PRESIDENTIAL SANCTUARIES AFTER THE CLINTON SEX SCANDALS

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The President has many responsibilities and many privileges . . . . He does not have the privilege to break the law.[1]

– House Majority Whip Tom DeLay

[T]he President of the United States is entitled to . . . an area of tolerance.[2]

– Iran-Contra Independent Counsel Lawrence Walsh

INTRODUCTION

Beginning with the Paula Jones lawsuit and accelerating with the 1998-99 Lewinsky scandal, separation of powers issues that directly affect the institution of the American presidency were the subject of prolific public debate and a dramatic flurry of constitutional decisions. The principal issues included the status and scope of (1) executive, attorney-client, and Secret

1. 144 CONG. REC. H10,025 (daily ed. Oct. 8, 1998) (statement of Rep. DeLay (R-Tex.) (supporting H. Res. 581, authorizing the House Committee on the Judiciary to investigate whether sufficient grounds existed for the impeachment of President Clinton). The resolution passed by a vote of 258 to 176. *See id.*; 144 CONG. REC. D1126-01 (daily ed. Oct. 8, 1998).

2. *The MacNeil/Lehrer News Hour* (PBS television broadcast, Dec. 24, 1992) (transcript on file with the *Harvard Journal of Law & Public Policy*) (interviewing former independent counsel Lawrence Walsh who stated that he lacked the authority to prosecute former President George Bush for alleged crimes related to the Iran-Contra investigation).

Service privileges; (2) presidential immunity from civil suit, civil contempt, criminal and civil subpoena, criminal indictment, prosecution, or imprisonment prior to impeachment and removal; (3) independent counsel investigations, as well as the substance[3] and procedure[4] of an Office of Independent Counsel ("OIC") referral to Congress; and (4) presidential impeachment.[5]

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3. On September 9, 1998, the Office of Independent Counsel ("OIC") delivered to the House Sergeant at Arms the OIC's "Referral" alleging substantial and credible information that may constitute grounds for the impeachment of President Clinton. The eleven counts of the Referral allege perjury, obstruction of justice, and abuse of power. *See* REFERRAL TO THE UNITED STATES HOUSE OF REPRESENTATIVES PURSUANT TO TITLE 28, UNITED STATES CODE, § 595(c) SUBMITTED BY THE OFFICE OF THE INDEPENDENT COUNSEL, H.R. DOC. NO. 105-310, at 131-211 (1998) (hereinafter "REFERRAL"). This document was the first such report to Congress under the independent counsel statute designed to trigger congressional impeachment proceedings against a sitting president. The statute requires an independent counsel to submit to the House of Representatives "substantial and credible information . . . that may constitute grounds for impeachment." 28 U.S.C. § 595(c) (1994).

The delivery of the Referral signaled a sobering escalation to a constitutional crisis, with the nation turning serious attention for the first time in a generation, and only the third time in history, to whether a sitting American president should be impeached.

The OIC's investigation has been underway since 1994 and has also included investigations related to Whitewater, the Travel Office firings, the alleged misuse of FBI files, and the suicide of Vincent Foster. The investigation has cost in excess of $40 million. *See* GAO Financial Audit, GAO/AIMD-98-285 (Sept. 30, 1998); *see also* Helen Kennedy, *Starr's Tab for Probes of Clinton Tops 40M*, N.Y. DAILY NEWS, Sept. 1, 1998, at 7. Some have alleged that the Lewinsky investigation lacked legitimacy, arguing that the OIC should not be empowered to probe into the private sexual conduct of the President, or even the truthfulness regarding the President's statements or testimony of such private conduct.

4. The failure of the independent counsel statute to anticipate some of the procedural aspects of the OIC investigation and referral to Congress led to some confusing moments. For example, the House of Representatives did not have procedures for dissemination and review of the first-of-its-kind "Referral," and hastily voted to publish the Referral on the Internet. *See* Frances Katz, *Rushing to Read It First;* ATLANTA J. & ATLANTA CONST., Sept. 12, 1998, at A10. This manner of publication raised a host of serious concerns, including whether such dissemination was consistent with the secrecy of grand jury information or the due process rights of the accused. *See id.*

5. On October 8, 1998, the House of Representatives voted to commence a formal impeachment inquiry. *See* 144 CONG. REC. D1126-01 (daily ed. Oct. 8, 1998). *See also* John F. Harris, *Impeachment Inquiry Approved*, WASH. POST, Oct. 9, 1998, at A1.

On December 11 and 12, 1998, the House Judiciary Committee voted to send four articles of impeachment to the full House. *See* HOUSE COMM. ON THE JUDICIARY, IMPEACHMENT OF WILLIAM JEFFERSON CLINTON, PRESIDENT OF THE UNITED STATES, H. REP. NO. 105-830, at 129-34 (1998). The votes were strictly along party lines with one exception: Rep. Lindsey Graham (R-S.C.) voted against Article II, which alleged perjury in the civil deposition. *See id.* at 131.

On December 19, 1998, the House approved two of the four articles:

Charge		Disposition	Vote
I	Provided perjurious, false and misleading testimony to the grand jury on August 17, 1998	Approved	228-206

These issues regarding presidential privileges, immunities, and susceptibility to discipline from Congress and the judiciary are often discussed in isolation and without fully appreciating their substantial interrelationships. Instead of comprehensively exploring each of these issues, this article examines how they each affect the ebb and flow of presidential independence and power vis-à-vis other governmental institutions. This article argues that the custodian of the presidency retains his rights as an ordinary citizen, such as his rights to privacy, due process, and attorney-client confidentiality, but also possesses

II	Provided perjurious, false and misleading testimony in the Jones case in his answers to written questions and in his deposition	Rejected	229-205
III	Obstructed justice (by encouraging Lewinsky to file a false affidavit denying their affair, arranging a job for her with the help of friend Vernon Jordan, and coaching Oval Office secretary Betty Currie to agree that he and Lewinsky never had sex and never were alone)	Approved	221-212
IV	Abused power by providing false and misleading answers to 81 questions propounded by the House Judiciary Committee	Rejected	285-148

See 144 CONG. REC. D1217-19 (daily ed. Dec. 19, 1998). The approved articles were passed largely along party lines—five Democrats and five Republicans crossed party lines as to article I; five Democrats and 12 Republicans crossed party lines as to Article IV. *See* Peter Baker and Juliet Eilperin, *Clinton Impeached*, WASH. POST, Dec. 20, 1998, at A1.

On December 20, 1998, the House appointed the following thirteen Managers, all Republicans (listed here in order of their seniority in the House): Judiciary Chairman Henry J. Hyde (Ill.), F. James Sensenbrenner Jr. (Wis.), Bill McCollum (Fla.), George W. Gekas (Pa.), Charles T. Canady (Fla.), Steven E. Buyer (Ind.), Edward G. Bryant (Tenn.), Steve Chabot (Ohio), Robert L. Barr Jr. (Ga.), Asa Hutchinson (Ark.), Christopher Cannon (Utah), James Rogan (Cal.), and Lindsey O. Graham (S.C.).

The 106th House rejected an argument that the impeachment from the lame-duck 105th Congress did not survive the end of the Congress. On January 6, 1999, the new House voted to reauthorize the House Managers. *See* 145 CONG. REC. H211 (daily ed. Jan. 6, 1999) (five Democrats joined Republicans in support of the reauthorization, which passed by a vote of 223-198).

On January 7, 1999, the Senate impeachment trial, presided over by Chief Justice William H. Rehnquist, commenced. The trial included no live witnesses but lawyers used excerpts from videotaped depositions of Monica Lewinsky, Vernon Jordan and Sidney Blumenthal. After deliberating behind closed doors, on February 12, 1999, the Senate acquitted President Clinton, rejecting both articles of impeachment. Neither article carried a majority. No Democrat voted for either article. The perjury article was defeated by a vote of 45-guilty, 55-not guilty (ten Republicans voted not guilty); the obstruction of justice article was defeated by a vote of 50-guilty, 50-not guilty (five Republicans voted not guilty). *See* 145 CONG. REC. S1458-59 (daily ed. Feb. 12, 1999). Senator Arlen Specter (R-Pa.) voted "not proven, therefore not guilty" for both articles, a vote that was counted as "not guilty." *See* 145 CONG. REC. S1741 (daily ed. Feb. 22, 1999).

additional protections from investigation, punishment, and removal from office not enjoyed by any other government official or ordinary citizen. The separation of powers, in fact, creates a web of privileges, immunities, and other "sanctuaries" that are necessary for the stability and functionality of the presidency. These sanctuaries permit presidents to engage in misconduct and even to commit certain crimes, and yet avoid immediate criminal sanction or removal from office—a consequence that appears to undermine the rule of law. In particular, President Clinton's acquittal by the Senate created the impression in some quarters that presidents are privileged to break the law. However, the Clinton acquittal does not imply that presidents are above the law—presidential sanctuaries are themselves created by law and justified by compelling public interests. The Lewinsky controversy, ironically, has reaffirmed presidential sanctuaries such as substantial immunity from judicial process and insulation from impeachment and removal, except in extreme circumstances.

I. REVIEW OF PRINCIPAL COURT DECISIONS

A. Presidential Immunity from Civil Suit: Clinton v. Jones

Some have attributed substantial blame for the Lewinsky crisis to the Supreme Court which, on May 22, 1997, unanimously rejected President Clinton's argument that he required temporary immunity from civil liability for his unofficial acts in order to effectively discharge his constitutional duties.[6] On May 6, 1994, Paula Corbin Jones, a

6. *See* Clinton v. Jones, 117 S. Ct. 1636 (1997). For a criticism of *Jones* in the media near the time of the impeachment Referral, see Jonathan Rauch, *The People Are Right: Keep Him*, NAT'L J., Sept. 26, 1998, at 2212 ("[T]he law has behaved rashly and boorishly from the day the Supreme Court allowed Paula Corbin Jones to proceed with her sexual harassment suit against a sitting president."); Rudolph H. Weingartner, *The Presidency After 1998*, PITT. POST-GAZETTE, Sept. 18, 1998, at A19 ("When the Supreme Court decided to permit the Paula Jones civil suit to go ahead while Clinton was still in office, it committed the goof of the decade."); Editorial, *Snoop Du Jour*, ST. LOUIS POST-DISPATCH, Sept. 14, 1998, at B6 ("The Supreme Court's prediction that Paula Jones-style lawsuits against the president wouldn't disrupt the presidency, now looks foolishly shortsighted."); Editorial, *When Starr Is Gone, What Check On Power? Does the Country Really Need an Independent Counsel?*, GREENSBORO NEWS & REC. (N.C.), Sept. 7, 1998, at A10 ("[H]ad it not been for the Supreme Court's regrettable decision to let Paula Jones' dubious sexual harassment lawsuit go forward, the subject of Monica Lewinsky would never have come up."); Robert Scheer, *Scandal Is Not His Only Legacy*, L.A. TIMES, Aug. 18, 1998, at B7 ("The ruling of the U.S. Supreme Court to permit the Paula Jones

former Arkansas state employee, filed suit against President Clinton in the United States District Court for the Eastern District of Arkansas alleging that on May 8, 1991, then-Arkansas Governor Clinton made an unwanted and crude sexual advance toward her in a Little Rock, Arkansas, hotel suite.[7] Ms. Jones' lawsuit alleged sexual harassment, denial of equal protection, intentional infliction of emotional distress, and defamation.[8] District Court Judge Susan Webber Wright held that the discovery would proceed, but that the trial would be stayed until after the completion of President Clinton's tenure as President.[9] A divided panel of the Eighth Circuit Court of Appeals rejected Judge Webber Wright's stay of trial as an abuse of discretion.[10]

The U.S. Supreme Court affirmed the Eighth Circuit's decision and denied President Clinton's assertion of temporary immunity.[11] Dismissing the President's constitutional arguments, the majority doubted that a ruling against the President would result in a deluge of litigation or significantly hamper the President's ability to perform his constitutional duties.[12] In one of the most criticized passages of the opinion, the Court concluded that the President's "predictive judgment" of undue distraction to the presidency "finds little support in either history or the relatively narrow compass of the issues raised in this particular case . . . . If the past is any indicator, it seems unlikely that a deluge of such litigation will ever engulf the Presidency. As for the case at hand, if properly managed by the District Court, it appears to us highly unlikely to occupy any substantial amount of [the President's] time."[13] More than once, the Court claimed that "history" demonstrated that future civil suits unrelated to official duties were unlikely to so

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case to go forward on the grounds that it would not intrude on the work of the presidency will go down as the stupidest decision in the court's history.").

7. Ms. Jones, then an Arkansas state employee who was staffing the registration desk at a hotel conference where then-Governor Clinton was speaking, claims to have been summoned by Arkansas state trooper Danny Ferguson to meet the Governor in a business suite. During this meeting, Ms. Jones alleges that Governor Clinton exposed himself and made a sexual advance toward Jones which she rejected. *See Jones*, 117 S. Ct. at 1640.

8. *See id.*

9. *See* Jones v. Clinton, 869 F. Supp. 690 (E.D. Ark. 1994).

10. *See* Jones v. Clinton, 72 F.3d 1354 (8th Cir. 1996).

11. *See Jones*, 117 S. Ct. at 1645-52.

12. *See id.* at 1648-50.

13. *Id.* at 1648.

distract a president as to impair the discharge of his constitutional functions.[14]

The *Jones* decision required the Court to revisit its narrowly divided (5-4) constitutional decision on presidential immunity in *Nixon v. Fitzgerald*[15] fifteen years earlier, which held that a president is "entitled to absolute immunity from damages liability predicated on his official acts."[16] Although the *Jones* Court declined to extend this constitutionally based immunity to the context of a "private" civil suit, the Court did not foreclose the possibility of judicial relief to a presidency "engulfed," noting that "a stay of either the trial or discovery might be justified by considerations that do not require the recognition of any constitutional immunity"[17] but rather may be required by the "high respect that is owed to the office of the Chief Executive."[18]

Notwithstanding the popularity of criticizing *Jones*, the Lewinsky controversy does not debunk the *Jones* majority's optimism that civil suits will not impair the presidency. The Clinton presidency was engulfed by a series of factors, including President Clinton's own misconduct and concealment of the truth, rather than a deluge of frivolous, politically-motivated civil suits. The Court also should not be faulted for denying that *Fitzgerald* should have, without much further inquiry, resolved the immunity issue in favor of President Clinton.[19] The gravamen of the President's claim in *Jones*—distraction—is distinguishable in the main from President Nixon's claim in *Fitzgerald*—fearlessness. Although distraction was mentioned as a factor in *Fitzgerald*,[20] the holding in *Fitzgerald* turned on the need to ensure that

14. *See id.* at 1648, 1651.

15. 457 U.S. 731 (1982). In *Fitzgerald*, a discharged Air Force employee sought civil damages from the former President of the United States, alleging that his dismissal represented unlawful retaliation for his congressional testimony about cost overruns and technical difficulties in the development of the C-5A transport aircraft. *See id.* at 734.

16. *Id.* at 749.

17. *Jones*, 117 S. Ct. at 1650.

18. *Id.* at 1650-51.

19. *See* VINCENT BUGLIOSI, NO ISLAND OF SANITY: PAULA JONES V. BILL CLINTON (1998). Bugliosi argues that the *Jones* Court mischaracterized the case as a pure institutional boundary dispute (executive branch versus the judiciary) rather than as a balance between the public right to an effective presidency versus the purely private interest of Paula Jones in pursuing her claim without delay.

20. *See Fitzgerald*, 457 U.S. at 752-53.

presidents possess an appropriate level of fearlessness that the threat of civil suits challenging their official acts would unduly chill or distort.[21]

This threat was perceived by the *Fitzgerald* majority to be sufficiently compelling to justify a permanent immunity that would follow Mr. Nixon—and other chief executives—even after leaving the sanctum of the presidency.[22] This absolute immunity enjoyed by presidents is far broader than the qualified immunity enjoyed by other high-ranking executive officers such as the Attorney General—the difference is justified by the unique constitutional status of the presidency.[23] The result acknowledges that even if a president, in his official capacity, acted in a way that had violated an individual's constitutional rights, that violation would forever go unremedied by a civil action.[24] The distraction factor in *Jones*, although also related to presidential functionality,[25] posed a different threat to the presidency, the resolution of which would require a realistic assessment not only of the likely volume of civil litigation against the President, but also of the consumptive potential of any one matter. The Court was required to assess whether the volume and consumptive potential of such litigation would impair the President's ability to perform his constitutional duties. Unlike President Nixon, President Clinton required only a temporary immunity until he left the presidency; thereafter, distraction to Bill Clinton could not impair the institutional functions of the executive branch.

Although the Court in *Jones* appeared to follow this methodology, missing from its analysis was a fair examination and acknowledgement of the constitutional duties imposed on the modern presidency. Without such an analysis, it was

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21. *See id.* at 752 (recognizing the "public interest in providing an official 'the maximum ability to deal fearlessly . . . with' the duties of his office") (citations omitted); *see also* Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) (noting dangers inherent in public officials fearing lawsuits). Stated differently, although the Court in *Fitzgerald* may have been influenced by both fearlessness and distraction, distraction alone was found to be insufficient in *Jones*.

22. *See Fitzgerald*, 457 U.S. at 752.

23. *See In re* Sealed Case (Espy), 121 F.3d 429, 448 (comparing *Fitzgerald* with Michell v. Forsyth, 472 U.S. 511 (1985)).

24. *See Fitzgerald*, 457 U.S. at 740. *See also* Akhil Amar & Neal Kumar Katyal, *Executive Privileges and Immunities: The Nixon and Clinton Cases*, 108 HARV. L. REV. 701, 708 (1995).

25. *See Jones*, 117 S. Ct. at 1656 (Breyer, J., concurring).

impossible to assess accurately whether a proposed exercise of judicial authority, such as the civil suit in *Jones*, or any other proposed judicial incursions on the presidency raised throughout the Lewinsky investigation (such as testimonial or documentary compulsory process, indictment, or prosecution), could be permitted. The Court conceded that the threat of impairment was the President's "strongest argument,"[26] but failed to acknowledge sufficiently the scope and burden of the President's duties.

As suggested by the pre-*Jones* commentary,[27] the briefs supporting the President,[28] and Justice Breyer's concurring opinion in *Jones*,[29] the Constitution places in one person not only the role of leading an entire branch of federal government,[30] but also critical responsibilities, most notably that of Commander-in-Chief and leader of American foreign policy, that must be performed twenty-four hours a day, for every day of the president's tenure.[31] Certain constitutional functions, particularly those that relate to foreign and military affairs, are performed only by the president, and often require an immediate response to sudden developments.[32] The Framers anticipated that these critical constitutional duties would be executed decisively and expeditiously;[33] a later constitutional

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26. *Id.* at 1645.

27. *See, e.g.*, Amar & Katyal, *supra* note 24.

28. *See, e.g.*, Brief for Petitioner at *11-17, Clinton v. Jones, No. 95-1853, 1996 WL 448096 (Aug. 8, 1996).

29. *See Jones*, 117 S. Ct. at 1653-56 (Breyer, J., concurring).

30. *See* U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President....").

31. The President's brief referenced middle-of-the-night emergencies in foreign affairs that awakened prior presidents and demanded an immediate reaction or decision. *See* Brief for Petitioner at *13 n.9, *Jones*, 1996 WL 448096.

32. A president's constitutional role to negotiate treaties and appoint and receive ambassadors, U.S. CONST. art. II, § 2, cl. 2 and § 3, gives rise to the president's sole authority to recognize foreign states, *see* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 410 (1964); to terminate treaties, *see* Goldwater v. Carter, 444 U.S. 996, 1006-07 (1979) (Brennan, J., dissenting); and to enter executive agreements, *see* Dames & Moore v. Regan, 453 U.S. 654, 682 (1981). More significantly, the president's role as commander-in-chief, U.S. CONST. art. II, § 2, cl. 1, has, with congressional acquiescence, evolved over the years to give to the president the constitutional authority unilaterally to respond to a sudden attack and, in many instances, to commit U.S. military forces abroad short of a formal declaration of war. *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936) (recognizing "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations").

33. *See* THE FEDERALIST NO. 70, at 424 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("Decision, activity, secrecy, and dispatch will generally characterize the

amendment ensures that the continuous operation of the presidency cannot be disabled, even temporarily.[34] Famous statements by Thomas Jefferson,[35] Joseph Story,[36] and others[37] adopted by the Supreme Court in *Fitzgerald,* substantiate a president's immunity, implicit in the duties given to presidents by the Constitution, from at least some exercise of judicial power.[38] It is against these institutional features that one must evaluate a president's susceptibility to a particular exercise of judicial authority.

The maxim that immunity is a necessary attribute to enable a variety of government officials and agents to discharge their duties is well-established in American law and substantiates the concept of presidential "sanctuaries."[39] However, the scope

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proceedings of one man in a much more eminent degree than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished.").

34. *See* U.S. CONST. amend. XXV (providing a mechanism for replacing, either temporarily or permanently, a disabled president).

35. *See Fitzgerald,* 457 U.S. at 751-52 n.31 ("[T]he leading principle of our Constitution is the independence of the Legislature, executive and judiciary of each other, and none are more jealous of this than the judiciary. But would the executive be independent of the judiciary, if he were subject to the *commands* of the latter, & to imprisonment for disobedience; if the several courts could bandy him from pillar to post, keep him constantly trudging from north to south & east to west, and withdraw him from his constitutional duties?") (quoting 10 WORKS OF THOMAS JEFFERSON 404 (P. Ford ed., 1905) (emphasis in original)).

36. *See id.* at 749, 751 n.31 (stating that Justice Story argued that the President's "incidental powers" include the power to perform his constitutional duties "without any obstruction or impediment whatsoever" and that the "president cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose his person must be deemed, in civil cases at least, to possess an official inviolability") (citing JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1563, at 419 (1833)).

37. *See id.* at 751 n.31 ("And Senator Maclay has recorded the views of Senator Ellsworth and Vice President John Adams—both delegates to the Convention—that 'the President, personally, was not the subject to any process whatever . . . . For [that] would . . . put it in the power of a common justice to exercise any authority over him and stop the whole machine of Government.'") (citing WILLIAM MACLAY, JOURNAL OF WILLIAM MACLAY 167 (E. Maclay ed., 1890)).

38. The concept of immunizing officeholders to enable them to perform their constitutional functions is implicit in the structure of government and, as to members of Congress, is expressly acknowledged in the arrest clause of Article I. *See* U.S. CONST. art. I, § 6, cl. 1 ("[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 . . . .").

39. Immunity from judicial process to enable public servants (judges, lawmakers, soldiers, and prosecutors, etc.) to discharge their duties without distraction or interference is a concept that is common and well established in the law. *See* U.S. CONST. art I, § 6, cl. 1; Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. §§ 501, 510 (1994) (tolling civil process for soldiers on active duty to enable such soldiers "to devote their entire energy to the defense needs of the nation"); Stump v. Sparkman, 435 U.S. 349, 363-64 (1978) (immunity permits judges to perform duties "without apprehension of

of immunity varies depending upon the nature of the officeholder's duties, and logically will differ from one officeholder to the next. Hence, the features of the presidency described above reveal that the *Jones* Court's analogy to immunities of judicial officers[40] sheds little light on presidential immunities, for the constitutional functions of the president require broader immunity.[41]

Furthermore, although the Court appeared to consider instances where former presidents have testified in matters where they themselves were not the target or defendant, these episodes also are of dubious relevance.[42] A defendant in a civil suit or a target of an investigation holds a materially different stake than does a mere witness. It is commonplace for litigants in civil litigation to allege that the principal party's deposition testimony lacks credibility. As a practical matter, over the course of a lengthy deposition, a skilled questioner can steer even a sophisticated deponent to make statements that appear to contradict other portions of the same testimony. If the relatively weak trigger mechanism in the current independent counsel statute remains unchanged,[43] future oral deposition testimony by a president could underlie the initiation or continuation of an independent counsel investigation.

Justice Breyer's concurrence in *Jones* was far more deferential to the President's functional impairment argument, recognizing constitutionally based barriers to a president's unbridled amenability to civil judicial process.[44] The Breyer concurrence potentially offers the key to limiting, without rejecting, the

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personal consequences to himself."); Imbler v. Pachtman, 424 U.S. 409, 423 (1976) (stating that prosecutors have immunity from suits related to prosecutorial acts in part because "harassment by unfounded litigation would cause a deflection of . . . energies from [a prosecutor's] public duties"). *See also Fitzgerald*, 457 U.S. at 744-47 (collecting government immunity cases).

40. *See Jones*, 117 S. Ct. at 1644.

41. This argument is analogous to the argument that a different standard of impeachment applies to presidents and federal judges. *See* note 259 *infra*.

42. Similarly, references to Justice Marshall's opinion in United States v. Burr, 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14,692d), requiring President Jefferson to produce documents needed in Aaron Burr's treason trial, did not involve a president as target or defendant.

43. The Attorney General must seek appointment of an independent counsel from the U.S. Court of Appeals for the District of Columbia Circuit, Special Division for Appointing Independent Counsels, if she determines after a 90-day preliminary investigation that "there are reasonable grounds to believe that further investigation is warranted." 28 U.S.C. § 592(c)(1)(A) (1994).

44. *See Jones*, 117 S. Ct. at 1652 (Breyer, J., concurring).

Jones holding. The majority avoided the pronouncement of a constitutionally based immunity based in large part on the prediction that civil suits would not engulf the presidency, so curtailment of the holding may be required if the prediction fails to materialize. As Justice Breyer observes, "[s]hould the majority's optimism turn out to be misplaced, then, in my view, courts will have to develop administrative rules applicable to such cases (including postponement rules of the sort at issue in this case) in order to implement the basic constitutional directive."[45]

Ironically, the Lewinsky crisis may indirectly hamper the ability of future civil plaintiffs to litigate successfully against a sitting president. For example, judges may tend to treat seriously a future president's motion to dismiss, alleging that the would-be plaintiff seeks more to grind a political axe than to vindicate a legal wrong; alternatively, judges may be more receptive to delaying proceedings on discretionary grounds not expressly related to immunity or the constitutional requirements of the presidency. The *Jones* decision ultimately may stand for the limited proposition that, although separation of powers does not require categorical immunity, a functional analysis of the needs of the executive branch in a particular case and a consideration of the development of history and practical realities since the *Jones* decision could result in a stay of proceedings. Congress was invited to create statutory guidelines along those lines,[46] although an interest in pursuing this objective has failed to materialize.

The United States District Court for the District of Columbia has been invited to reexamine some of these issues in the second civil suit filed against President Clinton, *Browning v. Clinton*.[47] In *Browning*, President Clinton's counsel has asked U.S. District Court Judge William B. Bryant to stay proceedings until the end of President Clinton's term, pursuant to the

45. *Id.* at 1658.

46. *See id.* at 1652.

47. Browning v. Clinton, No. 98-1991 (D.D.C. filed Aug. 17, 1998), is a defamation suit filed against President. The conservative group Judicial Watch Inc. filed the suit on behalf of Dolly Kyle Browning. Ms. Browning claims that President Clinton's false denial of their alleged 30-year affair led publishers to reject her semi-fictional novel about a woman's relationship with a Southern governor. *See* Harvey Berkman, *Even If Starr Disappeared, There'd Be Klayman*, NAT'L L.J., Nov. 9, 1998, at A9; *President Seeks Delay of Suit Claiming Defamation by Denial*, LEGAL INTELLIGENCER, Oct. 29, 1998, at 4.

court's "discretionary powers" recognized in *Jones*.[48] Alternatively, the President's counsel asked Judge Bryant to stay proceedings based on constitutional immunity, in disregard of *Jones*.[49]

Holding that a sitting president may be sued for his private conduct does not end the constitutional questions, but merely sounds the starting gun. Courts will face future separation of powers dilemmas as they attempt to supervise litigation against presidents. We have already seen a hint of the first issue: whether, under what circumstances, and to what extent a federal court judge may punish a sitting president for contempt of court. Apparently concerned that President Clinton failed to answer deposition questions in the *Jones* case with sufficient candor, District Court Judge Susan Webber Wright signaled that she may cite the President for contempt.[50] Federal judges have both inherent and statutory power to discipline misbehaving parties, but such authority may be truncated in light of the separation of powers concerns raised by a district court judge "punishing" a sitting president.[51]

Having declared presidential amenability to civil litigation, the majority in *Jones* failed to anticipate how the rules of the

48. *See* Motion for Temporary Stay on Grounds of Presidential Immunity at 7, Browning v. Clinton, No. 98-1991 (D.D.C. filed Aug. 17, 1998) ("It is now apparent that the Supreme Court drastically underestimated the burden that civil litigation can place on a president and on the smooth operation of the executive branch .... As subsequent experience in the *Jones* case makes very clear, the civil discovery process can unleash events occupying substantial amounts of executive branch time and energy."). In opposition, counsel for Ms. Browning stated "Mr. Clinton's argument that what cannot be done as a constitutional matter can be done in the exercise of a court's discretion, is simply an attempt to make an end run around [*Jones*]." Plaintiff's Opposition to Motion for Temporary Stay at 5, Browning v. Clinton, No. 98-1991 (D.D.C. filed Aug. 17, 1998).

49. *See* Motion for Temporary Stay at 10, *Browning* (No. 98-1991) ("Subsequent experience has proven the Court's confidence [that presidents would not be distracted by civil litigation] unfounded, and we respectfully suggest the time is ripe for a reconsideration of the Court's decision.").

50. *See* Jones v. Clinton, 12 F. Supp. 2d 931, 938 n.5 (E.D. Ark. 1998) ("Although the Court has concerns about the nature of the President's January 17, 1998 deposition testimony given his recent public statements, the Court makes no findings at this time regarding whether the President may be in contempt."). *See also* John F. Harris, *Jones Case Judge May Cite Clinton; Wright Raises 'Concerns' on Testimony*, WASH. POST, Sept. 2, 1998, at A4. Pursuant to 18 U.S.C. § 401, Judge Wright has the authority to punish witnesses whose answers are intended to obstruct the inquiry. *See* Coleman v. Espy, 986 F.2d 1184, 1190 (8th Cir. 1993).

51. After *Jones*, state court judges also potentially wield this authority to punish a sitting president, which raises further concerns of quasi-political officials (many state judgeships are elective office) empowered to hold a sitting president in contempt, not to mention federalism concerns.

civil litigation would be enforced against sitting presidents.[52] We have not yet fully realized the Court's understatement of the consumptive character of litigation, but we will—if there is a political tool that can be used against a president, it will not be ignored. The civil justice system makes it relatively easy to file a complaint and survive a motion to dismiss, provided one has the funding to retain sophisticated counsel, which political opponents of a president may be willing to provide. Counter-incentives such as malicious prosecution, abuse of process, or Rule 11 sanctions simply may be too weak to meaningfully deter a politically-motivated lawsuit.[53] Once discovery begins, a defendant-president could be forced to submit to depositions and other discovery regarding many tertiary and unrelated matters that would not even be admissible at trial.[54] Inconsistent answers in discovery, even regarding inadmissible and unrelated matters, conceivably could trigger an independent counsel investigation.[55]

These comments aside, the chief weakness of the Court's decision in *Jones* was the failure to acknowledge fully that the institutional attributes of the presidency shroud the temporary custodian of the office in sanctuaries into which typical judicial processes should not intrude. To be sure, the Court was sounding a theme chanted endlessly throughout the Lewinsky

52. In fact, Congress may play the role of referee in future litigation against presidents. *See* Jeff Connaughton, *Volatile Mix Of Private Plaintiffs, Independent Counsel, and Congress Threatens Basic Legal Rights Of Future Presidents*, LEGAL TIMES, Oct. 26, 1998, at 25 (arguing that civil litigation against presidents may result in Congress, an institution ill-equipped to apply the jurisprudence of perjury, arbitrating disputes regarding the truthfulness of presidential testimony).

53. *See generally* Mark A. Chertok, *Sanctions as a Slapp Deterrent: How Effective are They?*, 935 A.L.I.-A.B.A. 117 (1994).

54. The discovery rules are broad and liberally construed. *See* FED. R. CIV. P. 26(b)(1) ("The information sought [in discovery] need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.").

55. For example, less than two weeks after President Clinton's January 17, 1998, deposition in the *Jones* case, which in many ways was the centerpiece of the subsequent impeachment inquiry, Judge Wright ruled that the testimony relating to Ms. Lewinsky was "not essential to the core issues in this case" and "might be inadmissible as extrinsic evidence." Jones v. Clinton, No. LR-C-94-290, 1998 U.S. Dist. LEXIS 696, at *3 (E.D. Ark. Jan. 29, 1998) (order excluding evidence). *See also* Jones v. Clinton, 990 F. Supp. 657, 678-79 (E.D. Ark. 1998) (granting summary judgment and commenting that the Lewinsky evidence "does not have anything to do with . . . whether plaintiff *herself* was the victim of alleged *quid pro quo* or hostile work environment sexual harassment, whether the President and Ferguson conspired to deprive *her* of her civil rights, or whether *she* suffered emotional distress so severe in nature that no reasonable person could be expected to endure it.") (emphasis in original).

crisis that no person stands above the law. As the Court observed, Bill Clinton is merely "the individual who happens to be the President."[56] However, Bill Clinton, both as public and private persona, is in fact insulated from the reaches of other legal processes that would certainly be applied to ordinary citizens and other government officeholders. Unlike other officeholders, presidents are privileged and obligated at times to act deceptively or secretively; he may make false statements to the American people under certain circumstances (for example, to conceal a military operation); he can withhold certain information at times when confronted with a judicial or congressional subpoena. Moreover, notwithstanding the disabling political consequences, a president may act improperly or even unlawfully yet escape immediate sanction from Congress or the judiciary; he can act in his official capacity to violate an individual's constitutional rights yet remain immune from civil liability as in *Fitzgerald*; he can commit petty crimes and presumptively escape prosecution (at least until he leaves office) and also avoid impeachment, which is limited to "high" misconduct.

Missing from the public debate about President Clinton and the Lewinsky scandal is an admission of what Justice Marshall acknowledged almost 200 years ago, that "[i]n no case of this kind would a court be required to proceed against the president as against an ordinary individual."[57] The Court's analysis in *Jones* is similar to the House impeachment debate in that both appeared to ignore substantially the institutional sanctuaries of the presidency. Nevertheless, *Jones* does not repudiate or even address other aspects of presidential sanctuaries, but rather defines a limited exception to presidential immunity that the Court predicted would not substantially undermine presidential independence and functionality.

B. Rejection of the Secret Service Protective Function Privilege: Rubin v. United States

Both the District Court and the Circuit Court of Appeals for

56. *Jones*, 117 S. Ct. at 1648.

57. United States v. Burr, 25 F. Cas. 187, 192 (C.C.D. Va. 1807) (No. 14,694).

the District of Columbia rejected the United States Secret Service's so-called "protective function privilege."[58] These decisions, however, have little or nothing to do with the institutional prerogatives of the presidency, contrary to the impression created by journalists and commentators.[59] Rather, the struggle between the OIC and the Secret Service over this purported privilege was litigated on a narrower and lower level legal terrain—an interpretation of Rule 501 of the Federal Rules of Evidence[60]—with the President expressly disavowing any connection between the presidency and this purported privilege. These decisions do not address whether executive privilege could be asserted to block future Secret Service testimony.

On March 22, 1998, District Court Chief Judge Norma Holloway Johnson granted the OIC's motion to compel two Secret Service agents to testify before the grand jury investigating the Lewinsky matter.[61] The OIC hoped that the agents' testimony could, among other things, confirm that President Clinton and Ms. Lewinsky were alone together, contrary to the President's deposition testimony in the *Jones* case. The ruling was affirmed by the D.C. Circuit Court of Appeals,[62] and both the D.C. Circuit[63] and Chief Justice William Rehnquist[64] declined to stay the order pending an appeal to the

58. *See In re* Sealed Case (Secret Service), No. 98-3069, 1998 WL 370584 (D.C. Cir. July 7, 1998).

59. *See, e.g.*, Robert A. Rankin, *Lewinsky Affair, Starr Probe Takes Toll on the Presidency*, THE RECORD, Aug. 24, 1998, at A13 ("Judges overruled Clinton's claims that executive privilege shields Secret Service agents and top White House staff from having to testify before Starr's grand jury."); Andrew Cohen, *Can the Presidency Recover?*, THE GLOBE AND MAIL, Aug. 8, 1998, at A1 ("On July 7, a federal appeals court ruled that Mr. Clinton could not invoke 'protective privilege' to prevent Secret Service agents from testifying before the grand jury convened by Mr. Starr.").

60. Rule 501 provides in relevant part as follows:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress, or rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

FED. R. EVID. 501.

61. *See In re* Grand Jury Proceedings (Secret Service), No. 98-148, 1998 WL 272884 (D.D.C. May 22, 1998).

62. *See In re* Sealed Case (Secret Service), 148 F.3d 1073 (D.C. Cir. 1998).

63. *See In re* Sealed Case (Secret Service), 146 F.3d 1031 (D.C. Cir. 1998).

64. *See* Rubin v. United States, 119 S. Ct. 1, 2 (1998).

Supreme Court. The Supreme Court later denied certiorari.[65] In his dissent to the Supreme Court's denial of certiorari, Justice Breyer indicated that he would have recognized the protective function privilege under Rule 501.[66] Justice Breyer cited presidential assassination attempts[67] and sounded the theme of his opinion in *Jones*—that the president is "the sole indispensable man in government."[68] Justice Breyer believed that the privilege might help avert the national calamity of physical harm to the president.[69]

This dispute arose after several Secret Service agents refused to comply with an OIC subpoena compelling them to testify before the grand jury about their observations regarding Ms. Lewinsky. In opposing the OIC's motion to compel, the Secret Service asserted the protective function privilege, described as a testimonial privilege related to "information learned by Secret Service agents . . . while performing protective functions in physical proximity to the President."[70] The Secret Service's proposed privilege would be limited, inasmuch as it would not protect information "sufficient to provide reasonable grounds to conclude that a felony has been, is being, or will be committed."[71]

Rather than arguing for an Article II-based privilege, the Secret Service asked the court to recognize the privilege pursuant to Rule 501 of the Federal Rules of Evidence. President Clinton did not authorize the Secret Service to assert executive privilege. In fact, President Clinton made public statements distancing the Office of the President from the Secret Service's refusal to testify and claim of privilege.[72]

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65. *See* Rubin v. United States, 119 S. Ct. 461 (1998). Justices Ginsburg and Breyer filed dissenting opinions.

66. *See id.* at 461-64.

67. Justice Breyer attached an appendix to his opinion summarizing thirteen assassination attempts against presidents (four of which were successful). *See id.* at 465 (Breyer, J. dissenting).

68. *Id.* at 462.

69. *See id.* at 462-65.

70. *In re* Grand Jury Proceedings, 1998 WL 272884, at *1 (redacted version).

71. *Id.*

72. President Clinton stated that "with regard to the Secret Service, I literally have had no involvement in that decision whatever [sic]. That is a decision that they have made based on what they believe . . . is best for the institution of the presidency. And the court will just have to evaluate their arguments and make a judgement." Press Conference by the President, Apr. 30, 1998, 1998 WL 210627, at *5. *See also* PRELIMINARY MEMORANDUM CONCERNING REFERRAL OF OFFICE OF INDEPENDENT COUNSEL, H.R. DOC.

Instead, the privilege was officially asserted by Secretary of the Treasury Robert E. Rubin, the cabinet officer responsible for oversight of the Secret Service.[73] Although the privilege did not emanate from the presidency per se, its rationale was based upon the president's safety. The Secret Service argued that if its agents could be forced to testify, then the president could not rely on their confidentiality, and, therefore, the president might distance himself from the protective detail and consequently increase his risk of physical danger.[74]

Believing that the district court might *sua sponte* raise the constitutional issue, the OIC's brief in support of its motion to compel the agents' testimony reasoned that because the claimed privilege "is designed to protect the confidentiality and the safety of the President, and no one else," the privilege, to the extent it exists at all, "fits most logically within the Executive privilege that attaches to the President."[75] The OIC argued that, even to the extent that the purported privilege is "a subset of Executive privilege,"[76] it would not apply in this case because "Executive privilege applies only to conduct and communications made in furtherance of a President's Article II duties, not to his purely private conduct."[77]

Judge Johnson declined to decide the case on constitutional grounds because the Secret Service did not assert "a constitutional basis for the claimed privilege."[78] The D.C. Circuit similarly limited its holding to the Rule 501 issue.[79] Had

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NO. 105-317 (1998) (hereinafter "PRELIMINARY MEMORANDUM") ("Neither the President nor the White House played a role in the Secret Service's lawful efforts to prevent agents from testifying to preserve its protective function. The President never asked, directed or participated in any decision regarding the protective function privilege. Neither did any White House official. The Treasury and Justice Departments independently decided to respond to the historically unprecedented subpoenas of Secret Service personnel and to pursue the privilege to ensure the protection of this and future presidents."); Press Briefing by Mike McCurry, July 16, 1998, 1998 WL 399923, at *2 ("The White House Legal Counsel told me today that they have played no role in consulting or decision-making about how the Justice Department will represent the Treasury Department and the Secret Service in this litigation.").

73. *See In re* Sealed Case, 149 F.3d 1073, 1074 (D.C. Cir. 1998).

74. *See In re* Grand Jury Proceedings (Secret Service), No. 98-148, 1998 WL 272884, at * 4 (D.D.C. 1998) (redacted version).

75. Brief in Support of Motion to Compel and to Testify at 7, *In re* Grand Jury Proceedings (Secret Service), No. 98-148, 1998 WL 272884, at * 4 (D.D.C. 1998).

76. *Id.* at 8.

77. *Id.* at 7.

78. *In re* Grand Jury Proceedings, 1998 WL 272884, at *6 n.1 (D.D.C. 1998) (redacted version).

79. *See In re* Sealed Case, 148 F.3d at 1076, 1079.

the President authorized the Secret Service to assert executive privilege, these federal courts would have engaged in a much different analysis. As the Supreme Court held in *United States v. Nixon*,[80] executive privilege is constitutionally based and presumptively valid.[81] An assertion of executive privilege must be made by the President himself,[82] and such an assertion would have obligated the district court to engage in a functional balancing test that weighs the President's presumptive need for confidentiality against the grand jury's need for the information sought. By contrast, a newly proposed privilege pursuant to Rule 501 of the Federal Rules of Evidence requires the proponent of the privilege to demonstrate with "compelling clarity"[83] that the privilege is needed. As the D.C. Circuit concluded, "[t]he Secret Service has failed to carry its heavy burden under Rule 501."[84] The Court also considered with related skepticism the fact that the proposed privilege could be asserted or waived by someone other than the officeholder the privilege was designed to protect.[85]

President Clinton's decision to distance himself from the protective function privilege may have reduced substantially the need for judicial deference to the plea for secrecy, and avoided judicial examination of the institutional powers related to executive privilege.[86] Accordingly, all one knows after the

80. 418 U.S. 683 (1974).

81. *See id.* at 705-08.

82. *See, e.g.*, Memorandum from President Ronald Reagan for the Heads of Executive Departments and Agencies, On Procedures Governing Responses to Congressional Requests for Information (Nov. 4, 1982), *reprinted in* H.R. REP. NO. 99-435, at 1106 (1985). *See also In re* Sealed Case (Espy), 121 F.3d 729, 745 (D.C. Cir. 1997) (showing a consistent pattern of presidents personally asserting executive privilege, but declining to "decide whether the privilege must be asserted by the President personally, since the record indicates that President Clinton has done so here.").

83. *In re* Sealed Case, 148 F.3d at 1076.

84. *Id.* at 1079.

85. The Court noted that "the efficacy of the privilege is undermined by its being vested in the Secretary of the Treasury and not in the President, whose conduct the proposed privilege is supposed to influence; we know of no other privilege that works that way." *Id.* at 1077. Rather than focusing on the presumptive privilege in *Nixon*, the court looked to Rule 501 cases, notably, *Jaffee v. Redmond*, 518 U.S. 1 (1996) (recognizing a privilege protecting confidential communications between psychotherapist and her patient, and holding that statements that a police officer made to a social worker in the course of psychotherapy, and notes taken during their counseling sessions, were protected from compelled disclosure).

86. Notwithstanding President Clinton's efforts to distance the White House from the Secret Service's purported privilege, the OIC Referral faults the President: "The Executive Privilege was not the only claim of privilege interposed to prevent the grand

D.C. Circuit's decision in the Secret Service case is that a Treasury Department-asserted protective function privilege cannot be found in Federal Rule of Evidence 501, at least in the grand jury setting. The decision does not resolve whether presidentially asserted executive privilege could shield Secret Service agents from grand jury testimony, absent compelling circumstances.[87] Further, even with respect to the Rule 501 privilege, the D.C. Circuit was careful to emphasize that it was not deciding the viability of such a privilege to withstand a demand for Secret Service testimony in another forum, such as in a civil lawsuit or a congressional investigation.[88] Even assuming that presidents could not assert executive privilege to block Secret Service testimony in all instances, the ability to compel Secret Service testimony, even before the grand jury, must have some limits; otherwise, Secret Service testimony could be used to circumvent other legitimate privileges. For example, if agents could repeat a conversation the agent overheard between a president and his Secretary of Defense concerning an ongoing military operation, this communication, shielded from disclosure at the core of the executive privilege doctrine, could not be protected.[89]

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jury from gathering relevant information. The President also *acquiesced* in the Secret Service's attempt to have the Judiciary craft a new protective function privilege (rejecting requests by this Office that the President order the Secret Service officers to testify)." REFERRAL, *supra* note 3, at 590 (emphasis added).

87. Judge Johnson later rejected the OIC's argument that executive privilege cannot apply to presidential communications regarding private matters. *See In re* Grand Jury Proceedings (Lindsey & Blumenthal), 5 F. Supp. 2d 21, 25 (D.D.C. 1998).

Although executive privilege might have been claimed successfully, a more reliable protection for the Secret Service may come from Congress. In contrast to the lack of congressional interest in responding to the *Jones* decision, steps have already been taken toward the creation of statutory privilege for the Secret Service. *See* 145 CONG. REC. S366 (daily ed. Jan. 19, 1999) (statement of Sen. Leahy (D-Vt.)) (introducing the Safe Schools, Safe Streets, and Secure Borders Act, which "provides a reasonable and limited protective function privilege so future Secret Service agents are able to maintain the confidentiality they say they need to protect the lives of the President, Vice President and visiting heads of state."). A statutory privilege may be more reliable than executive privilege because a statutory privilege would not be vulnerable to a potentially errant application of the *Nixon* balancing test.

88. *See In re* Sealed Case, 148 F.3d at 1074.

89. Analogously, if the agent could be compelled to repeat the content of conversations overheard between a president and his personal lawyer, the attorney client privilege could be eviscerated.

C. Executive Privilege: The Lindsey and Blumenthal Testimony and the Espy Documents

Although the Secret Service case did not directly affect the constitutional powers of the presidency, the Clinton Administration's failed effort to invoke executive privilege in a separate case resulted in judicial decisions that reaffirmed an expansion—and not a diminishment as some mistakenly believe—of the executive privilege doctrine and the constitutionally based, presumptively valid status of this presidential sanctuary. On May 27, 1998, Judge Johnson rejected President Clinton's assertion of executive privilege and ordered top presidential aides Bruce Lindsey and Sidney Blumenthal to testify before the Lewinsky grand jury in accordance with the OIC's subpoena.[90] Significantly, however, Judge Johnson held that presidential communications are presumptively privileged even if "the matters discussed involved private conduct."[91] In deciding that executive privilege applied to conversations the President had with his advisors about the Lewinsky matter, Judge Johnson declined the OIC's invitation to narrowly interpret "presidential decisionmaking and deliberation" to which executive privilege applies.[92] Judge Johnson also held that conversations between

90. *See In re* Grand Jury Proceedings (Lindsey & Blumenthal), 5 F. Supp. 2d 21 (D.D.C. 1998).

91. *Id.* at 25.

92. *See id.* The possibility that Judge Johnson would restrict the application of executive privilege was not insignificant. For example, a passage of *Espy* appears to limit executive privilege for communications among the aides to circumstances where the president is the ultimate decisionmaker. *See Espy*, 121 F.3d at 752-53. This requirement was satisfied in *Espy* because President Clinton had the ultimate power to remove cabinet secretaries. *See id.* However, the analysis suggested possible avenues to begin trimming the applicability of presidential decisionmaking and deliberation. Here, the OIC maintained that executive privilege was inapplicable because the subjects of the Lewinsky communications (*e.g.*, whether to assert privileges, how to discuss the scandal with world leaders, how to prepare for possible impeachment proceedings) were essentially personal and were "far removed from the President's constitutionally enumerated duties." The OIC argued that applying executive privilege to such communications "bootstrap any private misdeed of sufficient gravity into the zone of Executive privilege. The result would be this: A privilege intended to aid the functioning of the executive branch would be transformed into a cloak for the gravest private misdeeds of a President." Reply Memorandum of the United States of America In Support of Motion to Compel Bruce R. Lindsey To Testify at 11, *In re* Grand Jury Proceedings (Lindsey & Blumenthal), 5 F. Supp. 2d 21 (D.D.C. 1998) (No. 98-95) (on file with *the Harvard Journal of Law & Public Policy*). In rejecting the OIC's invitation to hold that executive privilege did not apply, Judge Johnson declined to "speculate that conversations among the President and his advisors fell outside the President's Article

Mr. Lindsey or Mr. Blumenthal and the First Lady are presumptively privileged.[93] Relying on *Association of American Physicians and Surgeons v. Clinton*,[94] Judge Johnson reaffirmed that the First Lady is "the functional equivalent" of a formal senior presidential advisor to whom executive privilege would extend.[95]

Nevertheless, Judge Johnson concluded that the OIC had overcome the President's presumptive privilege. Judge Johnson applied a two-prong test which required the OIC to demonstrate (1) that "the subpoenaed material likely contains important evidence"; and (2) "that this evidence is not available with due diligence elsewhere."[96] Although the OIC must make these showings "with specificity," the OIC need not show that the information is "critical."[97] In summary fashion, Judge Johnson explained that she conducted an extensive *in camera* review of the materials and concluded that the OIC had met its burden.[98] The President declined to appeal the executive privilege portion of Judge Johnson's decision.[99]

The two-prong test Judge Johnson applied is a refinement of the *Nixon* executive privilege standard, announced one year earlier in the 1997 D.C. Circuit decision involving former Secretary of Agriculture Michael Espy.[100] In *Espy*, the White House asserted executive privilege to protect White House documents related to an investigation of Secretary Espy against a grand jury subpoena duces tecum.[101] After independent counsel Donald Smaltz was appointed to investigate these allegations, the White House conducted its own investigation, and the OIC subpoenaed all documents related to the White House inquiry.[102] Although the D.C. Circuit in *Espy* held that

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II responsibilities." *In re* Grand Jury Proceedings (Lindsey & Blumenthal), 5 F. Supp. 2d at 26.

93. *See In re* Grand Jury Proceedings (Lindsey & Blumenthal), 5 F. Supp. 2d at 27-28.

94. 997 F.2d 898 (D.C. Cir. 1993).

95. *In re* Grand Jury Proceedings (Lindsey & Blumenthal), 5 F. Supp. 2d at 27-28 (citing 3 U.S.C. §105(e)).

96. *Id.* at 28 (quoting *In re* Sealed Case (Espy), 121 F.3d 729, 754 (D.C. Cir. 1997)).

97. *Id.* (quoting *In re* Sealed Case (Espy), 121 F.3d at 754).

98. *See id.* at 28-30.

99. *See In re* Lindsey, 148 F.3d 1100, 1103 (D.C. Cir. 1998).

100. *See In re* Sealed Case (Espy) 121 F.3d at 754.

101. *See id.*

102. *See id.* at 735. The White House had produced a report on the *Espy* matter, but the OIC also wanted the report's supporting documentation. *See id.*

the OIC had overcome the claimed privilege,[103] the court expanded the scope of executive privilege to extend not only to conversations between aides and the president, but also to communications among presidential advisors, not involving the president, held in the course of preparing advice for the president.[104]

It is difficult to assess fully the substantive mechanics of the two-prong balancing test[105] because courts apply this to materials *in camera*. Nevertheless, the very availability of judicial review over efforts to compel disclosure of an expanded set of executive-branch documents theoretically limits inquisitional congressional committees or overly-zealous independent counsels from requiring disclosures that could compromise executive functions.

The most troublesome development regarding executive privilege arising from the Lewinsky scandal stems not from judicial opinions but rather from the accusation in the OIC Referral that President Clinton's assertion of executive privilege constituted an abuse of power. The Referral alleges that "[t]he President repeatedly and unlawfully invoked the Executive Privilege to conceal evidence of his personal misconduct from the grand jury."[106] As to the claims of executive privilege litigated in the Lindsey matter, the OIC alleged that these claims were "patently groundless."[107] A true danger to vital Article II prerogatives is posed by the OIC's implied argument that if a president asserts executive privilege, and the privilege is overcome in federal court, then a president has committed the impeachable offense of abuse of power.

Since Watergate, executive privilege has come under sustained attack, notwithstanding the Supreme Court's finding in *United States v. Nixon*[108] that the privilege is both

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103. *See id.* at 762.

104. *See id.* at 751-52.

105. *See id.* at 754.

106. REFERRAL, *supra* note 3, at 586.

107. *Id.* at 587. *Cf. Impeachment Inquiry: William Jefferson Clinton, President of the United States: Presentations By Investigative Counsel Before the House Comm. on the Judiciary*, 105th Cong. 85 (1998) (statement of David P. Schippers, Chief Investigative Counsel) ("[T]hroughout the grand jury investigation and various other investigations, the President has tried to extend the relatively narrow bounds of presidential privilege to unlimited, if not bizarre lengths.").

108. 418 U.S. 683 (1974).

constitutionally based and presumptively valid. The emasculation of executive privilege and the popular tendency to presume that executive privilege is always an illicit tool that serves no purpose other than to cloak wrongdoing have caused post-Watergate presidents to become too cooperative with overreaching congressional investigations in a way that compromises national interests.[109] The sequence of events leading to the Lindsey case does not reflect an abuse of power. President Clinton asserted executive privilege as to conversations that he had with persons who were undeniably high-level presidential advisors. A federal court agreed that the presumptively-valid constitutional privilege applied, but after conducting an *in camera* inquiry, the court ruled that the privilege was overcome by the OIC's specific showing of need. After this decision, President Clinton acceded to the court's ruling and allowed the aides to testify.

The phrase "abuse of power" conjures images of President Nixon using agencies of government to harm political opponents. Unlike President Nixon, who lacked the constitutional authority to engage in such actions, President Clinton not only had the constitutional power, but the obligation, to assert executive privilege to prevent disclosure of top-level presidential communications. As President Ronald Reagan observed, a president is a "temporar[y] custodian of an institution, the Presidency" and lacks the authority to "do away with any of the prerogatives of that institution, and one of those is executive privilege."[110] In separation of powers doctrine, institutional privileges and powers are defined to a large degree by historical practice. In order to protect the vitality of executive privilege, a president should not permit his advisors to testify about the content of presidential communications unless executive privilege does not apply, the privilege is overcome by a specific showing of need, or if compelling circumstances justify waiver of privilege.[111] These

109. *See* Randall K. Miller, *Congressional Inquests: Suffocating the Constitutional Prerogative of Executive Immunity*, 81 MINN. L. REV. 631, 669-79 (1997).

110. *Remarks and a Question-and-Answer Session With Reporters*, PUB. PAPERS 389 (Mar. 11, 1983) (discussing his assertion of executive privilege to withhold Environmental Protection Agency enforcement documents from a House oversight committee).

111. *See* Jack Quinn & Jeff Connaughton, *Abusing The Privilege*, LEGAL TIMES, Mar. 30, 1998, at 23 (noting that executive privilege is both a power and responsibility of the presidency, and also suggesting that executive privilege can function as "a judicially

conclusions are reinforced by the House Judiciary Committee's refusal to entertain seriously the question of whether an assertion of executive privilege in this manner could constitute an abuse of power.[112]

Furthermore, allegations of misconduct alone do not excuse the obligation to show need when one seeks to compel disclosure of presidential communications; if such allegations alone could trump executive privilege, the privilege would cease to exist. Although executive privilege should not be used to cloak executive branch wrongdoing, the D.C. Circuit in *Espy* noted that a party seeking disclosure of privileged communications must demonstrate "need, even when there are allegations of misconduct by high-level officials."[113] Judicial review of competing allegations of executive privilege and compulsory disclosure is a legitimate method of ensuring that executive privilege is not abused. Presidents should not roll over to demands for disclosure of presidential communications merely because "executive privilege" has become a buzzword of scandal from a political perspective.

D. Bruce Lindsey and Rejection of the Claim of Attorney-Client Privilege: Office of President v. Office of Independent Counsel

The principle that presidents are not "below the law" suggests that presidents should be able to obtain legal advice that is protected from disclosure by the attorney-client privilege just like ordinary citizens. However, the Lewinsky

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controlled 'check'" against overly-intrusive investigations of the executive branch).

112. *See* IMPEACHMENT OF WILLIAM JEFFERSON CLINTON, PRESIDENT OF THE UNITED STATES, H. REP. NO. 105-830, at 133 (1998) (voting to delete portion of draft article regarding executive privilege by a vote of 29 yeas, 5 nays, and 3 present); *see also* 145 CONG. REC. S297-98 (daily ed. Jan. 16, 1999) (statement of House Manager Gekas (R-Pa.)):

> [W]e felt . . . that executive privilege is something that is owed to the President, and that we cannot fairly strip that away from him or in any way diminish the power and the usability of executive privilege . . . the assertion of it, the use of it, the feel for it that the President of the United States must have and should have in the first instance, to assert it, should not be a part of our criticism . . . we decided that we were going to remove that from the allegations in any of the articles of impeachment . . . .

113. *In re* Sealed Case (Espy), 121 F.3d at 746 (*citing* Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 731 (1974) as holding that the "showing of need turns on extent to which subpoenaed evidence is necessary for government institution to fulfill its responsibilities, *not on type of conduct evidence may reveal*") (emphasis added).

scandal produced a controversial precedent that will hamper a president's ability to consult legal counsel. The government attorney-client privilege decisions arose as part of the same effort to prevent Bruce Lindsey from testifying before the Lewinsky grand jury about his conversations with the President. In addition to executive privilege, the White House also asserted attorney-client privilege, arguing that certain communications between Lindsey and President Clinton constituted legal advice from counselor to client. The dispute was an opportunity for the White House to challenge and possibly weaken the Eighth Circuit Court of Appeals' 1997 decision ordering the disclosure of attorney notes regarding Whitewater; there, the Eighth Circuit held that no government attorney-client privilege exists in the context of a criminal investigation.[114] In a defeat for the presidency, the D.C. Circuit joined the Eighth Circuit, and the Supreme Court's denial of certiorari left the law substantially unclear.

In *Lindsey*, the litigants offered the court three options: (1) the White House argued for an absolute government attorney-client privilege; (2) the OIC argued that no attorney-client privilege exists in the grand jury context (the position espoused by the Eighth Circuit and ultimately adopted by the D.C. Circuit); and (3) the DOJ, as amici, advocated a balancing test.[115] In the district court, Judge Norma Holloway Johnson adopted the balancing test,[116] reasoning that to subject both the claims of executive privilege and attorney-client privilege to an identical balancing test would spare "courts from having to apply two different privilege standards to conversations" that "frequently commingl[e] political and legal advice to the President."[117] Judge Johnson concluded that the qualified governmental attorney-client privilege was outweighed by the OIC's showing of "need" and ordered Lindsey to testify.[118]

The D.C. Circuit Court of Appeals affirmed the result, but declined to apply a balancing test that would have allowed

114. *In re* Grand Jury Subpoena Duces Tecum (Whitewater Notes), 112 F.3d 910 (8th Cir. 1997). The Eighth Circuit compelled disclosure of attorney notes that had been taken while talking with First Lady Hillary Rodham Clinton during her grand jury testimony regarding Vince Foster and Whitewater.

115. *In re* Grand Jury Proceedings (Lindsey & Blumenthal), 5 F. Supp. 2d at 31-32.

116. *Id.* at 36-37.

117. *Id.* at 34.

118. *Id.* at 38.

some government attorney-client communications to remain confidential.[119] Instead, the D.C. Circuit held that the government attorney-client privilege may never be asserted to resist disclosures to a criminal grand jury.[120] The court found that government lawyers are not entitled to the same degree of protection from disclosure as are private lawyers because of public interests. Where the client is the Office of the President, duty-bound to faithfully execute the nation's laws, the loyalties of the government lawyer could not lie exclusively with the client.[121] The Supreme Court denied certiorari; as in the Secret Service case, Justices Breyer and Ginsburg dissented from the denial of certiorari.[122]

Depending on the breadth of this holding, one consequence of the D.C. Circuit's decision in *Lindsey* is that presidents or other government officials may be required to retain private counsel in order to obtain confidential legal advice.[123] Even the retention of private counsel would not protect communications that occur in meetings private counsel may have with government lawyers because application of the common interest privilege to such communications also has been rejected.[124] If government officials were not adequately on notice after the Eighth Circuit's decision in the *Whitewater Notes* matter, certainly they should now understand that government lawyers represent the institution, not the occupant, and owe a substantially diminished duty of confidentiality to the latter.[125]

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119. *In re* Lindsey, 158 F.3d 1263 (D.C. Cir. 1998).

120. *Id.* at 1274.

121. *See id.* at 1272.

122. Office of the President v. Office of Indep. Counsel, 119 S. Ct. 446 (1998).

123. Indeed, liability insurance is now available for officials who are harmed by disclosure of communications with government lawyers. *Lindsey Ruling Impact: Outsourcing*, NAT'L L.J., Aug. 10, 1998, at A12.

124. *See Whitewater Notes*, 112 F.3d at 922:

> We have no doubt that the White House and Mrs. Clinton are concerned with understanding fully the facts involved in the OIC's investigation, nor that dividing responsibility between the personal attorneys and White House counsel can be a difficult task. And surely the multiplicity of investigating authorities only complicates the lives of these attorneys. But these justifications amount to no more than an assertion that "we all want to obey the law." We do not believe the common-interest doctrine stretches that far.

125. The *Lindsey* decision theoretically could be confined to the grand jury context and be limited to the proposition that government lawyers cannot assert the attorney-client privilege to conceal criminal wrongdoing. If so, the holding essentially expands the crime-fraud exception to the attorney-client privilege in the case of government lawyers. For a discussion of the crime-fraud exception, see for example Kendall C.

Although the Supreme Court denied certiorari in this instance,[126] the *Lindsey* holding on attorney-client privilege still may be vulnerable to curtailment, or even reversal, in light of the compelling dissents in both *Lindsey* and the Eighth Circuit's *Whitewater Notes* case, and the Supreme Court's recent reaffirmation in *Swidler & Berlin v. United States*[127] that broad protection for the well-established attorney-client privilege is necessary and in the public interest. In particular, the Court's decision in *Swidler & Berlin* expressly refused to discern a distinction between the way the attorney-client privilege should function in a civil versus a criminal context.[128] This reasoning is at odds with the D.C. Circuit's analysis in *Lindsey*, and suggests that the issues regarding the government attorney-client privilege, seemingly resolved by the Eighth and D.C. circuits, remain unsettled.[129]

The threat that *Lindsey* poses to the independence of the presidency is understood best in conjunction with the increasing array of circumstances in which presidents require confidential legal advice. Dissenting in *Lindsey*, Judge Tatel was concerned that a series of factors in the post-Watergate era, including openness at high levels of government, trends

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Dunson, *The Crime-Fraud Exception to the Attorney-Client Privilege*, 20 J. LEGAL PROF. 231, 232 (1996). If the holding is that the attorney-client privilege does not shield communications necessary or relevant to a grand jury investigation, at least two questions arise: how is the issue of necessity or relevance to be determined and who decides? The answers to these and other such questions may spawn new litigation.

126. *See* Office of President, 119 S. Ct. at 466.

127. 118 S. Ct. 2081(1998) (holding that the attorney-client privilege survives the death of the client). The opinion in *Swidler & Berlin* emphasized the public interest in preserving certain well-established confidential communications: "The attorney client privilege is one of the oldest recognized privileges . . . intended to encourage 'full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.'" (quoting Upjohn Co. v. United States, 449 U.S. 383, 389 (1981)).

128. *See Swidler & Berlin*, 118 S. Ct. at 2082-83 (emphasis added):

> Clients consult attorneys for a wide variety of reasons, many of which involve confidences that are not admissions of crime, but nonetheless are matters the clients would not wish divulged. The suggestion that the proposed exception would have minimal impact if confined to criminal cases, or to information of substantial importance in particular criminal cases, is unavailing because *there is no case law holding that the privilege applies differently in criminal and civil cases*, and because a client may not know when he discloses information to his attorney whether it will later be relevant to a civil or criminal matter, let alone whether it will be of substantial importance.

129. *See* Paul R. Rice, *Government Attorneys Needed Supreme Court Guidance In Lindsey Case*, LEGAL TIMES, Nov. 30, 1998, at 23 ("The Court has never fully addressed the parameters of the attorney-client privilege in the government context, and the lower court's decision [in *Lindsey*] raised more questions than it resolved.").

toward "the personalization of politics," and intense scrutiny of presidents from independent counsel, the press, and Congress, have combined to make presidents "easy targets," a scenario that the Supreme Court in *Fitzgerald* warned could undermine the presidency.[130] Tatel concluded that government attorney-client confidentiality was essential to counterbalance these trends: "No President can navigate the treacherous waters of post-Watergate government, make controversial official legal decisions, decide whether to invoke official privileges, or even know when he might need private counsel, without confidential legal advice."[131]

II. INSTITUTIONAL ISSUES RAISED BUT UNANSWERED

A. Can a President Be Subpoenaed To Testify Before the Grand Jury?

On July 25, 1998, President Clinton became the first president in history to be subpoenaed to testify before a grand jury and, on August 17, 1998, he became the first to testify in a grand jury inquiry as a target of a criminal investigation.[132] The President declined six prior invitations to testify, but after the subpoena was served, the President agreed to testify "voluntarily" on the condition that the subpoena be withdrawn.[133] Because President Clinton retreated, the constitutional question of whether there exists a potential presidential sanctuary from compulsory oral testimony remains unanswered. This is yet another variation on the issue of possible limits to presidential amenability to compulsory legal process, as seen in the *Jones* and *Fitzgerald* cases and in the debate over whether the President can be indicted prior to impeachment.

The President's entitlement to constitutional immunity from testifying before a grand jury remains untested and is by no means clear. Nevertheless, the OIC's insistence on taking oral testimony from the President was bold and unprecedented.[134]

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130. *In re* Lindsey, 158 F.3d at 1287 (Tatel, dissenting).

131. *Id.*

132. *See, e.g.*, Jack Nelson & Ronald J. Ostrow, *Clinton, Starr Converge at a Legal Crossroads*, L.A. TIMES, Aug. 16, 1998, at A1.

133. *See, e.g.*, Lyle Denniston & Susan Baer, *President Gains Deal to Testify*, BALT. SUN, July 30, 1998, at 1A.

134. For example, during Watergate, Special Prosecutor Leon Jaworski invited, but did not attempt to compel, President Nixon to testify. *See* Richard Ben-Veniste,

Former Independent Counsel Lawrence Walsh regarded it as a matter of respect and deference to the presidency to request that President Reagan respond to written interrogatories in the context of the Iran-Contra investigation rather than to insist that the President submit to oral interrogation.[135] Furthermore, Department of Justice guidelines, which independent counsels are usually expected to follow,[136] indicate that targets generally should not be subpoenaed.[137] The Supreme Court's ruling in *United States v. Nixon*, requiring President Nixon to comply with a subpoena duces tecum and produce the Watergate tapes, suggests that a president as target of an investigation must comply with a grand jury subpoena for documents or materials,[138] but this decision arguably does not reach the issue of whether a president must submit to the more personal and intrusive subpoena *ad testificandum*.[139] Ultimately, a president

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Comparisons Can Be Odious, Mr. Starr, NAT'L L.J., Dec. 21, 1998, at A21:

> [I]t was the practice of federal prosecutors not to subpoena the target of a grand jury investigation. On the other hand, it was considered unjust to deprive a target of the opportunity to testify if he so desired. Accordingly, Mr. Jaworski extended an invitation to President Nixon to testify before the grand jury. When Mr. Nixon declined, Mr. Jaworski did not publicize the exchange—because to do so would have been an unfair comment on Mr. Nixon's decision.

135. *See* Lawrence E. Walsh, *A Way For President To Tell All and Keep His Dignity*, HOUS. CHRON., Sept. 11, 1998, at A6. In addition, it is noteworthy that neither the House nor Senate attempted to require President Clinton to testify during the subsequent impeachment process. During the impeachment inquiry and trial, both Houses of Congress requested written responses to interrogatories, with all agreeing that the President should not be summoned to testify in person. *See* H. REP. NO. 105-830, at 400 (reprinting the House Judiciary Committee's 81 Requests to the President for Admission and the President's responses); *Ten Questions for Clinton*, WALL ST. J., Jan. 27, 1999, at A22 (reprinting text of questions submitted to President Clinton during the Senate trial by Senate Majority Leader Trent Lott and others on January 25, 1999).

136. *See, e.g.*, 28 U.S.C. § 594(f) (1994) (requiring independent counsel to follow DOJ guidelines "except to the extent that to do so would be inconsistent with the purposes" of the independent counsel statute); Morrison v. Olson, 487 U.S. 654, 696 (1987); United States v. Poindexter, 725 F. Supp. 13, 38 (D.D.C. 1989). *But see In re* Grand Jury Subpoena American Broadcasting Co's, Inc., 947 F. Supp. 1314 (E.D. Ark. 1996) (holding that the OIC is not bound by DOJ guidelines regarding subpoenas directed at media organizations); Julian A. Cook, III, *Mend It Or End It? What To Do With the Independent Counsel Statute*, 22 HARV. J.L. & PUB. POL'Y 279, 330 (1998) (arguing that, despite the language in the statute, whether to follow DOJ guidelines is entirely within the discretion of the Independent Counsel because there is no effective review mechanism).

137. *See* UNITED STATES DEP'T OF JUSTICE, UNITED STATES ATTORNEY'S MANUAL § 9-11.150 (Sept. 1997). *But see* Jonathan Turley, *Call Clinton to the Grand Jury*, NAT'L L.J., May 4, 1998, at A21 (arguing that, if the DOJ guideline applies, it would have permitted subpoenaing of President Clinton). President Clinton theoretically could have, like any citizen, invoked his Fifth Amendment right to be free from compulsory incrimination, notwithstanding its lack of political viability.

138. *See Nixon*, 418 U.S. at 713.

139. *Nixon* involved Federal Rule of Criminal Procedure 17(c) (governing subpoenas

wishing to avoid a grand jury subpoena might have to presume the resolution of other unresolved constitutional issues. That is, if the President cannot be indicted, prosecuted, held in contempt, or jailed prior to impeachment, then logically he cannot be "compelled" to comply with the grand jury subpoena, an arguably lesser included authority.[140]

In this case, the question was resolved politically—once the OIC decided to issue the subpoena, President Clinton apparently decided that compliance was the only viable political option.[141] This political decision might have institutional and legal consequences, however. Because President Clinton's hand was forced, his "voluntary" testimony might be cited as "precedent" for the proposition that a president can in fact be subpoenaed to testify before the grand jury, even if he is the target of the inquiry. Separation of powers jurisprudence defines the parameters of constitutional power at times by historical practice and acquiescence by other branches. In other words, sometimes historical practice can contribute to creating constitutional law. Because President Clinton acquiesced, the theoretical presidential sanctuary to be free from compulsory oral testimony might be foreclosed to future presidents.[142]

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for books, papers, documents or other objects and other materials made in criminal proceedings). *See id.* at 686, 697-700; FED. R. CRIM. P. 17(c). During the treason trial of Aaron Burr, Chief Justice Marshall similarly approved a subpoena *duces tecum* against President Jefferson, but also commented in *dicta* that President Jefferson also could have been required to comply with a subpoena *ad testificandum*. See United States v. Burr, 25 F. Cas. at 34. *Burr* is not so much an analysis of a president's amenability to compulsory process as it was a defendant's right to compel disclosure of exculpatory information. As others have noted, President Jefferson had the authority to dismiss Burr's prosecution if the President sought to avoid compulsory process. *See* Amar & Katyal, *supra* note 24, at 719-20 n.72.

140. *See* Peter Baker, *Clinton Seems Likely To Avoid Facing Starr*, MILWAUKEE J. SENTINEL, July 6, 1998, at 1A (quoting former White House counsel Jack Quinn as saying that if a sitting president cannot be indicted, then he cannot be subpoenaed by a special prosecutor because he would not be subject to "the compulsory processes of the court," namely a contempt-of-court citation and possible imprisonment for defying a subpoena); Jack Quinn, *Clinton Can Avoid the Starr Chamber*, WALL ST. J., July 17, 1998, at A14.

141. *See* Matthew Cooper & Evan Thomas, *Extracting Confession*, NEWSWEEK, Aug. 31, 1998, at 30.

142. A contrary argument supporting a sanctuary from testimonial subpoena is also possible. Notably, the OIC withdrew its subpoena and agreed take the examination at the White House, with the President's lawyers present and able to object to questions. The OIC apparently was more interested in the President's testimony than in forcing a constitutional showdown. The episode therefore could be cited for the proposition that presidents may submit to such questioning only voluntarily and with special accommodations.

B. Can a President Be Indicted and Prosecuted In Advance of Impeachment?

The Lewinsky scandal has raised again the long-standing, yet unresolved, debate regarding whether a sitting American president can be indicted, prosecuted, or imprisoned prior to the completion of impeachment and removal proceedings. Despite advocacy on both sides of this issue, and commentary that the Supreme Court's decision in *Jones* may have resolved this debate, a definitive answer remains elusive.[143] The constitutional text fails to resolve the debate. The Constitution anticipates post-impeachment criminal prosecution, but is silent as to whether a president may be indicted or prosecuted prior to removal from office by an impeachment conviction.[144] Commentators have unearthed historical evidence of the framers' and ratifiers' intent and analogous anecdotes supporting both sides of the debate.[145] The issue was briefed in *United States v. Nixon,* but the Court declined to decide the issue.[146]

In the absence of clear guidance from these sources, the more persuasive and constitutionally sound analysis arguably comes not from formalistic assertions, but instead from a pragmatic

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143. *See, e.g., Impeachment or Indictment: Is a Sitting President Subject to Compulsory Criminal Process?: Hearing Before the Subcomm. on the Constitution, Federalism, and Property Rights of the House Comm. on the Judiciary,* 105th Cong. (1998) (hereinafter "Pre-Impeachment Indictment Hearing"); Eric M. Freedman, *The Law as King and the King as Law: Is a President Immune from Criminal Prosecution Before Impeachment?,* 20 HASTINGS CONST. L.Q. 7, 11-12 n.12 (1992) (advocating that the President is subject to indictment and prosecution) (collecting sources); PHILIP B. KURLAND, WATERGATE AND THE CONSTITUTION 135 (1978). For recent commentary, *see* Akhil Reed Amar & Brian C. Kalt, *The Presidential Privilege Against Prosecution,* 2 NEXUS J. OP. 11, 12-13 (1997); *see also,* Daniel E. Troy, *When To Indict A President,* WASH. TIMES, March 9, 1998, at A15; Harvey Berkman & Marcia Coyle, *$64 Question: Can A Sitting President Be Indicted? If Monica Lewinsky Talks, The Answer Becomes Critical,* NAT'L L.J., June 22, 1998, at A1.

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

145. *See generally Pre-Impeachment Indictment Hearing, supra* note 143.

146. *See Nixon,* 418 U.S. at 687 n.2 ("The cross-petition . . . raised the issue whether the grand jury acted within its authority in naming the President as an unindicted coconspirator. Since we find resolution of this issue unnecessary to resolution of the question whether the claim of privilege is to prevail, the cross-petition for certiorari is dismissed as improvidently granted . . . .").

examination and balancing of the competing institutional functions.[147] Again, this analysis raises issues very similar to those explored in *Jones* and other controversies concerning a president's amenability to judicial authority. This analytical approach would discount the failed efforts of other federal officers to achieve immunity from prosecution. Although federal judges may be prosecuted prior to impeachment,[148] these officials are unlike an American president who is the chief officer of the executive branch of government.[149] The same argument applies to members of Congress, who similarly may not claim immunity from prosecution,[150] although an equally important distinction is that members of Congress are not subject to the impeachment power and otherwise may be removed from Congress only by Congress's own self-policing power of expulsion.[151]

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147. The Supreme Court has indicated a preference for a functional separation of powers analysis in the absence of a clear answer from the Constitution. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 384-97 (1989) (upholding the constitutionality of the U.S. Sentencing Commission, an independent body in the judicial branch, on the grounds that the function of sentencing is a shared responsibility among the three branches of government); *Morrison*, 487 U.S. at 691 (1988) (holding that the independent counsel statute does not violate the separation-of-powers doctrine); Nixon v. Administrator of Gen. Serv., 433 U.S. 425, 441-46 (1977) (determining that whether an act violates the separation of powers doctrine requires an analysis of whether the act prevents the President from performing his executive functions). *Cf.* Clinton v. City of New York, 118 S. Ct. 2091, 2120 (1998) (Breyer, J., dissenting) ("[W]e are to interpret nonliteral Separation of Powers principles in light of the need for 'workable government.'"). *But see* I.N.S. v. Chadha, 462 U.S. 919, 944 (1983) (appearing to reject a functional analysis of the separation of powers doctrine).

148. *See, e.g.*, United States v. Claiborne, 727 F.2d 842 (9th Cir. 1984); United States v. Hastings, 681 F.2d 706 (11th Cir. 1982); United States v. Isaacs, 493 F.2d 1124 (7th Cir. 1974).

149. *See, e.g., Jones*, 117 S. Ct. at 1658 (Breyer, J., concurring) ("[The] President is not like Congress, for Congress can function as if it were whole, even when up to half of its members are absent . . . the President is not like the Judiciary, for judges often can designate other judges, e.g., from other judicial circuits, to sit even should an entire court be detained by personal litigation . . . unlike Congress, which is regularly out of session . . . the President never adjourns."); *Fitzgerald*, 457 U.S. at 749-50 (holding that immunity from civil suit related to public duties is "a functionally mandated incident of the President's unique office . . . . The President occupies a unique position in the constitutional scheme . . . [Article II] establishes the President as the chief constitutional officer of the Executive Branch, entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity.").

150. *See generally* United States v. Helstoski, 442 U.S. 477 (1979) (holding that evidence of a legislative act may not be introduced as evidence in a federal grand jury investigation involving the prosecution of a member of Congress for alleged political corruption).

151. *See* U.S. CONST. art. I, § 5, cl. 2 (providing that "Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member.").

Opponents of presidential immunity from pre-impeachment prosecution argue essentially that the president is not above the law and must, like any citizen, be accountable to society's standards of minimum conduct. These commentators also argue that many violations of the criminal code simply do not warrant impeachment, and immunity from pre-impeachment indictment would either allow crimes to go unpunished, at least until the president leaves office, or would lead to impeachment for offenses that are not serious enough to warrant the impeachment process.[152]

Advocates of immunity argue that a prosecutor should not be empowered to disable an entire branch of government. Pragmatic difficulties include the fact that prosecutors, at least at the federal level, are subject to the president's control and a pre-impeachment prosecution of a president theoretically could enable this defendant to release himself at any moment by virtue of his pardon authority.[153] Attempted prosecution by a state prosecutor would implicate the federalism rule that state entities cannot scuttle key functions of the federal government.[154] The strongest argument is that the president, a unique constitutional officer, must be free from any threat of removal other than impeachment in order to fulfill his constitutional functions. As then-Solicitor General Robert Bork observed in 1973, although it is possible to indict and prosecute a sitting vice president in advance of impeachment, the same could not be said for a president, who is "the only officer whose temporary disability while in office incapacitates an entire branch of government."[155]

This argument requires a sobering admission that few commentators are willing to make—that a president may break the law short of "high crimes and misdemeanors" without

152. For example, Professor Freedman argues that "[i]f, for instance, Lyndon Johnson drove drunk, he should have been convicted of drunken driving, not impeached. In this way, society would have expressed its disapproval of his conduct, while retaining a leader who had done nothing to undermine his political legitimacy." Freedman, *supra* note 143, at 45.

153. *But see* Brian C. Kalt, *Pardon Me?: The Constitutional Case Against Presidential Self-Pardons*, 106 YALE L.J. 779 (1996) (arguing that self-pardon would be unconstitutional).

154. *See, e.g.*, Amar & Kalt, supra note 143, at 14 (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 435-36 (1819)).

155. Memorandum For the United States Concerning the Vice President's Claim of Constitutional Immunity at 18, *In Re* Proceedings of the Grand Jury Impaneled December 5, 1972, No. 73-965 (D. Md. filed Oct. 5, 1973).

immediate judicial consequences. His immunity from punishment is only temporary, and serious criminal conduct may lead to impeachment and removal. And politically, a president's low crimes are sure to bring condemnation and possibly paralysis to his administration. But while he is within the sanctuaries of the presidency, a president can avoid the disabling effect of amenability to prosecutorial power.

Professor Ronald Rotunda argued that this objection to pre-impeachment prosecution, based upon the unitary executive theory, "can no longer be invoked after Clinton v. Jones."[156] Professor Rotunda and others argue that *Jones* cleared the way for both indictment and prosecution of a sitting president.[157] Professor Rotunda may reveal a weakness in his interpretation by conceding that a successfully prosecuted president could not be imprisoned.[158] Hence, Professor Rotunda's interpretation of *Jones* might suggest that the nation could suffer the spectacle of an American president on criminal trial, and then the second spectacle of a convicted president potentially jetting off on Air Force One, able to escape from criminal punishment with impunity until and unless he is removed from office by the Senate. Notwithstanding Professor Rotunda's predictions of the reach of *Jones* beyond its factual setting, recent events have added little to the long-standing debate among commentators. Rather than permitting scholars to continue to debate this subject and allowing an independent counsel the authority potentially to trigger a constitutional crisis,[159] Congress should consider amending the independent counsel statute (if it survives in some form) to prohibit expressly an independent counsel (or any successor institution charged with investigating presidents) from seeking an indictment against a sitting

156. Ronald D. Rotunda, *The True Significance of Clinton v. Jones*, Commentary, CHIC. TRIB., July 8, 1997, § 1, at 13. Professor Rotunda serves as a constitutional law advisor to the OIC.

157. *See id.* There is no question that the *Jones* ruling raises questions of how the rules of civil litigation are to be enforced against presidents. *See* Connaughton, *supra* note 52, at 25. The Court may have failed to anticipate such questions as whether litigating presidents can be held in contempt for improper conduct, assuming that a court would reach these issues before an independent counsel or impeachment committee intercedes. *See id.*

158. *See id.*

159. In the midst of the Senate impeachment proceedings, the OIC leaked its belief that it could indict President Clinton before his presidency concludes. *See* Don Van Natta Jr., *The President's Trial: The Independent Counsel; Starr Is Weighing Whether To Indict Sitting President*, N.Y. TIMES, Jan. 31, 1999, at A1.

president.

C. The Scope of the President's Reasonable Expectation to Privacy

Consistent with the principle that presidents are not "below the law," the Supreme Court has acknowledged that when an individual is elected president, he does not sacrifice his constitutionally based right to privacy. *In Nixon v. Administrator of General Services*,[160] the Court stated that presidents retain "constitutionally protected privacy rights in matters of personal life unrelated to any acts done by them in their public capacity."[161] The Court upheld a statute authorizing the Administrator to review President Nixon's presidential materials "for the purpose of returning to [him] such of them as are personal and private in nature," and establishing procedures to allow public access to the rest.[162] The Court noted that "[o]ne element of privacy has been characterized as 'the individual interest in avoiding disclosure of personal matters.'"[163] These include a president's personal and family finances[164] and "communications between [the President] and, among others, his wife, his daughters, his physician, lawyer, and clergyman, and his close friends, as well as personal diary dictabelts and his wife's personal files."[165] The Court upheld the statute only after concluding that the screening procedures safeguarded the President's "legitimate privacy interests."[166]

This constitutionally based privacy interest, in which "even presidents"[167] have a stake, suggests some discretionary and possibly legal limitations on an OIC investigation that would intrude into traditionally private matters. The Lewinsky

160. 433 U.S. 425 (1977).

161. *See id.* at 457. The Court's privacy analysis in *Nixon* centered primarily on the reasonable expectation of privacy doctrine of Fourth Amendment jurisprudence.

162. *Id.* at 436 (referring to the Presidential Recordings and Materials Preservation Act, 44 U.S.C. § 2107).

163. *Id.* at 457 (quoting Whalen v. Roe, 429 U.S. 589, 599 (1977)).

164. *See id.*

165. *Id.* at 459.

166. *Id.* at 465.

167. BOSTON GLOBE, Aug. 18, 1998, at A1 (reprinting President Clinton's address to the nation from the Map Room of the White House, August 17, 1998, in which President Clinton commented, "[e]ven presidents have private lives.").

investigation involved potentially criminal conduct such as perjury and obstruction of justice; however, the underlying subject matter is not irrelevant to the debate of public matters that transcend the criminal law, such as the appropriate scope of independent counsel authority or determining whether the allegations of perjury and obstruction of justice against President Clinton satisfy the high standards for impeachment. Although most Americans condemn both adultery and perjury, many appear equally concerned that the OIC's investigation and subsequent impeachment disrespected privacy rights—not only the rights of the President, but the privacy rights of others connected to the investigation as well.[168] The OIC's investigation, triggered by privacy-invading surreptitious tape recordings[169] and including subpeonas for a list of the books Ms. Lewinsky might have been reading,[170] reinforced the perception that the OIC was on a partisan mission to injure

168. *See, e.g.*, Sharon Schmickle, *Public Squeamish About Crossing Sexual Privacy Line*, STAR TRIB. (Minneapolis-St. Paul), Aug. 9, 1998, at A23 ("[N]o matter how often people are told that this is about lies, not sex, they remain wary of government officials forcing anyone to disclose sexual secrets.").

169. A significant feature of the OIC investigation, from a privacy perspective, is that the investigation was launched as the result of secret tape recordings of Monica Lewinsky's private conversations by her then-friend Linda Tripp. In addition to the fact that the tape recordings appear to have violated Ms. Lewinsky's right to privacy, they triggered the OIC investigation, and on September 25, 1998, the House Judiciary Committee voted to release the tapes to the public, greatly exacerbating privacy concerns. *See* Andrew Miga, *Tripp Tapes To Be Released*, BOSTON HERALD, Sept. 26, 1998, at A1. A Maryland grand jury currently is investigating whether Ms. Tripp's tape recordings violated Maryland law. *See, e.g.*, George Lardener, *Tripp "Urgently" Seeks Donations for Legal Defense Fund*, WASH. POST, Jan. 8, 1999, at A8. The Maryland Wiretap and Electronics Surveillance Act makes it unlawful for a person willfully to tape record or otherwise intercept a wire, oral, or electronic communication unless the person is a party to the communication and all of the parties to the communication have given prior consent. *See* MD. CODE ANN., CTS. & JUD. PROC. § 10-402 (1998). *See also* Bodoy v. North Arundel Hospital, 945 F. Supp. 890 (D. Md. 1996).

170. In another episode that created an appearance of a disregard for privacy rights, the OIC subpoenaed the Washington D.C. bookstore Kramerbooks & Afterwords to compel production of receipts indicating titles purchased by Ms. Lewinsky. The OIC reportedly sought to determine whether Ms. Lewinsky purchased a phone sex novel, Nicholson Baker's "Vox," which may have been one of the gifts she then gave to President Clinton. This maneuver drew a torrent of criticism on privacy grounds, although the law on potential protection for the bookstore from disclosure of such information was unclear. *See* David Streitfeld, *Lewinsky to Turn Over Book Purchase Information; Agreement Resolves 1st Amendment Dispute Between Starr and Bookstore Owners*, WASH. POST, June 23, 1998, at A4; *Are Book Buys Anybody's Business?*, LEGAL TIMES, Mar. 30, 1998, at 16. In addition, pursuant to Ms. Lewinsky's waiver, the OIC also interviewed Ms. Lewinsky's psychotherapist, Irene Kassorla. Dr. Kassorla was, in essence, compelled to disclose Ms. Lewinsky's in-therapy statements about her relationship with President Clinton. *See* M. Gregg Bloche, *Was Monica's Therapist Waiver Truly Voluntary?*, NAT'L L.J., Feb. 15, 1999, at A22.

President Clinton politically rather than to rid the government of high-level public corruption. Furthermore, the spectacle of an impeachment referral that included graphic details of sexual acts between consenting adults appears to some as a symbolic affront to the constitutional values related to privacy. The House Judiciary Committee's Ranking Democrat, Representative John Conyers (D-Mich.), raised privacy concerns during the impeachment debate, exclaiming, "[t]o proceed to nullify a presidential election on the basis of authoritarian privacy-invading questions about sex, questions the government does not have the legal power to ask, is producing irreparable harm to our Nation and to its Constitution."[171]

The rebuttal to these concerns is that, in the context of a sexual harassment lawsuit,[172] questions regarding intimate details of a person's life, protectable from disclosure in other circumstances, may be fair game. Once the President chose to testify about his relationship,[173] then the more legitimate

171. *Background and History of Impeachment: Hearing Before the Subcomm. on the Const., Federalism, and Property Rights of the House Comm. on the Judiciary, 105th Cong.* 12 (1998) (statement Rep. John Conyers (D-Mich.)) (hereinafter "*Background and History of Impeachment*"). *See also Meet The Press: Senators Discuss the Impeachment Trial of President Clinton* (NBC television transcript, Jan. 17, 1999) (statement of Senator Kerry (D-Mass.)) ("What will it say to the rule of law . . . if a government investigator, charged with one responsibility to investigate one thing, winds up investigating the private life, the personal life of a politician and uses what comes out of that personal investigation to then act as the underlying act of incrimination?").

172. This analysis sets aside the fact that, because Ms. Jones permitted the statute of limitations to toll on her Title VII claim, her action in fact was styled as a Section 1983 action alleging that then-Governor Clinton violated her rights under color of state law. *See* Jones v. Clinton, 869 F. Supp. 690 (E.D. Ark. 1994). Section 1983 actions typically lie only if Congress fails to provide an adequate alternative remedy. *See* Leon Friedman, *New Developments In Civil Rights Litigation And Trends In Section 1983 Actions*, No. H4-5274, 576 PRACT. L. INST. LITIG. 7 (1997) (discussing recent Section 1983 cases and general requirements for Section 1983 actions).

173. Some commentators have suggested that President Clinton may have been able to resist answering questions about his relationship with Ms. Lewinsky in the *Jones* deposition based upon his right to privacy and pursuant to the Federal Rules of Civil Procedure. *See* Steven Lubet, *Poor Lawyering Exposed Clinton Unnecessarily*, NAT'L L.J., Aug. 31, 1998, at A19 (criticizing the President's counsel for failing to instruct the President not to answer such questions). The Federal Rules of Civil Procedure permit a witness to refuse to answer deposition questions only under narrow circumstances, including to preserve privileges, to enforce a limitation on evidence as directed by the court, and, notably, to avoid answering questions that "unreasonably . . . annoy, embarrass, or oppress the deponent." FED. R. CIV. P. 30(d)(3). Knowing, as President Clinton did, of his relationship with Ms. Lewinsky and the likely questions he would face about such matters in the *Jones* deposition, Professor Dershowitz suggested that a more prudent approach to the litigation, short of settlement, may have been to refuse to defend and accept a default judgment, at least as to the issue of liability. *See* ALAN M.

inquiry into perjury, subornation of perjury, and witness tampering became tenable. As Representative James E. Rogan (R-Cal.) explained:

> Lawyers did not just show up one day and begin to question the President's personal lifestyle. The President was a defendant in a civil rights sexual harassment lawsuit, and just like every other defendant in those types of cases around the country, he was ordered by a Federal judge supervising that case to answer under oath questions relating to his pattern of conduct as both governor and President with respect to female subordinate employees.[174]

Hence, the President's opponents argue that the OIC investigation and subsequent impeachment was not about sex but lying under oath and obstruction of justice, while defenders of the President invoke privacy considerations, complaining for example that the OIC's Referral emphasized salacious details of sex with an intent to embarrass the President, and arguing further that sex lies are not impeachable.[175]

The OIC's launching of an investigation, with the approval of the Attorney General and the special three-judge panel,[176] into

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DERSHOWITZ, SEXUAL MCCARTHYISM 15-21 (1998). After default as to liability, the proceedings would have focused on Ms. Jones' damages (to the extent they existed) rather than on President Clinton's conduct.

174. 144 CONG. REC. H11790 (daily ed. Dec. 18, 1998) (statement of Rep. Rogan (R-Cal.)). On December 11, 1997, Judge Susan Webber Wright ruled that counsel for Ms. Jones could obtain information about any sexual relations President Clinton had with state or federal employees beginning in May, 1986. *See* Jones v. Clinton, No. LR-C-94-290 (E.D. Ark. Dec. 11, 1997).

175. Further privacy-related arguments include the following: (1) the consensual relationship between President Clinton and Ms. Lewinsky was irrelevant to Paula Jones' claim of non-consensual sexual harassment as Judge Wright's later ruling suggested; and (2) consensual sex even between unequals in the workplace usually does not involve either quid pro quo or hostile workplace, the two prongs of sexual harassment law. *See* Deborah L. Rhode, *Danger or Delight? Is Romance at Work All Bad?*, NAT'L L.J., Nov. 23, 1998, at A21 (reporting that relationships between unequals at work are commonplace and may be protected by privacy doctrines). These arguments provide context and informs one's judgment about the relative culpability of President Clinton's conduct. Nevertheless, there remained the following unavoidable facts: Judge Wright ordered President Clinton to answer questions about Ms. Lewinsky; Judge Wright's order was legitimate and such questions were within the permissible scope of discovery; President Clinton chose to answer the questions; and he did so falsely.

176. On January 16, 1998, a special panel comprised of D.C. Circuit Judge David Sentelle, Fourth Circuit Senior Judge John Butzner Jr. and Eleventh Circuit Senior Judge Peter Fay granted Attorney General Janet Reno's request to expand the OIC investigation into "whether Monica Lewinsky or others suborned perjury, obstructed justice, intimidated witnesses, or otherwise violated federal law other than a Class B or C misdemeanor or infraction in dealing with witnesses, potential witnesses, attorneys

the truthfulness of civil deposition testimony, which involved intense governmental inspection and public disclosure of private matters, merits further scrutiny. Even in the context of a sexual harassment case, a defendant does not abdicate any rights to privacy he may have. Instead, the law balances privacy interests with the need to remedy unlawful conduct.[177] Sexual harassment law permitted the *Jones* deposition questioning because that law recognizes that some curtailment of privacy rights is necessary in order to remedy the unique and harmful problems related to sexual harassment.

However, the OIC's investigation posed a greater threat to privacy interests than did the civil litigation and arguably lacked an obvious countervailing governmental interest that would justify the intrusion. To be fair, just because presidents (along with their family, friends, lovers, and associates) retain their right to privacy does not by itself demonstrate that the OIC investigation, which may have adversely affected privacy interests, was necessarily improper. For example, neither the subject matter of sworn testimony (such as sex or other private matters) nor the disposition of litigation on the merits (such as dismissal or summary judgment) cleanses a potential perjury violation (although the materiality issue, along with President Clinton's other technical defenses, suggest that the typical exercise of prosecutorial discretion would counsel against pursuing indictment, and the suitability of such allegations for an impeachment referral was even less clear).[178]

One obviously can characterize the competing private and governmental interests, and strike a balance between them, in different ways. On the one hand, assuming that the underlying substantive law of sexual harassment is valid, one can argue

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or others concerning the civil case Jones v. Clinton." Order, *In re* Madison Guaranty Savings & Loan Ass'n, at 1-2 (D.C. Cir. Spec. Div. 1998) (Div. No. 94-1).

177. *See, e.g.*, Lawrence J. Baer, et al., *Essay, Discovering Sexual Relations – Balancing the Fundamental Right to Privacy Against the Need for Discovery in a Sexual Harassment Case*, 25 NEW ENG. L. REV. 849 (1991) (discussing attempts by the courts in sexual harassment cases to balance plaintiff's need for legitimate discovery with the privacy rights of defendants and third parties).

178. The civil justice system normally relies on the adversarial process to expose deceptive deposition testimony; if all allegations of this sort spawned criminal investigations, prosecutors would quickly exhaust resources necessary to investigate more serious crimes. Under the theory that presidents are held to a higher standard, however, normal prosecutorial restraint from entanglement with the civil litigation does not apply. Consequently, future testimony by litigating presidents are sure to draw allegations of perjury, with Congress called upon to adjudicate such allegations. *See* Connaughton, *supra* note 52, at 25.

that whatever prosecutorial tools are available to enforce these laws, including prosecution of perjury and obstruction of justice, even in sexual harassment cases that are defeated by dispositive motion, should be employed with maximum force regardless of the consequences to privacy values. On the other hand, one can argue that, considering that an OIC investigation tends to pose a greater privacy-invading potential that does other types of investigations, [179] privacy interests should be considered in the discretion of future independent counsel; codified as a consideration; or codified as a bar to proposed investigations in a revised independent counsel statute. The Lewinsky experience at least may suggest that privacy should be part of the upcoming debate, either in revising the independent counsel statute if it survives, or, if it perishes, in establishing rules for whatever institution hereafter investigates presidents. Privacy interests should at least be considered in relation to the ability of investigators to expand jurisdiction from subject to subject, or the ability to investigate matters beyond a president's official duties, absent compelling circumstances.

D. The Independent Counsel Statute

1. Congress Might Not Reauthorize the Independent Counsel Statute: Any Renewal Would Require Revisions

The Independent Counsel statute, first passed as part of the Ethics in Government Act in 1978,[180] was largely in response to the Watergate-era "Saturday Night Massacre"[181] that undermined the public's faith in the ability of the Executive Branch to investigate itself in certain circumstances. The

179. *Cf. The Future of the Independent Counsel Act, Hearing Before the Senate Committee on Governmental Affairs*, 106th Cong. (Mar. 3, 1999) (statement of Theodore B. Olson) (observing that OIC investigations are "almost invariably more lengthy, intrusive, broad, public and intense than normal Justice Department investigations").

180. Pub. L. No. 95-521, 92 Stat. 1824 (1978).

181. For a description of the "Saturday Night Massacre" in which Attorney General Elliott Richardson and Deputy Attorney General William Ruckleshaus chose to resign rather than follow President Nixon's order to remove Special Prosecutor Archibald Cox (who ultimately was removed by Robert Bork), *see* KEN GORMLEY, ARCHIBALD COX: CONSCIENCE OF A NATION 361-72 (1997); ARCHIBALD COX, THE COURT AND THE CONSTITUTION 24 (1987).

Supreme Court upheld the constitutionality of the provision limiting removal of an independent counsel only for cause in *Morrison v. Olson*,[182] a decision possibly inspired by the public interest in having a reliable, trustworthy mechanism to cleanse the government of corrupt officeholders. Ironically, because of the few limits on the authority of independent counsel, public perception now is that the independent counsel process is itself partisan, wasteful, and susceptible to corruption. In addition to producing what some claim is a virtual standing inquisition to investigate the president, an emerging army of counsels have been appointed to investigate relatively low-level offenses committed by relatively low-level officials.[183] With relative ease, the virtually unlimited powers of a single independent counsel with the sole objective to topple a single target can be unleashed. The predictable result is that the target is sure to, at a minimum, expend substantial sums in legal fees and emotional energy. As such, independent counsels are unlike ordinary prosecutors who have limited resources, unlimited targets, and multiple priorities that inform ordinary prosecutorial discretion.

The most likely governmental reform to come from the Lewinsky scandal is the death, or at least a trimming by Congress, of the independent counsel statute. The current statute, which was reauthorized in 1994, will expire on June 30, 1999,[184] and, ever since the Senate impeachment trial began, political pressure has mounted to end the OIC. At a minimum, any renewal would likely require constraints on future independent counsel and other mechanisms to foster at least some level of accountability and to ensure that a presidency is not crippled by an investigation in circumstances where it is not warranted.[185] Proposals for reform have generated

182. 487 U.S. 654 (1988).

183. For example, Independent Counsel David Barrett indicted former Housing and Urban Development Secretary Henry Cisneros for making false statements about payments to a former mistress during an FBI background check. *See* John Mintz & Bill Miller, *Espy Case Heightens Criticism of Independent Counsel Law*, WASH. POST, Dec. 4, 1998, at A16. *See also* Cook, *supra* note 136, at 298-99, 302-03, 305 (discussing independent counsel investigations of a White House Chief of Staff, White House Deputy Chief of Staff, and an Assistant to the President for Political Affairs).

184. *See* 28 U.S.C. § 599 (1994).

185. *See The Future of the Independent Counsel Act, Hearing Before the Senate Committee on Governmental Affairs*, 106th Cong. (Mar. 3, 1999) (statement of Theodore B. Olson, Esq., Partner, Gibson, Dunn & Crutcher L.L.P.) (arguing that the current statute's weak

substantial controversy.[186] The most frequently mentioned proposals include the following: (1) shrinking the list of possible targets;[187] (2) periodically rotating members of the Special Division of the U.S. Circuit Court of Appeals for the District of Columbia to minimize the perception of partisan influence; (3) imposing fixed terms on independent counsels; (4) imposing temporal or financial limits on independent counsel investigations;[188] (5) limiting investigations to activities that occur during the term of an administration; (6) limiting investigations to activities that involve misuse of government power (see discussion of privacy issues above); (7) restricting the ability of independent counsel to expand their jurisdiction to new subjects; (8) altering the selection process; and (9) ratcheting up the statute's trigger mechanism.[189] Broader

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trigger exposes "only two persons (the president and vice president) elected by the entire nation, to a potentially devastating and debilitating criminal investigation based upon allegations that may lack substance but which cannot be ruled out as a potential avenue of investigation."); Cook, *supra* note 136, at 323-332 (discussing how the independent counsel statute could be reformed to provide more oversight).

186. *See* David E. Rovella, *ABA Fights Over Counsel Law Reform: Competing Proposals Pit Litigation Section Against Criminal Justice*, NAT'L L.J., July 27, 1998, at A6.

187. Among the most sensible proposals include shrinking the officers covered by the Act. DOJ has both the competence and objectivity to investigate most executive employees. *See* Archibald Cox, *Curbing Special Counsels*, N.Y. TIMES, Dec. 12, 1996, at A37. An independent counsel process should be saved for the unusual, high-stakes crisis in which a perceived or actual conflict of interest is demonstrable. Appointment of an independent counsel should be rare—the drafters of the original statute "were thinking about Watergate and Teapot Dome—we were thinking twice a century." Robert Schmidt, *et al.*, *Kenneth Starr's Legacy*, LEGAL TIMES, Jan. 26, 1998, at 25 (quoting a member of the congressional staff who worked on the original statute).

188. Currently, independent counsel have virtually no limitations as to budget or duration of the investigation. *See* 28 U.S.C. § 594(a) (unlimited staff) and § 594(c) (unlimited budget). Proponents of reform measures to cap time and expenditures allege that resources spent on such investigations often are out of proportion to the magnitude of the alleged wrongdoing. *See* John Mintz and Bill Miller, *Espy Case Heightens Criticism Of Independent Counsel Law*, WASH. POST, Dec. 14, 1998, at A16. If cost and time limitations were in place, however, a corrupt target would have an incentive to stonewall an investigation until the independent counsel's temporal and financial limits have tolled.

189. Currently, a relatively weak allegation can trigger the appointment of an independent counsel. *See* 28 U.S.C. § 592(c)(1)(A) (the statute is triggered if "there are reasonable grounds to believe that further investigation is warranted . . . ."). The Attorney General is under increasing political pressure to choose between appointing an independent counsel on the basis of mere allegations, or being portrayed as a co-conspirator to conceal the alleged underlying wrongful conduct. *See, e.g.*, H. Rpt. No. 105-728 (reporting that on August 6, 1998, the House Committee on Government Reform and Oversight voted, on party lines, 24-19, to hold Janet Reno in contempt for refusing to comply with the Committee's subpoena for two memoranda prepared by Charles LaBella and FBI Director Louis Freeh; the memoranda reportedly urged appointment of an independent counsel to investigate alleged campaign fundraising abuses, advice that Ms. Reno declined to follow). Portions of the memoranda later were shown to Chairman Dan Burton and ranking minority member Henry Waxman. *See* H.

proposals range from establishing a permanent Office of Independent Counsel to abolishing the concept of the independent counsel altogether.[190]

From the perspective of the presidency, the independent counsel statute affects an important limitation on the president's ability to remove at his pleasure purely executive officers.[191] In his lone dissent in *Morrison*, Justice Scalia argued that Article II requires that the president have unfettered control of both the removal of purely executive officers and the investigation and prosecution of the laws.[192] The majority rejected this categorical approach, opining that the limitation on the president's authority to remove an independent counsel would not unduly impinge upon the president's ability to discharge his constitutional duties.[193] The constitutional theory that undergirds this analysis is that the need to effectively and independently investigate the rare Teapot Dome and Watergate-level defects in the executive branch warrants a

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Rpt. No. 105-829. This episode reflects the phenomenon of congressional committees coercing executive officers to divulge internal, predecisional documents. *See, e.g.*, Christopher H. Schroeder & Neil Kinkopf, *What About Burton's Contempt for the Constitution?*, LEGAL TIMES, Aug. 17, 1998, at 25. *Cf.* Brett M. Kavanaugh, *The President and the Independent Counsel*, 86 GEO. L.J. 2133, 2135-36 (1998) (arguing that the statute's triggering mechanism not only produces OIC investigations for trivial matters, such as Donald Smaltz's inquiry whether former Agriculture Secretary Mike Espy accepted illegal gratuities (Espy later was acquitted), but the mechanism can also be misused as a "shield" by the Attorney General to avoid launching an OIC investigation in cases, such as in campaign finance, where such an investigation appears to be clearly warranted).

190. *Compare* Julie O'Sullivan, *The Independent Counsel Statute: Bad Law, Bad Policy*, 33 AM. CRIM. L. REV. 463 (1996) (suggesting the abolition of the independent counsel statute), *with* Abbe David Lowell, *A Permanent Special Prosecutor*, LEGAL TIMES, Feb. 23, 1998, at 30. Other proposals include returning to the practice where the Attorney General appoints a special prosecutor or having the Criminal Division of the Department of Justice investigate high executive officers. The Senate Governmental Affairs Committee currently is holding hearings on these proposals and the debate on these matters is now underway. At the heart of the debate is the question of how to create an institution independent enough to credibly investigate presidents and other high-level officials, yet accountable enough so that the investigative power is not abused. *See, e.g., Can This Independent Counsel Law be Saved*, LEGAL TIMES, Feb. 22, 1999, at A28-31 (collecting four essays by Profs. Gormley, Sargentich, Barrett, and Weinberg). *See also Symposium, The Independent Counsel Act: From Watergate to Whitewater and Beyond*, 86 GEO. L.J. 2011 (1998).

191. *Cf.* Humphrey's Executor v. United States, 295 U.S. 602 (1935) (discussing the presidential power to remove executive officers); Myers v. United States, 272 U.S. 52 (1926) (discussing the same).

192. *See Morrison*, 487 U.S. at 702 (Scalia, J., dissenting) (arguing that the independent counsel statute unconstitutionally usurps executive power).

193. *See id.* at 666. Aside from removal for cause by the Attorney General (which is subject to judicial review), the only other check on an independent counsel is impeachment.

measured incursion on the president's control of prosecutorial authority. The theory has failed in practice; the weak trigger mechanism and political pressure have combined to produce independent counsel investigating nonserious matters.[194] The penetration into the sphere of presidential sanctuaries cannot be allowed under such circumstances. The Lewinsky experience in particular has led many to conclude that many of the investigations undertaken by independent counsel may competently and more appropriately be pursued by the Department of Justice or by special counsel appointed by the Attorney General. The presidency will be strengthened should the independent counsel statute meet its end this summer. Should some form of the statute survive, Congress should consider how to remedy certain defects that potentially affect presidential sanctuaries apparent from the Lewinsky experience; included among these defects are the OIC's treatment of grand jury material and the OIC's participation in impeachment, as discussed below.

2. *Disclosure of Secret Grand Jury Material and Fairness to the Target*

The submission of the OIC Referral to Congress and the subsequent release of the Referral and supporting materials to the public raised anew the issue of whether grand jury testimony and other material, typically shrouded in absolute secrecy, could lawfully be divulged in this fashion. On the eve of the submission to Congress of the Referral, some argued that Rule 6(e) of the Federal Rules of Criminal Procedure prohibited the OIC from disclosing grand jury testimony—so-called "6(e) material." Professor Susan Brenner agreed that the "lock of secrecy" on grand jury testimony should prevent its disclosure, even to Congress in the context of an impeachment referral.[195] In *Douglas Oil Co. v. Petrol Stops Northwest*,[196] the Supreme Court explained that failing to safeguard grand jury secrecy would harm the grand jury process by causing prospective witnesses

194. *See, e.g.* John Mintz & Bill Miller, *Espy Case Heightens Criticism of Independent Counsel Law*, WASH. POST, Dec. 4, 1998, at A16.

195. Tony Mauro, *Experts Question Whether Starr Can Report Testimony*, USA TODAY, Sept. 9, 1998, at 10A.

196. 441 U.S. 211 (1979).

to be hesitant to come forward or to testify fully and frankly for fear of retribution, and by creating a "risk that those about to be indicted would flee or would try to influence individual grand jurors to vote against indictment."[197]

One concern is that submitting such information to Congress, even if the submission were under seal, is tantamount to public disclosure because members of Congress could not be compelled to maintain such secrecy, and, to the contrary, they could release such information with impunity based on the protection of the Speech or Debate Clause.[198] Federal judges have authorized previous transmission of Rule 6(e) material in impeachment reports to Congress, including the Watergate Report. Notably, the D.C. Circuit concluded that independent counsel are covered by Rule 6(e),[199] but nevertheless permitted the release of the Iran-Contra Report because the information had already become widely known.[200]

The Lewinsky precedent appears to place little weight on the interest in preserving grand jury secrecy. On September 8, 1998, the special three judge panel overseeing the OIC in the Lewinsky investigation permitted the OIC to transmit grand jury material to the Congress.[201] Rather than permit the

197. *Id.* at 218-19. The D.C. Circuit recently reaffirmed the importance of the 6(e) secrecy rule, holding that media organizations were not entitled to hearing transcripts. *See In re* Motions of Dow Jones & Co., 142 F.3d 496 (D.C. Cir. 1998). Ironically, the transcripts related to the President's allegations that the OIC should be found in contempt for allegedly leaking grand jury material to the press.

198. U.S. CONST. art. I, § 6, cl. 1. The Speech or Debate Clause provides absolute immunity to members of Congress and their aides for legislative acts and allows members of Congress to disclose otherwise secret information during legislative proceedings. *See, e.g.*, Gravel v. United States, 408 U.S. 606, 616 (1972) (aide to congressman could not be questioned by grand jury after a congressman decided to read portions of a top-secret classified document, the "Pentagon Papers," in a meeting of the Subcommittee on Buildings and Grounds of the Senate Public Works Committee).

199. *See In re* North, 16 F.3d 1234 (D.C. Cir. 1994).

200. *See id.* at 1245 ("We do not intend to formulate a rule that once a leak of Rule 6(e) material has occurred, government attorneys are free to ignore the pre-existing bond of secrecy . . . . There must come a time, however, when information is sufficiently widely known that it has lost its character as Rule 6(e) material.").

201. See REFERRAL, *supra* note 3, at n.18:

> In the course of its investigation, the OIC gathered information from a variety of sources, including the testimony of witnesses before the grand jury. Normally a federal prosecutor is prohibited by Rule 6(e) of the Federal Rules of Criminal Procedure from disclosing grand jury material, unless it obtains permission from a court or is otherwise authorized by law to do so. This Office concluded that the statutory obligation of disclosure imposed on an Independent Counsel by 28 U.S.C. Sec. 595(c) grants such authority.

predictable piecemeal leaks, the House of Representatives voted to release the OIC Referral on the Internet.[202] Subsequently, the House voted to release substantial additional Rule 6(e) material, including the videotape of the President's grand jury testimony, to the public.[203] The justification for this disclosure was that the public had a right to know and was entitled to full access to allegations underlying a possible impeachment of a sitting president.

Beyond the question of whether such information should be disclosed, which relates chiefly to protecting the grand jury process, is the issue of whether Congress should craft procedures to govern the manner and timing of such disclosure, which relates more to fairness to the target. For example, President Clinton's attorneys argued that the release of the Referral to the public without affording the President an advance opportunity to review it and prepare an explanation or rebuttal was unfair because the Referral was an accusatory document written in advocacy style, which lacked all exculpatory material and contained testimony not tested by cross-examination.[204] Mr. Starr declined this request, once again reflecting a lack of deference to the office of the presidency.[205] If some version of the independent counsel statute survives, Congress should consider adding requirements that (1) an impeachment referral must be delivered to the target simultaneously with its delivery to the Congress and (2) public disclosure of the referral or accompanying materials should await a short, fixed time period to afford a target a reasonable opportunity to prepare a response. Disclosure to the public of

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> Nevertheless, out of an abundance of caution, the OIC obtained permission from the Special Division to disclose grand jury material as appropriate in carrying out its statutory duty. A copy of the disclosure order entered by the Special Division is set forth in the Appendix, Tab B. We also advised Chief Judge Norma Holloway Johnson, who supervises the principal grand jury in his matter, of our determination on that issue.

See also Letter from Independent Counsel Kenneth W. Starr to House Speaker Newt Gingrich (R-Ga.) and House Minority Leader Richard A. Gephardt (D-Mo.), Sept. 9, 1998, *reprinted in* WASH. POST, Sept. 10, 1998, at A12.

202. *See* Frances Katz, *The Starr Report: Media and Internet Traffic*, ATLANTA J. & ATLANTA CONST., Sept. 12, 1998, at A10.

203. *See* Juliet Eilperin and Dan Morgan, *Clinton Videotape Set for Release*, WASH. POST, Sept. 19, 1998, at A1.

204. *See* Peter Baker, *Kendall Wants Preview Copy of Starr Report*, WASH. POST, Sept. 8, 1998, at A4 (quoting statement by David Kendall, counsel to the President).

205. *See* Ruth Marcus, *Democrats Claim Unfairness in Timing; Bid to Issue Simultaneous Response Rejected; No Precedent, Republicans Say*, WASH. POST, Sept. 11, 1998, at A38.

both the referral and any response or rebuttal may mitigate the concerns that targets would be unfairly prejudiced by a one-sided presentation, particularly in highly visible and politicized cases.

Failing to address these issues potentially could sabotage subsequent criminal proceedings. In Watergate, the district court expressed an analogous concern that congressionally subpoenaed material, which inevitably would be released to the public, threatened to distort the integrity of judicial proceedings.[206] Any attempt to prosecute President Clinton after he leaves office may face a substantial obstacle in that whole-scale public release of 6(e) material, or at least the timing and manner of such disclosure, has potentially denied citizen Clinton of any opportunity for a fair trial and that this defect cannot be remedied by a change in venue. Ironically, then, the disclosures of 6(e) material from the Lewinsky investigation may well convert the temporary immunity from prosecution enjoyed by the President while he is within the sanctum of the presidency into a permanent immunity in this instance.

3. Independent Counsel as Impeachment Participant

The Clinton impeachment will renew concerns that the independent counsel theoretically may perform congressional impeachment functions or otherwise intrude upon the impeachment process in ways that undermine separation of powers principles and potentially lower the impeachment threshold. Commentators have raised concerns regarding the potential for an independent counsel, an executive officer, to be co-opted by impeachment proponents in Congress into making political judgments about impeachable offenses or playing an inappropriate role in the impeachment process.[207] Several

206. *See* Senate Select Comm. on Presidential Campaign Activities v. Nixon, 370 F. Supp. 521, 524 (D.D.C.), *aff'd on other grounds*, 498 F.2d 725 (D.C. Cir. 1974) ("A country's quality is best measured by the integrity of its judicial processes. Experience and tradition teach that facts surrounding allegations of criminal conduct should be developed in an orderly fashion during adversary proceedings before neutral fact finders, so that not only the truth but the whole truth emerges and the rights of those involved are fully protected.").

207. *See generally* Julie R. O'Sullivan, *The Interaction Between Impeachment and the Independent Counsel Statute*, 86 GEO. L.J. 2193 (1998). *See also* Ken Gormley, *Impeachment and the Independent Counsel: A Dysfunctional Union*, 51 STAN. L. REV. 309 (1999).

features of the Clinton impeachment demonstrate these concerns. First, the OIC Referral's delineation and advocacy of impeachable offenses permitted the House to some extent to avoid political accountability for the Clinton impeachment by adopting, with limited independent judgment, the propriety of the ensuing impeachment inquest. The House has been faulted by some for simply rubber-stamping the OIC's investigation without conducting an independent investigation, and the House Managers arrived at the Senate with an incomplete record and, consequently, a potentially ill-considered impeachment.[208] Most disturbingly, the House appeared to adopt a grand jury model of mere accusation without fact finding and adjudication, a model that would make impeachment routine and deprive the House of any meaningful role in the process. Impeachment proponents in the House repeatedly declared that the House's function merely was analogous to a grand jury in deciding whether to indict.[209] In reality, a grand jury's deferential probable cause analysis is a rubber stamp, and for the House to adopt such a standard is tantamount to abdicating its exclusive power to impeach. In fact, the impeachment standard for the House and Senate is the same—both must determine whether alleged misconduct rises to the level of requiring the invocation of the Constitution's

208. On the other hand, the Iran-Contra experience teaches that duplicative OIC and congressional investigations arguably are wasteful, inefficient, unfairly pile on the target, and potentially sabotage any later prosecution. *See, e.g.*, Lawrence E. Walsh, *Political Oversight, The Rule of Law, and Iran-Contra*, 42 CLEV. ST. L. REV. 587, 593-94 (1994) (describing how the grant of congressional immunity to Lieutenant Colonel Oliver North and Admiral John Poindexter prevented successful prosecution of those two figures by the Independent Counsel) (referring to United States v. North, 920 F.2d 940 (D.C. Cir. 1990) (per curiam); United States v. Poindexter, 951 F.2d 369 (D.C. Cir. 1991)).

209. *See* 144 CONG. REC. H11864 (daily ed. Dec. 18, 1998) (Rep. Duncan (R-Tenn.)) ("Many experts have pointed out that the role of the House is really that of a grand jury. A grand jury is required to indict any time there is a reasonable possibility that a crime has been committed. Like a grand jury, I believe the House has no choice but to impeach when we have a report, an official report of felony offenses having been committed.")

Republican House Managers defended their calling for witnesses during the Senate trial, even though they opposed witnesses during the House proceeding, on the basis of the grand jury analogy. *See The NewsHour with Jim Lehrer* (PBS television broadcast, Jan. 6, 1999) (transcript on file with the *Harvard Journal of Law & Public Policy*) (statement of House Manager McCollum (R-Fla.)) ("[W]e are more like a grand jury in the House. We've issued, if you will, the articles of impeachment that are an indictment or a series of indictments to the president for in this case crimes—what would be crimes in the civilian world—perjury, obstruction of justice, very serious crimes . . . . And since we are more the grand jury—the weight of the evidence is a little different.").

remedy of last resort, invading the sanctuaries of a coequal branch of federal government, and nullifying the only national election. The deferential grand jury model is an inappropriate guide to the exercise of such a solemn and important constitutional function.

Contributing to this problem may have been the OIC's interpretation of the automatic referral provision as requiring a referral to be "substantially complete"[210] before transmission to Congress. Some have argued that the OIC should have referred the Lewinsky matter to the House immediately and thereby permit the House to determine whether further investigation was warranted.[211] The Framers clearly intended to lodge the power to investigate and accuse a president of impeachable offenses in the House, the most politically responsive institution of government. Ironically, whether by means of a flawed statute or a flawed interpretation thereof, this function was performed by one of today's most unaccountable institutions, the OIC.

Second, the House avoided political accountability by emphasizing that the Referral constituted a neutral determination by the independent counsel. Third, an independent counsel's sole function is to investigate possible criminal conduct—the independent counsel lacks both the authority and competence to make judgments about the broader class of political crimes to which impeachment is directed.[212] Consequently, the false concept that felonious conduct is equivalent to impeachable conduct pervaded the Clinton impeachment. As discussed further below, under the traditional interpretation of impeachable offenses, criminal conduct is neither necessary nor sufficient; in fact, the criminal law analysis confused and distracted from the impeachment

210. *See* REFERRAL, *supra* note 3, at 9 ("Although Section 595(c) does not specify when information must be submitted, its text strongly suggests that information of this type belongs in the hands of Congress as soon as the Independent Counsel determines that the information is reliable and substantially complete.").

211. *See* Jack Quinn, *Starr's Attack Flawed*, USA TODAY, July 28, 1998, at 10A (criticizing the OIC's decision to subpoena President Clinton to the grand jury) ("if Starr believes he has evidence of [an impeachable] offense, he must *now* report it to the House and not pursue the president on his own. If Starr does not have such evidence, how can he possibly justify breaking with more than 200 years of American precedent to subpoena a president for the first time ever to testify before a grand jury?") (emphasis added).

212. *See, e.g.*, O'Sullivan, *supra* note 207, at 2227.

inquiry.

Other episodes from the Clinton impeachment suggest that the independent counsel was an accomplice of impeachment proponents. For example, Mr. Starr's advocacy of impeachment, particularly during his testimony to the House Judiciary Committee, prompted OIC ethics advisor Sam Dash to resign, complaining that Mr. Starr lacked the statutory authority to opine on the political question of impeachment.[213] In addition, the OIC procured a court order to compel an interview of Monica Lewinsky by the House Managers before the Senate decided whether witnesses would be called.[214] This prompted Senator Tom Harkin to petition Presiding Officer Rehnquist to halt the meeting, arguing that the OIC and the district court were violating separation of powers by interfering with the Senate's sole power over the conduct of impeachment trials.[215] These and other concerns of the OIC interfering with impeachment, or exercising impeachment authority should be considered during the forthcoming reauthorization debate, and possibly addressed by abolishing the mandatory referral provision or by providing guidelines to encourage the OIC to avoid being a visible adversary in the high constitutional drama of presidential impeachment. To the extent Congress decides that independent counsel should investigate presidential crimes, procedures must be established to ensure that this process should not be mistaken for an impeachment inquiry.

E. Pardon Power as Sanctuary

213. Susan Schmidt & Ruth Marcus, *Starr's Ethics Adviser Quits Over Testimony*, WASH. POST, Nov. 21, 1998, at A1; *Letter of Resignation from Ethics Adviser and Starr's Letter in Response*, N.Y. TIMES, Nov. 21, 1998, at A10.

214. Peter Barker, *Judge Orders Lewinsky to Cooperate*, WASH. POST, Jan. 24, 1999, at A1.

215. Steve Twomey, *Harkin Makes His Point on Impeachment with Objections*, WASH. POST, Jan. 26, 1999, at A8. Chief Justice Rehnquist wrote back to Harkin, denying his request. *See id.* Although it may have been prudent for the House managers to await action by the Senate to arrange an interview or deposition with Monica Lewinsky, the district court did not obviously interfere with the Senate proceedings. Article III counts may not review core impeachment issues under *Nixon v. United States*, 506 U.S. 224 (1993), but these courts retain jurisdiction over many matters collateral to the impeachment authority. *See* Randall K. Miller, *The Collateral Matter Doctrine: The Justiciability of Cases Regarding the Impeachment Process*, 22 Ohio N.U. L. Rev. 777, 806 (1996).

The Lewinsky controversy also included some interesting speculation and analysis of the president's pardon authority. Once impeachment proceedings against President Clinton were underway, speculation began that the President might attempt to pardon himself, or resign and receive a pardon from Vice President Albert Gore (as did Richard Nixon, who resigned and accepted a pardon from his successor, Gerald Ford). During the House impeachment proceeding, White House counsel Charles Ruff declared that President Clinton "absolutely" would not pardon himself or accept a pardon from his successor.[216] The relationship between the pardon power and impeachment was recognized as early as the framing and ratification debates, during which James Madison opined that presidents would not likely pardon their criminal accomplices, because such conduct would be impeachable.[217]

Although the pardon power is inapplicable to cases of impeachment, and a President presumably may not pardon himself, the pardon power nevertheless could be used to create a type of presidential sanctuary. The traditional purpose of executive clemency is to "afford relief from undue harshness or a mistake in the operation or enforcement of the criminal law."[218] The pardon power, however, is not limited to these purposes. President Bush's pardon of former Secretary of Defense Caspar Weinberger and five others involved in the Iran-Contra scandal[219] suggests that the pardon authority can be used to shelter executive branch activities, even potential misconduct, when a president reasonably perceives that an independent counsel or congressional investigation is attempting to punish or otherwise stigmatize executive officers

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216. *See Impeachment Inquiry: William Jefferson Clinton, President of the United States,Presentation on Behalf of the President: Hearing Before the House Comm. on the Judiciary*, 105th Cong. 450 (1998) (Rep. Chabot (R-Ohio) asked, "[c]an you assure us that President Clinton will not pardon himself or that he will not accept a pardon from any presidential successor?," to which counsel Ruff replied, "[a]bsolutely.").

217. *See* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 497-98 (Jonathan Elliott ed., 2d ed. 1888) ("if the President be connected, in any suspicious manner, with any person, and there be grounds to believe he will shelter him, the House of Representatives can impeach him").

218. *Ex Parte* Grossman, 267 U.S. 87, 120 (1925).

219. On December 24, 1992, President Bush pardoned Weinberger along with Elliott Abrams, Alan Fiers, Clair George, Robert McFarlane, and Duane Clarridge. *See* David Johnston, *Bush Pardons 6 in Iran Affair, Aborting a Weinberger Trial*, N.Y. TIMES, Dec. 25, 1992, at A1; *see also* Bruce Fein, *Bush's Finest Hour: The Courageous Pardons of Iran-Contra*, THE RECORDER, Jan. 7, 1993, at 7.

for a political or policy dispute. In his pardon proclamation, President Bush declared the following:

> The prosecutions of the individuals I am pardoning represent what I believe is a profoundly troubling development in the political and legal climate of our country: the criminalization of policy differences. These differences should be addressed in the political arena, without the Damocles sword of criminality hanging over the heads of some of the combatants. The proper target is the President, not his subordinates; the proper forum is the voting booth, not the courtroom.[220]

President Bush added that "the common denominator of their motivation—whether their actions were right or wrong—was patriotism."[221] This interpretation of the pardon power is naturally limited. A president may pay a severe political price and may be impeached and removed if he uses the pardon power solely to conceal crimes committed by executive officers.

III. THE ROLE OF CONGRESS: INVESTIGATION, CENSURE, IMPEACHMENT

A. Sole, Unreviewable Power

Congress's impeachment authority is the principal[222] safeguard to protect the people from an individual president who would abuse the broad privileges, immunities, and other institutional advantages of the presidency. Any discussion of the impeachment authority must begin with the anomaly of Congress's unreviewable authority to make constitutional law. Notwithstanding the comments of some individuals, including Justice Souter,[223] both the form and substance of impeachment

220. Proclamation No. 6518, 57 Fed. Reg. 62,145, 62,145 (1992).

221. *Id.*

222. In addition to impeachment, the Twenty-Fifth Amendment provides mechanisms that ultimately require a supermajority in both Houses of Congress for presidential removal. *See* U.S. CONST. amend. XXV. Although originally intended to apply to a physically disabled president, the Twenty-Fifth Amendment is not limited to this scenario.

223. *See* Nixon v. United States, 506 U.S. 224, 253-54 (1993) (Souter, J., concurring):

> One can, nevertheless, envision different and unusual circumstances that might justify a more searching review of impeachment proceedings. If the Senate were to act in a manner seriously threatening the integrity of its results,

proceedings lie entirely beyond judicial review.[224] The Constitution uses a rare phrase in describing Congress's impeachment authority—"sole power."[225] Americans are accustomed to the availability of judicial review as an ultimate check on all governmental authority. The impeachment power permits Congress, anomalously, to sit in final judgment. The Senate in particular, as the only institution standing between the impeached and his accusers—the House of Representatives—at least in this context has the unreviewable power to make law and pronounce whether an impeachable offense has been committed. Commentary by legal experts and pundits regarding what Congress legally must or must not do, therefore, is simply inapplicable to the impeachment power. The impeachment provisions of the Constitution bestow substantial authority on Congress, but not an affirmative obligation to act.[226]

Even if this conclusion were unclear from the "sole power" language of the Constitution, the susceptibility of federal judges to impeachment makes the judiciary self-interested and incompetent to sit in judgment of the impeachment authority. Federal judges leave office for only three reasons—death,

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convicting, say, upon a coin toss, or upon a summary determination that an officer of the United States was simply "a bad guy," . . . judicial interference might well be appropriate. In such circumstances, the Senate's action might be so far beyond the scope of its constitutional authority, and the consequent impact on the Republic so great, as to merit a judicial response despite the prudential concerns that would ordinarily counsel silence.

224. Notwithstanding Justice Souter's comment, the Court in *Nixon* declined to review a claim by impeached U.S. District Court Judge Walter L. Nixon, Jr. that his impeachment trial procedures failed to comply with the Senate's constitutional obligation to "try" impeachment. The Court commented that "the Judiciary, and the Supreme Court in particular, were not chosen [by the Framers] to have *any* role in impeachments." *Id.* at 234 (emphasis added). *See also id.* at 233 ("[T]he parties did not offer evidence of a single word in the history of the Constitutional Convention or in contemporary commentary that even alludes to the possibility of judicial review in the context of the impeachment powers.").

225. The Constitution declares that the "House of Representatives . . . shall have the sole Power of Impeachment," U.S. CONST. art. I, § 2, cl. 5, and the "Senate shall have the sole Power to try all Impeachments," U.S. CONST. art. I, § 3, cl. 6.

226. Congress's discretion is limited only with respect to the consequence of conviction of impeachable offenses in the Senate; if this occurs, the "president . . . *shall* be removed." U.S. CONST. art. II § 4 (emphasis added). For a contrary (and minority) view, however, see Joseph Isenbergh, *Impeachment and Presidential Immunity from Judicial Process* (visited March 26, 1999) <www.law.uchicago.edu/publications>. Isenburgh argues that "the Constitution does not define impeachable offenses as 'high crimes and misdemeanors.' Rather, 'high crimes and misdemeanors' are offenses for which removal from office is mandatory upon conviction in the Senate after impeachment by the House." Isenbergh argues that Congress "may" remove a president for other crimes that are less than "high" crimes. *Id.*

resignation, and impeachment. The Senate has the final word regarding the last of these, the only constitutional mechanism by which democratic institutions can remove potentially corrupt judges who have life tenure.[227] Under our structure of government, federal judges could not have the authority to potentially insulate themselves from impeachment by restricting the definition of impeachable offenses or by requiring onerous impeachment procedures. The Constitution also expressly immunizes the impeachment power from the president's authority to pardon.[228] A president cannot save anyone, least of all himself, from the impeachment sword.[229]

B. Presidential Sanctuaries from the Impeachment Authority

Notwithstanding the Congress's plenary impeachment authority, procedural safeguards and self-imposed substantive limitations coalesce to create a presidential sanctuary from impeachment in all but extreme circumstances. Perhaps the most meaningful limitations on the impeachment power are procedural—the division of power to accuse in the House and try in the Senate,[230] and the two-thirds supermajority required in the Senate to convict.[231] To guard against the potential that the impeachment and removal process would be overwhelmed by partisanship,[232] the Framers required a supermajority for conviction and removal in the Senate—an institution that was thought to be further removed from partisan influence than was the House.

Substantive limits on the impeachment authority have been

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227. *See* U.S. CONST. art. III, § 1 (providing life tenure and salary protection to federal judges).

228. *See* U.S. CONST. art. II, § 2, cl. 1 (providing that the President shall have the power to pardon except in the case of impeachment).

229. *See* Ex parte Garland, 71 U.S. (4 Wall.) 333, 380 (1867) ("The [pardon] power . . . is unlimited, with the exception stated [for cases of impeachment].").

230. *See* U.S. CONST. art. I, § 2, cl. 5 (stating that the House shall impeach); U.S. CONST. art. I, § 3, cl. 6 (stating that the Senate shall try all impeachments).

231. *See* U.S. CONST. art. I, § 3, cl. 6 (stating that conviction in the Senate requires "concurrence of two-thirds of the members present").

232. Alexander Hamilton warned that impeachment would "agitate the passions of the whole community, and to divide it into parties more or less friendly or inimical to the accused. In many cases it will connect itself with the preexisting factions, and will enlist all their animosities, partialities, influence, and interest on one side or on the other . . . ." THE FEDERALIST NO. 65, at 396 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

self-imposed by Congress in part due to the judicial nature of the power. Congress's impeachment authority, both by design and custom, is not simply "political" as that term is colloquially used, but is, at least in the Senate, principally judicial. A single accused faces a "trial" in the Senate—Members of the House are the "prosecutors" and Members of the Senate, upon taking a special "oath" to do "impartial justice"[233] are the "judges"[234] in a proceeding in which the Senate is a "court."[235] The Senate is a political institution and its decision in matters of impeachment is a political question, but the proceedings are judicial and the Senators' oath binds them to decide based upon impartial justice, not partisan impulse or obligation. The outcome will result in a final, unreviewable interpretation of constitutional law. With impeachment, Congress does not announce generally applicable standards[236] but makes a case-by-case judgment, avoids reaching the constitutional threshold unless absolutely necessary,[237] and limits its pronouncements only to the extent necessary to discharge its constitutional obligation. "High crimes and misdemeanors" will be further defined much in the same way that vague constitutional phrases such as "due process" and "equal protection" are clarified when the U.S.

233. *See* U.S. CONST. art. I, § 3, cl. 6 ("The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation."). Chief Justice Rehnquist administered the following oath to the Members of the Senate: "Do you solemnly swear that in all things appertaining to the trial of the impeachment of William Jefferson Clinton, President of the United States, now pending, you will do impartial justice according to the Constitution and laws, so help you God?" 145 CONG. REC. S41 (daily ed. Jan 7, 1999). After taking the oath, the Members signed an "oath book." *Id. See also* SENATE MANUAL CONTAINING THE STANDING RULES, ORDERS, LAWS, AND RESOLUTIONS AFFECTING THE BUSINESS OF THE U.S. SENATE 194 § 125.2 (Comm. Print 1992).

234. *Cf.* Akhil Reed Amar, *The Big Train That Could But Might Not*, CONN. L. TRIB., Jan. 4, 1999 ("[T]he senators are not merely jurors; they are also judges (mirroring the twin roles of House members as both grand jurors and prosecutors).").

235. *See* THE FEDERALIST NO. 65, at 398 (Alexander Hamilton) (Clinton Rossiter ed. 1961). Although some referred to Senators as "jurors" during the Clinton impeachment, Senator Tom Harkin (D-Iowa) objected successfully that use of the word "juror" had an unduly narrow connotation. *See* 145 CONG. REC. S279 (daily ed. Jan. 15, 1999) (statement of Presiding Officer Rehnquist) ("[T]he objection of the Senator from Iowa is well taken, that the Senate is not simply a jury; it is a court in this case.").

236. Prior to the October 8, 1998, vote to launch an impeachment inquiry, House Democrats proposed unsuccessfully that the House first define impeachable offenses and then apply the general standard to the allegations against President Clinton. *See* Jonathan Weisman, *House Casts 258-176 Vote For Impeachment Inquiry*, BALT. SUN, Oct. 9, 1998, at A1.

237. *Cf.* Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring) (classic statement of the judicial practice to avoid constitutional questions if the case is disposable on another basis).

Supreme Court performs its more familiar function of constitutional review. Like the Court, Congress must explain its decision, and the legitimacy of its sole power ultimately depends upon persuasion.

Congress has limited its impeachment authority by following a model of constitutional interpretation perfected in judicial fora, which involves examining the text, framing and ratification, history, and precedents. By following a methodology of constitutional interpretation and prudential self restraint, Congress has applied principled limitations on a power that might have, but did not, evolved in a different direction—for example, toward a vote of confidence.[238] The question is not what Congress "must" do, as its impeachment authority is not reviewable. Rather, the traditional model of constitutional interpretation Congress has chosen imposes substantive limits to its impeachment authority and preserves the corresponding presidential sanctuaries from impeachment.

1. The "Substantiality" Requirement

A process of traditional constitutional interpretation narrows the definition of impeachable offenses otherwise imaginable from a cursory review of the constitutional text[239] and Gerald Ford's assertion of institutional power.[240] At bottom, a

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238. *Cf.* Guy Gugliotta and Juliet Eilperin, *Vote on Report Briefly Unites House*, WASH. POST., Sept. 12, 1998, at A14 (excerpts from the September 11, 1998 speech of Minority Leader Richard A. Gephardt (D-Mo.) after the OIC Referral was transmitted to the House) ("This is not a second election. This is not politics .... This is not a witch hunt.. .. This is a constitutional test.").

239. Impeachable offenses include the specific offenses of "Treason" and "Bribery" and those offenses within the open-ended residual clause "other high Crimes and Misdemeanors." U.S. CONST. art. II, § 4.

240. See 116 CONG. REC. 11,913 (1970) ("[A]n impeachable offense is whatever a majority of the House of Representatives considers [it] to be at a given moment in history; conviction results from whatever offense or offenses two-thirds of the other body considers to be sufficiently serious to require removal of the accused from office."). Representative Ford was speaking in favor of a potential impeachment of Associate Justice William O. Douglas; a later statement indicates that Ford believed that presidents were less susceptible to impeachment:

> I think it is fair to come to one conclusion, however, from our history of impeachments: a higher standard is expected of Federal judges than of any other "civil officers" of the United States. The President and Vice President, and all persons holding office at the pleasure of the President, can be thrown out of office by the voters at least every 4 years. To remove them in midterm – it has been tried only twice and never done – would indeed require crimes of the magnitude of treason and bribery. Other elective officials, such as Members of

sanctuary exists because trivial offenses are insufficient. An analysis of the text, framing, history, and structure of government demonstrates that impeachment requires "substantiality."[241] This substantiality requirement effectuates the modifier "high" in the phrase "high crimes and misdemeanors,"[242] as well as the rejection of "maladministration" as an impeachable offense.[243]

The framing of the impeachment provisions supports a substantiality requirement. Ascertaining the framers' and ratifiers' collective intent is often an elusive pursuit, and the debate on impeachment was limited and participants made ambiguous and contradictory remarks. Nevertheless, a strong argument can be made. Having created an independent presidency, the framers recognized the need for a mechanism as an alternative to "assassination"[244] to remove a president

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> the Congress, are so vulnerable to public displeasure that their removal by the complicated impeachment route has not even been tried since 1798. But nine Federal judges, including one Associate Justice of the Supreme Court, have been impeached by this House and tried by the Senate; four were acquitted; four convicted and removed from office; and one resigned during trial and the impeachment was dismissed.

Id. at 11,913-94.

241. *See* HOUSE COMM. ON THE JUDICIARY, 93D CONG., CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT, at 26 (Comm. Print 1974) (hereinafter "1974 House Watergate Report"):

> Not all presidential misconduct is sufficient to constitute grounds for impeachment. There is a further requirement—substantiality. In deciding whether this further requirement has been met, the facts must be considered as a whole in the context of the office, not in terms of separate or isolated events. Because impeachment of a President is a grave step for the nation, it is to be predicated only upon conduct seriously incompatible with either the constitutional form and principles of our government or the proper performance of constitutional duties of the presidential office.

242. U.S. CONST. art. II, § 4. Some have argued that the word "other" also suggests a substantiality requirement because it indicates that impeachable offenses are limited to offenses of the same degree of severity as "treason" and "bribery." *See Background and History of Impeachment, supra* note 171, at 224 (statement of Laurence H. Tribe, Tyler Professor of Constitutional Law, Harvard University Law School) ("The word 'other' is a dead giveaway: high crimes and misdemeanors are offenses that bear some strong resemblance to the flagship offenses listed by the framers - treason and bribery."); *id.* at 112 (statement of Robert F. Drinan, S.J., Professor, Georgetown University Law Center) ("The word 'other' . . . is most significant. It clearly implies that the high crimes and misdemeanors must be comparable to or close to or analogous to treason and bribery."). However, one can imagine scenarios in which "bribery" arguably appears trivial. To me, the word "high" is more illuminating of the framer's intent to limit the scope of impeachable offenses.

243. *See* 2 MAX FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 550 (1911) (statement of James Madison) (arguing successfully that "maladministration" should not be included as an impeachable offense because "[s]o vague a term will be equivalent to a tenure during pleasure of the Senate.").

244. *See id.* at 64-65 (statement of Benjamin Franklin) ("What was the practice before

who became a tyrant or traitor. However, the impeachment power was intended as a rare remedy for extreme circumstances. Impeachment was not "tenure during pleasure of the Senate"; rather, the power was to be used only for "treachery" or "great and dangerous offences" such as "attempts to subvert the Constitution,"[245] "betrayal [of] trust to foreign powers,"[246] or "tyranny."[247] The framers had in mind the paradigm case of a gross abuse of public power. For example, "bribery" conjured the image of the president "in foreign pay."[248] The paradigm, though not exclusive, impeachment scenario involves commission of "political crimes," that is, abuse of those powers that only a president possesses.[249] The Framers could have, but did not, provide that impeachment should lie for any crime, poor character, dishonor, scandal, or misguided policy, and the Framers did not provide Congress with a procedure to vote no confidence. By limiting impeachment to "high" misconduct, the Framers created a sanctuary from impeachment for lower-level misconduct.

Impeachment precedents further delineate the presidential sanctuary. Historically, Congress has treated its authority to impeach a sitting president as a rare and extreme remedy, to be considered only with a grave sense of solemnity, sobriety, caution, and restraint. This is a statesmanlike attitude that traditionally transcends mere politics when Congress turns serious attention to its rarely seen but mighty "sole power" to impeach a president. Members know that they will face the

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this in cases where the chief Magistrate rendered himself obnoxious? Why recourse was had to assassination in [which] he was not only deprived of his life but of the opportunity of vindicating his character. 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.").

245. *Id.* at 550 (statement of George Mason).

246. *Id.* at 66 (statement of James Madison); *see* Daniel H. Pollitt, *Essay, Sex in the Oval Office and Cover-Up Under Oath: Impeachable Offense?*, 77 N.C.L. REV. 259 (1998).

247. *See* THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 126 (Jonathan Elliot ed., 1968) (statement of James Iredell).

248. 2 FARRAND, *supra* note 243, at 68 (statement of Charles Pinckney).

249. For example, impeachment is the people's weapon necessary to reclaim constitutional power subverted or aggrandized by a president who has become a tyrant. As Justice Story wrote, "the power of impeachment is not one expected in any government to be in constant or frequent exercise. It is rather intended for occasional and extraordinary cases, where a superior power, acting for the whole people, is put into operation to protect their rights, and to rescue their liberties from violation." 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 751 (4th ed. 1873).

judgment of history and that their decisions will have unavoidable and serious impact on the institutions of government and on the Nation.[250] This is exemplified best by the acquittal of Andrew Johnson, where statesmanship prevailed over the initial partisanship.[251]

The Senate acquittal of President Andrew Johnson[252] and the House's failed attempt to impeach President John Tyler[253]

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250. Some have sought to reflect this quality of self-restraint and caution as a legal standard of proof that must be applied by members of Congress. Most observers suggest that the precedents militate in favor of a "clear and convincing" standard, *see, e.g.*, IMPEACHMENT OF RICHARD M. NIXON PRESIDENT OF THE UNITED STATES, H. REP. NO. 93-1305, at 380-81 (1974) (minority statement supporting a clear and convincing standard); *cf.* Thomas B. Riply, Memorandum, *Standard of Proof in Senate Impeachment Proceedings*, Congressional Research Service, Jan. 7, 1999 (concluding that Senators should be guided by their consciences rather than by a fixed legal standard). Clear and convincing is higher than "preponderance of the evidence," used frequently in civil litigation, and lower than the criminal law's "beyond a reasonable doubt" criteria. Whether and what standard of proof applies to impeachment is debatable. Additionally, because Congress decides both law and fact in an impeachment proceeding, presumably, Congress would apply such a standard of proof only to whether the factual allegations have been proven; legal determinations would be unbounded by technical standards.

I personally believe that, to the extent one seeks to impose a legal standard, it should be analogous to beyond a reasonable doubt. Political accountability demands that members of Congress should not be able to find refuge in a standard that would permit them to vote to impeach a president while holding reasonable doubts about the propriety of so doing. "Beyond a reasonable doubt" is necessary in criminal law because one person's liberty is at stake; the democratic rights of millions are at stake when Congress considers whether to remove their elected president.

251. For example, Senator Lyman Trumbull, a Republican who crossed party lines and voted to acquit Andrew Johnson, explained: "Once set the example of impeaching a President for what, when the excitement of the hour shall have subsided, will be regarded as insufficient causes . . . no future President will be safe who happens to differ with the majority of the House and two-thirds of the Senate . . . . I tremble for the future of my country. I cannot be an instrument to produce such a result; and at the hazard of the ties even of friendship and affection, til calmer times shall do justice to my motives, no alternative is left me." WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON 243-44 (1992).

252. Although nominally impeached for his removal of Secretary of War Edwin M. Stanton in violation of the Tenure of Office Act, Johnson's impeachment was fueled more by his leniency toward the South in opposition to the policies of the Radical Republicans. *See id.* at 244-45, 276.

253. President Tyler faced impeachment for his veto of a tariff bill in 1843. *See* Stephen W. Stathis, et al. *Congressional Resolutions on Presidential Impeachment: A Historical Overview*, Congressional Research Service, Sept. 16, 1998.

An analogous point can be made regarding the acquittal of Associate Justice Samuel Chase, whose impeachment was fueled principally by Republicans who wanted to remove a Federalist judge on the basis of philosophy; the rejection of this attempt suggests that policy differences and political views do not ordinarily rise to the level of impeachable offenses. *See generally* Keith E. Whittington, *Reconstructing the Federal Judiciary: The Chase Impeachment and the Constitution*, 9 STUD. AM. POL. DEV. 55 (1986). Any analogy to the Chase impeachment and acquittal is imperfect because, as I have argued herein, impeaching a president should be more difficult than impeaching a

implies that even a deeply felt congressional disagreement with a target's policies or political philosophies alone is not enough to justify removal.[254] The Johnson impeachment suggests another aspect of the presidential sanctuary from impeachment—that a president may refuse to comply with a statute affecting executive power that he believes is unconstitutional, at least until such statute can be tested by the judiciary.[255] Conversely, aggressive and potentially unlawful presidential conduct that failed to arouse the impeachment sword suggests the "solidity of the American presumption against impeachment."[256] The effort to impeach President Nixon, which some say exemplifies the paradigm case of abuse of power and subversion of governmental institutions,[257] is widely regarded as legitimate.

Some degree of sanctuary from impeachment also is implicit in the structure of government and provision for the

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judge or even a Supreme Court Justice.

254. *See, e.g.*, 145 CONG. REC. S293 (daily ed. Jan. 16, 1999) (statement of House Manager Canady (R-Fla.)) ("[I]mpeachment is not to be used as a political weapon to resolve differences of policy between the legislative branch and the executive branch. Impeachment is not an appropriate remedy for errors—even serious errors—in the administration of government.") (citing to the comments of James Iredell during the framing and ratification debates).

255. The Supreme Court later vindicated Johnson's violation of the Tenure in Office Act in Myers v. United States, 272 U.S. 56 (1926) (declaring the Tenure of Office Act unconstitutional).

256. *Background and History of Impeachment, supra* note 171, at 87 (statement of Carl R. Sunstein, Karl N. Llewellyn Distinguished Service Professor of Jurisprudence, University of Chicago School of Law). Examples might include Lincoln's suspension of the writ of habeas corpus, *cf. The Impeachment Trial of President Abraham Lincoln*, 40 ARIZ. L. REV. 351 (1998) (mock trial), Franklin Roosevelt's lend-lease activities, John Kennedy's sexual improprieties, Lyndon Johnson's deceptions regarding Vietnam, and Ronald Reagan's purported concealment of Boland Amendment violations in Iran-Contra.

257. Among other offenses, President Nixon manipulated the CIA and FBI to thwart the investigation of the Watergate break-in and he used the IRS, as well as a special White House group called the "plumbers," to investigate and harass the President's enemies. *See Impeachment Inquiry: William Jefferson Clinton, President of the United States,Presentation on Behalf of the President: Hearing Before the House Comm. on the Judiciary*, 105th Cong. 212 (1998) (statement of James Hamilton, Esq., Swidler, Berlin, Shereff & Friedman) (detailing President Nixon's offenses).

If, as it was alleged, President Clinton directed that FBI files be used to inflict injury on the President's political adversaries, such misuse of power over governmental agencies and gross violation of privacy rights would strengthen analogies between Presidents Clinton and Nixon. The OIC has investigated, but failed to substantiate, these allegations. Similarly, former Clinton advisor Dick Morris alleged that the administration uses government officials to function as a "secret police" to harass the President's political opponents. If proved, such conduct would also be far more analogous to the Nixon era abuse of power. *See* Jamie Dettmer, *Nixon's Spectre Hangs Over Clinton in Washington*, SCOTLAND ON SUNDAY, Sept. 11, 1998, at 20.

democratic election of the president. Impeachment does not reverse the only national election per se;[258] nevertheless, impeachment fundamentally and substantially interferes with the democratic process and ultimate sovereignty of the people. Unlike the impeachment of federal judges, who are more easily impeachable,[259] presidential impeachment removes "the only elected officer to represent the entire nation both domestically and abroad."[260] This concern is exacerbated with respect to President Clinton, who has twice been elected and is the only elected president to be impeached. His presidency has enjoyed sustained and strong public support according to opinion polls, his party achieved historic successes in the 1998 mid-term election,[261] and each critical vote during the impeachment

258. A no-confidence vote accompanies a shift of power to the other party; by contrast, following a successful American impeachment, the same party likely would retain control of the White House. In other words, former Senator Robert Dole, President Clinton's principal opponent in the 1996 presidential election, would not become president if President Clinton were removed from office.

259. The conclusion that federal judges are subject to a different and perhaps diminished standard of impeachment than are presidents is not to advocate a double standard. The framers indicated that impeaching a president is a more serious matter, as reflected, for example, by the fact that the Chief Justice must preside over any impeachment trial of a president. *See* U.S. CONST. art I, § 3 ("When the President of the United States is tried, the Chief Justice Shall preside"). (This provision also reflects concern that the Vice President should not preside over an impeachment trial that, if successful, would elevate him to the presidency.) The Constitution also states that federal judges hold their office only "during good Behavior," U.S. CONST. art. III, § 1, a standard not applicable to presidents, and one that might suggest broader oversight over judicial "behavior."

More significantly, the differences between the presidency as a unique constitutional office and federal judgeships compel a different impeachment standard: a single federal judge: (1) does not embody an entire branch of government, *see* U.S. CONST. art. II, § 1 ("The executive Power shall be vested in a President of the United States of America."); (2) is not the sole U.S. representative in military and foreign affairs; and (3) is not elected for a fixed term of years by the nation. A president, who may fail to win reelection and who holds four-year terms only, is unlike a federal judge, who has life tenure and salary protection, and whose misconduct is rectified only by impeachment. Furthermore, a judge's amenability to pre-impeachment indictment, conviction, and imprisonment creates the possibility that a successful prosecution will preempt Congress's decision. Congress easily could conclude, for example, that Judges Walter Nixon and Harry Claiborne's conduct disabled them from performing their constitutional duties because both judges were sitting in prison cells when the impeachment bar was traversed.

Nevertheless, this was a hotly debated issue during the Clinton impeachment and merits further scholarly inquiry. *See* Charles J. Cooper, *A Perjurer in the White House?: The Constitutional Case for Perjury and Obstruction of Justice as High Crimes and Misdemeanors*, 22 HARV. J.L. & PUB. POL'Y 615 (1999) (rejecting the argument that impeachment of the president requires more serious conduct than federal judges).

260. *Jones*, 117 S. Ct. at 1653 (Breyer, J., concurring).

261. *See, e.g.*, Scott Winokur, et al., *GOP Takes a Big Pie in the Face*, WASH. TIMES, Nov. 4, 1998, at A1; Dan Balz and David S. Broder, *Shaken Republicans Count Losses*,

proceedings failed to muster bipartisan support. Some of President Clinton's defenders have suggested that impeachment under these circumstances is tantamount to a political coup d'etat.[262] The gravity of such interference with the political process counsels hesitation and implies a substantiality requirement.[263]

Generalized notions of "fitness" for the presidency, as measured by strength of character and integrity, are evaluated by the people in a national election, and Congress should not invoke its impeachment authority to second-guess this higher judgement, with the exception of a president who has so destroyed his moral authority that he is functionally disabled.[264] The American system subjects presidents to public

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Debate Blame, WASH. POST, Nov. 5, 1998, at A1 ("After anticipating big gains at every level of government, Republicans appeared to have lost five House seats and broke even in the Senate on Tuesday. It was the first time since 1934 that the president's party gained seats in the House in a midterm election.").

262. *See, e.g.*, 144 CONG. REC. H11782 (daily ed. Dec. 18, 1998) (statement of Rep. Conyers (D-Mich.)). A rebuttal to this argument is that popular sovereignty is limited under our system, and Congress need not tolerate a corrupt or tyrannical president merely because he is popular. *See* 145 CONG. REC. S1715 (daily ed. Feb. 22, 1999) (statement of Sen. Enzi (R-Wyo.)) ("This isn't even a popularity contest. Popularity cannot be a defense in an impeachment trial."); 144 CONG. REC. H11865 (daily ed. Dec. 18, 1998) (statement of Rep. Packard (R-Cal.)) ("We must send a message that no one, no matter how powerful or how popular, is above the law.").

263. Raising a potentially important point concerning elections and popular sovereignty, on December 8, 1998, Yale Law Professor Bruce Ackerman told the House Judiciary Committee that the Constitution's 20th amendment prohibits a "lame duck" House from impeaching a president, and that the impeachment would have to be reaffirmed by the 106th House. *Impeachment Inquiry: William Jefferson Clinton, President of the United States,Presentation on Behalf of the President: Hearing Before the House Comm. on the Judiciary*, 105th Cong. 37 (1998) (statement of Bruce Ackerman, Sterling Professor of Law and Political Science, Yale University). Others have expressed a contrary view. *See* Laurence H. Tribe, *If Only Prof. Ackerman's Theory Were Right!*, NAT'L L.J., Jan. 4, 1999, at A24; Elizabeth B. Bazan, Memorandum, *Continuation of an Impeachment Proceeding or an Impeachment Investigation from One Congress to the Next Congress*, Congressional Research Service, Oct. 7, 1998. The 106th House effectively rejected Professor Ackerman's theory when it reauthorized the impeachment Managers. *See* 145 CONG. REC. H211 (daily ed. Jan. 6, 1999).

264. For example, some supported impeachment in part because the President's actions damaged the moral legitimacy necessary to exercise his duties, particularly as to the President's role as commander-in-chief. *See, e.g.*, Jonathan Turley, *A Little Bit Impeached: What If President Clinton Is Under a Cloud For the Next Two Years?*, LEGAL TIMES, Sept. 7, 1998, at 25 (citing public speculation that a United States bombing mission in Afghanistan was motivated in part by "personal, opportunistic reasons"). However, the substantiality threshold of impeachment likely demands that a president be disabled from performing his constitutional duties, not merely weakened.

Additionally, members of Congress should have considered whether the President mitigated harm to the institution, his likelihood of rehabilitation, and the public's view of such factors. Some suggested that President Clinton's expressions of remorse, for example, are irrelevant as to whether or not he committed impeachable offenses. However, contrition may be relevant as to whether misconduct not obviously

evaluation of generalized fitness on one or two occasions in national elections rather than a continuing assessment found in many parliamentary systems. As Senator Rick Santorum (R-Pa.) commented, "I think someone who lies under oath is unfit morally to serve, but that doesn't mean that that rises to the level of conviction for impeachment. You know, those are two different issues, as far as I'm concerned, but there's no question, someone who does not tell the truth, someone who obstructs justice I think has a real problem leading this country."[265]

2. *Public Power Versus Essentially Private Conduct*

President Clinton's initial argument that impeachable offenses may emanate only from the exercise of public power, as in the paradigm case of political crimes, was flawed. The President's counsel argued that "[h]olders of public office should not be impeached for conduct (even criminal conduct) that is essentially private."[266] The argument suggests that the paradigmatic case for impeachment is the only case.[267] Ironically, the Supreme Court in *Jones* distinguished between the public and private president: "With respect to acts taken in his 'public character'—that is official acts—the President may be disciplined principally by impeachment, not by private lawsuits for damages. But he is otherwise subject to the laws

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impeachable has disabled his presidency. Contrition might mitigate potential harm to the institution. Contrition also enables one to distinguish a repentant wrongdoer from a wrongdoer who shows no remorse or, worse, displays arrogant defiance.

265. *Meet The Press: Senators Barbara Boxer, John Chafee, Mike Dewine, Dianne Feinstein, Rick Santorum and Charles Schumer Discuss President Clinton's Impeachment Trial* (NBC television broadcast, Jan. 10, 1999) (transcript on file with the *Harvard Journal of Law & Public Policy*).

266. Submission by Counsel for President Clinton to the Committee on the Judiciary of the United States House of Representatives at 28, Dec. 8., 1998. *See also Kendall: Report "Intended to Humiliate . . . and . . . Damage"*, WASH. POST, Sept. 12, 1998, at A11:

> A man tried to keep an inappropriate relationship private. The president has acknowledged his personal wrongdoing and sought forgiveness from his family, Ms. Lewinsky, the Cabinet, the Congress and the country. In light of that acknowledgment, the salacious allegations in this referral are simply intended to humiliate, embarrass and politically damage the president. In short, this is personal and not impeachable.

267. Some supporters of the view that impeachment must relate to official duties rely on an earlier version of the Constitution's impeachment clause that limited impeachment to treason, bribery, or high crimes and misdemeanors "against the United States"; the Committee of Style subsequently deleted the phrase "against the United States," presumably for nonsubstantive reasons. 2 FARRAND, *supra* note 243, at 575, 600.

for his purely private acts."[268] The argument continues that failing to distinguish between the public and private president may result in Congress, via the impeachment process, assuming the legal function of adjudicating criminal and civil claims of essentially private acts.[269] The primary precedent related to this issue—the failure to pursue impeachment against President Nixon for tax fraud—offers some support for the President's position, but the episode arguably is distinguishable and does not firmly resolve the issue.[270]

As an initial matter, perjury, obstruction of justice, or any other criminal act is per se wrongdoing against society—the offense inflicts a public injury. Furthermore, even to the extent that the President defined "private" as conduct not arising from the exercise of public power, many agree that such "private" conduct that is sufficiently grave, such as murder or molestation, may well cause a sustained public injury—for

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268. *Jones*, 117 S. Ct. at 1645. *See* Connaughton, *supra* note 52, at 25 (suggesting that this passage implies that presidents may only be impeached for "official" misconduct).

269. The reason that it has not yet been proven that President Clinton in fact has broken the law is that such determinations can only be made by a citizen jury empaneled in a criminal trial.

270. The Watergate House Judiciary Committee rejected this proposed article of impeachment (26-12), with some members of the Committee arguing that tax fraud does not rise to the level of impeachment, some members arguing that the allegation lacked sufficient evidence, and still other members not clearly expressing a reason for their vote. *See* HOUSE COMM. ON THE JUDICIARY, 105th CONG., 2D. SESS., IMPEACHMENT—SELECTED MATERIALS 240, 242-43 (Comm. Print 1998). This decision not to report a tax fraud article does not necessarily support the public versus private conduct distinction, but simply may reflect the "substantiality requirement," a standard coined by the Watergate committee.

Impeachment precedents unrelated to the presidency are of uncertain relevance since the president is likely governed by a different impeachment standard. Therefore, the impeachment of Judge Claiborne for tax fraud or the impeachment of Judge Nixon for perjury (cited by some impeachment proponents), and the failure to impeach Treasury Secretary Alexander Hamilton for paying hush money to conceal an adulterous affair (cited by some impeachment opponents) fail to resolve this issue of the exercise of public power versus essentially private conduct. *See Background and History of Impeachment*, *supra* note 171, at 205-06 (statement of Daniel H. Pollitt, Graham Kenan Professor of Law Emeritus, University of North Carolina School of Law) (describing then-Treasury Secretary Alexander Hamilton's payment of hush money to James Reynolds in order to conceal an affair between Hamilton and Reynolds' wife; a congressional investigating committee declined to pursue the matter, concluding that it was private not public).

Relevance aside, the House impeachment managers argue credibly that the Hamilton example of private concealment of an affair, but subsequent admission to the same when asked by Congress, illustrates the dividing line between public and private conduct and bolsters their position that the Clinton impeachment was triggered not by private acts but by potentially felonious acts. *See* Reply of the U.S. House of Representatives at 7, *In re* Impeachment of President William Jefferson Clinton, (1999).

example, a politically disabled president unable to discharge his duties. Although impeachment requires a substantial public injury, such injury could be caused either by public or private conduct. When Alexander Hamilton described impeachable offenses as "political" he was referring not to politics but rather to the nature of impeachable offenses which "relate chiefly to injuries done to . . . society itself."[271] The impeachment issue focuses on the magnitude of the wrongdoing and whether it has caused a substantial, continuing public injury.

3. *Analogies to the Criminal Law*

Although much of the impeachment debate centered on whether President Clinton committed certain crimes,[272] this inquiry distracted the debate since criminal violations are neither necessary nor sufficient for impeachment.[273] For the same reason, the bootstrap arguments that depend only on whether President Clinton's conduct breaches the criminal code fail to address the impeachment issue. For example, House Managers argued that (1) President Clinton's conduct violates his "take care" duty[274] and oath to preserve, protect, and defend the Constitution[275]; and (2) other citizens have been prosecuted

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

272. President Clinton is accused of perjury, *see* 18 U.S.C. § 1621 (1994) ("Whoever having taken an oath . . . in any case in which a law of the United States authorizes an oath to be administered" and "willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true . . . is guilty of perjury . . . ."); subornation of perjury, *see* 18 U.S.C. § 1622 (1994) ("Whoever procures another to commit any perjury is guilty of subornation of perjury . . . ."); and obstruction of justice, *see* 18 U.S.C. § 1512 (1994).

273. *See, e.g.*, O'Sullivan, *supra* note 207, at 2216-17 n. 100 (collecting modern commentary).

274. U.S. CONST. art. II, § 3 (stating that President "shall take Care that the Laws be faithfully executed").

275. U.S. CONST. art. II, § 1, cl. 8 ("Before he enter on the Execution of his Office, [the President] shall take the following Oath or Affirmation: —'I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.'").

The President's oath and take care duties were emphasized during the impeachment debate. *See Impeachment Inquiry: William Jefferson Clinton, President of the United States: Presentations By Investigative Counsel Before the House Comm. on the Judiciary*, 105th Cong. 99 (1998) (statement of David P. Schippers, Chief Investigative Counsel) ("The [*Jones*] case was not brought against just any citizen though, it was brought against the President of the United States who was under a legal and moral obligation to protect and preserve Ms. Jones' rights.").

and jailed for similar offenses,[276] and not impeaching President Clinton for such conduct would at least give the impression that presidents are above the law, and may have a ripple effect by suggesting to other witnesses that lying under oath is excusable. However, similar arguments could be made for any criminal offense, implying that criminal conduct automatically triggers impeachment.

The failure to distinguish between criminal and impeachable offenses contributed to some frustration during the impeachment debate. President Clinton's defensive "legalisms"—for example, that the President was able to testify deceptively without technically committing the crime of perjury due to vague definitions of "sexual relations" and the failure of Paula Jones' counsel to ask clarifying, follow-up questions[277]—although viable in a criminal prosecution and justified to prevent abusive prosecution, are not persuasive in an impeachment inquiry where culpability is measured in a more fundamental and non-technical sense.[278] Conversely, the subject matter of the alleged perjury—sex between consenting adults—while irrelevant to whether the technical crime of perjury has been committed, might well be relevant to gauging the substantiality of the misconduct, which is central to the impeachment inquiry.[279] The debate suggested that a crime is a

276. *See The Consequences of Perjury and Related Crimes: Hearing Before the House Comm. on the Judiciary*, 105th Cong. 6-9 (statements of Barbara Battalino and Pam Parsons, who were prosecuted for civil perjury arising from testimony about sex).

277. *See* PRELIMINARY MEMORANDUM, *supra* note 72, at 4 ("The President has admitted he had an improper sexual relationship with Ms. Lewinsky. In a civil deposition, he gave narrow answers to ambiguous questions. As a matter of law, those answers could not give rise to a criminal charge of perjury.").

278. The President's defenders advanced other, more specious legal arguments. For example, Rep. Bobby Scott actually argued that the individual who swore in President Clinton before the grand jury was a notary public and not the grand jury foreperson and, therefore, she lacked the authority to bind President Clinton to the oath under Rule 6(e) of the Federal Rules of Criminal Procedure. *See Impeachment Inquiry: William Jefferson Clinton, President of the United States, Consideration of Articles of Impeachment: Hearing Before the House Comm. on the Judiciary*, 105th Cong. 243 (1998) (statement of Rep. Scott (D-Va.)). In addition, the President's defenders raised many attack-the-prosecutor arguments. For example, on November 19, 1998, the President's lawyers and supporter's spent hours criticizing Independent Counsel Kenneth Starr and the OIC's investigation, raising points having nothing to do with whether President Clinton should be impeached. Such tactics reinforced the impression that the President would use any available argument to avoid accountability.

279. *Cf.* Connaughton, *supra* note 52, at 25 (suggesting that Congress is ill-equipped to measure perjury in the technical sense of determining whether a sworn statement was false, deliberate, and material.)

prerequisite to an impeachable offense, as if these thresholds lie on a continuum. As indicated above, this misconception is at least in part attributable to the House's deference to a mandatory impeachment referral created by an institution—the independent counsel—that is charged with investigating and prosecuting crimes, not defining impeachable offenses. It trivializes impeachment to suggest that commission of any act that can be prosecuted is a surrogate for an impeachable offense.[280]

Moreover, the supposed truism chanted repeatedly throughout the impeachment debate—that the purpose of impeachment is not to punish but to protect the republic[281]—is not entirely true. Although the principal purpose of impeachment is to halt further injury to the polity, contrary to conventional wisdom, punishment is a secondary purpose, or at least an incidental effect or collateral consequence of, the impeachment power. The fact that an impeached official is still susceptible to punishment by criminal prosecution does not mean that impeachment does not punish. Impeachment is a quasi-judicial power that, if exercised, stigmatizes and strips of office an individual who has committed grave wrongs. To impeach and remove is "to doom to . . . infamy"[282] and "sentenc[e] to a perpetual ostracism from the esteem and confidence and honors and emoluments of his country."[283] Upon removal, the Senate may also disqualify the impeached from future office,[284] an undoubted punishment, yet excepted from the prohibition on legislative punishment.[285] In addition

280. Professor O'Sullivan was right—the improper interplay between the independent counsel and the impeachment process ensures that public and congressional impeachment debates would be "dominated by questions of technical criminality." O'Sullivan, *supra* note 207, at 2261.

281. *See, e.g.*, 144 CONG. REC. H11813 (daily ed. Dec. 18, 1998) (statement of Rep. Obey (D-Wis.)) (stating that impeachment is "to protect the country from irreparable harm, not to punish the President .... [T]he proper institution to punish the President if he violated the law is the court system, a legal institution, not the Congress, a political institution.").

282. THE FEDERALIST NO. 65, at 398 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

283. *Id.* at 399.

284. *See* U.S. CONST. art. I, § 3, cl. 7. ("Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States ....").

285. *See* U.S. CONST. art. I, § 9, cl. 3 (stating that Congress may not pass a bill of attainder).

to punishment, members of Congress also invoked other traditional purposes of criminal law, such as deterring future unlawful conduct, when debating impeachment.[286]

Because punishment is at least a collateral effect of impeachment, the impeachment process should and does include some of the basic safeguards for the accused that are observed in a criminal process such as fairness, due process, presumption of innocence, and proportionality. The criminal law doctrine of proportionality[287] is another factor that counsels Congress to consider impeachment precedents in limiting the impeachment authority. These safeguards bolster the president's sanctuary from impeachment. If impeachment and removal truly were pure political processes, there would be no need to afford the president notice or an opportunity to defend. Procedural safeguards provided the accused by Congress, which follow principles of due process, is another safeguard Congress imposes on itself to limit its impeachment authority.

4. The Rule of Law

Some impeachment supporters argued that the "rule of law" compelled President Clinton's impeachment because allowing a misbehaving president to escape impeachment would signal hypocrisy to the citizenry, particularly children, and make it difficult to enforce laws and require truth-telling upon which the rule of law itself is based. However, this articulation, without more, was overly-wooden and otherwise flawed. Proponents of this view, ironically, quoted Justice Brandeis's famous statement:

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286. *See, e.g.*, 144 CONG. REC. H10022 (daily ed. Oct. 8, 1998) (statement of Rep. Barr (R-Ga.)) ("We will be sending a message to this and all future Presidents that if, in fact, the evidence establishes that you or any future President have committed perjury, obstruction of justice, subversion of our judicial system, that we will be saying, no, sir, Mr. President, these things you cannot do.").

287. *See, e.g.*, A.C. Ewing, *A Study of Punishment II: Punishment as Viewed by the Philosopher*, 21 CANADIAN B. REV. 102, 115 (1943) ("To punish a lesser crime more severely than a greater would be either to suggest to men's minds that the former was worse when it was not, or, if they could not accept this, to bring the penal law in some degree into discredit or ridicule"); H.L.A. HART, LAW, LIBERTY AND MORALITY 36 (1963) ("[L]egal gradation of the seriousness of crimes, expressed in its scale of punishments," should not "conflict with common estimates of their comparative wickedness."); Solem v. Helm, 463 U.S. 277, 284-86 (1983) (embracing the concept of proportionality in the context of interpreting the Eighth Amendment's prohibition on cruel and unusual punishment).

> In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously . . . . For good or for ill, it teaches the whole people by its example . . . . If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.[288]

However, the rule of law mandates that important public objectives, such as punishing criminal offenses and ensuring truth-telling under oath, must yield under certain circumstances to equally legitimate yet competing public interests. Notably, Justice Brandeis's famous articulation appears in his dissenting opinion in which he opposed a criminal prosecution, not because punishing criminal conduct was not an important public objective, but because this interest was outweighed in that case by the constitutional protection against self-incrimination. The jurisprudence of constitutional criminal procedure demonstrates that protecting certain Fourth, Fifth, and Sixth Amendment rights means that guilty and morally culpable individuals will sometimes avoid judgment and punishment. The "rule of law" is not machine-like; it is applied with discretion and in consideration of context, subject matter, and competing interests.[289]

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288. Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting). *See Impeachment Inquiry: William Jefferson Clinton, President of the United States, Consideration of Articles of Impeachment: Hearing Before the House Comm. on the Judiciary*, 105th Cong. 91-92 (1998) (statement of Rep. Goodlatte (R-Va.)) (referring to Justice Brandeis); *see also Background and History of Impeachment, supra* note 171, at 275-76 (statement of Jonathon Turley, Shapiro Professor of Public Interest Law, George Washington University School of Law) (quoting Brandeis and arguing "[w]hen there is compelling evidence of criminal acts in the Chief Executive, an entire system of laws is undermined and demands some form [of] corrective action.").

289. Additionally, immunity is a legal concept that arises in various forms and in diverse circumstances to limit avenues to fully or immediately redress alleged wrongdoing. Examples arise from circumstances beyond immunity for prosecutors, legislators, judges, foreign diplomats, and members of the armed services discussed earlier. *See* note 38-39 and accompanying text, *supra*. For example, cases arising under the Indian Gaming Regulatory Act ("IGRA") acknowledge that violations of federal rights will sometimes go unremedied because of competing considerations regarding sovereign immunity. *See, e.g.*, Seminole Tribe v. Florida, 517 U.S. 44 (1996) (invalidating the IGRA provision allowing tribes to sue states on sovereign immunity grounds); Kickapoo Tribe of Indians v. Babbitt, 43 F.3d 1491 (D.C. Cir. 1995) (holding that that tribes cannot sue their trustee, the Secretary of the Interior, because such action would have to join the compacting state as an indispensable party, which is impossible unless sovereign immunity is waived). Government contracting cases impose limitations on the ability of injured plaintiffs to obtain tort remedies. *See, e.g.*, Bushman v. Seiler, 755

The rule of law itself creates the privileges, immunities, and other sanctuaries necessary to protect the independence and functionality of the presidency. This body of separation of powers law indicates that presidents should not be impeached even when there is evidence of felonious misconduct, unless such misconduct is so grave so as to be called a high crime and misdemeanor. During the Senate trial, House Managers often invoked principles of equality,[290] but failed to acknowledge that the law sometimes treats similar conduct differently.[291] Some impeachment proponents conceded that President Clinton's conduct did not pose a substantial threat to the system of government, but rather they alleged impeachment is justified because false testimony by the nation's chief law enforcement officer disrespects the rule of law and sets a horrible example.[292] Accepting this argument, however, would repudiate any notion of immunity, an arguably more fundamental pillar underlying the rule of law than are prohibitions on perjury.

F.2d 653 (8th Cir. 1985) (conferring qualified immunity on employees of Medicare carriers). Of course, in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), the Court held that even if President Nixon violated an individual's constitutional rights, the individual may never sue for redress of such injuries because of the presidential immunity that is, in this case, absolute and permanent. "It never has been denied that absolute immunity may impose a regrettable cost on individuals whose rights have been violated. But . . . it is not true that our jurisprudence ordinarily supplies a remedy in civil damages for every legal wrong." *Id.* at 754 n. 37.

290. *See, e.g.*, 145 Cong. Rec. S285 (daily ed. Jan. 16, 1999) (statement of House Manager Buyer (R-Ind.)) ("[T]he weak are equally entitled as the strong to equal justice under the law.").

291. For example, a libelous statement would subject an "ordinary citizen" to civil liability, but the same statement uttered by a member of Congress during floor debate would not lead to liability because the member is sheltered from civil suit by the Constitution's Speech and Debate provision. *See* Chastain v. Sundquist, 833 F.2d 311 (D.C. Cir. 1987) (permitting a defamation suit against a member of Congress only after determining that the allegedly defamatory statement occurred outside the constitutional zone of speech and debate immunity).

Although the impeachment managers claimed that impeachment was justified because President Clinton's misconduct impeded Paula Jones' vindication of her constitutional and other legal rights, *see* Trial Mem. of the U.S. House of Representatives at 57, *In re* Impeachment of President William Jefferson Clinton, (1999), the argument could have, but did not attempt to, distinguish the Supreme Court's holding in *Fitzgerald* that presidential immunity absolutely and permanently outweighed Mr. Fitzgerald's right to vindicate his constitutional rights.

292. *See, e.g.*, 144 CONG. REC. H11800 (daily ed. Dec. 18, 1998) (statement of Rep. Canady (R-Fla.)) ("The question is not whether the President has destroyed our system of government. We know that that has not happened. That is obvious. The question is whether by his conduct he has undermined the integrity of the law; whether by his conduct he has undermined the integrity of the high office that has been entrusted to him; whether he has subverted the rule of law; whether he has acted to set an example which is harmful to our system of government.").

5. Balancing Competing Interests

To the extent that Congress sought to follow a methodology of traditional constitutional interpretation, it was inappropriate to invoke formalistically the public justification for perjury statutes, the sacredness of oath-taking or truth-telling,[293] or generalized concepts of the rule of law as silver bullets to suggest that impeachment was inevitable.[294] A constitutional analysis of impeachment should be more nuanced, requiring members of Congress to balance these considerations against other aspects of the rule of law such as immunity, proportionality, presidential independence and functionality, and popular sovereignty in America's only national election. Balancing these considerations should also be informed by Congress's traditional grave reluctance to approach impeachment short of egregious circumstances. The analysis must balance the institutional needs of the presidency and not, as was suggested by some, the needs of the Clinton Presidency.[295]

Stated differently, the members should have weighed whether the public harm of diminishing the independence of the presidency outweighs the public benefit of removing from office an individual whose scandalous and possibly unlawful conduct has diminished his fitness to serve. Applying a method of traditional constitutional analysis, the members were able to discern a standard—impeachment requires either a substantial subversion of government or "private" misconduct that is so egregious that it substantially destroys a president's continued

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293. *See* 144 CONG. REC. H11843 (daily ed. Dec. 18, 1998) (statement of Rep. Cannon (R-Utah)) ("When oaths cease to be sacred, our dearest and most valuable rights become insecure.") (quoting John Jay).

294. The rule of law is more complicated than that suggested by some impeachment proponents. Most important constitutional questions involve balancing equally legitimate rights and interests.

295. *See* 145 CONG. REC. S940 (daily ed. Jan. 23, 1999) (statement of House Manager Rogan (R-Cal.)):

> Yes, reasonable minds can differ on this case as to whether the President should be removed office. But reasonable minds can only differ if those reasonable minds come to the conclusion that enforcement of the sexual harassment laws in this country are less important than the preservation of this man in the office of the Presidency. And that is the ultimate question that this body is going to have to answer. What is more important—the survival of Bill Clinton's Presidency in the face of perjury and obstruction of justice, or the protection of the sexual harassment laws in this country?

ability to discharge his official duties. Impeachment is the ultimate weapon of last resort for an out of control president whose egregious conduct has caused and continues to cause substantial harm to the republic. This is an extraordinarily high threshold.

This is not to suggest that the resolution of such an inquiry is simple or obvious. Members of Congress were confronted with novel scenarios that presented multiple "smoking guns" to indicate, at a minimum, deception to the public and false testimony under oath.[296] All agreed that President Clinton's misconduct—both his underlying liaison with Monica Lewinsky[297] and his subsequent deception to conceal the same—was blameworthy. One needed to look no further than the consistent condemnation of his conduct by congressional

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296. The obstruction of justice impeachment article was strong but merely circumstantial; by contrast, President Clinton's own words make clear that he provided both deceptive and false testimony in the civil deposition. Although he later defended the truthfulness of the deposition testimony before the federal grand jury, the House's rejection of the impeachment article regarding the deposition made it difficult for the House Managers to simply incorporate the deposition testimony into the grand jury testimony. Moreover, the grand jury testimony included the President's admission of an inappropriate physical relationship with Ms. Lewinsky, diminishing the essential (albeit not technical) culpability of the conduct.

The House rejected the impeachment article regarding the deposition at least in part because the false testimony there probably was not "material," a technical requirement for the crime of perjury. However, as noted, technical criminality is not a requisite for impeachment. The House could have impeached President Clinton for the deposition testimony regardless of its perjurious nature as a technical matter and, in fact, such an article would have been more difficult for the President's counsel to try before the Senate. Indeed, the House even could have impeached President Clinton for his adamant and prolonged public deception begun by the so-called "wagging finger" address to the nation of January 26, 1998, when he denied with conviction having "sexual relations with that woman—Ms. Lewinsky." *See* John F. Harris and Dan Balz, *Clinton More Forcefully Denies Having Had Affair or Urging Lies*, WASH. POST, Jan. 27, 1998, at A1. This conduct arguably constituted the paradigmatic violation of the public trust more so than did the grand jury testimony.

297. Impeachment proponents often emphasized that impeachment has nothing to do with sex and everything to do with potential perjury and obstruction of justice. *See, e.g.*, 144 CONG. REC. H11776 (daily ed. Dec. 18, 1998) (statement of Rep. Hyde (R-Ill.)) ("It is not a question of sex. Sexual misconduct and adultery are private acts and are none of Congress's business. It is not even a question of lying about sex. The matter before the House is a question of lying under oath."). However, some were, in reality, at least equally troubled by the underlying conduct itself and its reflection on the President's judgment, character, and ultimate fitness to serve. Pragmatically, the decision to engage in such a relationship at a time when the President knew that he was a defendant in a sexual harassment suit (and on notice that he likely would be required to testify about his sex life) was inexcusably reckless. From a more fundamental perspective, the details of the President's adulterous sex acts with a subordinate half his age (comparable in age to the President's daughter), within the sanctum of the Oval Office, constitutes a level of immorality intolerable, and consequently dispositive, to some.

Democrats opposed to impeachment.[298] Strong arguments were made in favor of impeachment, such as the argument that President Clinton's criminal conduct undermined the integrity of the judicial process. That a president might engage in potential crimes yet avoid impeachment and removal may be a defensible constitutional analysis, but was, at least until now, entirely theoretical and untested. As House Manager Lindsey Graham stated, "reasonable people can disagree on what we should do," adding that the Senate should also "consider what is best for this Nation" in addition to determining whether President Clinton committed impeachable offenses.[299] Ultimately, however, because the traditional impeachment bar is so high, impeachment proponents effectively advocated for a transformation of the impeachment authority. Congress's sole power of impeachment implies the potential for Congress to shape and transform the traditional impeachment standard. Congress has the authority to conclude that documented false testimony for the purpose of concealing personal misconduct is impeachable. This decision would not be a coup d'etat but rather a transformation of the impeachment power, moving it on the continuum away from the safety valve for an extreme political crime and closer to a vote of no confidence.

An extraordinary use, or transformation, of the impeachment authority might be justified as a response to a presidency that has become dangerously strong, overshadowing the other branches of government. For example, the Clinton impeachment arguably may have reflected a reassertion of

298. Congressman Robert Wexler (D-Fla.) passionately stated the following:

> [I]f the question before this committee were about the morality of the president's actions, there would be no debate. The president's conduct was wrong. He did lie to the American people. In fact for those of us who believe in this president, who are committed to his policies . . . the president's relationship with Monica Lewinsky was more than wrong, it was heart breaking. How could he have been so foolish? How could he have done such a reckless thing? There are no good answers. But I believe in my heart that morality is a complex equation, that good people sometimes do bad things, that moral people sometimes commit immoral acts. And when I look at the totality of this case, I am left with one undeniable conclusion, the president betrayed his wife. He did not betray his country.

Impeachment Inquiry: William Jefferson Clinton, President of the United States, Consideration of Articles of Impeachment: Hearing Before the House Comm. on the Judiciary, 105th Cong. 148-49 (1998) (statement of Rep. Wexler (D-Fla.)). *See also* 144 CONG. REC. S9923 (daily ed. Sept. 3, 1998) (statement of Sen. Lieberman (D-Conn.)) (becoming the first congressional Democrat to call President Clinton's conduct "immoral").

299. 145 CONG. REC. S937-38 (statement of House Manager Graham (R-S.C.)).

institutional authority to counterbalance the transfer of power to the presidency, particularly from the beginning of the New Deal to the end of the Cold War. The modern presidency, however, has not transformed presidents into tyrants. To the contrary, since 1960, only one President has served two complete terms of office—three others were voted out of office, one president resigned in disgrace, and one president was assassinated.[300] Transformation of the impeachment authority is a threat to constitutional order to the extent it merely was another weapon in a cultural struggle[301] or "the politics of personal destruction."[302] Although ideological struggles define the core of American politics, they should not be permitted to alter the structure of government even if motivated by laudible ideological pusuits.[303] The constitutional amendment process,

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300. *See, e.g., Impeachment Inquiry: William Jefferson Clinton, President of the United States, Consideration of Articles of Impeachment: Hearing Before the House Comm. on the Judiciary*, 105th Cong. 145-46 (1998) (statement of Rep. Jenkins (R-Tenn.)). *See also* Jeremy Paul, *Clinton Impeachment Makes the Case for Repeal of the 22nd Amendment—Really*, LEGAL TIMES, Feb. 22, 1999, at 27 (arguing that the Twenty-Second amendment limiting presidents to two terms has unduly impaired presidential power, noting that Presidents Nixon, Reagan, and Clinton attained second terms only to have them "dominated by scandal, congressional investigation into presidential propriety, and a corresponding breakdown in the federal government's ability to work effectively . . . .")

301. *See, e.g.*, Bob Davis and Jackie Calms, *Clinton's Shot at Doom or Redemption Hangs on History's Pendulum*, WALL ST. J., Jan 7, 1999, at A1; *The Geraldo Rivera Show: Geraldo Rivera and G. Gordon Liddy Debate Decision to Impeach Was Another Battle In Cultural War By Congressional Conservatives Against Liberal Baby Boomers* (CBS television broadcast, Dec. 22, 1998) (transcript on file with the *Harvard Journal of Law & Public Policy*); Michael Powell, *The '60s Culture Clash Underlies a New Crisis*, WASH. POST, Dec. 19, 1998, at C1.

President Clinton's adulterous sex acts with Monica Lewinsky were seen as reinforcing his identification of the moral relativism of the 1960s and his support for abortion and homosexual rights, and his impeachment was seen as a way to defend the country against a decline in cultural values. However, once a president's morality or positions on social policy become an acceptable basis for impeachment, we will have created a parliamentary system.

302. Also known as political cannibalism or partisan bloodsport, the politics of personal destruction were blamed by some for President Clinton's impeachment. *See, e.g.*, Richard Lacayo, *Washington Burning*, TIME, Jan. 4, 1999, at 66 ("Clinton's impeachment is the latest episode in the intensification of congressional partisanship that dates back at least to the Democrat-controlled Senate's 1987 rejection of Robert Bork for the Supreme Court. It includes the scuttling of George Bush's nomination of John Tower to become Defense Secretary amid rumors about his drinking and behavior toward women, as well as the fight over Clarence Thomas, the ouster of House Speaker Jim Wright on ethics charges and the fight that Newt Gingrich led over the misuse of the House bank. Congress is now involved in an endless cycle of payback that makes the warring House of Atreus seem like just one more placid Greek family.").

303. *See* 144 CONG. REC. H11785 (daily ed. Dec. 18, 1998) (statement of Rep. Schumer, (D-N.Y.)):

> What began 25 years ago with Watergate as a solemn and necessary process to force a President to adhere to the rule of law has grown beyond our control so

although cumbersome, ensures that fundamental governmental change is broadly supported with the state governments participating.

In the final analysis, absent a transformation of the impeachment authority, impeachment for President Clinton was not justified. The Constitution's impeachment clause applies to "high" crimes, not "any" crime, immorality, or poor character. Judgments as to these latter matters are assessed by the people in quadrennial national elections. The "rule of law" dictates that either a remedy or a punishment for wrongdoing must give way to competing legal values in many circumstances. In this circumstance, the sanctuaries necessary for the independence and functionality of the presidency provide a temporary immunity for the type of criminal conduct President Clinton allegedly committed. Deterrence of such conduct should be left to a president's post-tenure amenability to prosecution and a president's concern with his place in history.

C. Impeachment "Alternatives": Censure

Recognizing that President Clinton's conduct did not traverse the impeachment bar, many members of Congress considered alternatives to impeachment and removal. These alternatives included favoring impeachment with the hope and expectation that the Senate would acquit; a declaration that the President committed impeachable offenses, but declining either to impeach or remove; and various vehicles to express Congress's condemnation of the President's conduct, including a sense of Congress resolution, reprimand, unicameral censure,

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that now we are routinely using criminal accusations and scandal to win the political battles and ideological differences we cannot settle at the ballot box. It has been used with reckless abandon by both parties, Democrats and Republicans, and we are now at a point where we risk, deeply risk, wounding the Nation we all love. We cannot disagree, it seems; we cannot forcefully advocate for our positions, without trying to criminalize or at least dishonor our adversaries over matters having nothing to do with public trust. And it is hurting our country, it is marginalizing and polarizing this Congress. I want to be clear. I am not pointing fingers at Republicans . . . . The ledger between the two parties is pretty much even . . . . I expect history will show that we have lowered the bar on impeachment so much we have broken the seal on this extreme penalty so cavalierly that it will be used as a routine tool to fight political battles. My fear is that when a Republican wins the White House Democrats will demand payback.

bicameral censure, censure legislation requiring presentment to the president for his signature, veto, or pocket veto, and findings of fact.[304] Some censure proposals merely condemned the President's conduct, while other proposals added to the statement of condemnation a fine or a requirement that the President must agree to refuse a pardon. Censure, possibly accompanied by a fine[305] or an agreement not to accept a pardon,[306] was popular among many as an intermediate option between doing nothing—impliedly condoning, forgiving, or ignoring disgraceful conduct—and the extreme remedy of impeachment.[307] The outer boundaries of the presidential sanctuary from impeachment save egregious circumstances envision obnoxious and possibly felonious presidential acts that are not impeachable, but arguably compel congressional rebuke.

Although popular from the beginning, these alternatives to

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304. During the Senate trial, Senators Pete V. Domenici (R-N.M.), Olympia J. Snowe (R-Me.), and Susan Collins (R-Me.) proposed that the Senate vote on "findings of fact," declaring that President Clinton engaged in certain misconduct such as providing false testimony. *See* Eric Pianin & Guy Gugliotta, *Senate's Fiercest Partisan Battle Possible Over "Findings of Fact"*, WASH. POST, Feb. 4, 1999, at A7. The findings of fact vote would precede a final vote of guilty/not guilty. The proposal failed to gain support.

305. Some supporters of a censure with a fine approach analogize to the January 21, 1997, reprimand and fine of $300,000 of House Speaker Newt Gingrich (R-Ga.). Speaker Gingrich was accused of providing false information to the House Ethics Committee investigating charges of a financial link between his college course and political action committee, thereby allowing the Speaker to use a tax-exempt institution to advance his personal political goals. The fine was imposed after Speaker Gingrich admitted that he misled the Ethics Committee that was investigating the allegations; the money was intended to reimburse the Committee for supplemental costs of investigation that were attributable to the misleading statements. *See generally* Janet Hook, *House Approves Punishment of Gingrich*, L.A. TIMES, Jan. 22, 1997, at A1; Mike Dorning, *House Hands Gingrich His Punishment*, CHI. TRIB., Jan. 22, 1997, at A1; Catalina Camia, *House Votes To Penalize Gingrich*, DALLAS MORNING NEWS, Jan. 22, 1997, at A1. George Stephanopoulos, former Adviser to President Clinton, defended using the same approach for the President: "It's clear that this private matter had public costs over the last seven months .... So, like with Speaker Gingrich, the president should pay a fine for prolonging the inquiry over these seven months for the public costs and that could be the basis for a solution. And most of all, it would end this." John Solomon, *Starr: Lewinsky Probe Cost $4.4M*, AP ONLINE, Sept. 15, 1998, 1998 WL 6723341, at 5. Imposition of a fine in this manner likely runs afoul of prohibitions on bills of attainder, and this defect likely could not be cured by the President's acquiescence.

306. Such an agreement may be difficult to enforce because a pardon is a constitutional power of the presidency that cannot be bargained away by the officeholder.

307. *See, e.g.*, Expressing The Sense Of The Senate That The President Should Reimburse The American Taxpayer For Costs Associated With The Independent Counsel's Investigation Of His Relationship With Ms. Monica Lewinsky, S. Res. 276, 105th Cong. (1998).

impeachment—or "impeachment lite" as they are sometimes called—were rejected. Democrats in the House sought to offer censure as an alternative to impeachment, but Republicans blocked an opportunity to vote on a censure resolution with a parliamentary ruling that censure was not germane under House rules and precedents to the impeachment resolution.[308] At the end of the Senate trial, Senator Diane Feinstein (D-Cal.) offered a censure resolution, but the Senate voted to postpone indefinitely consideration of the proposal.[309] Congress's decision not to censure President Clinton might be cited as precedent against using this or similar methods to express Congress's rebuke of an executive officer. Nevertheless, the use of such methods in the future is not foreclosed and their constitutional viability hopefully will be the subject of future scholarly inquiry.

Members of Congress expressed conflicting views on censure as a viable solution, with some members doubting whether Congress has the constitutional authority to censure a president.[310] Censure is neither authorized nor permitted by the

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308. *See* 144 CONG. REC. H12038 (daily ed. Dec. 19. 1998) (ruling of the chair).

309. Senator Feinstein's censure resolution declared that President Clinton "engaged in an inappropriate relationship with a subordinate employee in the White House, which was shameless, reckless and indefensible," "deliberately misled and deceived the American people and officials in all branches of the United States Government," "gave false or misleading testimony," and impeded the "discovery of evidence in judicial proceedings." The resolution further stated that the President's "unacceptable" conduct "has brought shame and dishonor to himself" and the presidency, has resulted in a "loss of integrity, trust and respect," and deserves condemnation by the Senate "in the strongest terms." *See* 145 CONG. REC. S1652 (daily ed. Feb. 12, 1999).

310. Censure was proposed almost immediately after the OIC's Referral to the Congress, but the concept met with mixed reviews. Rep. Robert L. Barr (R-Ga.) stated that "[i]t sets a terrible precedent for future presidents that they can abuse their office, because all they're going to get is a slap on the wrist." Guy Gugliotta, *House May Release Clinton Video Testimony; Voters Angry*, WASH. POST, Sept. 16, 1998, at A1. Rep. Tom DeLay (R-Tex.) stated that "[a] resolution of censure would do nothing more than to allow members of the House to record their disapproval. The House has no choice but to proceed with an impeachment inquiry." CBS This Morning, (CBS television broadcast Sept. 16, 1998), *available in* 1998 WL 3655569. Sen. Phil Gramm (R-Tex.) said that "I don't see it [censure] in the Constitution." Nancy E. Roman, *A Censure Won't Be Enough, GOP Lawmakers Tell Leaders*, WASH. TIMES, Sept. 16, 1998, at A1. Sen. Joseph Lieberman (D.-Conn.) stated that "[t]hat is a distinct possibility, the censure. You can sense as you listen not just to Democrats but also to Republicans that there is not a great yearning for an impeachment here." CBS This Morning, (CBS television broadcast Sept. 15, 1998), *available in* 1998 WL 3655498. Rep. Clifford Stearns (R-Fla.) stated that "Congress has absolutely no power to censure a sitting president." NBC Nightly News, (NBC television broadcast Sept. 15, 1998), *available in* 1998 WL 13489488, Sept. 15, 1998. Rep. David Bonior (D-Mich.) said that "I think there are a lot of options here .... One is to do nothing, which is unacceptable. The other is some type of rebuke of the president, a public rebuke by the body, and I think that becomes a very real option. The other, of

Constitution. Critics have suggested that censure would constitute an unconstitutional bill of attainder,[311] violate the separation of powers, be used to harass presidents, or circumvent the impeachment process by permitting a condemnation by simple majority where a supermajority does not exist to remove.[312] Other critics alleged that the proposals would provide political cover for those who voted to acquit but wanted to claim that they condemned the President.[313] Supporters stated that Congress had ample authority and precedent to express its sense of rebuke,[314] and that such expression would not have been a bill of attainder because it would not restrain the President's liberty.[315] The benefit of censure politically was that the Senate could acquit yet prevent President Clinton from proclaiming exoneration.[316]

Historically, several presidents have faced the threat of formal rebuke by a House of Congress. In 1842, the House

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course, is proceeding ahead with impeachment proceedings." Brian McGrory, *Key Leaders Say Clinton Could Survive*, BOSTON GLOBE, Sept. 14, 1998, at A1. Sen. Orrin Hatch (R.-Utah) said that "[censure] is a very, very serious thing. It has caused senators to resign . . . . It is something that would hang a cloud over this presidency from henceforth to history." Lee Davidson, *Hatch Gets Presidential Call On Way To Interview*, DESERT NEWS, Sept. 14, 1998, at A1. *See also* 144 CONG. REC. 11788-89 (daily ed. Dec. 18, 1998) (statement of Rep. Buyer (R-Ind.)) (arguing that censure would violate the separation of powers, could be used to harass executive and judicial officers, and was a prohibited bill of attainder because the intent was to "shame and condemn the president's misconduct and impugn his reputation.").

311. *See* U.S. CONST. art. I, § 9, cl. 3. These proposals arguably elevate punishment from a secondary purpose or collateral consequence of impeachment to a primary purpose. *See Meet The Press: Representative Henry Hyde Discusses His Decision To Request Ken Starr Make Monica Lewinsky Available For Debriefing* (NBC television broadcast, Jan. 24, 1999) (transcript on file with the *Harvard Journal of Law & Public Policy*) (statement of House Judiciary Committee Chairman and Impeachment Manager Henry Hyde) ("[A] censure worth its paper, worth the ink on it has to punish the president. We have no authority to punish the president.").

312. Rep. Bill McCollum (R-Fla.) believed that censure was unnecessary because he believed that "impeachment" in the House, even assuming that the Senate would not convict, is the "ultimate censure . . . the ultimate scarlet letter." William Neikirk, *GOP Altering Sales Pitch For Impeachment*, CHIC. TRIB., Dec. 7, 1998, at 1.

313. *See* 145 CONG. REC. S1663 (daily ed. Feb. 12, 1999) (statement of Sen. Inhofe (R-Okla.)).

314. *See, e.g.*, 144 CONG. REC. H11790 (daily ed. Dec. 18, 1998) (statement of Rep. Meehen (D-Mass.) ("Will censure now be derided as unconstitutional? If so, I fear that that precedent will gag the House when it desires to express its formal opinion on another subject on another day.").

315. *See, e.g.*, 144 CONG. REC. H11,912 (daily ed. Dec. 15, 1998) (statement of Rep. Jackson Lee (D-Tex.)).

316. *See generally* ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, COMMITTEE ON FEDERAL LEGISLATION, ALTERNATIVES TO IMPEACHMENT: WHAT MAY CONGRESS DO? (1998); *see also* Victor Williams, *All the President's Witnesses Can't Erase Constitutional Ban on Censure*, LEGAL TIMES, Dec. 14, 1998, at 24.

adopted a committee report that criticized President John Tyler for grossly exceeding his constitutional authority by exercise of the veto power; in 1860, the House approved a resolution stating that President James Buchanan and his Secretary of the Navy, by considering the party relations of potential government contractors, deserve "the reproof of this House."[317] The most well-known "censure" resolution against a president was that relating to Andrew Jackson in 1834, although the Senate resolution in that case was not technically called a censure.[318] On March 29, 1834, the Senate passed a resolution declaring that President Andrew Jackson had "assumed upon himself authority not conferred by the constitution and laws, but in derogation of both."[319] The rebuke came in response to President Jackson's refusal to recharter the United States Bank and withdrawal of its government deposits, ending the bank's monopoly over American monetary policy and outraging the Whigs in the Senate.[320]

Jackson issued a "Protest" in response to the censure resolution, which, among other things, questioned Congress's authority to censure a president.[321] Notably, President Jackson observed that the censure resolution was, in essence, an exercise of "judicial" power, but the only "judicial" power possessed by Congress was that of impeachment. The Senate's judicial authority can be exercised only after the House invokes the judicial power of accusation and passes a resolution. Jackson complained that, without a prior House resolution, the Senate disregarded the "safeguards and formalities" required

317. Jack Maskell, *Censure of the President by the Congress*, Congressional Research Service Report for Congress, Sept. 29, 1998, at 4-5.

318. *See* CONG. GLOBE, 36th Cong., 1st Sess., 2938-39 (1860) (statement of Rep. Bobock) ("You will observe that in this resolution there is no direct declaration of censure, and no impeachment of the motives of the President. It was simply a declaration that his act was not in conformity with the Constitution and the laws of the land."). The Senate's resolution against President Jackson of March 28, 1834, provided: "*Resolved*, That the President, in the late executive proceedings in relation to the public revenue, has assumed upon himself authority and power not conferred by the Constitution and laws, but in derogation of both." *See* 10 CONG. DEB. 1187 (1834); 2 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 1591, at 1040 (1907). *See also* Maskell, *supra* note 317, at 4.

319. HINDS' PRECEDENTS, *supra* note 329, at 1040.

320. For a historical account of this episode, *see generally*, ROBERT V. REMINI, ANDREW JACKSON AND THE COURSE OF AMERICAN DEMOCRACY, 1833-1845, at 137-55 (1984).

321. Andrew Jackson, "Protest" (Apr. 15, 1834), 3 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1288.

for an exercise of the Senate's judicial power.[322] Jackson also complained that the Senate failed to give him an appropriate opportunity to respond to the allegations.[323] Two years later, after the Jacksonian Democrats regained control of the Senate, the censure was withdrawn.[324]

During the Clinton impeachment trial, some Senators suggested that the Senate temporarily adjourn in order to consider a censure resolution as a legislative body rather than as a court of impeachment.[325] However, President Jackson's analogy of censure to the impeachment authority suggests the opposite. Because censure, like impeachment, is a quasi-judicial mechanism designed in part to punish a misbehaving president and to otherwise express a sense of congressional rebuke necessary to cleanse the body politic, Congress should be able, and may be required, to rely on the same constitutional authority and procedure as impeachment. If the Congress has the greater power to remove the only nationally elected chief of the executive branch, logically Congress may possess the lesser authority to censure a president, but perhaps only if Congress is obliged to follow the same constitutional mechanism as impeachment, requiring the House to propose censure and a super-majority in the Senate to approve it. Following the "safeguards and formalities" of impeachment may answer the criticism that censure by majority of one House would be too easy and could be used to unduly harass presidents. From Congress's perspective, an advantage to issuing a censure resolution as part of Congress's impeachment authority is that Congress would be in its role of making unreviewable constitutional law. Even if Congress were not to follow the impeachment procedure, a censure resolution rebuking an executive officer's conduct would likely be considered a

322. *See id.* at 1293. President Jackson asserted that

> The Constitution makes the House of Representatives the exclusive judges, in the first instance, of the question whether the President has committed an impeachable offense. A majority of the Senate, whose interference with this preliminary question has for the best of all reasons been studiously excluded, anticipate the action of the House of Representatives, assume . . . the function which belongs exclusively to that body.

Id. at 1295.

323. *Id.*

324. *See* REMINI, *supra* note 320, at 155.

325. *See, e.g.*, Capitol Hill Hearing With White House Personnel, Federal News Service, Jan. 27, 1999 (statement of Sen. Lieberman (D-Conn.)).

political question and therefore not subject to judicial review. Either way, Congress probably is the only institution of government capable of resolving the constitutionality of censure and other such mechanisms, to the extent it has not already done so by rejecting these methods during the Lewinsky scandal.

IV. CONCLUSION

The Lewinsky scandal has generated the most activity in separation of powers law since the Watergate era, but the scandal neither destroyed this President nor the institution of the presidency. Notwithstanding the assessment by some that President Clinton squandered the privileges and immunities of the executive branch, the presidency, ironically, will likely emerge from this crisis as a stronger institution in spite of President Clinton's behavior. President Clinton's acquittal, a constitutional law decision by the Senate—the final arbiter of the impeachment law—will reaffirm Congress's prior "holdings" that impeachment carries a "substantiality" requirement. Impeachable offenses are offenses seriously incompatible with the institutions of government or those that substantially impair a president's ability to perform his constitutional duties. President Clinton's conduct falls short of this extraordinarily high threshold. This does not imply that nonimpeachable yet scandalous conduct cannot legitimately be called loathsome, reckless, or even immoral, and such conduct may weaken this President politically and irreparably stain his legacy. But these are not surrogates for impeachment.

The American system of government depends on a vibrant executive branch, able to rely on its institutional advantages of unity, secrecy, and dispatch. The individual who temporarily holds the office requires the benefit of certain privileges and immunities that simply are not enjoyed by ordinary citizens or even other high-ranking government officials. The unique constitutional office of the presidency demands that a single individual lead an entire branch of government, be able twenty-four hours a day to decide whether the nation is at war or peace, and to function as the sole organ of American foreign policy. In recognition of the sensitivity of these functions, our constitutional system has stabilized the office and insulated the temporary custodian with immunities, privileges and,

ultimately, sanctuaries from many of the ordinary operations of law. These sanctuaries offer a buffer zone to ensure that partisanship, policy disputes, or cultural battles do not transform into criminal or impeachment inquests in ways that unduly stifle or sabotage critical functions of the executive branch.

This does not imply that a president is above the law or that, like a monarch, he can do no wrong. It does mean that the vitality of the office is an important constitutional value that will outweigh other legitimate constitutional values in certain cases. Recognizing presidential sanctuaries theoretically threatens to invite more serious presidential misconduct. However, the sanctuaries last only for four years and may be penetrated in the interim if the president acts in such an extreme fashion that a correction by the people cannot await a national election. Presidential sanctuaries are justified by the institutional needs of the office: executive privilege ensures candid advice to presidents and the ability to maintain the level of secrecy necessary to effectuate executive functions; official immunity ensures that presidential decision-making is not chilled or distorted; absolute immunity from pre-impeachment indictment and sanctuary from impeachment save extraordinary circumstances ensure the stability and independence of the presidency.

The presidency has emerged from this crisis stronger in some areas, with presidents having the authority to assert executive privilege over a broader set of communications, including communications with the First Lady and among top advisors in furtherance of providing advice to the president. Congress may pass a statutory privilege for Secret Service agents to resist disclosing their observations of non-criminal events while guarding presidents. Even if the Congress fails to do so, the president will, in any event, be able to assert executive privilege to prevent the testimony of Secret Service agents, an authority which is untested but logically included in the constitutionally based, presumptively valid power of executive privilege. Most importantly, the Clinton acquittal will restore presidential immunity from impeachment save in egregious circumstances.

To be sure, the presidency suffered some setbacks, such as the potential for President Clinton's "voluntary" testimony on

August 17, 1998, to function as a precedent that a sitting president as target of an investigation may be compelled to testify before a grand jury, and that a president must retain, and have the resources to afford, private counsel in order to ensure that legal advice is accompanied by attorney-client confidentiality. And the *Jones* decision, with its failure to take seriously vital institutional interests, its unrealistic view of modern litigation, and its naivete of the potential for unscrupulous would-be plaintiffs to use civil litigation as a political lever, casts an uncertain shadow. *Jones* nevertheless may prove less harmful to the presidency than originally supposed if trial judges show the respect to the presidency that the Supreme Court instructed. The application of *Jones* by the lower federal courts has the potential to marginalize the threat it poses to the presidency. The most important point about *Jones* is what it is not—*Jones* does not say that a president can be subpoenaed, indicted, prosecuted, or imprisoned. *Jones* does not affect other aspects of presidential sanctuaries. Interpretations of *Jones* beyond the very specific issues presented therein are unwarranted. *Jones* merely was a limited incursion into presidential sanctuaries that has thus far not impeded the functionality of the presidency, resulted in a proliferation of politically motivated suits, or affected other aspects of presidential immunity such as those recognized in *Fitzgerald.*

The presidency will also be strengthened by Congress's likely trimming of or refusal to reauthorize the independent counsel statute. The OIC's investigation of the Lewinsky matter and failure to treat the presidency with requisite respect in some instances such as subpoenaing President Clinton rather than requesting responses to written interrogatories as was the practice in Iran-Contra, usurping certain impeachment functions, and suggesting that sitting presidents can be prosecuted, will add momentum to the perception among members of Congress that Washington has too many independent counsels, spending too much money, and probing in areas too remote from the core concerns the statute originally was designed to rectify. The independent counsel statute was spawned by the Watergate executive branch's failure to investigate and rid itself of high-level public corruption. The constitutional compromise that the Supreme Court struck in

Morrison is legitimate only in the context of the twice-a-century Teapot Dome-Watergate level presidential scandal where the Department of Justice cannot credibly pursue the investigation. Congress should tailor the statute with this narrow remedial purpose in mind or permit the statute to lapse.

As scholars begin to analyze the separation of powers issues raised by the Lewinsky scandal, they should endeavor to do so without formalistic and categorical impulse. Instead, scholars should reflect pragmatically and holistically on the importance, not of an imperial presidency, but of a functional presidency that depends upon certain institutional prerogatives, powers, and protections implicit in the constitutional structure of government.

APPENDIX

ARTICLES OF IMPEACHMENT

Following are the two articles of impeachment against President Clinton that House Judiciary Committee Chairman Henry J. Hyde (R-Ill.) read from the well of the Senate on January 7, 1999:

House Resolution 611, Resolved, That William Jefferson Clinton, President of the United States, is impeached for high crimes and misdemeanors, and that the following articles of impeachment be exhibited to the United States Senate:

Articles of impeachment exhibited by the House of Representatives of the United States of America in the name of itself and of the people of the United States of America, against William Jefferson Clinton, President of the United States of America, in maintenance and support of its impeachment against him for high crimes and misdemeanors.

ARTICLE I

In his conduct while President of the United States, William Jefferson Clinton, in violation of his constitutional oath faithfully to execute the office of President of the United States and, to the best of his ability, preserve, protect, and defend the Constitution of the United States, and in violation of his constitutional duty to take care that the laws be faithfully executed, has willfully corrupted and manipulated the judicial

process of the United States for his personal gain and exoneration, impeding the administration of justice, in that:

On August 17, 1998, William Jefferson Clinton swore to tell the truth, the whole truth, and nothing but the truth before a Federal grand jury of the United States. Contrary to that oath, William Jefferson Clinton willfully provided perjurious, false and misleading testimony to the grand jury concerning one or more of the following: (1) the nature and details of his relationship with a subordinate Government employee; (2) prior perjurious, false and misleading testimony he gave in a Federal civil rights action brought against him; (3) prior false and misleading statements he allowed his attorney to make to a Federal judge in that civil rights action; and (4) his corrupt efforts to influence the testimony of witnesses and to impede the discovery of evidence in that civil rights action.

In doing this, William Jefferson Clinton has undermined the integrity of his office, has brought disrepute on the Presidency, has betrayed his trust as President, and has acted in a manner subversive of the rule of law and justice, to the manifest injury of the people of the United States.

Wherefore, William Jefferson Clinton, by such conduct, warrants impeachment and trial, and removal from office and disqualification to hold and enjoy any office of honor, trust or profit under the United States.

ARTICLE II

In his conduct while President of the United States, William Jefferson Clinton, in violation of his constitutional oath faithfully to execute the office of President of the United States and, to the best of his ability, preserve, protect, and defend the Constitution of the United States, and in violation of his constitutional duty to take care that the laws be faithfully executed, has prevented, obstructed, and impeded the administration of justice, and has to that end engaged personally, and through his subordinates and agents, in a course of conduct or scheme designed to delay, impede, cover up, and conceal the existence of evidence and testimony related to a Federal civil rights action brought against him in a duly instituted judicial proceeding.

The means used to implement this course of conduct or

scheme included one or more of the following acts:

(1) On or about December 17, 1997, William Jefferson Clinton corruptly encouraged a witness in a Federal civil rights action brought against him to execute a sworn affidavit in that proceeding that he knew to be perjurious, false and misleading.

(2) On or about December 17, 1997, William Jefferson Clinton corruptly encouraged a witness in a Federal civil rights action brought against him to give perjurious, false and misleading testimony if and when called to testify personally in that proceeding.

(3) On or about December 28, 1997, William Jefferson Clinton corruptly subpoenaed in a Federal civil rights action brought against him.

(4) Beginning on or about December 7, 1997, and continuing through and including January 14, 1998, William Jefferson Clinton intensified and succeeded in an effort to secure job assistance to a witness in a Federal civil rights action brought against him in order to corruptly prevent the truthful testimony of that witness in that proceeding at a time when the truthful testimony of that witness would have been harmful to him.

(5) On January 17, 1998, at his deposition in a Federal civil rights action brought against him, William Jefferson Clinton corruptly allowed his attorney to make false and misleading statements to a Federal judge characterizing an affidavit in order to prevent questioning deemed relevant by the judge. Such false and misleading statements were subsequently acknowledged by his attorney in a communication to that judge.

(6) On or about January 18 and January 20-21, 1998, William Jefferson Clinton related a false and misleading account of events relevant to a Federal civil rights action brought against him to a potential witness in that proceeding in order to corruptly influence the testimony of that witness.

(7) On or about January 21, 23 and 26, 1998, William Jefferson Clinton made false and misleading statements to potential witnesses in a Federal grand jury proceeding in order to corruptly influence the testimony of those witnesses. The false and misleading statements made by William Jefferson Clinton were repeated by the witnesses to the grand jury, causing the grand jury to receive false and misleading

information.

In all of this, William Jefferson Clinton has undermined the integrity of his office, has brought disrepute on the presidency, has betrayed his trust as president, and has acted in a manner subversive of the rule of law and justice, to the manifest injury of the people of the United States.

Wherefore, William Jefferson Clinton, by such conduct, warrants impeachment and trial, and removal from office and disqualification to hold and enjoy any office of honor, trust or profit under the United States.

Passed the House of Representatives December 19, 1998, Newt Gingrich, Speaker of the House of Representatives.