: Did she give you a tie?

WJC: Yes, she has given me a tie before. I believe that's right. Now, as I said, let me remind you, normally when I get these ties, you know, together, and they're given to me later, but I believe that she has given me a tie.[132]

4. Evidence that Contradicts the President's Testimony

a. Monica Lewinsky's testimony

The evidence reveals that Ms. Lewinsky gave the President a number of gifts of many different kinds over a lengthy period of time.

(i) Ms. Lewinsky testified before the grand jury that she gave the President six neckties, on the following occasions -- November 20, 1995, March 31, 1996, shortly before August 16, 1996, sometime between March 3 and March 9, 1997, either October 21 or October 22, 1997, and December 6, 1997, six weeks before the deposition in the Jones case.[133] White House records confirm at least two of the ties Ms. Lewinsky gave the President, a tie given on November 22, 1995,[134] and another in August 1996 for the

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[132] Clinton 1/17/98 Depo. at 76-77.

[133] Lewinsky 8/6/98 GJ at 235-36.

[134] V006-DC-00000157. See also Footlik 302, March 19, 1998, at 2. According to Ms. Lewinsky, her sexual relationship with President Clinton had begun a week earlier, on November 15, 1995. Lewinsky 8/6/98 GJ at 10. The President chose to keep this tie (as he is permitted to do), rather than send it to the White House gift unit. See Currie 5/14/98 GJ at 76 ("Normal procedure is that gifts usually go to the gift unit.").

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President's birthday.[135] On a thank-you note dated September 4, 1996, the President wrote regarding the birthday tie: "The tie is really beautiful."[136]

(ii) Ms. Lewinsky gave the President a pair of sunglasses on approximately October 22, 1997.[137] The President's attorney, David E. Kendall, stated in a letter on March 16, 1998: "We believe that Ms. Lewinsky might have given the President a few additional items, such as ties and a pair of sunglasses, but we have not been able to locate these items."[138]

(iii) On November 13, 1997, Ms. Lewinsky gave the President an antique paperweight that depicted the White House circa 1800.[139] Ms. Lewinsky testified that she saw the paperweight in the Dining Room of the White House, where the President keeps many political memorabilia items, on December 6, 1997, and possibly also on December 28, 1997.[140] The President recently turned over the paperweight in response to a subpoena.[141]

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[135] V006-DC-00000162, V006-DC-00000180, V006-DC-00003714, V006-DC-00003715. Again, records indicate that the President planned to keep the items. V006-DC-00000180. Ms. Lewinsky also gave the President a t-shirt that she had brought back from Bosnia.

[136] V006-DC-00000159.

[137] Lewinsky 8/6/98 GJ at 28.

[138] Letter to OIC, 3/16/98.

[139] Lewinsky 8/6/98 GJ at 28. See also Lewinsky GJ Exhibit 6; Lewinsky 302, 7/28/98 at 13; LT16 at 14.

[140] Lewinsky 302.

[141] Letter to OIC, **cite**

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(iv) Ms. Lewinsky gave the President at least seven books - one as recently as January 4, 1998: 1) The Presidents of the United States, on January 4, 1998[142]; 2) Our Patriotic President: His Life in Pictures, Anecdotes, Sayings, Principles and Biography[143] on December 6, 1997;[144] 3) The Notebook, given on ___, 1997[145]; 4) Oy Vey, in early 1997;[146] 5) a small golf book in early 1997,[147] 6) her personal copy of Vox, a novel about phone sex, on

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[142] V002-DC-00000471. Ms. Lewinsky testified that she bought and gave the President that book in early January 1998, and that when she talked to him on January 5, 1998, he acknowledged that he received the book. Lewinsky 8/6/98 GJ at 189-192. When testifying before the grand jury, the President acknowledged receiving "a particularly nice book for Christmas, an antique book on Presidents. She knew that I collected old books and it was a very nice thing." Clinton 8/17/98 GJ at 36. The President believes that he received the book earlier. Clinton 8/17/98 GJ at __.

[143] V002-DC-0000003.

[144] Lewinsky 8/6/98 GJ at 109. She also testified that a chart used in the Grand Jury as an exhibit accurately listed that she gave the President that biography on December 6, 1997. Lewinsky 8/6/98 GJ at __. See also Lewinsky GJ Exhibit 7.

[145] Lewinsky 8/6/98 GJ at 26-17; Lewinsky GJ Exh. 5. The President did not produce The Notebook in response to a subpoena.

[146] Lewinsky 8/6/98 GJ at 182-183. Ms. Lewinsky further testified and told a friend that she had seen a copy of the book in the President's study the evening she waited alone for him in November 1997. Lewinsky 8/6/98 GJ at 183, LT16 at 30. White House records name Oy Vey on an October 10, 1997 catalog of books in the West Wing. 1361-DC-00000002 (Catalog of Books in the West Wing Presidential Study as of 10 October 1997). The President did not produce Oy Vey in response to a subpoena.

[147] Lewinsky 8/6/98 GJ at 183-84; Lewinsky 302, 7/28/98 at 13. Ms. Lewinsky testified that she had seen a copy of the book in the President's study during the evening that she waited alone for him in November 1997. Lewinsky 8/6/98 GJ at 183-84. The President did not turn this book over in response to a subpoena.

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March 29,1997;[148] and 7) an antique book on Peter the Great on August 16, 1997.[149]

(v) Ms. Lewinsky testified that she gave the President the following additional gifts: a Sherlock Holmes game and a glow in the dark frog sometime after Christmas 1996;[150] a golf ball and tees and a plastic pocket frog on February 28, 1997;[151] after the President injured his leg in March 1997, a care package filled with whimsical gifts, such as metal magnet with Presidential seal for his crutches, license plate with "Bill" for his wheelchair, and knee pads with the Presidential seal;[152] a Banana Republic long sleeve casual shirt and a puzzle on golf mysteries on May

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[148] Lewinsky 8/6/98 GJ at 183-84; Lewinsky 302, 7/28/98 at 13. Ms. Lewinsky further testified and previously told one of her friends that while for the President on November 13, 1997, she saw a copy of Vox on the desk in the study. LT16 at 30. Ms. Lewinsky related that she found it "funny. . . that he has Vox there" in the study, but it made her happy because she felt like "there are like little reminders of me there." LT16 at 36-37. See also LT19 at 26-27. The President did not produce Vox in response to a subpoena.

[149] Lewinsky 8/6/98 GJ at 27-28; Lewinsky 302, 7/28/98 at 13. The President did not turn over the antique book in response to a subpoena.

[150] Lewinsky GJ, Aug. 6, 1998, at 26-27; Lewinsky GJ Exhibit 6; Lewinsky 302, 7/28/98 at 13. Ms. Lewinsky testified that she dropped these gifts off with Betty Currie and that the President acknowledged the gifts during a phone conversation shortly thereafter. Lewinsky 302.

[151] Lewinsky 8/6/98 GJ at 26-27; Lewinsky GJ Exhibit 6; Lewinsky 302, 7/28/98 at 12-13. Ms. Lewinsky told federal investigators that she may have seen the plastic pocket frog on the desk in the Oval Office. **date**. Lewinsky 302.

[152] Lewinsky 8/6/98 at 26-27; Lewinsky GJ Exhibit 7; Lewinsky 302, 7/28/98 at 13.

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produced a number of gifts that Ms. Lewinsky gave him,[158] and he testified to the grand jury regarding these items: "the items you asked for from Monica Lewinsky that I produced to you, you know that there was a tie, a coffee cup, a number of other things I had. Then I told you there were some things that had been in my possession that I no longer had, I believe. I don't remember if I did that. There was one book, I remember that I left on vacation last summer."[159] The President further acknowledged to the grand jury that "she continued to give [him] gifts" even after their physical relationship had ended.[160] that

Betty Currie also testified that Ms. Lewinsky sent over a number of packages for the President -- six or eight, she estimated.[161] Ms. Lewinsky also sometimes dropped parcels off or had family members do so.[162] Ms. Currie testified that to her knowledge, no one "tried to call or delivered packages or

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[158] The President testified that "to his knowledge" he has turned over all the gifts that Ms. Lewinsky gave him. Clinton 8/17/98 GJ at 154. The President has since produced at least one additional gift that Ms. Lewinsky gave him.

[159] Clinton 8/17/98 GJ at 172-173.

[160] Clinton 8/17/98 GJ at 47.

[161] Currie 5/6/98 GJ at 88-89; see also id. at 184; Currie 5/14/98 GJ at 78. Courier receipts show that Ms. Lewinsky sent nine packages to Ms. Currie. See 0837-DC-00000001 to 0837-DC-00000027. When the packages came to the White House, Ms. Currie would leave the packages from Ms. Lewinsky in the President's box outside the Oval Office, and "[h]e would pick it up." Currie 5/6/98 GJ at 88-89; see also Currie 5/14/98 GJ at 78. To the best of her knowledge, such parcels always reached the President. "The President got everything anyone sent him." Currie 5/6/98 GJ at 129.

[162] LT1 at 63-64.

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something as many times as [Ms. Lewinsky] did."[163]

c. Analysis

Contrary to the President's statement in his civil deposition that he could not recall whether he had ever given any gifts to Ms. Lewinsky and that he had received a gift from Ms. Lewinsky only "once or twice," they exchanged numerous gifts of all kinds over a lengthy period of time.

A truthful answer to the questions about gifts by the President at the Jones deposition would have raised questions about their relationship, however, including whether their relationship was more than platonic and whether he had lied in denying that their relationship was sexual. Again, the President's central lie at the deposition -- about his sexual relationship with Ms. Lewinsky -- required subsidiary and related lies, including lies about the gifts.

IV. There is substantial and credible information that the President lied under oath during his deposition in the Jones case about his conversations with Monica Lewinsky and Vernon Jordan about her involvement in the Jones case.

President Clinton was questioned during his deposition whether he had discussed with Ms. Lewinsky the possibility of her testifying in the Jones case. He also was asked whether he was aware that Vernon Jordan had met with Monica Lewinsky to discuss the Jones case. There is substantial and credible information that the President lied under oath in answering these questions.

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[163] Currie 5/5/98 GJ at 145.

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A. Conversations with Ms. Lewinsky regarding the possibility of her testifying in the Jones Case.

1. President Clinton's testimony in his deposition

In the President's civil deposition, the Jones attorneys explored any discussions the President might have had with Monica Lewinsky about the Jones case. Ms. Jones's attorneys sought to determine whether the President had made any efforts to influence her testimony, as they believed had occurred with a number of possible witnesses:

> Q: Have you ever talked to Monica Lewinsky about the possibility that she might be asked to testify in this lawsuit?
>
> WJC: I'm not sure, and let me tell you why I'm not sure. It seems to me the, the, the — I want to be as accurate as I can here. Seems to me the last time she was there to see Betty before Christmas we were joking about how you-all [the Jones attorneys], with the help of the Rutherford Institute, were going to call every woman I'd ever talked to . . . . and ask them that, and so I said you [Ms. Lewinsky] would qualify, or something like that. I don't, I don't think we ever had more of a conversation than that about it, but I might have mentioned something to her about it, because when I saw how long the witness list was, or I heard about it, before I saw, but actually by the time I saw it her name was on it, but I think that was after all this had happened. I might have said something like that, so I don't want to say for sure I didn't, because I might have said something like that.
>
> * * * *
>
> Q: What, if anything, did Monica Lewinsky say in response?
>
> WJC: Nothing that I remember. Whatever she said, I don't remember. Probably just some predictable thing.[164]

2. Evidence that Contradicts the President's Testimony

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[164] Clinton 1/17/98 Depo. at 70-71 (emphasis added).

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a. Ms. Lewinsky's Testimony

Ms. Lewinsky testified that she spoke twice to President Clinton on the phone about the possibility that she might be asked to testify in the lawsuit, and also met in person with him about it.

(i) December 17, 1997 Call. Ms. Lewinsky testified that President Clinton called her at about 2:00 a.m. on December 17, 1997, and told her that Ms. Currie's brother had died, and that Monica was on the witness list in the Jones case. According to Ms. Lewinsky, "He told me that it didn't necessarily mean that I would be subpoenaed, but that that was a possibility, and if I were to be subpoenaed, that I should contact Betty and let Betty know that I had received the subpoena."[165] Ms. Lewinsky asked him how she should handle it if she were subpoenaed, and the President told her that she might be able to sign an affidavit.[166] The President also told her, "You know, you can always say you were coming to see Betty or that you were bringing me letters."[167] Ms. Lewinsky took that statement to be a reminder of the general pattern of concealment that they had discussed earlier in their relationship.

(ii) December 28, 1997 Visit. Ms. Lewinsky was subpoenaed on December 19. Ms. Lewinsky met with President Clinton on

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[165] Lewinsky 8/6/98 GJ at 123.

[166] Lewinsky 8/6/98 GJ at 123. **check other ML testimony**

[167] Lewinsky 8/6/98 GJ at 123. **check other ML testimony**

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December 28, 1997, nine days after she had been subpoenaed and less than three weeks before the President was deposed.

According to Ms. Lewinsky, she and the President discussed how she came to be placed on the witness list. Ms. Lewinsky said they also discussed the fact that her subpoena required the production of gifts to her from the President, and noted that both she and the President were concerned about the specific request for a "hat pin" because the had given her a hat pin.[168]

Because of their mutual concern about the subpoena, Ms. Lewinsky testified that she asked the President if she should put the gifts away somewhere.[169] The President responded "I don't know" or "Hmm" or "Let me think about it."[170] Later that day, Ms. Lewinsky transferred the gifts to Ms. Currie who stored them under her bed.[171][172][173]

(iii) January 5, 1998 Call. Ms. Lewinsky also testified that she spoke to the President by telephone on January 5, 1998, where they continued to discuss her role in the Jones case. Ms. Lewinsky stated that she expressed concern that if she were deposed and asked about her transfer to the Pentagon, she would

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[168] Lewinsky 8/6/98 GJ at 151-52.

[169] Lewinsky 8/6/98 GJ at 152. **check other ML testimony**

[170] Lewinsky 8/6/98 GJ at 152. **check other ML testimony**

[171] Lewinsky 8/6/98 GJ at 154. **check other ML testimony**

[172] Lewinsky 8/6/98 GJ at 154-56 **check other ML testimony**

[173] Lewinsky 8/6/98 GJ at 156. **check other ML testimony**

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have a difficult time explaining how she had obtained the job. According to Ms. Lewinsky, the President suggested that she answer by explaining that the people in the White House Legislative Affairs office helped her get the job.[174]

b. The President's Grand Jury testimony

When the President testified to the grand jury, the President admitted -- in direct contradiction to his civil deposition testimony -- that Ms. Lewinsky visited him on December 28, 1997,[175] and that during that visit, they discussed her involvement in the Jones case:

> WJC: . . . I remember a conversation about the possibility of her testifying. I believe it must have occurred on the 28th.
>
> She mentioned to me that she did not want to testify. So, that's how it came up. Not in the context of, I heard you have a subpoena, let's talk about it.
>
> She raised the issue with me in the context of her desire to avoid testifying, which I certainly understood; not only because there were some embarrassing facts about our relationship that were inappropriate, but also because a whole lot of innocent people were being traumatized and dragged through the mud by these Jones lawyers with their dragnet strategy. . .[176]
>
> * * * *
>
> Q: . . . Do you agree that she was upset about being subpoenaed?
>
> WJC: Oh, yes, sir, she was upset. She -- well, she-- we --

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[174] Lewinsky 8/6/98 GJ at 197.

[175] **cite**

[176] Clinton 8/17/98 GJ at 36-37 (emphasis added).

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she didn't -- we didn't talk about a subpoena. But she was upset. She said, I don't want to testify; I know nothing about this; I certainly know nothing about sexual harassment; why do they want me to testify. And I explained to her why they were doing this, and why all these women were on these lists, people that they knew good and well had nothing to do with any sexual harassment.[177]

c. Analysis

There is substantial and credible information that President lied under oath in his civil deposition in answering "I'm not sure" when asked whether he had ever talked to Ms. Lewinsky about the possibility of her testifying. In fact, he had talked to Ms. Lewinsky about it on three occasions, as Ms. Lewinsky's testimony and the President's subsequent grand jury testimony makes clear. Those conversations all occurred in the month before the President's civil deposition, where he said "I'm not sure."

The President's motive to lie in his civil deposition on this point is evident. Had he admitted that he talked to Ms. Lewinsky about the possibility that she might be asked to testify or her testimony, that would raise the prospect that he had tampered with a prospective witness. Such an admission almost certainly would lead Ms. Jones' attorneys to inquire further into that subject with both the President and Ms. Lewinsky. Furthermore, had the President admitted talking to Ms. Lewinsky about her testifying, that conversation almost certainly would have attracted substantial public scrutiny if and when the President's deposition became public.

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[177] Clinton 8/17/98 GJ at 39-40 (emphasis added).

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B. The President's Conversations With Vernon Jordan Regarding Ms. Lewinsky

1. The President's testimony in the Jones Case

The President also was questioned in his deposition regarding the conversations that he had with other individuals, including Vernon Jordan, regarding Ms. Lewinsky and her role in the Jones case:

> Q: Did anyone other than your attorneys ever tell you that Monica Lewinsky had been served with a subpoena in this case?
>
> WJC: I don't think so.[178]

The President later testified in more detail about conversations with others, specifically including Mr. Jordan, about Ms. Lewinsky's role in the case.

> Q: Excluding conversations that you may have had with Mr. Bennett or any of your attorneys in this case, within the past two weeks has anyone reported to you that they had had a conversation with Monica Lewinsky concerning this lawsuit?
>
> WJC: I don't believe so. I'm sorry, I just don't believe so.
>
> Q. Has it ever been reported to you that [Vernon Jordan] met with Monica Lewinsky and talked about this case?
>
> WJC: I knew that he met with her. I think Betty suggested that he meet with her. Anyway, he met with her. I, I thought that he talked to her about something else. I didn't know that -- I thought he had given her some advice about her move to New York. Seems like that's what Betty said.[179]

b. Evidence That Contradicts the President's Deposition in

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[178] Clinton 1/17/98 Depo. at 68-69.

[179] Clinton 1/17/98 Depo. at 72 (emphasis added).

FOIA # none (URTS 16305) DocId: 70105128 Page 65

the Jones Case

(i) Vernon Jordan's Testimony

Vernon Jordan testified that his conversations with the President about Ms. Lewinsky's subpoena were "a continuing dialogue."[180] When asked if he had kept the President informed about both Ms. Lewinsky's status in the Jones case and her job search, Mr. Jordan responded: "The two -- absolutely."[181]

On December 19, Ms. Lewinsky phoned Mr. Jordan and told him that she had been subpoenaed in the Jones case.[182] Following that call, Mr. Jordan then tried to reach the President "to inform the President what I'd learned"[183] — namely, "that Monica Lewinsky was coming to see me, and that she had a subpoena"[184] — but the President was unavailable.[185] Later that day, at 5:01 p.m., Mr. Jordan had a seven-minute telephone conversation with the President:[186]

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[180] Jordan 3/5/98 GJ at 26.

[181] Jordan 3/5/98 GJ at 29.

[182] 1051-DC-00000003 (Pentagon phone records). See also Jordan 3/3/98 GJ at 92-93, 101 (testifying that Ms. Lewinsky called him up and she was "very upset" about "being served with a subpoena in the Paula Jones case").

[183] Jordan 5/5/98 GJ at 141.

[184] Jordan 5/5/98 GJ at 142-43.

[185] Jordan 5/5/98 at 133-34. Mr. Jordan had told Ms. Lewinsky to come see him at 5:00 PM. **cite** See also Jordan 5/5/98 at 144 (relating why he wanted to tell the President about Ms. Lewinsky's subpoena).

[186] 1178-DC-00000014 (White House phone records); Jordan 5/5/98 GJ at 145.

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I said to the President, "Monica Lewinsky called me up. She's upset. She's gotten a subpoena. She is coming to see me about this subpoena. I'm confident that she needs a lawyer, and I will try to get her a lawyer."[187]

Mr. Jordan testified that "the purpose of my call" was to inform the President of Ms. Lewinsky's subpoena.[188]

Later in the day on December 19, after meeting with Ms. Lewinsky, Vernon Jordan went to the White House and met with the President alone in the Residence.[189] Mr. Jordan told the grand jury: "I told him that Monica Lewinsky had been subpoenaed, came to me with a subpoena."[190] According to Mr. Jordan, the President "thanked me for my efforts to get her a job and thanked me for getting her a lawyer ...."[191]

According to Mr. Jordan, on January 7, 1998, Ms. Lewinsky showed him a copy of her signed affidavit denying any sexual relationship with the President.[192] He testified that he told the President about the affidavit, probably in one of his two logged

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[187] Jordan 5/5/98 GJ at 145. See also id. at 147.

[188] Jordan 5/5/98 GJ at 147.

[189] Jordan 3/3/98 GJ at 167-69. White House records indicate that Mr. Jordan was scheduled to arrive at 8:00 p.m., and actually arrived at 8:15 p.m. See 1178-DC-00000026 (WAVES record). Mr. Jordan testified, however, that he is certain that he did not arrive at the White House until after 10 p.m. Jordan 5/5/98 GJ at 164.

[190] Jordan 3/3/98 GJ at 169.

[191] Jordan 3/3/98 GJ at 172.

[192] Jordan 5/5/98 GJ at 221-22 (emphasis added); see also Jordan 5/5/98 GJ at 20.

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calls to the White House that day:[193]

Q: [W]alk us through what exactly you would have said on the portion of the conversation that related to Ms. Lewinsky and the affidavit.

VJ: Monica Lewinsky signed the affidavit.

* * * *

Q: [L]et's say if it was January 7th, or whenever it was that you informed him that she signed the affidavit,[194] is it accurate that based on the conversations you had with him already, you didn't have to explain to him what the affidavit was?

VJ: I think that's a reasonable assumption.

Q: So that it would have made sense that you would have just said, "She signed the affidavit," because both you and he knew what the affidavit was?

VJ: I think that's a reasonable assumption.

Q: All right. When you indicated to the President that she had signed the affidavit, what, if anything, did he tell you?

VJ: I think he -- his judgment was consistent with mine that that was -- the signing of the affidavit was consistent with the truth.[195]

Mr. Jordan testified that "I knew that the President was concerned about the affidavit and whether or not it was signed. He was, obviously."[196] When asked why he believed the President

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[193] V004-DC-00000159 (Akin, Gump phone records); Jordan 3/5/988 GJ at 24-25, 33; Jordan 5/5/98 GJ at 223-26.

[194] The affidavit is dated January 7, 1998, so the conversation informing the President that it had been signed could not have occurred on any earlier than this date. See Doc. Supp. A, Tab [].

[195] Jordan 5/5/98 GJ at 224-26.

[196] Jordan 3/5/98 GJ at 25. Cf. Jordan 5/5/98 GJ at 226 (When President was told Ms. Lewinsky signed affidavit, "[t]here was no elation. There was no celebration.").

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was concerned, Mr. Jordan testified:

> Here is a friend of his who is being called as a witness in another case and with whom I had gotten a lawyer, I told him about that, and told him I was looking for a job for her. He knew about all of that. And it was just a matter of course that he would be concerned as to whether or not she had signed an affidavit foreswearing what I told you the other day, that there was no sexual relationship.[197]

Mr. Jordan summarized his contacts with the President about Monica Lewinsky and her involvement in the Jones litigation as follows:

> I made arrangements for a lawyer and I told the President that. When she signed the affidavit, I told the President that the affidavit had been signed and when Frank Carter told me that he had filed a motion to quash, as I did in the course of everything else, I said to the President that I saw Frank Carter and he had informed me that he was filing a motion to quash. It was as a simple information flow, absent a substantive discussion about her defense, about which I was not involved.[198]

C. Analysis

In his civil deposition testimony, the President stated that he had talked to Vernon Jordan about Ms. Lewinsky's job, but he did not admit that he had talked to him about anything to do with Ms. Lewinsky's involvement in the Jones case. As the testimony of Vernon Jordan reveals, and as the President conceded in his subsequent grand jury appearance,[199] the President did talk to Mr. Jordan about Ms. Lewinsky's involvement in the Jones case --

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[197] Jordan 3/5/98 GJ at 26. Mr. Jordan did not explain why President Clinton would be "concerned" if Ms. Lewinsky's affidavit were true.

[198] Jordan 3/5/98 GJ at 125.

[199] Clinton 8/17/98 GJ at 75-77.

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including that she had been subpoenaed, that Jordan had helped her obtain a lawyer, and that she had signed an affidavit denying a sexual relationship with the President.

The President's motive for making false statements on this subject was straightforward. Admitting that he had talked with Vernon Jordan about Monica Lewinsky's involvement in the Jones case, as well as about her job, would surely raise questions whether Ms. Lewinsky's testimony and future job were connected. Such an admission by the President in his civil deposition thus would have prompted Ms. Jones' attorneys to inquire further into the subject. And such an admission in his deposition also would trigger public scrutiny if and when the deposition became public.

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V. There is substantial and credible information that President Clinton endeavored to obstruct justice by engaging in a pattern of activity to conceal the truth of his relationship with Monica Lewinsky from the judicial process in the Jones case.

From the beginning of their relationship, President Clinton and Monica Lewinsky hoped and expected that it would remain secret from the public and others in the White House. The desire for secrecy would include taking active steps, if necessary, to conceal the relationship. Ms. Lewinsky testified:

> "[T]here was never a question in my mind and I -- from everything he said to me, I never questioned him, that we were ever going to do anything but keep this private, so that meant deny it and that meant do -- take whatever appropriate steps needed to be taken, you know, for that to happen . . . ."[200]

The President similarly testified that "I hoped that this relationship would never become public."[201]

Once it became apparent that Monica Lewinsky might be a witness in the Jones case, action to continue to conceal the relationship assumed legal significance. An effort to obstruct justice by concealing the truth from the legal process, whether by lying under oath or concealing documents or corruptly influencing a witness' testimony, is a federal crime.[202] There is substantial and credible information that President Clinton

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[200] Lewinsky GJ, Aug. 6, 1998, at 166-67.

[201] Clinton 8/17/98 GJ at 107.

[202] For a discussion of the legal requirements and scope of the federal obstruction of justice and witness tampering statutes, see Appendix Tab H (Legal Standards), Parts I(B), (C).

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engaged in such efforts to ensure that the truth of his relationship with Monica Lewinsky was not revealed in the Jones case.

In particular, there is substantial and credible information that

- the President and Monica Lewinsky discussed the fact that she had been subpoenaed for the gifts she had received from the President and reached an understanding that she would not produce them;
- the President and Monica Lewinsky had an understanding that they would both lie under oath about their relationship in the Jones case;
- the President encouraged Monica Lewinsky to file an affidavit to avoid a deposition;
- the President used Ms. Lewinsky's false affidavit in an endeavor to avoid questioning about Ms. Lewinsky at his own deposition; and
- that the President used his influence to assist Ms. Lewinsky in obtaining a job in New York at a time when she was a prospective adverse witness in the Jones case.

A. There is substantial and credible information that the President and Monica Lewinsky reached a mutual understanding -- a conspiracy to obstruct justice, in criminal law terms -- that Ms. Lewinsky, in response to a subpoena she received in the Jones case, would not produce all of the gifts that she had received from the President, which she did not. [CAN WE SAY THAT?]

1. Evidence

On December 19, 1997, Monica Lewinsky was served with a subpoena in connection with the Jones v. Clinton litigation. The subpoena required Ms. Lewinsky to testify at a deposition on

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January 23, 1998.[203]

The subpoena also required Ms. Lewinsky to produce "each and every gift including, but not limited to, any and all dresses, accessories, and jewelry, and/or hat pins given to you by, or on behalf of, Defendant Clinton."[204]

After being served with the subpoena, Monica Lewinsky became concerned because the list of gifts included the "hat pin, which screamed out at me because that was the first gift that the President had given me and it had some significance."[205] Ms. Lewinsky also expressed concern to her mother, Marcia Lewis, about the dress and book.[206]

Later in the day on December 19, 1997, the same day that she received the subpoena, Ms. Lewinsky met with Vernon Jordan, where she shared her concern about the gifts.[207] During that meeting, Ms. Lewinsky asked Mr. Jordan to inform the President that she had been subpoenaed.[208]

Vernon Jordan acknowledged that he and Ms. Lewinsky met on December 19, 1997, to discuss Ms. Lewinsky's subpoena.[209] He said

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[203] 920-DC-00000013-18. A copy of the subpoena is set forth in the Document Supplement, Exhibit __.

[204] Id. at Exhibit A p. 3.

[205] Lewinsky GJ, Aug. 6, 1998, at 132.

[206] Marcia Lewis GJ, Feb. 11, 1998, at 97-111.

[207] Lewinsky GJ, Aug. 6, 1998, at 132.

[208] Lewinsky GJ, Aug. 6, 1998, at 133.

[209] Jordan GJ, March 3, 1998, at 121, 138, 150.

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that Ms. Lewinsky "was concerned about the subpoena and I think for her the subpoena ipso facto meant trouble."[210] Mr. Jordan stated that said that while Ms. Lewinsky told him that the President had given her gifts, he does not remember if she mentioned any particular gift.[211]

On the evening of December 19, 1997, Vernon Jordan met with President Clinton at the White House. Mr. Jordan testified that they discussed Monica Lewinsky and the subpoena she had received.[212]

On December 22, 1997, Vernon Jordan took Monica Lewinsky to meet with attorney Frank Carter, who had agreed to represent Ms. Lewinsky at the request of Mr. Jordan. Ms. Lewinsky testified that before that meeting, she gathered together some of the "innocuous" gifts from the President that were called for by the subpoena (not including the hat pin), and brought them with her to turn over to Mr. Carter.[213] She testified that she showed these items to Mr. Jordan before turning them over to Frank Carter.[214] Mr. Jordan testified that he has no recollection of

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[210] Jordan GJ testimony, March 3, 1998, at 159. Mr. Jordan stated that Ms. Lewinsky was crying both on the telephone earlier that day and then again in his office. Id. at 149-150.

[211] Jordan GJ, March 3, 1998, at 138, 152, 153.

[212] Jordan GJ testimony, March 3, 1998, at 167-72. See also Part II(B) (discussing President's knowledge of Vernon Jordan's aid to Monica Lewinsky).

[213] Lewinsky GJ, Aug. 6, 1998, at 139-40.

[214] Lewinsky GJ, Aug. 6, 1998, at 139-40, 145. Ms. Lewinsky is unclear about the extent to which she told Mr. Jordan that she was not turning over all the gifts that were responsive to the

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Ms. Lewinsky saying anything to him about the subpoena or the gifts on this date.[215]

On December 28, 1998, Monica Lewinsky and the President met at the White House. During that meeting, Ms. Lewinsky "mentioned that I had been concerned about the hat pin being on the subpoena and he said that that had sort of concerned him also and asked me if I had told anyone that he had given me this hat pin and I said no."[216] They then discussed the possibility of moving some of the gifts called for by the subpoena out of her possession:

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

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subpoena. She testified to the grand jury that she "might" have "impliedly" told Mr. Jordan that there were other gifts that she was not producing to Frank Carter. Id. at 139-40. She also said that the items she showed Vernon Jordan on that day did not include the hat pin, even though she had indicated to him three days earlier that the President had given her one as a gift. Id. at 145. She testified that Mr. Jordan's reaction to being shown the gifts was non-committal. Id. at 142.

[215] Jordan 3/3/98 GJ at 190.

[216] Lewinsky 8/6/98 GJ at 152.

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that topic.[217]

Ms. Lewinsky testified that a few hours after their meeting on December 28, 1997, she received a call from Betty Currie.[218] Ms. Lewinsky testified was not surprised to receive the call, given her earlier discussion with the President.[219] According to Ms. Lewinsky, Betty Currie said to her: "'I understand you have something to give me.' Or, 'The President said you have something to give me.' [Something] [a]long those lines."[220] Ms. Lewinsky understood that Ms. Currie was referring to the gifts from the President.[221]

Ms. Currie testified, by contrast, that it was Monica Lewinsky who initiated the call about transferring the box of gifts. Ms. Currie also stated that she did not remember the President telling her that Ms. Lewinsky had some items for Ms.

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[217] Lewinsky 8/6/98 GJ at 152. In a later grand jury appearance, Ms. Lewinsky again described the conversation, and said "I don't remember his response. I think it was something like, 'I don't know,' or 'Hmm' or — there really was no response." Lewinsky GJ, Aug. 20, 1998, at 66; id. at 73 ("I think he said something like 'That concerned me too.'").

Ms. Lewinsky also told Linda Tripp that she had discussed the gifts and subpoena with the President. Ms. Tripp testified that Ms. Lewinsky told her of a conversation with the President in which he told her to "get rid of" the brooch, the hat pin, the book "Leaves of Grass," and the Martha's Vineyard (Black Dog) souvenirs. Tripp GJ, July 29, 1998, at 104-05.

[218] Lewinsky GJ, Aug. 6, 1998, at 154.

[219] Lewinsky GJ, Aug. 6, 1998, at 154.

[220] Lewinsky GJ, Aug. 6, 1998, at 154-55.

[221] Lewinsky GJ, Aug. 6, 1998, at 155.

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Currie to hold. She further testified that she did not remember telling the President that she was holding the gifts for Ms. Lewinsky, nor did she know if the President was aware that she was holding these gifts for Ms. Lewinsky.[222] When asked if the contrary statement by Ms. Lewinsky -- indicating that Ms. Currie had in fact spoken to the President about the gift transfer -- would be false, Ms. Currie replied: "Then she may remember better than I. I don't remember."[223]

Later that same day, it is undisputed that Ms. Currie drove to Monica Lewinsky's apartment. Ms. Lewinsky gave Ms. Currie a sealed box that contained several gifts she had received from the President, including the hat pin.[224] Ms. Lewinsky wrote "Please do not throw away" on the box.[225] Betty Currie then took the box and placed it in her home under her bed.

Betty Currie confirmed that she took possession of the box of gifts.[226] She testified that Monica Lewinsky told her that she (Lewinsky) was uncomfortable retaining the gifts herself because, Ms. Currie said, "people were asking questions about the stuff she had gotten."[227] Ms. Currie remembers that the transfer took

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[222] Currie 5/6/98 GJ at 105-06.

[223] Currie GJ, May 6, 1998 at 126.

[224] Lewinsky GJ, Aug. 6, 1998, at 158.

[225] Lewinsky 8/6/98 GJ at 158.

[226] Photographs of the box of gifts and its contents are set forth in the Appendix at Exhibit __.

[227] Currie GJ testimony, Jan. 27, 1998 at 58. In her first grand jury appearance in January 1998, Ms. Currie was asked

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place sometime in early January 1998,[228] when she drove to Ms. Lewinsky's residence after work, took the box from her, brought it home, and put it under her bed.[229] Ms. Currie knew (from Ms. Lewinsky) that the box contained gifts the President had given to Ms. Lewinsky.[230]

When the box was later obtained from Ms. Currie by a subpoena issued by the OIC, it contained (a) a hat pin; (b) a brooch; (c) an official copy of the 1996 State of the Union Address inscribed "To Monica Lewinsky with best wishes, Bill Clinton;" (d) a photograph of the President in the Oval Office

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whether she knew who had been asking the questions about the gifts; she testified, "No sir, I don't." Id. In her May grand jury appearance, Ms. Currie responded to a similar question by saying that she understood that a Newsweek reporter, Michael Isikoff, was asking questions about the gifts. Currie GJ testimony, May 6, 1998 at 107, 114, 120. She testified: "And Monica had told me that Isikoff had called her. So that's how I knew the name Isikoff. And I think that's when she mentioned that he had called about the gifts." Id. at 120. Ms. Isikoff had not, in fact, contacted Ms. Lewinsky that week.

In contrast to Ms. Currie's later testimony, Mr. Isikoff was working on an article about Ms. Lewinsky in mid-January, and in the course of his reporting he called Ms. Currie to find out about packages that Ms. Lewinsky had sent by courier (as Ms. Currie testified, 5/6/98 at 123, 130).

[228] In her original FBI interview, Ms. Currie stated that the transfer of the gift box occurred in December 1997. Currie FBI Interview, Jan. 24, 1998, at 3. Later before the grand jury, she testified that she could not remember exactly when the transfer took place. Currie GJ, Jan. 27, 1998, at 56-57. She stated, however, that it took place after a December 28, 1997 meeting between Ms. Lewinsky and the President; she estimated it was a couple of weeks after that meeting. Currie GJ, May 6, 1998, at 103-05.

[229] Currie GJ, May 6, 1998, at 107-08.

[230] Currie GJ, May 6, 1998, at 106-07.

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with a handwritten note, "To Monica -- Thanks for the tie Bill Clinton;" (e) a photograph of the President and Ms. Lewinsky inscribed "To Monica -- Happy Birthday! Bill Clinton 7-23-97;" (f) a sun dress, two tee shirts, and a baseball cap with a "Black Dog" logo on them.[231]

Monica Lewinsky stated that she and the President both understood from their conversation on December 28 that she would not produce the gifts. She realized that, had she disclosed the gifts, it would

> at least prompt [the Jones attorneys] to want to question me about what kind of friendship I had with the President and they would want to speculate and they'd leak it and my name would be trashed and he [the President] would be in trouble.[232]

When Ms. Lewinsky was asked why the President would have given her more gifts on December 28, when he knew she was under a current obligation to disclose the gifts in response to the subpoena, she stated:

> You know, I can't answer what [the President] was thinking, but to me, it was — there was never a question in my mind and I — from everything he said to me, I never questioned him, that we were never going to do anything but keep this private, so that meant deny it, and that meant do — take whatever appropriate steps needed to be taken, you know, for that to happen . . . .[233]

2. The President's Grand Jury Testimony

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[231] 302 of Production by Janis, Schuelke and Wechsler in response to subpoena of Betty Currie, Feb. 8, 1998 at 1-2. **[need better cite here]**

[232] Lewinsky GJ, Aug. 6, 1998, at 167.

[233] Lewinsky 8/6/98 GJ at 166-67.

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President Clinton testified that he had spoken to Monica Lewinsky about the gifts he had given her, but said he believed the conversation may have occurred before she received the subpoena on December 19. He testified:

> I did have a conversation with Ms. Lewinsky at some time about gifts, the gifts I'd given her. I do not know whether it occurred on the 28th, or whether it occurred earlier. I do not know whether it occurred in person or whether it occurred on the telephone. I have searched my memory for this, because I know it's an important issue. . . . The reason I'm not sure it happened on the 28th is that my recollection is that Ms. Lewinsky said something to me like, what if they ask me about the gifts you've given me. That's the memory I have. That's why I question whether it happened on the 28th, because she had a subpoena with her, request for production. "And I told her that if they asked her for gifts, she'd have to give them whatever she had, that that's what the law was."[234]

The President also denied that he had asked Betty Currie to pick up a box of gifts from Monica Lewinsky. He stated:

> Q: After you gave her the gifts on December 28 [1997], did you speak with your secretary, Ms. Currie, and ask her to pick up a box of gifts that were some compilation of gifts that Ms. Lewinsky would have —
>
> WJC: No, sir, I didn't do that.
>
> Q: To give to Ms. Currie?
>
> WJC: I did not do that.[235]
>
> * * * *
>
> Q: [D]id you ever have a conversations with Betty Currie about gifts, or picking something up from Monica Lewinsky?
>
> WJC: I don't believe I did, sir, no.

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[234] Clinton GJ, Aug. 17, 1998, at 43-45.

[235] Clinton GJ, Aug. 17, 1998, at 51.

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Q: You never told her anything to this effect, that Monica has something to give you?

WJC: No, sir.[236]

3. Analysis

The uncontroverted evidence demonstrates that the President gave gifts to Monica Lewinsky; that Ms. Lewinsky was concerned about having possession of these gifts; that after she was served with a subpoena in the Jones litigation, Ms. Lewinsky met with Vernon Jordan and discussed the gifts; that Vernon Jordan met with the President that night and discussed the Lewinsky subpoena with him; that Ms. Lewinsky later met with the President at the White House; and that after that meeting, Ms. Lewinsky did not produce any gifts to Ms. Jones' attorneys and indeed transferred some gifts to the President's personal secretary who stored them under her bed.

Ms. Lewinsky testified that she spoke to the President about the gifts called for by the subpoena, in particular the hat pin. The President testified that there was some conversation about gifts. The President suggested that the conversation might have taken place before Ms. Lewinsky was subpoenaed, but the President acknowledged that his memory is unclear on the timing.

The testimony conflicts, however, as to what happened when Ms. Lewinsky raised the subject of gifts. The President says

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[236] Clinton GJ, Aug. 17, 1998, at 114-15. Ms. Lewinsky has stated that the President never told her to turn over all the gifts he had given her to Frank Carter. Lewinsky FBI Interview, Aug. 19, 1998, at 4.

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that he told Ms. Lewinsky to produce any subpoenaed gifts. Ms. Lewinsky testified to the contrary -- that the President did not tell her to produce the gifts.

Ms. Lewinsky's testimony is more credible. First, if Ms. Currie called Ms. Lewinsky, as Ms. Lewinsky testified, then there can be no doubt about the President's role. But even if Ms. Lewinsky called Ms. Currie, it is unlikely that either the President or Ms. Lewinsky would have involved Ms. Currie in this scheme to conceal subpoenaed evidence unless the President had indicated his assent when Ms. Lewinsky said she might not produce the gifts.

For that reason, there is substantial and credible evidence that President Clinton and Monica Lewinsky discussed the subpoenaed gifts and reached a mutual understanding that she would not produce the gifts to Ms. Jones' attorneys, which she did not.

B. There is substantial and credible information that (i) President Clinton endeavored to obstruct justice by encouraging Ms. Lewinsky to file a false affidavit to avoid her deposition and then making improper use of that affidavit at his deposition and (ii) the President and Ms. Lewinsky had a mutual understanding -- a conspiracy, in criminal law terms -- that they would both lie under oath about their relationship in the Jones case, including by the use of cover stories.

When Monica Lewinsky was subpoenaed in the Jones case, she filed an affidavit swearing, among other things, that she had not had a sexual relationship with President Clinton. Ms. Lewinsky

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filed the affidavit as part of her motion to quash the subpoena, hoping that she would not have to testify at a deposition. Ms. Lewinsky has since acknowledged under oath that her affidavit was false.

The evidence shows that President Clinton and Ms. Lewinsky had an understanding that each would testify falsely under oath in the Jones case about the sexual aspects of their relationship. Moreover, the President encouraged her to file an affidavit so that she would not have to testify at a deposition. The President then allowed his lawyer to use that false affidavit at the President's deposition in an effort to limit the questions he could be asked about Ms. Lewinsky. Such acts constitute both an obstruction of justice and a conspiracy to obstruct justice.

1. Evidence regarding affidavit

Monica Lewinsky testified that after her name appeared on the witness list in the Jones litigation, President Clinton suggested that she file an affidavit if she were subpoenaed to testify. Ms. Lewinsky stated that President Clinton called her at around 2:00 or 2:30 in the morning on December 17, 1997.[237] The President told her that her name had appeared on the Paula Jones case witness list.[238] According to Ms. Lewinsky, when she asked the President what she should do if she were subpoenaed, he said she should call Betty Currie and that "maybe you can sign an

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[237] Lewinsky GJ, Aug. 6, 1998, at 121-22.

[238] Lewinsky GJ, Aug. 6, 1998, at 122-23.

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affidavit."[239] On later questioning, Ms. Lewinsky said that she was "100% sure" that the President suggested that she might want to sign an affidavit to avoid testifying.[240]

Ms. Lewinsky understood the President's advice to mean that she might be able to execute an affidavit that would either be false on its face or might otherwise be deceptive so as to avoid disclosing the true nature of their relationship: "I thought that signing an affidavit could range from anywhere -- the point of it would be to deter or to prevent me from being deposed and so that could range from anywhere between maybe just somehow mentioning, you know, innocuous things or going so far as maybe having to deny any kind of relationship.[241]

Ms. Jones' lawyers served Ms. Lewinsky with a subpoena for a deposition on December 19, 1997. Ms. Lewinsky contacted Vernon Jordan, who in turn put her in contact with attorney Frank Carter.[242] Based on the information Ms. Lewinsky provided, Mr. Carter prepared an affidavit in which she stated: "I have never had a sexual relationship with the President."[243]

After Mr. Carter drafted the affidavit, Ms. Lewinsky spoke

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[239] Lewinsky GJ, Aug. 6, 1998, at 123.

[240] Lewinsky FBI Interview, Aug. 19, 1998, at 4.

[241] Lewinsky GJ, Aug. 6, 1998, at 124.

[242] Ms. Lewinsky said that she did not contact Betty Currie, as the President had previously suggested, because Ms. Currie's brother had been killed a few days before. Lewinsky GJ, Aug. 6, 1998, at 128-29.

[243] Lewinsky Affidavit, Jan. 7, 1998, ¶ 8.

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to the President by phone, and asked the President if he wanted to see the draft affidavit. According to Ms. Lewinsky, the President replied that he did not need to see it because he had already "seen about fifteen of them."[244]

Vernon Jordan confirms that President Clinton knew that Ms. Lewinsky planned to execute an affidavit that denied a sexual relationship.[245] Mr. Jordan further testified that he told President Clinton when the affidavit was signed and that, by that point, the President was already aware of the affidavit and its general contents.[246] Ms. Lewinsky's affidavit was filed with the federal court in Arkansas on January [20?], 1998, as part of her motion to quash the deposition subpoena.

Before the President's deposition, his lawyer, Robert Bennett, obtained a copy of Ms. Lewinsky's affidavit from Frank Carter.[247] At the President's deposition, Ms. Jones's counsel asked a series of questions about the President's relationship with Ms. Lewinsky, including questions about whether he had been alone with Ms. Lewinsky in and around the Oval Office. Mr. Bennett objected to the "innuendo" of the questions, noting that

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[244] Lewinsky GJ, Aug. 6, 1998, at [check cite; I have 199-200, but this is wrong]; See also Lewinsky FBI Interview, Aug. 18, 1998, at 3-4.

[245] Jordan GJ, May 5, 1998, at 138. The call was placed at 5:01 p.m. and lasted about 5 minutes. **[check phone records]**

[246] Jordan GJ, May 5, 1998, at 224-26. The quoted passage is also set forth in Part III(C).

[247] Carter GJ June 18, 1998, at 113.

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Ms. Lewinsky had signed an affidavit denying a "sexual relationship," which Mr. Bennett interpreted as saying that "there is absolutely no sex of any kind in any way, shape, manner, or form, with President Clinton."[248] Mr. Bennett further said: "Counsel is fully aware that Ms. Lewinsky has filed, has an affidavit which they are in possession of saying that there is absolutely no sex of any kind of any manner, shape or form, with President Clinton."[249] Judge Wright allowed the questioning to continue.

2. The President's grand jury testimony

The President told the grand jury: "did I hope [Ms. Lewinsky would] be able to get out of testifying on an affidavit? Absolutely. Did I want her to execute a false affidavit? No, I did not."[250]

When questioned about his phone conversation with Ms. Lewinsky on December 17, 1997 — the one during which Ms. Lewinsky testified that the President suggested filing an affidavit — the President testified that he did not remember exactly what he had said to Ms. Lewinsky that night.[251]

The President disputed the notion that Ms. Lewinsky's

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[248] Clinton Deposition, Jan. 17, 1998, at 54.

[249] Clinton Deposition, Jan. 17, 1998, at 53-55.

[250] Clinton GJ, Aug. 17, 1998, at 120. See also id. at 82 ("I was glad she saw a lawyer. I was glad she was doing an affidavit.").

[251] Clinton GJ, Aug. 17, 1998, at 117.

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affidavit was necessarily inaccurate. He testified that, depending on Ms. Lewinsky's state of mind, her statement denying a sexual relationship could have been true.

> I believe at the time she filled out this affidavit, if she believed that the definition of sexual relationship was two people having intercourse, then this is accurate. And I believe that is the definition that most ordinary Americans would give it.[252]

1. Evidence regarding cover stories

Ms. Lewinsky testified that one of the ways that she and President Clinton agreed to conceal their relationship was to formulate "cover" stories to explain Ms. Lewinsky's presence in the West Wing and Oval Office. For example, they agreed that Ms. Lewinsky would tell people that she was coming to the Oval Office to deliver papers or to have papers signed when in fact she was really going to have a sexual encounter with the President.[253]

While employed at the White House, Ms. Lewinsky used this cover story and told several people in and around the Oval Office that she was there to deliver papers or obtain the President's signature.[254] Several Secret Service employees testified that they understood or were told that the purpose of Lewinsky's visits was to deliver to or pick up official papers from

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[252] Clinton 8/17/98 GJ at __.

[253] Lewinsky GJ, Aug. 6, 1998, at 53-54; Id. at 54 (Q: "When you say that you planned to bring papers, did you ever discuss with the President the fact that you would try to use that as a cover?" ML: "Yes.").

[254] Muskett GJ, July 21, 1998, at 25-26, 83, 89-90; July 17, 1998, at 5; Fox GJ, Feb. 17, 1998, at 34-35.

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President Clinton.[255] In fact, Ms. Lewinsky stated that she never had occasion as part of her White House job to deliver papers or obtain the President's signature.[256]

After she was transferred to the Pentagon, Ms. Lewinsky testified that she and the President formulated a second cover story: that Ms. Lewinsky went to the Oval Office to visit Betty Currie rather than the President. Ms. Lewinsky testified that she and the President discussed how, for additional corroboration, "Betty always needed to be the one to clear me in so that, you know, I could always say I was coming to see Betty."[257]

The cover story provided the intended corroboration. White House records indicate that from June 1996 until the end of 1997, Ms. Lewinsky made 12 visits to the White House for unspecified reasons, and one for a radio address, at times that the President was in the Oval Office.[258] Ms. Lewinsky testified that she met

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[255] Householder GJ, Aug. 13, 1998, at 11; Byrne GJ, July 30, 1998, at 9, 16, 30, 37; Garabito GJ, July 30, 1998, at 17. Other Secret Service Officers testified that they saw Ms. Lewinsky in the West Wing carrying paperwork. Moore GJ, July 30, 1998, at 25-26; J. Overstreet GJ, Aug. 11, 1998, at 7; Wilson GJ, July 23, 1998, at 32.

[256] Lewinsky GJ, Aug. 6, 1998, at 54-55.

[257] Lewinsky GJ, Aug. 6, 1998, at 55.

[258] See Appendix, Tab D (Table of Lewinsky Visits to White House). Ms. Lewinsky made a 13th visit to attend the taping of the President's weekly radio address on February 28, 1997. Id., at 3. Ms. Lewinsky testified that she met with the President after the radio address, and engaged in sexual activity with him. Lewinsky GJ, Aug. 6, 1998, at 30-31. Betty Currie signed Ms. Lewinsky in on that occasion as well. Appendix, Tab D at 3.

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with the President privately on 10 occasions after she left her job at the White House.[259] Betty Currie signed her in for each of those private visits.[260]

Ms. Lewinsky has stated that her real purpose in visiting the White House on these occasions was to visit President Clinton, rather than Ms. Currie.[261] Ms. Lewinsky, on some occasions, saw Ms. Currie when the President was not in the Oval Office, but if the President was in the Office, her reason for going to the White House was to see him.[262]

Betty Currie has acknowledged that Ms. Lewinsky "probably" saw President Clinton during each of her visits when he was in the Oval Office.[263] President Clinton agreed that "just about every time" that Ms. Lewinsky came to the Oval Office to see Ms. Currie when the President was there, Ms. Lewinsky was there to see the President as well.[264]

Monica Lewinsky testified that President Clinton encouraged her to continue to use the cover stories to conceal their

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[259] See Appendix, Tab E (table of Lewinsky contacts with President). Ms. Lewinsky testified that she met with the President in private after she left her position at the White House on eleven dates in 1997: February 28 (following the radio address), March 29, May 24, July 4, July 14, July 24, August 16, October 11, November 13, December 6, and December 28.

[260] See Appendix, Tab D.

[261] cite.

[262] Lewinsky GJ, Aug. 6, 1998, at 55.

[263] Currie GJ, May 6, 1998, at 57-58.

[264] Clinton GJ, Aug. 17, 1998, at 117.

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relationship after her name appeared on the witness list in the Jones case.

In her early morning phone conversation with President Clinton on December 17, 1997 — the same conversation in which the President told her that her name was on the witness list and suggested that she file an affidavit if subpoenaed [265] — Ms. Lewinsky said she had the following discussion with the President:

> ML: At some point in the conversation, and I don't know if it was before or after the subject of the affidavit came up, he sort of said, "You know, you can always say you were coming to see Betty or that you were bringing me letters." Which I understood was really a reminder of things that we had discussed before.
>
> Q: So when you say things you had discussed, sort of ruses that you had developed.
>
> ML: Right. I mean, this was -- this was something that -- that was instantly familiar to me.
>
> Q: Right.
>
> ML: And I knew exactly what he meant.
>
> Q: Had you talked with him earlier about these false explanations about what you were doing visiting him on several occasions?
>
> ML: Several occasions throughout the entire relationship. Yes. It was the pattern of the relationship, to sort of conceal it.[266]

Ms. Lewinsky testified that she was relieved after this call,

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[265] Lewinsky GJ, Aug. 6, 1998, at 121-22.

[266] Lewinsky GJ, Aug. 6, 1998, at 123-24 (emphasis added). See also Lewinsky FBI Interview, Aug. 5, 1998, at 3 (during December 17, 1998 telephone call, "LEWINSKY is 99.99% sure CLINTON said LEWINSKY can always say she was there to see CURRIE" (capitalization in original)).

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because the President "was assured she was comfortable with the situation."[267]

President Clinton repeated parts of the cover stories in his deposition in the Jones case. When asked if he had met with Ms. Lewinsky "several times" while she worked at the White House, the President responded that he had seen her on two or three occasions during the government shutdown, "and then when she worked at the White House, I think there were one or two other times when she brought some documents to me."[268] When asked if he was ever alone with Ms. Lewinsky in the Oval Office, the President stated:

> When she worked at Legislative Affairs they always had somebody there on the weekends. . . . Sometimes they would bring me things on the weekends. In that case, whatever time she would be in there, drop it off, exchange a few words and go, she was there....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.[269]

Ms. Lewinsky understood that the President planned to continue to conceal the relationship by relying on the previously discussed cover stories, and understood that he wanted her to continue to advance those stories as well, even under oath. She testified:

> [I]t wasn't as if the President called me and said, "You know Monica, you're on the witness list, this is going to be really hard for us, we're going to have to tell the truth

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[267] Lewinsky 302, **[cite]**

[268] Clinton Deposition, Jan. 17, 1998, at 50-51.

[269] Clinton Deposition, Jan. 17, 1998, at 52-53.

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and be humiliated in front of the entire world about what we've done," which I would have fought him on probably. That was different. And by him not calling me and saying that, you know, I knew what that meant.[270]

The pattern of devising cover stories in an effort to forestall an inquiry into the relationship continued after Ms. Lewinsky was subpoenaed to testify. On January 5, 1998, she met with her attorney, Frank Carter, to discuss possible questions that Ms. Lewinsky could be asked at a deposition. One of the questions that concerned her was a question about how she had obtained her job at the Pentagon; she was worried that if the Jones lawyers checked with the White House about the transfer, some at the White House would say unflattering things about how she had been terminated.[271] Ms. Lewinsky spoke to President Clinton on the phone that evening, and asked for advice on how to answer the question. Ms. Lewinsky testified that President responded, "you could always say the people in Legislative Affairs got it for you or helped you get it."[272]

2. The President's Grand Jury Testimony

The President testified that before he knew that Ms. Lewinsky was a witness in the Jones case, he "might well" have told Ms. Lewinsky that she could offer the cover stories if questioned about her presence in the West Wing and Oval Office:

Q: Did you ever say anything like that, you can always say

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[270] Lewinsky GJ, Aug. 6, 1998, at 234 (emphasis added).

[271] Id. at 192-93.

[272] Id. at 197.

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that you were coming to see Betty or bringing me letters? Was that part of any kind of a, anything you said to her or a cover story, before you had any idea she was going to be part of Paula Jones?

WJC: I might well have said that.

Q: Okay.

WJC: Because I certainly didn't want this to come out, if I could help it. And I was concerned about that. I was embarrassed about it. I knew it was wrong.[273]

The President testified that he did not remember whether he had discussed the cover stories with Ms. Lewinsky during the December 17, 1997 conversation,[274] or at any time after Ms. Lewinsky's name appeared on the Jones witness list:

Q: Did you tell [Ms. Lewinsky] anytime in December something to that effect: You know, you can always say that you were coming to see Betty or you were bring me letters? Did you say that, or anything like that, in December '97 or January '98 to Monica Lewinsky?

WJC: Well, that's a very broad question. I do not recall saying anything like that in connection with her testimony. I could tell you what I do remember saying if you want to know. But I don't — we might have talked about what to do in a non-legal context at some point in the past, but I have no specific memory of

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[273] Clinton GJ, Aug. 17, 1998, at 119. Earlier in his testimony the President appeared to acknowledge that the cover stories had been used while the relationship was ongoing. When asked about instances that he had been alone with Ms. Lewinsky, the President testified: "I don't remember when [the meetings] were, but I remember twice when, on Sunday afternoon, she brought papers down to me, stayed, and we were alone." Id. at 32.

[274] According to Ms. Lewinsky, this was the conversation in which the President told her that her name was on the Jones witness list, and she and the President discussed her filing an affidavit and the continued use of cover stories. See paragraphs __ - __, above. The President testified that he remembers having a phone conversation sometime during this period, and although he does not remember telling Ms. Lewinsky about her name being on the witness list, said "I certainly won't dispute that I might have said that." Clinton GJ, Aug. 17, 1998, at 116.

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that conversation.

I do remember what I said to her about the possible testimony.

* * * *

Q: . . . . Did you say anything like [the cover stories] once you knew or thought she might be a witness in the Jones case? Did you repeat the statement, or something like it to her?

WJC: Well, again, I don't recall, and I don't recall whether I might have done something like that, for example, if somebody says, what if the reporters ask me this, that or the other thing. I can tell you this: In the context of whether she could be a witness, I have a recollection that she asked me, well, what do I do if I get called as a witness, and I said, you have to get a lawyer. And that's all I said. And I never asked her to lie.

Q: Did you tell her to tell the truth?

WJC: Well, I think the implication was she would tell the truth.[275]

3. Analysis

There is substantial and credible information that the President and Ms. Lewinsky reached an understanding that each of them would lie under oath when asked whether they had a sexual relationship -- which is a conspiracy to obstruct justice, in criminal law terms. Indeed, a conspiracy to lie obviously was an essential part of their December and January discussions, lest

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[275] Clinton 8/17/98 GJ at 118, 119-20 (emphasis added). The President repeated at several other points in his testimony that he did not remember what he said to Ms. Lewinsky in the phone conversation on December 17. See id. at 117 ("I don't remember exactly what I told her that night."); id. at 118-19 ("you are trying to get me to characterize something [the cover stories] that I'm — that I don't know if I said or not"). Nevertheless, the President also testified on several other occasions that he had never told Ms. Lewinsky to lie. See id. at 117, 119.

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one of the two testify truthfully in the Jones case and thereby incriminate the other as a perjurer.

There also is substantial and credible information that President Clinton endeavored to obstruct justice by encouraging Ms. Lewinsky to file a false affidavit to avoid a deposition and by making improper use of that affidavit at his deposition -- each step to prevent the gathering of truthful evidence in the Jones v. Clinton litigation.[276]

During the course of their relationship, the President and Ms. Lewinsky discussed and used cover stories to falsely explain Ms. Lewinsky's presence in and around the Oval Office area. Ms. Lewinsky and the President discussed the continued use of the cover stories even after Ms. Lewinsky was named as a potential witness in the Jones litigation. At no time did the President tell Ms. Lewinsky not to use these stories and to tell the truth about the reasons for her visits. Ms. Lewinsky testified directly on this issue, and while the President testified that he does not remember having any such conversation, he had actually repeated the substance of these cover stories in his Jones deposition.

As a result, there is substantial and credible evidence that President Clinton endeavored to obstruct justice by encouraging Monica Lewinsky to lie about the reasons for visiting the Oval Office after it became clear that she was a potential witness in

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[276] The OIC is aware of no evidence that Mr. Bennett knew that Ms. Lewinsky's affidavit was false at the time of the President's deposition.

FOIA # none (URTS 16305) DocId: 70105128 Page 95

the Jones v. Clinton litigation.

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C. There is substantial and credible information that President Clinton endeavored to obstruct justice by helping Ms. Lewinsky obtain a job in New York at a time when she was potentially an adverse witness against him if she were to tell the truth during the Jones case.

The President always had a strong incentive to ensure that Ms. Lewinsky did not become so unhappy that she would jeopardize the secrecy of the relationship. Common sense suggests, in addition, that the President's incentive to keep Ms. Lewinsky happy grew once the Jones litigation began, and various women with whom the President had worked began to be subpoenaed.

The evidence developed during this criminal investigation reveals that at various times during the Jones discovery process, the President devoted substantial time and attention to help Ms. Lewinsky obtain a job in the private sector. This section outlines those efforts and then discusses their possible significance.

1. Evidence

Ms. Lewinsky testified that she first mentioned her desire to move to New York in a letter to the President on July 3, 1997. The letter recounted her frustration at not receiving an offer to return to the White House.[277] Ms. Lewinsky then met with the President on July 4, on July 14, and August 16, 1997.[278] After the meeting on August 16, Ms. Lewinsky says that she did not hear

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[277] Lewinsky GJ, Aug. 6, 1998, at 68.

[278] See Appendix Tab D (Table of Lewinsky White House visits); Tab E (Table of Lewinsky contacts with President).

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from or see the President for the next six weeks.

President Clinton received Plaintiff's First Set of Interrogatories in the Jones case on September 22, 1997, and filed his answers on September 30, 1997. The interrogatories asked, among other things, whether the President had engaged in sexual relations with women other than Mrs. Clinton. President Clinton's objected to those questions rather than providing answers immediately.[279] According to Ms. Lewinsky, President Clinton called her around midnight on September 30; during that conversation, he promised to call her more often.

By October 1997, Ms. Lewinsky was increasingly frustrated because the President had not obtained a position for her at the White House. On October 7, 1997, Ms. Lewinsky sent a letter, which she said had an angry tone, to the President by courier.[280] In response to her letter, Ms. Lewinsky said she received a late-night call from President Clinton on October 9, 1997. She said that the President told her he would start working on a job in New York for her.[281]

The following Saturday, October 11, 1997, Ms. Lewinsky met

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[279] The Federal Rules of Civil Procedure permit a party to object to interrogatories rather than answer them. See Fed. R. Crim. P. ___.

[280] Ms. Lewinsky said that on October 6, 1997, she had been told by Linda Tripp that a friend of Tripp's at the National Security Council had reported that Lewinsky would not be getting a White House job. Ms. Lewinsky said that at that point she finally decided to move to New York. Lewinsky FBI Interview, July 31, 1998, at 9.

[281] Id.

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with President Clinton alone in the Oval Office dining room from 9:36 a.m. until about 10:54 a.m. Ms. Lewinsky testified that during that meeting she gave the President a list of New York jobs in which she was interested.[282] Ms. Lewinsky mentioned to the President that she would need a good reference from someone in the White House; the President said he would take care of it.[283] Ms. Lewinsky also said she suggested that Vernon Jordan might be able to help her, and President Clinton agreed.[284] Immediately after the meeting, President Clinton telephoned Vernon Jordan.[285]

Sometime during this period, according to White House Chief of Staff Erskine Bowles, President Clinton raised the subject of Monica Lewinsky and stated that "she was unhappy where she was working and wanted to come back and work at the OEOB [Old Executive Office Building]; and could we take a look."[286] Mr. Bowles responded to President Clinton's request by referring the matter to Deputy Chief of Staff John Podesta.

Mr. Podesta said he spoke to Betty Currie, and asked her to have Ms. Lewinsky call him. Mr. Podesta said that he heard nothing until about October, when he was approached by Betty Currie and told that Ms. Lewinsky was planning to move to New

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[282] Lewinsky FBI Interview, July 31, 1998, at 11.

[283] Lewinsky FBI Interview, Aug. 13, 1998, at 2.

[284] Lewinsky GJ, Aug. 6, 1998, at 104-04.

[285] [phone records; do they show call at 10:57 a.m. to VJ?]

[286] Bowles GJ, April 2, 1998, at 67.

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York and was looking for opportunities there. Mr. Podesta later happened to be riding with UN Ambassador William Richardson on Air Force One; Mr. Podesta said that he mentioned to Ambassador Richardson that Ms. Currie had a friend looking for an entry-level position in New York. He asked Mr. Richardson if there were any public affairs positions open at the UN in New York.

According to Ms. Lewinsky, Ambassador Richardson called Ms. Lewinsky on October 21, 1997.[287] Ambassador Richardson's office subsequently offered her a position at the UN.[288] Ms. Lewinsky testified that she was unenthusiastic about working for the United Nations.[289] President Clinton indicated to her that he would ask Ms. Currie to set up a meeting with Vernon Jordan to discuss other possibilities.

On November 5, 1997, Ms. Lewinsky met with Vernon Jordan in his law office. Mr. Jordan indicated that he had spoken with President Clinton, and that Ms. Lewinsky "came highly

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[287] Lewinsky FBI Interview, July 31, 1998, at 12. Ms. Lewinsky said that she spoke to President Clinton about the phone call on October 23, during which she suggested to the President that she was interested in some job other than at the United Nations. Id. According to Lewinsky, the President replied that he just wanted her to have some options. Id.

Ms. Lewinsky said that she spoke to the President again on October 30 about the interview, in which she expressed anxiety about meeting with the Ambassador. Ms. Lewinsky said that the President told her to call Betty Currie after the interview so he would know how the interview went. Id. at 13.

[288] [Richardson disputes that he called personally; what does he say, assistant say about this?]

[289] Lewinsky FBI Interview, July 31, 1998, at 13.

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recommended."[290] Ms. Lewinsky and Mr. Jordan discussed her desire to move to New York and work in public relations for a private company. Mr. Jordan telephoned President Clinton immediately after the meeting. Ms. Lewinsky had no contact with the President or Mr. Jordan for another month.[291]

On December 5, 1997, the parties in the Jones case exchanged witness lists. Ms. Jones's attorneys listed Ms. Lewinsky as a potential witness. The President testified that he did not learn that Ms. Lewinsky was on the list until late in the day on December 6, 1997.[292]

The activity devoted to obtaining a job for Ms. Lewinsky then increased substantially. On December 7, 1997, President Clinton met with Mr. Jordan at the White House.[293] The next day, Ms. Lewinsky sent packages both to the White House and to Mr. Jordan's office.[294] Ms. Lewinsky testified that these packages contained job information.

Ms. Lewinsky met with Mr. Jordan on December 11 to discuss

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[290] Lewinsky FBI Interview, July 31, 1998, at 14. (confirmed in e-mail to CAD)

[291] See Appendix, Tab E (table of Lewinsky contacts with President). Ms. Lewinsky stated that just before Thanksgiving, 1997, she called Betty Currie and asked her to contact Vernon Jordan and prod him along in the job search. Lewinsky FBI Interview, Aug. 4, 1998, at 8. It was Ms. Lewinsky's understanding that Jordan was helping her at the request of the President and Ms. Currie. Id.

[292] See Clinton GJ, Aug. 17, 1998, at ___.

[293] 1178-DC-00000026.

[294] 837-DC-00000017, 837-DC-00000020.

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specific job contacts in New York. Mr. Jordan gave Ms. Lewinsky the names of some of his business contacts,[295] and followed up that meeting by making calls to contacts at MacAndrews & Forbes (Revlon), American Express, and Young & Rubicam.

Mr. Jordan also telephoned President Clinton to keep him informed of the efforts to help Ms. Lewinsky. Mr. Jordan testified that President Clinton was aware that "people were trying to get jobs for her; that Podesta was trying to help her, that Bill Richardson was trying to help her, but that she really wanted to work in the private sector."[296]

On that same day, December 11, Judge Wright ordered President Clinton, over his objection, to answer certain written interrogatories as part of the discovery process in Jones. Those interrogatories required, among other things, the President to identify any women other than his wife with whom he had both worked and engaged in sexual relations while President (a term undefined for purposes of the interrogatory). The President answered the interrogatory on December __, 1997, by declaring under oath: "None."

On December 17, 1997, according to Ms. Lewinsky, President Clinton called her in the early morning and told her that she was on the witness list. On December 18 and December 23, 1997, Monica Lewinsky interviewed for jobs in New York, with companies that had been contacted by Vernon Jordan. On December 19, Ms.

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[295] Lewinsky FBI Interview, Aug. 4, 1998, at 2.

[296] Jordan GJ (what day?) at 153.

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Lewinsky was served with a deposition subpoena by Paula Jones's lawyers.

On December 22, 1997, Mr. Jordan took her to meet with Frank Carter, her potential attorney. En route, Ms. Lewinsky and Mr. Jordan discussed the subpoena, the Jones suit, and her job search.

On December 28, 1997, Monica Lewinsky and the President met in the Oval Office.[297] During that meeting, the President and Ms. Lewinsky discussed her move to New York and her involvement in the Jones suit.[298]

On January 5, 1998, Ms. Lewinsky declined the United Nations job. On that same day, she met with Frank Carter and discussed her affidavit, in which she planned to deny the existence of a sexual relationship with the President. During that meeting, Mr. Carter posed questions to Ms. Lewinsky that she might face in a deposition, including questions regarding how she had obtained her Pentagon job. Concerned about how to answer this question, Ms. Lewinsky called Betty Currie and said she wanted to speak with the President about an important matter. She says that she told Ms. Currie that she needed to speak to the President "before [she] signed something."[299]

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[297] Lewinsky GJ, Aug. 6, 1998, at 151-52.

[298] Lewinsky FBI Interview, July 28, 1998, at 7. This was the same meeting where the President and Ms. Lewinsky discussed their concerns over the Lewinsky subpoena and its demand for the production of gifts. Lewinsky GJ, Aug. 6, 1998, at 151-52. See Part III(A), above.

[299] Lewinsky GJ, Aug. 6, 1998, at 195-96.

FOIA # none (URTS 16305) DocId: 70105128 Page 103

A few hours later, the President called Ms. Lewinsky back. According to Ms. Lewinsky, the President suggested to Ms. Lewinsky a misleading answer to the proposed deposition question -- namely, that the Office of Legislative Affairs had helped her get the job.

Ms. Lewinsky signed the affidavit denying the relationship with President Clinton on January 7, 1998. The next day, on January 8, 1998, Monica Lewinsky interviewed in New York with MacAndrews & Forbes, a company recommended by Vernon Jordan, but the interview went poorly. Mr. Jordan then called Ron Perelman, the Chairman of the Board at MacAndrews & Forbes. Mr. Jordan had never before called Mr. Perelman directly with a job candidate recommendation. Mr. Perelman said Lewinsky should not worry, and that someone would call her back for another interview. Mr. Jordan relayed this message to Ms. Lewinsky.

Ms. Lewinsky interviewed the next morning [?]. A few hours late, Ms. Lewinsky received an informal offer for a position. Ms. Lewinsky told Mr. Jordan of the offer. Mr. Jordan then telephoned President Clinton and informed him. As Mr. Jordan put it to the President: "Mission accomplished."

On January 12, 1998, Ms. Jones' attorneys informed Judge Wright that they might call Monica Lewinsky, among other women with whom the President had worked, as a trial witness.[300] Judge

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[300] Ms. Jones' attorney named the "other women" he planned to call at trial:

Mr. Fisher: They would include Kathleen Willey...Beth Coulson, Monica Lewinsky

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Wright stated that she would allow those witnesses, including Ms. Lewinsky, to be a trial witness.[301]

On January 13, 1998, a Revlon employee telephoned Ms. Lewinsky and formalized the offer, and requested that Ms. Lewinsky provide references. Either that day or the next, President Clinton told Erskine Bowles that Ms. Lewinsky "had found a job in the. . .private sector, and she had listed John Hilley as a reference, and could we see if he could recommend her, if asked." Mr. Bowles responded that he was sure that Hilley would give Ms. Lewinsky a recommendation commensurate with her job performance.[302] Thereafter, Mr. Bowles took the President's request to Deputy Chief of Staff John Podesta, who in

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Judge Wright: Can you tell me who she is?

Mr. Fisher: Yes, your Honor.

Judge Wright: I never heard of her.

Mr. Fisher: She's the young woman who worked in the White House for a period of time and was later transferred to a job in the Pentagon.

1414-DC-00001327-32.

[301] As the Court stated:

Well, you've got -- you've got these [witnesses]. You've got the ones I have listed, or you have listed...And I do think you have enough -- I mean, right now, my inclination is to say that this conduct that Ms. Jones had alleged is so egregious. But it's not going to take just a whole lot to show the pattern and practice. . . . . And I am inclined just to make you stick with the witnesses you've got.

1414-DC-00001334-46.

[302] Bowles GJ, April 2, 1998, at 78.

FOIA # none (URTS 16305) DocId: 70105128 Page 105

turn spoke to Mr. Hilley about writing a letter of recommendation. After speaking with Mr. Podesta, Mr. Hilley agreed to write such a letter, but cautioned it would be a "generic" one.[303] The next day, January 14, 1997 at approximately 11:17 a.m., Lewinsky faxed her letter of acceptance to Revlon.

3. Analysis

Direct evidence of conversations is critical to prove beyond a reasonable doubt that someone received job assistance in order to influence her testimony in a judicial proceeding. But powerful inferences can be drawn from circumstantial evidence.

In this case, the President of the United States initiated an extraordinary series of efforts to obtain Monica Lewinsky a job, involving the Ambassador to the United Nations and two of the most powerful persons in the country, Ronald Perelman and Vernon Jordan. Whether such assistance was to influence Ms. Lewinsky's testimony by keeping her "in line"[304] or to reward an ex-paramour (or both) -- or perhaps just to remove an ex-paramour to another city -- is something that only President Clinton can know for sure. But there is substantial and credible information that he initiated job assistance for Ms. Lewinsky, at least in part, to keep her in line in the Jones case, which is an obstruction of justice.

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[303] [**cite**]

[304] FILL IN CITE TO TRIPP TAPES re HUBBELL

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VI. There is substantial and credible information that President Clinton endeavored to obstruct justice by attempting to influence the testimony of Betty Currie.

Under the federal witness tampering statute, it is a crime to engage in "misleading conduct toward another person," if done with the intent to influence the testimony of that other person in an official proceeding.[305]

In a meeting with Betty Currie on the day after his deposition and in a separate conversation a few days later, President Clinton made several statements to her that he knew were false. The contents of the statements and the context in which they were made indicate that President Clinton was attempting to influence the testimony that Ms. Currie might at some point be required or requested to give in the Jones case.

A. Evidence

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[305] The statute provides that whoever

> corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to -- (1) influence, delay, or prevent the testimony of any person in an official proceeding; [or] (2) cause or induce any person to -- (A) withhold testimony, or withhold a record, document, or other object, from an official proceeding; . . . . shall be fined under this title or imprisoned not more than ten years, or both.

18 U.S.C. § 1512(b). Just a few years ago, the Governor of Guam was convicted of witness tampering for lying to a potential witness "intending that [the witness] would offer [the Governor's] explanation concerning the funds to the FBI." United States v. Bordallo, 879 F.2d 519 (9th Cir. 1988). It is no defense to a charge of witness tampering that the official proceeding had not yet begun, nor is it a defense that the testimony sought to be influenced turned out to be inadmissible or subject to a claim of privilege. 18 U.S.C. § 1512(e).

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1. Saturday, January 17 Deposition

President Clinton's deposition in Jones v. Clinton occurred on January 17, 1998. In that deposition, he testified that he could not recall being alone with Monica Lewinsky and that he had not had sexual relations with her. During his testimony, the President referred several times to his secretary Betty Currie and to her relationship with Ms. Lewinsky. He stated, for example, that the last time he had seen Ms. Lewinsky was when she had come to the White House to see Ms. Currie[306] and that Ms. Currie was present when the President had made a joking reference about the Jones case to Ms. Lewinsky.[307] President Clinton also indicated that Ms. Currie was his source of information about Vernon Jordan's assistance to Ms. Lewinsky[308] and that Ms. Currie had helped set up the meetings between Ms. Lewinsky and Mr. Jordan regarding her move to New York.[309]

Because the President referred so often to Ms. Currie, it was foreseeable, even likely, that she might become a witness in the Jones matter, at least during the discovery process, which was scheduled to terminate January 30.[310] Betty Currie has stated that at some point, President Clinton may have mentioned that she

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[306] Clinton Deposition, Jan. 17, 1988, at 68.

[307] Clinton Deposition, Jan. 17, 1988, at 71.

[308] Clinton Deposition, Jan. 17, 1988, at 72-73, 79.

[309] Clinton Deposition, Jan. 17, 1988, at 81.

[310] cite for discovery deadline

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might be asked about Monica Lewinsky.[311]

2. Sunday, January 18 Meeting with Ms. Currie

Shortly after 7:00 p.m. on Saturday, January 17, 1998, following his deposition, President Clinton called Ms. Currie at her home.[312] The President told Ms. Currie that he wanted to speak to her, and asked her to come to the White House the next day.[313] Ms. Currie testified that "It's rare for [President Clinton] to ask [her] to come in on Sunday" because it is "church day."[314]

At about 5:00 p.m. on Sunday, January 18, 1998, Betty Currie went to the White House and met with President Clinton. Ms.

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[311] Currie FBI Interview, Jan. 24, 1998, at 8 ("CURRIE advised CLINTON may have mentioned that CURRIE might be asked about LEWINSKY"); Currie GJ, May 6, 1998, at 118 (Q: "Didn't the President talk to you about Monica's name coming up in those cases [Whitewater or Jones v. Clinton]?" BC: "I have a vague recollection of him saying that her name may come up. Either he told me, somebody told me, but I don't know how it would come up.").

[312] Currie May 7, 1998 GJ testimony at 80-81; GJ Exhibit BC 3-10 (Presidential Call Log, Jan. 17, 1998).

[313] Currie Jan. 27, 1998 GJ at 65-66. The President confirmed that he called Betty Currie shortly after his deposition, and that he asked her to come in on Sunday, her day off. Clinton GJ, Aug. 17, 1998, at 149.

The next day at around 1:00 p.m., the President again called Ms. Currie at home. Currie May 7, 1998 GJ at 85. **[phone record]** Ms. Currie could not recall the content of the second call, stating: "He may have called me on Sunday at 1:00 after church to see what time I can actually come in. I don't know. That's the best I can recollect." Id. at 88.

[314] Currie GJ, May 7, 1998, at 91. See also Clinton GJ, Aug. 17, 1998, at 149 (acknowledging that Ms. Currie normally would not be in the White House on Sunday).

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concerned that her name was mentioned in a Washington Post article that would appear that morning.[333] Ms. Currie testified that the conversation was primarily about the *Post* article; she further testified that she believed the President "just wanted to vent or whatever."[334]

On either Tuesday or Wednesday of that week, the President again met with Ms. Currie and discussed the Monica Lewinsky matter. Ms. Currie testified as follows:

> BC: It was Tuesday or Wednesday. I don't remember which one this was, either.. But the best I remember, when he called me in the Oval Office, it was sort of a recapulation [sic] of what we had talked about on Sunday -- you know, "I was never alone with her" -- that sort of the thing.
>
> Q: Did he pretty much list the same --
>
> BC: To my recollection, sir, yes.
>
> Q: And did he say it in sort of the same tone and demeanor that he used the first time he told you on Sunday?
>
> BC: The best I remember, sir, yes.
>
> * * * *
>
> Q: And the President called you into the Oval Office specifically to list these things?

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[333] Currie GJ, May 7, 1998, at 112-14. Betty Currie's name appears once in the Washington Post on January 21, 1998. In an article about the Monica Lewinsky matter, the sentence mentioning Ms. Currie states in full: "At times, according to the source, [Ms. Lewinsky] would be responsible for delivering correspondence to the Oval Office, usually leaving it with the president's confidential assistants, Nancy Hernreich or Betty Currie, and she sometimes ran into Clinton during these duties." Susan Schmidt, et al., *Clinton Accused of Urging Aide to Lie; Starr Probes Whether President Told Woman to Deny Alleged Affair to Jones's Lawyers,* The Washington Post at A1 (Jan. 21, 1998).

[334] Currie GJ, May 7, 1998, at 111-14.

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BC: I don't know if that's specifically what he called me in for, but once I got inside, that's what he --

Q: That's what he told you?

BC: Uh-huh.[335]

B. The President's Grand Jury Testimony

The President was questioned about why he might have said to Ms. Currie in their meeting, "we were never alone together, right?" and "you could see and hear everything." The President testified:

> what I was trying to determine was whether my recollection was right and that she was always in the office complex when Monica was there, and whether she thought she could hear any conversations we had, or did she hear any.
>
> * * * *
>
> I was trying to — I knew, Mr. Bittman, to a reasonable certainty that I was going to be asked more questions about this. I didn't really expect you to be in the Jones case at the time. I thought what would happen is that it would break in the press, and I was trying to get the facts down. I was trying to understand what the facts were.[336]

The President was asked about the nature of his comments to Ms. Currie and his reasons for asking them:

Q: If Ms. Currie testified that that these were not really questions to her, that they were more like statements, is that not true?

WJC: Well, I can't testify as to what her perception was. I can tell you this. I was trying to get information in a hurry. I was downloading what I remembered. I think

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[335] Currie GJ, Jan. 27, 1998, at 80-82 (emphasis added).

[336] Clinton GJ, Aug. 17, 1998, at 56-57 (emphasis added). See also id. at 131-32 (Q: "You said that you spoke to her in an attempt to refresh your own recollection about the events involving Monica Lewinsky, is that right?" WJC: "Yes.").

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Ms. Currie would also testify that I explicitly told her, once I realized that you were involved in the Jones case — you, the Office of Independent Counsel — and that she might have to be called as a witness, that she should just go in there and tell the truth, tell what she knew, and be perfectly truthful.

So, I was not trying to get Betty Currie to say something that was untruthful. I was trying to get as much information as quickly as I could.

Q: What information were you trying to get from her when you said, I was never alone with her, right?

WJC: I don't remember exactly what I did say with her. That's what you say I said.

Q: If Ms. Currie testified to that, if she says you told her, I was never alone with her, right?

WJC: Well, I was never alone with her —

Q: Did you not say that, Mr. President?

WJC: Mr. Bittman, just a minute. I was never alone with her, right, might be a question. And what I might have meant by that is, in the Oval Office complex.[337]

Later in the grand jury appearance, when asked again about the comments to Betty Currie about never being alone with Ms. Lewinsky, the President reiterated that he was referring to a larger area that simply the room where he and Ms. Lewinsky were located. He also testified that his statements to Ms. Currie were only intended to cover a limited range of dates:

WJC: . . . . [W]hen I said, we were never alone, right, I think I also asked her a number of other questions, because there were several times, as I'm sure she would acknowledge, when I either asked her to be around. I remember once in particular when I was talking with Ms. Lewinsky when I asked Betty to be in the, actually, in the next room in the dining room, and, as I testified earlier, once in her own office.

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[337] Clinton GJ, Aug. 17, 1998, at 57-58.

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But I meant that she was always in the Oval Office complex, in that complex, while Monica was there. And I believe that this was part of a series of questions I asked her to try to quickly refresh my memory. So, I wasn't trying to get her to say something that wasn't so. And, in fact, I think she would recall that I told her to just relax, go in the grand jury and tell the truth when she had been called as a witness.

Q: So, when you said to Mrs. Currie that, I was never alone with her, right, you just meant that you and Ms. Lewinsky would be somewhere, perhaps in the Oval Office or many times in your back study, is that correct?

WJC: That's right, we were in the back study.

Q: And then —

WJC: Keep in mind, sir, I just want to make it — I was talking about 1997. I was never, ever trying to get Betty Currie to claim that on the occasions when Monica Lewinsky was there when she wasn't anywhere around, that she was. I would never have done that to her, and I don't think she thought about that. I don't think she thought I was referring to that.

Q: Did you put a date restriction? Did you make it clear to Mrs. Currie that you were only asking her whether you were never alone with her after 1997?

WJC: Well, I don't recall whether I did or not, but I assumed — if I didn't, I assumed she knew what I was talking about, because it was the point at which Ms. Lewinsky was out of the White House and had to have someone WAVE her in, in order to get into the White House. And I do not believe to this day that I was — in 1997, that she was ever there and that I ever saw her unless Betty Currie was there. I don't believe she was.[338]

The President was also asked about his statement to Betty Currie that "you could see and hear everything." He testified that he was uncertain what he intended by that comment:

Q: When you said to Mrs. Currie, you could see and hear everything, that wasn't true either, was it, as far as you knew. You've already —

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[338] Clinton GJ, Aug. 17, 1998, at 133-34 (emphasis added).

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WJC: My memory of that —

Q: My memory of that was that, that she had the ability to hear what was going on if she came in the Oval Office from her office. And a lot of times, you know, when I was in the Oval Office, she just had the door open to her office. Then there was — the door was never completely closed to the hall. So I think there was — I'm not entirely sure what I meant by that, but I could have meant that she generally would be able to hear conversations, even if she couldn't see them. And I think that's what I meant.[339]

The President then testified that when he made the comment to Ms. Currie about her being able to hear everything, he again was referring only to a limited period of time:

Q: . . . .you would not have engaged in those physically intimate acts if you knew that Mrs. Currie could see or hear that, is that correct?

WJC: That's correct. But keep in mind, sir, I was talking about 1997. That occurred, to the — and I believe that occurred only once in February of 1997. I stopped it. I never should have started it, and I certainly shouldn't have started it back after I resolved not to in 1996. And I was referring to 1997.

And I — what — as I say, I do not know — her memory and mine may be somewhat different. I do not know whether I was asking her about a particular time when Monica was upset and I asked her to stand, stay back in the dining area. Or whether I was, had reference to the fact that if she kept the door open to the Oval Office, because it was always — the door to the hallway was always somewhat open, that she would always be able to hear something if anything went on that was, you know, too loud, or whatever.

I do not know what I meant. I'm just trying to reconcile the two statements as best I can, without being sure.[340]

The President was also asked about his comment to Ms. Currie

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[339] Clinton GJ, Aug. 17, 1998, at 134-35 (emphasis added).

[340] Clinton GJ, Aug. 17, 1998, at 136-37.

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that Ms. Lewinsky had "come on" to him, but that he had "never touched her:"

> Q: . . . . [If Ms. Currie] testified that you told her, Monica came on to me and I never touched her, you did, in fact, of course, touch Ms. Lewinsky, isn't that right, in a physically intimate way?
>
> WJC: Now, I've testified about that. And that's one of those questions that I believe is answered by the statement that I made.[341]
>
> Q: What was your purpose in making these statements to Ms. Currie, if it weren't for the purpose to try to suggest to her what she should say if ever asked?
>
> WJC: Now, Mr. Bittman, I told you, the only thing I remember is when all this stuff blew up, I was trying to figure out what the facts were. I was trying to remember. I was trying to remember every time I had seen Ms. Lewinsky.
>
> * * * *
>
> . . . I knew that all this stuff was going to come out. . . . I did not know [at the time] that the Office of the Independent Counsel was involved. And I was trying to get the facts and try to think of the best defense we could construct in the face of what I thought was going to be a media onslaught.
>
> Once you became involved, I told Betty Currie not to worry . . . . I said Betty, just don't worry about me. Just relax, go in there and tell the truth. You'll be fine. Now, that's all there was in this context.[342]

Finally, the President was asked why he would have called Betty Currie into his office a few days after the Sunday meeting, and repeated the same series of statements about Ms. Lewinsky to her. The President testified that although he would not dispute

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[341] The President is referring to the statement he read at the beginning of his grand jury appearance. See [Count I]. For the full text of the statement, see Doc. Supp. Tab [].

[342] Clinton GJ, Aug. 17, 1998, at 139-40 (emphasis added).

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Ms. Currie's testimony to the contrary, he did not remember having a second conversation with her on this topic.[343]

C. Analysis

The President referenced Ms. Currie on multiple occasions in his civil deposition when describing his relationship with Ms. Lewinsky. In the wake of the President's deposition, it was foreseeable that Ms. Currie either might be called upon to prepare an affidavit or might be deposed.

The President met with Ms. Currie the next day. And as the President's own grand jury testimony reveals, the statements he made to Betty Currie on January 18 and again on January 20 or 21, 1998 — that he was never alone with Ms. Lewinsky, that Ms. Currie could always hear or see them, and that he never touched Ms. Lewinsky — were false. And the President knew they were false at the time he made them. Therefore, the President's defense that he was simply trying to refresh his memory is at war with the commonsense notion that Ms. Currie's confirmation of false statements would do little to remind the President of the facts.

The content of the President's statements and the context in which those statements were made provide substantial and credible information that President Clinton made these false statements to influence Ms. Currie's testimony in any proceeding in which she might be called upon to provide it.

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[343] Clinton GJ, Aug. 17, 1998, at 141-42.

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VII. There is substantial and credible information that President Clinton endeavored to obstruct justice during the federal grand jury investigation: He refused to testify for seven months and simultaneously lied to potential grand jury witnesses knowing that they would relay the President's statements to the grand jury and thereby deceive the grand jury.

After the media started reporting the allegations regarding the President and Ms. Lewinsky and the existence of a criminal investigation into those allegations,[344] the President lied about his relationship with Ms. Lewinsky to senior aides, friends, and ultimately, to the American public. The President made false, evasive, and misleading statements about the relationship to at least three current senior aides -- John Podesta, Erskine Bowles, and Sidney Blumenthal, and one former senior aide -- Harold Ickes.[345] While the President did not explicitly tell his aides to repeat his false statements to the grand jury, he was well aware that repetition of the statements was a reasonably

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[344] On January 18, 1998, an Internet news magazine "The Drudge Report," posted an article about Ms. Lewinsky and her conversations with Ms. Tripp. **cite** Two days later, on January 20, 1998, individuals at the White House learned about an upcoming Washington Post story that planned to report that the President was having an affair with an intern. Bowles 4/2/98 GJ at 119. See also Podesta 6/16/98 GJ at 81. The next day, January 21, 1998, the Post printed a story entitled, "Clinton Accused of Urging Aide to Lie; Starr Probes Whether President Told Woman to Deny Alleged Affair to Jones's Lawyers." Washingon Post, at A1.

[345] In addition to the false statements discussed in detail here, the President made false statements to many other potential witnesses. On January 21, 1998, he told Vernon Jordan, the lawyer who assisted Ms. Lewinsky in her job search, that "a false story has come out about this relationship." Jordan 6/9/98 GJ at 79-80. The President told Ms. Hernreich ___. **cite other examples.**

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foreseeable -- even likely -- consequence.

The false, evasive, and misleading statements that the President made to his aides include his denial of any kind of sexual relationship with Monica Lewinsky; his statement that Ms. Lewinsky made a sexual demand on him; his denial of visits by Monica Lewinsky to him; and his denial of multiply telephone conversations with Monica Lewinsky.

The President's aides took the President at his word when he made these statements. They believed him. The President made those misleading statements knowing that the aides would likely be called before the grand jury that was investigating the allegations of perjury, subornation of perjury, and obstruction of justice against him.[346] Moreover, even after the aides were subpoenaed to testify before the grand jury, the President never corrected the false statements he made to them. Each aide testified to the nature of the relationship between Monica Lewinsky and William Jefferson Clinton based on those statements without knowing that they were at best misleading -- and at worst calculated falsehoods designed to perpetuate the lies that the President told during his deposition in the Jones case. The President's willful failure to correct these statements resulted

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[346] The President knew from prior experience as Arkansas Attorney General and as the target of a four-year, multi-faceted investigation that a grand jury commonly questions people to whom a person under investigation has spoken about pertinent matters.

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in the dissemination of misleading, evasive, and false statements to the grand jury regarding the nature of the President's relationship with Monica Lewinsky. Indeed, the aides' testimony left the grand jury with an entirely false impression of the relationship between the President and Ms. Lewinsky and thus had the grave potential to affect the investigation.

There is substantial and credible evidence that the President made misleading statements to four aides -- Mr. Podesta, Mr. Bowles, Mr. Blumenthal, and Mr. Ickes, all of whom were potential grand jury witnesses -- in an attempt to influence their testimony before the grand jury.

1. Evidence

(a) The President's grand jury admissions

The President admitted to the grand jury that after the scandal broke, he made "misleading" statements to particular aides knowing that those aides would likely be called to testify before the grand jury. The President testified as follows:

> Q: Do you recall denying any sexual relationship with Monica Lewinsky to the following people: Harry Thomasson, Erskine Bowles, Harold Ickes, Mr. Podesta, Mr. Blumenthal, Mr. Jordan, Ms. Betty Currie? Do you recall denying any sexual relationship with Monica Lewinsky to those individuals?
>
> WJC: I recall telling a number of those people that I didn't have, either I didn't have an affair with Monica Lewinsky or didn't have sex with her. And I believe, sir, that -- you'll have to ask them what they thought. But I was using those terms in the normal way people use them. You'll have to ask them what they thought I was saying.
>
> Q: If they testified that you denied sexual relationship or relationship with Monica Lewinsky, or if they told

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us that you denied that, do you have any reason to doubt them, in the days after the story broke; do you have any reason to doubt them?

WJC: No. The -- let me say this. It's no secret to anybody that I hoped that this relationship would never become public. It's a matter of fact that it had been many, many months since there had been anything improper about it, in terms of improper contact. I -- * * * I did not want to mislead my friends, but I wanted to find language where I could say that. I also, frankly, did not want to turn any of them into witnesses, because I -- and sure enough they all became witnesses. * * * And so I said to them things that were true about this relationship. That I used -- in the language I used, I said, there's nothing going on between us. That was true. I said, I have not had sex with her as I defined it. That was true. And did I hope that I would never have to be here on this day giving this testimony? Of course.

But I also didn't want to do anything to complicate this matter. further. So, I said things that were true. They may have been misleading, and if they were I have to take responsibility for it, and I'm sorry.

Q: It may have been misleading, sir, and you knew though, after January 21st when the Post article broke and said that Judge Starr was looking into this, you knew that they might be witnesses. You knew that they might be called into a grand jury, didn't you?

WJC: That's right. I think I was quite careful what I said after that. I may have said something to all these people to that effect, but I'll also -- whenever anybody asked me any details, I said, look, I don't want you to be a witness or I turn you into a witness or give you information that would get you in trouble. I just wouldn't talk. I, by and large, didn't talk to people about this.

Q: If all of these people -- let's leave out Mrs. Currie for a minute. Vernon Jordan, Sid Blumenthal, John Podesta, Harold Ickes, Erskine Bowles, Harry Thomasson, after the story broke, after Judge Starr's involvement was known on January 21st, have said that you denied a sexual relationship with them. Are you denying that?

WJC: No.

Q: And you've told us that you --

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WJC: I'm just telling you what I meant by it. I told you what I meant by it when they started this deposition.

Q: You've told us now that you were being careful, but that it might have been misleading. Is that correct?

WJC: It might have been. Since we have seen this four-year, $40-million-investigation come down to parsing the definition of sex, I think it might have been. I don't think at the time that I thought that's what this was going to be about.

In fact, if you remember the headlines at the time, even you mentioned the Post story. All the headlines were -- and all the talking, people who talked about this, including a lot who have been quite sympathetic to your operation, said, well, this is not really a story about sex, or this is a story about subornation of perjury and these talking points, and all this other stuff.

So, what I was trying to do was to give them something they could -- that would be true, even if misleading in the context of this deposition, and keep them out of trouble, and let's deal -- and deal with what I thought was the almost ludicrous suggestion that I had urged someone to lie or tried to suborn perjury, in other words. [347]

(b) The Testimony of Current and Former Aides

1. John Podesta. John Podesta, Deputy Chief of Staff,[348] testified that on several occasions shortly after the media first began reporting the Lewinsky allegations, the President either denied having a relationship with Ms. Lewinsky or otherwise minimized his involvement with her.

Mr. Podesta described a meeting with the President, the

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[347] Clinton 8/17/98 GJ at 105-109 (emphasis added).

[348] Podesta 2/5/98 GJ at 13. Mr. Podesta has served as Deputy Chief of Staff since early 1997, and previously served as Staff Secretary for the Clinton Administration from 1993 through 1995. Podesta 2/5/98 GJ at 10, 13.

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Chief of Staff, Erskine Bowles, and Deputy Chief of Staff, Sylvia Matthews, in the early morning of January 21, 1998.[349] During that meeting, the President specifically stated: "Erskine, I want you to know that this story is not true."[350] Mr. Podesta further recalled that the President said "that he had not had a sexual relationship with her, and that he never asked anybody to lie."[351]

Several days later, on January 23, 1998, the President more adamantly told Mr. Podesta that he had not engaged in sex of any "kind, shape or manner" with Ms. Lewinsky. Mr. Podesta recalled:

JP: See, we were getting ready to do the State of the Union prep, and he was working on the State of the Union draft, back in his study.

I went back there just to kind of get him going - this is first thing in the morning -- and he said -- you know, we sort of get engaged. I asked him how he was doing and he said he was working on the State of the Union draft, back in his study. I went back there just to kind of get him going -- this is first thing in the morning -- and he said -- you know, we sort of get engaged. I asked him how he was doing, and he said he was working on this draft, and he said to me that he had never had sex with her, and that -- and that he never asked -- you know, he repeated the denial, <u>but he was extremely explicit in saying he never had sex with her.</u>

Q: How do you mean?

JP: Just what I said.

Q: Okay. Not explicit, in the sense that he got more specific than sex, than the word "sex."

JP: Yes, he was more specific than that.

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[349] Podesta 6/16/98 GJ at 85.

[350] Podesta 6/16/98 GJ at 85.

[351] Podesta 6/16/98 GJ at 85.

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Q: Okay. Share that with us.

JP: Well, I think he said - he said that - there was some spate of, you know, what sex acts were counted, and he said that he had never had sex with her in any way whatsoever --

Q: Okay.

JP: --that they had not had oral sex.[352]

Later, possibly that same day,[353] the President made a further false and misleading statement to Mr. Podesta regarding his relationship with Ms. Lewinsky. Mr. Podesta testified that the President "said to me that after [Monica] left [her job at the White House], that when she had come by, she came by to see Betty, and that he -- when she was there, either Betty was with them -- either that she was with Betty when he saw her or that he saw her in the Oval Office with the door open and Betty was around -- and Betty was out at her desk."[354]

Both the President and Mr. Podesta knew that Mr. Podesta was

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[352] Podesta 6/16/98 GJ at 92-94 (emphasis added). During further questioning, Mr. Podesta reiterated the scope of the President's denials during that conversation:

Q: Okay. Let's go back to the first one. No question in your mind he's denying any kind of sex in any way, shape or form, correct?
JP: That's correct.
Q: All right. What else did he say at that particular session?
JP: He said to me, "I don't know how I could put that, but that's the truth."

Podesta 6/16/98 GJ at 92-94.

[353] Podesta 6/16/98 GJ at 88. Mr. Podesta dated this conversation as perhaps taking place on January 23, 1998.

[354] Podesta 6/16/98 GJ at 88 (emphasis added). "So that they weren't alone in -- you know, in the sense that the door was open . . .and somebody was standing outside the door." Id.

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likely to be a witness in the ongoing grand jury criminal investigation.[355] Nonetheless, Mr. Podesta recalled that the President "volunteered" to provide information about Ms. Lewinsky to him[356] even though Mr. Podesta had not asked for these details.[357]

Mr. Podesta "believe[d]" the President, and testified that it was important to him that the President denied the affair.[358] Mr. Podesta repeated to the grand jury the false and misleading statements that the President told him.

2. Erskine Bowles. Mr. Bowles, the White House Chief of Staff,[359] confirmed Mr. Podesta's account of the President's January 21, 1998, statement in which the President denied having a sexual relationship with Ms. Lewinsky. Mr. Bowles testified:

> EB: . . . And this was the day this huge story breaks. And the three of us walked in together -- Sylvia Matthews, John Podesta, and me -- into the Oval Office, and the President was standing behind his desk.
>
> Q: About what time of day is this?
>
> EB: This is approximately 9:00 in the morning, or something -- you know, in that area. And he looked up at us and he said the same thing he said to the American people.

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[355] Mr. Podesta testified that he was "sensitive about not exchanging information because I knew I was a potential witness." Podesta 6/23/98 GJ at 79. See also Podesta 6/23/98 GJ at 9 ("given this investigation, I think anybody in the White House is potentially a witness").

[356] Podesta 6/16/98 GJ at 94.

[357] Podesta 6/23/98 GJ at 79.

[358] Podesta 6/23/98 GJ at 77-78.

[359] Bowles 4/2/98 GJ at 12. Mr. Bowles has been the Chief of Staff for President Clinton since January 20, 1997. Id.

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> He said, "I want you to know I did not have sexual relationships with this woman Monica Lewinsky. I did not ask anybody to lie. And when the facts come out, you'll understand."[360]

Mr. Bowles testified that he took the President's statements seriously: "All I can tell you is: This guy who I've worked for looked me in the eye and said he did not have sexual relationships with her. And if I didn't believe him, I couldn't stay. So I believe him."[361] Mr. Bowles repeated the false and misleading statement that the President made to him to the grand jury without knowledge of the statement's inaccuracy.

3. Sidney Blumenthal. Sidney Blumenthal,[362] an Assistant to the President,[363] similarly testified that the President made statements to him denying the Lewinsky allegations shortly after the media first began reporting the allegations.

Mr. Blumenthal stated that he spoke to Mrs. Clinton on the afternoon of January 21, 1998, and to the President early that evening. During those conversations, both Clintons offered an explanation for the President's meetings with Ms. Lewinsky, and President Clinton offered an explanation for Ms. Lewinsky's purportedly false allegations of a sexual relationship.[364]

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[360] Bowles 4/2/98 GJ at 84 (emphasis added).

[361] Bowles 4/2/98 GJ at 91.

[362] Mr. Blumenthal was one of numerous individuals whose testimony the White House tried, unsuccessfully, to forestall by an invocation of Executive privilege.

[363] Blumenthal 2/26/98 GJ at 4-5.

[364] Blumenthal 6/4/98 GJ at 46-53. Mrs. Clinton told Mr. Blumenthal that "that she was distressed that the President was

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Testifying before the grand jury, Mr. Blumenthal related his discussion with President Clinton:

> I recall that it was January 21st, the day that the story broke. . . . It was in the early evening. It was a week before the State of the Union address. . . . I was in my office and the President asked me to come to the Oval Office. . .[365]
>
> * * * *
>
> And I said to the President, "What have you done wrong?" And he said, "Nothing. I haven't done anything wrong." I said, "Well, then, [confessing is] one of the stupidest ideas I've ever heard. Why would you do that if you've done nothing wrong?"[366]
>
> * * * *
>
> And it was at that point that he gave his account of what had happened to me and he said that Monica -- and it came very fast. He said, "Monica Lewinsky came at me and made a sexual demand on me." He rebuffed her. He said, "I've gone down that road before, I've caused pain for a lot of people and I'm not going to do that again."
>
> She threatened him. She said that she would tell people they'd had an affair, that she was known as the stalker among her peers, and that she hated it and if she had an affair or said she had an affair then she wouldn't be

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being attacked, in her view, for political motives, for his ministry of a troubled person." Mr. Blumenthal also testified that Mrs. Clinton did not indicate how she knew about the President's ministry to troubled people, and that the President said nothing to deny Mrs. Clinton's characterization of his ministry. Blumenthal 6/4/98 GJ at 52-53. Mr. Podesta, however, testified that the President never mentioned that he had ministered to Ms. Lewinsky when the President was denying any sexual relationship with her. Podesta 6/16/98 GJ at 95..

[365] Blumenthal 6/4/98 GJ at __.

[366] The idea of a confession became open for discussion because, according to Mr. Blumenthal, the President had just told him of receiving a call from the political consultant Dick Morris earlier that day. Mr. Morris told him that President Nixon could have survived Watergate if he had gone on television and confessed at the outset of the scandal, and Mr. Morris thought that the President should also consider confessing.

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the stalker any more.[367]

Mr. Blumenthal testified that the President appeared "upset" during this conversation.[368]

Finally, Mr. Blumenthal asked the President to explain a detail mentioned in the press reports.

> I said, you know, there are press reports that you made phone calls to her and that there's voice mail. Did you make phone calls to her?
>
> He said that he remembered calling her when Betty Currie's brother died and that he left a message on her voice machine that Betty's brother had died and he said she was close to Betty and had been very kind to Betty. And that's what he recalled.[369]

According to Mr. Blumenthal, the President said that the call he made to Ms. Lewinsky relating to Betty's brother was the "only one he could remember."[370]

A grand juror asked Mr. Blumenthal a follow-up question whether the President had said that his ministry to Ms. Lewinsky included any kind of sexual activity. Mr. Blumenthal testified that the President's response was "the opposite. He told me that she came on to him and that he had told her he couldn't have sexual relations with her and that she threatened him. That is what he told me."[371]

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[367] Blumenthal 6/4/98 GJ at 46-51 (emphasis added).

[368] Blumenthal 6/25/98 GJ at 41.

[369] Blumenthal 6/4/98 GJ at 50. Thereafter, Mr. Blumenthal testified, the conversation turned to the upcoming State of the Union address. Id.

[370] Blumenthal 6/25/98 GJ at 27.

[371] Blumenthal 6/4/98 GJ at 52-53 (emphasis added).

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Mr. Blumenthal testified that after the President relayed this information to him, he felt "generally sympathetic" to the President. Mr. Blumenthal testified: "And I certainly believed his story. It was a very heartfelt story, he was pouring out his heart, and I believed him."[372] Mr. Blumenthal repeated to the grand jury the misleading, evasive and false statements that the President made to him.

Harold Ickes. Mr. Ickes, a former Deputy Chief of Staff,[373] also related a conversation that he had with the President on the morning of January 21, 1998, during which the President denied the Lewinsky allegations.

Regarding that conversation, Mr. Ickes testified: "The two things that I recall, the two things that he again repeated in public -- had already said publicly and repeated in public that same Monday morning was that he had not had -- he did not have a -- or he had not had a sexual relationship with Ms. Lewinsky and that he had done nothing -- now I'm paraphrasing -- had done nothing to ask anybody to change their story or suborn perjury or obstruct justice."[374]

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[372] Blumenthal 6/25/98 GJ at 17. See also Blumenthal 6/25/98 GJ at 26 ("My understanding was that the accusations against him which appeared in the press that day were false, that he had not done anything wrong").

[373] Ickes 7/23/98 GJ at 8. Mr. Ickes worked as Deputy Chief of Staff for President Clinton from early 1994 through January 1997. Id.

[374] Ickes 6/10/98 GJ at 73. See also Ickes 8/5/98 GJ at 88 ("[H]e denied to me that he had had a sexual relationship. I don't know the exact phrase, but the word `sexual' was there. And he denied any obstruction of justice").

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Mr. Ickes recalled that the President probably "volunteered" this information.[375] Mr. Ickes repeated the misleading, evasive and false statements to the grand jury.

3. Analysis

The President made the following misleading statements to his aides:

- The President told Mr. Podesta that he "had not engaged in sex of any kind, shape, or manner with Ms. Lewinsky," including oral sex.
- The President told Mr. Podesta, Mr. Bowles, and Mr. Ickes that he did not have a "sexual relationship" with Ms. Lewinsky.
- The President told Mr. Blumenthal that Ms. Lewinsky "came on to him and that he had told her he couldn't have sexual relations with her and that she threatened him."
- The President told Mr. Blumenthal that he couldn't remember making any calls to Ms. Lewinsky other than once when he left a message on her answering machine.
- The President told Mr. Podesta that "when [Ms. Lewinsky] came by, she came by to see Betty [Currie]."

During the President's grand jury testimony, the President explicitly admitted that his statements to aides denying a sexual relationship with Ms. Lewinsky "may have been misleading."[376] In addition, the President conceded that he had been alone with Ms. Lewinsky on numerous occasions[377] and that he "had occasional telephone conversations with Ms. Lewinsky that included

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[375] Ickes 6/10/98 GJ at 73.

[376] **cite**

[377] Clinton 8/17/98 Deposition at 9-10, **add other alone cites.**

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inappropriate sexual banter"[378] -- thereby implicitly conceding that the factual predicates for other statements to aides were misleading.

The President's motive for deceiving his advisors is clear. The President knew that they would be called to testify regarding any communications with him and Ms. Lewinsky, and he presumably wanted his aides to disseminate his false but near-contemporaneous statements regarding Ms. Lewinsky to anyone and everyone, including the grand jury.

Moreover, the President's near-contemporaneous statements to his aides were of heightened importance because for many months, the President refused this Office's invitation to testify before the grand jury. Thus, it was not apparent that the President's voice would ever be heard by the grand jury. In the President's view, the next best thing to his own denials were heartfelt denials by his aides. The President may also have intended for his aides to use his blanket denials to implicitly color their view of particular facts, or he may have viewed the denials as a simple method to keep the aides on the his team.

The President's denials were "not pro forma."[379] The aides to whom he made the false statements trusted the President, and believed his statements. The denials may have affected the cooperation of those potential witnesses, and gravely affected the ability of the grand jury to gather accurate information in a

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[378] Clinton 8/17/98 Deposition at 9-10.

[379] Podesta GJ cite.

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timely manner.

The President's only defense to the charge of making false, evasive and misleading statements to the potential grand jury witnesses is a linguistic one. The President argues that at the time he made the statements to his aides he carefully parsed them and crafted each word so that the statements would not be literally false. The President's defense is undermined by his own admissions before the grand jury that his statements denying the relationship "may have been misleading," and the contradictory grand jury testimony of some of the President's most trusted, and most loyal aides.

For all of these reasons, there is substantial and credible information that the President obstructed justice during the grand jury investigation. He refused to testify for seven months and simultaneously lied to potential grand jury witnesses knowing that they would relay the President's statements to the grand jury and thereby deceive the grand jury.

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MEMORANDUM

TO: OIC Attorneys

FROM: Brett Kavanaugh

RE: Indictment/Impeachment

DATE: December 3, 1996

John asked me simply to circulate relevant materials on the question whether a sitting President may be indicted, a question that is obviously intertwined with the research Stephen and Craig have been doing on Section 595(c). I attach the following illustrative materials:

(1) The relevant portion of the brief of President Nixon in the Supreme Court in United States v. Nixon. (The Special Prosecutor did not address the issue squarely in his brief.)

(2) The relevant portion of the reply brief of President Nixon in the Supreme Court in United States v. Nixon.

(3) The brief submitted by Solicitor General Bork in the District Court of Maryland, arguing that a sitting Vice President could be indicted but a sitting President could not.

(4) The relevant portion of the brief of Solicitor General Dellinger in Clinton v. Jones, to be argued in the Supreme Court in January.

(5) The relevant portion of Professor Tribe's treatise.

(6) An article by Byron York in the American Spectator that summarizes the impeachment/indictment issues.

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FILED
JUN 21 19
MICHAEL RODAK, JR.

Nos. 73-1766 and 73-1834

In the Supreme Court of the United States

OCTOBER TERM, 1973

UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES ET AL., RESPONDENTS

RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, CROSS-PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

ON WRITS OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT, CROSS-PETITIONER RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES

JAMES D. ST. CLAIR,
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> President might receive a letter which it would be improper to exhibit in public * * *. The occasion for *demanding* it ought, in such a case, to be very strong and to be fully shown to the court before its production could be *insisted* on. 25 F. Cas. at 190–192. (emphasis in original) (487 F. 2d at 710).

Other cases also clearly demonstrate that in order for a court to balance countervailing public interest, the party seeking disclosure must make a threshold showing of compelling need or "uniquely powerful" need. In *United States* v. *Reynolds,* 345 U.S. 1 (1953), a case relied upon in *Nixon* v. *Sirica,* this Court stated:

> In each case, the showing of necessity which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate. Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake. *A fortiori,* where necessity is dubious, a formal claim of privilege . . . will have to prevail. (345 U.S. at 11).

At another point in *Reynolds* this Court stated:

> [W]e will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case. *Id.*

This point is further illustrated by *Committee for Nuclear Responsibility, Inc.* v. *Seaborg,* 463 F. 2d 788, 792 (D.C. Cir. 1971). There the court held:

> Of course, the party seeking discovery must make a preliminary showing of necessity to warrant even *in camera* disclosure, . . .

Certainly, this well-documented principle supports the proposition that, before a court can even engage in balancing, the party seeking disclosure must show a compelling need to overcome a presumption of privilege. *Senate Select Committee on Presidential Campaign Activities* v. *Richard M. Nixon,* Slip Op. No. 74–1258 (D.C. Cir. May 23, 1974). Since that showing has not been made in this case, it was incumbent upon the district court to grant the President's motion to quash.

It is clear that the Special Prosecutor has failed to make the requisite showing of compelling need necessary to activate the balancing test. Nor has he made a sufficient showing to establish that each of the requested materials is relevant and admissible and that it is not an attempt to discover additional evidence already known. Therefore under well-established case law, the subpoena should have been quashed in all respects by the court below.

VI. AN INCUMBENT PRESIDENT CANNOT LAWFULLY BE CHARGED WITH A CRIME BY A GRAND JURY

A. THE PRESIDENT CANNOT BE INDICTED WHILE HE IS SERVING AS PRESIDENT

It has never been seriously disputed by legal scholars, jurists, or constitutional authorities that a President may not be indicted while he is an incumbent. The reasons for the President's non-indictability bear

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directly on the question of whether he may be named as an unindicted co-conspirator by a grand jury. The reasons are obvious and compelling. They are particularly relevant in light of the ongoing proceedings in the House of Representatives.

The Presidency is the only branch of government that is vested exclusively in one person by the Constitution. Art. II, section 1, clause 1 states:

> The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four years * * *

Article II then details the powers and functions that the President shall personally have and perform. The functioning of the executive branch ultimately depends on the President's personal capacity: legal, mental and physical. If the President cannot function freely, there is a critical gap in the whole constitutional system established by the Framers.

The President, personally, as no other individual, is necessary to the proper maintenance of orderly government. Thus, in order to control the dangerous possibility of any incapacity affecting the President, and hence the executive branch, the Constitution specifically limits and provides for all those events that could incapacitate a President.[65]

The necessary reason for the great concern and specificity of the Constitution in providing for a President at all times capable of fulfilling his duties,

[65] U.S. Const., Amend. 25, ratified on February 23, 1967. See Congressional Research Service, United States Congress, *The Constitution of the United States* at 42–43.

is the fact that all three branches of government must have the capacity to function if the system is to work. While the capacity to function is assured to the legislative and judicial branches by the numbers of individuals who comprise them, the executive branch must depend on the personal capacity of a single individual, the President. Since the executive's responsibilities include the day-to-day administration of the government, including all emergency functions, his capacity to function at any hour is highly critical. Needless to say, if the President were indictable while in office, any prosecutor and grand jury would have within their power the ability to cripple an entire branch of the national government and hence the whole system.

Further analysis makes it even more clear that a President may not be indicted while in office. The President is vested under Art. II, section 3, clause 1, with the power "that the Laws be faithfully executed" and he has under Art. II, section 2, clause 1, the power of granting "Pardons for Offenses against the United States, except in Cases of Impeachment." Under that same clause, he shall appoint the "Judges of the Supreme Court" with "the Advice and Consent of the Senate." The President has also been granted by Congress the same power to appoint all Article III judges. 28 U.S.C. 44 and 28 U.S.C. 133. Since the President's powers include control over all federal prosecutions, it is hardly reasonable or sensible to consider the President subject to such prosecution. This is consistent with the concept of prosecutorial discre-

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tion, the integrity of the criminal justice system or a rational administrative order. This is particularly true in light of the impeachment clause which makes a President amenable to post-impeachment indictment. Art. I, section 3, clause 7. This clause takes account of the fact that the President is not indictable and recognizes that impeachment and conviction must occur before the judicial process is applicable to the person holding office as President. This section reads: "But the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law." While out of necessity an incumbent President must not be subject to indictment in order for our consitutional system to operate, he is not removed from the sanction of the law. He can be indicted after he leaves office at the end of his term or after being "convicted" by the Senate in an impeachment proceeding.

The history surrounding the Constitution's adoption further makes it clear that impeachment is the exclusive remedy for presidential criminal misconduct. A very revealing interchange took place on September 15, 1787, only two days before the final adoption of the Constitution. Gouverneur Randolph moved to except cases of treason from the power of the President to pardon offenses against the United States, a power granted by Art. II, section 2, clause 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.

There are several relevant considerations that should be noted about the Convention and the provision that resulted from them. First, it is clear that an incumbent President is not subject to criminal prosecution. He is amenable to the criminal laws, but only after he has been impeached and convicted, and thus stripped of his critical constitutional functions.

The text of Art. I, section 3, clause 7, points so explicitly in that direction that it hardly requires exposition, and the legislative history is wholly in accord. James Wilson noted that if the President himself be a "party to the guilt he can be impeached and prosecuted." 2 *Farrand* 626. And on September 4, 1787, in the recurring debate on whether impeachments should be tried by the Senate or by the Supreme Court, Gouverneur Morris said:

> A conclusive reason for making the Senate instead of the Supreme Court the Judge of Impeachments, was that the latter was to try the President after the trial of the impeachment. 2 *Farrand* 500.

The decision to make the Senate, and not the Supreme Court,[66] the ultimate body to decide upon the Presi-

[66] In this respect Gouverneur Morris noted:

> [N]o other tribunal than the Senate could be trusted [to try the President]. The Supreme Court were too few in number and might be warped or corrupted. He was agst. [sic] a dependence of the Executive on the Legislature, considering the Legislative tyranny the great danger to be apprehended; but there could be no danger that the Senate

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dent's removal, further argues for limiting any court or grand jury from removing a President by way of indictment or other judicial process.

There is literally nothing in all of the records of the Convention to suggest that any delegate had any contrary view. This reading of the language in question was put forward twice by Hamilton when he wrote:

> 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. *The Federalist,* No. 65, at 426 (Modern Library ed. 1937).

He returns to the point in the 69th *Federalist,* and uses it there to illustrate an important distinction between a President and a king.

> The President of the United States would be liable to be impeached, tried, and, upon conviction of treason, bribery, or other high crimes or misdemeanors, removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of law. The person of the King of Great Britain is sacred and inviolable; there is no constitutional tribunal to which he is amenable; no punishment to which he can be subjected without involving the crisis of a national revolution.

would say untruly on their oaths that the President was guilty of crimes or facts, especially as in four years he can be turned out. *2 Farrand 551.*

So far as we are aware, that an incumbent President is not indictable is a proposition that has never been challenged by the Special Prosecutor. The proposition is relevant here because of the suggestion that an otherwise valid claim of privilege by the President should be overridden if there is in some manner an alleged showing of a *prima facie* criminal case or a *prima facie* finding of criminal involvement, such as the authorizing of the naming, or the naming of the President as an unindicted co-conspirator. If, however, such facts were true, which they are not, they go not to the evidentiary needs of the grand jury, but to those of the Committee on the Judiciary in the House.

Whatever 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. The grand jury may not indict the President or allege that there is probable cause to find criminal liability on the part of a President. Thus, such a claimed "finding" by the grand jury has no force in overcoming any presidential claim of privilege, as it is a legal nullity, being constitutionally impermissible.

A second important theme that runs through the debates of the Constitutional Convention of 1787 is whether the President should be answerable, in an impeachment proceeding, to the courts or to the Senate. On June 13, 1787, the Committee of the Whole adopted a resolution offered by Messrs. Randolph and Madison to give the national Judiciary jurisdic-

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tion of "Impeachments of any national officers." 1 *Farrand* 224. On July 18th, however, the Convention voted unanimously to remove the language giving the courts jurisdiction of impeachments. 2 *Farrand* 39. This did not end the matter. The report of the Committee on Detail, on August 6th, would have given the Supreme Court original jurisdiction "in cases of impeachment." 2 *Farrand* 186. As noted above a subsequent committee, however, recommended on September 4th that the trial of impeachments be by the Senate, 2 *Farrand* 493. This was approved on September 8th by a vote of nine states to two. 2 *Farrand* 547. See the report of the debate on this issue at 2 *Farrand* 551–553.

The significance of the foregoing history is that it is not mere chance or inadvertence that the President is made answerable to the Senate, sitting as a Court of Impeachment. The Framers repeatedly considered making him answerable to the Judiciary, and they twice rejected proposals to this effect, thus further reinforcing the conclusion that it would be wholly inconsistent with the Framer's intent to hold a President indictable.

Finally, it should also be observed that there was no sentiment in the Convention for providing restraints other than impeachment against a President. The argument went quite the other way. There was sentiment in the Convention that a President would not be subject even to impeachment and that it would be enough that he served for a limited term and would answer to the people if he chose to stand for reelection. This point was extensively debated on July 20,

1787, with the motion to strike out the impeachment provision offered by Charles Pinckney and Gouverneur Morris, 2 *Farrand* 64–69. The arguments in favor of the Pinckney motion seem unpersuasive, and in fact during the course of the debate on it, Morris admitted that the discussion had changed his mind. But the debate is interesting because those who opposed the Pinckney motion, and supported retention of impeachment, made it clear that this was the only means by which they considered that the President was subject to law. Thus, Colonel George Mason said:

> No point is of more importance than that the right of impeachment should be continued. Shall any man be above Justice? Above all shall that man be above it, who can commit the most extensive injustice? When great crimes were committed he was for punishing the principal as well as the Coadjutors. (2 *Farrand* 65).

And again Eldridge Gerry—

> urged the necessity of impeachments. A good magistrate will not fear them. A bad one ought to be kept in fear of them. He hoped that maxim would never be adopted here that the Chief Magistrate could do no wrong. (2 *Farrand* 66).

By a vote of eight states to two, the Pinckney motion was defeated and the Convention agreed that the Executive should be removable on impeachment. 2 *Farrand* 69. But it is only conviction in the Senate that leads to this result. On September 14th, the Convention rejected, by a vote of eight states to three, a proposal that an officer impeached by the House be suspended from office until tried and acquitted by the Senate. 2 *Farrand* 612–613.

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This examination of the proceedings of the Constitutional Convention of 1787 establishes that the Framers deliberately chose one particular means of guarding against the abuse of the powers they entrusted to a President. He may not be indicted unless and until he has been impeached and convicted by the Senate. Impeachment is the device that ensures that he is not above justice during the term in office, and the trial of impeachment is left to the Senate and not to the courts.

Those principles have been recognized by this Court. In the early and leading case of *Marbury* v. *Madison* 1 Cranch (5 U.S.) 137, 165 (1803), the Court said:

> By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience.

Thirty-five years later, in *Kendall* v. *United States ex. rel. Stokes,* 12 Pet. (37 U.S.) 524, 610 (1838) the Court said:

> The executive power is vested in a President and as far as his powers are derived from the Constitution, he is beyond the reach of any other department, except in the mode prescribed by the Constitution through the impeaching power.[67]

[67] See also the observations in 1 Bryce, *The American Commonwealth* 89 (1889):

> The President is personally responsible for his acts, not indeed to Congress, but to the people, by whom he is chosen. No means exist of enforcing this responsibility, except by impeachment, but as his power lasts for four years only, and is much restricted, this is no serious evil.

We are wholly mindful of weighty warnings against the view that "the great clauses of the Constitution must be confined to the interpretation which the Framers, with the conditions and outlook of their time, would have placed upon them. . . ." *Home Building & Loan Assn.* v. *Blaisdell.* 290 U.S. 398, 443 (1934). But if the provisions of the Constitution that we have been discussing can fairly be said to have taken on new meaning with the passage of years, and with the emergence of new problems, surely any change must be in the direction of strengthening the independence of the Presidency, rather than creating new hobbles on it.

Powell v. *McCormick,* 395 U.S. 486 (1969), reaffirms the extraordinary nature and strictly limited character of the power to remove political officials, particularly those directly elected by the people. That decision held that the Congress could not expand the constitutional limits mandated for expelling or alternatively excluding a Congressman from his seat. U.S. Const., Article I, section 5, clause 2; Article I, section 2, clause 2. The constitutional sanctity of the people's electoral choice, therefore, was considered so important that it required judicial intervention and protection. While judicial action was required in *Powell* to protect the electorate's rights under the Constitution, the reverse is certainly not true. This same power cannot be used to nullify the electorate's decision. This is particularly true in the case of the Presidency when the Constitution explicitly delegates the power to remove the President under strict conditions to the representatives of the voters who elected him. It seems improbable, at best, to suggest that the Framers

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felt that any court and grand jury could also remove or even legally incapacitate the Chief Executive. The specificity and grave nature of the impeachment process and the total absence of any discussion of any other method, is an extremely powerful argument for the exclusivity of impeachment as the only method of removing a President.

The *Powell* case emphasizes that while another branch cannot control the Congress in the execution of their peculiar constitutional responsibilities, neither can the Congress, as a whole, control the execution of a particular Congressman's duties via exclusion. Exclusion is an action that the Congress may take solely within the limits of Article I, section 2, clause 2. It is not a political tool. Obviously this also applies to the executive branch. If Congressman Powell could not be excluded from his congressional seat by a majority of Congress except by adhering to the requirements of the Constitution, then surely the Chief Executive may not be deprived of his ability to control decisions in the executive branch by a member of the executive department, unless the President has specifically delegated this authority to him. Nor can such an employee control the President through judicial or criminal process.

The decision in *Powell* is also harmonious with the long established principle that the Judiciary may prevent other branches from overstepping their constitutional bounds of responsibility. *Marbury* v. *Madison,* 1 Cranch (5 U.S.) 137 (1803). In *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579 (1952), this Court

made a similar determination that certain actions taken by the executive branch were beyond the scope of the constitutional duties mandated to the branch. If the Judiciary had determined that seizing the steel mills had been within the powers the Constitution and the laws had entrusted to the President, clearly it could not have forced the President to exercise his discretion and seize the mills. Although the Supreme Court has ruled innumerable laws unconstitutional over the last 187 years it has never once mandated that either Congress exercise its descretion to pass a law or the Executive prosecute an individual. The reasons are self-evident.

Today, in our nuclear age, far more than in George Washington's time, the nature of our country and of the world insistently requires a President who is free to act as the public interest requires, within the framework created by the Constitution. The whole Watergate problem has illustrated how truly complex the right decision can be. It is thus all the more necessary that a President have the ability to freely discuss issues, think out loud, play the devil's advocate, and consider alternatives, free from the threat that a probing statement will one day form the basis for an allegation of criminal liability.

B. THE GRAND JURY ACTION OF NAMING THE PRESIDENT AS AN UNINDICTED CO-CONSPIRATOR IS A NULLITY

The constitutional policy that mandates that the President is not subject to judicial process or criminal indictment while President, clearly shows that the grand jury action naming or authorizing the name of

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the President as an unindicted co-conspirator contravenes the constitutional power of the grand jury or any court of this country.

The implication by a grand jury on the basis of certain alleged facts, that the President may have violated the law can have only one proper result. As stated above, the grand jury may with the district court's consent, forward the factual material creating the implications, minus any conclusions, to the House of Representatives.[68] That result was fulfilled when the grand jury filed with the court below its factual report and recommended that it be forwarded to the House Judiciary Committee, in March of 1974. The President made no objection to this move because the House of Representatives is the proper body, the only proper body, to impeach a President, as part of the process of removing a President from office. The grand jury's constitutionally impermissible authorization to the Special Prosecutor, permitting the President to be named or naming the President as an unindicted co-conspirator, however, attempts to subvert and prejudice the legitimate constitutional procedure of impeachment.

[68] This is the necessary implication of the grand jury's role, as a body with a limited mandate, as opposed to the House of Representatives whose political and constitutional mandate entitles them to consider whether in light of the President's complex responsibilities and political concerns a particular action or statement of his constitutes a crime. While any citizen may clearly express an opinion to his Congressman on the President's guilt, innocence or character, a grand jury, as an official part of our system of justice, with all that implies for its credibility and impact, may not.

In its opinion in *In Re Report and Recommendation of the June 5, 1972 Grand Jury Concerning Transmission of Evidence to the House of Representatives*, 370 F. Supp. 1219 (D.D.C. 1974), the district court convincingly demonstrated why the June 5, 1972, Grand Jury could not authorize the naming of the President as an unindicted co-conspirator. The very reasons why it was proper to refer the *Report and Recommendation to the House of Representatives* are those that argue against referring the naming or the authorization to name the President as an unindicted co-conspirator to that same body. In fact, these same considerations today require its expungement, because it is a legal nullity that continues to prejudice the President by its purported legal significance and apparent authority. The court below noted of the Report:

> The Report here at issue suffers from none of the objectionable qualities noted in *Hammond* and *United Electrical*. It draws no accusatory conclusions. It deprives no one of an official forum in which to respond. It is not a substitute for indictments where indictments might properly issue. *It contains no recommendations, advice or statements that infringe on the prerogatives of other branches of government.* Indeed, its only recommendation is to the Court, and rather than injuring separation of powers principles, the Jury sustains them by lending its aid to the House in the exercise of that body's constitutional jurisdiction. It renders no moral or social judgments. The Report is a simple and straightforward compilation of information gathered by the Grand Jury, and

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no more. (370 F. Supp at 1226) (emphasis added).

As noted by the district court nothing could be more important to America's future than that the ongoing impeachment be "unswervingly fair." 370 F. Supp at 1230. And nothing could be more clear than that the naming of the President of the United States as an unindicted co-conspirator by a secret grand jury proceeding, which was subsequently leaked to the press, is a direct and damaging assault on the fairness of the House impeachment proceeding. It is the kind of prejudice that a court would certainly be required to remedy or compensate for if it affected the rights of a criminal defendant to a trial, free from the probability of prejudicial pre-trial publicity. *In Re Murchison*, 349 U.S. 133 (1955); *Estes* v. *Texas*, 381 U.S. 532 (1965); *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966).

This unauthorized action of the grand jury that has the appearance of official status, and presently the implicit approval of the lower court may well directly affect the outcome of the House procedure. Yet, the President has no legal recourse against the grand jury's action except with this Court. No petit jury, whose obligation is to find guilt "beyond a reasonable doubt" is empowered to adjudicate this charge against the President.[69]

The rigorous adversary format, with that most powerful tool for determining the truth, cross-examination, is not available in the secret grand jury

[69] While the President, as an individual, might some day vindicate himself before a petit jury, as long as he holds the office of President he could not be vindicated in a court of law.

setting. It is now well established that the right of cross-examination is an essential element of due process in any proceeding where an individual's "property" or "reputation" may be adversely affected.[70] The fundamental right to present evidence and to cross-examine witnesses in an impeachment proceeding is manifest. As the experience of our judicial system has demonstrated, the most effective method of establishing the truth of an accusation is to permit the respondent the right to personally cross-examine those presenting adverse testimony. The Supreme Court flatly states in *Greene* v. *McElroy*, 360 U.S. 474 (1959) that:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice or jealousy. We have formalized these protections in the requirements of confrontation and cross-

[70] *Goldberg* v. *Kelly*, 397 U.S. 254 (1970); *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969); *Fuentes* v. *Shevin*, 407 U.S. 67 (1972); *Bell* v. *Benson*, 402 U.S. 535 (1971); Cf. *Board of Regents* v. *Roth*, 408 U.S. 564, 573 (1972) and *Wisconsin* v. *Constaintineau*, 400 U.S. 433, 437 (1971).

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> examination. They have ancient roots. They find expression in the Sixth Amendment. . . . This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, . . . but also in all types of cases where administrative . . . action was under scrutiny. (360 U.S. at 496–497).

Justice Douglas in the concurring opinion in *Peters* v. *Hobby*, 349 U.S. 331 (1955), emphasized the necessity of permitting a respondent to cross-examine all adverse witnesses.

> Under cross-examination [witnesses] stories might disappear like bubbles. Their whispered confidences might turn out to be yarns conceived by twisted minds or by people who, though sincere, have poor faculties of observation and memory.
>
> Confrontation and cross-examination under oath are essential, if the American ideal of due process is to remain a vital force in our public life. We deal here with the reputation of men and their right to work—things more precious than property itself. We have here a system where government with all its power and authority condemns a man to a suspect class and outer darkness, without the rudiments of a fair trial. (349 U.S. at 351).

There is no way within our judicial system to disprove allegations made against a President. It is because of this and because of the vast impact of this purportedly official criminal implication and charge against a President, on the whole body politic, that the Constitution requires no less a body than the whole House of Representatives to find the President likely enough

to be guilty of criminal misconduct that he should be tried by the Senate.

The characterization of the President of the United States as an unindicted co-conspirator, is nothing less than an attempt to nullify the presumption of innocence by a secret, non-adversary proceeding. The presumption of innocence is a fundamental of American justice; the grand jury's procedure is an implication of guilt which corrupts this ideal. To thus allow the Special Prosecutor to use such a constitutionally impermissible device, as an incident to an evidentiary desire, for the purpose of overcoming executive privilege, is wholly intolerable. The American legal system has never allowed the desire for evidence to go beyond the bounds of law. *Boyd* v. *United States*, 116 U.S. 616 (1886); *Weeks* v. *United States*, 232 U.S. 383 (1914); *Silverthorne Lumber Company* v. *United States*, 251 U.S. 385 (1920); *Mapp* v. *Ohio*, 367 U.S. 643 (1961). The President should not be made a hostage of the unwarranted pressure inherent in the grand jury's improper action.

The former Special Prosecutor, Mr. Archibald Cox, was quoted in the *New York Times* on January 5, 1974, as dealing with this exact issue. In response to rumors that he would name the President as an unindicted co-conspirator the newspaper printed this:

> Mr. Cox, in the telephone interview from his vacation home in Maine, described such a technique as 'just a backhanded way of sticking the knife in.' *New York Times*, January 6, 1974, p. 1, col. 6; p. 40, col. 1.

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A later issue of the *New York Times* dealt with the same basic questions when it stated:

> Leon Jaworski, the Watergate special prosecutor, advised the Federal Grand Jury investigating the Watergate break-in and cover-up that it would not be 'responsible conduct' to move to indict President Nixon, according to a spokesman for the office.
>
> Although Mr. Jaworski's advice to the Grand Jury did not refer to President Nixon by name—the matter was discussed in terms of a factual situation such as exists—it did include the suggestion that the House Judiciary Committee's impeachment inquiry was the proper forum to consider matters of evidence relating to a President.
>
> Although there had been speculation that Mr. Jaworski had tentatively concluded that legal complications militated against a move to indict the President, today's statement was the first direct confirmation of the fact. *New York Times*, March 12, 1974, p. 1.

It is only by impeachment and conviction and then subsequent criminal action that the President may be found to be a member of any criminal conspiracy. To base a desire for evidence on a stratagem which attempts to cripple the Presidency, and thus nullify the President's claim of executive privilege, is unprecedented, but more significantly a grotesque attempt to abuse the process of the judicial branch of government. Under our system of government only the House of Representatives may determine that evidence of sufficient quantity and quality exists to try the President. And, that trial must take place in the Senate with the Chief Justice presiding.

C. EVEN IF IT WERE PERMISSIBLE, THE NAMING OF AN INCUMBENT PRESIDENT AS AN UNINDICTED CO-CONSPIRATOR DOES NOT CONSTITUTE A PRIMA FACIE SHOWING OF CRIMINAL ACTIVITY

In the preceding section we have conclusively demonstrated why it is not constitutionally permissible to name an incumbent President as an unindicted co-conspirator. However, if such an act had been constitutionally permissible, it would nevertheless not have the effect of constituting a *prima facie* showing of criminality sufficient to overcome the President's constitutional claim of executive privilege.

There is a basic distinction between a finding of "probable cause" and the showing of a "*prima facie*" case which makes the Special Prosecutor's use of these two terms in the instant case both inaccurate and improper.

Probable cause is a legal concept based on the proposition that a crime "might" have been committed. As such it justifies an inquiry into an individual's guilt. It does not justify any legal effect that would operate to overcome either a presumption of innocence or executive privilege attaching to an otherwise valid claim. On the other hand, *prima facie* evidence is evidence sufficient to have a legal effect, which if unrebutted, is sufficient to go to a jury in a trial setting and sufficient to convict an individual of a crime before a petit jury. The finding of the grand jury at issue here has none of this sufficiency. It has never been tested in

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Nos. 73-1766 and 73-1834

JUL 1 1974

MICHAEL RODAK, JR., C

In the Supreme Court of the United States

OCTOBER TERM, 1973

UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES ET AL., RESPONDENTS

RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, CROSS-PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

ON WRITS OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE RESPONDENT, CROSS-PETITIONER RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES

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345 U.S. at 11. Similarly, the court of appeals in *Senate Select Committee on Presidential Campaign Activities* v. *Nixon*, No. 74–1258 (D.C. Cir., May 23, 1974), regarded an identical waiver argument, offered by the plaintiffs in that case, as so lacking in substance that it did not merit discussion in the opinion.

Finally, there is much weight in a point made by Judge MacKinnon in his dissent in *Nixon* v. *Sirica*, 487 F. 2d 700, 758–759 (D.C. Cir. 1973). He wrote:

> There has been no waiver. This conclusion rests upon three factors: the strict standards applied to privileges of this nature to determine waiver; the distinction between oral testimony and tape recordings; and, most important, considerations of public policy that argue persuasively for a privilege that permits the Chief Executive to disclose information on topics of national concern without that which properly ought to be withheld in the public interest.

Like Judge MacKinnon, we think that the most important of these points is the one last stated. Plainly the country is best served when there is the maximum disclosure possible from the Executive, consistent with the requirements of the public interest. This President, like his predecessors, has always acted on that principle. Disclosure has been the rule and claim of privilege the rare exception. But if this Court were to accept the Special Prosecutor's beguiling suggestion that this case can be decided on a narrow ground of waiver, the inevitable long-term consequence must be less disclosure, not more, since Presidents will be reluctant to make public even those things that can be

released without harm to the public interest, if by doing so they may be held to have waived their constitutional privilege to withhold related information that the nation's interests require be kept confidential.

IV. THE SPECIAL NATURE OF THE PRESIDENCY

The Special Prosecutor states an obvious and important truth when he reminds us that "in our system *even the President* is under the law." (S.P. Br. 68) (emphasis in original). A fundamental error that permeates his brief, however, is his failure to recognize the extraordinary nature of the Presidency in our system and that the Framers, who fully understood this, provided an extraordinary mechanism for making a President subject to the law.

The President is not merely an individual, to be treated in the same way as any other person who has information that may be relevant in a criminal prosecution. He is not, as the Special Prosecutor erroneously suggests, merely "the *head* of the Executive Branch." (S.P. Br. 79) (emphasis in original). Instead, as we pointed out at the beginning of this brief, it was announced by this Court more than a century ago, and since reiterated, that "the President is the Executive Department." *Mississippi* v. *Johnson*, 4 Wall. (71 U.S.) 475, 500 (1867). So much is apparent from the Constitution itself. Article II begins with the simple but sweeping declaration: "The executive Power shall be vested in *a* President of the United Statese of America" (emphasis added). In addition, the President, as this Court has recognized, is, more than any other officer of government the represent-

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ative of all of the people. *Myers* v. *United States*, 272 U.S. 52, 123 (1926). Chief Justice Taft went on to say that

> as the President is elected for four years, with the mandate of the people to exercise his executive power under the Constitution, there would seem to be no reason for construing that instrument in such a way as to limit and hamper that power beyond the limitations of it, expressed or fairly implied.

It was no mere happenstance that all executive power was vested in a single person, the President. This was a subject of recurring debate at the Constitutional Convention. Suggestions of a multi-member Executive were repeatedly pressed and as repeatedly rejected. It was seen, as Dr. Franklin said, as "a point of great importance." 1 *Farrand* 65.

In this respect the Executive differs from the other two great branches of government. The legislative power is vested by Article I in "a Congress of the United States," divided into two bodies and composed now of 535 members. The judicial power is, by Article III, spread among the nine Justices of this Court and the hundreds of judges of the inferior courts that Congress has seen fit to ordain and establish. But one person, and one person alone, is entrusted by Article II with the awesome task of exercising the executive power of the United States. "The President is the Executive Department." This difference, as we shall develop below, has important consequences. It serves to distinguish many of the cases relied on by the Special Prosecutor, involving as they do individual

members of the legislative and judicial branches. Specifically, the particular position the President occupies in our constitutional scheme means that the courts cannot issue compulsory process to compel him to exercise powers entrusted to him in a certain way, that, so long as he is President, he is not subject to criminal process, and that, as a logical corollary, he may not, while President, be named as an unindicted co-conspirator.

Of course, as we have already pointed out (Pres. Br. 52 n. 45), the Framers did not want a king, and Hamilton devoted all of the 69th *Federalist* to demonstrating that the Presidency, as created in the Constitution, bore no resemblance to the monarchy from which the colonists had successfully rebelled. The term of the President is limited to four years. The legislative branch controls the national purse strings, the war power, and the general policy direction of government. The President is given only a limited veto, subject to being overridden, over legislative acts. He is given no role whatever in the process of constitutional amendment. Finally, and most important for present purposes, the President may be removed from office by conviction on impeachment, and after he has left office, either through expiration of his term or by conviction on impeachment, he is subject to prosecution for crimes that he may have committed.

We have already developed in detail the process by which the impeachment provisions of the Constitution took form. (Pres. Br. 95–104). The language of Article I, section 3, clause 4, can hardly be read in any other

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way than that indictment of a President can only follow his conviction on impeachment. This was certainly the understanding of the delegates at Philadelphia, of the contemporary expositors of the Constitution, and of students of constitutional law from 1787 until today.

There is nothing in *United States* v. *Isaacs*, 493 F. 2d 1124 (7th Cir. 1974), *cert. denied* —— U.S. ——, (June 17, 1974), that is contrary to what we have just said. A judge of a court of appeals is not the judicial branch. He is a part of that branch, but the Judiciary can function uninterrupted during those rare occasions when a single judge is forced to stand trial on a criminal charge. The Presidency cannot function if the President is preoccupied with the defense of a criminal case, and the thought of a President exercising his great powers from a jail cell boggles the mind.[26]

The President, as we have noted, *is* the Executive Department. If he could be enjoined, restrained, indicted, arrested, or ordered by judges, grand juries, or marshals, these individuals would have the power to control the executive branch. This would nullify the separation of powers and the co-equality of the Executive.

The conclusion that the President is not subject to indictment while in office is consistent also with a proper ordering of government. When this principal national leader, elected by all of the people, is to be

[26] It is also worthwhile noting that at the Convention the discussion of impeachment was wholly in terms of a remedy against the President. Berger, *Impeachment: The Constitutional Problems* 100 (1973). The inclusion in Article II, section 4, of the "Vice President, and all Civil Officers of the United States" was made without discussion in the closing hours of the Convention. 2 *Farrand* 575.

removed, it is proper that the removal be considered and accomplished only by a body that, like the President, is politically representative of the whole Nation. Impeachment is a process designed to deal with the problem of criminal conduct by the President and yet still preserve the majoritarian character of the Republic. Criminal indictments or judicial orders cannot provide the tools to remove or limit a whole branch of government, and were not contemplated by the Founders for such a purpose. Only the branch of government that represents the people who elected the President, the legislative branch, can take actions that will in any way remove or tend to remove a President from office. This is the function of Congress, not of a grand jury.

For reasons that we have already fully developed (Pres. Br. 107–115), it follows *a fortiori* from the non-indictability of an incumbent President that he cannot be named as an unindicted co-conspirator, and that the action of the grand jury in this case must be ordered expunged. The ability of a President to function is severely crippled if a grand jury, an official part of the judicial branch, can make a finding that a President has been party to a criminal conspiracy and make this in a form that does not allow that finding to be reviewed or contested and disproved.[27] To allow this would be a mockery of due process and would deny to Presidents of the United States even those minimal protections that the Constitution extends to

[27] And to suggest that the naming of a President as a criminal co-conspirator, even if unindicted, is not an "impeachment" of the President is, we submit, to play games with common words and common sense.

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prison inmates subject to disciplinary proceedings. *Wolff* v. *McDonnell*, —— U.S. ——, No. 73-679 (June 26, 1974).

If the grand jury had before it evidence, competent or otherwise, *United States* v. *Calandra*, 414 U.S. 338 (1974), that led it to think that the President had been party to a crime, its only permissible course of action was to transmit that evidence to the House Judiciary Committee, rather than to make a gratuitous, defamatory, and legally impermissible accusation against the President.

Presumably the Special Prosecutor advised the grand jury to make this finding, and did so with the thought that it would strengthen his hand in litigation such as the present case (P.S.A. 8). If the President could be considered a co-conspirator, then all of his statements would arguably come within the exception to the hearsay rule and would meet the requirement of Rule 17(c) that subpoenaed material must be evidentiary in nature. In addition, this impermissible finding is relied on by the Special Prosecutor for his argument (S.P. Br. 90–102) that executive privilege vanishes if there is a *prima facie* showing of criminality. But even if the grand jury were empowered to make this finding—and as a matter of law it cannot—we have already shown that an allegation of criminal activity does not overcome the assertion of presidential privilege (Pres. Br. 82–86), and that a grand jury finding, based as it is only on a showing of probable cause, falls far short of the *prima facie* showing of

criminality that is required to defeat even the usual evidentiary privileges. (Pres. Br. 115–122.)[28]

The Special Prosecutor makes the surprising suggestion that the President enjoys no privileges or immunities.

> One might infer quite plausibly from the specific grant of official privileges to Congress that no other constitutional immunity from normal legal obligations was intended for government officials or papers. (S.P. Br. 77).

But it is quite clear that the privileges given to individual members of the legislative branch by Article I,

[28] The cases relied on by the Special Prosecutor (S.P. Br. 98) are not to the contrary. Such cases as *Ex parte United States*, 287 U.S. 241, 250 (1932), *Ewing* v. *Mytinger & Casselberry*, 339 U.S. 594, 599 (1950), and the others cited stand only for the proposition that a grand jury indictment conclusively establishes that there is probable cause to hold the person named for trial. They do not hold that the grand jury's action is an evidentiary showing of a *prima facie* case.

Again the Special Prosecutor is not helped by *United States* v. *Aldridge*, 484 F. 2d 655, 658 (7th Cir. 1973); *United States* v. *Bob*, 106 F. 2d 37 (2d Cir. 1939), *cert. denied*, 308 U.S. 589 (1940); or the other cases he cites with regard to attorney-client privilege. In those cases the privilege was held to vanish only after the government by proof at trial, had made a *prima facie* showing of criminal involvement.

Finally, the Special Prosecutor's heavy reliance on *Clark* v. *United States*, 289 U.S. 1 (1933) (S.P. Br. 95–97, 100–101, 108–109), is misplaced. Quite aside from the very different nature of the "privilege," or, more properly, rule of competency, there in issue, Justice Cardozo was quick to point out that "[i]t would be absurd to say that the privilege could be got rid of merely by making a charge of fraud," 289 U.S. at 15, and that "there must be a showing of a *prima facie* case sufficient to satisfy the judge that the light should be let in." 289 U.S. at 14.

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section 6, were given them for a specific and well-understood purpose. This was to protect the legislators "against possible prosecution by an unfriendly executive and conviction by a hostile judiciary . . ." *United States* v. *Johnson,* 383 U.S. 169, 179 (1966). It was "designed to assure a co-equal branch of government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch." *Gravel* v. *United States,* 408 U.S. 606, 616 (1972).

The Executive needed no protection from himself. As chief of state, chief executive, commander-in-chief, and chief prosecutor, he had no need to fear intimidation by a hostile executive or prosecution by an unfriendly executive. In addition, he was protected further by the elaborate procedure for impeachment, and by his immunity from criminal process until he had been convicted on impeachment. Thus the Constitution says nothing about immunities of the Executive comparable to what it says about members of the legislative branch because to have done so would have been to guard against an evil that could never come to pass.

Even members of the executive branch do have to fear damage actions brought by private citizens, and this Court has not been slow to read into the Constitution an implied immunity to protect the Executive in this situation. The leading case is *Spalding* v. *Vilas,* 161 U.S. 583 (1896), frequently relied on in this Court and always with approval. E.g., *Barr* v. *Matteo,* 360

U.S. 564, 570 (1959);[29] *Scheuer* v. *Rhodes,* 413 U.S. 919, 927 n. 8 (1974).

The Special Prosecutor would have the Court believe that the discretion about production of documents, which it has always been recognized that Presidents have, shrinks to a mere ministerial duty to produce what is demanded whenever a court disagrees with the Chief Executive's assessment of what the public interest requires. The argument seems little more than a play on words, intended to avoid the decisions, from *Marbury* on, that the courts may compel ministerial

[29] In the *Barr* case this Court relied heavily, in discussing immunity for executive officers, on the well-known opinion of Judge Learned Hand in *Gregoire* v. *Biddle,* 177 F. 2d 579 (2d Cir. 1949), where judicial immunity was at issue. Several of Judge Hand's insights in that case are applicable here. Thus he says:

> it can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine. What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him . . . (177 F. 2d at 581).

Again Judge Hand observed that "[t]here must indeed be means of punishing public officers who have been truant to their duties . . ." 177 F. 2d at 581. But the Constitution provides three sanctions against a truant President. He is subject to the political sanction of being defeated for reelection and to the legal sanctions of conviction on impeachment and of criminal punishment after he has been removed from office.

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acts but that they cannot interfere with discretionary decisions of high executive officers.

Nothing could be clearer than that the decision to disclose or to withhold the most intimate conversations of the President with his chief advisers involves the gravest and most far-reaching possible considerations of public policy. Who can say what the long term, or even short term, public effects of the President's decision to make public transcripts of tapes of his conversations about Watergate will be? It was a difficult and monumental decision, and no man living can predict with assurance how ultimately the history of this country, and indeed of the world, may be influenced by it. It was a discretionary decision in the most important sense, and it is nonsense to call such a disclosure "ministerial" merely because the final action of disclosure can be accomplished by a messenger.

A presidential decision to release the confidential tapes or written memoranda of his meetings with his advisers involves the same basic discretion as his initial decision to make such records. Surely neither the courts nor Congress could require Presidents to make such recordings on the ground that they would then be available should there be charges of misconduct against aides to some future President.

This case must be viewed in the light that the President is the executive branch, co-equal to the multi-membered legislative and judicial branches. If that co-equality is to be preserved, the President cannot be subject to the vagaries of a grand jury nor deprived of his power to control disclosure of his most confi-

dential communications. If he misuses his great powers, he must be proceeded against by the remedy that the Constitution has provided.

V. THE SPECIAL PROSECUTOR HAS NOT DEMONSTRATED A UNIQUE AND COMPELLING NEED FOR THIS MATERIAL

The Special Prosecutor makes the casual suggestion that "[t]here is a compelling public interest in trying the conspiracy charged in *United States* v. *Mitchell*, et al., upon all relevant and material evidence." (S.P. Br. 107). Doubtless every prosecutor in history has thought the same thing. The genius of the law, happily, has rejected that course, and in this case the Special Prosecutor's suggestion begs every important question before the Court. A prosecutor has the right to every man's evidence "except for those persons protected by a constitutional, common-law, or statutory privilege." *Branzburg* v. *Hayes*, 408 U.S. 665, 688 (1972). If, as we have argued, the materials at issue are subject to a valid privilege, based both on the Constitution and on the common law, the Special Prosecutor may not have them, no matter how relevant or material he thinks they may be, any more than he could require the defendants in this case to produce relevant and material evidence based on what they told their attorneys or based on confidential communications with their wives.

Our argument, of course, has been that the great question is, as Judge Wilkey put it, "Who Decides?", and that the answer to that question is that the President decides. But even if we are wrong on that, and

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Draft

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

Agnew File

In Re Proceedings of The Grand Jury Impaneled December 5, 1972:	
Application of Spiro T. Agnew Vice President of the United States	Misc. No. 73-

MEMORANDUM FOR THE UNITED STATES CONCERNING THE VICE PRESIDENT'S CLAIM OF CONSTITUTIONAL IMMUNITY

The motion by the Vice President poses a grave and unresolved constitutional issue: whether the Vice President of the United States is subject to federal grand jury investigation and possible indictment and trial while still in office. Due to the historic independence and vital function of the Grand Jury, motions to interfere with or restrict its investigations have traditionally met with disfavor. See, e.g., United States v. Dionisio, 410 U.S. 1 (1973); Branzburg v. Hayes, 408 U.S. 665 (1972); United States v. Ryan, 402 U.S. 530 (1971). Thus in ordinary circumstances we would oppose litigious interference with grand jury proceedings ~~notwithstanding~~ without regard to the underlying merits of any asserted claim of immunity. But in the special circumstances of this case, which involves a constitutional issue of utmost importance, we believe it appropriate, in the interest of (both) the Vice President and ~~in the interest of~~ the nation, that the Court resolve the issue at this stage of the proceedings.

Counsel for the Vice President have ably advanced arguments that the Constitution prohibits the investigation and indictment of an incumbent Vice President. We acknowledge the weight of their contentions. In order that judicial resolution of the issues may be fully informed,

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however, we wish to submit considerations that suggest a different conclusion: that the Congress and the judiciary possess concurrent jurisdiction over allegations made concerning a Vice President.

This makes it appropriate that the Department of Justice state now its intended procedure should the Court conclude that an incumbent Vice President is amenable to federal jurisdiction prior to removal from office. The United States Attorney will, in that event, complete the presentation of evidence to the grand jury and await that body's determination of whether an indictment is proper. Should an indictment issue, the Department will hold the proceedings in abeyance for a reasonable time, if the Vice President consents to a delay, in order to offer the House of Representatives an opportunity to consider the desirability of impeachment proceedings. */

The Department believes that this deference to the House of Representatives at the indictment stage, though not constitutionally required, is an appropriate accommodation of the respective interests involved. It reflects a proper comity between the different branches of government, especially in view of the significance of this matter for our national polity. We also appreciate the fact that the Vice President has expressed a desire to have this matter considered in the forum provided by the Congress. The issuance of an indictment, if any, would in the meantime toll the statute of limitations and preserve the matter for subsequent resolution.

We will first state the posture of this matter and then offer for the Court's consideration arguments based upon the Constitution's text, its rationale, and

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*/ We note that the Speaker of the House, Representative Carl Albert, though declining to take action at this stage, has not foreclosed the possibility that he might recommend House action at a subsequent stage.

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historic practice which indicate that all civil officers of the United States other than the President are amenable to the federal criminal process either before or after the conclusion of impeachment proceedings.

STATEMENT

A Grand Jury in this District, impaneled December 5, 1972, is currently conducting an investigation of possible violations by Spiro T. Agnew, Vice President of the United States, and others of certain provisions of the United States Criminal Code, including 18 U.S.C. 1951, 1952 and 371, and certain criminal provisions of the Internal Revenue Code of 1954. This investigation is now well advanced and the Grand Jury is in the process of receiving evidence.

The Vice President has moved to enjoin "the Grand Jury from conducting any investigation looking to possible indictment of [Mr. Agnew] and from issuing any indictment, presentment or other charge or statement pertaining to [him]" (Motion, p. 1). Mr. Agnew has further moved "to enjoin the Attorney General of the United States, the United States Attorney for the District of Maryland and all officials of the United States Department of Justice from presenting to the Grand Jury any testimony, documents, or other materials looking to possible indictment of [him] and from discussing with or disclosing to any person any such testimony document or materials" (Motion, p. 1-2).

The Vice President's motion is based on two contentions: (1) that "[t]he Constitution forbids that the Vice President be indicted or tried in any criminal court," and (2) that "officials of the prosecutorial arm have engaged in a steady campaign of statements to the press which could have no purpose and effect other than to prejudice any grand or petit jury hearing evidence relating to the Vice Presidnet * * *" (Motion, p. 2).

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On September 28, 1973, this court directed that the Department of Justice submit its brief on the constitutional issue on October 5, ~~1973,~~ and its brief on the remaining issue on October 8, ~~1973,~~ that the Vice President's counsel file a reply brief on October 11, and that oral argument be had on October 12. This Memorandum is submitted, on behalf of the United States, the Grand Jury, and the individual respondents named in the motion, in opposition to the claim that the Grand Jury should be enjoined because the Vice President cannot "be indicted or tried in any criminal court" (Motion, p. 1).

I

THE TEXT OF THE CONSTITUTION AND HISTORIC PRACTICE UNDER IT DO NOT SUPPORT A BROAD IMMUNITY ~~OF~~ FOR CIVIL OFFICERS PRIOR TO REMOVAL

Analysis of the Constitution's text demonstrates that no general immunity from the criminal process exists for civil officers who are subject to impeachment.

1. The Constitution provides no explicit immunity from criminal sanctions for any civil officer. The only express immunity in the entire document is found in Article I, Section 6, which provides: ~~that~~

> The Senators and Representatives * * * shall in all Cases except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same * * *.

Since the Framers knew how to, and did, spell out an immunity, the natural inference is that no immunity exists where none is mentioned. Indeed, any other reading would turn the constitutional text on its head: the construction advanced by counsel for the Vice President requires that the explicit grant of immunity to legislators be read as in fact a partial withdrawal of a complete

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immunity legislators would otherwise have possessed in common with other government officers. The intent of the Framers was of course precisely to the contrary. Cf. United States v. Johnson, 383 U.S. 169, 177-185 (1966).

In the face of this strong textual showing it would require a compelling constitutional argument to erect such an immunity for a Vice President. Counsel for the Vice President contend that such an argument is provided by Article I, Section 3, Clause 7, by Article II, Section 4, and by the Twelfth Amendment. We will examine each of these contentions in turn.

2. Article I, Section 3, Clause 7 provides:

> 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.

There is in this language no suggestion that criminal punishment for civil officers of the United States must be deferred until the Senate had convicted in an impeachment proceeding. It is merely a statement that such a conviction does not bar further punishment. The clause merely precludes a plea of double jeopardy; it does not affect the sequence of the two processes.*/

Counsel for the Vice President read this language as containing the negative pregnant that a civil officer cannot be liable and subject to indictment and other criminal

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*/ A student of the subject, after showing that impeachment is a civil proceeding, explains the saving provision: "If impeachment is not criminal, it may be asked, why was it deemed necessary to have a saving clause for subsequent indictment and punishment. Possibly the saving clause was designed to preclude an inference from the unmistakable criminal nature of English impeachment that an impeachment could be pleaded in bar to a subsequent criminal prosecution,

(footnote con'd on next page)

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process prior to conviction on impeachment, and they cite the remarks of Alexander Hamilton and Gouverneur Morris as supporting this position (Memo., p. 9)*/ Those remarks, however, do not appear to be addressed directly to the issue of the necessary sequence of indictment and impeachment; they merely paraphrase the constitutional language for explanatory purposes.**/

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*/ (footnote con't from preceeding page)

an excess of caution." Berger, Impeachment: The Constitutional Problems 80 (Cambridge, Mass., 1973). Just as an individual may be both criminally prosecuted and deported for the same offense (see Fong YueTind v. United States, 149 U.S. 698, (1893)), a civil officer could be both criminally punished and impeached even absent the Article I, Section 3 proviso.

*/ Gouverneur Morris' explanation for making the Senate rather than the Supreme Court the judge of impeachment -- that trial in the Court on separate criminal issues would follow -- is historically unsupported. The principal reason for that choice of forum apparently was the fact that the Supreme ourt would have been appointed by the President and therefore could not be trusted to deal independently with his impeachment. See 2 Farrand, Records of the Federal Convention 550-552 (New Haven, 1911).

**/ It is true, as is stated in the memorandum submitted on behalf of the Vice President (Memo., p. 10), that in the debates in North Carolina on ratification, Governor Johnson expressed his view that indictment could only follow impeachment. However, James Iredell, who was the "Mastermind" of the North Carolina Ratification Convention (2 Bancroft, History of the Formation of the Constitution of the United States of America 348 (New York, 1882)), and later became a Justice of the Supreme Court, argued forcefully that impeachable officers are subject to indictment while in office. See 4 Elliot, Debates of the Federal Constitution 37, 109 (Philadelphia, 1876).

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The Framers did not in fact debate the question whether impeachment must precede indictment. When their attention was directed specifically to the Office of the Presidency, their remarks strongly suggested an understanding that the President, as the Chief Executive, would not be subject to ordinary criminal process. See 2 Farrand, Records of the Federal Convention 64-69 (New Haven, 1911). But nothing in the debates suggests that such immunity would extend to any lesser officer and, as we show below (see pp. , infra), there are substantial reasons, embedded not only in the constitutional framework but in the practical exigencies of government, for distinguishing between the President, on the one hand, and all lesser officers including the Vice President, on the other, in this regard.

Notwithstanding the paucity of debate or contemporaneous commentary on the issue, it is clear that the Framers and their contemporaries understood that impeachable officers are subject to criminal process. The first Congress, many of whose members had been delegates to the Constitutional Convention, promptly enacted Section 21 of the Act of April 30, 1790, 1 Stat. 117, recognizing that sitting federal judges were criminally punishable for bribery and providing for their disqualification from office upon conviction. And in 1796, Attorney General Lee informed Congress that a judge of a territorial court, a civil officer subject to impeachment, was indictable for criminal offenses while in office. 3 Hinds, Precedents of the House of Representatives 982-983 (Washington, 1907). These considerations, together with those rooted in the constitutional text and practicalities of government that we shall next discuss, have led subsequent commentators

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to conclude, with virtual unanimity, that the Framers did not intend civil officers other than the President to be immune from criminal process. See, e.g., Rawle, A View on the Constitution of the United States of America 169, 215 (Philadelphia, 1829); Simpson, supra, 52-53; eerick, Impeaching Federal Judges: A Study of the Constitutional Provisions, 39 Fordham L. Rev. 1, 55 (1970).

The sole purpose of the caveat in Article I, Section 3, that the party convicted upon impeachment may nevertheless be punished criminally, is to preclude the argument that the doctrine of double jeopardy saves the offender from the second trial. This was the interpretation of the clause offered by Luther Martin, a member of the Constitutional Convention and Judge Chase's counsel, during Chase's impeachment. 14 Annals of Congress, 8th Cong., 2d Sess., p. 423. In truth, impeachment and the criminal process serve different ends so that the outcome of one has no legal effect upon the outcome of the other. James Wilson, an important participant in the Constitutional Convention,__/ put the matter succinctly:

> Impeachments * * * come not * * * within the sphere of ordinary jurisprudence. They are founded on different principles; are governed by different maxims, and are directed to different objects; for this reason, the trial and punishment of an offense in the impeachment, is no bar to a trial of the same offense at common law. [I Wilson, Works 324 (Cambridge, Mass., 1967).]

__/ "James Wilson was the strongest member of this [the Pennsylvania] delegation and Washington considered him to be one of the strongest men in the convention. * * * He had served several times in congress, and had been one of the signers of the Declaration of Independence. At forty-five he was regarded as one of the ablest lawyers in America." Farrand, The Framing of the Constitution 21 (New Haven, 1913).

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Because the two processes have different objects, the considerations relevant to one may not be relevant to the other. For that reason, neither conviction nor acquittal in one trial, though it may be persuasive, need automatically determine the result in the other trial. To take an obvious example, a civil officer found not guilty by reason of insanity in a criminal trial could certainly be impeached nonetheless.

The argument advanced by counsel for the Vice President, which insists that only a party actually convicted upon impeachment may be tried criminally, would tie the two processes together in an impermissible manner. Impeachment trials, as that of President Andrew Johnson reminds us, may sometimes be influenced by political passions and interests that would be rigorously excluded from a criminal trial. These may produce unwarranted acquittal. Or somewhat more than one-third of the Senate might conclude that a particular offense, though properly punishable in the courts, did not warrant conviction on impeachment. Hence, if Article I, Section 3, Clause 7, were read to mean that no one not convicted upon impeachment could be tried criminally, the failure of the House to vote an impeachment, or the failure of the impeachment in the Senate, would confer upon the civil officer accused complete and -- were the statute of limitations permitted to run -- permanent immunity from criminal Prosecution however plain his guilt. There is no such requirement in the Constitution or in reason. To adopt that view would give Congress the power to pardon by acquittal or even by mere inaction, since the officer would never be a "Party convicted" upon impeachment,

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even though the Constitution lodges the power to grant clemency exclusively in the President. The Framers certainly never supposed that failure to obtain conviction upon impeachment conferred permanent criminal immunity.

The conclusion seems required, therefore, that the Constitution provides that the "Party convicted" is nonetheless subject to criminal punishment, not to establish the sequence of the two processes, but solely to establish that conviction upon impeachment does not raise a double jeopardy defense in a criminal trial.—/

2. The argument made by counsel for the Vice President concerning Article II, Section 4 seems no more persuasive. That section of the Constitution provides:

> The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high crimes and Misdemeanors.

The Vice President's contention that he is immune from criminal process while in office rests heavily on the assumption that even initiation of the process of indictment, trial, and punishment upon conviction, would effect his practical removal from office in a manner violative of the exclusivity of the impeachment power (See, e.g., Memo., pp. 2, 5-6). This assumption is without foundation in history or logic.

We agree that conviction upon impeachment is the exclusive means for removing a Vice President from office. Although non-elective civil officers in the executive branch may be dismissed from office by the President, and Senators and Representatives may be expelled by their respective Houses, historically the President, Vice President, and federal judges have been removable from office only by impeachment. But it is clear from history

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that a criminal indictment, or even trial and conviction, does not, standing alone, effect the removal of an impeachable officer.

As counsel for the Vice President point out (Memo., pp. 14-15), one of his predecessors, Aaron Burr, was subject to simultaneous indictment in two states while in office, yet he continued to exercise his constitutional responsibilities until the expiration of his term.—/ Judge John Warren Davis of the United States Court of Appeals for the Third Circuit, and Judge Albert W. Johnson of the United States District Court for the Middle District of Pennsylvania, were both indicted and tried while in office; neither was convicted, and each continued to hold office during trial. See Borkin, The Corrupt Judge 95-186 (New York, 1962). Judge Kerner of the Seventh Circuit, whose conviction for bribery is currently pending on appeal, has not yet been removed from office. Similarly, the criminal conviction of Congressmen does not act to remove them from office: "the final judgment of conviction [does] not operate, ipso facto, to vacate the seat of the convicted Senator, nor compel the Senate to expel him or to regard him as expelled by force alone of the judgment." Burton v. United States, 202 U.S. 344, 369.

This is not to say that trial and punishment would not interfere in some degree with an officer's exercise of his public duties, although, as the case of Aaron Burr illustrates, mere indictment standing alone

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—/ Apparently neither Burr nor his contemporaries considered him constitutionally immune from indictment. Although counsel for the Vice President assert that Burr's indictments were "allowed to die" (Memo., p. 15), that was merely because "Burr thought it best not to visit either New York or New Jersey." Parmet & Hecht, Aaron Burr: Portrait of an Ambitious Man, 231 (New York, 1967).

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qualify a replacement. This is recognition that the President is the only officer whose disability while in office incapacitates a branch of government. The Constitution makes no provision, because none is needed, for the disability of a Vice President, a judge, a legislator, or any subordinate executive branch officer.

Counsel for the Vice President suggest (Memo., pp. 7-8, 18) that adoption of the Twelfth Amendment, providing for separate elections of the President and Vice President, in some way supports immunity for a Vice President. In fact, the implication of the Amendment is the contrary. The original constitutional plan was that each elector should vote for two persons for President. The man receiving the greatest vote was to be President and the runnerup was to be Vice President. The Vice President was thus the next most powerful contender for the Presidency. The Framers, however, did not foresee the development of political parties which ran "tickets," one man standing for President and the other for Vice President. An elector would then cast one ballot for each of these candidates which had the embarrassing result that Thomas Jefferson and Aaron Burr, though regarded by their party as condidates for, respectively, President and Vice President, received an equal number of votes. There being no constitutionally elected President, the election was thrown into the House of Representatives. The Twelfth Amendment, adopted in response, provided separate elections so that a man wanted only as Vice President should not thus block the election of the man wanted as President. The adoption of the

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Twelfth Amendment, therefore, was recognition that the Vice President, under a party system, is not the second most desired man for President but rather an understudy chosen by the presidential candidate. That recognition does not magnify the constitutional position of a Vice President. 1/

1/ The related argument that the Framers could not have intended the President, through his Attorney General, to harass political rivals and therefore the Vice President must be immune from criminal process (see Memo., p. 18), is unsound. Not only is the Vice President rarely, if ever, an important political rival of the President once he accepts the secondary office, but the logical implication of that argument is that all major politicians--Senators, Governors, and many persons not even holding office--must be freed of responsibility for criminal acts.

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Thus we conclude that considerations derived from the structure of the Constitution itself indicate that only a President possesses immunity from the criminal process prior to impeachment. The position of a Vice President would appear to be similar to that of judges, Congressmen, and other civil officers. There are also, however, practical considerations that point in the same direction. Such considerations are entitled to weight in the absense of compelling constitutional reasons for an immunity of the sort we have shown exist only for the Presidency. In many cases, for instance, problems will be posed by the presence of co-conspirators and the running of the statute of limitations. An official accused of taking bribes has obviously had co-conspirators, if the charges are true. Even if the officer were immune, the co-conspirators would not be. The result would be that the grand and petit juries would receive evidence about the illegal transactions and that evidence would inevitably name the officer as the recipient of the bribes the defendants gave. The trial might end in the conviction of the co-conspirators for bribing the officer, yet the officer would not be on trial, would not have the opportunity to cross-examine and present testimony on his own behalf. The man and his office would be slandered and demeaned without a trial in which he was heard. The man might prefer that to the risk of punishment, but the courts should not adopt a rule that opens the office to such a demeaning procedure.

This practical problem is raised by the motion here which asks this Court to prohibit "the Grand Jury from conducting any investigation looking to the [Vice

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President's] possible indictment" and to enjoin the prosecutors from presenting any evidence to the grand jury "looking to [his] possible indictment" (Motion, p. 1).

The criminal investigation being conducted by the grand jury is wide-ranging, and the Vice President is not its sole subject. The evidence being presented, while it touches on the Vice President, involves others also. It would be virtually impossible to exclude all evidence relating to the Vice President and at the same time present evidence relating to possible co-conspirators in a meaningful manner. Thus enjoining the investigation and presentation of evidence "looking to the possible indictment of [the Vice President]" would require the investigations of other persons also to be suspended. The relief therefore would plainly "frustrate the public's interest in the fair and expeditious administration of the criminal laws" (United States v. Dionisio, supra, 410 U.S. at 17).

The statute of limitations with respect to some of the possible illegal activities being investigated will run in December 1973. A suspension of the grand jury's investigation of the Vice President and others could therefore jeopardize the possibility of a timely indictment. "The possible expiration of a period of limitations if, of course, highly relevant to the exercise of the court's discretion" determining whether to stay the presentation of evidence to the grand jury. Grant v. United States, 282 F.2d 165, 170 (C.A. 2) (Friendly, C.J.).—/

Should this Court suspend the grand jury investigation the result would likely be to accord the Vice President and other persons permanent immunity from prosecution through the running of the statute of limitations

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even though it is unlikely he is entitled to the temporary immunity, pending conviction upon impeachment, that his counsel claim for him.

CONCLUSION

For the reasons stated, applicant's motion should be denied.

Respectfully submitted.

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Solicitor General,

KEITH A. JONES
EDMUND W. KITCH
Assistants to the Solicitor General.

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II

THE STRUCTURE OF THE CONSTUTION AND THE WORKINGS OF THE CONSTITUTIONAL SYSTEM DO NOT IMPLY AN IMMUNITY FOR A VICE PRESIDENT

The Constitution is an intensely practical document and judicial derivation of powers and immunities is necessarily based upon consideration of the documents structure and of the practical results of alternative interpretations. McCulloch v. Maryland, 4 Wheat. 316 (1819); Stuart v. Laird, 1 Cranch 299, 308 (1803); Field v. Clark, 143 U.S. 649, 691 (1892); United States v. Midwest Oil Co., 236 U.S. 459, 472-473 (1915); United States v. Curtis-Wright Corp., 299 U.S. 304, 328-329 (1936). We turn, therefore, to a structural and functional analysis of the Constitution in relation to the immunity claimed for Vice Presidents.

The real question underlying the issue of whether indictment of any particular civil officer can precede conviction upon impeachment--and it is constitutional in every sense because it goes to the heart of the operation of government--is whether a governmental function would be seriously impaired if a particular civil officer were liable to indictment before being tried on impeachment. The answer to that question must necessarily vary with the nature and functions of the office involved.

We may begin with a category of civil officers subject to impeachment whom we think may clearly be tried and convicted prior to removal from office through the impeachment process:

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federal judges. [1] A judge may be hampered in the performance of his duty when he is on trial for a felony but his personal incapacity in no way threatens the ability of the judicial branch to continue to function effectively. There have been frequent occasions where death, illness, or disqualification has removed all of the available judges from a district or a circuit and even this extreme circumstance has been met effectively by the assignment of judges from other districts and circuits.

Similar considerations apply to Congressmen and these practical judgments are reflected in the Constitution. As already noted, Article I, Section 6 provides a very limited immunity for Senators and Representatives and explicitly permits them to be tried for felonies and breaches of the peace. This limited grant of immunity demonstrates a recognition that, although the functions of the legislature are not lightly to be interfered with, the public interest in the expeditious and even-handed administration of the criminal law outweighs the cost imposed by the incapacity of a single legislator. Such incapacity does not seriously impair the functioning of Congress. [2]

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[1] The Department of Justice is now contending that a United States court of appeals judge is subject to indictment, conviction, and sentencing prior to removal through the impeachment process. See United States v. Kerner, now pending in the Court of Appeals for the Seventh Circuit, No. 73-000. This, of course, is the historic position of the Department. See pp. , supra.

[2] It seems too clear for argument that other civil officers, such as heads of executive departments, are fully subject to criminal sanctions whether or not first removed from office.

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Almost all legal commentators agree, on the other hand, that an incumbent President must be removed from office through conviction upon an impeachment before being subject to the criminal process. Indeed, counsel for the Vice President takes this position (Memo, pp.). It will be instructive to examine the basis for that immunity in order to see whether its rationale also fits an incumbent Vice President, for that is the crux of the question before the Court.

As we have noted, p. , supra, the Framers' discussions assumed that impeachment would precede criminal trial because their attention was focussed upon the Presidency. (See also, 2 Farrand, supra, p. 500, and Hamilton, The Federalist, Nos. 65 and 69.) They assumed that the nation's Chief Executive, responsible as no other single officer is for the affairs of the United States, would not be taken from duties that only he can perform unless and until it is determined that he is to be shorn of those duties by the Senate.

The scope of the powers lodged in the single man occupying the Presidency is shown by the briefest review of Artide II of the Constitution. The whole "executive Power" is vested in him and that includes 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 Justice of the Supreme Court and other civil officers, the power and responsibility to execute the laws, and the power to grant reprieves and pardons. The constitutional outline of

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the powers and duties of the Presidency, though more complete than noted here, does not flesh out the full importance of the office, but this is so universally recognized that we do not pause to emphasize it.

Without in any way denigrating the constitutional functions of a Vice President, or those of any individual Supreme Court Justice or Senator, for that matter, they are clearly less crucial to the operations of government than those of a President. A Vice President has, in fact, only three constitutional functions: to replace the President in the event of the President's removal from office, death, resignation, or inability to discharge the powers and duties of his office (25th Amendment, Section 1, 3, and 4); to make, together with a majority of either the principal officers of the executive departments or such other body as Congress may by law provide, a written declaration of the President's inability (25th Amendment, Section 3); and to preside over the Senate, which Vice Presidents rarely do, [1] and cast the deciding vote in case of a tie (Article I, Section 3).

None of a Vice President's constitutional functions is substantially impaired by his liability to the criminal process. The only problem that might arise would be the death of a President at the time a Vice President was the defendant in a criminal trial. That would pose no practical difficulty, however. The criminal proceedings would have to be suspended or terminated and the impeachment process begun. This would leave the nation in the same practical situation as would the institution of

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[1] The Framers assumed that Vice Presidents would not regularly preside over the Senate for they expressly provided in Artide I, Section 3, Clause 5, for the election of a President pro tempore to act to the Vice President's absence.

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impeachment proceedings against an incumbent President, the sole legal difference being that the successor to office would be the Speaker of the House of Representatives rather than the Vice President. It is worth observing that though the country has never been without a President it has frequently lacked a Vice President.

The inference that only the President is immune from indictment and trial prior to removal from office also arises from an examination of other structural features of the Constitution. The Framers could not have contemplated prosecution of an incumbent President because they vested in him complete power over the execution of the laws, which includes, of course, the power to control prosecutions. (Article I, Section 3.) And they gave him "Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment" (Article I, Section 2, Clause 1), a power that is consistent only with the conclusion that the President must be removed by impeachment, and so deprived of the power to pardon, before criminal process can be instituted against him. A Vice President, of course, has no power either to control prosecutions or to grant pardons. These structural features are thus consistent with the conclusion that he may be prosecuted and convicted while still in office.

This conclusion is reinforced by the Twenty-Fifth Amendment, Sections 3 and 4. The problem, as we have noted, is one of the functioning of a branch of government, and it is noteworthy that the President is the only officer of government for whose temporary disability the Constitution provides procedures to

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apparently does not seriously hinder full exercise of the powers of the Vice Presidency. But the relationship between trial and punishment, on the one hand, and actual removal from office, on the other, is far from automatic. As perhaps the leading American commentator on impeachment has observed (Simpson, A Treatise on Federal Impeachment 52 (Philadelphia, 1916)):

> A public officer may be criminally convicted of trespass, though acting under a claim of right, or for excessively speeding his automobile, yet neither would justify impeachment. If, however, the conviction was followed by imprisonment, impeachment might be well maintained, for the office would be brought into contempt if a convict were allowed to administer it. It may be said that, in that event, impeachment would depend on the severity or lenity of a trial judge, and this would be so, but for the office's sake, a man may be said to be guilty of a "high misdemeanor" if he so acts as to be imprisoned.

Whether conviction of and imprisonment for minor offenses must lead to removal on conviction of impeachment therefore depends, in any given case, on the sound judgment of the Congress and the President's exercise of his pardoning power. Certainly it is pellucidly clear that criminal indictment, trial, and even conviction of a Vice President would not, ipso facto, cause his removal; subjection of a Vice President to the criminal process therefore does not violate the exclusivity of the impeachment power as the means of his removal from office.

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William Jefferson **CLINTON**, PETITIONER,
v.
Paula Corbin **JONES**.
No. 95-1853.
United States Supreme Court Amicus Brief.
October Term, 1995.
August 8, 1996.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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*I QUESTION PRESENTED

Whether a private civil action for damages against the President of the Unite States, based on events occurring before the President took office, should be permitted to go forward during the President's term of office.

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lawsuits," id. at 751; and that the public interest in the President's unimpaired attention to his official responsibilities must take precedence over a private litigant's desire to obtain redress for legal wrongs, id. at 754 n.37. As explained above, the President would be faced with a "diversion of his energies by concern with private lawsuits," id. at 751, if he were compelled to defend himself against a private suit for damages during his term in office. That diversion would "raise unique risks to the effective functioning of government." Ibid. The teaching of Fitzgerald is that the judicial system should not lend itself to such risks. [FN8]

FN8. A similar lesson can be drawn from the evident immunity of a sitting President from criminal prosecution. The available evidence strongly indicates that the Framers did not contemplate the possibility that criminal prosecutions could be brought against a sitting President. See, e.g., 2 Max Farrand, Records of the Federal Convention of 1787, at 64-69, 500 (New Haven 1911); The Federalist No. 69, at 416 (Hamilton) (C. Rossiter ed. 1961) (the President "would be liable to be impeached, tried, and, upon conviction * * * removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of law") (emphasis added). As the Court noted in Fitzgerald, "there is a lesser public interest in actions for civil damages than * * *in criminal prosecutions." 457 U.S. at 754 n.37. In In Re Proceedings of the Grand Jury Impaneled December 5, 1972, Civil 73-965 (D. Md.) (mem. filed Oct. 5, 1973), the United States took the position that while a sitting Vice President is subject to criminal prosecution, a sitting President is not.

*16 C. The court of appeals read Fitzgerald to mark the outer limit of Presidential immunity. Pet. App. 8-9. In the court's view, "[t]he [Supreme] Court's struggle in Fitzgerald to establish presidential immunity for acts within the outer perimeter of official responsibility belies the notion * * * that beyond this outer perimeter there is still more immunity waiting to be discovered." Id. at 9. Because the instant case involves claims that are (with one possible exception, see note 3, supra) beyond "the 'outer perimeter' of [the President's] official responsibility," Fitzgerald, 457 U.S. at 756, the court of appeals concluded that Fitzgerald precluded the recognition of any constitutionally grounded immunity here. Pet. App. 9. And because the court of appeals believed that the President "is entitled to immunity, if at all, only because the Constitution ordains it," id. at 16, the court regarded Fitzgerald as dispositive of the question whether a sitting President may be compelled to defend against a private lawsuit during his service in office.

The court of appeals erred in asserting that deferral of litigation until the President leaves office would "extend[] presidential immunity beyond the outer perimeter delineated in Fitzgerald." Pet. App. 9. The plaintiff in Fitzgerald *17 did not name former President Nixon as a defendant until nearly four years after the conclusion of his Presidency. See 457 U.S. at 740. The case therefore did not implicate--and the Court accordingly did not discuss--the potential conflicts between a sitting President's performance of his constitutional responsibilities and the demands placed upon the defendant in a civil lawsuit. Rather, the Court focused on the danger that the

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be said of the Senate's power to try impeachments.[21] Indeed, assertions of executive privilege which thwart impeachment investigations or trials can themselves quite properly become the basis for an article of impeachment.

For example, prior to President Nixon's resignation in August 1974, the Judiciary Committee of the House of Representatives recommended to the full House an Article of Impeachment (Article III) charging that President Nixon's repeated refusal to comply with Judiciary Committee subpoenas issued in the course of the impeachment investigation was "subversive of constitutional government," since such refusal involved a presidential usurpation of "functions and judgments necessary to the exercise of the sole power of impeachment vested by the Constitution in the House of Representatives."

Although the House Judiciary Committee voted not to seek judicial enforcement of its subpoenas to the President but sought instead to submit the validity of those subpoenas to the House and Senate, it has been suggested in plausible dictum that, if and when judicial enforcement is properly requested, federal courts possess constitutional power to review the validity of congressional impeachment subpoenas answered by claims of executive privilege, and further that the congressional interest in judicially enforcing such subpoenas (if otherwise valid) is substantial enough to outweigh any danger that the prejudicial publicity associated with the impeachment investigation might frustrate the impaneling of unbiased juries in ancillary criminal trials.[22]

§ 4–17. The Ultimate Remedy: Impeachment for High Crimes and Misdemeanors

Although the impeachment process has been used periodically since 1789,[1] there has been no judicial attempt to define its limits. This is attributable, in part, to the constitutional language ostensibly confining the issue of impeachment to the legislative branch of government, and thus arguably barring judicial review of impeachments under the political question doctrine.[2] What follows, therefore, is not a discussion

jury matters should be lawfully available to disbarment committees and police disciplinary investigations and yet be unavailable to the House of Representatives in a proceeding of so great import as an impeachment investigation."); 40 Op.Atty. Gen. 45 (1941) (executive privilege would not be invoked in impeachment proceedings).

21. See § 4–17, infra.

22. See Senate Select Committee v. Nixon (II), 370 F.Supp. 521, 522–23 (D.D.C. 1974), aff'd, 998 F.2d 725 (D.C.Cir. 1974).

§ 4–17

1. For a survey of impeachments in the United States, see "Impeachment and the U.S. Congress," Cong.Q. (March 1974).

2. See Ritter v. United States, 84 Ct.Cl. 293 (1936), cert. denied 300 U.S. 668 (1937) (dismissing suit of a judge who contended that the Senate had tried him for non-impeachable offenses: "the Senate was the sole tribunal that could take jurisdiction of the articles of impeachment presented to that body against the plaintiff and its decision is final"). See generally C. Black, Impeachment: A Handbook 53–55 (1974) (urging that it would be absurd to reinstate a President whose legitimacy had been stripped through impeachment by the House of Representatives and conviction by the Senate, legislative bodies presumably reflecting the sense of polity); Broderick, "A Citizen's Guide to Impeachment of a President: Problem Areas", 23 Catholic U.L.Rev. 205 (1973). See also H. Black, Constitutional Law 121–22 (1897); 1 J. Story, Commentaries § 805, at 587; 3 W. Willoughby, The Constitutional Law of the United States 1451 (2d ed. 1929). That impeachments are entirely beyond the pur-

of a judicially articulated law of impeachment, but is instead an independent analysis, buttressed as appropriate by conclusions that can be drawn from the attempt to impeach President Nixon,[3] as well as from earlier impeachment proceedings.[4]

Article II, § 4, provides that "[t]he President, Vice-President and all Civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." Members of Congress are not "civil officers" for purposes of impeachment. But although Senators and Representatives thus cannot be impeached, they can be removed from office. Article I, § 5 provides: "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members. . . . Each House may . . . punish its members for disorderly behavior, and, with the concurrence of two thirds, expel a member.[5]

Although of course private citizens are not subject to impeachment, the resignation of a "civil officer" does not give immunity from impeachment for acts committed while in office.[6] Congress might wish to continue an impeachment proceeding after its target has resigned from office in order to deprive the resigned officer of any retirement benefits affected by the fact of impeachment or conviction; to solidify the lesson of the officer's misconduct in the form of clear precedent; or simply to make plain to the public and for the future that the resigned officer's withdrawal from office was the result not of unjust persecution but rather of the way in which the officer had abused an official position.

Under the provisions of article II, § 4, the President, Vice President, or any other civil officer may be impeached for, and convicted of, "Treason, Bribery, or other high Crimes and Misdemeanors." Of these impeachable offences, only treason is expressly defined by the Constitution. Article III, § 3 states that "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort." Despite then-Congressman Gerald Ford's well-known assertion that "an impeachable offence is whatever a majority of the House of Representatives considers [it] to be",[7] there is now wide agreement that the phrase "high Crimes and

view of the courts is not always conceded, however. See R. Berger, Impeachment 108 (1973); I. Bryant, Impeachment, Trials and Errors 182–97 (1972); Goldberg, "Question of Impeachment," 1 Hastings Con.L.Q. 5, 8 (1974); Rezneck, "Is Judicial Review of Impeachment Coming?", 60 A.B.A.J. 681 (1974); Cf. Powell v. McCormack, 395 U.S. 486 (1969), discussed in § 3–6, supra. Given the decision of the Constitutional Convention to transfer impeachment trials from the Supreme Court, where they were initially to have been conducted, to the Senate, the more defensible view appears to be the traditional one of non-reviewability.

3. The impeachment effort was terminated after the President's resignation on August 9, 1974.

4. Although impeachment has been used primarily as a way of removing federal judges, the special characteristics of judicial impeachments are not discussed here, but rather in Chapter 3, supra.

5. See Powell v. McCormack, 395 U.S. 486 (1969).

6. See Firmage and Mangrum, "Removal of the President: Resignation and the Procedural Law of Impeachment," 1974 Duke L.J. 1023, 1089–95.

7. 116 Cong.Rec. 11913 (1970). The falsity of that position is evident from an examination of the debates on impeachment at the Constitutional Convention. In response to a suggestion by Colonel Mason that impeachments not be limited to cases of bribery and treason, but include as well instances of "maladministration," Madison

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Misdemeanors" was intended by the Framers to connote a relatively limited category closely analagous to the "great offences" impeachable in common law England.[8] In addition to treason and bribery, the "great offences" included misapplication of funds, abuse of official power, neglect of duty, encroachment on or contempt of legislative prerogatives, and corruption.[9]

There have been only two serious attempts to impeach American Presidents. In both instances, the offenses charged reflected the impact of the common law tradition discussed here: offenses have been regarded as impeachable if and only if they involve serious abuse of official power.

President Andrew Johnson was impeached by the House of Representatives in 1867 on the ground that he had attempted to dismiss Secretary of War Stanton in apparent defiance of the Tenure of Office Act of 1867.[10] Johnson escaped conviction in the Senate by one vote.

Representative John Bingham, leader of the House Managers of Impeachment, defined an impeachable offence in the traditional manner: "An impeachable high crime or misdemeanor is one in its nature or consequences subversive of some fundamental or essential principle of government or highly prejudicial to the public interest, and this may consist of a violation of the Constitution, of law, of an official oath, or of duty, by an act committed or omitted, or, without violating a positive law, by the abuse of discretionary powers from improper motives or for an improper purpose." [11]

History has not dealt kindly with the impeachment of Andrew Johnson. The procedural arbitrariness of the Johnson trial, and the fact that the law Johnson ignored was widely regarded as unconstitutional even before the Supreme Court so declared in *Myers v. United States*,[12] have together contributed to a fairly broad agreement that the congressional attempt to oust Johnson was itself an abuse of power.[13]

admonished that "so vague a term [would] be equivalent to tenure during the pleasure of the Senate." Mason then substituted the current constitutional language—"other high crimes and misdemeanors"—for "maladministration," apparently to ensure that mere congressional disapproval of the policies of a President could not serve as a basis for impeachment. See M. Farrand, The Records of the Constitutional Convention of 1787 (1911).

8. See, e.g., R. Berger, Impeachment 53–102 (1973); C. Black, Impeachment: A Handbook 39–40 (1974); Broderick, "A Citizen's Guide to Impeachment of a President: Problem Areas," 23 Catholic U.L. Rev. 205 (1973). Our law of impeachment has also been said to derive from the Roman law of infamy. See Franklin, "Romanist Infamy and the American Constitutional Concept of Impeachment," 23 Buff.L. Rev. 313 (1974). See generally "The Legal Aspects of Impeachment: An Overview," prepared by the Office of Legal Counsel of the Department of Justice (February 1974). For an unusual argument that the impeachment clause makes impeachment and conviction *mandatory* in cases of "high crimes and misdemeanors" but *optional* in other cases, see Note, "The Scope of the Power to Impeach," 84 Yale L.J. 1316 (1975).

9. See R. Berger, Impeachment 70–71 (1973).

10. The act was ultimately declared unconstitutional. See Myers v. United States, 272 U.S. 52 (1926), discussed in § 4–10, supra.

11. 1 Trial of Andrew Johnson 157 (1868).

12. See note 10, supra.

13. There appears, however, to be a growing revisionist view that the "real" reason for Johnson's impeachment—his systematic subversion of congressional reconstruction efforts—was a proper basis for conviction and removal from office. See

Richard Nixon was the second President to become the subject of serious impeachment proceedings. Mr. Nixon resigned from office as the thirty-seventh President on August 9, 1974, after his compliance with the Supreme Court's decision in *United States v. Nixon* [14] disclosed information which, when added to evidence already accumulated by the House Judiciary Committee, made virtually inevitable the President's impeachment, conviction, and removal from office. The invocation of the impeachment process in the Nixon case has led to a widespread re-evaluation of the thesis, embraced by many after the Johnson acquittal, that impeachment is of little practical significance as a check on the Chief Executive.[15]

Even before the final revelations, the House Judiciary Committee had found that three proposed articles of impeachment were supported by "clear and convincing" evidence. The Committee had accordingly voted to recommend impeachment by the House and trial by the Senate. These three proposed impeachment articles, voted by the Committee on July 27, 29 and 30, 1974, provide specific illustrations of the contemporary understanding of what constitutes "high crimes and misdemeanors." The Judiciary Committee first found that President Nixon warranted "impeachment and trial, and removal from office" because he had "prevented, obstructed, and impeded the administration of justice" by engaging "personally and through his subordinates and agents in a course of conduct or plan to delay, impede, and obstruct the investigation of [the Watergate break-in]; to cover up, conceal and protect those responsible; and to conceal the existence and scope of other unlawful covert activities." [16] Under a second Article of Impeachment, the Judiciary Committee determined that President Nixon, "in violation of his constitutional oath . . . and in disregard of his constitutional duty to take care that the laws be faithfully executed," "endeavored to obtain from the Internal Revenue Service in violation of the constitutional rights of citizens, confidential information contained in income tax returns for purposes not authorized by law. . . .;" "misused" the FBI, Secret Service, and "other executive personnel in violation or disregard of the constitutional rights of citizens. . . .;" "authorized . . . a secret investigative unit . . . within the office of the President, financed in part with money derived from campaign contributions, which . . . engaged in covert and unlawful activities, and attempted to prejudice the constitutional right of an accused . . . to a fair trial;" "failed. . . . to act when he knew or had reason to know that his close subordinates endeavored to impede and frustrate lawful inquiries by duly constituted executive, judicial and legislative

M. Benedict, The Impeachment and Trial of Andrew Johnson (1973).

14. 418 U.S. 683 (1974) discussed in § 4–15, supra.

15. See, e.g., Firmage and Mangrum, supra note 6, at 1025–26. But the critical thesis has not been abandoned, and proposals of a more parliamentary or quasi-parliamentary substitute for impeachment continue to be advanced. See, e.g., H. Joint Res. No. 903, 93d Cong., 2d Sess. 1111 (1974); Linde, "Replacing a President: Rx for 21st Century Watergate," 43 Geo.Wash. L.Rev. 384 (1975); Havighurst, "Doing Away With Presidential Impeachment: The Advantages of Parliamentary Government," 1974 Ariz.L.Rev. 223.

16. Article I specified nine "means used to implement this course of conduct or plan".

entities . . .;" "knowingly misused the executive power by interfering with agencies of the executive branch . . . in violation of his duty to take care that the laws be faithfully executed."

In a third Article of Impeachment, the Judiciary Committee found that President Nixon "failed without lawful cause or excuse to produce papers and things as directed by duly authorized subpoenas issued by the [Judiciary] Committee . . . and wilfully disobeyed such subpoenas," contrary to "his oath faithfully to execute the office of the President." The Committee stated that the subpoenaed information was needed "to resolve by direct evidence fundamental, factual questions relating to Presidential direction, knowledge, or approval of actions demonstrated by other evidence to be substantial grounds for impeachment of the President [who] thereby assum[ed] to himself functions and judgments necessary to the exercise of the sole power of impeachment vested by the Constitution in the House of Representatives." [17]

A number of independently plausible conclusions about the character of impeachable offences are reinforced by the proposed Nixon impeachment articles. The first of these is the limited usefulness of "criminality" as a measure of "high crimes and misdemeanors". Only the first of the three Nixon impeachment articles voted by the House Judiciary Committee (and limited portions of the second) dealt with alleged presidential violations of federal criminal law.[18] At the same time, the Committee rejected an additional proposed article of impeachment based on evidence of possible criminal irregularities in presidential tax returns and in expenditures of public funds to enhance the value of President Nixon's personal property.[19]

The House Judiciary Committee's proposal of the Nixon Impeachment Articles therefore appears to confirm the view of most commentators: [20] *A showing of criminality is neither necessary nor sufficient for*

17. Article III was adopted by a smaller majority (21–17) than Article I (27–11) or Article II (28–10), in part because of doubts as to the propriety of congressional, rather than judicial, resolution of the Committee's right to subpoena the information from the President. See Final Report on the Impeachment of Richard M. Nixon, President of the United States, H.R. Rep. No. 1035, 93d Cong., 2d Sess., in 120 Cong.Rec. H9103 (daily ed. Aug. 22, 1974). Those doubts were perhaps understandable in light of some of the Supreme Court's needlessly extravagant if stirring language, claiming for itself the role of "ultimate interpreter of the Constitution," in United States v. Nixon, 418 U.S. 683, 704 (1974). It has never been the law, however, that only the Supreme Court can authoritatively resolve constitutional disputes. The whole thrust of the political question doctrine is in fact to the contrary. For an argument that the Judiciary would nonetheless have provided a better forum for deciding whether the President was obliged to submit the requested information to the House, see Pollak, "The Constitution as an Experiment," 123 U.Penn.L.Rev. 1318, 1323–28 (1975).

18. See 18 U.S.C. § 1510 (1970) (making it a felony "willfully [to endeavor] . . . to obstruct, delay, or prevent the communication of information relating to a violation of any criminal statute of the United States by any person to a criminal investigator").

19. Also rejected was an article based on the administration's secret-bombing of Cambodia in 1969 and 1970. A useful discussion of the issue posed by that article and its rejection appears in Pollak, supra note 17, at 1329–39.

20. Among the most thoughtful studies, one that reaches this conclusion is particularly worth consulting: Committee on Federal Legislation, Association of the Bar of the City of New York, The Law of Presidential Impeachment (released Jan. 21, 1974).

the specification of an impeachable offense.[21] That non-criminal activities may constitute impeachable offenses is hardly surprising. A deliberate presidential decision to emasculate our national defenses, or to conduct a private war in circumvention of the Constitution, would probably violate no criminal code, but it should surely be deemed a ground of impeachment. And there is little doubt that, despite the want of criminality, such an action would fall within the compass of the common law's "great offenses." [22] In contrast, a President's technical violation of a law making jay-walking a crime obviously would not be an adequate basis for presidential removal.[23] With respect to the question of criminality, then, Edmund Burke's opening statement at the impeachment trial of Warren Hastings remains definitive: "It is by this tribunal that statesmen who abuse their power . . . are tried . . . not upon the niceties of a narrow [criminal] jurisprudence, but upon the enlarged and solid principles of morality." [24] Nor could the desire to insure that impeachment not be turned into a partisan political weapon be satisfied by a mechanical rule tying impeachable offenses to enumerated crimes, and it does not in fact require such a rule. A commitment to principle can better be secured, insofar as any verbal formula can help secure it, by accepting and acting on the proposition that "Congress may properly impeach and remove a President only for conduct amounting to a gross breach of trust or serious abuse of power, and only if it would be prepared to take the same action against any President who engaged in comparable conduct in similar circumstances." [25]

A second conclusion to which the Nixon affair points is that an inductive approach to defining impeachable offenses makes substantial sense. The House Judiciary Committee notably refrained from stating any precise definition of "high crimes and misdemeanors" against which particular proposed impeachment articles could be measured. This approach minimized the possibility of serious partisan division prior to consideration of the actual evidence. In many cases, it may not

21. See R. Berger, Impeachment 56–57 (1973); C. Black, Impeachment: A Handbook 33–35 (1974); C. Hughes, The Supreme Court of the United States 19 (1928); Goldberg, "Question of Impeachment", 1 Hastings Const.L.Q. 5 (1974); S. Boutwell, The Constitution of the United States at the End of the First Century (1895); Fenton, "The Scope of the Impeachment Power," 65 Nw.U.L.Rev. 719 (1970). But see Thompson & Pollit, "Impeachment of Federal Judges: An Historical Overview," 49 N.C.L.Rev. 87, 106 (1970); C. Warren, The Supreme Court in United States History 293 (1922); I, Brait, Impeachment: Trial and Errors (1972).

22. See generally Staff Report, House Judiciary Committee, "Constitutional Grounds for Presidential Impeachment" (released Feb. 22, 1974).

23. Some crimes that do not relate directly to the President's official duties may nevertheless be impeachable offenses if their character is such as to taint the office of the presidency. For example, a President's murder of a personal enemy, while not bearing directly upon official presidential duties, would so malign the holder of the office that the President, stripped of legitimacy, would be unable effectively to discharge presidential duties. See C. Black, Impeachment: A Handbook 39 (1974). "At the heart of the matter is the determination [that] the officeholder has demonstrated by his actions that he is unfit to continue in the office in question." Committee on Federal Legislation, supra note 20.

24. 7 E. Burke, Works 11, 14 (1839).

25. Committee on Federal Legislation, supra note 20.

be until such evidence is known that legislators will perceive the need to abandon their ordinary partisan or personal loyalties. In this special context, the usual equation between ignorance and impartiality plainly makes little sense. Moreover, deciding whether impeachable conduct has occurred primarily on the basis of the conduct's factual context, rather than in terms of the application of some general rule, is more in keeping with the necessarily political—but *not* necessarily partisan—character of the impeachment process.

We turn finally to a brief consideration of the *process* of impeachment and trial. Article I, § 2, cl. 5, declares that "[t]he House of Representatives . . . shall have the sole Power of Impeachment." [26] But what *is* impeachment? In many senses, it is analogous to a grand jury indictment in the criminal justice system.[27] The House of Representatives decides by majority vote whether charges raised against "civil officers" are sufficiently serious, and are supported by sufficient evidence, to warrant holding a Senate trial.

With respect to federal grand jury proceedings, the Supreme Court has refused to establish a rule permitting defendants to challenge indictments as supported by inadequate or incompetent evidence: in the subsequent "trial on the merits, defendants are entitled to a strict observance of all the rules designed to bring about a fair verdict." [28] However this may be in the grand jury setting, in the context of impeachment the institutional costs of a Senate trial, as well as the extraordinary damage done to a civil officer's reputation by the "mere" fact of impeachment, have caused the House of Representatives to impose restraints on its impeachment decisions that the Supreme Court has not imposed on federal grand juries. For example, in 1974 the House Judiciary Committee, charged by the full House with responsibility for making a preliminary (and probably definitive) decision as to whether articles of impeachment should be voted against President Nixon, imposed upon itself the requirement that any impeachment article must be supported by "clear and convincing evidence" before it could be favorably reported out of committee. It seems likely that the House of Representatives itself would have applied the same standard in voting on the articles of impeachment if President Nixon had not resigned before such a vote could be taken.

Article I, § 3, cl. 6, governs the conduct of a trial of impeachment: "The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried the Chief Justice shall preside: and no person shall be convicted without the concurrence of

26. For an analysis of impeachment procedure in the House, see Firmage and Mangrum, supra note 6, at 1032–50. The place (if any) of executive privilege in House impeachment investigations is discussed in § 4–16, supra.

27. See C. Black, Impeachment: A Handbook (1974).

28. Costello v. United States, 350 U.S. 359 (1956) (holding that a defendant in a federal criminal case may be required to stand trial, and that his conviction may be sustained, where only hearsay evidence was presented to the grand jury which indicted him).

two thirds of the members present." [29] Although the Chief Justice presides when the President is on trial, the Senate, possessor of "the sole Power to try all Impeachments," decides the procedural and evidentiary rules which govern such trials. Under the prevailing rules, the Senate can overrule decisions of the Chief Justice concerning the admissibility of evidence, and, by passing questions to the Chief Justice, individual Senators may interrogate witnesses.[30]

Article I, § 3, cl. 7, limits the effect of impeachment and conviction by providing that "Judgement 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, Judgement and Punishment, according to Law". Such criminal liability is absolute; Congress cannot eliminate it by a grant of immunity, nor the President by an exercise of the pardon power.[31]

It is widely thought that article I, § 9, cl. 3,[32] evidences the intention of the Framers that the English practice of directing criminal punishments against specific offenders as part of the legislative process should not be adopted in the United States. At the same time, those who drafted article I, § 3, cl. 7, did not wish to immunize office-holders from criminal prosecution; the clause was designed in part to make clear that criminal prosecutions subsequent to removal from office would not constitute double jeopardy of the sort explicitly prohibited by the fifth amendment.[33]

29. For an analysis of impeachment procedure in the Senate, see Firmage and Mangrum, supra note 6, at 1050–62, 1073–78. The place (if any) of executive privilege in Senate impeachment trials is discussed in § 4–16, supra.

30. See "Impeachment and the U.S. Congress." Cong.Q. 12–13 (March, 1974).

31. U.S. Const., art. II, § 2, cl. 1, gives the President the "power to grant . . . pardons . . . except in cases of impeachment." See § 4–11, supra.

32. "No Bill of Attainder . . . shall be passed." See §§ 10–4, 10–5, infra.

33. This interpretation gives the impeachment judgment clause significance as something other than a specification of time sequence. Indictment of "civil officers" prior to impeachment and removal is not necessarily prohibited. See Firmage & Mangrum, supra note 6, at 1094–1102; Berger, "The President, Congress, and the Courts," 83 Yale L.J. 1111, 1133, 1136 (1974). See § 4–14, supra. This construction of the impeachment judgment clause also reinforces the proposition that, since impeachment is an ultimately political process, impeachable offenses must be defined politically, and are not limited to indictable crimes.

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Impeach or Indict?

IF YOU THINK KENNETH STARR IS GOING TO INDICT BILL CLINTON, YOU'LL BE SORELY DISAPPOINTED. STARR CAN INVESTIGATE, BUT IT WILL BE UP TO CONGRESS TO ACT.

BY BYRON YORK

All across Capitol Hill, a sense of frustration and resignation has set in among those who have spent the past three years investigating Clinton administration scandals. What do they have to show for their work? The Travelgate investigation uncovered wrongdoing and stonewalling throughout the White House, but the administration seems to have suffered no lasting political damage. The Whitewater hearings destroyed the credibility of several top White House aides, but most remain in their jobs, and several have been generously reimbursed—with taxpayer dollars—for their legal expenses. Filegate, so promising last summer, bogged down by fall, when Republicans were unable to discover which higher-ups were behind the administration's widespread abuse of the FBI.

In short, political oversight didn't work. Bill Clinton and his staff proved sharper, slicker, and more determined to obstruct Congress than even some of their opponents had imagined. Now the energy that once drove the congressional investigations has been replaced by a quiet—and perhaps desperate—faith in Kenneth Starr, the independent counsel who is investigating Whitewater, Travelgate, and Filegate.

Clinton's adversaries hope Starr will indict the president. But they are likely to be disappointed, because a look at the law and history shows that it is a virtual certainty that Starr will *not* indict Bill Clinton—at least not while he is in the White House. And if the independent counsel does find presidential crimes, the issue will go not to the courts but back to Capitol Hill, where members of Congress from both parties will be forced to abandon the easy soundbites of oversight hearings and instead face a difficult vote on the question of impeachment.

THE UNINDICTABLE MAN

Can Clinton be indicted while he is president? For those who believe that no man is above the law, the answer would seem an easy yes. But it is not as simple as that.

The Constitution does not specifically address the question. Article II, Section 4 says only that "The President...shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors." Article I, Section 3 says that "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." Taken together, the clauses mean the president can be both impeached and prosecuted. But which comes first? There is good reason to argue that prosecution is possible only after impeachment.

The issue was at the heart of Watergate when Richard Nixon contended that he could not be indicted as long as he was president. At the same time, Spiro Agnew, facing problems of his own, claimed that *he* couldn't be indicted as long as he was vice president. Agnew argued that the Constitution required that he be impeached before he could be indicted, gambling on the possibility that Congress wouldn't go forward with impeachment and he could thus escape punishment. Nixon hoped for much the same thing.

Agnew's strategy was a failure. Solicitor General Robert Bork, representing the Justice Department, argued that the vice president, like other public officials, could indeed be indicted while in office. Bork's reasoning was that the vice president's job just wasn't important enough for him to be immune from prosecution. But Bork also addressed the Nixon question by declaring that the president *was* so important that he could not be indicted while in office. He based his argument on three points:

• The Constitution gives the president exclusive control of the executive branch; it is the only branch of government headed by a single person. Therefore, Bork wrote, "if the president were indictable while in office, any prosecutor and grand jury would have within their power the ability to cripple an entire branch of the national government..."

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• The Constitution gives the president the power to enforce the law, to grant pardons, and to appoint judges. Bork argued that it would create a massive conflict for the president to face his own law enforcement institutions. "Since the president's powers include control over all federal prosecutions," Bork explained, "it is hardly reasonable or sensible to consider the president subject to such prosecution."

• The Constitution prescribes impeachment as the only way to punish a sitting president for criminal misconduct. "He is amenable to the criminal laws," Bork wrote, "but only after he has been impeached and convicted, and thus stripped of his critical constitutional functions."

Bork's argument had the convenient effect of protecting Nixon while cutting Agnew loose. But his brief offered little ultimate protection for Nixon; Bork clearly stated that Nixon or any other chief executive could be prosecuted after leaving the presidency, whether by impeachment, resignation, or simply serving out his term.

Watergate special prosecutor Leon Jaworski apparently found the argument persuasive; despite enormous pressure from his own staff to charge Nixon, Jaworski decided against indictment (although he did name the president an unindicted co-conspirator). "I had no doubt but that the grand jury wanted to indict him," Jaworski wrote in his memoir, *The Right and the Power*. But Jaworski had "grave doubts that a sitting president was indictable for the offense of obstruction of justice," especially when the House Judiciary Committee was considering the same issue. He concluded that "the proper constitutional process...would be for the Committee to proceed first with its impeachment inquiry."

But Jaworski did not stop there. After reaching his decision not to indict, he went one crucial step further: he sent the evidence he had gathered—organized into what his staff called the "road map"—to the House committee. At that point, the matter was in the domain of the political system.

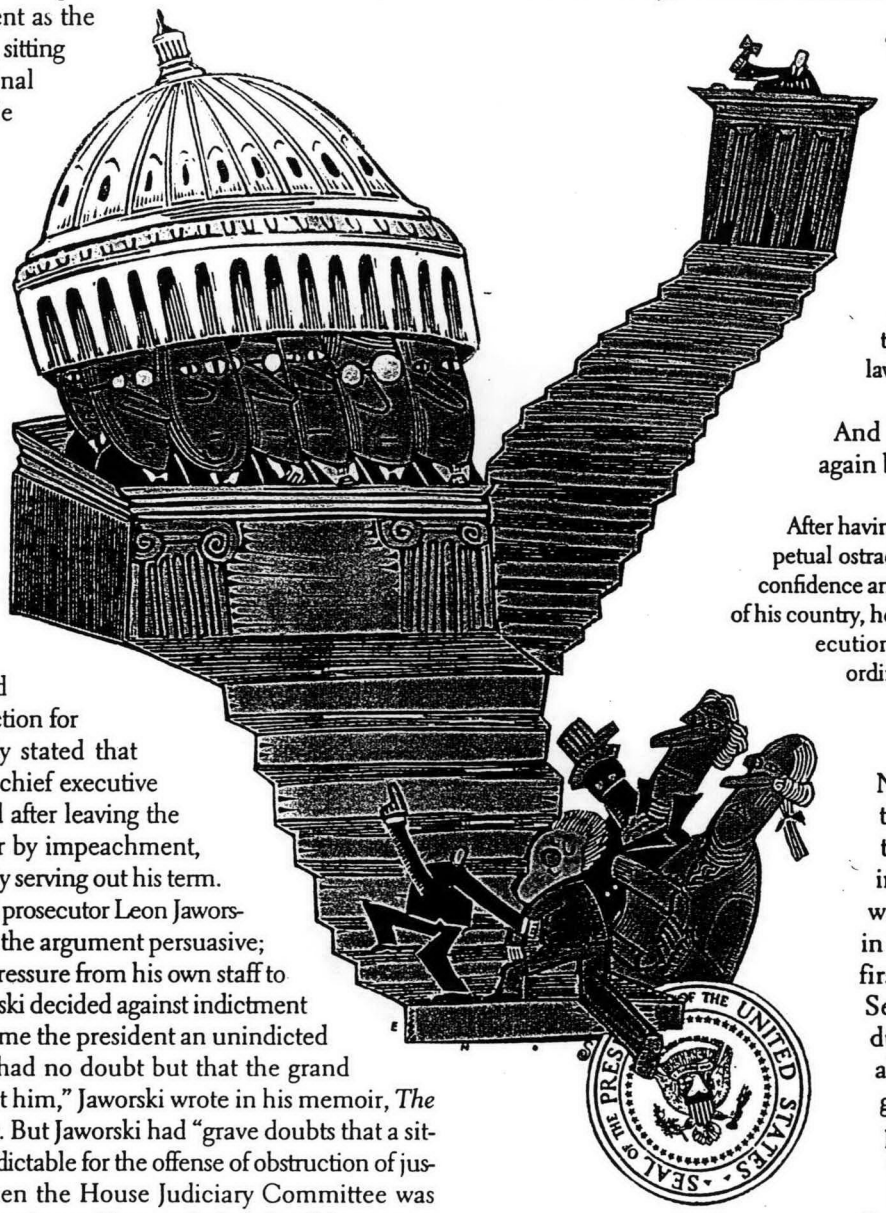
There are indications the framers of the Constitution would have agreed with Jaworski's decision not to indict. Even though they chose not to specifically enumerate it in the Constitution, the founders apparently believed that a president would have to face political judgment before facing criminal justice. In *Federalist No. 69*, Alexander Hamilton wrote:

> The President of the United States would be liable to be impeached, tried, and, upon conviction of treason, bribery, or other high crimes or misdemeanors, removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of the law.

And in *Federalist No. 65*, again by Hamilton:

> 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 the law.

Clearly Richard Nixon was very lucky that Alexander Hamilton did not succeed him in office. But Hamilton was not the only framer in favor of impeachment first, prosecution later. Several months earlier, during the constitutional convention, the delegates argued over which part of government would be best suited to try impeachments. Gouverneur Morris of Pennsylvania urged that the Senate, rather than the Supreme Court, should sit in judgment of the president, because the high court would likely "try the President after the trial of the impeachment." His argument carried the day.



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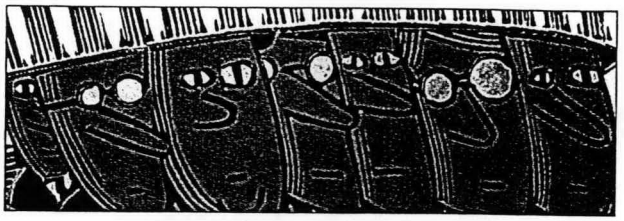
STARR'S BIG MOVE

What does this mean for Kenneth Starr? First of all, it means he won't indict Bill Clinton while Clinton is president. In several public statements, Starr has made clear that he has great respect for precedent and the accepted practices of the judicial system. It is very unlikely that he would jump outside of both to indict Clinton. And if he did, it is a sure thing that Clinton would mount a ferocious defense along Nixon/Bork lines. Just look at how energetically—and so far successfully—he has argued that he should not be the target of the Paula Jones *civil* suit as long as he remains in office.

But if Starr has strong evidence that Clinton has committed crimes, what does he do with it? We know from the McDougal trial, for example, that $50,000 that was obtained by defrauding the United States government was channeled into Clinton's company; the money was part of the illegal $300,000 Small Business Administration loan that went to Susan McDougal. The president testified under oath and on videotape that he knew nothing about the fraudulent loan. If Starr were to discover clear and convincing evidence that the president committed perjury, he would face the question of how to advance the case against a sitting president without resorting to a possibly unconstitutional indictment.



If Kenneth Starr tries to indict the president, it's a sure thing that Bill Clinton would mount a ferocious defense along Nixon/Bork lines from 1974.

Jaworski's "road map" provides the answer. By refusing to indict the president and instead giving his evidence to the House Judiciary Committee, Jaworski limited his role as prosecutor to that of evidence-gatherer. Starr would do the same thing: by handing the issue to Congress, where it could be properly dealt with by elected representatives. And there's one more reason Starr will go to Congress: unlike Jaworski in 1974, Starr is required by law to do so. Section 595 (c) of the independent counsel law instructs the independent counsel to "advise the House of Representatives of any substantial and credible information which such independent counsel receives...that may constitute grounds for an impeachment."

IMPEACH: YES OR NO?

Once it has possession of Starr's evidence, how would members of Congress decide whether or not to impeach? They would likely return to what the founders had to say about the issue. The framers of the Constitution believed that the citizenry should have the right to remove the chief executive not only in the normal course of elections but also in cases of wrongdoing. And they clearly foresaw that the question would arise from time to time. Consider the following excerpt from the *Records of the Federal Convention of 1787*, in which several delegates attempted to convince two holdouts that an impeachment clause should be included in the new Constitution:

> **Mr. Pinckney** [Charles Pinckney of South Carolina] & **Mr. Morris** [Gouverneur Morris of Pennsylvania] moved to strike out this part of the Resolution. **Mr. P.** observed [the president ought not] be impeacheable whilst in office.
>
> **Mr. Davie** [William Richardson Davie of North Carolina] said if he not be impeacheable whilst in office, he will spare no efforts or means whatever to get himself re-elected. He considered this as an essential security for the good behaviour of the Executive.
>
> **Mr. Morris** [said]...In case he should be re-elected, that will be sufficient proof of his innocence. Besides, who is to impeach? Is the impeachment to suspend his functions? If it is not, the mischief will go on. If it is, the impeachment will be nearly equivalent to displacement, and will render the Executive dependent on those who are to impeach.
>
> **Col. Mason** [George Mason of Virginia] said no point is of more importance than that the right of impeachment should be continued. Shall any man be above Justice? Above all, shall that man be above it, who can commit the most extensive injustice?...
>
> **Docr. Franklin** [Benjamin Franklin] said...it would be the best way therefore to provide in the Constitution for the regular punishment of the Executive when his misconduct should deserve it, and for his honorable acquittal when he should be unjustly accused.
>
> **Mr. Madison** [James Madison of Virginia] thought it indispensable that some provision should be made for defending the Community against the incapacity, negligence or perfidy of the chief Magistrate. The limitation of the period of his service was not a sufficient security....
>
> **Mr. Gerry** [Elbridge Gerry of Massachusetts] urged the necessity of impeachments. A good magistrate will not fear them. A bad one ought to be kept in fear of them....

The discussion changed Morris's mind, and he later voted in favor of an impeachment clause. (The measure carried, ten to two.) But more serious disagreements arose concerning the seriousness of wrongdoing that would be necessary to trig-

ger an impeachment proceeding. Some of the framers believed Congress should be empowered to get rid of the president for almost any reason. For example, according to the *Records*, Roger Sherman of Connecticut contended "that the National Legislature should have power to remove the Executive at pleasure." It was a fairly popular position; an early draft of the Constitution stipulated that the president could be removed for "malpractices or neglect of duty," which would have given Congress enormous leeway in choosing to get rid of a president.

A later draft added the word "corruption" to the list of impeachable offenses. But by late August 1787, those in favor of limiting impeachments had changed the draft to specify that the president could be removed for just two reasons: treason and bribery. That set off an impassioned debate. "Why is the provision restrained to treason and bribery only?" George Mason asked the convention. "Treason as defined in the Constitution will not reach many great and dangerous offences..." Mason moved that "maladministration" be added to the list of impeachable offenses. That provoked a protest from Madison, who argued that "maladministration" was so vague that it would mean that the president served "a tenure during pleasure of the Senate." Mason eventually surrendered, abandoning "maladministration" and proposing "high crimes and misdemeanors" instead. The phrase was approved by a vote of eight to three and became the final wording of the Constitution.

This is not an abstract scenario; it could happen, and rather quickly. But so far, almost no one in Congress will even admit to thinking about it.

In the more than 200 years since the document was ratified, no one has come up with a specific definition of "high crimes and misdemeanors." But clear and convincing evidence from Starr that the president is guilty of perjury, obstruction of justice, or a variety of other offenses would certainly fit the bill. In fact, it might result in articles of impeachment similar to those drawn up by the House Judiciary Committee against Richard Nixon in 1974. Some of the committee's charges against Nixon included:

- [M]aking false or misleading statements to lawfully authorized investigative employees of the United States.
- [W]ithholding relevant and material evidence or information from lawfully authorized investigative officers and employees of the United States.
- [M]aking or causing to be made false or misleading public statements for the purpose of deceiving the people of the United States into believing that a thorough and complete investigation had been conducted with respect to allegations of misconduct on the part of personnel of the executive branch of the United States...and that there was no involvement of such personnel in such misconduct.
- [Failing] without lawful cause or excuse to produce papers and things as directed by duly authorized subpoenas issued by the Committee on the Judiciary of the House of Representatives...

All but the most zealous defenders of Bill Clinton would be hard-pressed to deny that the list is strikingly similar to present-day accusations against the president.

THE FIGHT AHEAD

If Starr forwards evidence of possible Clinton crimes to Congress, the beginning of an impeachment inquiry would put enormous demands on the leadership of the House of Representatives. No longer would the president's critics be able simply to accuse the White House of corruption. In an impeachment they would have to go on record with a vote that might ultimately come back to haunt them should the impeachment attempt fail. And should it succeed, of course, the burden would then shift to the Senate for trial.

This is not an abstract scenario; it could happen, and could happen rather quickly. But so far, almost no one in Congress will even admit to thinking about the issue. "We deal with facts rather than speculation," says one Judiciary Committee staffer, adding that there have been no discussions on the issue. "I haven't heard of anything yet," says another committee official. "The sad thing around here is that no one really has prepared," says a Republican who is not on Judiciary. "No one here has talked about it."

They should, and soon, because Starr's years of investigation might result in action against the president at any time. When the independent counsel follows the intentions of the framers—plus his own statutory mandate—and passes the evidence on to Congress, it will be time for lawmakers to put up or shut up. Starr can point the way, but the 105th Congress will have to decide.

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